No. _____

In the Supreme Court of the United States

MICHAEL PATRICK LATHIGEE,
Petitioner,

v.

BRITISH COLUMBIA SECURITIES COMMISSION
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Nevada's opinion enforcing the BCSC's $21.7 million (CAD) Canadian "Disgorgement Order" against Lathigee as a judgment in Nevada conflicts with this Court's precedents in *Huntington* v. *Attrill*, 146 U.S. 657, 13 S. Ct. 224 (1892); *Kokesh* v. *SEC*, 581 U.S. ___, 137 S. Ct. 1635 (2017); and *Liu* v. *SEC*, 591 U.S. ___, 140 S. Ct. 1936 (2020), such that certiorari should be granted, because the Disgorgement Order constitutes a fine or penalty as a matter of law.

PARTIES TO THE PROCEEDINGS

Petitioner, Michael Patrick Lathigee ("Lathigee"), was the appellant in the Supreme Court of Nevada and defendant in the Eighth Judicial District Court, Clark County, Nevada.

Respondent, British Columbia Securities Commission ("BCSC"), was the respondent in the Supreme Court of Nevada and the plaintiff in the Eighth Judicial District Court, Clark County, Nevada.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Lathigee is an individual.

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TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Lathigee respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this matter.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada is reprinted in the Appendix ("App.") at 1a-16a and is reported at 477 P.3d 352. The District Court's findings of fact, conclusions of law and judgment is reprinted at App. 17a-48a. The original Canadian Disgorgement Order is reprinted at App. 49a-76a. The Nevada Supreme Court's unpublished order denying rehearing is reprinted at App. 77a-78a.

JURISDICTION

The Supreme Court of Nevada issued its opinion on December 10, 2020. A copy of that opinion is reprinted at App. 1a-16a.

A timely petition for rehearing was denied on March 18, 2021, and a copy of the order denying rehearing is reprinted at App. 77a-78a. This Court's March 19, 2020 order extended the deadline to file petitions for writs of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. Legal Framework Relevant to Disgorgement Orders.

1. *Huntington* v. *Attrill*. This Court has historically refused to recognize foreign country judgments that are penal in nature. The genesis of American law on the subject arises in 1825 in a statement by Justice Marshall that "[t]he Courts of no country execute the penal laws of another. . . ." *The Antelope*, 23 U.S. 66, 1825 WL 3130, 10 Wheat. 66, 123 (1825). The meaning of "penal" in this context was the subject of a later U.S. Supreme Court opinion in *Huntington* v. *Attrill*, 146 U.S. 657, 13 S. Ct. 224 (1892), a case where one private individual (Huntington) obtained a securities fraud judgment against another private individual (Attrill), wherein it was stated,

> Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

146 U.S. at 667, 13 S. Ct. at 227.

And later in the same opinion:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries'; the latter are a breach and violation of public rights and duties, *which affect the whole community, considered as a community*, and are distinguished by the harsher appellation of 'crimes and misdemeanors.' 3 Bl. Comm. 2.

146 U.S. at 668-69, 13 S. Ct. at 228 (italics added).

Thus, the rule of *Huntington* is that U.S. courts may only enforce judgments that are based on the purely private rights belonging to individuals and cannot enforce judgments from a foreign nation that seek to protect the public interests of that nation. The latter are simply unenforceable by the U.S. courts and are not recognized. *Huntington* remains the seminal opinion on the subject and was discussed at length

and followed as recently as 2017 in *Kokesh* v. *SEC*, 581 U.S. ___, 137 S. Ct. 1635 (2017).

2. *Kokesh* v. *SEC*. *Kokesh* involved an SEC enforcement action for an alleged violation of federal securities laws, wherein the SEC sought a disgorgement judgment against the defendant. At issue in the appeal before this Court was whether there was a penalty within the five-year limitations period of 28 U.S.C. § 2464, which provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The U.S. District Court held that the disgorgement was not a penalty, and that § 2462 did not apply; the Tenth Circuit Court of Appeals affirmed that decision. *SEC* v. *Kokesh*, 834 F.3d 1158 (10th Cir. 2016). This Court reversed. 137 S. Ct. at 1646.

