

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

GILBERT P. HYATT,

Appellants,

v.

FRANCHISE TAX BOARD OF THE  
STATE OF CALIFORNIA,

Respondents.

Docket No. 84707

Electronically Filed  
Oct 10 2022 11:57 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
**APPENDIX OF EXHIBITS TO  
APPELLANT'S OPENING BRIEF  
VOLUME 39 OF 42**

Mark A. Hutchison (Nev. Bar No. 4639)  
Joseph C. Reynolds (Nev. Bar No. 8630)  
HUTCHISON & STEFFEN, PLLC  
10080 Alta Drive, Suite 200  
Las Vegas, NV 89145  
Telephone: (702) 385-2500

Pertter C. Bernhard (Nev. Bar No. 734)  
PB CONSULTING, LLC  
1921 Glenview Drive  
Las Vegas, NV 89134  
Telephone: (702) 513-9961

Donald J. Kula (Cal. Bar No. 144342) (pro hac vice)  
PERKINS COIE LLP  
1888 Century Park East, Suite 1700  
Los Angeles, CA 90067-1721  
Telephone: (310) 788-990

*Attorneys for Appellant Gilbert P. Hyatt*

## Chronological Index

Doc No.	Description	Date	Vol.	Bates Range	
1	Order of Remand	8/5/2019	1	AA000001	AA000002
2	Notice of Hearing	8/13/2019	1	AA000003	AA000004
3	Court Minutes re: case remanded, dated September 3, 2019	9/3/2019	1	AA000005	AA000005
4	Recorder's Transcript of Pending Motions	9/25/2019	1	AA000006	AA000019
5	FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party	10/15/2019	1	AA000020	AA000040
6	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	10/15/2019	1, 2	AA000041	AA000282
7	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	10/15/2019	2,3	AA000283	AA000535
8	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 3	10/15/2019	3,4	AA000536	AA000707



9	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 Attorneys' Fees or Costs, filed October 15, 2019	10/15/2019	4-7	AA000708	AA001592
10	Exhibits 14-34 to 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 Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	7-11	AA001593	AA002438
11	Exhibits 35-66 to 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 Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	11-15	AA002439	AA003430
12	Exhibits 67-82 to 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 Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	15-19	AA003431	AA004403

13	Exhibits 83-94 to 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 Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	19-21	AA004404	AA004733
14	Correspondence re: 1991 state income tax balance, dated December 23, 2019	12/23/2019	21	AA004734	AA004738
15	Judgment	2/21/2020	21	AA004739	AA004748
16	Notice of Entry of Judgment	2/26/2020	21	AA004749	AA004760
17	FTB's Verified Memorandum of Costs	2/26/2020	21	AA004761	AA004772
18	Appendix to FTB's Verified Memorandum of Costs — Volume 1	2/26/2020	21, 22	AA004773	AA004977
19	Appendix to FTB's Verified Memorandum of Costs — Volume 2	2/26/2020	22, 23	AA004978	AA005234
20	Appendix to FTB's Verified Memorandum of Costs — Volume 3	2/26/2020	23, 24	AA005235	AA005596
21	Appendix to FTB's Verified Memorandum of Costs — Volume 4	2/26/2020	24, 25	AA005597	AA005802
22	Appendix to FTB's Verified Memorandum of Costs — Volume 5	2/26/2020	25, 26	AA005803	AA006001
23	Appendix to FTB's Verified Memorandum of Costs — Volume 6	2/26/2020	26, 27	AA006002	AA006250

24	Appendix to FTB's Verified Memorandum of Costs — Volume 7	2/26/2020	27, 28	AA006251	AA006500
25	Appendix to FTB's Verified Memorandum of Costs — Volume 8	2/26/2020	28, 29	AA006501	AA006750
26	Appendix to FTB's Verified Memorandum of Costs — Volume 9	2/26/2020	29, 30	AA006751	AA006997
27	Appendix to FTB's Verified Memorandum of Costs — Volume 10	2/26/2020	30, 31	AA006998	AA007262
28	Appendix to FTB's Verified Memorandum of Costs — Volume 11	2/26/2020	31-33	AA007263	AA007526
29	Appendix to FTB's Verified Memorandum of Costs — Volume 12	2/26/2020	33, 34	AA007527	AA007777
30	Appendix to FTB's Verified Memorandum of Costs — Volume 13	2/26/2020	34, 35	AA007778	AA008032
31	Appendix to FTB's Verified Memorandum of Costs — Volume 14	2/26/2020	35, 36	AA008033	AA008312
32	Appendix to FTB's Verified Memorandum of Costs — Volume 15	2/26/2020	36	AA008313	AA008399
33	Appendix to FTB's Verified Memorandum of Costs — Volume 16	2/26/2020	36, 37	AA008400	AA008591
34	Appendix to FTB's Verified Memorandum of Costs — Volume 17	2/26/2020	37	AA008592	AA008694

35	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	3/2/2020	37, 38	AA008695	AA008705
36	FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008706	AA008732
37	Appendix to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008733	AA008909
38	FTB's Opposition to Plaintiff Gilbert Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/16/2020	38, 39	AA008910	AA008936
40	FTB's Notice of Appeal of Judgment	3/20/2020	39	AA008937	AA008949
41	Plaintiff Gilbert P Hyatt's Opposition to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/27/2020	39	AA008950	AA008974
42	Reply in Support of Plaintiff Gilbert P. P Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	4/1/2020	39	AA008975	AA008980
43	Court Minutes	4/9/2020	39	AA008981	AA008982
44	FTB's Reply in Support of Motion for Attorney's Fees	4/14/2020	39	AA008983	AA009012

45	Court Minutes re: motion for attorney fees and costs	4/23/2020	39	AA009013	AA009014
46	Recorder's Transcript of Pending Motions	4/27/2020	39	AA009015	AA009053
47	Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009054	AA009057
48	Notice of Entry of Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009058	AA009064
49	FTB's Supplemental Notice of Appeal	7/2/2020	39	AA009065	AA009074
50	Order Affirming in Part, Reversing in Part and Remanding	4/23/2021	39	AA009075	AA009083
51	Remittitur	6/7/2021	39	AA009084	AA009085
52	Hyatt Supplemental Memo in Support of Motion to Retax Costs and Supplemental Appendix	9/29/2021	39, 40	AA009086	AA009283
53	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 1	12/2/2021	40, 41	AA009284	AA009486
54	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 2	12/2/2021	41, 42	AA009487	AA009689
55	FTB's Supplemental Brief re Hyatt's Motion to Retax Costs	12/3/2021	42	AA009690	AA009710

56	Minute Order re Motion to Strike Motion to Retax Alternatively Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/10/2022	42	AA009711	AA009712
57	Order Denying Mtn to Strike Mtn to Retax Mtn for Ext of Time	4/6/2022	42	AA009713	AA009720
58	Hyatt Case Appeal Statement	5/6/2022	42	AA009721	AA009725
59	Hyatt Notice of Appeal	5/6/2022	42	AA009726	AA009728
60	Recorder's Transcript of Motion to Retax	1/25/2022	42	AA009729	AA009774
61	Recorder's Transcript Continued Motion to Retax	1/27/2022	42	AA009775	AA009795

### Alphabetical Index

Doc No.	Description	Date	Vol.	Bates Range	
6	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	10/15/2019	1, 2	AA000041	AA000282
7	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	10/15/2019	2,3	AA000283	AA000535

32	Appendix to FTB's Verified Memorandum of Costs — Volume 15	2/26/2020	36	AA008313	AA008399
33	Appendix to FTB's Verified Memorandum of Costs — Volume 16	2/26/2020	36, 37	AA008399	AA008591
34	Appendix to FTB's Verified Memorandum of Costs — Volume 17	2/26/2020	37	AA008591	AA008694
19	Appendix to FTB's Verified Memorandum of Costs — Volume 2	2/26/2020	22, 23	AA004978	AA005234
20	Appendix to FTB's Verified Memorandum of Costs — Volume 3	2/26/2020	23, 24	AA005235	AA005596
21	Appendix to FTB's Verified Memorandum of Costs — Volume 4	2/26/2020	24, 25	AA005597	AA005802
22	Appendix to FTB's Verified Memorandum of Costs — Volume 5	2/26/2020	25, 26	AA005803	AA006001
23	Appendix to FTB's Verified Memorandum of Costs — Volume 6	2/26/2020	26, 27	AA006002	AA006250
24	Appendix to FTB's Verified Memorandum of Costs — Volume 7	2/26/2020	27, 28	AA006251	AA006500
25	Appendix to FTB's Verified Memorandum of Costs — Volume 8	2/26/2020	28, 29	AA006501	AA006750
26	Appendix to FTB's Verified Memorandum of Costs — Volume 9	2/26/2020	29, 30	AA006751	AA006997

14	Correspondence re: 1991 state income tax balance, dated December 23, 2019	12/23/2019	21	AA004734	AA004738
43	Court Minutes	4/9/2020	39	AA008981	AA008982
3	Court Minutes re: case remanded, dated September 3, 2019	9/3/2019	1	AA000005	AA000005
45	Court Minutes re: motion for attorney fees and costs	4/23/2020	39	AA009013	AA009014
10	Exhibits 14-34 to 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 Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	7-11	AA001593	AA002438
11	Exhibits 35-66 to 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 Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	11-15	AA002439	AA003430
12	Exhibits 67-82 to 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 Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	15-19	AA003431	AA004403



13	Exhibits 83-94 to 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 Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	19-21	AA004404	AA004733
5	FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party	10/15/2019	1	AA000020	AA000040
36	FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008706	AA008732
40	FTB's Notice of Appeal of Judgment	3/20/2020	39	AA008937	AA008949
38	FTB's Opposition to Plaintiff Gilbert Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/16/2020	38, 39	AA008910	AA008936
44	FTB's Reply in Support of Motion for Attorney's Fees	4/14/2020	39	AA008983	AA009012
55	FTB's Supplemental Brief re Hyatt's Motion to Retax Costs	12/3/2021	42	AA009690	AA009710
49	FTB's Supplemental Notice of Appeal	7/2/2020	39	AA009065	AA009074
17	FTB's Verified Memorandum of Costs	2/26/2020	21	AA004761	AA004772
58	Hyatt Case Appeal Statement	5/6/2022	42	AA009721	AA009725
59	Hyatt Notice of Appeal	5/6/2022	42	AA009726	AA009728

8	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 3	10/15/2019	3,4	AA000536	AA000707
53	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 1	12/2/2021	40, 41	AA009284	AA009486
54	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 2	12/2/2021	41, 42	AA009487	AA009689
37	Appendix to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008733	AA008909
18	Appendix to FTB's Verified Memorandum of Costs — Volume 1	2/26/2020	21, 22	AA004773	AA004977
27	Appendix to FTB's Verified Memorandum of Costs — Volume 10	2/26/2020	30, 31	AA006998	AA007262
28	Appendix to FTB's Verified Memorandum of Costs — Volume 11	2/26/2020	31- 33	AA007263	AA007526
29	Appendix to FTB's Verified Memorandum of Costs — Volume 12	2/26/2020	33, 34	AA007527	AA007777
30	Appendix to FTB's Verified Memorandum of Costs — Volume 13	2/26/2020	34, 35	AA007777	AA008032
31	Appendix to FTB's Verified Memorandum of Costs — Volume 14	2/26/2020	35, 36	AA008033	AA008312

52	Hyatt Supplemental Memo in Support of Motion to Retax Costs and Supplemental Appendix	9/29/2021	39, 40	AA009086	AA009283
15	Judgment	2/21/2020	21	AA004739	AA004748
56	Minute Order re Motion to Strike Motion to Retax Alternatively Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/10/2022	42	AA009711	AA009712
16	Notice of Entry of Judgment	2/26/2020	21	AA004749	AA004760
48	Notice of Entry of Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009058	AA009064
2	Notice of Hearing	8/13/2019	1	AA000003	AA000004
50	Order Affirming in Part, Reversing in Part and Remanding	4/23/2021	39	AA009075	AA009083
47	Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009054	AA009057
57	Order Denying Mtn to Strike Mtn to Retax Mtn for Ext of Time	4/6/2022	42	AA009713	AA009720
1	Order of Remand	8/5/2019	1	AA000001	AA000002
41	Plaintiff Gilbert P Hyatt's Opposition to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/27/2020	39	AA008950	AA008974

9	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 Attorneys' Fees or Costs, filed October 15, 2019	10/15/2019	4-7	AA000708	AA001592
35	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	3/2/2020	37, 38	AA008695	AA008705
61	Recorder's Transcript Continued Motion to Retax	1/27/2022	42	AA009775	AA009795
60	Recorder's Transcript of Motion to Retax	1/25/2022	42	AA009729	AA009774
4	Recorder's Transcript of Pending Motions	9/25/2019	1	AA000006	AA000019
46	Recorder's Transcript of Pending Motions	4/27/2020	39	AA009015	AA009053
51	Remittitur	6/7/2021	39	AA009084	AA009085
42	Reply in Support of Plaintiff Gilbert P. P Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	4/1/2020	39	AA008975	AA008980

## **CERTIFICATE OF SERVICE**

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPENDIX OF EXHIBITS TO APPELLANT’S OPENING BRIEF VOLUME 39 OF 42** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list.

DATED this 10<sup>th</sup> day of October, 2022.

*/s/ Kaylee Conradi*

---

An employee of Hutchison & Steffen, PLLC

1 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

21 THE COURT: Yes.

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

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

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

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

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

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

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



1 before any decision can be made on that.

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

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

13 MR. HUTCHISON: Yes, Your Honor.

14 MS. LUNDVALL: Yes.

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

16 MR. HUTCHISON: Okay.

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

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

1 THE COURT: Yes.

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

3 [Pause]

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

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

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

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

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

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

10 That date is?

11 THE CLERK: October 15th.

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

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

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

15 THE CLERK: Correct.

16 MR. HUTCHISON: Great.

17 THE COURT: Okay?

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

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

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

21 THE COURT: Okay.

22 MS. LUNDVALL: Thank you, Your Honor.

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

24 /////

25 /////

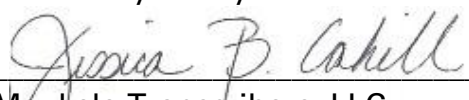
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

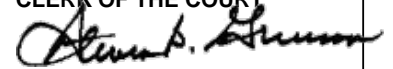
MR. HUTCHISON: Thank you, Your Honor.

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



1 **NOA**  
2 Pat Lundvall (NSBN 3761)  
3 Rory T. Kay (NSBN 12416)  
4 McDONALD CARANO LLP  
5 2300 West Sahara Avenue, Suite 1200  
6 Las Vegas, Nevada 89102  
7 Telephone: (702) 873-4100  
8 Facsimile: (702) 873-9966  
9 lundvall@mcdonaldcarano.com  
10 rkay@mcdonaldcarano.com

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

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 GILBERT P. HYATT,

16 Plaintiff,

17 vs.

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

20 Defendants.

Case No.: 98A382999

Dept. No.: X

21 **FTB's NOTICE OF APPEAL OF**  
22 **JUDGMENT**

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

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

27 FTB appeals from that portion of the Judgment determining that "neither party is deemed  
28 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.

///

///

///

///

///

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  
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*

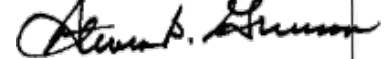
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**CERTIFICATE OF SERVICE**

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  
24  
25  
26  
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 )

21 JUDGMENT

22 This case has been remanded back to this Court by order of the Nevada Supreme  
23 Court dated August 5, 2019 for proceedings consistent with its order and consistent with  
24 the United States Supreme Court decision in this case, *Franchise Tax Board of California*  
25 *v. Hyatt*, 587 U.S. 139 S. Ct. 1485, 1499 (2019). In accordance with those instructions, the  
26 Court enters judgment in this action as follows:  
27

28 CASE PROCEDURAL HISTORY

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.

17  
18 DATED this 21<sup>st</sup> day of February, 2020.

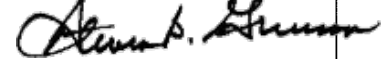
19  
20   
21 TIERRA JONES  
22 DISTRICT COURT JUDGE  
23  
24  
25  
26  
27  
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- 29
- 30
- 31
- 32
- 33
- 34
- 35
- 36
- 37
- 38
- 39
- 40
- 41
- 42
- 43
- 44
- 45
- 46
- 47
- 48
- 49
- 50
- 51
- 52
- 53
- 54
- 55
- 56
- 57
- 58
- 59
- 60
- 61
- 62
- 63
- 64
- 65
- 66
- 67
- 68
- 69
- 70
- 71
- 72
- 73
- 74
- 75
- 76
- 77
- 78
- 79
- 80
- 81
- 82
- 83
- 84
- 85
- 86
- 87
- 88
- 89
- 90
- 91
- 92
- 93
- 94
- 95
- 96
- 97
- 98
- 99
- 100

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





1 **OPP**

2 Mark A. Hutchison (4639)  
3 HUTCHISON & STEFFEN, PLLC  
4 Peccole Professional Park  
5 10080 West Alta Drive, Suite 200  
6 Las Vegas, NV 89145  
7 Tel: (702) 385-2500  
8 Fax: (702) 385-2086  
9 mhutchison@hutchlegal.com

6 Peter C. Bernhard (734)  
7 KAEMPFER CROWELL  
8 1980 Festival Plaza Drive, Suite 650  
9 Las Vegas, NV 89135  
10 Tel: (702) 792-7000  
11 Fax: (702) 796-7181  
12 pbernhard@kcnvlaw.com

10 *Attorneys for Plaintiff Gilbert P. Hyatt*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

14 GILBERT P. HYATT,  
15 Plaintiff,

16 v.

17 FRANCHISE TAX BOARD OF THE  
18 STATE OF CALIFORNIA, and DOES 1-100  
19 inclusive,  
20 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**

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

23 **1. Introduction.**

24 *The FTB's improper motion for reconsideration should be denied.* The Court has seen  
25 and heard all the arguments now set forth by the FTB and decided the issue squarely against the  
26 FTB. On October 15, 2019 the parties each submitted extensive briefing including on whether  
27 the FTB is entitled to attorney's fees under NRCP 68. On February 21, 2020, this Court issued a  
28 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* factors<sup>1</sup> specified by the Nevada Supreme Court require that this Court again  
21 reject the FTB's motion for attorneys' fees under NRCP 68.<sup>2</sup> 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.<sup>3</sup>

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

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

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

28 <sup>3</sup> *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 NRCF 68. Hyatt  
23 prevailed once in the United States Supreme Court<sup>4</sup> and twice in the Nevada Supreme Court,<sup>5</sup>  
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 <sup>4</sup> *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*").

28 <sup>5</sup> *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.<sup>6</sup> Hyatt's suit against the FTB in

---

23  
24 <sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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 <sup>7</sup> 440 U.S. at 420-21.

28 <sup>8</sup> Appendix Exh. 1.

<sup>9</sup> 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.<sup>10</sup>  
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.<sup>11</sup>

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,<sup>12</sup> the FTB moved for judgment on the  
9 pleadings arguing the FTB had immunity under California's own immunity laws.<sup>13</sup> Hyatt  
10 opposed, citing *Nevada v. Hall* and Nevada law on comity.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> Hyatt opposed the  
19 motion on all points, again citing *Nevada v. Hall* in opposing the FTB's immunity argument.<sup>17</sup> 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*.<sup>18</sup>

---

24 <sup>10</sup> Appendix, Exh. 3.

25 <sup>11</sup> Appendix, Exh. 4.

26 <sup>12</sup> Appendix, Exh. 5.

27 <sup>13</sup> Appendix, Exhs. 6, 8, and 10.

28 <sup>14</sup> Appendix, Exhs. 7 and 9.

<sup>15</sup> Appendix, Exhs. 11 and 12.

<sup>16</sup> Appendix, Exhs. 13, 14, and 21.

<sup>17</sup> Appendix, Exhs. 16, 17, 18, 19, and 20.

<sup>18</sup> 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.<sup>19</sup> The  
6 Nevada Supreme Court accepted review of both petitions.<sup>20</sup> 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*.<sup>21</sup> 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,<sup>22</sup> again arguing that *Nevada v. Hall* and Nevada's law on comity  
12 provided a basis for his case to proceed in this Court.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> On July 13 2001, the Nevada Supreme Court ordered  
20 additional briefing from both sides on Hyatt's petition for rehearing.<sup>26</sup> Both sides submitted the  
21 additional briefing.<sup>27</sup>

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 <sup>19</sup> Appendix, Exhs. 15 and 25.

25 <sup>20</sup> Appendix, Exhs. 24 and 28.

26 <sup>21</sup> Appendix, Exh. 25.

27 <sup>22</sup> Appendix, Exhs. 26 and 29.

28 <sup>23</sup> Appendix, Exh. 29

<sup>24</sup> Appendix, Exh. 31.

<sup>25</sup> Appendix, Exh. 32.

<sup>26</sup> Appendix, Exh. 33.

<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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*.<sup>30</sup> 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.<sup>31</sup>

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*").<sup>32</sup>  
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 <sup>28</sup> Appendix, Exh. 38.

27 <sup>29</sup> Appendix, Exh. 42.

28 <sup>30</sup> Appendix, Exhs. 39, 41, 43, and 45.

<sup>31</sup> Appendix, Exhs. 40 and 44.

<sup>32</sup> 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,<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> In 2005, the FTB moved  
9 for summary adjudication seeking to remove the bad faith delay issue from the case.<sup>36</sup> 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.<sup>37</sup>

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

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).<sup>40</sup> 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 <sup>33</sup> Appendix, Exhs. 11 and 12.

25 <sup>34</sup> Appendix, Exhs. 48 and 50.

26 <sup>35</sup> Appendix, Exh. 51

27 <sup>36</sup> Appendix, Exh. 49.

28 <sup>37</sup> Appendix, Exhs. 52 and 53.

<sup>38</sup> Appendix, Exhs. 4, 55, 56, and 58.

<sup>39</sup> Appendix, Exh. 57.

<sup>40</sup> Appendix, Exh. 59.

1 damages), and on August 14, 2008 (award of punitive damages).<sup>41</sup>

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.<sup>42</sup>

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

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.<sup>44</sup>

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.<sup>45</sup> 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."<sup>46</sup> Hyatt filed a

25 <sup>41</sup> Appendix, Exhs. 60, 61, and 62.

26 <sup>42</sup> *Id.*

27 <sup>43</sup> Appendix, Exh. 63.

28 <sup>44</sup> Appendix, Exh. 66.

<sup>45</sup> Appendix, Exh. 64.

<sup>46</sup> 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,<sup>47</sup> 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.<sup>48</sup> 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).<sup>49</sup> 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

<sup>47</sup> Appendix, Exh. 67.

<sup>48</sup> Appendix, Exhs. 69 and 70.

<sup>49</sup> 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  
6 stated that he incurred substantial costs that he would not otherwise  
7 have incurred by paying for professional representatives to assist  
8 him during the audits. (130 Nev. at 691)

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

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

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

19 Hyatt suffered extreme treatment from FTB. As explained above in  
20 discussing the fraud claim, FTB disclosed personal information that  
21 it promised to keep confidential and delayed resolution of Hyatt's  
22 protests for 11 years, resulting in a daily interest charge of \$8,000.  
23 Further, Hyatt presented testimony that the auditor who conducted  
24 the majority of his two audits made disparaging remarks about  
25 Hyatt and his religion, was determined to impose tax assessments  
26 against him, and that FTB fostered an environment in which the  
27 imposition of tax assessments was the objective whenever an audit  
28 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)

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

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

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

---

<sup>50</sup> *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.<sup>51</sup> Hyatt opposed the FTB on  
4 both grounds.<sup>52</sup>

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*").<sup>53</sup>  
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.<sup>54</sup> The FTB argued Hyatt was not entitled to any  
16 damages.<sup>55</sup> 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.<sup>56</sup> 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).<sup>57</sup>

23  
24  
25 <sup>51</sup> Appendix, Exhs. 72, 74, 75, and 77.

26 <sup>52</sup> Appendix, Exhs. 73 and 76.

27 <sup>53</sup> Appendix, Exh. 78.

28 <sup>54</sup> Appendix, Exh. 79.

<sup>55</sup> Appendix, Exh. 80 and 82.

<sup>56</sup> Appendix, Exh. 81.

<sup>57</sup> 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*.<sup>58</sup> Hyatt opposed the petition.<sup>59</sup> 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.<sup>60</sup>

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,<sup>61</sup> 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*").<sup>62</sup>

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

22 ORDER this matter REMANDED to the district court for  
23 proceedings consistent with this order.<sup>63</sup>

24 **R. Judgement vacated.**

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

26 <sup>58</sup> Appendix, Exhs. 84 and 86.

27 <sup>59</sup> Appendix, Exh. 85.

28 <sup>60</sup> Appendix, Exh. 87.

<sup>61</sup> Appendix, Exhs. 88, 89, and 90.

<sup>62</sup> Appendix, Exh. 93.

<sup>63</sup> 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  
thinly disguised motion for reconsideration.**

7 The FTB's motion for attorney's fees seeks relief specifically denied by the Court last  
8 month. It is a motion for reconsideration of the Court's February 21, 2020 Judgment, regardless  
9 of the title the FTB gives it. The FTB's motion, however, does not meet, or even attempt to meet,  
10 the procedural requirement or legal standard for a motion for reconsideration. Nor does it have  
11 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."<sup>64</sup> (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 <sup>64</sup> 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,<sup>65</sup> 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,<sup>66</sup> 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.<sup>67</sup>

27           <sup>65</sup> Appendix, Exh. 67.

28           <sup>66</sup> *Id.*

<sup>67</sup> 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  
      royalties and that he had moved to Nevada.
- 3       • The FTB audited Hyatt between 1993 and 1997, during which time the FTB's lead  
4       auditor repeatedly made anti-Semitic remarks against Hyatt; created a "fiction"  
5       about him; during the audit she rummaged through his trash and peaked in the  
6       windows at his Las Vegas house; after the audit she again visited his house to take  
      picture of her posing in front of it and called Hyatt's ex-wife to brag that Hyatt had  
      been "convicted"; she also expressed to a co-worker that she hoped the audit  
      advanced her career.
- 7       • The FTB promised Hyatt strict confidentiality in regard to his personal and  
8       financial information, but then made massive public disclosures of the fact that  
      Hyatt was under audit, of his social security number, and of his private address.
- 9       • The FTB suggested to Hyatt's tax attorney that absent a settlement of the tax  
10      issues there would be a further "in-depth investigation and exploration of  
11      unresolved fact questions" which Hyatt and his tax attorney understood to be a less  
12      than subtle threat; and then when Hyatt did not settle the tax issues at the outset,  
      the FTB delayed the protest phase of the audit for over 10 years before issuing a  
      final decision and letting Hyatt appeal that decision to the more independent  
      California State Board of Equalization.<sup>68</sup>
- 13      • Hyatt and multiple other witnesses provided first hand testimony of the extreme  
14      emotional distress and change in personality and physical condition suffered by  
15      Hyatt during the 10 plus years that the FTB kept open the protest phase of the  
      audit.
- 16      • FTB auditors were evaluated in a manner that drove them to make assessments  
17      without regard to the collectability of the assessments and were rewarded for  
      making high dollar assessments such as Hyatt's case given his extreme income.

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

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

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

---

26      Nevada in 1991 as Hyatt contended all along and thereby reversed the FTB's erroneous audit conclusions on the  
27      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.

28      <sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup> 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 <sup>69</sup> 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.

<sup>70</sup> 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).<sup>71</sup> 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.

---

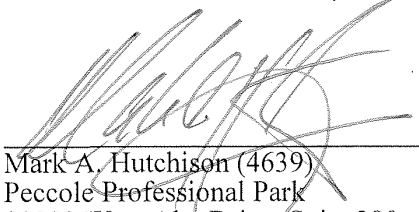
26 <sup>71</sup> The FTB also cites *Marek v. Chensy*, 473 U.S. 1 (1985) (holding plaintiff was not entitled to an award of attorney's  
27 fees in a civil rights case where plaintiff recovered less than that statutory settlement of the government). Although  
28 the case contains a lengthy discussion 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.

HUTCHISON & STEFFEN, PLLC

11  
12  
13               
14             Mark A. Hutchison (4639)  
15             Peccole Professional Park  
16             10080 West Alta Drive, Suite 200  
17             Las Vegas, NV 89145

18             Peter C. Bernhard (734)  
19             KAEMPFER CROWELL  
20             1980 Festival Plaza Drive, Suite 650  
21             Las Vegas, NV 89135

22             Attorneys for Plaintiff Gilbert P. Hyatt  
23  
24  
25  
26  
27  
28



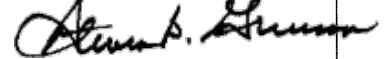
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 27<sup>th</sup> 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



**RPLY**

Mark A. Hutchison (4639)  
HUTCHISON & STEFFEN, PLLC  
Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Tel: (702) 385-2500  
Fax: (702) 385-2086  
mhutchison@hutchlegal.com

Peter C. Bernhard (734)  
KAEMPFER CROWELL  
1980 Festival Plaza Drive, Suite 650  
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

**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)).<sup>1</sup> 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  
28 <sup>1</sup> Indeed, the FTB citing *Hernandez v. Palmer* would not even be permitted in the Nevada Supreme Court or Court of 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

17  
18 

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

21  
22 Peter C. Bernhard (734)  
KAEMPFER CROWELL  
1980 Festival Plaza Drive, Suite 650  
23 Las Vegas, NV 89135

24 *Attorneys for Plaintiff Gilbert P. Hyatt*  
25  
26  
27  
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

## ALL PARTIES ON THE E-SERVICE LIST

6

98A382999

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

---

<b>Civil Conversion Case Type</b>	<b>COURT MINUTES</b>	<b>April 09, 2020</b>
-----------------------------------	----------------------	-----------------------

---

98A382999	Gilbert Hyatt vs California State Franchise Tax Board
-----------	---

---

**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

This Minute Order was electronically served by Courtroom Clerk, Teri Berkshire, to all registered parties for Odyssey File & Serve. tb

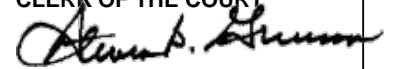
PRINT DATE: 04/09/2020

Page 1 of 2

Minutes Date: April 09, 2020



98A382999



**RIS**  
Pat Lundvall (NSBN 3761)  
Rory T. Kay (NSBN 12416)  
McDONALD CARANO LLP  
2300 West Sahara Avenue, Suite 1200  
Las Vegas, Nevada 89102  
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 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.<sup>1</sup> 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.

---

<sup>1</sup> 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).<sup>2</sup> 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.

---

<sup>2</sup> 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 General<sup>3</sup> 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

---

<sup>3</sup> 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.



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

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

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

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

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

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.<sup>4</sup> 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

---

<sup>4</sup> 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.