Writing for a unanimous court, Justice Sotomayor began her opinion with the Court's holding:

> A 5-year statute of limitations applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. This case presents the question whether § 2462 *applies to claims for disgorgement imposed as a sanction for violating a federal securities law*. The Court holds that it does. *Disgorgement in the securities-enforcement context is a "penalty" within the meaning of § 2462*, and so disgorgement actions must be commenced within five years of the date the claim accrues.

137 S. Ct. at 1639 (emphases added).

Going through the history of the SEC's disgorgement powers, Justice Sotomayor noted that beginning in the 1970's, the courts began ordering disgorgement in SEC enforcement proceedings for two reasons: (1) to deprive defendants of their profits and thus remove any perceived reward for violating the securities laws, and (2) to protect the public by providing a deterrent to future violations. 137 S. Ct. at 1640 (citing *SEC* v. *Texas Gulf Sulpher Co.*, 312 F. Supp. 77, 92 (S.D.N.Y. 1970)).

Justice Sotomayor went on to describe in considerable detail the definition of "penalty":

> A "penalty" is a "punishment, whether corporal or pecuniary, imposed and

> enforced by the State, for a crime or offen[s]e against its laws." *Huntington* v. *Attrill*, 146 U.S. 657, 667, 13 S. Ct. 224, 36 L.Ed. 1123 (1892). This definition gives rise to two principles. First, whether a sanction represents a penalty turns in part on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." *Id.*, at 668, 13 S. Ct. 224. Although statutes creating private causes of action against wrongdoers may appear—or even be labeled—penal, in many cases "neither the liability imposed nor the remedy given is strictly penal." *Id.*, at 667, 13 S. Ct. 224. This is because "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." *Id.* Second, a pecuniary sanction operates as a penalty only if it is sought "for the purpose of punishment, and to deter others from offending in like manner"—as opposed to compensating a victim for his loss. *Id.*, at 668, 13 S. Ct. 224.

137 S. Ct. at 1642.

This definition resulted in the conclusion that disgorgement is a penalty. 137 S. Ct. at 1643. Justice Sotomayor then identified several factors that characterized disgorgement as a penalty.

First, Justice Sotomayor concluded in *Kokesh* that disgorgement is a penalty because it is a public law that gives rise to disgorgement. 137 S. Ct. at 1643. "The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Id.*

Second, Justice Sotomayor determined in *Kokesh* that disgorgement is imposed for punitive purposes, to both deprive defendants of the profits of their activities and to deter future violations. 137 S. Ct. at 1643. "Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objective." *Id.* (internal quotation marks and citations omitted).

Third, Justice Sotomayor also concluded that disgorgement is not compensatory since courts "have required disgorgement regardless of whether the disgorged funds will be paid to such investors as restitution." 137 S. Ct. at 1644 (internal quotation marks and citations omitted). In the case of the SEC (as with the BCSC), Justice Sotomayor noted that while some of the funds may go to investors, other of the funds may go to the U.S. Treasury, and (as with the BCSC) there is no statutory law that commands the distribution of funds to investors. *Id.* "When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a

legal violation, the payment operates as a penalty." *Id.* "Disgorgement . . . is intended not only to prevent a wrongdoer's unjust enrichment but also to deter others' violations of the securities laws." 137 S. Ct. at 1645.