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

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

18 But Hyatt raised this argument in the most recent appeal, and the United States Court  
19 rejected its deceptiveness. At its core, *Nevada v. Hall* was about sovereign immunity and  
20 held that "the Constitution does not bar private suits against a State in the courts of another  
21 State." *Franchise Tax Bd. of California v. Hyatt ("Hyatt III")*, 139 S. Ct. 1485, 1492 (2019).  
22 When Hyatt tried to argue that FTB had waived any argument about sovereign immunity  
23 because it purportedly did not raise *Nevada v. Hall* sooner on appeal, the United States  
24 Supreme Court rejected Hyatt's misleading attempt: "We also reject Hyatt's argument that  
25 the Board waived its immunity. The Board has raised an immunity-based argument from  
26 this suit's inception, though it was initially based on the Full Faith and Credit Clause." *Id.* at  
27 1491, n. 1. The United States Supreme Court was correct. FTB's first pleading asserted a  
28 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  
Las Vegas, Nevada 89102  
Telephone: (702) 873-4100  
Facsimile: (702) 873-9966  
lundvall@mcdonaldcarano.com  
rkay@mcdonaldcarano.com

21 *Attorneys for Defendant*  
22 *Franchise Tax Board of the State of California*  
23  
24  
25  
26  
27  
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

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

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

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

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

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

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

Page 131

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

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

5 A Yes, I do.

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

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

9 BY MS. LUNDVALL:

10 Q 162, Mr. Jumelet.

11 A Oh, 162.

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

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

19 Did I read that correctly, Mr. Jumelet?

20 A Yes, you did.

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

Page 130

1 BY MS. LUNDVALL:

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

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

8 Q Okay. Any other demarcation?

9 A Not that I recall.

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

11 A Yes, I did.

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

14 A Yes, I did.

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

17 A No, I did not.

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

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

Page 132

1 THE COURT: Noted for the record.

2 BY MS. LUNDVALL:

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

8 A Yes.

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

11 A Frequently, yes.

12 Q And what direction did you give to them?

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

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

17 A It would depend on whose deposition it was.

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

21 A Yes.

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

25 A That's correct.

Page 221

## INDEX

NAME	DIRECT	CROSS	REDIRECT	RE CROSS
PLAINTIFF'S WITNESSES:				
MALCOLM DOUGLAS JUMELET	3	84		
DEFENDANT'S WITNESSES:				
//				
EXHIBITS				
DESCRIPTION	ADMITTED			
470 Nonresident Training Manual	159			

Page 222

## 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.

Verbatim Digital Reporting, LLC

Littleton, CO 80120

(303) 915-1677

\_\_\_\_\_  
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

Page 93

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?

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 95

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 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,



Page 193

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.)

Page 195

## 1 CERTIFICATION

2  
 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.

## 6 AFFIRMATION

7  
 8 I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL  
 9 SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

Verbatim Digital Reporting, LLC

Littleton, CO 80120

(303) 915-1677

13 MICHELE PHELPS, TRANSCRIBER

DATE

Page 194

## 1 INDEX

2 NAME DIRECT CROSS REDIRECT RECROSS

## 3 PLAINTIFF'S WITNESSES:

4 KURT SJOBERG 66 90 157

5 CANDANCE LES 162

## 6 DEFENDANT'S WITNESSES:

7 //

## 8 EXHIBITS

9 DESCRIPTION ADMITTED  
 10 637 Franchise Tax Board's Response 125  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

# **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:
---------------------	------------------	-------------------------

## 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

AA009008

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

AA009009

### 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.

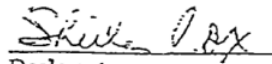
Copies of bank statements and canceled checks as well as signature cards were requested for any and all accounts held open by Mr. Hyatt in 1991 and 1992. Incomplete information has been provided up to this point, and according to Mr. Hyatt's attorney, Mr. Hyatt has provided everything he has regarding 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.

  
Declarant

PBTK 00016

2326-0003

AA009010



STATE OF CALIFORNIA  
FRANCHISE TAX BOARD

SUBPOENA DUCES TECUM  
98-02

In the Matter of

For the Period:  
01/01/91 through 12/31/92

GILBERT P. HYATT  
PO BOX 81230  
Las Vegas, NV 89180-1230

TO: 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, 1998, 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 CALIFORNIA

By [Signature]

FTE 2580 (Rev 6-91) 500 1

PBTK 00017

2326-0004

AA009011

## 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

98A382999

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Civil Conversion Case Type**

**COURT MINUTES**

**April 23, 2020**

---

98A382999                      Gilbert Hyatt  
   vs  
   California State Franchise Tax Board

---

**April 23, 2020                      3:00 AM                      Motion for Attorney Fees  
and Costs**

**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, Defendant s Motion to for Attorney s Fees and Costs is DENIED, as the Court has already held there was no prevailing party in this case and neither party is entitled to attorney fees and costs. Applying the Beattie factor analysis, this Court finds that the Plaintiff s claims were brought in good faith under the existing and applicable law at the time, and that Plaintiff s decision to reject Defendant s offer was not unreasonable or in bad faith in light of the existing law of the time and as illustrated by the award the jury ultimately found reasonable. The fees sought by Defendant are not justified as the Court was within its discretion in finding that neither party prevailed in this case and that neither party is entitled to attorney fees and costs accordingly. Plaintiff s counsel is to prepare an Order consistent with the Court s findings and submit it to the Court for signature.

Clerk's Note: This Minute Order was electronically served by Courtroom Clerk, Teri Berkshire, to all registered parties for Odyssey File & Serve. /tb

PRINT DATE: 04/23/2020

Page 1 of 2

Minutes Date: April 23, 2020

**AA009013**



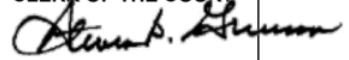
98A382999

PRINT DATE: 04/23/2020

Page 2 of 2

Minutes Date: April 23, 2020

**AA009014**



1 RTRAN

2  
3  
4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7 )  
8 GILBERT HYATT, )  
9 Plaintiff, )

CASE#: 98A382999

DEPT. X

10 vs. )

11 CALIFORNIA STATE FRANCHISE )  
TAX BOARD, )

12 Defendant. )  
13

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

17 **RECORDER'S TRANSCRIPT OF PENDING MOTIONS**

18 APPEARANCES:

19 For the Plaintiff:

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

20 For the Defendant:

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

23  
24  
25 RECORDED BY: VICTORIA BOYD, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, April 21, 2020

2  
3 [Case called at 10:14 a.m.]

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

12 Okay. Who's here for the Tax Board?

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

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

18 MR. LUNDVALL: 3761.

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

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

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

24 MR. BERNHARD: Your Honor, this is Peter Bernhard, bar  
25 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 ////

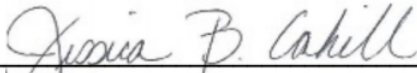
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. HUTCHISON: Thank you, Your Honor.

THE COURT: Okay. Thank you very much.

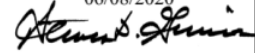
[Proceedings concluded at 11:30 a.m.]

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.



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



  
CLERK OF THE COURT

**ODM**

Mark A. Hutchison (4639)  
HUTCHISON & STEFFEN, PLLC  
Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Tel: (702) 385-2500  
Fax: (702) 385-2086  
mhutchison@hutchlegal.com

Peter C. Bernhard (734)  
KAEMPFER CROWELL  
1980 Festival Plaza Drive, Suite 650  
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

**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>

MERITAS® <http://www.mcdonaldcarano.com/nevada\_business\_law.html> | Nevada Military Support Alliance <http://www.nvmilitarysupport.org/>

PERSONAL AND CONFIDENTIAL: This message originates from the law firm of McDonald

Carano LLP. This message and any file(s) or attachment(s) transmitted with it are confidential, intended only for the named recipient, and may contain information that is a trade secret, proprietary, protected by the attorney work product doctrine, subject to the attorney-client privilege, or is otherwise protected against unauthorized use or disclosure. This message and any file(s) or attachment(s) transmitted with it are transmitted based on a reasonable expectation of privacy consistent with ABA Formal Opinion No. 99-413. Any disclosure, distribution, copying, or use of this information by anyone other than the intended recipient, regardless of address or routing, is strictly prohibited. If you receive this message in error, please advise the sender by immediate reply and delete the original message. Personal messages express only the view of the sender and are not attributable to McDonald Carano LLP.

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.

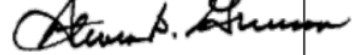
Mark

Mark A. Hutchison  
Partner

[HS logo]<<https://protect-us.mimecast.com/s/qGrrC68mqzUrRyrVtpzKQn/>>  
HUTCHISON & STEFFEN, PLLC  
(702) 385-2500  
hutchlegal.com <<http://www.hutchlegal.com>>

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

<2020-05-22 (clean) Order Denying Def\_s Mtn for Attorney\_s Fees Costs - MAH 5-22-20.DOCX>



1 **NEOJ**

2 Mark A. Hutchison (4639)  
3 HUTCHISON & STEFFEN, PLLC  
4 Peccole Professional Park  
5 10080 West Alta Drive, Suite 200  
6 Las Vegas, NV 89145  
7 Tel: (702) 385-2500  
8 Fax: (702) 385-2086  
9 mhutchison@hutchlegal.com

6 Peter C. Bernhard (734)  
7 KAEMPFER CROWELL  
8 1980 Festival Plaza Drive, Suite 650  
9 Las Vegas, NV 89135  
10 Tel: (702) 792-7000  
11 Fax: (702) 796-7181  
12 pbernhard@kcnvlaw.com

10 *Attorneys for Plaintiff Gilbert P. Hyatt*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

14 GILBERT P. HYATT,

15 Plaintiff,

16 v.

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

19 Defendants.

Case No. 98A382999  
Dept. No. X

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

22 TO: ALL INTERESTED PARTIES

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

24 ///

26 ///

27 ///

28 ///

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  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

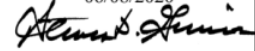
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 8<sup>th</sup> day of June, 2020, I caused the above and foregoing documents entitled **NOTICE OF ENTRY OF ORDER DENYING 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

  
CLERK OF THE COURT

**ODM**

Mark A. Hutchison (4639)  
HUTCHISON & STEFFEN, PLLC  
Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Tel: (702) 385-2500  
Fax: (702) 385-2086  
mhutchison@hutchlegal.com

Peter C. Bernhard (734)  
KAEMPFER CROWELL  
1980 Festival Plaza Drive, Suite 650  
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

**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>>

MERITAS®<[http://www.mcdonaldcarano.com/nevada\\_business\\_law.html](http://www.mcdonaldcarano.com/nevada_business_law.html)> | Nevada Military Support Alliance<<http://www.nvmilitarysupport.org/>>

PERSONAL AND CONFIDENTIAL: This message originates from the law firm of McDonald

Carano LLP. This message and any file(s) or attachment(s) transmitted with it are confidential, intended only for the named recipient, and may contain information that is a trade secret, proprietary, protected by the attorney work product doctrine, subject to the attorney-client privilege, or is otherwise protected against unauthorized use or disclosure. This message and any file(s) or attachment(s) transmitted with it are transmitted based on a reasonable expectation of privacy consistent with ABA Formal Opinion No. 99-413. Any disclosure, distribution, copying, or use of this information by anyone other than the intended recipient, regardless of address or routing, is strictly prohibited. If you receive this message in error, please advise the sender by immediate reply and delete the original message. Personal messages express only the view of the sender and are not attributable to McDonald Carano LLP.

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.

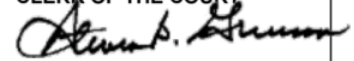
Mark

Mark A. Hutchison  
Partner

[HS logo]<<https://protect-us.mimecast.com/s/qGrrC68mqzUrRyrVtpzKQn/>>  
HUTCHISON & STEFFEN, PLLC  
(702) 385-2500  
hutchlegal.com <<http://www.hutchlegal.com>>

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

<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)  
McDONALD CARANO LLP  
2300 West Sahara Avenue, Suite 1200  
Las Vegas, Nevada 89102  
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.

///

///

///

///

///

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

2 Dated this 2<sup>nd</sup> 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*

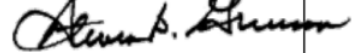
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**CERTIFICATE OF SERVICE**

15 I certify that on this 2<sup>nd</sup> day of July, 2020, I caused a true and correct copy of the  
16 **FTB's SUPPLEMENTAL NOTICE OF APPEAL** to be electronically filed and served to all  
17 parties of record via this Court's electronic filing system to all parties listed on the e-service  
18 master list:

21 /s/ Beau Nelson

22 An employee of McDonald Carano LLP

# **EXHIBIT A**



1 **NEOJ**

2 Mark A. Hutchison (4639)  
3 HUTCHISON & STEFFEN, PLLC  
4 Peccole Professional Park  
5 10080 West Alta Drive, Suite 200  
6 Las Vegas, NV 89145  
7 Tel: (702) 385-2500  
8 Fax: (702) 385-2086  
9 mhutchison@hutchlegal.com

6 Peter C. Bernhard (734)  
7 KAEMPFER CROWELL  
8 1980 Festival Plaza Drive, Suite 650  
9 Las Vegas, NV 89135  
10 Tel: (702) 792-7000  
11 Fax: (702) 796-7181  
12 pbernhard@kcnvlaw.com

10 *Attorneys for Plaintiff Gilbert P. Hyatt*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

14 GILBERT P. HYATT,

15 Plaintiff,

16 v.

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

19 Defendants.

Case No. 98A382999  
Dept. No. X

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

22 TO: ALL INTERESTED PARTIES

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

24 ///

26 ///

27 ///

28 ///

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  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



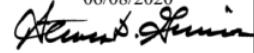
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 8<sup>th</sup> day of June, 2020, I caused the above and foregoing documents entitled **NOTICE OF ENTRY OF ORDER DENYING 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

  
CLERK OF THE COURT

**ODM**

Mark A. Hutchison (4639)  
HUTCHISON & STEFFEN, PLLC  
Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Tel: (702) 385-2500  
Fax: (702) 385-2086  
mhutchison@hutchlegal.com

Peter C. Bernhard (734)  
KAEMPFER CROWELL  
1980 Festival Plaza Drive, Suite 650  
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

**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>>

MERITAS®<[http://www.mcdonaldcarano.com/nevada\\_business\\_law.html](http://www.mcdonaldcarano.com/nevada_business_law.html)> | Nevada Military Support Alliance<<http://www.nvmilitarysupport.org/>>

PERSONAL AND CONFIDENTIAL: This message originates from the law firm of McDonald

Carano LLP. This message and any file(s) or attachment(s) transmitted with it are confidential, intended only for the named recipient, and may contain information that is a trade secret, proprietary, protected by the attorney work product doctrine, subject to the attorney-client privilege, or is otherwise protected against unauthorized use or disclosure. This message and any file(s) or attachment(s) transmitted with it are transmitted based on a reasonable expectation of privacy consistent with ABA Formal Opinion No. 99-413. Any disclosure, distribution, copying, or use of this information by anyone other than the intended recipient, regardless of address or routing, is strictly prohibited. If you receive this message in error, please advise the sender by immediate reply and delete the original message. Personal messages express only the view of the sender and are not attributable to McDonald Carano LLP.

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

[HS logo]<<https://protect-us.mimecast.com/s/qGrrC68mqzUrRyrVtpzKQn/>>  
HUTCHISON & STEFFEN, PLLC  
(702) 385-2500  
hutchlegal.com <<http://www.hutchlegal.com>>

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

<2020-05-22 (clean) Order Denying Def\_s Mtn for Attorney\_s Fees Costs - MAH 5-22-20.DOCX>

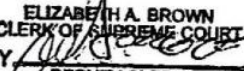
IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 80884

FILED

APR 23 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal from a district court judgment and post-judgment order denying attorney fees and costs. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

In October 1991, and on the eve of receiving substantial licensing fees from several patents, respondent Gilbert P. Hyatt moved from California to Nevada. Appellant Franchise Tax Board of the State of California (FTB) subsequently audited Hyatt's 1991 California tax return and initially determined that Hyatt did not move to Nevada until April 1992. FTB assessed a deficiency and imposed fraud penalties against Hyatt for the 1991 and 1992 tax years, totaling over \$13 million. In 1998, Hyatt sued FTB in Nevada state court alleging that FTB committed multiple intentional torts while conducting its tax audit; over 20 years of litigation ensued.

Early in the litigation, FTB petitioned for writ relief from this court, seeking a mandate that it had sovereign immunity from suit in Nevada. We denied the petition based on a United States Supreme Court case, *Nevada v. Hall*, 440 U.S. 410, 411-12, 421 (1979), *overruled by Franchise Tax Bd. of Cal. v. Hyatt*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1485 (2019) (*Hyatt III*). FTB sought review of these same claims in the Supreme Court,

which also denied FTB sovereign immunity based on *Hall*. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 489 (2003) (*Hyatt I*) (holding that Nevada need not credit California's immunity laws under the Full Faith and Credit Clause). At that point, FTB made an offer of judgment to Hyatt for \$110,000 inclusive of all interest, costs, and fees.

Hyatt declined FTB's offer and recovered a verdict at trial for \$388 million in damages. But after an appeal to this court and two additional writs of certiorari to the Supreme Court, FTB obtained reversal of *Hall* and, with it, immunity from civil suit in Nevada. *Hyatt III*, \_\_\_ U.S. at \_\_\_, 139 S. Ct. at 1492 (overruling *Hall* and holding that "States retain their sovereign immunity from private suits brought in the courts of other States"). On final remand from the Supreme Court and this court, the district court entered judgment for FTB and found that neither party was entitled to costs under NRS 18.005 and NRS 18.020 as the prevailing party in the action, based on mixed results throughout more than two decades of litigation. The court further found that FTB could not recover post-offer-of-judgment costs or attorney fees under NRCP 68 and NRS 17.115 upon applying the *Beattie v. Thomas* factors. 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). FTB appeals and seeks costs from the inception of the litigation under NRS Chapter 18 and attorney fees (and costs, in case its NRS Chapter 18 argument fails) from the time its offer of judgment expired. We reverse the district court's denial of costs under NRS Chapter 18 but affirm the court's discretionary denial of attorney fees under NRCP 68 and NRS 17.115.<sup>1</sup>

---

<sup>1</sup>The 2015 Legislature repealed NRS 17.115, 2015 Nev. Stat., ch. 442, § 41, at 2569, then reenacted it in revised form in 2019 as NRS 17.117. This



I.

The district court's denial of FTB's statutory costs is subject to de novo review because it implicates a question of law—whether FTB fits the definition of “prevailing party” under NRS 18.020. *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 422, 373 P.3d 103, 106-07 (2016). NRS 18.020(3) provides that “[c]osts must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered, in . . . an action for the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500.” A party prevails in an action “if it succeeds on any significant issue in litigation”; it need not prevail on all claims to be the prevailing party. *Las Vegas Metro. Police Dep’t v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (emphasis omitted) (quoting *Valley Elec. Ass’n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)). And a defendant who achieves dismissal of a claim with prejudice may qualify as a prevailing party under this standard. *145 East Harmon II Tr. v. Residences at MGM Grand – Tower A Owners’ Ass’n*, 136 Nev. 115, 120, 460 P.3d 455, 459 (2020).

Here, FTB lost every round except the last on its sovereign immunity defense. But, in the final round, it won dismissal of all Hyatt’s claims, despite Hyatt’s success in prior phases of litigation. *Hyatt III*, \_\_\_ U.S. at \_\_\_, 139 S. Ct. at 1492, 1499. Hyatt argues that FTB is a fortuitous beneficiary of an intervening change in federal law, not a true prevailing

---

order cites NRS 17.115 (2005) (enacted as 2005 Nev. Stat., ch. 58, § 1, at 117) as the relevant amendment to this appeal because FTB made its offer of judgment in 2007. Similarly, the version of NRCP 68 in effect at the time of the offer, *see* NRCP 68 (2005), applies to this appeal, not the version adopted in 2019 as part of the amendments to the Nevada Rules of Civil Procedure that took effect on March 1, 2019.



party. See *Petrone v. Sec'y of Health & Human Servs.*, 936 F.2d 428, 430 (9th Cir. 1991) (holding that appellant was not a prevailing party because she was a “fortuitous beneficiary” of a congressional act and did not “win . . . in the courtroom” (quoting *Hendricks v. Bowen*, 847 F.2d 1255, 1259 (7th Cir. 1988) (Easterbrook, J., concurring))); *Eberle v. State ex rel. Nell J. Redfield Tr.*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992) (holding that there was no prevailing party because the legislature rendered pending issues on appeal moot and ended litigation in respondents’ favor). But unlike these cases, on which Hyatt relies, FTB did not prevail based on a serendipitous change to decisional law unrelated to its litigation. Rather, FTB twice petitioned the Supreme Court for a writ of certiorari seeking reversal of *Hall*; without those petitions, the Court would not have overruled its longstanding precedent, and Hyatt’s judgment would still stand. True, a change in the law intervened, but it was not a “fortuitous” one. *Petrone*, 936 F.2d at 430 (quoting *Hendricks*, 847 F.2d at 1259). FTB caused the change in federal law that it benefited from, and therefore, that change of law does not divest FTB of its prevailing party status. Accordingly, we conclude that FTB is entitled to costs under NRS 18.020(3) as a matter of right. *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 775 (1995) (holding that the court must award costs to the prevailing party under NRS 18.020(3) “as a matter of right”).

## II.

The district court also denied FTB’s request for both post-offer costs and attorney fees under NRCP 68 (2005) and NRS 17.115 (2005). As to the district court’s denial of post-offer costs, it is likewise reviewable de novo as a question of law. *Overfield*, 121 Nev. at 9, 106 P.3d at 1199. However, the district court’s denial of post-offer attorney fees is

discretionary, and its decision will stand absent “clear abuse.” *Laforge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000).

At the time of FTB’s offer in 2007, NRCP 68(a) provided that “[a]t any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions.” Under that rule, if the offeree rejects the offer and fails to obtain a more favorable result, “the offeree *shall* pay the offeror’s post-offer costs . . . and reasonable attorney’s fees, *if any be allowed*, actually incurred by the offeror from the time of the offer.” NRCP 68(f)(2) (emphasis added). And as written at the time relevant to this appeal, NRS 17.115(4) provided:

[I]f a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:

. . .

(c) *Shall order* the party to pay the taxable costs incurred by the party who made the offer; and

(d) *May order* the party to pay to the party who made the offer . . .

(3) *Reasonable attorney’s fees* incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment.

(Emphasis added).

Rule 68 and NRS 17.115 can be interpreted harmoniously and still given full effect. *Albios v. Horizon Cmty. Sys., Inc.*, 122 Nev. 409, 422, 132 P.3d 1022, 1030-31 (2006). And in *Gunderson v. D.R. Horton, Inc.*, this court interpreted Rule 68(f)(2) together with NRS 17.115(4) to hold that, where an offeree rejects and fails to better its opponent’s offer of judgment, an award of post-offer costs is mandatory, while an award of post-offer attorney fees is discretionary. 130 Nev. 67, 80-81, 319 P.3d 606, 615 (2014). Hyatt



failed to better FTB's \$110,000 offer when the Supreme Court reversed judgment in his favor for lack of jurisdiction. *Hyatt III*, \_\_\_ U.S. at \_\_\_, 139 S. Ct. at 1499. FTB is therefore alternatively eligible for mandatory post-offer costs under Rule 68 and NRS 17.115(4), though such an award is redundant based on our holding that FTB is entitled to costs dating back to the inception of the litigation under NRS 18.020(3).<sup>2</sup>

The question of the district court's denial of FTB's attorney fees under these same sections remains. The trial court looks to four factors to determine whether post-offer fees are appropriate when the offeree fails to obtain a more favorable result:

- (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

---

<sup>2</sup>FTB does not argue that its post-offer costs under NRCP 68 and NRS 17.115 include sums not also allowed under NRS Chapter 18. *But see Frazier v. Drake*, 131 Nev. 632, 645 n.11, 357 P.3d 365, 374 n.11 (Ct. App. 2015) (declining to address whether respondents could recover dollar-for-dollar expert witness fees under NRCP 68 and NRS 17.115(4)(d)(1) without the limitations of NRS 18.005(5) because they failed to raise the argument in their answering brief). So, FTB has waived this argument, and we will not consider FTB's post-offer costs beyond those allowed under NRS 18.020(3) and NRS 18.005. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (holding that an issue not raised and argued in the appellant's opening brief is deemed waived); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that a point not urged in the trial court is deemed waived); Appellant's Opening Brief at 28 n.7 ("This [post-offer costs], of course, is in the alternative to Hyatt's liability to pay all FTB's costs under NRS 18.020.").

*Beattie*, 99 Nev. at 588-89, 668 P.2d at 274. The parties agreed to evaluate and determine FTB's eligibility for fees before determining the amount, so the court did not evaluate the final *Beattie* factor. See *Frazier v. Drake*, 131 Nev. 632, 644, 357 P.3d 365, 373 (Ct. App. 2015) (holding that where the good-faith factors all weigh in favor of the offeree, the fourth factor becomes irrelevant). But otherwise, the district court analyzed each factor in kind to find that Hyatt pleaded and pursued his claims in good-faith reliance on *Hall* and reasonably rejected FTB's offer.

At the time of the offer, FTB's sovereign immunity defense had already failed in this court and the Supreme Court. And even assuming FTB's offer was reasonable and made in good faith, Hyatt's rejection of that offer was reasonable—at that point in the litigation, this court and the Supreme Court had also both declined to apply Nevada's statutory damages caps of \$50,000 per claim to FTB, leaving Hyatt with unencumbered potential recovery. Accordingly, it was within the district court's discretion to find that Hyatt acted reasonably by declining FTB's \$110,000 offer as settlement of his eight tort claims, and we will not disturb this sound finding.


### III.

Finally, Hyatt argues that this court may affirm the district court's denial of statutory costs as a matter of equity. Hyatt claims that FTB has unclean hands for waiting to raise its defense under *Hall* until it exhausted its Nevada appeals, or alternatively, because it committed intentional torts during Hyatt's audit. Hyatt's equitable framing aside, he argues that this court should exercise its discretion to deny costs and fees because it is, in his view, fair. This is a consideration federal courts have weighed under FRCP 54(d) (governing awards of costs and attorney fees to

the prevailing party in federal court). But unlike FRCP 54(d), which affords such discretion in awarding costs to a prevailing party, costs are mandatory under NRS 18.020 (stating that “[c]osts must be allowed of course” to the prevailing party). Compare *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 565 (2012) (holding that an award of costs under FRCP 54(d) is discretionary), with *Beattie*, 99 Nev. at 588 n.5, 668 P.2d at 274 n.5 (noting that Nevada has not adopted FRCP 54(d) and instead adopted NRS 18.020, under which costs are mandatory instead of discretionary). Hyatt’s reliance on equity under the analogous federal rule cannot override the Nevada statute’s plain language. See *Young v. Nev. Gaming Control Bd.*, 136 Nev. Adv. Op. 66, 473 P.3d 1034, 1036 (2020) (noting limited exceptions to doctrine that the express terms of a statute control). We therefore affirm the district court’s denial of FTB’s attorney fees under NRCP 68 and NRS 17.115, reverse the district court’s denial of costs, and remand for further proceedings consistent with this order.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Stiglich

  
\_\_\_\_\_, J.  
Cadish



Silver, J.  
Silver

Pickering, J.  
Pickering

Herndon, J.  
Herndon

cc: Hon. Tierra Danielle Jones, District Judge  
McDonald Carano LLP/Las Vegas  
Lemons, Grundy & Eisenberg  
Hutchison & Steffen, LLC/Las Vegas  
Kaempfer Crowell/Las Vegas  
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 80884  
District Court Case No. A382999

**FILED**

JUN 07 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: May 19, 2021

Elizabeth A. Brown, Clerk of Court

By: Rory Wunsch  
Deputy Clerk

cc (without enclosures):

Hon. Tierra Danielle Jones, District Judge  
McDonald Carano LLP/Las Vegas  
Lemons, Grundy & Eisenberg  
Hutchison & Steffen, LLC/Las Vegas  
Kaempfer Crowell/Las Vegas

**RECEIPT FOR REMITTITUR**

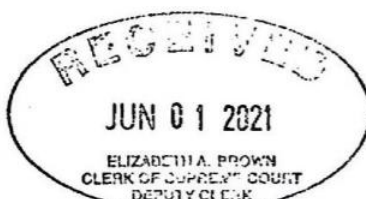
Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on MAY 25 2021.

*[Signature]*  
Deputy District Court Clerk

RECEIVED  
APPEALS

MAY 25 2021

CLERK OF THE COURT



1

21-14392

AA009084

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

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

**Supreme Court No. 80884**  
District Court Case No. A382999

**CLERK'S CERTIFICATE**

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

**JUDGMENT**

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"We therefore affirm the district court's denial of FTB/s attorney fees under NRCF 68 and NRS 17.115, reverse the district court's denial of costs, and remand for further proceedings consistent with this order."

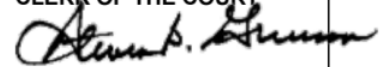
Judgment, as quoted above, entered this 23rd day of April, 2021.

IN WITNESS WHEREOF, I have subscribed  
my name and affixed the seal of the Supreme  
Court at my Office in Carson City, Nevada this  
May 19, 2021.

Elizabeth A. Brown, Supreme Court Clerk

By: Rory Wunsch  
Deputy Clerk





**SUPPL**

Mark A. Hutchison (4639)  
HUTCHISON & STEFFEN, PLLC  
Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Tel: (702) 385-2500  
Fax: (702) 385-2086  
mhutchison@hutchlegal.com

Peter C. Bernhard (734)  
KAEMPFER CROWELL  
1980 Festival Plaza Drive, Suite 650  
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

**SUPPLEMENTAL MEMORANDUM IN  
SUPPORT OF PLAINTIFF GILBERT P.  
HYATT'S MOTION TO RETAX COSTS**

Plaintiff Gilbert P. Hyatt ("Plaintiff" or "Hyatt") files this Supplemental Memorandum in support of his Motion to Retax Costs Requested by Defendant FTB.

***Procedural history re Motion to Retax:*** The FTB filed its Memorandum of Costs on February 26, 2020. Hyatt filed a Motion to Retax Costs March 3, 2020. This Court denied the FTB's request for costs and attorneys' fees on April 23, 2020 finding no prevailing party per the Judgment entered February 21, 2020. The Nevada Supreme Court reversed the Judgment in part in an April 23, 2021 Order holding that the FTB was entitled to an award of statutory costs under NRS 18.005 and 18.020. The Nevada Supreme Court, however, affirmed the remaining portion

1 of the Judgment denying the FTB's request for a discretionary award of attorneys' fees under  
2 NRCF 68 and NRS 17.115. The Nevada Supreme Court also affirmed that the FTB was not  
3 entitled to an award of costs under NRCF 68 and NRS 17.115 as the FTB waived any right to  
4 argue for such an award by not raising it in its opening brief.

5 Remittitur was issued by the Nevada Supreme Court on May 25, 2021, returning the  
6 matter to this Court for the limited consideration of the FTB's request for statutory costs under  
7 NRS 18.005 and 18.020. This Court ordered on June 29, 2021 that (1) Hyatt may supplement his  
8 Motion to Retax by September 30, 2021, (2) the FTB may file a response by December 2, 2021,  
9 and (3) the matter will be heard on January 18, 2022.

## 10 **1. Introduction.**

11 In accord with the Nevada Supreme Court's Order returning the case to this Court, the  
12 FTB is entitled to a *limited* award of costs as specified in NRS 18.005. The FTB however has  
13 grossly overreached in requesting \$2,262,815.56 in its Memorandum of Costs. Consistent with  
14 the unusual and fortuitous circumstances that resulted in the FTB becoming the "prevailing  
15 party," it cannot make the requisite showing of necessity and reasonableness for the vast majority  
16 of its requested costs. The award to the FTB must be limited to **\$211,734.32**, which is the total  
17 costs the FTB seeks that were incurred before the decision in *Hyatt I* in April 2003<sup>1</sup> when the  
18 FTB could have but failed to raise the argument it later prevailed on in *Hyatt III* in 2019.<sup>2</sup>  
19 Alternatively, if the Court in its discretion determines not to limit the FTB to statutory costs  
20 incurred before April 2003, the maximum award should be limited to **\$214,720.91** representing  
21 the costs to which the FTB is entitled based on category-by-category consideration under NRS  
22 18.005.

23 The Court is intimately familiar with the 20-plus year history of this case as documented  
24 in the Judgment entered February 21, 2020. None of the costs the FTB incurred in taking  
25 discovery or defending discovery during the two-decade case, nor any of its costs incurred in  
26 preparing for or conducting its defense at the four-month jury trial in 2008, contributed in any  
27

28 <sup>1</sup> *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003).

<sup>2</sup> *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019).

1 way to the FTB prevailing in this case. Instead, the FTB sat on its hands from the outset of the  
2 case in 1998 and did not seek the jurisdictional relief upon which it later prevailed—*i.e.*, reversal  
3 of a long-standing United States Supreme Court precedent, *Nevada v. Hall*, 440 U.S. 410 (1979).  
4 That reversal did not occur until 2019, *twenty-one years* after this case was filed.