Justice Sotomayor also rejected the SEC's contention that disgorgement is remedial in nature, since "disgorgement sometimes exceeds the profits gained as a result of the violation." 137 S. Ct. at 1644. Thus, inside traders may be subject to disgorgement even if they do not profit from their information. *Id.* Further, as happened in the case at bar, "disgorgement is sometimes ordered without consideration of a defendant's expenses that reduce the amount of illegal profit." *Id.*

Finally, Justice Sotomayor nixed the SEC's "mixed motives" argument:

> True, disgorgement serves compensatory goals in some cases; however, we have emphasized the fact that sanctions frequently serve more than one purpose. . . A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. . . Because disgorgement orders "go beyond compensation, are intended to punish, and label defendants wrongdoers" as a

> consequence of violating public laws, . . . they represent a penalty and thus fall within the 5-year statute of limitations of § 2462.

137 S. Ct. at 1644-45.

3. *Liu* v. *SEC*. In *Liu*, this Court outlined an equitable relief exception to the general rule that disgorgement is a penalty when a disgorgement award "does not exceed a wrongdoer's net profits and is awarded for victims. . . ." *Liu* v. *SEC*, 140 S. Ct. at 1940. Notably, in order to ascertain whether this exception was applicable, the Court vacated the judgment and remanded the case with instructions for the lower courts to "ensure the award was so limited." *Id.* Elaborating on this issue, the Court clarified, "Courts may not enter disgorgement awards that exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into the account.'" *Id.* at 1949-50 (citation omitted).

B. Factual and Procedural History.

1. The Administrative Proceedings Before the BCSC. The BCSC bifurcates its administrative proceedings into two "portions," being a "liability portion" and a "sanctions portion," similar to how an American court might divide the liability and punitive damages phases of a trial. On July 8, 2014, in the liability portion, Lathigee was found liable for violating § 57(b) of the British Columbia Securities

Act ("BCSA"). 5 Joint Appendix ("JA") 755-820; App.49a-76a.

The decision of the "sanctions portion" of the BCSC's hearing, resulting in the "Disgorgement Order," was issued on March 16, 2015. App. 50a, at ¶ 1. The order specifically stated, "This is the *sanctions portion* of a hearing pursuant to sections 161(1) and 162 of the *Securities Act*. . . ." *Id.* (emphasis added). The Disgorgement Order required "under section 161(1)(g) [of the BCSA] RSBC, 1996, c. 418], Lathigee pay to the Commission CAD$21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act. . . ." App. 74a, at ¶ 62(b)(iv).

> Section 161(1)(g) of the BCSA provides:
>
> > If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following: . . . (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention. . . ."

1 JA 78, at ¶ 1.

The BCSC registered the sanctions decision in the British Columbia Supreme Court on April 15, 2015, under § 163(1) of the BCSA which allows the Securities Commission to file a decision with the BC Supreme Court. "This does not involve an adjudication on the merits but is a registration process to facilitate the collection of monetary orders made by BCSC Panels." 1 JA 144, at ¶ 3.

Lathigee appealed the sanctions decision, and on May 31, 2017, the Court of Appeal for British Columbia issued its opinion in *Poonian* v. *BCSC*, 2017 BCCA 207 (2017), which was a similar appeal involving different litigants that was combined with Lathigee's appeal. 1 JA 74-125.

On February 12, 2018, the BCSC attempted to register (which is a much more abbreviated and clerical-type procedure than to recognize) the Disgorgement Order in Clark County, Nevada case no. A-18-769386-F (Dept. 12), under the Nevada Uniform Enforcement of Foreign Judgments Act ("NUEFJA"), Nev. Rev. Stat § 17.330 et seq. However, as the NEUFJA is limited to so-called sister-state judgments from other U.S. jurisdictions that are entitled to Full Faith and Credit under the U.S. Constitution, i.e., "foreign" in the NUEFJA means "other states." The BCSC, thus, stipulated to dismiss that improvidently-filed action.