5 Indeed, the FTB had the opportunity and the right to raise this very argument when it first  
6 obtained review by the United States Supreme Court in 2002 and instead argued for a "taxing  
7 authority exception" to *Nevada v. Hall* based on sovereign immunity.<sup>3</sup> But the FTB represented  
8 to the United States Supreme Court at that time that it was not seeking reversal of *Nevada v. Hall*,  
9 and instead sought an exception for the FTB's tax assessment and collection activity.<sup>4</sup> The FTB  
10 was explicit about this in 2003, even at oral argument when questioned by Justice Breyer about  
11 the possibility of seeking to overturn *Nevada v. Hall*, to which FTB counsel responded "***the Court***  
12 ***doesn't have to go that far*** to get -- to get to this point. The Court can literally analogize to the  
13 special protections that are provided to state tax systems within the federal system itself."<sup>5</sup> The  
14 Court rejected the FTB's "exception" argument in 2003 in *Hyatt I*.

15 None of the requested costs that were incurred by the FTB after the decision in *Hyatt I*  
16 was issued in April 2003—other than perhaps the filing fees later paid to the United States  
17 Supreme Court for *Hyatt II*<sup>6</sup> and *Hyatt III*—contributed to the FTB ultimately prevailing. If the  
18 FTB had made the same jurisdictional argument for overturning *Nevada v. Hall* in 2003 that it  
19 made almost *two decades later*, the FTB would have either: (1) prevailed in 2003 and saved itself  
20 from incurring the very costs it now asks Hyatt to pay, or (2) still not prevailed in 2003 making it  
21 even more difficult to raise a Hail Mary argument almost 20 years later because a decision in  
22

---

23 <sup>3</sup> For *Hyatt I*, the FTB's *certiorari* petition was granted in 2002. Appendix Exh. 42. *Hyatt I* was then briefed and  
24 argued by the parties in 2003. Appendix Exhs. 43-45 and Supp. Appendix Exh. 95. The U.S. Supreme Court issued  
25 its decision in April 2003. Appendix, Exh. 46. References throughout this document to "Appendix" refer to the  
26 October 15, 2019 Appendix (unless otherwise indicated). For the Court's convenience, Hyatt previously lodged a  
27 hardcopy and an electronic copy of the Appendix with the Court. Hyatt refers and incorporates herein 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."). References throughout this document to "Supp.  
Appendix" refer to the Supplemental Appendix Hyatt submits with this Supplemental Memorandum containing new  
exhibits not attached to his prior Appendix.

28 <sup>4</sup> Appendix Exhs. 39, 41, 43, 45.

<sup>5</sup> Supp. Appendix Exh. 95, p. 5 of transcript.

<sup>6</sup> *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016).

1 2003 refusing to overturn *Nevada v. Hall* would have been the "law of the case."<sup>7</sup>

2 The FTB therefore cannot make a showing that any of its requested statutory costs that  
3 were incurred after April 2003 were necessary. None of those costs contributed to the FTB  
4 prevailing—other than filing fees paid to the United States Supreme Court. As detailed below, the  
5 total costs requested by the FTB through April 2003 are **\$211,734.32**. Therefore, this is the  
6 maximum amount the Court can award the FTB under NRS 18.005.

7 Alternatively, if the Court does not limit the FTB's costs request to those incurred before  
8 April 30, 2003, application of the necessary and reasonable standard on a category-by-category  
9 basis as required under NRS 18.005 nonetheless mandates a similar substantial reduction in the  
10 FTB's requested costs to no more than **\$214,720.91**. As detailed below, this amount includes  
11 reductions for costs the FTB requests for certain categories that are contrary to law and to the  
12 Special Master Report and Recommendation issued in this case in 2009—and expressly adopted  
13 by the Court in 2010—regarding Hyatt's requested costs after prevailing at trial.<sup>8</sup> Those prior  
14 rulings are the "law of the case" such that the findings adopted by the Court at that time, and the  
15 bases for rejecting certain types of cost requests by Hyatt should be applied here to the FTB's  
16 identical category requests. Further, as also detailed below, there must be reductions of costs for  
17 certain categories in which the FTB has simply failed to provide adequate support and  
18 documentation.

19 In short, the Court should resist the FTB's massive overreach in its requests for costs and  
20 strictly apply the necessary and reasonable limitations that apply to most of the cost categories  
21 under NRS 18.005. The Court has considerable discretion in deciding what amount of costs to  
22 award the FTB under NRS 18.005 and should use it here to limit the FTB award to costs incurred  
23 that have some bearing on the FTB prevailing in the case. Very few of the FTB's requested costs  
24 can meet that standard.

---

26 <sup>7</sup> Not only would the FTB have needed to convince the 2019 United States Supreme Court to overrule the 50-year-  
27 old precedent of *Nevada v. Hall*, it would also have to convince the Court to overturn its own more recent 2003  
28 decision in this case on an identical issue.

<sup>8</sup> Supp. Appendix Exh. 96 (Special Master Report and Recommendation) and Supp. Appendix Exh. 97 (Court order adopting Special Master Report and Recommendation).

1     **2.     The FTB's costs incurred after April 2003 were not necessary or**  
2     **reasonable as they did not contribute to the FTB ultimately prevailing,**  
3     **and therefore are not recoverable.**

3     **A.     Costs requested under NRS 18.005 must be reasonable and necessary.**

4             Under NRS 18.005, recoverable costs must be "reasonable, necessary, and actually  
5 incurred." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015).

6             "The determination of allowable costs is within the sound discretion of the trial court. . . .

7             Pursuant to NRS 18.005, costs must be reasonable." *Bobby Berosini, Ltd. v. People for the*  
8     *Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998).

9             The basis on which the FTB "won" this case in 2019 should have been asserted by the  
10     FTB and addressed when the FTB first obtained review of the case by the United States Supreme  
11     Court in *Hyatt I*, which was decided in April 2003. The FTB does not and cannot make a showing  
12     that its costs incurred after April 2003 were necessary given its failure to present its "winning"  
13     argument, as determined in the 2019 United States Supreme Court ruling. Although this Court is  
14     familiar with the procedural history of this case, Hyatt addresses it again below in the context of  
15     the FTB's current request *for over \$2 million in costs incurred after the first review of this case by*  
16     *the United States Supreme Court*. Consistent with the necessary and reasonable requirements of  
17     NRS 18.005, a cost award to the FTB should be limited to \$211,734.32, its asserted costs incurred  
18     before the *Hyatt I* decision in April 2003.

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

20             Hyatt filed this action in this Court on January 6, 1998, against the FTB, the California  
21     state agency responsible for assessing state income taxes. Hyatt's lawsuit against the FTB in  
22     Nevada was based on the United States Supreme Court's holding in *Nevada v. Hall* that a state  
23     could not claim immunity in the courts of a sister state based on that state's own immunity laws.

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

26             The United States Supreme Court granted the FTB's petition in 2002 for writ of *certiorari*  
27     seeking review of the Nevada Supreme Court's April 4, 2002 order.<sup>9</sup> The FTB's petition for  
28

---

<sup>9</sup> Appendix, Exh. 42.

1 review and its briefing on the merits did not assert or seek review on the issue of whether *Nevada*  
2 *v. Hall* was wrongly decided and should be reversed. Rather, it argued that an exception to  
3 *Nevada v. Hall* should be established, so that certain “sovereign” functions, such as taxing  
4 activities, be exempted from the holding in *Nevada v. Hall*.<sup>10</sup> Hyatt filed opposition briefing,  
5 arguing that in *Nevada v. Hall* there was no basis for an exception as asserted by the FTB.<sup>11</sup> The  
6 case was submitted to the United States Supreme Court on whether a “tax” exception should be  
7 carved out from *Nevada v. Hall*. Again, at oral argument when Justice Breyer inquired, FTB  
8 counsel confirmed that the FTB was not seeking to overturn *Nevada v. Hall*, preferring to argue  
9 for an exception to the long-standing precedent.<sup>12</sup>

10 The United States Supreme Court issued its opinion denying the FTB’s appeal in a  
11 unanimous 9-0 decision, *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) (“*Hyatt I*”).<sup>13</sup>  
12 The decision rejected the FTB’s asserted exception to *Nevada v. Hall* and concluded that the  
13 Nevada Supreme Court had appropriately applied comity by allowing Hyatt’s intentional tort  
14 claims to proceed in Nevada state court while dismissing Hyatt’s negligence claim.

15 **D. Hyatt won a jury verdict at trial (2008).**

16 Trial before a jury commenced on April 14, 2008, the Honorable Jessie Walsh, District  
17 Judge, presiding, and lasted for four months. The jury returned verdicts on August 6, 2008  
18 (liability for and award of compensatory damages), on August 11, 2008 (liability for punitive  
19 damages), and on August 14, 2008 (award of punitive damages).<sup>14</sup>

20 The jury rendered a verdict in favor of Hyatt and against the FTB on all causes of action  
21 presented to the jury. The jury awarded Hyatt compensatory damages of \$85 million for  
22 emotional distress; compensatory damages of \$52 million for invasion of privacy; attorneys' fees  
23 as special damages of \$1,085,281.56 on Hyatt’s fraud claim; and punitive damages of \$250  
24 million.<sup>15</sup>

25  
26 <sup>10</sup> Appendix, Exhs. 39, 41, 43, and 45.

27 <sup>11</sup> Appendix, Exhs. 40 and 44.

<sup>12</sup> Supp. Appendix Exh. 95, p. 5 of transcript.

28 <sup>13</sup> Appendix, Exhs. 46 and 47.

<sup>14</sup> Appendix, Exhs. 60, 61, and 62.

<sup>15</sup> *Id.*

On September 8, 2008, Judge Walsh entered a judgment consistent with the jury's verdicts.<sup>16</sup>

**E. FTB appealed the judgment (2009 to 2014) without seeking reversal of *Nevada v. Hall*.**

The FTB appealed from the 2008 judgment to the Nevada Supreme Court.<sup>17</sup> In the FTB's opening 100-plus-page brief filed on August 7, 2009, the FTB made reference to *Nevada v. Hall* in footnote 80, asking that the Nevada Supreme Court evaluate the continuing viability of *Nevada v. Hall*.<sup>18</sup> The Nevada Supreme Court conducted two oral arguments on the FTB's appeal.<sup>19</sup> The issue of reversing *Nevada v. Hall* was not raised in either argument by the parties or the Nevada Supreme Court.

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

In 2014, the Nevada Supreme Court affirmed in part and reversed in part the judgment without any reference or discussion of *Nevada v. Hall*. *See Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 662 (2014).<sup>20</sup> The Nevada Supreme Court affirmed the portion of the judgment in favor of Hyatt on his cause of action for fraud and the award of \$1,085,281.56, and issued specific conclusions as to the trial evidence that supported the fraud claim:

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

...

FTB represented to Hyatt that it would protect his confidential information and treat him courteously. At trial, Hyatt presented evidence that FTB disclosed his social security number and home address to numerous people and entities and that FTB revealed to third parties that Hyatt was being audited. In addition, FTB sent letters concerning the 1991 audit to several doctors with the same last name, based on its belief that one of those doctors provided Hyatt treatment, but without first determining which doctor actually

<sup>16</sup> Appendix, Exh. 63.

<sup>17</sup> Appendix, Exh. 64.

<sup>18</sup> Appendix, Exh. 65. The FTB's 145-page Reply Brief did not address the validity of *Nevada v. Hall*. Appendix, Exh. 68.

<sup>19</sup> Appendix, Exhs. 69 and 70.

<sup>20</sup> Appendix, Exh. 71.

1 treated Hyatt before sending the correspondence. Furthermore,  
2 Hyatt showed that FTB took 11 years to resolve Hyatt's protests of  
3 the two audits. Hyatt alleged that this delay resulted in \$8,000 in  
4 interest per day accruing against him for the outstanding taxes owed  
5 to California. Also at trial, Hyatt presented evidence through  
6 Candace Les, a former FTB auditor and friend of the main auditor  
7 on Hyatt's audit, Sheila Cox, that Cox had made disparaging  
8 comments about Hyatt and his religion, that Cox essentially was  
9 intent on imposing an assessment against Hyatt, and that FTB  
10 promoted a culture in which tax assessments were the end goal  
11 whenever an audit was undertaken. Hyatt also testified that he  
12 would not have hired legal and accounting professionals to assist in  
13 the audits had he known how he would be treated. Moreover, Hyatt  
14 stated that he incurred substantial costs that he would not otherwise  
15 have incurred by paying for professional representatives to assist  
16 him during the audits. (130 Nev. at 691)

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

22 Based on this evidence, we conclude that substantial evidence  
23 supports each of the fraud elements.

24 130 Nev. at 692.

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

28 Hyatt suffered extreme treatment from FTB. As explained above in  
discussing the fraud claim, FTB disclosed personal information that  
it promised to keep confidential and delayed resolution of Hyatt's  
protests for 11 years, resulting in a daily interest charge of \$8,000.  
Further, Hyatt presented testimony that the auditor who conducted  
the majority of his two audits made disparaging remarks about  
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.

In sum, on the merits, the Nevada Supreme Court affirmed the jury's verdict and the trial  
court judgment on two significant intentional tort claims – fraud and IIED. Similarly, on the  
merits, in the decades long administrative tax proceeding in California, the California Board of



1 Equalization ("SBE") determined definitively in Hyatt's favor that Hyatt moved to Nevada in  
2 October 1991, contrary to the FTB's residency audit determination that had spawned the decades-  
3 long administrative proceeding in California and this intentional tort case in Nevada. In 2019, the  
4 California Office of Tax Appeal ("OTA") denied the FTB's request for consideration of the  
5 residency determination in Hyatt's favor.<sup>21</sup> In other words, the very issue on which the FTB  
6 commenced its residency audit of Hyatt, launching the decades-long legal proceedings in both  
7 Nevada and California was determined on the merits in Hyatt's favor finding he has been a  
8 Nevada resident since the fall of 1991—just as he told the FTB in 1993 at the time of his audit and  
9 has repeatedly told the FTB for decades.

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

12 Having exhausted its appeals in Nevada, the FTB sought and received a second review by  
13 the United States Supreme Court in 2015. Unlike its positions and arguments in 2003, this time  
14 FTB sought reversal of *Nevada v. Hall*. The FTB also alternatively argued that the award of  
15 damages in favor of Hyatt must be limited to \$50,000 per claim in accord with Nevada law  
16 limiting damages for claims made against Nevada state agencies.<sup>22</sup> Hyatt opposed the FTB on  
17 both grounds.<sup>23</sup>

18 With only eight members due to Justice Scalia's passing, the United States Supreme Court  
19 rendered a 4 to 4 decision on the FTB's request to reverse *Nevada v. Hall*. *See Franchise Tax Bd.*  
20 *of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016) ("*Hyatt II*").<sup>24</sup> Relief was therefore denied as to that  
21 issue. A majority of the Court, however, granted the FTB's alternative request that, in accord  
22 with *Hyatt I*, the FTB must be treated the same as a Nevada state agency regarding damage  
23 limitations. The United States Supreme Court therefore ordered the case remanded to Nevada  
24 state court for proceedings consistent with its ruling.

25  
26 <sup>21</sup> Supp. Appendix Exh. 98. In finding for Hyatt on the residency issue, the SBE reversed all tax, penalty, and  
27 interest assessments made against Hyatt, which the OTA affirmed in denying the FTB's request for reconsideration.  
*Id.* The SBE did affirm a much smaller tax assessment on the unrelated ground of California source income. *Id.*

28 <sup>22</sup> Appendix, Exhs. 72, 74, 75, and 77.

<sup>23</sup> Appendix, Exhs. 73 and 76.

<sup>24</sup> Appendix, Exh. 78.

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

3 After remand, the Nevada Supreme Court issued a decision in 2017 strictly applying *Hyatt*  
4 *II* and limiting Hyatt's recovery to the statutory cap applicable to a Nevada state agency.<sup>25</sup> The  
5 Nevada Supreme Court's decision in 2017 did not reference and had nothing to do with *Nevada v.*  
6 *Hall*. Nonetheless, the FTB again petitioned the United States Supreme Court to review the case,  
7 and again sought reversal of *Nevada v. Hall*, after Justice Scalia's seat was filled.<sup>26</sup> Hyatt  
8 opposed the petition.<sup>27</sup> The United States Supreme Court again granted the FTB's petition for  
9 review on the issue of whether the Court should reverse its long-standing *Nevada v. Hall*  
10 precedent.<sup>28</sup>

11 **I. The United States Supreme Court reversed its long-standing *Nevada v. Hall***  
12 **precedent (2019).**

13 After briefing and arguments by the parties,<sup>29</sup> the United States Supreme Court in a 5-4  
14 decision reversed *Nevada v. Hall* and remanded this case to Nevada state court for proceedings  
15 not inconsistent with the Court's opinion. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct.  
16 1485 (2019) ("*Hyatt III*").<sup>30</sup> This opinion has led to the present issue, the FTB's request for an  
award of costs for its "win", as announced in 2019 under *Hyatt III*.

17 **J. The FTB does not and cannot establish that its costs incurred after the decision in**  
18 ***Hyatt I* were necessary because the FTB could and should have sought reversal of**  
19 ***Nevada v. Hall* in *Hyatt I*.**

20 The total costs the FTB seeks that were incurred as of April 2003 when *Hyatt I* was  
21 issued is **\$211,734.32**.<sup>31</sup> These were calculated based on the FTB's supporting materials for the  
22 costs requested in each category under NRS 18.005 and by adding all costs dated before April 30,  
2003.<sup>32</sup> These costs by category were as follows:

23 \_\_\_\_\_  
24 <sup>25</sup> Appendix, Exh. 83.

25 <sup>26</sup> Appendix, Exhs. 84 and 86.

26 <sup>27</sup> Appendix, Exh. 85.

27 <sup>28</sup> Appendix, Exh. 87.

28 <sup>29</sup> Appendix, Exhs. 88, 89, and 90.

29 <sup>30</sup> Appendix, Exh. 93.

30 <sup>31</sup> The amount was calculated by reviewing the FTB's supporting material for its Memorandum of Costs and for each  
category in the Memorandum of Costs adding the expenses dated before and then after April 30, 2003. *See* chart  
attached as Exhibit 99 to the Supplemental Appendix.

31 <sup>32</sup> FTB Exhibits A to U that list each requested cost by date (FTB Appdx., Vols. 1 to 17) and Supp. Appendix, Exh.  
99.

- No. 1 - *Clerk's fees* - \$1,681.00
- No. 2 - *Reporters' fees for depositions and one copy* - \$35,206.61
- No. 3 - *Juror's fees and expenses* - \$0.00
- No. 4 - *Fees for trial witnesses* - \$153.60
- No. 5 - *Expert fees* - \$0.00
- No. 7 - *Fees for service of process* - \$229.00
- No. 8 - *Compensation for official reporter* - \$2,458.40
- No. 11 - *Telecopies* - \$1,208.49
- No. 12 - *Photocopies* - \$74,323.20
- No. 13 - *Long-distance calls* - \$7,850.06
- No. 14 - *Postage* - \$11,577.70
- No. 15 - *Travel and lodging for depositions* - \$51,040.98
- No. 17 - *Other reasonable and necessary expense* - \$26,005.28
- Total costs incurred as of April 2003: **\$211,734.32**.<sup>33</sup>

As described in the above procedural summary, none of the FTB's over \$2 million in claimed costs incurred after April 2003 contributed to the United States Supreme Court overturning *Nevada v. Hall* in 2019 after the FTB exhausted all other appeals. The lone exception might be the \$600 in Clerk fees the FTB incurred in petitioning the United States Supreme Court in regard to *Hyatt II* and *Hyatt II*.<sup>34</sup> But the FTB could and should have raised reversal of *Nevada v. Hall* as part of *Hyatt I* and had the issue resolved by April 2003, thereby never needing to incur repeated United States Supreme Court filing fees. As a result, the FTB's cost award in this case under NRS 18.005 should be limited to its costs as of that time, **\$211,734.32**.

<sup>33</sup>Supp. Appendix, Exh. 99 (listing FTB requested costs before after April 30, 2003).

<sup>34</sup> FTB Exhibit A (FTB Appdx., Vol. 1, pp. 1, 30-35, 39-41). For the United States Supreme Court filing fees, the FTB mixes its request for filing fees with the cost of preparing the record. The FTB paid two \$300 Clerk fees to the United States Supreme Court. But it also requests \$3,778.50 for printing of the record. At most the FTB should be awarded a total of \$600 related to Clerks fees for the United States Supreme Court. *Id.*

1 **3. Alternatively, a category-by-category application and analysis of the**  
2 **“necessary and reasonable” requirements under NRS 18.005, consistent**  
3 **with this Court's prior interpretation of the statute in this case, also**  
4 **mandates a significant reduction in the FTB's requested cost award.**

5 NRS 18.005 lists and describes 17 categories of potentially recoverable costs. Application  
6 of the “necessary and reasonable” requirements of NRS 18.005 on a category-by-category basis,  
7 including application of this Court's previous interpretation of certain categories (which is the law  
8 of the case), limits the FTB's recovery of costs to no more than **\$214,720.91** as itemized below:

- 9 • No. 1 - *Clerk's fees* - \$2,270.02.
- 10 • No. 2 - *Reporters' fees for depositions and one copy* - \$170,320.91
- 11 • No. 3 - *Juror's fees and expenses* - \$2,055.88
- 12 • No. 4 - *Fees for trial witnesses* - \$0.00
- 13 • No. 5 - *Expert fees* - \$7,500
- 14 • No. 7 - *Fees for service of process* - \$999
- 15 • No. 8 - *Compensation for official reporter* - \$31,432.57
- 16 • No. 11 - *Telecopies* - \$0.00
- 17 • No. 12 - *Photocopies* - \$0.00
- 18 • No. 13 - *Long-distance calls* - \$0.00
- 19 • No. 14 - *Postage* - \$0.00
- 20 • No. 15 - *Travel and lodging for depositions* - \$0.00
- 21 • No. 17 - *Other reasonable and necessary expense* - \$0.00
- 22 • Total costs incurred as of April 2003: **\$214,720.91**

23 This number was calculated by including the costs requested by the FTB for the four  
24 categories listed in NRS 18.005 for which the Court has more limited discretion as these  
25 categories do not specifically reference the costs having to be necessary and/or reasonable. These  
26 four categories are: Nos. 1 (clerk's fees), 2 (reporter's depo fees), 3 (juror fees), and 8 (official  
27 reporter fees).<sup>35</sup> Conversely, as detailed below, most of the costs requested by the FTB are from  
28 seven other categories listed in NRS 18.005 that specifically reference that the costs must be

---

<sup>35</sup> Arguably caselaw still imposes that requirement. See discussion *supra*, at 4-5.

1 necessary and/or reasonable. These categories are: Nos. 4 (witness fees at trial), 5 (expert fees  
2 above \$1,500 per expert), 7 (service of process), 11 (telecopies/faxes), 12 (photocopies), 13  
3 (long-distance calls), 14 (postage), 15 (travel), and 17 (other). For the vast majority of these  
4 requested costs, the FTB makes no showing of necessity or reasonableness. Virtually none of  
5 these costs contributed, and therefore were not necessary, to the FTB prevailing in 2019 by  
6 overturning the United States Supreme Court's long-established legal precedence of *Nevada v.*  
7 *Hall*.

8 Moreover, for most of these discretionary costs the FTB failed to submit sufficient  
9 information to establish necessity and reasonableness even without consideration of whether the  
10 expense contributed to overturning of *Nevada v. Hall*. On this point, this Court has previously  
11 addressed the 17 categories of costs listed in NRS 18.005 in the context of this specific case when  
12 this Court determined that Hyatt was the prevailing party in 2009. A detailed 22-page report was  
13 submitted to this Court by its own Special Master and then approved by this Court at that time.<sup>36</sup>  
14 In so doing, the Court excluded certain costs then sought by Hyatt. The Court's rulings in  
15 limiting Hyatt's recovery in certain cost categories should be applied here to the FTB's costs  
16 request.

17 **A. Hyatt seeks only small deductions for the costs requested by the FTB under the four**  
18 **categories for which the Court arguably has the least discretion.**

19 The FTB seeks fees under four of the costs categories that do not specifically reference  
20 reasonable or necessary, Nos. 1, 2, 3, and 8, and Hyatt requests small deductions in these less  
21 discretionary categories consistent with the statutory language and the Court's prior adoption of  
22 the Special Master Report from 2009.

23 **(1) No. 1 - Clerk's fees – FTB's request for \$9,898.52 should be reduced to \$2,270.02.**

24 The FTB seeks fees paid to the court clerk. See FTB Exhibit A (FTB Appdx., Vol. 1, pp.  
25 1-141). The Special Master's Report from 2009 excluded as unnecessary fees paid to the Nevada  
26 State Bar for *pro hac vice* applications of out-of-state attorneys.<sup>37</sup> The FTB's Cost Memorandum  
27 includes \$3,850.00 in *pro hac vice* fees paid to the Nevada State Bar for the FTB's California

28 <sup>36</sup> Supp. Appendix Exhs. 96 and 97.

<sup>37</sup> Supp. Appendix Exh. 96, pp. 19-20.

1 attorneys.<sup>38</sup> These costs should be excluded from the FTB's cost award now just as they were  
2 when Hyatt sought them in 2009. Further, as addressed in footnote 34 above, for the United  
3 States Supreme Court filing fees, the FTB mixes its request for filing fees with the cost of  
4 preparing the record. The FTB paid two \$300 Clerk fees to the United States Supreme Court.  
5 But it also requests \$3,778.50 for printing of the record.<sup>39</sup> At most the FTB should be awarded a  
6 total of \$600 related to Clerks fees for the United States Supreme Court. After these deductions,  
7 the FTB total cost award for Clerk's fees should be \$2,270.02

8 ***(2) No. 2 - Reporters' fees for depositions and one copy – FTB's request for***  
9 ***\$171,494.91 should be reduced to \$170,320.91.***

10 The FTB seeks reporter fees for depositions and some court hearings. See FTB Exhibit A  
11 (FTB Appdx., Vol. 1, pp. 42-186). The Special Master's Report from 2009 allowed the cost of  
12 only one copy of each deposition, and disallowed videographer fees under this category if a court  
13 reporter was present.<sup>40</sup> Here, Hyatt does not oppose the FTB's request for one copy of each  
14 deposition transcript totaling \$170,320.91. Hyatt further addresses videographer fees below  
15 under Category 17.

16 The FTB's Cost Memorandum, however, also improperly seeks \$1,174 in court hearing  
17 transcripts.<sup>41</sup> These costs are misplaced here and must be considered, if at all, under Category 17  
18 based on an analysis of need. This amount, \$1,174, should therefore be deducted here in this  
19 category from the FTB's cost award.

20 ***(3) No. 3 - Juror's fees and expenses – FTB's request for \$2,055.88 is not opposed.***<sup>42</sup>

21 ***(4) No. 8 - Compensation for official reporter – FTB's request for \$31,432.57 is not***  
22 ***opposed.***<sup>43</sup>

23 The total amount unopposed by Hyatt in these four essentially non-discretionary  
24 categories is therefore **\$206,079.38**.

25  
26 <sup>38</sup> FTB Exhibit A (FTB Appdx., Vol. 1, pp. 1), listing total fees paid to Nevada State Bar as \$3,850.

27 <sup>39</sup> FTB Exhibit A (FTB Appdx., Vol. 1, pp. 1, 30-35, 39-41).

28 <sup>40</sup> Supp. Appendix Exh. 96, p. 6.

<sup>41</sup> FTB Exhibit B (FTB Appdx., Vol. 1, pp. 187-89, 191).

<sup>42</sup> FTB Exhibit C (FTB Appdx., Vol. 1, pp. 187-199).

<sup>43</sup> FTB Exhibit G (FTB Appdx., Vol. 2, pp. 370-449).

1                   **a. Hyatt opposes and objects to almost all of the FTB's requested costs under**  
2                   **the seven highly discretionary categories listed in NRS 18.005.**

3                   ***(1) No. 4 - Fees for trial witnesses - FTB's request for \$27,276.86 should be excluded in***  
4                   ***its entirety for multiple reasons.***

5                   The FTB seeks fees including mileage and travel expenses paid to trial witnesses. *See*  
6                   FTB Exhibit D (FTB Appdx., Vol. 2, pp. 200-301). This category explicitly states it is for "fees  
7                   for witnesses at trial" but excludes witness fees of those who were called at trial without reason or  
8                   necessity. First, the FTB improperly includes \$14,200.00 incurred as fees paid to Hyatt expert  
9                   witnesses for their time in deposition.<sup>44</sup> These costs are not recoverable under this category and  
10                  should be excluded regardless of whether the Court awards the remaining requested costs in this  
11                  category.

12                 Secondly, the FTB has not and cannot make a showing of necessity for any witness the  
13                 FTB called at trial in 2008. As addressed above, the trial had nothing to do with the FTB  
14                 prevailing in overturning *Nevada v. Hall* in 2019. No witness called by the FTB at trial, and  
15                 therefore no expense in calling any of witnesses, meets the necessity test. All of the requested  
16                 costs in this category, \$27,276.86, should therefore be excluded. (Of note, none of these expenses  
17                 were incurred before April 2003.)<sup>45</sup>

18                   ***(2) No. 5 - Expert fees – FTB's request for \$242,254.67 should be reduced to \$7,500***  
19                   ***(\$1,500 for each of the FTB's five expert witnesses).***

20                 The FTB seeks fees paid to expert witnesses. *See* FTB Exhibit E (FTB Appdx., Vol. 2,  
21                 pp. 302-361). Under this category, recovery of fees paid to experts is limited to \$1,500.00 per  
22                 expert, unless there is a showing that a larger requested fee for the expert's time "w[as] of such  
23                 necessity as to require the larger fee." NRS 18.005(5). Per the language of the statute, particular  
24                 scrutiny must be given as to the necessity of costs requests for experts that exceed \$1,500 per  
25                 expert. As addressed in the preceding section, the FTB does not and cannot make a showing of  
26                 necessity for any witness called at trial because the trial had nothing to do with overturning  
27                 *Nevada v. Hall*—all the evidence presented at trial, including from the FTB's experts, related to

28                 

---

<sup>44</sup> FTB Exhibit D (FTB Appdx., Vol. 2, p. 200), listing fees paid to Hyatt expert witnesses Sjoberg, Solve, Frank,  
Jumelet, and Truly.

<sup>45</sup> Supp. Appendix Exh. 99, p. 1.

1 whether the FTB's committed intentional torts directed towards Hyatt. None of this evidence had  
2 any bearing on whether the United States Supreme Court should overturn *Nevada v. Hall*.

3 In this regard, the FTB's experts presented at trial in 2008, all three (John Sullivan,  
4 Kathleen Wright, and Deidre Mulligan) testified as to FTB audit processes and practices, and  
5 certainly not about *Nevada v. Hall*. None of them had any connection or relation to the FTB's  
6 effort to overturn *Nevada v. Hall* years later in 2019. The FTB does not and cannot reasonably  
7 make an assertion to the contrary. The FTB's recoverable costs related to its experts must  
8 therefore be limited to \$1,500 for each of the five experts for a total of \$7,500. (Of note, none of  
9 these expenses were incurred before April 2003.)<sup>46</sup>

10 ***(3) No. 7 - Fees for service of process – FTB's request for \$999 is not opposed.***<sup>47</sup>

11 ***(4) No. 11 - Telecopies - FTB's request for \$6,728 should be denied in its entirety for***  
12 ***failing to establish the necessity of any or all of this amount.***

13 It appears that the FTB has simply submitted the entirety of its law firm's billed telecopy  
14 (*i.e.*, fax) charges with no explanation as to what the faxes were for or how they assisted in the  
15 case. *See* FTB Exhibit H (FTB Appdx., Vol. 3, pp. 450-508). This approach was determined to  
16 be insufficient by the Special Master in 2009 (and adopted by this Court). The Special Master  
17 disallowed Hyatt's requested fax expenses by finding spreadsheets insufficient documentation and  
18 determining that source documentation is needed.<sup>48</sup> Further, the FTB submits nothing to establish  
19 how these expenses relate in any way to the United States Supreme Court overturning the *Nevada*  
20 *v. Hall* precedent. The entire requested expense should be excluded. (Of note, only \$1,208.49 of  
21 these expenses were incurred before April 2003.)<sup>49</sup>

22 ***(5) No. 12 - Photocopies – FTB's request for \$651,628.14 should be denied in its***  
23 ***entirety or limited to no more than 20% of the request (\$130,325.63).***

24 This expense is the FTB's largest single request, and its most significant overreach.  
25 \$463,684.37 of the total requested in this category is from the FTB's outside law firm's own  
26 internal tracking records with nothing more submitted. *See* FTB Exhibit I (FTB Appdx., Vols. 3

27 <sup>46</sup> Supp. Appendix Exh. 99, p. 1.