2. Proceedings Before the State District Court. On March 20, 2018, the BCSC filed the Nevada state litigation, 1 JA 1, seeking recognition of

the Disgorgement Order, 1 JA 10-16, under two causes of action: First, under the Nevada Uniform Recognition of Foreign-Country Money Judgments Act ("NURF-CMJA"), Nev. Rev. Stat. § 17.700 et seq., and, second, under comity. The parties each conducted some very limited written discovery, after which both parties moved for summary judgment. 1 JA 32 & 149. Ultimately, on May 14, 2019, the District Court denied Lathigee's motion for summary judgment, granted the BCSC's countermotion for summary judgment, and entered judgment for the BCSC which recognized the Disgorgement Order. App. 17a-48a.

In the state District Court proceedings, Lathigee raised his arguments based on *Huntington* and *Kokesh*. App. 35a-38a. However, *Liu* had not yet been decided. The District Court rejected the applicability of *Huntington* and *Kokesh*, reaching the conclusion that "the British Columbia judgment sought to be recognized by this Court is not penal. . . ." App. 36a. The District Court also concluded that the holding of *Kokesh* was limited to the SEC and, thus, not applicable to the BCSC. App. 37a-39a. Finally, the District Court reasoned that *Huntington* was also inapplicable to this case because its holdings do not apply to foreign country judgments, as in the instant case. App. 39a-41a.

3. Proceedings Before the Nevada Supreme Court. After Lathigee appealed to the Nevada Supreme Court, the case was assigned to the en banc panel of the Court. App. 1a. After the case

was fully briefed, this Court issued *Liu*, which was addressed only by supplemental authorities, not supplemental briefs. Thus, the Nevada Supreme Court's opinion addressed *Huntington*, *Kokesh*, and *Liu*.

With regard to *Huntington*, the Nevada Supreme Court determined the word "penal" has "different shades of meaning" depending on the context. App. 7a. Although the Supreme Court recognized that a single judgment can include "both an unenforceable penalty and an enforceable remedial award, the Court eventually favored the enforceability of the Disgorgement Order. *Id.* The Supreme Court then reasoned that the Disgorgement Order could be viewed as remedial. App. 8a-9a.

Analyzing *Kokesh*, the Nevada Supreme Court, similar to the District Court, suggested that it would be inapplicable to foreign country judgments, such as the Disgorgement Order. App. 11a. The Supreme Court, nevertheless, analyzed *Kokesh* on its merits but only within the context of *Liu*. App. 11a-12a. Tellingly, however, the Supreme Court did not permit the remedy allowed by this Court for a remand to determine if an equitable exception existed to salvage the Disgorgement Order. App. 1a-16a.

Since *Liu* was issued after the Nevada Supreme Court was fully briefed, and only by supplemental authorities, Lathigee filed a petition for rehearing, which included a discussion of *Liu*.

Without any discussion, the Supreme Court denied rehearing. App. 77a-78a.

REASONS FOR GRANTING THE PETITION

A. The Nevada Supreme Court Opinion Conflicts With Both *Huntington* and *Kokesh*.

Building on *Huntington*, this Court observed in *Kokesh*, as an initial factor, that disgorgement is a penalty because it is a public law that gives rise to disgorgement. 137 S. Ct. at 1643. "The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Id.* As applied here, § 161(1)(g) of the BCSA is clearly a public law, which is implicated if, and only if, "the commission or the executive director considers it to be in the public interest." 1 JA 100, at ¶ 83. Thus, the Disgorgement Order declared, "We find that it is in the public interest to order the respondents to pay the full amount obtained as a result of their fraud." App. 68a, at ¶ 49.

The *Poonian* decision repeatedly stated that disgorgement under § 161(1)(g) must further the public interest. 1 JA 85, at ¶ 34 ("The Executive Director argues the issues raised by s. 161(1)(g) are distinct from those under § 155.1(b) because an order may be made, in the opening language of § 161(1), 'If the commission or the executive director considers it