28 <sup>47</sup> FTB Exhibit F (FTB Appdx., Vol. 2, pp. 362-369).

<sup>48</sup> Supp. Appendix Exh. 96, p. 11.

<sup>49</sup> Supp. Appendix Exh. 99, p. 2.



1 and 4, pp. 509-1008). The Special Master's Report from 2009 required supporting documentation  
2 beyond a mere spreadsheet and disallowed almost 80% of Hyatt's requested copying expenses on  
3 that basis. As the report concluded, "Absent such justifying documentation, the Special Master  
4 recommends this Honorable Court cannot adequately evaluate the reasonableness of the cost  
5 requested. . . ."<sup>50</sup> Here too, the reasonableness and necessity of the FTB's \$651,628.14 copying  
6 cost request cannot be evaluated as the FTB submitted merely a listing of the charges. It simply  
7 lists all of its phone charges. The FTB does this for both the photocopy expenses asserted by its  
8 counsel (\$577,304.94) and by outside vendors (\$102,876.23).<sup>51</sup>

9 In fact, from the dates of the asserted phone charges in the FTB's Exhibit I it appears the  
10 majority related to work performed before the 2008 trial, not for any appeal related to the reversal  
11 of *Nevada v. Hall*. There is no attempt by the FTB to tie any of its outrageous request for  
12 photocopying costs to its work and the basis on which the FTB prevailed in this case, *i.e.*,  
13 convincing the United States Supreme Court to reverse *Nevada v. Hall*. (Of note, only  
14 \$50,533.38 of these expenses were incurred before April 2003.)<sup>52</sup>

15 The FTB's requested copying expense represents over one-fourth of the FTB's total  
16 requested costs in its Memorandum of Costs. Although the FTB has made no showing of  
17 reasonableness and necessity for any amount, if the Court is inclined to grant some amount it  
18 should award no more than the approximate 20% of copying costs Hyatt was awarded by the  
19 Special Master in 2009 (adopted by this Court). And 20% of the FTB's requested copying costs  
20 would be \$130,325.63.

21 ***(6) No. 13 - Long-distance calls – FTB's request for \$15,844.82 should be denied in its***  
22 ***entirety as no showing of necessity or reasonableness is made.***

23 Again, the FTB has simply submitted the entirety of its outside law firm's long-distance  
24 telephone calls for reimbursement. See FTB Exhibit J (FTB Appdx., Vol. 5, pp. 1009-1203).  
25 There is no explanation as to what the calls were for, whom they were to and from, or how they  
26 assisted in the case. This approach was found insufficient by the Special Master in 2009. He

27 <sup>50</sup> Supp. Appendix Exh. 96, pp. 11-12, 21

28 <sup>51</sup> FTB Exhibit I (FTB Appdx., Vol. 3, pp. 509-806 (FTB counsel) and Vol. 4, pp. 807-1008 (outside vendors)).

<sup>52</sup> Supp. Appendix Exh. 99, p. 2.

1 allowed only a small percentage of Hyatt's requested long-distance call expenses finding  
2 spreadsheets and phone bills insufficient documentation.<sup>53</sup> Further, here the FTB had not  
3 submitted any information as to how these expenses assisted the FTB in overturning the *Nevada*  
4 *v. Hall* precedent. The entire requested expense should be denied. (Of note, only \$1,066.20 of  
5 these expenses were incurred before April 2003.)<sup>54</sup>

6 ***(7) No. 14 - Postage – FTB's request for \$46,745.97 is opposed in its entirety because***  
7 ***no showing of necessity or reasonableness is made.***

8 The FTB has submitted the entirety of its outside law firm's postal expenses for  
9 reimbursement. See FTB Exhibit K (FTB Appdx., Vols. 6-9, pp. 1204-2183). The Special  
10 Master in 2009 allowed a portion of Hyatt's requested postal expenses because he had reliable and  
11 supporting documentation.<sup>55</sup> Unlike its fax, copy, and phone requests, for its postage expenses  
12 the FTB has submitted backup, *i.e.*, supporting documentation. Nonetheless, the FTB makes no  
13 showing of necessity. Nor does the FTB address what the postage charges were for or how they  
14 assisted the FTB in overturning the *Nevada v. Hall* precedent. The entire requested expense  
15 should be denied. (Of note, only \$11,577.70 of these expenses were incurred before April  
16 2003.)<sup>56</sup>

17 ***(8) No. 15 - Travel and lodging for depositions - FTB's \$225,431.41 should be excluded***  
18 ***in its entirety because it includes (i) costs outside of this category, and (ii) no***  
***showing of necessity or reasonableness.***

19 In requesting \$225,431.41 under this category, the FTB has simply submitted the entirety  
20 of its outside law firm's and in-house counsel's travel expenses throughout this 20-plus year  
21 litigation without any attempt to segregate which expenses legitimately fall within this category,  
22 and which do not. See FTB Exhibit L (FTB Appdx., Vols. 10 and 11, pp. 2,184-2,704). The  
23 FTB's Memorandum of Costs and supporting documentation make no effort to segregate the  
24 requested costs for travel incurred for depositions and discovery. At best, the descriptions of the  
25 supporting documents in Exhibit L include only a handful of references to mileage paid to FTB  
26 attorneys that reference depositions. These few select entries from 2004 forward total **\$897.10** in

27 <sup>53</sup> Supp. Appendix Exh. 96, pp. 12.

28 <sup>54</sup> Supp. Appendix Exh. 99, p. 2.

<sup>55</sup> Supp. Appendix Exh. 96, pp. 12-13.

<sup>56</sup> Supp. Appendix Exh. 99, p. 2.

1 costs.<sup>57</sup> This is the only amount for which the FTB has made any showing that the travel costs  
2 were incurred for depositions or discovery.<sup>58</sup>

3 By the dates of the listed travel expenses it clear that the vast majority of entries on FTB  
4 Exhibit L relate to travel expenses for hearings, pretrial matters, and the trial in 2008 or even  
5 post-trial—not depositions or discovery. The list of depositions set forth in FTB Exhibit B in  
6 support of the FTB's request for reporter's fees confirms that no deposition was taken after  
7 December 2007.<sup>59</sup> But the FTB seeks nine pages of listed travel expenses occurring after that  
8 date.<sup>60</sup> This is improper and should be rejected in its entirety by the Court. As NRS 18.005(15)  
9 states, and as the Special Master's Report in 2009 confirmed in limiting Hyatt's recovery in this  
10 category (adopted by this Court), travel expenses under this category are limited to travel incurred  
11 in taking depositions and conducting discovery.<sup>61</sup> The Special Master's Report in 2009 excluded  
12 travel expenses for attending hearings and any travel costs incurred after the close of discovery.<sup>62</sup>

13 Even for the limited amount of **\$897.10** that can be tied to a deposition,<sup>63</sup> the FTB cannot  
14 and does not make a showing of how or why those depositions were necessary and relate to or  
15 assisted in the United States Supreme Court overturning *Nevada v. Hall* in *Hyatt III*. None of the  
16 discovery taken in the case related to or assisted the FTB in convincing the United States  
17 Supreme Court to overturn *Nevada v. Hall*. Further, the FTB would have avoided most of its  
18 deposition and discovery travel expenses if it had petitioned the United States Supreme Court to  
19 overturn *Nevada v. Hall* in *Hyatt I*. There is therefore no basis to award the FTB any travel costs  
20 on its Exhibit L from 2004 forward regardless of whether the costs can be attributed to  
21

---

22 <sup>57</sup> Of the 25 pages and hundreds of listed travel expenses on FTB Exhibit L, the only entries referencing deposition or  
23 depo are on Sept. 14,15, 2004, March 23, 2006, April 6, 2006, and May 5, 9, 30, 2006 (Vol. 10, pp. 2190, 2196-  
2197). The hundreds of other listed expenses give no indication as to the purpose of the travel expense.

24 <sup>58</sup> To the extent the FTB argues in reply that its travel expenses unrelated to depositions and discovery should  
25 nonetheless be awarded under No. 17 the "Other" category, Hyatt must be given an opportunity to review and  
26 respond to any new argument. But the FTB has no argument as to how or why these expenses incurred after April  
2003 were necessary for it to prevail in overturning *Nevada v. Hall* (except perhaps its travel expenses related to  
Hyatt III, which the FTB has not segregated or identified).

26 <sup>59</sup> FTB Exhibit B (FTB Appdx., Vol. 1, p. 3330).

27 <sup>60</sup> FTB Exhibit L (FTB Appdx., Vol. 10, pp. 2200-2208).

27 <sup>61</sup> Supp. Appendix Exh. 96, pp. 6, 18.

28 <sup>62</sup> *Id.*

28 <sup>63</sup> FTB Exhibit L (Vol. 10, pp. 2190, 2196-2197, entries on Sept. 14,15, 2004, March 23, 2006, April 6, 2006, May 5,  
9, 30, 2006).

1 depositions or discovery. (Of note, the travel expenses submitted *en masse* by the FTB in its  
2 Exhibit L dated prior to April 2003 total only \$51,040.98.<sup>64</sup> Most of these appear to relate to  
3 hearings, proceedings, or trial, not discovery, as the costs do not match up with the dates of  
4 depositions taken in the case.<sup>65</sup>)

5 To the extent the FTB submits supplemental or amended materials identifying the travel  
6 expenses in Exhibit L incurred *before Hyatt I in April 2003* for depositions or discovery, on the  
7 basis that it would have incurred those expenses even if it had sought to overturn *Nevada v. Hall*  
8 in *Hyatt I*, Hyatt must be given an opportunity to review and respond to any new materials.

9 In sum, the FTB makes no showing of travel related expenses incurred for deposition or  
10 discovery except for \$897.10. And none of those expenses were incurred before the decision in  
11 *Hyatt I* in April 2003. The FTB failed to carry its burden establishing that any of its travel  
12 expenses related to depositions or discovery and were necessary for it to prevail in this case. No  
13 cost award should therefore be awarded for the FTB's submitted travel expenses.

14 ***(9) No. 17 - Other reasonable and necessary expense - FTB's request for \$831,024.51***  
15 ***should be denied in its entirety.***

16 Under this miscellaneous, catch-all category, the FTB's requests were broken down into  
17 nine subparts. The Court has significant discretion over requests in this category as the statute  
18 specifies the expenses must be "reasonable and necessary." Overwhelmingly, the FTB's requests  
19 in this category lack the showing of reasonableness or necessity that permeates its bloated  
20 Memorandum of Costs. The expenses listed do not relate in any manner to the FTB overturning  
21 of *Nevada v. Hall* in 2019. Hyatt will address the nine subparts individually.

22 ***(a) Private investigator - FTB's request for \$1,494.63 should be denied in its***  
23 ***entirety.***

24 The FTB requests vague and unspecified private investigator costs. See FTB Exhibit M  
25 (FTB Appdx., Vol. 12, pp. 2705-09). First, the Special Master's Report in 2009 (adopted by this  
26 Court) excluded Hyatt's request for private investigator expenses.<sup>66</sup> Further, NRS 18.005(17)

27 <sup>64</sup> Supp. Appendix Exh. 99, p. 3.

28 <sup>65</sup> See and compare FTB Exhibit B and FTB Exhibit L. The FTB submitted no chart, comparison, list, etc., tying the  
requested expenses to depositions.

<sup>66</sup> Supp. Appendix Exh. 96, p. 19.

1 makes no reference to investigators. Most significantly, the FTB does not and cannot make a  
2 showing of necessity and reasonableness for this expense. FTB's Exhibit M lists and contains  
3 four invoices from an investigator dated from 2006 and 2007. The invoices themselves give no  
4 clue as to what the investigator was doing or why his work was necessary, and certainly provide  
5 no showing that he assisted in the FTB's later legal arguments before the United States Supreme  
6 Court that lead to the overturning of *Nevada v. Hall* in 2019. For example, the investigator's last  
7 invoice dated July 2, 2007 only references "Criminal History Research" for \$300. *See* FTB  
8 Exhibit M (p. 2709.) This was not a criminal case, and the arguments for overturning *Nevada v.*  
9 *Hall* had nothing to do with criminal law. This entire requested expense should be excluded. (Of  
10 note, none of these expenses were incurred before April 2003.)<sup>67</sup>

11 (b) *Research - FTB's request for \$183,030.42 should be denied because the FTB*  
12 *failed to identify and limit this request to legal research related to overturning*  
*Nevada v. Hall.*

13 The FTB seeks recovery of all computer research costs. *See* FTB Exhibit N (FTB Appdx.,  
14 Vols. 12-14, pp. 2710-3313). NRS 18.005(17) specifically references "expenses for  
15 computerized services for legal research." Arguably, the FTB could recover its expenses for  
16 computer research related to its successful appeal to overturn *Nevada v. Hall* in 2019. But the  
17 FTB fails to identify what if any of its computer research related to that appeal. Again, the FTB  
18 does not tie or limit this requested expense to research related to securing the reversal of *Nevada*  
19 *v. Hall* in 2019. Instead, the FTB appears to submit a request to recover all computer research  
20 incurred during the 20-plus year case with entries dated from 1998 to 2018. *See* FTB Exhibit N  
21 (pp. 2710-3313). Based on the dates, the vast majority of these expenses have nothing to do with  
22 seeking to overturn *Nevada v. Hall*. For example, of the 15 pages of listed research expenses  
23 listed in FTB Exhibit N only the last two-and-half pages are dated from 2016 forward when the  
24 FTB was seeking to overturn *Nevada v. Hall*.<sup>68</sup> The FTB therefore fails to make any showing of  
25 reasonableness and necessity for the expenses requested.

26 Again, Hyatt anticipates the FTB may try to argue in reply it should recover computer  
27

28 <sup>67</sup> Supp. Appendix Exh. 99, p. 3.

<sup>68</sup> FTB Exhibit N (Vol. 12, pp. 2710-2724 (expenses from 2016 to 2019 start on page 2722)).

1 research expense incurred before April 2003, when it seemingly could have earlier prevailed on  
2 overturning *Nevada v. Hall*. This amount would be \$20,436.87.<sup>69</sup> But none of the research  
3 expense before April of 2003 could have related to or therefore been necessary to overturning  
4 *Nevada v. Hall* because the FTB did not seek to overturn that precedent in 2003. Even this  
5 limited amount should therefore not be awarded to the FTB.

6 Alternatively, if the Court does not exclude or limit this expense in accord with the above  
7 arguments, at a minimum the Court should limit its award for this expense consistent with the  
8 Special Master report from 2009 (adopted by this Court) that limited Hyatt's request to 55% of the  
9 total computer research expense requested.<sup>70</sup> Here that amount would be \$100,666.73.<sup>71</sup>

10 (c) *Mediator/Special Master Fees - FTB's request for \$77,147.71 should be denied in*  
11 *its entirety.*

12 The FTB lumps two expenses together here, fees for a failed mediation in 2007 (\$1,575)  
13 and fees for the Special Master in 2009 and 2010 (\$75,572.71) relative to Hyatt's Memorandum  
14 of Costs after the 2008 trial in which he prevailed and the jury awarded hundreds of millions in  
15 damages. See FTB Exhibit O (FTB Appdx., Vols. 14, pp. 2710-3314-3328). Neither is  
16 appropriate here, and both should be rejected by the Court.

17 In regard to the mediator's fees, the parties split these in 2007 as is typical in mediation.  
18 There is no statutory basis to recover this cost. The Special Master rejected Hyatt's request to  
19 recover this expense in his 2009 report, which this Court adopted.<sup>72</sup> There is no basis to award  
20 the FTB this expense.

21 In regard to the Special Master's fees, the court order appointing the Special Master  
22 specially held that the fees would be split 50/50.<sup>73</sup> Indeed, this is referenced in the materials the  
23 FTB submitted in support of its costs as they included an order approving payment of the fee  
24 which stated:

25 pursuant to the Order Appointing Special Master which states that

26 <sup>69</sup> *Id.*, at pp. 2710-2714; Supp. Appendix Exh. 99, p. 3.

27 <sup>70</sup> Supp. Appendix Exh. 96, p. 15

28 <sup>71</sup> The FTB requested a total of \$183,030.42 in research cost in FTB Exhibit N.

<sup>72</sup> Supp. Appendix Exh. 96. The Special Master's Report did not address and thereby rejected Hyatt's request in 2009 to recover one-half of the mediator's fee.

<sup>73</sup> Supp. Appendix Exh. 100, p. 2., Ins. 24-25 (January 29, 2009 Order Appointing Special Master).

1                    *payment of the Special Master's fees and costs shall be divided*  
2                    *equally between the above captioned parties as previously*  
3                    *determined by this Court on a 50/50 basis between the above*  
                    captioned parties pursuant to the Order appointing the Special  
                    Master.<sup>74</sup>

4                    In sum, Hyatt was not entitled to, and did not seek recovery of, the one-half of the Special  
5                    Master's fees that he paid. Nor therefore is the FTB now entitled to recover its one-half of the  
6                    Special Master's fees. The Court has already addressed this subject in its order appointing the  
7                    Special Master and then in its order approving payment to the Special Master. (Of note, none of  
8                    these expenses were incurred before April 2003.)<sup>75</sup>

9                    This expense request by the FTB should be denied in its entirety.

10                  (d)        *Video services - FTB's request for \$57,744.21 should be denied in its entirety.*

11                  The FTB seeks deposition video expenses. See FTB Exhibit P (FTB Appdx., Vol 14, pp.  
12                  3329-3430). This is an improper request and was rejected by the Special Master when Hyatt  
13                  requested the same in 2009, and the Court adopted this position.<sup>76</sup> No videographer fees are  
14                  recoverable if a court reporter was present at the deposition. This expense is better addressed  
15                  under NRS 18.005(2) and allows for a copy of the transcript but not videographer fees. While the  
16                  FTB makes the request under this miscellaneous "other" category, there is no basis for awarding  
17                  this deposition expense.

18                  Additionally, as argued above for multiple other expenses, the FTB does not and cannot  
19                  make a showing that this expense was necessary relative to the FTB's appeal that resulted in the  
20                  United States Supreme Court overturning *Nevada v. Hall* in 2019. None of the videos taken at  
21                  the depositions assisted the FTB in prevailing in this case. This expense should be rejected on  
22                  this basis as well.

23                  Moreover, the vast majority of these expenses were incurred after April 2003 when *Hyatt*  
24                  *I* was decided. FTB's Exhibit P shows that only \$5,263.50 of the total expense was incurred  
25                  before April 2003.<sup>77</sup> Although the FTB should not receive any recovery under this category of  
26

27                  <sup>74</sup> FTB Appdx., Vol. 14, p. 3324 (emphasis added).

28                  <sup>75</sup> Supp. Appendix Exh. 99, p. 3.

<sup>76</sup> Supp. Appendix Exh. 96, p. 6.

<sup>77</sup> FTB Exhibit P (FTB Appdx., Vol. 14, pp. 3314-3328); Supp. Appendix Exh. 99, p. 3.

1 expenses, if the Court does award any amount it should be limited to the amount incurred before  
2 April 2003.

3 (e) *Trial expenses - FTB's request for \$98,434.76 should be denied in its entirety.*

4 The FTB seeks miscellaneous "trial expenses," which a review of its Exhibit Q (FTB  
5 Appdx., Vol 14, pp. 3431-3474) shows included index tabs, trial exhibits, copying trial exhibits,  
6 binders for trial exhibits, parking during trial, and internet service during trial. This is an  
7 improper request and was rejected by the Special Master (adopted by this Court) when Hyatt  
8 requested the same costs in 2009 after winning the jury trial in 2008.<sup>78</sup> The FTB lost the jury trial  
9 in 2008 and therefore has an even weaker argument for requesting these costs. Additionally, the  
10 FTB does not and cannot make a showing that these expenses or any other trial-related expense  
11 was necessary relative to the FTB's appeal that resulted in overturning *Nevada v. Hall* in 2019.  
12 This expense should be rejected on all these grounds. (Of note, none of these expenses were  
13 incurred before April 2003.)<sup>79</sup>

14 (f) *Supplies - FTB's request for \$9,646.10 should be denied. in its entirety.*

15 The FTB seeks miscellaneous "supplies" that appear directly related to trial expenses  
16 addressed in the section above. Here the FTB seeks per its Exhibit R (FTB Appdx., Vol 15, pp.  
17 3475-3557) binders, folders, binder clips, labels, pens, pencils, paper, toner, tape, and snacks.  
18 These expenses should be rejected for the same reason referenced above for rejecting the  
19 requested trial expenses. These expenses were rejected by the Special Master in 2009 (adopted  
20 by this Court) when Hyatt requested the same after winning the jury trial in 2008.<sup>80</sup> Additionally,  
21 the FTB does not and cannot make a showing that these expenses or any other trial-related  
22 expenses were necessary relative to the FTB's appeal that resulted in the United States Supreme  
23 Court overturning *Nevada v. Hall* in 2019. The FTB lost the jury trial in 2008. (Of note, none of  
24 these expenses were incurred before April 2003.)<sup>81</sup>

27 <sup>78</sup> Supp. Appendix Exh. 96, p. 19.

28 <sup>79</sup> Supp. Appendix Exh. 99, p. 3.

<sup>80</sup> Supp. Appendix Exh. 96, p. 19.

<sup>81</sup> Supp. Appendix Exh. 99, p. 3.



1           (g)     *Meals - FTB's request for \$12,295.41 should be denied in its entirety.*

2           The FTB seeks meal expenses dating from 2003 through 2019 with no explanation or  
3 even reference as to who was at the meal, what event it pertained to, or why it was a necessary  
4 and reasonable expense. The submission is simply a listing of restaurant charges with receipts.  
5 See FTB Exhibit S (FTB Appdx., Vol. 16, pp. 3558-3745). The FTB's submission therefore fails  
6 to establish the necessary and reasonable requirements of subsection 17. Moreover, in 2009 the  
7 Special Master's report rejected virtually all travel and meal expenses sought by Hyatt except  
8 those pertaining to attorney travel expenses for depositions and discovery.<sup>82</sup> And this Court  
9 adopted the same position. In that regard, Hyatt sought recovery for travel and meals under both  
10 subsections 15 (addressed above) and 17. But only travel and meal expenses related to  
11 depositions and discovery were allowed.

12           At most, the FTB is entitled to costs for meals related to travel for depositions or  
13 discovery. But it fails to make any showing that a meal listed in its Exhibit S is related to  
14 depositions or discovery. Indeed, the vast majority of meals listed date from late 2007 and  
15 thereafter when discovery was closed. Only the first five entries on the first page of Exhibit S  
16 totaling \$304.91 (FTB Appdx., Vol. 16, pp. 3558) are dated before April 2003. At best the FTB  
17 should be awarded only that portion of the \$304.91 incurred before April 2003 that it can  
18 establish related to depositions or discovery. Otherwise, this request by the FTB should be  
19 rejected in its entirety.

20           (h)     *Trial transcripts - FTB's request for \$134,741.75 should be denied in its entirety.*

21           The FTB seeks recovery of expenses for trial transcripts it incurred during the trial  
22 between April and August 2008. See FTB Exhibit T (FTB Appdx., Vol. 17, pp. 3746-3807). The  
23 Special Master allowed this cost to Hyatt in 2009 as the prevailing party in the 2008 jury trial.<sup>83</sup>  
24 But unlike Hyatt who prevailed in the 2008 jury trial, the FTB makes no showing of  
25 reasonableness or necessity as to this expense. Again, the FTB does not and cannot make a  
26 showing that these expenses or any other trial related expense were necessary relative to the

27  
28 <sup>82</sup> Supp. Appendix Exh. 96, p. 13, 18.

<sup>83</sup> Supp. Appendix Exh. 96, p. 17.

1 FTB's appeal that resulted in the overturning of *Nevada v. Hall* in 2019. The FTB never would  
2 have incurred this expense had it sought to overturn *Nevada v. Hall* when the United States  
3 Supreme Court first reviewed this case via *Hyatt I* decided in April 2003. The FTB should not be  
4 rewarded for waiting years and years and incurring substantial costs before pursuing the argument  
5 on which it eventually prevailed, when the FTB could have done so early in this case. The FTB's  
6 request for recovery of trial transcript expenses should be rejected in its entirety. (Of note, none  
7 of these expenses were incurred before April 2003.)<sup>84</sup>

8 (i) *Litigation support - FTB's request for \$251,226.32 should be denied in its entirety.*

9 The FTB seeks recovery of a variety of trial technology expenses as well as some  
10 appellate preparation expenses. See FTB Exhibit T (FTB Appdx., Vol. 17, pp. 3808-3843). The  
11 vast majority of these expenses related directly to the 2008 jury trial including charges for mock  
12 trials, jury consultant, deposition synching, trial presentation services, and hot seat operator. The  
13 Special Master allowed Hyatt in 2009 to recover trial technology expenses as the prevailing party  
14 in the 2008 jury trial.<sup>85</sup> But for the same reason expressed in the immediately above section on  
15 trial transcripts, the FTB should not be awarded its trial technology expenses. The FTB does not  
16 and cannot make a showing that these expenses or any other trial related expense were necessary  
17 relative to the FTB's appeal that resulted in the United States Supreme Court overturning *Nevada*  
18 *v. Hall* in 2019. The FTB never would have incurred this expense had it sought to overturn  
19 *Nevada v. Hall* when the United States Supreme Court first reviewed this case in 2003. The FTB  
20 should not be rewarded for waiting years and years and incurring substantial costs before  
21 pursuing the argument on which it eventually prevailed, when it could have done so early in this  
22 case. (Of note, none these expenses were incurred before April 2003.)<sup>86</sup>

23 The last three entries in the FTB's list of expenses for this request appear to relate to  
24 appellate work. See FTB Exhibit T, pp. 3808, 3840-43. Of those three, the first two entries for  
25 \$4,000 (March 26, 2012) and \$1,520 (June 25, 2012) clearly relate to the appeal to the Nevada  
26 Supreme Court in this case. Hyatt prevailed in that appeal, and the FTB did not seek to overturn

27 <sup>84</sup> Supp. Appendix Exh. 99, p. 3.

28 <sup>85</sup> Supp. Appendix Exh. 96, p. 21.

<sup>86</sup> Supp. Appendix Exh. 99, p. 3.

1 *Nevada v. Hall* during that appeal.<sup>87</sup> Indeed, the Nevada Supreme Court affirmed the jury's  
2 verdict that the FTB defrauded Hyatt and engaged in intentional infliction of emotional distress.<sup>88</sup>  
3 The FTB therefore does not and cannot make a showing that these two expense items were  
4 reasonable or necessary relative to its later argument to the United States Supreme Court to  
5 overturn *Nevada v. Hall*.

6 The last expense item in this request is for \$231.70 dated April 18, 2017 for use of the  
7 UNLV School of Law Moot Court Room. See FTB Exhibit T, pp. 3808, 3843. Based on the  
8 timing of this invoice, this expense could possibly relate to the FTB's appeal to the United States  
9 Supreme Court seeking to overturn *Nevada v. Hall*. If the FTB can so relate this expense, Hyatt  
10 would concede that \$231.70 can be awarded to the FTB. But all other expenses listed as part of  
11 this request should be rejected.

#### 12 **4. Conclusion.**

13 The Court should limit the FTB's cost award under NRS 18.005 to the cost incurred before  
14 April 2003. That was when *Hyatt I* was decided and the FTB could have, and should have,  
15 sought reversal of *Nevada v. Hall*. The FTB's total requested costs as of April 2003 is  
16 **\$211,734.32.**

17 Alternatively, if the Court does not use April 2003 as the demarcation for finding what  
18 costs were reasonable and necessary in awarding FTB costs under NRS 18.005, the Court should  
19 limit the FTB's award in accord with the specific categories under NRS 18.005 that require the  
20 costs were necessary for the FTB to prevail and reasonable under the circumstances of this case.  
21 Considering the FTB prevailed strictly based on overturing *Nevada v. Hall*, none of the FTB's  
22 costs related to the discovery, the law and motion procedures, or the lengthy trial on the merits of  
23 the FTB's intentional torts were necessary for the FTB to prevail. Further, the FTB's cost award  
24 should be governed by the same rulings and interpretations of NRS 18.005 as this Court adopted

25 ///

26 ///

27 \_\_\_\_\_

28 <sup>87</sup> Appendix. Exh. 71

<sup>88</sup> *Id.*

1 via the Special Master's Report and Recommendation in 2009.<sup>89</sup> Application of these factors  
2 reduces the FTB's cost award to **\$214,720.91**.

3 Dated this 29th day of September, 2021.

HUTCHISON & STEFFEN, PLLC

4  
5 /s/ Mark A. Hutchison

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

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

*Attorneys for Plaintiff Gilbert P. Hyatt*

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  

---

<sup>89</sup> Supp. Appdx. Exhs. 96 and 97.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 29<sup>th</sup> day of September, 2021, I caused the above and foregoing documents entitled **SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFF GILBERT P. HYATT’S MOTION TO RETAX COSTS** 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

INTENTIONALLY LEFT BLANK  
EXHIBIT PAGE ONLY

## EXHIBIT 95

HUTCHISON & STEFFEN  
A PROFESSIONAL LLC

FRANCHISE TAX BOARD OF CALIFORNIA, Petitioner, v. GILBERT P. HYATT, ET AL.

No. 02-42

SUPREME COURT OF THE UNITED STATES

2003 U.S. TRANS LEXIS 12

February 24, 2003, Monday, Washington, D.C.

NOTICE: [\*1] Transcribed by Alderson Reporting Company, Inc., 1111 14th Street, N.W., Suite 400, Washington D.C. 20005-5603, Telephone Number: 202-289-2260

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES: FELIX LEATHERWOOD, ESQ., Deputy Attorney General, Los Angeles, California; on behalf of the Petitioner.

H. BARTOW FARR, III, ESQ., Los Angeles, California; on behalf of the Respondent.

OPINION: PROCEEDINGS

[11:02 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 02-42, Franchise Tax Board of California versus Gilbert Hyatt.

Mr. Leatherwood.

ORAL ARGUMENT OF FELIX LEATHERWOOD ON BEHALF OF PETITIONER

MR. LEATHERWOOD: Mr. Chief Justice, may it please the Court:

Respondent has prompted the Nevada courts to extend their authority over California's tax process. The Nevada court has said at Joint Appendix 138, the entire process, of FTB audits of Hyatt, including the FTB's assessment of taxes and the protests, is at issue in this case, end quote. This has been said to mean, at Joint Appendix 138, that the tax process is under attack.

This lawsuit interferes with California's capacity to [\*2] administer these taxes. The administration of taxes is a core, sovereign responsibility from which all functions of State Government depend on. It is protected by immunity laws of common-law tort lawsuits, like the kind presented by Respondent.

California has invoked the protection of its immunity laws, but the Nevada courts have allowed respondents laws to proceed, not by extending full faith and credit. And this refusal threatens our constitutional system for cooperative federalism in violation of Article IV, Section 1 of the United States Code.

QUESTION: Mr. Leatherwood, may I ask you a threshold question? Some of your friends in this case have invited an overruling of Nevada against Hall. Of course, California was favored by that decision. Do you join in the plea to overrule Nevada v. Hall, or do you say this case is different because it involves four sovereign functions?