to be in the public interest.…' For its part, § 155.1 does not require the court to consider the public interest. The Executive Director argues this signals a different 'statutory context.'"); 1 JA 85, at ¶ 35 ("Unlike the Copyright Board, the Commission is a 'discrete and special administrative regime', charged under the Act to protect the public interest in relation to investors and capital markets."); 1 JA 85, at ¶ 40 ("To be clear, the issue to be resolved on this appeal is not whether a disgorgement order would be in the public interest, nor is the issue whether there has been non-compliance with the Act. Those requisite elements of a § 161(1)(g) order are not before this Court."); 1 JA 89, at ¶ 49 ("I recognize the Commission's important public interest mandate that informs the Commission's exercise of discretion to make an order under § 161(1), which provides a host of tools to the Commission to use alone or in combination."); 1 JA 93, at ¶ 58 ("Principles that apply to all sanction orders are applicable to section 161(1)(g) orders, including: a) a sanction is discretionary and may be applied where the panel determines it to be in the public interest") (quoting *Re Michaels*, 214 BCSECCOM 457 (2014)); 1 JA 95, at ¶ 67 ("The Executive Director stresses the important and specialized role of the Commission in crafting sanctions that are in the public interest in the particular circumstances of the case before it."); 1 JA 119, at ¶ 112 ("Disgorgement is a specific tool, and the Commission must not, in the name of the public interest, use that tool in such a way as to extend it beyond its specific, permissible purpose."); 1 JA 120, at ¶ 144 ("I agree with and adopt the two-

step approach identified by Vice Chair Cave in *SPYru* [*Re SPYru Inc.*, 2015 BSCECCOM 452 (2015)] at paras. 131-32: . . . The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence."); 1 JA 124, at ¶ 165 ("Of course, it is also for the Commission to determine whether it is in the public interest to make any order under § 161(1)(g).").

The BCSC's expert witness, Mr. Gordon R. Johnson, 1 JA 131-39, included as support for his opinion a long passage from the British Columbia Court of Appeals in *Poonian* v. *British Columbia Securities Commission*, 2017 BCCA 207 (B.C. App. 2017), which quoted a similar opinion, *Committee for the Equal Treatment of Asbestos Minority Shareholders* v. *Ontario (Securities Commission)*, 201 SCC 37 at ¶ 42 (CanLII, 2001), arising from a comparable law in Ontario:

> The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. . . The focus of the regulatory law is on the protection of societal interests, not the punishment of an individual's moral faults. . . .

1 JA 132-33.

Lathigee's expert, Mr. Sullivan, opined that a consideration of the public interest is required under § 161: "The pre-conditions to the ordering of orders under Sections 161 and 162 of the BC Securities Act are a determination that the person has contravened a provision of the BC Securities Act and a consideration of the public interest." 1 JA 146, at ¶ 3. The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the Disgorgement Order imposed against Lathigee, arise from a public law, and further public interests, not private ones.

With regard to the second *Kokesh* factor, Justice Sotomayor determined that disgorgement is imposed for punitive purposes, to both deprive defendants of the profits of their activities and to deter future violations. 137 S. Ct. at 1643. "Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objective." *Id.* (internal quotation marks and citations omitted). The Disgorgement Order concluded, "Orders under sections 161(1) and 162 are protective and preventative, intended to be exercised to prevent future harm. *See Committee for Equal Treatment of Asbestos Minority Shareholders* v. *Ontario (Securities Commission)*, 2001 SCC 37. App. 53a, at ¶ 5. The Disgorgement Order stated that relevant considerations in determining whether to order sanctions include: (1) "the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct"; (2) "the need to

demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets"; and (3) "the need to deter those who participate in the capital markets from engaging in inappropriate conduct." App. 53a, at ¶ 6.

The *Poonian* decision affirmed that a purpose of § 161(1)(g) is deterrence. 1 JA 100, at ¶ 82 ("The taking away of any amounts obtained or payment or loss avoided deprives a person who fails to comply of any benefit. Therefore, the person is deterred from non-compliance. In that sense, § 161(1)(g) also has a deterrence purpose. This purpose is consistent with the Act's overarching remedial and protective nature."); 1 JA 105, at ¶ 102 ("[S]ummarizing the underlying principles of disgorgement . . . disgorgement reflects the equitable policy designed to remove all money unlawfully obtained by a respondent so that the respondent does not retain any financial benefit from breaching the Act.") (internal quotation marks and citation omitted); 1 JA 106, at ¶ 105 (same effect); 1 JA 108, at ¶ 112 (Disgorgement's "purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing."); 1 JA 111, at ¶ 120 ("The public interest is not unlimited. In my opinion, disgorgement may not go further than required to prevent each wrongdoer from retaining an amount obtained, directly or indirectly, as a result of the wrongdoing. Nor does deterrence require more."); 1 JA 119, at ¶ 143(1) ("The purpose of § 161(1)(g) is to deter persons from contravening the Act by removing the incentive to contravene, i.e., by ensuring the

person does not retain the "benefit" of their wrongdoing.").

The opinion of the BCSC's own expert, Mr. Johnson, repeatedly made clear that the purpose of the British Columbia law under which disgorgement is authorized is designed to deprive the defendant of wrongful profits and deter future violations, and thereby force compliance with British Columbia's security laws:

> The British Columbia Court of Appeal expresses the purpose of the Section 161(1)(g) remedy most clearly at paragraph 111 of the *Poonian* decision. There the Court makes it clear that the purpose is not to punish or to compensate. The purpose of the remedy is to deter non-compliance by removing the prospect of receiving and retaining moneys from non-compliance.

1 JA 133-34.

"Disgorgement is a specific tool, and the Commission must not, in the name of public interest, use that tool in such a way as to extend it beyond its specific, permissible purpose. Its purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing." 1 JA 133, at ¶ 112. "The 'disgorgement' remedy has the purpose of removing the incentive for non-compliance." 1 JA 134, at ¶ 5. Accordingly, there can be no reasonable dispute that disgorgement orders, imposed under § 161(1)(g),

including the instant Disgorgement Order, are imposed to deprive the defendant, such as Lathigee, of wrongful profits and deter future violations. In other words, the goal is deterrence, which is an objective achieved by imposing appropriate penalties. 1 JA 147, at ¶ 5.

The Nevada Supreme Court's opinion further conflicts with *Kokesh* because the *Poonian* decision repeatedly stated that disgorgement under § 161(1)(g) is not punitive or compensatory. 1 JA 96, at ¶ 70 ("It is clear, in my opinion, that the purpose of § 161(1)(g) is neither punitive nor compensatory. This view is held consistently among the various decisions of the Commission and the securities commissions of other provinces.") (citations omitted); 1 JA 97, at ¶ 75 ("In my view, it does not follow that just because moneys collected under certain sections may be used for 'compensation,' the sections giving rise to orders to pay those moneys (§§ 155.1(b), 157(1)(b), 161(1)(g), and 162) have a compensatory purpose. . . . [C]onsidering the extensive case law discussing the purpose of § 161(1)(g) and its nature as a sanction, I would endorse the view of the Commission in *Michaels* at para. 42, which concluded that 'the sanction does not focus on compensation or restitution or act as a punitive or deterrent measure over and above compelling the respondent to pay any amounts obtained from the contravention(s) of the Act.'"); 1 JA 98, at ¶ 76 ("While 'compensation' may well be a possible effect of a § 161(1)(g) order, I cannot say that is its purpose. Any analysis of restitution would arise under § 15.1, not § 161(1)(g)."); 1 JA 98, at ¶ 77 ("This