MR. LEATHERWOOD: Justice Ginsberg, we do not join in the chorus to overrule Nevada v. Hall. This case is different. This case goes to footnote 24 of Nevada v. Hall. It's our feeling that Nevada v. Hall is good law in the sense it does -- it does not implicate another state managing another state's core sovereign [\*3] function. It's -- Nevada v. Hall was strictly an automobile accident.

QUESTION: But the comparison would be between the university, education, which was the -- which was the defendant, and the tax authorities. Both of those, education and tax, seem core. Or if you're going to compare the tort itself, it would be a comparison between negligent driving, on the one hand, and going into another state and committing -- you know, peering through windows, going through garbage, totally wrongly getting all the neighbors to reveal private

information, et cetera. So comparing the particular acts, what's the difference, or comparing sovereign functions, what's the difference?

MR. LEATHERWOOD: I mean, compared -- I thank you, Your Honor -- in comparing the sovereign functions --

QUESTION: Education versus tax.

MR. LEATHERWOOD: Yeah, and driving an automobile in another state's -- on another state's highway --

QUESTION: That's not the sovereign function.

MR. LEATHERWOOD: That's not --

QUESTION: I'm saying that --

MR. LEATHERWOOD: -- the sovereign function.

QUESTION: -- it seems like that's apples and oranges to me. That is, in the one case, we're looking at the acts they're complaining [\*4] of, and here the plaintiff is complaining of acts that took place in Nevada that were miles outside what would be reasonable. I'm not saying he's right, but that's his complain. In Nevada v. Hall, they were complaining about negligent driving. So what's the difference there?

Or, alternatively, in Nevada v. Hall, it was a driver who worked for a university, and here it is an investigator who works for the tax board. So what's the difference there?

MR. LEATHERWOOD: Well, to answer the Court's question directly, the most significant difference is that the tax function is -- is much more significant than the education function.

QUESTION: Well, that's -- that -- that --that would be a very difficult premise for us to say, that education is somehow secondary.

MR. LEATHERWOOD: Well --

QUESTION: You're -- you're saying Nevada can't have a great university -- can have a great university by keeping its people within its own borders. They can't go to California to get information to solicit, to recruit students? That -- that would be a very difficult decision for us to write on that premise.

MR. LEATHERWOOD: No, Your Honor, I would agree with you that that would be a difficult --

QUESTION: [\*5] For the State of California to argue that education is not a core state function is, to me, rather astounding.

MR. LEATHERWOOD: No, Your Honor, I'm not arguing that education is not a core sovereign function.

What I'm arguing is that taxation is an essential core sovereign function since that education cannot move forward --

QUESTION: Well, Mr. --

MR. LEATHERWOOD: -- to provide taxation.

QUESTION: -- Leatherwood, we -- this court tried to follow a core state function test under the Tenth Amendment. And in Garcia, kind of gave it up, didn't it, as being an unworkable thing. Now, why would we want to resurrect that here? And why is it that you don't say, well, if the Court wants to overrule Nevada v. Hall, that's fine; I'll win. I mean, I don't understand your position. You're asking us to go back to a test that we rejected under the Tenth Amendment in Garcia, but you don't want to say, sure, if you want to overrule Nevada v. Hall, be my guest.

MR. LEATHERWOOD: Yes, Your Honor. Justice O'Connor, what we are attempting to say here is that this case is more analogous to this court's jurisprudence in the area of the Federal Tax Injunction Act along the line of fair assessment -- the [\*6] fair assessment cases, where the court has directed that the Federal Government will back off on trying to manage state taxes.

QUESTION: There you have a specific act of Congress that tells the Federal Government to back off. And I don't believe you have any such thing here.

MR. LEATHERWOOD: But we do have the Full Faith and Credit Clause, which directs that a state is to recognize the public acts of another state. And we do have an immunity law applicable here, and this directs that Nevada should respect the immunity laws of the State of California. And the immunity law, in this particular instance, provide absolute immunity for conduct as undertaken in a -- in a tax audit. Anything that's associated with tax audit, is protected.

QUESTION: But Nevada did recognize California law to the extent it was similar to Nevada's -- that is, saying you had immunity from the negligent acts. And then it went on to say, no, you don't have immunity from intentional acts, even though California law does give immunity from intentional acts. But surely you wouldn't go to the extreme that you would say someone could come over to Las Vegas from California and just beat up somebody because they haven't [\*7] paid their taxes, would they?

MR. LEATHERWOOD: Absolutely, I agree with the Court on that point. The --

QUESTION: Why not?

MR. LEATHERWOOD: -- the extension of that --



QUESTION: Why do you agree on that point? I don't understand that?

MR. LEATHERWOOD: Because the extension of our immunity law does not cover physical torts or torts --

QUESTION: Oh.

MR. LEATHERWOOD: -- outside the scope --

QUESTION: I see.

MR. LEATHERWOOD: -- of course, the scope of -- of the -- the acts that are incidental to --

QUESTION: I see. So under California law, there would be -- that would be actionable; whereas, under Nevada law, here, what they're doing is actionable. You just want to use the California standard rather -- rather than the Nevada standard.

MR. LEATHERWOOD: Well, in fact, Your Honor, if they would use the Nevada standard, use the same standard that Nevada applies to its own taxing agencies, then this case would be on a hold. What Nevada has done in this particular case is that it has gone outside its own precedent and applied a different standard to California taxing agencies, and it's not --

QUESTION: But that's not what they're -- the Nevada court said, we're going to treat the [\*8] tax collectors from anywhere who come in to our state and act here, and we're going to -- the Nevada Supreme Court said, we're going to apply our rule, and our rule is negligence is immunity; intentional, there isn't. So you're asking us to discredit or disbelieve the Nevada Supreme Court when it said, the law we apply to tax collectors who act in this state is the same as we apply to Nevada tax collectors.

MR. LEATHERWOOD: Your Honor, I am not asking this Court to not believe the Nevada Supreme Court. But what I'm saying is that Nevada has published precedent, as recent as 1989, where it requires that a taxpayer forego bringing a lawsuit until they -- until there has been -- until there's a resolution of all statutory procedures.

QUESTION: Oh, but this -- but Nevada Supreme Court, I thought, made very clear that what they were dealing with is tortious conduct, harassing conduct. They, in fact, refused -- Nevada Supreme Court refused to decide where this man was domiciled, because that would interfere with the ongoing procedure in California on the tax liability. I thought that the Nevada Supreme Court had made it clear that they were dealing with the way their resident is being [\*9] harassed and not with where he was domiciled on a magic date.

MR. LEATHERWOOD: Your Honor, what has happened in this particular case, 97 percent of the conduct that occurred during the course of this audit occurred in California. And, quite naturally, what Nevada is -- what Nevada is doing is permitting Mr. Hyatt to go behind the actual tort and make a collateral attack on the tax itself.

QUESTION: Well, that may be, but the that isn't the issue that we've got in front of us here. I mean, the question in front of us is not how far can the Nevada courts go in reviewing California's tax practice. The issue before us is, among others, in a claim of tort against your -- your operative in Nevada, for the manner in which the tax is collected is their absolute immunity. And, you know, maybe the Nevada courts are going too far in discovery, but that's not the issue in front of us.

MR. LEATHERWOOD: I would absolutely agree with the Court that the issue whether or not Nevada was obligated to apply our immunity laws with respect --

QUESTION: All right.

MR. LEATHERWOOD: -- with respect to conduct undertaken incidental to this audit.

QUESTION: May I go back to Justice Stevens' question, because [\*10] I'm not sure of your answer to it. What if the State of California passed a statute tomorrow saying the use of thumbscrews in tax collection is authorized? Is -- would your answer to Justice Stevens' question be that -- or wouldn't your answer to Justice Stevens' question be that if you went into Nevada and you used thumbscrews, you would be entitled, on your theory, to absolute immunity? Isn't that correct?

MR. LEATHERWOOD: Your Honor, no. What I'm saying is that, under that particular theory, I do not think that you could pass law in the State of California that will essentially sanction a crime, and there was no crimes committed within the course of this audit.

If the -- if an auditor commits an intentional tort, such as a burglary or a trespass in Nevada or in California, it's -- it's our position that that particular conduct is not incidental to --

QUESTION: It doesn't matter. I mean, we're trying to get the -- we're trying to get the analysis of it, and I'm having exactly the same problem. Imagine that, you know, California did say there is absolute immunity, even if you beat somebody up, absolute tort immunity. Okay? Even for beating people up. Now, suppose they did [\*11] have that; you could prosecute it as a crime. Now you're in Nevada, and they say, the plaintiff, he beat me up, he came across the state line, down from Lake Tahoe. He was in a bad mood, lost too much money at the casino, and he beat me up. All right? Now, can

Nevada bring that lawsuit or not? That's, I think, what Justice Stevens' question was.

MR. LEATHERWOOD: Well -- well, I understand that, Your Honor. My position is that even though that law does not exist in California --

QUESTION: Yes.

MR. LEATHERWOOD: -- but applying --

QUESTION: If it did.

MR. LEATHERWOOD: -- applying it -- my -- our particular theory --

QUESTION: Yes.

MR. LEATHERWOOD: -- that, yes, we -- then Nevada would be obligated under the Full Faith and Credit Clause to apply that particular law. But --

QUESTION: And, therefore, you could not bring the lawsuit in Nevada about somebody beating somebody up.

MR. LEATHERWOOD: If --

QUESTION: If that were the law in California.

MR. LEATHERWOOD: -- if that were -- if that was the case. But --

QUESTION: Yeah, okay.

MR. LEATHERWOOD: -- in this particular case, that's illegal in California and that's illegal in Nevada.

QUESTION: So how, then, do we reconcile that [\*12] position, where we're back to our starting place, with the fact that he could bring an action if on his way down from Lake Tahoe in the state car, he happened to drive a little negligently and ran somebody over? I mean, that's Nevada v. Hall, just reverse the states.

MR. LEATHERWOOD: No, and we're agreeing with Nevada v. Hall.

QUESTION: I know. So this is why we're having a problem. It's clear that if our tax collector, on his way down from Lake Tahoe, runs over a Nevada resident, the Nevada resident can sue and apply Nevada law.

MR. LEATHERWOOD: Yes, I --

QUESTION: You say, if, in fact, that same tax collector beats up somebody, and the California law is that you cannot sue, Nevada cannot apply its own law.

MR. LEATHERWOOD: That's not what I'm saying, Your Honor. I'm saying if that conduct -- if that conduct is connected to the actual audit itself, then it's protected. But what I'm saying, I cannot possibly see, under any possible theory, that a beating, that it -- that breaking into

someone's house could actually be part of the assessment -- tax assessment process. If an auditor engages in that kind of behavior, the auditor is not covered under the absolute immunity. That is [\*13] outside the scope of that --

QUESTION: Okay.

MR. LEATHERWOOD: -- of that statute.

QUESTION: And is the reason that the answer is different in the two cases, the reason that there is something special about tax collection or is the reason that there is a closer connection in the hypo of the beating up for tax collection than the driving the automobile for tax collection?

MR. LEATHERWOOD: Well --

QUESTION: Which is it? Is it the nature of the tax collection or the nature of the activity which leads to the tort liability?

MR. LEATHERWOOD: Well, I think it's both, Your Honor. Well, first of all, tax -- tax collection, by definition, is an intrusion of someone's life. The allegations alleged here are principally invasion of privacy, disclosure of information, that sort of thing. Ninety-seven percent of that conduct occurred in California. You cannot possibly investigate or prosecute Mr. Hyatt's case without intruding into that tax --

QUESTION: Mr. Leatherwood, if I understand your position, it would be exactly the same if a hundred percent of the conduct had occurred in Nevada.

MR. LEATHERWOOD: Absolutely, Your Honor. That -- but -- but --

QUESTION: But the problem I have -- may [\*14] I just ask this question. Assume there is a -- there's a difference between Nevada law and California law, as I understand it. Some things are actionable against a tax people in one state and not the other. Why is it, in your view, that if the same conduct had occurred six months later, but by Nevada tax collectors instead of by California tax collectors, because he's been in both states and probably is subject to tax in both, Nevada would allow the suit against its own tax people but now allow it against the California tax people? Why does that make sense?

MR. LEATHERWOOD: Well, Your Honor, in this particular case, as I've indicated, according to our reading of Nevada precedent, published precedent, that they would not permit this lawsuit to proceed until the tax process has been concluded. With respect to -- to directly answer your question, it does not appear that Nevada would prosecute its own -- it will permit a prosecution of its own agents in the case where the

allegations are principally that there is an intrusion into Mr. Hyatt's life or that there --

QUESTION: Well, we understood the reasoning of the Nevada Supreme Court to say they would. I think -- I must have misread [\*15] the opinion. Is that --

MR. LEATHERWOOD: No, absolutely not, Your Honor. I don't think you misread the opinion. What I think the Nevada Supreme Court said is that they will permit intentional tort prosecution of government employees. This case does not involve a government employee. This case involves a government agency itself, a tax agency. And under Nevada law, you cannot proceed against the Nevada tax agency without first exhausting your administrative and statutory remedies to contest the underlying tax itself.

QUESTION: But certainly this sort of thing isn't the kind of thing you could have exhausted your remedies on, is it?

MR. LEATHERWOOD: Absolutely, Your Honor. In our -- in our -- it is our position that this entire -- the entire lawsuit is linked up to our tax process, because the conduct that the Respondent is complaining about here is that the tax itself is -- the tax itself and the tax process is engaged in bad faith. And I would --

QUESTION: Now, what is -- was your answer to the question? Suppose that this tax collector were driving negligently in Nevada --

MR. LEATHERWOOD: Part --

QUESTION: Suppose the tax collector were driving negligently in Las Vegas. It's [\*16] very important for the tax collector to go examine the record, and he's driving negligently. What --

MR. LEATHERWOOD: I think, under Nevada v. Hall, he would be -- he would be subject to negligent liability. It's not connected to a core silent function because the function here is -- the function here is a tax investigation, whereas, driving is something that you can investigate independent of the tax process itself.

QUESTION: So suppose that we -- we conclude that footnote 24 does not provide sufficient guidance for us to have a stable jurisprudence and that you will lose unless Nevada versus Hall is overruled. Would you then ask us to overrule Nevada versus Hall?

MR. LEATHERWOOD: Your Honor --

QUESTION: I know you don't want to entertain that possibility, but suppose that's what we conclude.

MR. LEATHERWOOD: Well, we -- we've thought about this, Your Honor, of course, and we would accept a win, if that's the Court's direction, through overruling

Nevada v. Hall, but it's our contention that the Court doesn't have to go that far to get -- to get to this point. The Court can literally analogize to the special protections that are provided to state tax systems within the federal [\*17] system itself.

QUESTION: But then that, as I suggested earlier, is a difficult thing to do, because there are congressional statutes that mandate that here. And all we have is the Full Faith and Credit Clause. Now, perhaps you say that's sufficient, but isn't it possible that there might be other emanations of the Full Faith and Credit Clause, other than just footnote 24, or whatever it is, in Nevada against Hall. I'm not talking about overruling it, but developing it, perhaps.

MR. LEATHERWOOD: Yes, Your Honor. I would agree with that. Of course, we think that Nevada's failure to recognize or give dignity to California's immunity statute is not only a violation of the Full Faith and Credit Clause, but is a hostile act, and this kind of hostility is contrary to our whole concept of --

QUESTION: What -- what about a congressional statute? That is, suppose the opinion read -- what would your objection -- I know you'll object to this possible opinion, and I want to hear what your objection is -- the opinion says they're complaining here, as far as we're concerned, with a serious tort, invasion of privacy, you know, a whole lot of really bad behavior, et cetera -- they're complaining [\*18] about that taking place by a California official in Nevada, and we can't really distinguish that from the automobile accident taking place in Nevada. They're both torts. They're both very bad -- you know, this is worse conduct. Now, it's true that our investigation of this may interfere with California's tax authority's ability to sort of run investigations in general. But if that turns out to be a problem, a big problem, Congress can legislate.

MR. LEATHERWOOD: Well, that still creates -- that still creates the situation where Nevada is supervising and managing California's tax practices.

QUESTION: Back to activities happening in Nevada.

MR. LEATHERWOOD: Yeah. In this lawsuit -- this lawsuit is -- is being prosecuted -- is being investigated almost exclusively in California. The -- the intrusion here, the interference here, is that Nevada has permitted Mr. Hyatt to use this lawsuit both as a -- as a wall and a battering ram. It has almost suppressed the entire California tax investigation. It's creating an entire class of possible plaintiffs that can sue California just for literally going across the state line and making an inquiry as to whether or not a former California resident, [\*19] a former California taxpayer, actually owes any taxes.

QUESTION: Well, they would have to show as an intentional -- whatever that means under Nevada law -- not just negligent when they --

MR. LEATHERWOOD: Well, the intentional act here is that California created a tax system in bad faith to -- bad faith to extort an exit -- an exit tax from -- from a taxpayer.

QUESTION: I thought that, again, the Nevada Supreme Court said, we are not going to touch the question of where this man was domiciled. That's for California to decide. What we are dealing with is this new thing. One allegation was trespass and going through the man's trash, and another was calling -- maybe the calls emanated in California -- calling people in Nevada insinuating bad things about this person. And that has nothing to do with where the man is domiciled. It's a question that California is deciding and Nevada says it won't touch.

MR. LEATHERWOOD: Yeah, and I would -- I would direct the Court to Joint Appendix 133, where -- where the Court would -- the Nevada courts have indicated that almost all the action in this -- in this lawsuit occurred in California. And --

QUESTION: Well, you -- you recognized that there [\*20] were two trips into California.

MR. LEATHERWOOD: Actually, Your Honor --

QUESTION: I mean, to Nevada.

MR. LEATHERWOOD: Actually, Your Honor, I believe there were three trips, and they were short trips -- they were trips of extremely short duration.

QUESTION: And what was there about -- on one of those trips, there was a trespass on his property and rummaging through his trash.

MR. LEATHERWOOD: Well, that's not part of -- that's not part of the allegations of the -- of the complaint itself. The complaint is saying that --

QUESTION: It was a more -- a more general interference with his privacy, but those were examples that were alleged, if not in the complaint, somewhere.

MR. LEATHERWOOD: No, there has been deposition testimony that there -- on one of the trips, that the investigator looked at the timing of Mr. -- of Respondent's trash delivery and also looked at -- determined whether or not Respondent was receiving any mail at that particular location. That does not justify the pervasive nature and the extent in which this lawsuit has reached into California and literally attacked the tax process.

And, once again, I will refer the Court to the Joint Appendix at page 60, where [\*21] it is alleged that the California tax system itself is a -- is a fraud -- that is, put together in bad faith for the specific purpose of extorting an exit tax from former residents who -- as they leave California.

Well, if the Court has no more questions in this regard, I would like --

QUESTION: Do you want to reserve your time, Mr. Leatherwood?

MR. LEATHERWOOD: -- reserve the balance of my time, thank you.

QUESTION: Very well.

Mr. Farr, we'll hear from you.

#### ORAL ARGUMENT OF H. BARTOW FARR ON BEHALF OF RESPONDENT

MR. FARR: Thank you, Mr. Chief Justice, and may it please the Court:

In our federal system, it's recognized that the states will sometimes have overlapping jurisdiction. When that happens, the Constitution allows each state to apply its own laws against the background principle of comity where they believe it would be appropriate to defer to the laws of another state. And I submit that the Nevada courts here have applied these principles very carefully.

Nevada, of course, correctly held that they were not required to apply California's legislative-created law of immunity. At the same time, however, they have applied principles of comity to strike out the declaratory [\*22] judgment count that would have gone to the very issue that is being contested in the Florida -- excuse me -- in the California tax proceeding, which is the date that Mr. Hyatt moved to Nevada. And they have also given California complete immunity for any negligence that it has committed.

So in this case, it seems to me, the system is working --

QUESTION: Mr. Farr, can I ask you, do you think they were compelled by the Full Faith and Credit Clause to grant immunity on the negligence claim?

MR. FARR: That's an interesting question, Justice Stevens, because Nevada officials themselves have immunity. There would be a question, I suppose, of whether the Full Faith and Credit Clause requires that. My general feeling is probably not, but that is really not a question so much of whether -- a choice of law between California law and Nevada law, but simply a question of what Nevada law would apply. So I don't



think that the Full Faith and Credit Clause itself speaks to that issue, but I do think principles of comity will traditionally reach that result. And, in fact --

QUESTION: Well, are principles of comity dictated by the Constitution? Suppose --

MR. FARR: They are --

QUESTION: -- suppose [\*23] Nevada said they were not going to grant comity?

MR. FARR: That's correct, yes. And I don't think there is a federally enforceable law of state comity, but I think that is the system that has existed essentially between sovereigns for much longer than the United States is --

QUESTION: Well, is it your position then the private plaintiff can always bring suit against a state in the courts of another state?

MR. FARR: Well, the first question, of course, is whether the court has legislative -- the first Full Faith and Credit question is whether the court in which the suit is brought has legislative jurisdiction. So there is a requirement that that state have constitutionally sufficient contacts with the law --

QUESTION: Well, then under due precedent. Well, that's easy to satisfy.

MR. FARR: So assuming that they've satisfied that, they are entitled to bring a suit. Then the question is whether the state -- and I -- and I believe at that point the state is free to apply its own laws to protect its own interests. I think that's what the Full Faith and Credit Clause allows. And it is the doctrine of comity that provides the acknowledgment of the state -- the other state's interests. [\*24] And that's typically, in fact, what's happened with Nevada --

QUESTION: It's very --

MR. FARR: -- versus --

QUESTION: -- it's very odd to me that California can't be sued in its own courts and it can't be sued in a federal court, but it can be sued in a Nevada court, which, if we follow that, the question really is has the -- has the least interest in maintaining the dignity of the State of California.

MR. FARR: Well, there are two -- two factors there, Justice Kennedy. First of all, there is the fact that Nevada has some very real interests of its own, its own sovereign interests to protect here. I mean, there have been torts which were both committed in Nevada and directed at a Nevada resident. So, to begin with, before one gets to the immunity question, Nevada, as a sovereign state, has important interests in assuring compensation and also in

detering that kind of conduct. So the idea that a legislatively created immunity by another state should be able to prevent Nevada from protecting those interests seems inconsistent with the federal system.

Now, if one goes beyond that to the question of inherent immunity, the very idea that a state should have to be subject to sue in [\*25] the courts of another state, I think, first of all, as you know, we don't believe that issue is properly presented on the question presented in this case. But if you would like me to address it just for a moment, I think there -- there are differences if one looks to the -- to the way that the -- essentially immunity has been resolved in -- in the course of -- of the United States.

First of all, in its own courts, it has the common-law immunity based on the idea that it is both the king being sued in its own court, and also typically it is also the progenitor of the law, so to speak, to Justice Holmes' point.

In the United States, there's -- the courts of the United States, there's a very specific situation. At the time of the convention, the states were, obviously, forming a new sovereign, and the question of whether that sovereign was going to grant them the immunity they had in their own courts or whether that sovereign would be in the same position essentially as foreign sovereigns typically were, which is that they did not have to provide sovereignty except as a matter of comity. That's *The Schooner Exchange* opinion.

But -- so the states, at that point, had a very real interest [\*26] in deciding that question, and they did, in fact, decide that question, as the court has recognized. That is not true with respect to the immunity that they have had in the courts of other states.

QUESTION: Is -- how does Alden fit into this? In Alden, I take it the court now -- we've held that a citizen of Maine suing in the State of Maine's courts alleging that Maine had violated a federal law can't do it. Sovereign immunity. Right? That's Alden.

All right. Suppose the citizen of Maine walks into a New Hampshire court and brings the same lawsuit against Maine, assuming New Hampshire has appropriate jurisdiction under its own laws.

MR. FARR: Uh-huh.

QUESTION: Do we get a different result?

MR. FARR: Okay, I think that is not a question that is within the notion of what is the question in this case.

QUESTION: No, no, well --

MR. FARR: I'm sorry. I --

QUESTION: -- you see, what I --

MR. FARR: Excuse me.

QUESTION: -- nonetheless, although --

MR. FARR: No, I --

QUESTION: -- what I'm trying to do is -- is sort out what, in my mind, are a set of impossible anomalies, and that's why I ask you that question.

MR. FARR: I'm sorry. I started to answer in the wrong way.

QUESTION: [\*27] Go ahead.

MR. FARR: What I -- I reserve the point, of course, always, that I don't believe this is within the question presented.

QUESTION: Yeah, yeah, of course.

MR. FARR: But I actually was going -- what I meant to say is that I don't think it's the same kind of question in the sense that I think still when you're talking about enforcement of a federal cause of action in another state, that is still really a federal-state question.

QUESTION: See, but --

MR. FARR: That's still --

QUESTION: -- your answer, then --

MR. FARR: -- an evolving question.

QUESTION: -- your answer to my question is Alden cannot be avoided simply by the Maine citizen walking into a New Hampshire court and bringing the same case.

MR. FARR: That's correct.

QUESTION: All right.

MR. FARR: I think that is --

QUESTION: And I would guess that's right.

MR. FARR: -- still a federal-state --

QUESTION: All right, assuming that's right --

MR. FARR: -- I think that is still a federal-state issue.

QUESTION: -- assuming that's right, now, look at the tremendous anomaly, which you were just about to address, and I want to be sure you do. Our citizen of Maine walks into the New Hampshire court and sues the State [\*28] of Maine under federal law. And the answer is, he can't do it because of sovereign immunity. Our citizen of Maine does the same thing, but this time his cause of action is state law. And now you say he can do it.

MR. FARR: That's right. And --

QUESTION: And the only difference between the two cases is that his cause of action is federal law in the first case, and he can't sue the state; but state law in the second case, and he can, which, of course, means that the law of New Hampshire binds Maine in a way that federal law cannot. Now, that, to me, I just can't -- that, to me, seems so anomalous that -- that I'd like an explanation --

MR. FARR: Well --

QUESTION: -- if you can give it. And you see how I'm thinking of it as connected here, because the facts here are just part of that general anomaly.

MR. FARR: That's correct. Actually, Justice Breyer, I think that's something that the court, to some extent, addressed in Alden itself --

QUESTION: Uh-huh.

MR. FARR: -- in distinguishing the opinion in Nevada versus Hall, when it noted that when you get into the situation of a state being sued in the courts of another state and, as in Nevada versus Hall, under a state cause of action, [\*29] you have now implicated the sovereignty of a second sovereign. So when one is now looking at the -- at the issues of sovereign immunity, one is looking at a different platform of issues and also at a different historical base.

QUESTION: But that seems to make their case even harder. It would be difficult to conceive that the framers thought that Virginia could be sued in Pennsylvania but not in the federal court. I would think that the presumption would be that this was an even stronger case for the exercise of sovereign immunity than when all of the citizens of the union are involved as in the Alden situation --

MR. FARR: Well, I think that --

QUESTION: -- in the Eleventh Amendment.

MR. FARR: I mean, I think that there are two things going on. I mean, first of all, the question is not whether they can be sued, but if not, why not. For example, with Pennsylvania and Virginia, as I'm sure the Court is aware, had a -- Nathan versus Virginia is a case in which that very situation came up. But in the courts of Pennsylvania, the Pennsylvania Attorney General urged its own courts to recognize sovereign immunity. So that could naturally fit within the idea that Schooner Exchange had made [\*30] clear, which is that when you're talking about coequal sovereigns of that nature, one is talking about sovereignty that -- excuse me, immunity that is extended as a matter of comity, not as a matter of absolute right of the other sovereign. And the reason is -- excuse me -- the reason is that if you don't

allow the sovereign to execute its own laws within its own territory, you're depriving that sovereign of part of its sovereignty.

QUESTION: Well, doesn't our original jurisdiction as the states between states bear something on this question?

MR. FARR: It bears a little bit. But, of course, Article III itself is not a exclusive jurisdiction provision. The Section 1251 provides exclusive jurisdiction with respect to suits between states.

QUESTION: The idea that the framers would provide for its original jurisdiction in the Supreme Court in -- for suits by one state against another suggests they thought it might be pretty hard to bring such a suit anywhere else.

MR. FARR: Well, and they -- certainly as a practical matter, they would have been right, Mr. Chief Justice. I mean, as a practical matter, it has always been difficult to bring a suit against a state, either in its own courts [\*31] or in the courts of another state. I mean, even since Nevada versus Hall, typically states have granted immunity to other states for when they're sued in their own courts. And if they haven't granted absolute immunity, what they have done, which I think is an important principle emerging -- emerging principle of comity, is they have tended to look at their own immunity to see what kinds of suits could be brought against them and to try, then, to grant to the -- to the outside sovereign that same type of immunity.

QUESTION: Mr. Farr, have you found other examples around the country of suits by citizens of one state against another state in the other state's courts?

MR. FARR: I --

QUESTION: Is this relatively rare, or is it happening? And in what context is it happening?

MR. FARR: It's relatively rare, and -- but there have been some suits. There are a few of them cited in our red brief, if I can find the page number, pages 38 and 39. The -- there are suits, for example, negligence suits involving the release of dangerous persons within another state who have created injury to citizens --

QUESTION: Uh-huh.

MR. FARR: -- of that state. There are more commercial-type things involving [\*32] contracts or -- one, in particular, is a it for invasion of privacy when someone who wrote a book disclosed information. In general, though, Justice O'Connor, as I say, some of those suits, the courts have just said, we're not going to hear them whether you have a valid cause of action or not. We're simply not going to -- going to recognize that

in our courts because of the sovereignty of the defendant. Other courts have said, yes, we will open our courts, but we are going to look to our own immunity to try to have essentially a baseline to measure the sort of immunity that we are going to --

QUESTION: Mr. Farr, are you saying --

MR. FARR: -- accept.

QUESTION: -- that that, too, is just a matter of comity?

MR. FARR: I do think that that's --

QUESTION: Doesn't --

MR. FARR: -- just a matter --

QUESTION: -- doesn't the Privileges and Immunity Clause of Article IV have something to say? If you can treat a tax collector from California differently than the tax collector in Nevada, you're not giving their tax collectors equal privileges and immunities in Nevada.

MR. FARR: If one granted lesser immunity? Is that the question --

QUESTION: Yes. If one -- you said that the only stopper [\*33] was a notion of comity, and I'm suggesting that you might not be able to treat two officials, one from out of state, one from in state, to treat -- to favor the in-state official. But maybe Privileges and Immunities have -- has something to do with that.

MR. FARR: If a state is entitled as a defendant to invoke Privileges and Immunities against the courts in another state, I would think that's right. Certainly in the case --

QUESTION: Is it?

MR. FARR: I --

QUESTION: I mean, I thought --

MR. FARR: I would have thought not.

QUESTION: -- that would go to individual liability, but it would -- it would not affect this question, but I may be wrong.

MR. FARR: Well, no, I -- that would be my assumption, also, Justice Souter. I think that the -- the Privileges and Immunities and Equal Protection are -- are provisions that apply to individuals who are claiming discrimination in -- in another state. I don't think they would apply directly to a state.

But, as I say, the -- the notion that comity is -- is something that -- that doesn't have a force, even though it's not federal enforceable, it seems to me is a little bit of a misperception. Because, again, if one goes back to the

notion [\*34] of the law of nations or separate sovereigns, comity essentially has been the provision that governs their relations since well before the convention.

QUESTION: Well, there is some reluctance to say that California officials can run amok in Nevada without Nevada being able to do anything about it. I suppose if it were a pervasive practice, Nevada might be able to sue California in the original jurisdiction under some *parens patriae* theory. I'm not sure about that.

MR. FARR: Well, I mean, let me suggest a couple of other possibilities, Justice Kennedy, as well. I don't -- I don't know whether the court would take original jurisdiction of that question or not, but, I mean, the most direct example of something states could do, obviously, is they could reach agreements between themselves. I mean, there have been two cases before this court involving suits against states in the courts of other states. One was Nevada in California's courts. This is California in Nevada's courts. If those states, who are neighboring states, feel that this is an issue that they need to address, they could reach some sort of agreement and, therefore, have reciprocal legislation.