conclusion is also consistent with the observation that generally the power to order a person who has contravened the Act to pay compensation or restitution is reserved for the courts (§§ 155.1(a) and 157(1)(i) and 0)). While a victim may receive money from the § 15.1 mechanism, that is distinct from the power to order restitution. First, notice to the public under this 'expeditious' method is only made *after* money has been received through an order. If no money is received, the mechanism is not engaged. Second, the victim has no enforceable order against the wrongdoer, whereas §§ 155.2(1) and (3) give the person to whom the court awards compensation all the usual enforcement tools available for court orders.") (italics in original); 1 JA 98, at ¶ 78 ("I also find persuasive Vice Chair Cave's explanation in Streamline (in dissent) as to why compensation or restitution is not the purpose of a § 161(1)(g) order: 'Compensation or restitution to investors is not the purpose of a disgorgement order. Only the BC Supreme Court can order compensation or restitution under the Act, pursuant to sections 155.1(a) or 157(1)(i). Since these two provisions specifically refer to compensation and restitution, it would be incorrect to interpret section 161(1)(g) as also being a compensation or restitution provision. The wording of section 161(1)(g) shows it is not a compensation or restitution provision. The goal of restitution is to restore the victim to his or her original position, which requires the court to consider victims' losses. In contrast, section 161(1)(g) requires the panel to consider the amount obtained as a result of misconduct. These are two different things. For

example, a court order for compensation or restitution may include more than what an investor actually invested (and a respondent obtained), such as interest payments or loss of opportunity. A respondent would not have obtained these amounts as a result of misconduct and consequently an order under section 161(1)(g) that included these amounts would be broader than what that section allows.' "I note further the Commission is expressly prohibited from including loss of opportunity and interest on the loss in determining an applicant's loss under the Part 3, § 15.1 claims mechanism: Securities Regulation, § 7.4(3)."); 1 JA 99, at ¶ 80 ("I also agree with the decisions of securities commissions in British Columbia and across the country concluding s. 161(1)(g), or its counterparts, is not compensatory in nature."); 1 JA 105, at ¶ 102 (Disgorgement "is not a compensation mechanism for victims of the wrongdoing.") (internal quotation marks and citation omitted); 1 JA 109, at ¶ 112. (Disgorgement "is not to punish or compensate, although those aims are achievable by other means in the Act, or in conjunction with other sections of the Act."); 1 JA 119, at ¶ 143(2) ("The purpose of § 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention.").

The *Poonian* decision also recognized that any disgorged funds remaining, after all claims have been made, are not returned to the defendant but may be used by the BCSC for educational purposes. 1 JA 96, at ¶ 72 ("Sections 15 and 15.1 of the Act address what the Commission may do with funds received under

§ 161(1)(g). . . After the requisite period of time has expired, the Commission may use any remaining funds only for educating securities market participants and the public about investing, financial matters or the operation or regulation of securities markets (§ 15(3)).").

Further, the BCSC's own expert, Mr. Johnson, himself pointed out that the purpose of disgorgement is not—repeat, not—to compensate investors: "Its [disgorgement] purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing. It is not to punish or compensate. . . ." 1 JA 109. And later, "I disagree with the suggestion that because compensation is not the objective of Section 161(1)(g) therefor disgorgement is not an objective. Disgorgement and compensation are different concepts." 1 JA 135. At the end of the day, the Nevada Supreme Court's opinion conflicts with *Kokesh* because disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, are not compensatory in nature.

The Nevada Supreme Court concluded that it could construe the Disgorgement Order as having both qualities of an unenforceable penalty and an enforceable remedial award, while still ultimately enforcing the order. App. 7a-9a. However, this Court specifically held in *Kokesh* that such "mixed motives" *do not remove the penalty from a disgorgement order*. 137 S. Ct. at 1644-45 ("A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also *serving either*

retributive or deterrent purposes, is punishment, as we have come to understand the term. . . Because disgorgement orders 'go beyond compensation, are intended to punish, and label defendants wrongdoers' as a consequence of violating public laws, . . . *they represent a penalty* and thus fall within the 5-year statute of limitations of § 2462.") (italics added).

In the end, the Nevada Supreme Court's opinion conflicts with *Huntington* and *Kokesh* on several levels.