And, for example, under the [\*35] Full Faith and Credit Clause for years, as the Court may know, there is a doctrine that said that states didn't have to enforce the penal laws of another state, even though Full Faith and Credit, on its face, would make you feel that maybe they would have.

But, in fact, states eventually began, through reciprocal agreements in decisions, and I think in legislation also, saying, you know, we essentially will enforce the penal laws and the tax laws of other states, so long as they do for us. So, again, the states --

QUESTION: Penal laws or penal judgments?

MR. FARR: No, no, penal judgments, the court said in -- in Milwaukee County, have to be enforced, but they -- they distinguished at that point, Mr. Chief Justice, the idea that a law itself would have to be in force before it had been reduced to --

QUESTION: Right, but what -- what -- what is the -- I don't want to -- I don't want you to get distracted, because I thought Justice Ginsberg and maybe Justice Kennedy and I were driving at the same problem, which is that imagine Nevada v. Hall is good law. All right, now, the question comes up, How do you prevent Nevada from going wild? All right. And so now we have several answers: [\*36] (a), Congress can pass a statute --

MR. FARR: Correct.

QUESTION: -- (b) interstate compacts -- that was what you were suggesting.

MR. FARR: And -- and --

QUESTION: All right.

MR. FARR: -- if I may --

QUESTION: Yeah, the --

MR. FARR: -- if I may intercede, it doesn't necessarily have to be a compact. I'm not sure --

QUESTION: Right, some --

MR. FARR: -- it's agreements that have to be proven.

QUESTION: -- kind of a voluntary action by the states.

MR. FARR: Right, correct.

QUESTION: (c) Privileges and Immunities, which has the problem that it refers to citizens and not states, (d) equal protection doesn't work, I don't think, because it says, again, citizens. A due process clause, is a state a person under the Due Process Clause?

(e), what's (e)? I mean, you see? If Nevada -- (e) is, of course, footnote 24, but then that gets us into the National League of Cities problem. And so National League of Cities --

MR. FARR: Well, there could --

QUESTION: -- that -- that -- that approach -- equal -- no, Privileges and Immunities, due process of law, voluntary action states, Congress enacts a law, anything else? Have we got -- is that the exhaustive list that we must choose from? [\*37]

MR. FARR: It's --

QUESTION: Or --

MR. FARR: -- it seems exhaustive --

QUESTION: And the only -- all right, that's -- if -- if nothing in that list works, then the only alternative is overrule Nevada v. Hall.

QUESTION: Is --

QUESTION: -- or, excuse me --

QUESTION: -- is comity on the list?

MR. FARR: Well, comity --

QUESTION: Well, I mean -- I mean I --

MR. FARR: -- excuse me -- comity is --

QUESTION: Comity -- comity is not the answer to the problem, because -- well, it is, in a sense. It is, in a sense.

MR. FARR: Yeah, I mean --



QUESTION: Voluntary restraint.

MR. FARR: Excuse me. I don't -- I certainly don't mean to minimize the theoretical possibility that suits in courts of one state could ultimately prove to be a problem, generally. What I'm suggesting is that there is nothing, first of all, in the history of the Full Faith and Credit Clause that would suggest that once a state has proper legislative jurisdiction, as I think everybody concedes that Nevada does here, that somehow that clause was intended to displace the law of that state simply because another state had made different policy choices about, let's say, here, compensation and immunity.

QUESTION: But can [\*38] you say that categorically and absolutely? I mean, there are all sorts of permutations of facts that could up.

MR. FARR: Well, what -- the permutations and facts, I think, go particularly to what constitutes legislative jurisdiction. So perhaps in that sense, my statement is broader, or seems broader in the context of this case than I mean it to be. But I do -- but I do think, in general, that I don't see any warrant in the Full Faith and Credit Clause, given the fact that it was enacted with very little debate, and almost all of the debate was about judgments and not about enforcement of other states' laws, I think it would be stretching the clause beyond recognition to say that at some point it was -- it was telling states, you're going to have to set your laws aside and apply the laws of another state.

QUESTION: There was a time in the '30s and '20s when this court came pretty close to that, the cases that preceded *Pacific Employers*.

MR. FARR: That's correct, Mr. Chief Justice.

QUESTION: *Clapper* and *Bradford*.

THE COURT: Yes.

MR. FARR: That's correct. And as I think my argument might suggest, I think the Court was correct to essentially back away from that kind of balancing [\*39] test and essentially go back to the principle of saying when a state is competent to legislate, then it may apply its own laws, leaving the additional questions about what might happen at that point to questions comity where a state is the defendant. And, as I've suggested, Nevada courts have shown considerable comity already here, and the case, of course, is not yet concluded.

QUESTION: Comity is something like a hearty handshake. I mean, it -- it's something that you can't put any -- any force to.

MR. FARR: That's -- that's true in one sense, Mr. Chief Justice. I mean, when I say it's not -- that there's no

federally enforceable state law of comity, I -- that's true. But at the same time, I mean, the court's decisions about comity since back in the last 18th century have emphasized that it is a serious doctrine. It's a doctrine built of respect for -- for other sovereigns. And in particular -- and I think this -- this is -- also goes to the practical problem that Justices Kennedy and Breyer are asking about -- it also does have a healthy measure of self interest in it.

I mean, when -- when you are talking about coequal sovereigns, any sovereign that is exercising jurisdiction [\*40] over another sovereign understands that that's -- the first sovereign -- or the second sovereign has the same power and authority over it.

QUESTION: Is -- is the question of comity one that has a federal component so that this court should weigh in on when it has to be exercised?

MR. FARR: I don't believe so state versus state, Justice O'Connor. Or course, in the -- in the types of cases that the board was referring to this morning, like *McNary*, there are comity elements. And there -- and there is a jurisprudence of this court with respect to federal and state relations which does depend on comity, and that is, of course, federally enforceable. I don't believe that there is a concomitant enforceable doctrine -

QUESTION: But you're arguing --

MR. FARR: -- state to state.

QUESTION: Even in the face -- even in the face of some development by state -- a state court that seems totally out of whack with our constitutional structure?

MR. FARR: Well, Justice O'Connor, I suppose I should --

QUESTION: Are there no extremes? Is there no limitation?

MR. FARR: Well, I -- I mean, I'm -- I suppose I should pause in the sense that -- that if there is something that is so threatening to the [\*41] constitutional structure and something for which there is no historical basis in -- in terms of the -- the way that sovereigns deal with each other. Now, see, that's -- that's where I think this case is very different, because even though there was certainly a practical tradition that states were not to be sued in other states, as I say, since *Schooner Exchange*, and, indeed, in the *Verlinden* in 1980, this court has always taken the position that when you're talking about relationships between sovereigns, and they're coequal sovereigns, and the issue is immunity between them, that is a matter of comity.

QUESTION: All right, but leave -- say, this case, I can easily see on your theory writing the part of the opinion that says the acts in Nevada, the acts in Nevada that were arguably torts are certainly up to Nevada to pursue. But the discovery commissioner here, they say, went way too far in ordering discovery and ordered discovery that would have been relevant only to negligent action and only negligent action, really, that took place in California, though a Nevada resident was at issue. And they can't do that, says the opinion, because -- because -- and now this is where it seems [\*42] to me there -- something -- what do I fill that blank with\*. They can't do that. They can't go over and, in Nevada, complain about negligent action as this discovery commissioner may have done, negligent action in California aimed at a Nevada resident where it's a tax action. They can't do that because -- and now what? You see -- do you see what's bothering me?

I -- at this point, it seems to me there has to be something in the Constitution that limits that, and this case may raise that problem because of the actions of the discovery commissioner. And, therefore, I think I need something to fill that blank with.

MR. FARR: Well, as -- I don't think, to start with, that the answer is the Full Faith and Credit Clause.

QUESTION: All right, what is it?

MR. FARR: I mean --

QUESTION: I -- it's an odd -- an awkward vehicle, Full Faith --

MR. FARR: Right.

QUESTION: -- but what is the answer?

MR. FARR: Well, I mean, I still think that, in the end, the answer is that this is a matter that one trusts to the judgment of states --

QUESTION: So the answer is if they want to do that, they can do it.

MR. FARR: -- that if, in fact, there is a question about discovery, that --

QUESTION: Uh-huh. [\*43]

MR. FARR: -- I mean, that I -- accepting the characterization, although I dispute it to some extent, but to the extent there's a question about discovery, that is simply part and parcel of the states being able to exercise their jurisdiction. I don't --

QUESTION: I thought discovery was --

QUESTION: Okay.

QUESTION: -- interlocutory. I thought that we couldn't write in an opinion, as Justice Breyer has suggested, if I didn't think that that question was currently reviewable.

MR. FARR: Well, there's certainly nothing specifically in the question presented about discovery. The -- the -- the -- again, to come back to the question presented, because we've discussed a wide range of issues, most of which I don't think are within the question presented, but when we come back to the question presented, the question is basically was the Nevada or the Nevada courts required to dismiss this action on summary judgment because of California's law of immunity? And --and the reason for that is because, according to California, the Full Faith and Credit Clause requires Nevada to enforce California's law of immunity.

QUESTION: Mr. Farr --

MR. FARR: Our view is -- yeah?

QUESTION: -- do I understand [\*44] -- your comity argument basically is -- it's kind a self-executing thing, because each time a state has to answer the comity question, it asks the question, what would I do if the tables were reversed? And as history teaches us, they generally treat the other sovereign the way they would want to be treated themselves. And that's --

MR. FARR: Well --

QUESTION: -- well, that's the rule that seems to have been developed without any overriding constitutional command order here.

MR. FARR: That's correct, Justice Stevens. And, in fact, they have become more specific in applying comity, I believe, in saying we want to treat the other sovereign as we do treat ourselves, not just as we want to be treated. We are treating the other sovereign the way we treat ourselves.

QUESTION: What if the -- what if the case came, and they didn't do it? Justice Breyer's question, how do I fill in the blank? I -- if, let's say, through this intrusive discovery process, systematically applied, they really were interfering with California's taxation, couldn't California bring an original action to enjoin this interference?

MR. FARR: I certainly think that's possible. And, of course, as I've said, I mean, [\*45] California can try to talk to Nevada and try to reach agreement at a sovereign level about this, or if, in fact -- the Full Faith and Credit Clause has a specific express commitment to Congress of the right to declare the effects of other laws.

QUESTION: What would be the underlying --

QUESTION: Underlying --

QUESTION: -- substantive law in Justice Souter's proposed original action?

MR. FARR: The -- I suppose, I mean, based on what California has said before -- said up to now, it would bring it under the Full Faith and Credit Clause, that it would say that there is some requirement --

QUESTION: Well, but we wouldn't need an original action for the Full Faith and Credit Clause. If that's so, it could apply in this case.

MR. FARR: That's correct. I mean, whether they're -

QUESTION: So what's the -- what would an original action -- there was -- there's no underlying substantive standard to apply?

MR. FARR: I mean, the question would be, is there -- obviously, the question that's being raised. I am not aware of the federal substantive standard --

QUESTION: We haven't --

MR. FARR: -- that says --

QUESTION: -- in boundary cases, though, adopted, as a federal rule, something maybe [\*46] different from the law of either state.

MR. FARR: That's correct. Now, you do have -- there are certain cases, in fact, in which you can't have overlapping jurisdiction, where you can't own the same water, you can't own the same land, you can't escheat the same property. So that's true. The court has addressed those kinds of cases.

In a situation where you're simply saying another state is applying its laws, I prefer that they apply our laws, and I'm troubled by the discovery that they have -- they have allowed in applying their own laws, I'm not sure what the federal principle --

QUESTION: It's not simply that.

MR. FARR: -- is that entitles you to stop it.

QUESTION: It's not simply that it's a prior action pending. That's what makes this case different, and one of the things that makes it different from Nevada v. Hall. Why is it -- is the California proceeding ongoing? Isn't it normal for a second court to stay its operations so it won't interfere with that prior action?

MR. FARR: it -- in fact, the Nevada court dismissed the declaratory judgment action precisely because it didn't want to get into the question that was at issue in the California proceeding.

QUESTION: Yes, but [\*47] what about the intrusive discovery?

MR. FARR: Well, most of the -- most of the other material -- with one exception, most of the other issues involved things that have nothing to do with the merits of the California inquiry. I mean, whether confidential information has been improperly disclosed has -- is not -- does not require you to adjudicate the California tax liability in order to understand that. The only thing that has any bearing that is close to that, I submit, is something that is roughly akin to like a malicious prosecution suit. And tort law itself, over time, takes care of that. We've not gotten to that issue yet in the Nevada Supreme Court.

QUESTION: Thank you, Mr. Farr.

Mr. Leatherwood, you have five minutes remaining.

#### REBUTTAL ARGUMENT OF FELIX LEATHERWOOD ON BEHALF OF PETITIONER

MR. LEATHERWOOD: Thank you, Your Honor.

In this particular case, I'd like to go back to Justice Breyer's thumbscrew example. I don't think the Full Faith and Credit Clause would actually force Cal -- force Nevada to apply -- apply a California thumbscrew statute, because that would actually be outside the tax function.

What I'm saying in this particular case what has happened is [\*48] that Nevada's failure to give us back to California's immunity statute has resulted in interference with California's tax system. If this court does not intervene and give us back to our particular proposed test, which would look into California to see whether or not we would grant immunity, then essentially that would permit any defendant any form of taxpayer to run to the border and literally sue the State of California or any other state to prevent the enforcement of that particular statute.

In addition, I pointed out that this gives another state the power to intrude into the actual operation of another state, and that's what has happened here.

There has been some -- some discussion as to whether or not Nevada has legislative jurisdiction. We concede that they have legislative jurisdiction over the tort. But we -- what we complain about is that they won't respect our legislative jurisdiction or our tax process over our immunity laws, and that is our particular complaint.

We submit the case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Leatherwood. The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-      entitled matter was submitted.)

INTENTIONALLY LEFT BLANK  
EXHIBIT PAGE ONLY

## EXHIBIT 96

HUTCHISON & STEFFEN  
A PROFESSIONAL LLC

**ASHLEY HALL & ASSOCIATES**  
**INCORPORATED**

COURT APPOINTED RECEIVER, SPECIAL MASTER & MEDIATION SPECIALISTS  
2255-A Renaissance Drive  
Las Vegas, NV 89119  
[AshleyHall1@cox.net](mailto:AshleyHall1@cox.net)

BG ASHLEY J. HALL, USA (Ret.), President  
JAMES R. ADAMS, ESQ., Legal Counsel  
DAVID LENTES, Forensic Financial Analyst

TELEPHONE:  
(702) 592-3953  
FACSIMILE  
(702) 433-7875

TO: The Honorable Jessie Walsh, Judge Department 10  
Mr. Mark A. Hutchison, Esq., Legal Counsel for the Plaintiff  
Mr. John T. Steffen, Legal Counsel for the Plaintiff  
Mr. Pete Bernhard, Esq., Legal Counsel for the Plaintiff  
Ms. Pat Lundvall, Esq., Legal Counsel for the Defendant  
Ms. Carla B. Higginbotham, Esq., Legal Counsel for the Defendant

FR: Ashley J. Hall, Special Master *AJH*  
HYATT vs. FTB SPECIAL MASTERSHIP: Case No.: A382999

DT: 11.25.09

SB: Special Master's Final Report & Recommendations in the HYATT vs. FTB  
"Memorandum of Costs" Case

The Special Master is pleased to provide the Court with his final conclusions and recommendations based on the audit, assessment and evaluation of the information submitted by the Parties in the Hyatt vs. FTB "Memorandum of Costs" Case, along with the legal requirements as set forth in the accompanying Legal Brief provided by Mr. Adams. As briefed in earlier reports, the Special Mastership utilized the Analytical Matrix that has specifically been developed to give the Special Mastership the ability to conduct a thorough audit, assessment, and evaluation of all materials submitted by the Parties that has resulted in the Special Master's conclusions and recommendations to the Court, as required in the duties, authorities, and responsibilities set forth in the Order Appointing Special Master, pursuant to Nevada Rules of Civil Procedure 53; i.e.

1. "As Special Master, Ashley Hall shall review all documentation and records relating to all costs, as defined in Chapter 18 of the NRS, which are claimed by Plaintiff...."

2. "The Special Master is authorized to gather any and all information, facts, and data as deemed necessary by the Special Master in order to make reports and recommendations to the Court as to the various costs incurred by Plaintiff related to the above captioned action and the propriety and allowance of such cost under Chapter 18 of the NRS."

Based on the duties, responsibilities and authorities assigned to the Special Master, as referenced above, the Special Master outlines the method and means utilized to reach his conclusions and recommendations as follows:

1. In an effort to reach a conclusion on the Recommended Cost briefed to the Court and to the Parties, the Special Master established an Analytical Matrix that has allowed him to identify, collect, audit, assess, and evaluate the recoverable elements submitted for reimbursement by the Plaintiff and challenged by the Defendant.

2. To allow the Special Master to meet the technical aspects of NRS 18, Supreme Court Rulings, Case Law, as well as providing him with the method and means to specifically categorize and evaluate the Cost Reimbursement information submitted by the Plaintiff and challenged by the Defendant, the Special Master directed Mr. James R. Adams, Esq., Legal Counsel for the Special Master, to provide a Legal Brief in coordination with the Special Mastership's utilization of the Analytical Matrix in order to reach the conclusions and recommendations set forth herein.
3. Mr. Adams has provided the legal guidance to the Special Master regarding the application of NRS 18, Nevada Supreme Court Rulings, Case Law and any other Relevant Counsel that he deems to be appropriate in applying to the question of "Costs" that are allowed within the Law, by Court president, are that the Special Master has verified and that he deems to be "Reasonable."
4. Additionally, the Special Master assigned Mr. David Lentes, Forensic Financial Analyst to the Special Master, to conduct a fair, verifiable, and complete Audit of those claimed Costs associated with the Memorandum of Costs submitted by the Plaintiff, including the supporting data that has been submitted by the Plaintiff and challenged by the Defendant.
5. The Special Master has conducted a thorough review of all of the Case File information, both hard copy and electronic, submitted by the Parties, as well as a thorough Review, Audit, Assessment, & Evaluation, in conjunction with Mr. Adams and Mr. Lentes, that has resulted in the Special Master concluding his final Recommendations regarding the issue of "Costs" to the Court and to the Parties.
6. Based on the above, the Special Master established a Three (3) Phase Review, Assessment, Evaluation, and Recommendation process. Phase I was submitted to the Court and the Parties at the conclusion of the initial Preliminary Audit by Mr. Lentes & initial Legal Brief by Mr. Adams, in preparation for the Special Master's Working Conference with the Parties on May 11, 2009. Phase II was conducted as a result of the additional supporting documentation provided by the Plaintiff following the Working Conference with the Parties, including the feedback and a response to the supplementation by the Defendant. The Phase III allowed the Special Master to review all of the researched and verified information provided, as set forth above, evaluate the supplementation and response of both Plaintiff and Defendant, allowing him to finalize his conclusions and recommendations set forth herein:
  - a. Assembling the Case File, including supporting documentation;
  - b. Establishing of an Analytical Matrix that allowed the Special Master to assemble all of the information used to evaluate the submitted information in accordance with NRS 18, Nevada Supreme Court Rulings, Case Law that will provide the Special Master to determine the degree of 'Reasonableness' to the Costs Claim;
  - c. Conducting a complete Audit of all Costs included in the Memorandum of Costs, which included a request for additional supporting materials following the Working Conference with the Parties on May 11, 2009, to better allow the Special Master to verify certain submitted costs that the Special Master felt required additional documentation;



- d. Meeting with the Parties to conduct a Working Conference for the purpose of reviewing and explaining the findings contained in the Preliminary Audit and Evaluation Report; and,
  - e. Reviewing, Auditing, Evaluating and concluding the Special Master's Final Recommendations regarding Reimbursement of Costs, as submitted in the Case.
7. As a result of the Special Master's Working Conference with the Parties on May 11, 2009, several resulting issues have been met and successfully addressed by the Special Mastership:
- a. Prior to the May 11, 2009 meeting with counsel occurring, the Special Master received a letter dated May 8, 2009 from Bullivant Houser and Bailey. This letter contained questions and concerns raised by Plaintiff Hyatt's counsel in response to the Phase I preliminary report of the Special Master. These matters were addressed during the May 11, 2009 meeting and subsequent email correspondence from the Special Master to all counsel.
  - b. At the conclusion of the May 11, 2009 meeting, the Special Master determined that supplementation should be allowed to give Hyatt an opportunity to provide such information and argument as was necessary to legally justify the recoverability of provisionally disallowed costs. Defendant FTB was also given the opportunity to respond to Hyatt's supplementation and to attack or support any provisional recommendations made by the Special Master in the Preliminary Report. Please note that the Preliminary Report, initial spreadsheets, and initial preliminary recommendations created by the Special Master as part of Phase I-- and provided to all counsel before the May 11, 2009 conference --were preserved and are available to this Honorable Court for consideration. The Preliminary Report with its initial provisional recommendations may be relevant and necessary if this Honorable Court disagrees with the decision by the Special Master to allow supplementation after the May 11, 2009 meeting and desires to base its ruling on the Motion to Re-Tax on the documents and arguments made before the post-May 11, 2009 supplementation. It should also be noted that FTB repeatedly maintained its argument that any supplementation made by Hyatt at the direction of the Special Master should not be considered pursuant to statutory and case law. It should also be noted that FTB has also repeatedly argued and maintained to the Special Master verbally and in briefing that any and all supplementation by Hyatt should not be considered, including those documents provided in Hyatt's Opposition to the Motion to Re-Tax and Erratas to his original Memorandum of Costs. The Special Master leaves this to this Honorable Court's discretion whether or not the Special Master's decision to allow supplementation is permitted pursuant to NRS 18.110(1)'s non-jurisdictional time limit and statutory language. *Village Builders 96, L.P. v. U.S. Laboratories, Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005).
  - c. Additionally, Hyatt's supplementation on or about July 15, 2009 contained a written request for an evidentiary hearing regarding the reasonableness and necessity of expert witness fees above the \$1,500.00 cap and also contained a statement wherein



Hyatt reserved the right to submit additional supplementation after reviewing FTB's forthcoming supplementation. The Special Master informed all counsel that the Special Master did not see the need for any evidentiary hearing on the issue of expert fees. This Honorable Court however may chose to set such a hearing in the event this Honorable Court deems it necessary. The Special Master informed the respective counsel's, in response to Hyatt's supplementation, that Hyatt had no rights reserved or otherwise to do additional supplementation without the Special Master or this Honorable Court's permission and leave. Since this was FTB's Motion to Retax, FTB has the final right of written supplementation which occurred on or about August 15, 2009.

d. There was an additional request made via email by counsel for Hyatt that all counsels have the opportunity to review the Final Report of the Special Master and provide comment and perhaps further argument and supplementation before it be submitted to this Honorable Court. The Special Master noted that while it had the authority under the Order Appointing Special Master to allow such a second review by counsel, the Special Master was not required to do so if the Special Master felt it was unnecessary. The Special Master informed counsel that such a meeting was unnecessary via email correspondence.

e. Please note that in FTB's August 15, 2009 supplementation to the Special Master, counsel for FTB claimed it had not received many of the exhibits attached to Hyatt's July 15, 2009 supplementation. The Special Master investigated this claim via email correspondence to all counsel. It was determined by both FTB and Hyatt that Hyatt did fully serve FTB's counsel with a complete copy of its July 15, 2009 supplementation, including all exhibits.

f. The Special Master would also like to emphasize that each and every page of proposed justifying documentation in support of each and every cost was viewed, evaluated, audited, and in some causes re-audited more than once to ensure that the legal standards governing the recoverability of costs were fully complied with. This process was perhaps longer than anticipated and took a greater amount of time of the Special Master due to the following: (1) the sheer number of documents that the Special Master had to review; (2) the multiple requested costs that could be listed on a single page of proposed justifying document, including requested costs under different categories of recovery; (3) the disorganization of the production of miscellaneous costs and costs requested recoverable pursuant to NRS 18.005(17); (4) the inconsistent and/or nonexistent date stamping throughout the proposed justifying documents provided; and, (5) the fact that justifying documentation of costs were produced by Hyatt separated out by attorney and attorney firm rather than just separated and organized by the subsection numbers of the statute itself. The Special Master has done his utmost given these issues to perform the most complete and accurate inputting of all costs, legal review of all costs, audit and even re-audit of all costs being sought to the extent possible.

8. The Analytical Model developed by the Special Mastership has allowed him to provide an objective, factual and timely method and means in determine the following:

- a. Review the size and scope of the legal case that resulted in the Memorandum of Costs.
- b. Ascertain if the submission of documentation was suitable to support and verify Reimbursement of Costs as requested by the Plaintiff.
  - That the documentation submitted was sufficient to verify both the amount and nature of the Costs;
  - That the information submitted was not sufficient to verify either the nature of the work performed or the associated Cost Reimbursement being requested;
  - That the additional information requested and supplied by the Plaintiff provided the Special Master with evidence to substantiate and verify that such Costs were acceptable under the criteria; and,
  - That through the audit, assessment and evaluation process regarding the Memorandum of Costs; the Special Master has been able to make his Recommendations to the Court regarding both the technical and reasonable aspects associated with the Case.
9. The Special Master was able to meet the time-line he felt was acceptable in conducting the final Audit, Assessment & Evaluation that has resulted in the Recommendations contained herein.
10. Mr. Adams has outlined his Legal Assessment of the Recommendations set forth herein.

Please see the attached Audit Report and accompanying spreadsheets containing all of the Submitted Costs for Reimbursement and the disposition of those submissions by the Special Mastership. The following attachments are provided:

- a. ALL - Cost Categorization (Summary Analysis) [All Exhibits - All NRS Codes]
- b. ALL - Cost Categorization (Summary Analysis) [All Exhibits - NRS Code 1-15]
- c. ALL - Cost Categorization (Summary Analysis) [All Exhibits - NRS Code 17]
- d. ALL - Cost Categorization (Detail Analysis) [All Exhibits - NRS Code 1-15]
- e. ALL - Cost Categorization (Detail Analysis) [All Exhibits - NRS Code 17]

In conclusion, the Special Master wishes to thank the Court, the Parties and the members of the Special Mastership Team for their cooperation that has allowed him to provide the Court with his final Recommendations regarding the "Memorandum of Cost" as submitted by the Plaintiff in the Case, and as such submittals met the technical and "reasonableness" criteria required of the Special Master.

If there are any questions, please advise the Special Master or Mr. Adams.

cc: Mr. Adams  
Mr. Lentz  
Mr. Kern

ADAMS LAW GROUP, LTD.  
ATTORNEYS AT LAW

Phone: (702) 838-7200  
James R. Adams, Esq.  
Assly Sayyar, Esq.

8681 W. Sahara Ave., Suite 280  
Las Vegas, NV 89117  
[www.adamslawnevada.com](http://www.adamslawnevada.com)

Facsimile: (702) 838-3636

November 25, 2009

To: The Honorable Judge Jessie Walsh  
All Counsel of Record

RE: *GILBERT P. HYATT v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA* -  
A382999 - Legal Assessment of the Recommendations

Dear Judge Walsh and Counsel:

As you know, Special Master, Ashley Hall has been appointed by Judge Jessie Walsh to review all documentation and records relating to all costs, as defined in Chapter 18 of the Nevada Revised Statutes, which are claimed by Plaintiff in the above captioned action. The Special Master was charged with reporting to the Court the various recoverable costs claimed by the Plaintiff related to the above captioned action and making recommendations regarding the propriety and allowance of such costs. In this regard, the Special Master and his counsel have reviewed NRS 18 and relevant case law to determine the criteria by which the claimed costs should be reviewed to determine their propriety.

The Special Master created an Analytical Matrix that allowed the Special Mastership to identify, organize, assess, evaluate, and recommend those costs that met the criteria under NRS 18, Nevada Supreme Court rulings, and applicable case law. Additionally, the Special Mastership organized its work under three categories: Phase I - produced the Preliminary Report; Phase II - produced the full assessment and evaluation of all submitted costs by Plaintiff; and Phase III - produced the Special Master's final recommendations on allowable costs.

The Special Master created a Preliminary Report of his findings as Phase I of this process of review and audit. The Preliminary Report of the Special Master, with legal memorandum and detailed spreadsheets, was provided to all counsel. A meeting was held on May 11, 2009, and attended by counsel of all parties (either in person or via telephone) and by James R. Adams, Esq., Assly Sayyar, Esq., David Lentos and the Special Master Ashley Hall. Through the meeting and by the detailed Preliminary Report, all counsel were made aware of the Special Master's concerns as to justifying documentation, the Special Master's method of analysis, the Special Master's outlining and application of the law in this area, and exactly how far in the audit and review process the Special Master had gone for each cost subcategory as identified in the detailed spreadsheets created by Mr. Lentos. By May 11, 2009, certain cost categories and the supporting documentation related thereto, had already been audited and reviewed by the Special Master. There were also some categories where the Special Master had refrained from evaluating the propriety of any proposed

justifying documentation until additional supplementation could occur addressing other factors governing the recoverability of certain costs.

It was the Special Master's decision to allow additional supplementation and input from counsel in response to the Preliminary Report. The Special Master determined that supplementation should be allowed to give Hyatt an opportunity to provide such information and argument as was necessary to justify the recoverability of provisionally disallowed costs. The Special Master, thus, granted Hyatt an opportunity to provide justifying documentation and other evidence in support of its Memorandum of Costs and in Opposition to the Motion to Retax. FTB was also given the opportunity to respond to Hyatt's supplementation and to challenge or support any provisional recommendations made by the Special Master in the Preliminary Report.

After the May 11, 2009, meeting, the Special Master set forth a time frame for additional supplementation after input from counsel. The Special Master received Hyatt's supplementation in support of its Opposition to the Motion to Retax on or about July 15, 2009. The Special Master received FTB's supplementation in support of its Motion to Retax on or about August 15, 2009. The Special Master carefully read and reviewed the supplementation provided. The Special Master then began the process of re-auditing and reviewing all provisionally allowed and disallowed costs. The Special Master also began the process of auditing those categories of costs that no provisional recommendation had yet been made.<sup>1</sup>

General Considerations Applicable to All Cost Categories:

1. The Special Master will construe NRS 18 strictly. *Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994) and *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998).
2. Plaintiff is required to provide justifying documentation of each cost such that the Special Master can determine that a cost was "actually incurred" in Case No. A382999. *Village Builders 96, L.P. v. U.S. Laboratories, Inc.*, 121 Nev. 261, 112 P.3d 1082 (2005). The cost must have been an actual cost, rather than reasonable estimate or calculation of such costs based upon administrative convenience. *Gibellini v. Klindt*, 885 P.2d 540, 110 Nev. 1201. Thus, for example, the Special Master concluded that a mere spreadsheet composed by a law firm without attaching underlying source documentation to evidence the actual cost incurred does not rise to the level of "justifying documentation" as required by the Nevada Supreme Court. It is the underlying, justifying documentation that should be submitted to evidence an actual cost. The mere verification by a licensed attorney via an affidavit or sworn statement pursuant to NRS 18.110 of the validity of a spreadsheet without justifying

---

<sup>1</sup> The Special Master informs this Honorable Court that there were some costs submitted by Hyatt that the Special Master had not given a provisional recommendation as part of the Phase I analysis due to a lack of categorization on the part of Plaintiff. The Special Master required Hyatt to inform the Special Master under what subsection of NRS 18.005 the Special Master should consider the cost. Additionally, Hyatt had not identified the 5 experts of which it was seeking to recover costs under NRS 18.005(5). Therefore, no preliminary recommendation or review occurred on the expert costs until after the post-May 11, 2009 supplementation.

documentation was insufficient to support an award of costs. This same argument of the validity of an attorney verification in lieu of justifying documentation was made by U.S. Labs. U.S. Labs argued to the Nevada Supreme Court that the Memorandum of Costs did not require justifying documentation attached thereto when "the overall amount is obviously reasonable" *Village Builders 96, L.P. v. U.S. Laboratories, Inc.*, 121 Nev. 261, 277, 112 P.3d 1082, 1093 (2005). The Nevada Supreme Court rejected this argument. "Such documentation" of each copy made or each call made "is precisely what is required under Nevada law to ensure that the cost awarded are only those costs actually incurred." *Id.*

3. Pursuant to NRS 18.005, Plaintiff's costs must be reasonable and actually incurred. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998).

Thus, for every category of cost and every cost sought by Hyatt, the Special Master asked the following questions:

1. Is there adequate supporting justifying documentation for the cost?
2. From a review of the supporting documentation, can the Special Master determine whether the cost was "actually incurred" in this case?
3. From a review of the supporting documentation, can the Special Master make a determination whether or not the cost was reasonable as required by either the statute or case law?

If a cost was supported by sufficient justifying documentation, was actually incurred in this case, and was reasonable pursuant to applicable law, the cost was recommended as "Recoverable." If a cost sought by Hyatt was not supported by sufficient justifying documentation, could not be determined as actually incurred in this case, or was deemed not reasonable (or the reasonableness could not be determined,) the cost was recommended as "Not Recoverable." A cost recommended as "Not Recoverable" will also be followed by a descriptive phrase providing at least one reason why the Special Master deemed the cost "Not Recoverable." The Special Master notes however that a cost deemed "Not Recoverable" may be "Not Recoverable" for reasons in addition to the reason listed on the spreadsheet provided with the Final Report. Some costs are "Not Recoverable" for more than one reason. Following are the descriptive phrases used in labeling non-recoverable costs noted in the Final Report and associated spreadsheets:

1. "No Proof of Cost Incurred" - If no underlying justifying documentation was provided (for example, in the case of mere spreadsheets drafted by law firms with no back up documentation), the cost was disallowed and deemed "Not Recoverable."
2. "Insufficient Proof of Actual Cost" - If a supporting document was included, but the Special Master could not determine from that document that a cost was actually incurred (for example, a mere check request with no further evidence of a cost actually incurred, or an attorney billing statement to a client for a cost, but with no further evidence of a cost actually incurred), the cost was disallowed and deemed "Not Recoverable." The Special Master

determined that an attorney's request for a cost, with no "justifying document" evidencing that cost was insufficient proof of a cost actually incurred.

3. "Reasonableness Undeterminable" - If a supporting document was included and it evidenced an actual cost, but there was no way to tie that cost to this particular case (for example, a check issued to a vendor with no case number, case name, or other indication for what the check was issued), the cost was disallowed and deemed "Not Recoverable" as under the law the reasonableness of the cost incurred cannot be determined by this Honorable Court.
4. "Category - Unallowable per NRS" - The cost was not allowable under NRS 18.005 under the specific category requested or subsequent recategorization after the post-May 11, 2009 supplementation.
5. "Insufficient Showing of Necessity" - To award costs under NRS 18.005(17), Plaintiff must demonstrate how such costs were incurred and why they were reasonable and necessary. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 971 P.2d 383 (1998). Where there was an insufficient showing of how the requested costs were necessary to and incurred in the present action, such costs were disallowed and deemed "Not Recoverable."

The Special Master also notes that for some categories of costs, half or part of the cost sought based on the documents provided may have been allowed but other portions of the same cost may have been disallowed. Below, the Special Master provides a more detailed reasoning behind why portions of certain costs were recoverable but other portions were not.

Specific Considerations for Each Cost Category

1.	NRS 18.005(1) - Clerk's Fees	pg. 5
2.	NRS 18.005(2) - Reporters Fees for Deposition	pg. 6
3.	NRS 18.005(3) - Juror's Fees and Expenses	pg. 7
4.	NRS 18.005(4) - Fees for Witnesses at Trial	pg. 7
5.	NRS 18.005(5) - Reasonable Fees for Experts	pg. 8
6.	NRS 18.005(6) - Reasonable Fees for Interpreters	pg. 9
7.	NRS 18.005(7) - Process Server Fees	pg. 10
8.	NRS 18.005(8) - Fees for Official Court Reporter	pg. 10
9.	NRS 18.005(9) - Reasonable Costs for any Bond	pg. 10
10.	NRS 18.005(10) - Fees for Bailiff	pg. 10
11.	NRS 18.005(11) - Reasonable Costs for Telecopies	pg. 11
12.	NRS 18.005(12) - Reasonable Costs for Photocopies	pg. 11
13.	NRS 18.005(13) - Reasonable Costs for Long Distance Phone	pg. 12
14.	NRS 18.005(14) - Reasonable Costs for Postage	pg. 12
15.	NRS 18.005(15) - Reasonable Costs for Travel and Lodging	pg. 13
16.	NRS 18.005(16) - Fees Pursuant to NRS 19.0335	pg. 13



17.	NRS 18.005(17) - Any Other Reasonable and Necessary Expense	pg. 14
A.	Computerized Legal Research	pg. 15
B.	Electronic Database Management	pg. 15
C.	Live Note Real Time Transcript	pg. 16
D.	Travel to Nevada Supreme Court	pg. 16
E.	Transcript and Hearings	pg. 17
F.	Courier/Runner Service	pg. 17
G.	Travel Expenses	pg. 18
H.	Misc. Costs	pg. 18
I.	Parking	pg. 19
J.	Office/Trial Supplies	pg. 19
L. [sic]	Investigative Services	pg. 19
M.	State Bar of Nevada Fees	pg. 19
N.	Overtime Pay	pg. 20
O.	Telephone Charges	pg. 20
P.	Attorney and Professional Fees.	pg. 20
Q.	Document Scanning Services	pg. 21
S. [sic]	Technology Services	pg. 21
T.	General Legal Research	pg. 22

In creating the Final Report based on the documentation that was provided, the Special Master determined which cost was recoverable, and which was not. Each category was evaluated using its own unique criteria under the law. Each evaluation included both pre and post- May 11, 2009 supplementation and documents. With the attached spreadsheets supporting the same, the Special Master recommends that \$2,539,068.65 of the proposed costs be recoverable by Hyatt. The Special Master recommends that \$788,253.47 of the proposed costs sought by Hyatt not be recoverable. A copy of the condensed report of the costs at issue and discussed in this Legal Memorandum is attached hereto as Exhibit 1 and provides a condensed summary of the more detailed spreadsheets providing the dollar amounts referenced in this document.

#### 1. NRS 18.005(1) - Clerks' fees

Clerk fees were allowable as long as documentation supported an actual cost incurred in this case to a court clerk's office. Verification by an attorney of a cost via affidavit was deemed insufficient to establish the threshold question of justifying documentation that this Honorable Court must consider pursuant to the Nevada Supreme Court. *Village Builders 96, L.P. v. U.S. Laboratories, Inc.*, 121 Nev. 261, 277, 112 P.3d 1082, 1093 (2005). The Special Master also notes that reasonableness is not a factor set forth by the statute to determine if this particular cost is recoverable.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$1,505.44	\$171.94	\$1,333.50

2. **NRS 18.005(2) - Reporters' fees for depositions, including a reporter's fee for one copy of each deposition.**

Under NRS 18.005, costs of depositions not used at trial can be taxed. *Jones v. Viking Freight System, Inc.*, 101 Nev. 275, 701 P.2d 745 (1985).

The Special Master allowed as a cost under this category only 1 copy of each deposition regardless whether the copy was video or paper. However, the Special Master was inclined to recommend an allowance of an additional cost of a separate or second copy of a deposition pursuant to NRS 18.005(17) based on the argument and showing made by Hyatt that such a cost was reasonable and necessary. Hyatt argued, and the Special Master agreed that paying for a second copy of an original sealed deposition was necessary and reasonable since counsel was under an obligation to store the sealed originals under conditions that would protect them from loss, destruction or tampering. Given this requirement and the complex and intensive nature of the case, the Special Master concluded that deposition copies were a reasonable and necessary expense under NRS 18.005(17). Also see NRCP 30(f) (2009).

Videographer fees were not allowable in this category if a reporter was otherwise present and charged a cost. Hyatt did request in its Response to Phase I Draft of Special Master's Report (hereinafter "Response") that videographer fees are recoverable pursuant to NRS 18.005(17). However, pursuant to the Special Master's review of Hyatt's Response, Hyatt made either no showing or an insufficient showing of the reasonableness or necessity of videographer fees under NRS 18.005(17). Hyatt has failed to show or provide sufficient evidence or argument why video services were needed in a single instance.

In Hyatt's supplementation, the Special Master was provided information and evidence supporting the contention that depositions taken were, in fact, for witnesses in this case and, thus, costs related to those witnesses were actually incurred. The Special Master also notes that reasonableness is not a factor set forth by the statute to determine if this cost particular is recoverable.

In reviewing the spreadsheet subsection 2 to see what costs are recoverable or not, please see the separate spreadsheet for Exhibit 6 which are also costs related to NRS 18.005(2).

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$31,099.68	\$3,652.12	\$27,447.56

Exhibit 6

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$156,459.38	\$13,141.25	\$143,318.13

///



3. NRS 18.005(3). Jurors' fees and expenses, together with reasonable compensation of an officer appointed to act in accordance with NRS 16.120.

Juror fees and expenses are allowable as long as documentation supported an actual cost incurred. The Special Master notes that reasonableness is not a factor set forth by the statute to determine if this cost is recoverable. In reviewing the spreadsheet subsection 3 to see what costs are recoverable or not, please see the separate spreadsheet for Exhibit 9 which are also costs related to NRS 18.005(3).

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$1,684.39	\$0.00	\$1,684.39

Exhibit 9

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$41,869.47	\$0.00	\$41,869.47

4. 18.005(4). Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the court finds that the witness was called at the instance of the prevailing party without reason or necessity.

Plaintiff may recover the cost of procuring a witness even where the witness is not called and is not present in court. Fees paid to a witness who was subpoenaed but did not actually attend the trial may be allowed as costs when it was reasonably expected that his attendance would be necessary and he held himself in readiness to attend. Thus, calling witnesses at trial is not a prerequisite to an award of witness fees as costs. *Bergmann v. Boyce*, 109 Nev. 670, 679-680, 856 P.2d 560, 566 (1993). However, where a witness attended court under subpoena, was not called, sworn, or examined in the proceeding, and there was no showing as to why he was required as a witness, or why he was not called, sworn, and examined, an objection to the allowance of his fees should be sustained. *State v. Gayhart*, 66 P. 1087 (Nev. 1901).

The Special Master found certain costs in this category as recoverable. Hyatt has, through its supplementation, established and confirmed which witnesses testified at trial, at pretrial hearing, and at depositions. To the extent a cost was requested for a non-testifying witness, Hyatt provided a sufficient showing of reasonableness as to why the witness did not testify and why the cost was justified.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$2,366.00	\$1,841.00	\$525.00

///

///

5. 18.005(5). Reasonable fees of not more than five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.

Costs for only five experts are allowable in this category. To the extent costs requested are over \$1,500.00 for each witness, a showing should be made by Plaintiff as to why a larger fee is necessary. Counsel for Plaintiff, in his Response, provided the Special Master with the identity of the five expert witnesses upon whom Hyatt sought recovery. The five witnesses identified are Malcolm Jumlet, Edwin Antolin, Paul G. Schervish, Daniel Solove, and Kurt Sjoberg. Hyatt also argued that an additional three experts' costs should be recoverable under NRS 18.005(17). Those three experts are George Swarts, Diane Turly and Mari Frank. Hyatt has requested costs beyond the \$1,500.00 cap.

First, the Special Master considered the argument that costs above \$1,500.00 should be permitted. "With regard to investigation costs at the trial court level, this court has held that, even though a prevailing party submits itemized statements in support of investigation costs, the party must also demonstrate 'how such fees were necessary to and incurred in the present action.'" Without such information, a grant of investigation costs constitutes an abuse of discretion by the trial court." *Gilman v. Nevada State Bd. of Veterinary Medical Examiners*, 120 Nev. 263, 89 P.3d 1000 (2004). NRS 18.005(5) allows this Honorable Court to go beyond the cap based on a determination of the usefulness and necessity of the "testimony" of an expert. In *The Trustees of the Carpenters for So. Nev. Health and Welfare Trust v. Better Building Company*, 101 Nev. 742, 710 P.2d 1379 (1985). After reviewing Hyatt's Response to Phase I Draft of Special Master's Report, the additional documents provided, and FTB's Response to Hyatt's Response to Phase I Draft of Special Master Report, the Special Master recommends that for the five experts named by Hyatt, the circumstances surrounding said expert's testimony were of such a necessity to require a fee beyond \$1,500.00. The Special Master notes that there is some concern that Hyatt retained some of its experts "at the last minute" and therefore the experts had to "rush" to complete lengthy reviews and reports. However, it is the Special Master's position that even if Hyatt hired its experts at an earlier time, based on the length and the detailed nature of the report, the costs would have likely been similar (though be spread over a longer period of time).

Second, the Special Master considered the issue of whether the costs incurred by the expert's support staff and others could be taxable as a cost under NRS 18.005(5). For example, Hyatt identified Malcolm Jumlet of Price Waterhouse as one of the five experts. However, the billing for Price Waterhouse included time billed by numerous other individuals. In short, the Special Master needed to determine whether Price Waterhouse's billing is a "reasonable fee" for one of the five experts. From a review of the documents, the Special Master determined that Price Waterhouse's work was reasonable in light of the support and assistance it provide Mr. Jumlet, the essential and extremely helpful nature of Mr. Jumlet's report and his testimony during trial, Mr. Jumlet's qualifications and experience, his lengthy and detailed report and review of documents in this action, and the detailed nature of the work he performed with the assistance of other Price Waterhouse staff. The Special Master reviewed the case cited by Hyatt in its supplement, *H-B-S Partnership v. Aircoa Hospitality Services, Inc.* 176 P.3d 1136, 1144 (N.M. App. Ct., 2007), and concluded that support staff whose work helped create the expert report was a recoverable cost. Thus, costs for Malcolm Jumlet and the rest of the staff at Price Waterhouse is reasonable and constitutes 1 expert of the

5 Hyatt is allowed to request. The work performed by all of the employees at Price Waterhouse was in support of Mr. Jumlet's expert opinion and the formation of his report. Mr. Jumlet's testimony and report was lengthy and extremely helpful to the jury in understanding this case according to Judge Walsh.

Third, the Special Master reviewed not only the invoices submitted by the five named experts but also their reports and other documentation provided by Hyatt. The Special Master notes that some of the invoices provided by the five named experts contained either such a poorly drafted description of the work actually performed by the expert, or contained no description at all. In some cases there was merely a recitation of hours worked in a month's period of time and the dollar amount due and owing, with no description of the work. However, with the supplementation provided by Hyatt, the Special Master was provided with a description of the various expert's work, skill, level of knowledge, time spent in depositions and testifying at trial, and extent and nature of work performed with supporting exhibits. This information taken, in its totality, has led the Special Master to recommend the allowance of said expert costs.

Fourth, the Special Master considered whether the costs incurred for the three additional experts—George Swarts, Diane Turly and Mari Frank—are recoverable under NRS 18.005(17) as requested by Hyatt. The Special Master has reviewed the arguments and evidence presented by Hyatt in its supplement as to whether these expert costs were "reasonable and necessary" and recommends that there is an insufficient showing of the reasonableness and necessity of these three experts given the nature of their anticipated testimony being duplicative to that of those five experts whose costs are being sought under NRS 18.005(5). Additionally, the Special Master notes that the language of NRS 18.005(17) states that this subcategory is for recovery of "any other reasonable and necessary expense." In its plain language it is arguable that NRS 18.005(17) cannot be used to recover costs that are already specifically identified as recoverable pursuant to NRS 18.005(1-16), and that only "other" costs (other than 18.005(1)-(16)) may be considered under NRS 18.005(17). While neither party has addressed this argument in their briefing or supplementation, it may be an issue for this Honorable Court's consideration.

Pursuant to NRS 18.005(5)

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$1,250,781.96	\$0.00	\$1,250,781.96

Pursuant to NRS 18.005(17)(s)

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$140,081.74	\$140,081.74	\$0.00

6. 18.005(6). Reasonable fees of necessary interpreters.

Interpreter fees were allowable as long as documentation supported an actual cost incurred in this case by an interpreter and the amount was reasonable. Hyatt argues that because of attorney verification, the threshold issue of justifying documentation has been satisfied. For the legal reasons stated above, under Nevada law absent justifying documentation, a cost was deemed not recoverable.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$185.00	\$185.00	\$0.00

7. 18.005(7). The fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary.

Process server fees were allowable as long as documentation supported an actual cost incurred in this case for the service of process, summons or subpoena.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$775.58	\$122.96	\$652.62

8. 18.005(8). Compensation for the official reporter or reporter pro tempore.

Compensation for the official reporter was allowable as long as documentation supported an actual cost incurred in this case to the official reporter. The Special Master notes that reasonableness is not a factor under this particular category of cost. The Special Master also states that there were numerous invoices and costs sought for court reporters who were not the official reporter. Those costs shall be addressed pursuant to NRS 18.005(17) below.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$1,327.11	\$640.16	\$686.95

9. 18.005(9). Reasonable costs for any bond or undertaking required as part of the action.

Reasonable costs for any bond or undertaking required as a part of this action were allowable as long as documentation supported an actual cost incurred in this case for the bond or undertaking. Hyatt has not sought any costs under this subsection.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$0.00	\$0.00	\$0.00

10. 18.005(10). Fees of a court bailiff or deputy marshal who was required to work overtime.

Fees of a bailiff or marshal required to work overtime were allowable as long as documentation supported an actual cost incurred in this case for overtime pay of a bailiff or marshal. Hyatt has not sought any costs

under this subsection.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$0.00	\$0.00	\$0.00

**11. 18.005(11). Reasonable costs for telecopies.**

The Special Master requires sufficient justifying documentation beyond a mere spreadsheets created by law firms. Attorney verification of a spreadsheet as to the reasonableness and existence of the cost are insufficient pursuant to the Nevada Supreme Court. Justifying documentation is essential for every fax and every copy. See *Village Builders 96, L.P. v. U.S. Laboratories, Inc.*, 121 Nev. 261, 277, 112 P.3d 1082, 1093 (2005). The Special Master requires supporting documentation to link the cost to this case (for example, fax confirmation sheet or contemporaneous descriptive fax log). The source documentation used in creating the spreadsheet would, most likely, qualify as justifying documentation. Absent such justifying documentation, the Special Master recommends that this Honorable Court cannot adequately evaluate the reasonableness of the cost requested, or even that a cost was actually incurred. Therefore, costs under this category wherein mere spreadsheets were used as justifying documentation are not recoverable. Hyatt was given the opportunity to provide such source documentation but did not do so. Instead, Hyatt has argued in its supplementation that a reduction of the cost requested should be sufficient to overcome the requirements of the Supreme Court. However, these are the same arguments made by U.S. Labs which the Nevada Supreme Court found unpersuasive. The statute is to be strictly construed and to establish reasonableness there must be adequate and sufficient justifying documentation. The Special Master's recommendations, therefore, are in accordance with the Nevada Supreme Court.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$27,733.12	\$27,733.12	\$0.00

**12. 18.005(12). Reasonable costs for photocopies.**

The Special Master requires sufficient justifying documentation beyond a mere spreadsheet showing the date of each photocopy and the total photocopying charge. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353, 971 P.2d 383, 386 (1998). For example, the source documentation used in creating spreadsheets used in this category should be produced. Such documents might include contemporaneously kept descriptive logs, printouts from the photocopy machines, etc. Hyatt has argued that attorney verification and affidavits produced in the post-May 11, 2009 supplementation are sufficient to establish justifying documentation. However, the Special Master recommends that Hyatt's reasoning should not be adopted and based on existing Nevada case law, the affidavits of counsel as to the reasonableness of the charges alone is not sufficient. See *Village Builders 96, L.P. v. U.S. Laboratories, Inc.*, 121 Nev. 261, 277, 112 P.3d 1082, 1093 (2005). Absent such justifying documentation, the Special Master recommends that this Honorable Court cannot adequately evaluate the reasonableness of the cost requested, or even that a cost was actually incurred.

Hyatt has also argued that binders and other office supplies are "reasonable costs of photocopies." The Special Master does not recommend adopting this reasoning. Binders, exhibit tabs and other office supplies are not photocopies or related to the creation of a photo copy. While such items may be recoverable under NRS 18.005(17), the Special Master opines that those costs are not recoverable under NRS 18.005(12).

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$145,437.19	\$80,571.40	\$64,865.79

Exhibit 7

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$38,010.44	\$0.00	\$38,010.44

**13. 18.005(13). Reasonable costs for long distance telephone calls.**

The Special Master requires sufficient justifying documentation beyond a mere spreadsheet or phone bill wherein phone numbers are redacted (giving the Special Master no way of knowing why the cost was reasonable or to whom the call was made). The Special Master gave Hyatt the opportunity after May 11, 2009, to supplement and provide sufficient justifying documentation for long distance phone calls. The Special Master notes that Hyatt's response was to argue that attorney verification was sufficient, and to admit that the cell bills and conference call bills provided "may have included long distance" (See Hyatt's Response 29:18), but because of the "reasonable" or small dollar amount at issue, the Special Master should recommend the cost. The Special Master recommends this Honorable Court not adopt the arguments of Hyatt as they are contrary to Nevada law on the subject. Absent justifying documentation that reached the standard set forth in *Village Builders*, this Honorable Court may not be able to determine reasonableness. Thus, the cost has been recommended as not recoverable.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$9,288.71	\$9,284.57	\$4.14

**14. 18.005(14). Reasonable costs for postage.**

The Special Master requires sufficient justifying documentation beyond a mere spreadsheet or attorney bills to a client regarding postage costs. Given the opportunity to supplement additional justifying documentation, Hyatt in its Response relied on the affidavits of attorneys and verifications of spreadsheets and attorney bills as justifying documentation. Again, the Special Master does not recommend the Honorable Court allow recovery of costs on the basis of attorney affidavit alone. Only those costs supported by sufficient justifying documentation and are deemed reasonable should be recoverable.

///



Costs Requested	Costs Not Recoverable	Costs Recoverable
\$17,971.25	\$4,235.27	\$13,735.98

15. 18.005(15). Reasonable costs for travel and lodging incurred taking depositions and conducting discovery.

The Special Master disallowed costs for meals and parking under this particular category as the category is for "travel" and "lodging." The Special Master disallowed costs for any "party" to this action to attend a deposition as a "party" to this action was not "taking" the deposition or "conducting" the discovery (the attorneys were). Hyatt argues that he and his assistant, Jeng, were in an "active role" of assisting counsel while traveling to conduct discovery. However, the statute is clear that costs are recoverable only for travel and lodging incurred "taking" deposition and "conducting" discovery. Thus, unless a party is in proper person, a party's costs for traveling and lodging are not recoverable as that party (who is represented by counsel) is not the one conducting the discovery or taking the deposition. Hyatt also argues that parking and office room rental is part of "travel." However, the Special Master is inclined to recommend a strict construction of the plain language of the statute pursuant to *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 1352, 971 P.2d 383, 385 (1998). Thus, parking and room rental was not recommended for approval under this category.

The Special Master found certain costs as recoverable such as car rental for travel, airplane tickets for travel, hotel and motel charges for lodging—so long as they are deemed reasonable. Hyatt provided supplemental information in his Response to link a travel or lodging cost to an actual deposition or discovery date and time.

The Special Master also notes that a request was made by Hyatt to consider some of the above costs pursuant to NRS 18.005(17), specifically the costs incurred by Mr. Hyatt and his assistant. The Special Master does not recommend said costs even considering them under the standard of NRS 18.005(17). The Special Master recommends that there is an insufficient showing of proof to establish the reasonableness and necessity of such a cost.

Finally, the Special Master will note that a number of travel related invoices, receipts and costs were submitted by Hyatt's counsel under miscellaneous or subsection 17 of the statute. It is entirely unknown if those receipts and costs were in any way related to discovery or depositions. Those costs were not submitted or provided pursuant to NRS 18.005(15), and will be considered below with the legal briefing as to NRS 18.005(17).

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$31,242.44	\$10,520.62	\$20,721.82

///

16. 18.005(16). Fees charged pursuant to NRS 19.0335.

Hyatt has not sought any costs under this subsection.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$0.00	\$0.00	\$0.00

17. 18.005(17). Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research.

No recovery can be made under this category of NRS 18.005(17) without a showing of both necessity and reasonableness of the cost. *Bergmann v. Boyce*, 109 Nev. 670, 681-682, 856 P.2d 560, 567-568 (1993). The prevailing party must "attempt to demonstrate how such fees were necessary to and incurred in the present action." *Bobby Berasini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998).

Originally, during the Phase I Preliminary Report provided by the Special Master, the Special Master made no attempt to evaluate any of the costs sought under NRS 18.005(17) to determine if there were sufficient justifying documentation. The Special Master simply provisionally disallowed all such costs sought under NRS 18.005(17) for a lack of any evidence or argument as to why these costs were both reasonable and necessary. The Special Master specifically informed all parties in his Phase I Preliminary Report that he would still have to evaluate the justifying documentation of all costs sought under NRS 18.005(17) and that lack of justifying documentation may be a reason to disallow a cost even if there were a sufficient argument and proof that the cost was both reasonable and necessary. Hyatt had provided, in its Response, argument and evidence that it believes is sufficient to establish both reasonableness and necessity. Once such evidence was provided by Hyatt, the Special Master then conducted a review of whether the argument presented by Hyatt was sufficient to establish reasonableness and necessity. The Special Master then looked to and examine the documents to see if justifying documentation existed which was sufficient to satisfy the standards set down by the Nevada Supreme Court. Therefore, as previously stated, the Special Master may have denied recommending a cost under this subsection for one specifically stated reason, but may have had other reasons to recommend disallowance of a cost.

///

///

///



A. Computerized Legal Research<sup>2</sup>

The Nevada legislature has expressly amended NRS 18.005(17) to allow computerized services for legal research as an allowable cost. The Special Master recognizes an intent on the part of the Nevada legislature to allow costs for computerized legal research assuming said costs are reasonable and necessary and supporting documentation was found justifying said cost. The Special Master recommends that Hyatt's arguments as to the complexity of this case, the nature of the legal issues involved, and the lengthy trial and discovery periods all demonstrate how essential it was in this case for attorneys to conduct computerized legal research on a multitude of topics. Statements and summaries provided by Thompson West or Lexis demonstrated a computerized research cost was actually incurred, and that the cost was incurred in this case. Argument of counsel supported the contention that the costs were reasonable and necessary given the complexity of this case. Therefore the Special Master recommends that for all costs sought that were actually supported by documentary evidence from a legal research provider, that cost should be recoverable.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$265,186.80	\$123,996.85	\$141,189.95

B. Electronic database management.

Routine office overhead (otherwise known as "normal out-of-pocket" expenses of a law firm) is not recoverable as a cost under NRS 18.005(17). *Bergmann v. Boyce*, 856 P.2d 560, 109 Nev. 670, 681 (1993). Establishing both reasonableness and necessity is essential. In Hyatt's Response, he argued that because the amount sought is so small, the cost should be recoverable. The Special Master does not recommend this Honorable Court adopt Hyatt's argument as the Nevada Supreme Court law is clear on the level of proof required before a cost is recoverable pursuant to NRS 18.005(17).

The Special Master will note that some database management costs were organized by Hyatt as subsection 17 costs and others were not categorized, but were simply provided under Exhibit tab 7. For some of the specific invoices provided behind Exhibit Tab 7, Hyatt's response set forth argument and reasoning why the cost was reasonable and necessary. Other similar costs under other sections of the Response were not justified as reasonable and necessary. Therefore, the Special Master has recommended only those costs that were sufficiently demonstrated to be both reasonable and necessary with appropriate supporting documentation. For example, the costs incurred with Bridge City Legal under Exhibit 7 of Hyatt's Opposition to the Motion to Retax were explained in detail in Hyatt's Response on why document coding

<sup>2</sup> It should be noted that these subcategories under NRS 18.005(17) are in part the creation of Hyatt as this was the manner in which he submitted his costs. Some subcategories below are also, in small part, created by the Special Master in an attempt to organize for purposes of evaluation and auditing. Hyatt appears to have adopted said subcategories in its Responds to Phase I and the Special Master has not had any objection to the sub-categorization of costs related to NRS 18.005(17). These subcategories were utilized for clarification and organizational purposes to deal with the massive amount of documents which are the subject of the Special Master's review.

and extensive office supplies were necessary for trial exhibits in addition to outsourced copying costs. Certain other costs for similar services or products which were not supported by justification as to reasonableness or necessity were recommended as not recoverable. In those cases, Hyatt simply argued that because the dollar amount was small the cost should be awarded.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$5,514.64	\$3,986.25	\$1,528.39

Exhibit 7

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$45,092.69	\$0.00	\$45,092.69

**C. Live Note Real Time Transcript**

Not only did reasonableness and necessity needed to be established, but also sufficient justifying documentation needed to be provided. Therefore, even if a cost was reasonable and necessary, absent sufficient justifying documentation, the cost was not recommended. See the attached spreadsheet for more specific cost-by-cost information for the basis of the Special Master's recommendations.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$4,390.00	\$4,390.00	\$0.00

**D. Travel to Nevada Supreme Court**

Hyatt argues that costs incurred by Don Kula to travel to the Nevada Supreme Court were necessary and reasonable. However, Hyatt fails to say more than this conclusory statement. The Special Master does not recommend this Honorable Court rely on mere conclusory statements of reasonableness or necessity without supporting proof or argument upon which such a conclusory statement is founded. The Special Master gave Hyatt the opportunity after Phase I to provide lengthy argument and proof as to why the Special Master should consider a cost both reasonable and necessary for this particular case. If Hyatt failed to provide more than a conclusory statement in its response, the cost was recommended as not recoverable even if justifying documentation existed.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$22.34	\$221.34	\$0.00

///

#### E. Transcripts and Hearings

The Special Master recommends that this Honorable Court find that transcripts of the lengthy trial and of certain court proceedings or discovery commissioner proceedings in this action were both reasonable and necessary. In the case of a dispute between counsel, or if complex legal or factual issues are determined, the transcript of a hearing is, sometimes, the only way to ensure that an order or ruling in a matter is properly drafted. Additionally, given the extremely lengthy nature of the trial and the constant motions and rulings made during trial, a same-day trial transcription is often necessary and reasonable for proper prosecution and defense of a case. Therefore, given the lengthy and complex nature of this case, and to the extent justifying documents existed, costs for one copy of a transcript was recommended as recoverable.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$177,864.88	\$59,623.54	\$118,241.34

#### Exhibit 6

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$200,968.47	\$101,149.94	\$99,818.53

#### Exhibit 7

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$11,897.79	\$0.00	\$11,897.79

#### F. Courier/Runner Service.

The trial court may award courier expenses to the extent that the court determines that the expenses incurred were reasonable and necessary. *Bergmann v. Boyce*, 109 Nev. 670, 681-682, 856 P.2d 560, 567 - 568 (1993). However, routine office overhead (otherwise known as "normal out-of-pocket" expenses of a law firm) is not recoverable as a cost under NRS 18.005(17). *Bergmann v. Boyce*, 856 P.2d 560, 109 Nev. 670, 681 (1993). By Hyatt's own admission in the Response, courier fees sought are "in-house standard fees" (Response, 43:5-6). There was no argument or evidence that any particular courier fee was beyond normal office overhead. Hyatt's argument that since the amount was small, the Honorable Court should just allow the cost has no basis or support in law. Additionally, for a large portion of the courier costs sought, there was not sufficient justifying documentation.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$7,651.03	\$7,631.03	\$20.00

///

#### G. Travel Expenses

The costs grouped loosely under this subcategory heading include all those costs sought by Hyatt pursuant to NRS 18.005(17) and/or simply categorized as "miscellaneous" relating in anyway to mileage, travel and lodging. Part of the costs sought include mileage incurred by Hyatt's counsel's in house courier. Hyatt argues that these are typical office overhead and are, therefore, recoverable. Other costs requested were the occasional credit card statement and check requests related to hotel, auto rental, parking, and airfare which Hyatt alleged related to discovery and depositions. The Special Master noted, however, in reviewing the proposed documentation of these costs that (1) the mileage costs requested were part of routine office overhead and there was no showing as to why the particular cost requested was otherwise an extraordinary expense; and (2) there was no evidence that the miscellaneous costs requested for airfare, parking, auto rental and hotel costs had anything to do with discovery. Unfortunately, the necessity and reasonableness of each and every cost was not provided. The Special Master therefore recommends costs recoverable or not recoverable as follows.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$84,511.36	\$83,846.20	\$665.16

#### H. Miscellaneous Costs

A smattering of unorganized invoices, bills and cost requests were submitted by Hyatt under various tabs in the binders provided to the Special Master. Based on Hyatt's briefing, these were categorized as miscellaneous costs being sought under NRS 18.005(17). In the Response, Hyatt provided some general statements explaining what these costs were for but not why they were reasonable or necessary. Hyatt again simply made a blanket statement that these costs were reasonable and necessary for trial without providing the Honorable Court or Special Master a reason, evidence, or argument as to why this is true. The Special Master contends that this is an insufficient showing of necessity or reasonableness under strict construction of the statute. The Special Master cannot recommend a cost that is not supported by evidence or argument of reasonableness or necessity sufficient to allow this Honorable Court to judge each and every cost accordingly.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$4,743.77	\$4,743.77	\$0.00

#### Exhibit 7

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$39,645.26	\$39,645.26	\$0.00

///

**I. Parking**

The Special Master is persuaded by the argument and evidence of Hyatt that attorney parking costs to attend court hearings and trial in this case were reasonable and necessary and are not part of regular office overhead. When sufficient justifying documentation existed, the Special Master recommended said costs as recoverable.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$1,548.62	\$1,253.12	\$295.50

**J. Office/Trial Supplies**

Hyatt's one sentence conclusory statement that these costs are recoverable is insufficient to establish necessity or reasonableness. There is no evidence these costs were anything more than regular office overhead or otherwise reasonable nor necessary. Absent such a showing, under Nevada law, the Special Master recommends as follows.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$19,702.52	\$19,702.52	\$0.00

**Exhibit 7**

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$10,241.25	\$10,241.25	\$0.00

**L. [sic] Investigative Services.**

The only reason given behind the costs regarding investigators by Hyatt in his Response was that such costs were incurred to "examine underlying issues." This fails to provide the Special Master or this Honorable Court with the necessary showing of necessity and reasonableness. Costs are recommended as follows on that basis.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$3,348.35	\$3,348.35	\$0.00

**M. State Bar of Nevada Fees**

The Special Master is not persuaded that it was either reasonable or necessary to have several counsel on behalf of Hyatt appear *pro hac vice* for this entire case. There is little to no evidence as to why out of state

counsel was necessary in this case when local Nevada attorneys were more than qualified to pursue and litigate the matter. In the opinion of the Special Master, the reason given by Hyatt of "familiarity" with the parties does not sufficiently support the level of necessity or reasonableness for years worth of *pro hac vice* costs. Costs are recommended as follows on that basis.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$9,850.00	\$9,850.00	\$0.00

#### N. Overtime Pay

While federal courts generally classify word processing and documentation by legal secretaries as normal out-of-pocket expenses not includable in taxable costs, fees may be awarded if secretarial costs were not routine office overhead. *Bergmann v. Boyce* 856 P.2d 560, 109 Nev. 670 (1993). While Hyatt provided the dates and times of work incurred that are being sought as costs, Hyatt's reasoning of why these costs are recoverable was that given how little overtime is being sought, the cost must be reasonable and necessary. The Special Master recommends, however, that Hyatt's reasoning does not rise to the level of sufficient evidence of either reasonableness or necessity of each cost. The work performed by the secretary is unknown. Why it was reasonable to allow the secretary to work overtime is unknown. Therefore, the Special Master recommends the following.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$4,511.95	\$4,511.95	\$0.00

#### O. Telephone charges

Hyatt requests that these miscellaneous costs be recategorized and considered under NRS 18.005(13). The Special Master has evaluated the same under the standard of NRS 18.005(13) and for the above stated reasons herein recommends as follows:

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$3,169.08	\$30.00	\$3,139.08

#### P. Attorney and Professional Fees

Attorney fees are not recoverable as costs. There was no reason given by Hyatt as to why attorney fees constitute a cost, let alone a recoverable one.

///

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$5,393.82	\$5,393.82	\$0.00

Exhibit 7

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$9,408.38	\$9,408.38	\$0.00

**Q. Document Scanning Services**

No explanation or evidence was provided by Hyatt why document scanning services were reasonable or necessary beyond normal office overhead. Upon review of the supporting documentation, the costs sought are contained in mere spreadsheet line items sought by the attorney firm with no other supporting documentation. This leads the Special Master to believe these costs are charged Hyatt for in-house scanning that occurs on a printer/copier in the attorney office. For the most part, there was no showing of how these costs are extraordinary and beyond mere routine office costs except for those costs sought under Exhibit 7. Without such as showing, the cost cannot be recovered even if there was sufficient justifying documentation. In cases were a sufficient showing through detailed argument and supplementation existed, the costs were recoverable with sufficient justifying documentation.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$3,012.00	\$3,012.00	\$0.00

Exhibit 7

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$12,082.93	\$0.00	\$12,082.93

**S. [sic] Technology Services**

Hyatt has provided justifying documentation and arguments why such services were reasonable and necessary in this action given the length of the trial time and information provided to the court and jury.

Exhibit 7

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$499,459.54	\$0.00	\$499,459.54

///

**T. General Legal Research**

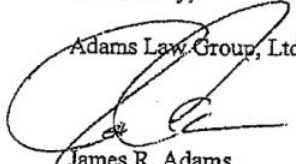
Again, there was a lack of any evidence or argument demonstrating what these items were used for, why they were necessary, and how the cost was reasonable given this case. Without such as showing, the cost cannot be recovered.

Costs Requested	Costs Not Recoverable	Costs Recoverable
\$86.75	\$86.75	\$0.00

Thus, in conclusion, the Special Master recommends that \$2,539,068.65 of the proposed costs be recoverable by Hyatt. The Special Master recommends that \$788,253.47 of the proposed costs sought by Hyatt not be recoverable.

Yours Truly,

Adams Law Group, Ltd.



James R. Adams



# EXHIBIT 1

HYATT vs CA FTB (PLAINTIFF COST ANALYSIS)  
ALL - Cost Categorization (Summary Analysis) [All NRS Codes]  
As of November 20, 2009

	REASONABLE / NECESSARY COSTS	REASONABLE / NECESSARY COSTS	TOTAL
17 (f) - Courier / Runner Service	20.00	20.00	40.00
17 (g) - Travel - Deposition / Discovery	63.18	15.00	78.18
17 (h) - Miscellaneous Costs	0.00	0.00	0.00
17 (i) - Parking (Court)	25.00	25.00	50.00
17 (j) - Office / Trial Supplies	0.00	0.00	0.00
17 (k) - Investigation Services	0.00	0.00	0.00
17 (m) - State Bar of Nevada Fees	0.00	0.00	0.00
17 (n) - Overtime Pay - Staff	0.00	0.00	0.00
17 (o) - Telephone Charges	0.00	0.00	0.00
17 (p) - Attorney / Professional Fees	0.00	0.00	0.00
17 (q) - Document Scanning Service	0.00	0.00	0.00
17 (r) - General Legal Research	0.00	0.00	0.00
<b>Total 17 - Reasonable / Necessary Costs</b>	<b>108.18</b>	<b>40.00</b>	<b>148.18</b>
<b>Total EXHIBITS 1/2/3/4/5</b>	<b>108.18</b>	<b>40.00</b>	<b>148.18</b>
<b>EXHIBIT 6</b>			
02-06 - Reporters' Fees / Depositions	48.00	48.00	96.00
17-06 - Reasonable / Necessary Costs	0.00	0.00	0.00
17(02)6 - Transcripts - Miscellaneous	0.00	0.00	0.00
<b>Total 17-06 - Reasonable / Necessary Costs</b>	<b>48.00</b>	<b>48.00</b>	<b>96.00</b>
<b>Total EXHIBIT 6</b>	<b>48.00</b>	<b>48.00</b>	<b>96.00</b>
<b>EXHIBIT 7</b>			
05-07 - Expert Witnesses Fees / Costs			
05-7(a) - Expert Witnesses (Price Water-1)			
05-00-7 - Expert Witnesses (Price Exp)	0.00	0.00	0.00
05-01-7 - Expert Witness (Anderson)	0.00	0.00	0.00
05-02-7 - Expert Witness (Bautista)	0.00	0.00	0.00
05-03-7 - Expert Witness (Brennan)	0.00	0.00	0.00
05-04-7 - Expert Witness (Coleman)	0.00	0.00	0.00
05-05-7 - Expert Witness (DIB)	0.00	0.00	0.00
05-06-7 - Expert Witness (Draw)	0.00	0.00	0.00
05-07-7 - Expert Witness (Freeman)	0.00	0.00	0.00
05-08-7 - Expert Witness (Jumiate)	0.00	0.00	0.00
05-09-7 - Expert Witness (Lo)	0.00	0.00	0.00
05-10-7 - Expert Witness (Machado)	0.00	0.00	0.00
05-11-7 - Expert Witness (Mullenburg)	0.00	0.00	0.00
05-12-7 - Expert Witness (Reynolds)	0.00	0.00	0.00
05-13-7 - Expert Witness (Waggener)	0.00	0.00	0.00
05-14-7 - Expert Witness (Wilkins)	0.00	0.00	0.00
<b>Total 05-7(a) - Expert Witnesses (Price Water-1)</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>
05-7(b) - Expert Witnesses (Other-4)			
05-15-7 - Expert Witness (Antolin)	0.00	0.00	0.00
05-16-7 - Expert Witness (Schervish)	0.00	0.00	0.00
05-17-7 - Expert Witness (Sjoberg)	0.00	0.00	0.00
05-18-7 - Expert Witness (Solove)	0.00	0.00	0.00
<b>Total 05-7(b) - Expert Witnesses (Other-4)</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>
<b>Total 05-07 - Expert Witnesses Fees / Costs</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>

9:00 AM  
11/23/09  
Accrual Basis

HYATT vs CA FTB (PLAINTIFF COST ANALYSIS)  
ALL - Cost Categorization (Summary Analysis) [All NRS Codes]  
As of November 20, 2009

Expense

EXHIBITS 1/2/3/4/5

- 01 - Clerks' Fees / Costs
- 02 - Reporters' Fees / Depositions
- 03 - Jurors' Fees / Expenses
- 04 - General Witnesses Fees / Costs
- 05 - Interpreters Fees / Costs
- 07 - Summons / Subpoena Process Serv
- 08 - Reporters' Fees / Court
- 11 - Telecopies / Facsimiles Costs
- 12 - Photocopies Costs
  - 12 (a) - Photocopies Costs - Inhouse
  - 12 (b) - Photocopies Costs - Outsourced
- Total 12 - Photocopies Costs

- 13 - Long Distance / Conf Phone Cost
  - 13 (a) - Long Distance Charges
  - 13 (b) - Conference Call Charges
  - 13 (c) - Cellular Phone Charges
- Total 13 - Long Distance / Conf Phone Cost

- 14 - Postage / Delivery
  - 14 (a) - General Postage - USPS
  - 14 (b) - Overnight Delivery Service
- Total 14 - Postage / Delivery

- 15 - Travel Costs - Dep / Discovery
  - 15 (a) - Airfare
  - 15 (b) - Auto Rental / Fuel / Tolls
  - 15 (c) - Ground Transportation
  - 15 (d) - Hotels / Lodging
  - 15 (e) - Meals
  - 15 (f) - Mileage Reimbursement
  - 15 (g) - Parking
- Total 15 - Travel Costs - Dep / Discovery

- 17 - Reasonable / Necessary Costs
  - 17 (a) - Computerized Legal Research
  - 17 (b) - Electronic Database Management
  - 17 (c) - LiveNote - Real Time Transcript
  - 17 (d) - Travel To NSC
  - 17 (e) - Transcripts
    - 17 (e1) - Transcripts - Trial / Hearing
    - 17 (e2) - Transcripts - Miscellaneous
    - 17 (e3) - Transcripts - Commission Biggar
- Total 17 (e) - Transcripts

CONDENSED REPORT FORMAT

ADPHISMRECOMMENDED	STPHISMNOTRECOMMENDED	TOTAL
01 - Clerks' Fees / Costs	01 - Clerks' Fees / Costs	01 - Clerks' Fees / Costs
02 - Reporters' Fees / Depositions	02 - Reporters' Fees / Depositions	02 - Reporters' Fees / Depositions
03 - Jurors' Fees / Expenses	03 - Jurors' Fees / Expenses	03 - Jurors' Fees / Expenses
04 - General Witnesses Fees / Costs	04 - General Witnesses Fees / Costs	04 - General Witnesses Fees / Costs
05 - Interpreters Fees / Costs	05 - Interpreters Fees / Costs	05 - Interpreters Fees / Costs
07 - Summons / Subpoena Process Serv	07 - Summons / Subpoena Process Serv	07 - Summons / Subpoena Process Serv
08 - Reporters' Fees / Court	08 - Reporters' Fees / Court	08 - Reporters' Fees / Court
11 - Telecopies / Facsimiles Costs	11 - Telecopies / Facsimiles Costs	11 - Telecopies / Facsimiles Costs
12 - Photocopies Costs	12 - Photocopies Costs	12 - Photocopies Costs
12 (a) - Photocopies Costs - Inhouse	12 (a) - Photocopies Costs - Inhouse	12 (a) - Photocopies Costs - Inhouse
12 (b) - Photocopies Costs - Outsourced	12 (b) - Photocopies Costs - Outsourced	12 (b) - Photocopies Costs - Outsourced
Total 12 - Photocopies Costs	Total 12 - Photocopies Costs	Total 12 - Photocopies Costs
13 - Long Distance / Conf Phone Cost	13 - Long Distance / Conf Phone Cost	13 - Long Distance / Conf Phone Cost
13 (a) - Long Distance Charges	13 (a) - Long Distance Charges	13 (a) - Long Distance Charges
13 (b) - Conference Call Charges	13 (b) - Conference Call Charges	13 (b) - Conference Call Charges
13 (c) - Cellular Phone Charges	13 (c) - Cellular Phone Charges	13 (c) - Cellular Phone Charges
Total 13 - Long Distance / Conf Phone Cost	Total 13 - Long Distance / Conf Phone Cost	Total 13 - Long Distance / Conf Phone Cost
14 - Postage / Delivery	14 - Postage / Delivery	14 - Postage / Delivery
14 (a) - General Postage - USPS	14 (a) - General Postage - USPS	14 (a) - General Postage - USPS
14 (b) - Overnight Delivery Service	14 (b) - Overnight Delivery Service	14 (b) - Overnight Delivery Service
Total 14 - Postage / Delivery	Total 14 - Postage / Delivery	Total 14 - Postage / Delivery
15 - Travel Costs - Dep / Discovery	15 - Travel Costs - Dep / Discovery	15 - Travel Costs - Dep / Discovery
15 (a) - Airfare	15 (a) - Airfare	15 (a) - Airfare
15 (b) - Auto Rental / Fuel / Tolls	15 (b) - Auto Rental / Fuel / Tolls	15 (b) - Auto Rental / Fuel / Tolls
15 (c) - Ground Transportation	15 (c) - Ground Transportation	15 (c) - Ground Transportation
15 (d) - Hotels / Lodging	15 (d) - Hotels / Lodging	15 (d) - Hotels / Lodging
15 (e) - Meals	15 (e) - Meals	15 (e) - Meals
15 (f) - Mileage Reimbursement	15 (f) - Mileage Reimbursement	15 (f) - Mileage Reimbursement
15 (g) - Parking	15 (g) - Parking	15 (g) - Parking
Total 15 - Travel Costs - Dep / Discovery	Total 15 - Travel Costs - Dep / Discovery	Total 15 - Travel Costs - Dep / Discovery
17 - Reasonable / Necessary Costs	17 - Reasonable / Necessary Costs	17 - Reasonable / Necessary Costs
17 (a) - Computerized Legal Research	17 (a) - Computerized Legal Research	17 (a) - Computerized Legal Research
17 (b) - Electronic Database Management	17 (b) - Electronic Database Management	17 (b) - Electronic Database Management
17 (c) - LiveNote - Real Time Transcript	17 (c) - LiveNote - Real Time Transcript	17 (c) - LiveNote - Real Time Transcript
17 (d) - Travel To NSC	17 (d) - Travel To NSC	17 (d) - Travel To NSC
17 (e) - Transcripts	17 (e) - Transcripts	17 (e) - Transcripts
17 (e1) - Transcripts - Trial / Hearing	17 (e1) - Transcripts - Trial / Hearing	17 (e1) - Transcripts - Trial / Hearing
17 (e2) - Transcripts - Miscellaneous	17 (e2) - Transcripts - Miscellaneous	17 (e2) - Transcripts - Miscellaneous
17 (e3) - Transcripts - Commission Biggar	17 (e3) - Transcripts - Commission Biggar	17 (e3) - Transcripts - Commission Biggar
Total 17 (e) - Transcripts	Total 17 (e) - Transcripts	Total 17 (e) - Transcripts

9:00 AM  
11/23/09  
Accrual Basis

HYATT vs CA FTB (PLAINTIFF COST ANALYSIS)  
ALL - Cost Categorization (Summary Analysis) [All NRS Codes]  
As of November 20, 2009

	PLAINTIFF RECOMMENDED	DEFENSE RECOMMENDED	TOTAL
12-07 • Photocopies Costs			
12(b)7 • Photocopies Costs - Outsourced	3,910.24	0.00	3,910.24
Total 12-07 • Photocopies Costs	3,910.24	0.00	3,910.24
17-07 • Reasonable / Necessary Costs			
17(b)7 • Electronic Database Management	15,922.89	0.00	15,922.89
17(e)7 • Transcripts - Commission Biggar	1,527.99	0.00	1,527.99
17(h)7 • Miscellaneous Costs	3,490.32	0.00	3,490.32
17(j)7 • Office / Trial Supplies	0.00	0.00	0.00
17(p)7 • Attorney / Professional Fees	2,000.00	0.00	2,000.00
17(q)7 • Document Scanning Service	3,269.93	0.00	3,269.93
17(s)7 • Expert Witnesses Fees / Costs			
17(s1) • Expert Witness (Bates)	0.00	1,100.00	1,100.00
17(s2) • Expert Witness (Evashenko)	0.00	7,948.86	7,948.86
17(s3) • Expert Witness (Frank)	0.00	2,318.89	2,318.89
17(s4) • Expert Witness (Swartz)	0.00	6,057.00	6,057.00
17(s5) • Expert Witness (Truly)	0.00	1,112.14	1,112.14
Total 17(s)7 • Expert Witnesses Fees / Costs	0.00	14,026.89	14,026.89
17(t)7 • Trial Technology Services	18,459.75	2,000.00	20,459.75
Total 17-07 • Reasonable / Necessary Costs	37,900.02	16,026.89	53,926.91
Total EXHIBIT 7	41,810.26	16,026.89	57,837.15
EXHIBIT 9			
03-09 • Jurors' Fees / Expenses	1,665.40	0.00	1,665.40
Total EXHIBIT 9	1,665.40	0.00	1,665.40
Total Expense	43,475.66	16,026.89	59,502.55
Percentage	76.31%	23.68%	

8/29/24  
1/10/25  
Annual Rate

HYATT vs CAFTB (PLAINTIFF COST ANALYSIS)  
ALL - Cost Categorization (Summary Analysis) [All NRS Codes]

As of November 26, 2025

Expense	Attorney's Fee 14 Costs (\$M NOT RECOMMENDED)	Reproduction (\$M NOT RECOMMENDED)	Total 14 RECOMMENDED	Unlawful NRS 18 Costs (\$M NOT RECOMMENDED)	No Profit Of Cost Incurred (\$M NOT RECOMMENDED)	No Profit Of Necessity (\$M NOT RECOMMENDED)	Inefficient Profit Of Necessity (\$M NOT RECOMMENDED)	Inefficient Profit Actual Cost (\$M NOT RECOMMENDED)
631-8751/12/14/16								
01 - Check/Taxi Costs	1,321.00	0.00	1,321.00	0.00	71.94	0.00	0.00	1,000.00
02 - Reproduction/Taxi/Replication	27,441.56	0.00	27,441.56	0.00	28.00	0.00	0.00	1,071.00
03 - Attorney's Fee/Expenses	1,811.39	0.00	1,811.39	0.00	0.00	0.00	0.00	0.00
04 - General Counsel/Paid Costs	521.00	0.00	521.00	0.00	0.00	0.00	0.00	1,728.00
05 - General Counsel/Paid Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
06 - General Counsel/Paid Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
07 - General Counsel/Paid Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
08 - General Counsel/Paid Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
09 - General Counsel/Paid Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
10 - General Counsel/Paid Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
11 - Transcripts/Facilities Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
12 - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 - Photocopies Costs - In-house	64,681.78	0.00	64,681.78	0.00	64,681.78	0.00	0.00	64,681.78
13 (a) - Photocopies Costs	64,681.78	0.00	64,681.78	0.00	64,681.78	0.00	0.00	64,681.78
13 (b) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (c) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (d) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (e) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (f) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (g) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (h) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (i) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (j) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (k) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (l) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (m) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (n) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (o) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (p) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (q) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (r) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (s) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (t) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (u) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (v) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (w) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (x) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (y) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
13 (z) - Photocopies Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 - Postage/Delivery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (a) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (b) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (c) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (d) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (e) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (f) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (g) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (h) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (i) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (j) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (k) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (l) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (m) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (n) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (o) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (p) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (q) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (r) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (s) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (t) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (u) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (v) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (w) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (x) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (y) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
14 (z) - General Postage - USPS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 - Travel Costs - Day / Discovery	10,844.42	0.00	10,844.42	0.00	1,945.56	0.00	0.00	1,945.56
15 (a) - Airfare	3,716.53	0.00	3,716.53	0.00	3,716.53	0.00	0.00	3,716.53
15 (b) - Auto Rental / Fuel / Tolls	213.62	0.00	213.62	0.00	213.62	0.00	0.00	213.62
15 (c) - Ground Transportation	6,114.27	0.00	6,114.27	0.00	6,114.27	0.00	0.00	6,114.27
15 (d) - Hotel / Lodging	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (e) - Meal / Entertainment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (f) - Miscellaneous	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (g) - Parking	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (h) - Travel Costs - Day / Discovery	20,721.82	0.00	20,721.82	0.00	2,812.56	0.00	0.00	2,812.56
15 (i) - Travel Costs - Day / Discovery	20,721.82	0.00	20,721.82	0.00	2,812.56	0.00	0.00	2,812.56
15 (j) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (k) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (l) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (m) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (n) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (o) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (p) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (q) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (r) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (s) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (t) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (u) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (v) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (w) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (x) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (y) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
15 (z) - Travel Costs - Day / Discovery	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 - Reproduction / Necessary Costs	141,185.55	0.00	141,185.55	0.00	141,185.55	0.00	0.00	141,185.55
16 (a) - Computer / Necessary Costs	141,185.55	0.00	141,185.55	0.00	141,185.55	0.00	0.00	141,185.55
16 (b) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (c) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (d) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (e) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (f) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (g) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (h) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (i) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (j) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (k) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (l) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (m) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (n) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (o) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (p) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (q) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (r) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (s) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (t) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (u) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (v) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (w) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (x) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (y) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
16 (z) - Computer / Necessary Costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 - Transcripts - Total / Necessity	48,108.95	0.00	48,108.95	0.00	48,108.95	0.00	0.00	48,108.95
17 (a) - Transcripts - Total / Necessity	48,108.95	0.00	48,108.95	0.00	48,108.95	0.00	0.00	48,108.95
17 (b) - Transcripts - Total / Necessity	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (c) - Transcripts - Total / Necessity	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (d) - Transcripts - Total / Necessity	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (e) - Transcripts - Total / Necessity</								

8:00 AM  
NY 0018  
11/23/09  
Account 021417

HYATT vs CA FTB (PLAINTIFF COST ANALYSIS)  
ALL - Cost Categorization (Summary Analysis) [All NRS Codes]

	Attainable MHS 18 Costs (\$M NOT RECOMMENDED)	Realistic Values (\$M RECOMMENDED)	Total All RECOMMENDED	Unattainable MHS 18 Costs (\$M NOT RECOMMENDED)	No Proof of Necessity (\$M NOT RECOMMENDED)	Insufficient Proof of Necessity (\$M NOT RECOMMENDED)	Insufficient Proof of Actual Cost (\$M NOT RECOMMENDED)
17 (7) - Courier / Runner Service	20.00	0.00	20.00	0.00	14.00	1,697.80	0.00
17 (8) - Travel - Expenses / Dictionary	665.18	0.00	665.18	0.00	2,303.87	7,479.75	511.10
17 (9) - Merchandise Costs	0.00	0.00	0.00	0.00	2,896.16	4,719.30	151.40
17 (10) - Shipping / Courier	250.00	0.00	250.00	0.00	0.00	0.00	0.00
17 (11) - Insurance	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (12) - Investigation Services	0.00	0.00	0.00	0.00	0.00	15,369.00	0.00
17 (13) - Other	0.00	0.00	0.00	0.00	0.00	3,543.35	0.00
17 (14) - State Bar of Nevada Fees	0.00	0.00	0.00	0.00	0.00	8,600.00	0.00
17 (15) - Overnight Fax - Staff	0.00	0.00	0.00	0.00	0.00	182.46	0.00
17 (16) - Telephone Charges	3,130.00	0.00	3,130.00	0.00	203.00	0.00	0.00
17 (17) - Attorney / Professional Fees	0.00	0.00	0.00	5,593.82	0.00	0.00	0.00
17 (18) - Expenses / Professional Fees	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (19) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (20) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (21) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (22) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (23) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (24) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (25) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (26) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (27) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (28) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (29) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (30) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (31) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (32) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (33) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (34) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (35) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (36) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (37) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (38) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (39) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (40) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (41) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (42) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (43) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (44) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (45) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (46) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (47) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (48) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (49) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (50) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (51) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (52) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (53) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (54) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (55) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (56) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (57) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (58) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (59) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (60) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (61) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (62) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (63) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (64) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (65) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (66) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (67) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (68) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (69) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (70) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (71) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (72) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (73) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (74) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (75) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (76) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (77) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (78) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (79) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (80) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (81) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (82) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (83) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (84) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (85) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (86) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (87) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (88) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (89) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (90) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (91) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (92) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (93) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (94) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (95) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (96) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (97) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (98) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (99) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (100) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (101) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (102) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (103) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (104) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (105) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (106) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (107) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (108) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (109) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (110) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (111) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (112) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (113) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (114) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (115) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (116) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (117) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (118) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (119) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (120) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (121) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (122) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (123) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (124) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (125) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (126) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (127) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (128) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (129) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (130) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (131) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (132) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (133) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (134) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (135) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (136) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (137) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (138) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (139) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (140) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (141) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (142) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (143) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (144) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (145) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (146) - Other / Expenses / Subscribing Service	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17 (147) - Other / Expenses / Subscri							

[illegible]

codes]

Expense	Reasonable Expense Incurred (\$M NOT RECOMMENDED)	Category - Usable, Per MS (\$M NOT RECOMMENDED)	English Documentation (\$M NOT RECOMMENDED)	Math Error (\$M NOT RECOMMENDED)	Not This Case (\$M NOT RECOMMENDED)	Total All VO's Recommended	TOTAL
Expend 12/21/15							
11-Child Care Costs	0.00	0.00	0.00	0.00	0.00	171.84	1,506.44
12-Child Support/Free Options	2,545.11	0.00	0.00	0.00	0.00	3,452.12	31,699.68
13-Joint Fees/Expenses	0.00	0.00	0.00	0.00	0.00	1,644.26	1,644.26
14-General Minimum Fees / Costs	15.00	0.00	90.00	0.00	0.00	1,641.00	2,296.00
15-Insurance Fees / Costs	0.00	0.00	0.00	0.00	0.00	184.00	184.00
16-Summary / Subject Process Serv	0.00	0.00	0.00	0.00	0.00	122.96	775.58
17-Repellent Fees / Costs	161.48	0.00	0.00	0.00	0.00	840.16	1,327.11
18-Telephone / Recruits Costs	0.00	0.00	0.00	0.00	0.00	27,723.12	27,723.12
19-Philippines Costs	0.00	0.00	0.00	0.00	0.00	66,573.12	66,573.12
20-Philippines Costs - Jobs	428.86	12.00	487.22	0.00	0.00	18,664.27	18,664.27
21-Philippines Costs - Outcomes	448.86	13.00	487.22	0.00	0.00	90,271.40	116,427.18
Total 12- Philippines Costs							
13-Long Distance / Cell Phone Cost	841.87	0.00	0.00	0.00	0.00	3,877.05	3,871.19
14-Long Distance / Cell Phone Cost	0.00	0.00	0.00	0.00	0.00	4,545.12	4,545.12
15-Long Distance / Cell Phone Cost	841.31	0.00	0.00	0.00	0.00	971.33	971.33
16-Long Distance / Cell Phone Cost	1,482.25	0.00	0.00	0.00	0.00	6,394.07	6,394.07
Total 13- Long Distance / Cell Phone Cost							
14-Philippines Salary	0.00	0.00	0.00	0.00	0.00	1,518.27	1,523.87
15-Philippines Salary	337.73	0.00	0.00	0.00	0.00	1,518.27	1,518.27
16-Philippines Salary	337.73	0.00	0.00	0.00	0.00	1,518.27	1,518.27
17-Philippines Salary	337.73	0.00	0.00	0.00	0.00	1,518.27	1,518.27
Total 14- Philippines Salary							
15-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
16-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
17-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
18-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
19-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
20-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
21-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
22-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
23-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
24-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
25-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
26-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
27-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
28-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
29-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
30-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
31-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
32-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
33-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
34-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
35-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
36-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
37-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
38-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
39-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
40-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
41-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
42-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
43-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
44-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
45-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
46-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
47-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
48-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
49-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
50-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
51-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
52-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
53-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
54-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
55-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
56-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
57-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
58-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
59-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
60-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
61-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
62-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
63-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
64-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
65-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
66-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
67-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
68-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
69-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
70-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
71-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
72-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
73-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
74-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
75-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
76-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
77-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
78-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
79-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
80-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
81-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
82-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
83-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
84-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
85-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
86-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
87-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
88-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
89-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
90-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
91-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
92-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
93-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
94-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
95-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
96-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
97-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
98-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
99-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
100-Trip Costs - Out / Outcomes	2,750.26	0.00	0.00	0.00	0.00	8,564.64	17,782.94
Total 15- Trip Costs - Out / Outcomes							
17-Racewinds / Nursery Costs	22.18	0.00	0.00	0.00	0.00	123,096.90	261,168.90
17 (a) - Comprehensive Legal Research	0.00	0.00	0.00	0.00	0.00	2,088.62	2,088.62
17 (b) - Economic Database Management	0.00	0.00	0.00	0.00	0.00	2,088.62	2,088.62
17 (c) - Lawyer - Real Time Transcription	0.00	0.00	0.00	0.00	0.00	2,088.62	2,088.62
17 (d) - Travel To NYC	0.00	0.00	0.00	0.00	0.00	2,088.62	2,088.62
17 (e) - Transcription	4,823.05	0.00	0.00	0.00	0.00	16,844.80	105,990.78
17 (f) - Transcription - Travel / Housing	594.75	0.00	0.00	0.00	0.00	33,068.34	87,835.63
17 (g) - Transcription - Miscellaneous	0.00	0.00	0.00	0.00	0.00	6,078.92	9,678.92
17 (h) - Transcription - Condominium Rgnt	4,812.82	0.00	0.00	0.00	0.00	39,623.94	177,694.86
Total 17 (a) - Transcription							