B. The Nevada Supreme Court Opinion Also Conflicts With the Remedy Allowed by the Court in *Liu*.

In *Liu*, this Court outlined an equitable relief exception to the general rule that disgorgement is a penalty when a disgorgement award "*does not exceed a wrongdoer's net profits and is awarded for victims*. . . ." *Liu* v. *SEC*, 140 S. Ct. at 1940 (italics added). Obviously, before any court can apply this exception to remove a disgorgement order from the presumptions in *Huntington* and *Kokesh*, *there must be a factual predicate*. Importantly, there is no record evidence that Lathigee ever received any funds by fraud or misconduct, let alone had any profits. In fact, the record presupposes that Lathigee personally received proceeds of fraud when he had none.

At the administrative level, the Executive Director of the BCSC argued that "section 161(1)(g) is not limited to requiring payment of the amount obtained by a respondent. He cited *Oriens Travel &*

Hotel Management Ltd., 2014 BCSBCCOM91 and *Michaels*." 1 JA 13, ¶ 36 (underline in original). The court then agreed with the Executive Director:

> ¶ 37 The Commission in *Oriens* and *Michaels* held that an order against a respondent for payment of the full amount obtained as a result of his contravention of the Act is possible without having to establish that the amount obtained through the contravention was obtained by that respondent.
>
> ¶ 38 We agree with the principles articulated and approaches taken in the illegal distribution and fraud cases canvassed above. They are even more compelling in cases of fraud. We should not read section 161(1)(g) narrowly to shelter individuals from that sanction where the amounts were obtained by the companies that they directed and controlled.

1 JA 13-14, ¶¶ 37-38 (underline in original).

Additionally, BCSC's own expert witness, Mr. Gordon R. Johnson, confessed, "Certainly, I agree the impact of the remedy is significant in that the order in question requires Mr. Lathigee to pay $21,700,000 Canadian *without proof that Mr. Lathigee personally received that amount*." 1 JA 132 (italics added). Therefore, the Supreme Court's opinion further

conflicts with *Liu* because Lathigee had no opportunity in a remand proceeding to factually demonstrate that the Disgorgement Order cannot be enforced against him according to the equitable relief exception in *Liu*. *See id.* at 1940.

Due to the obvious conflicts in the Nevada Supreme Court's opinion with *Liu*, this Court should, at a very minimum, vacate the Supreme Court's opinion and order a remand to the District Court for compliance with this Court's precedents, including *Liu*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 5, 2021

APPENDIX

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APPENDIX A

In the Supreme Court of the State of Nevada

No. 78833

MICHAEL PATRICK LATHIGEE
Appellant,

v.

BRITISH COLUMBIA SECURITIES COMMISSION,
Respondent.

OPINION

FILED: December 10, 2020

BEFORE THE COURT EN BANC

Appeal from the final district court order recognizing and enforcing a Canadian judgment. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Affirmed.

BEFORE THE COURT EN BANC.

OPINION

By the Court, Pickering, C.J.:

This is an appeal from a district court decision to recognize and enforce in Nevada the disgorgement portion of a securities-fraud judgment from British Columbia. Appellant Michael Lathigee objects that the disgorgement judgment is in the nature of a fine or penalty, so it should not be enforced outside Canada. We disagree and affirm.

I.

Respondent British Columbia Securities Commission (BCSC) initiated proceedings against Lathigee under the British Columbia Securities Act (BC Securities Act). After a six-day hearing, in which Lathigee participated with counsel, the BCSC found that Lathigee had perpetrated a fraud, violating section 57(b) of the BC Securities Act, when he raised $21.7 million (CAD) from 698 Canadian investors without disclosing the failed financial condition of the entities he and his associate controlled. As sanctions, the BCSC imposed a disgorgement order on Lathigee under section 161(1)(g) of the BC Securities Act. The disgorgement order directs Lathigee to pay the ill-gotten $21.7 million (CAD) to the BCSC. Section 15.1 of the BC Securities Act and its associated regulations provide a notice-and-claim procedure by which the BCSC notifies the public and attempts to return any disgorged funds it recovers to the defrauded investors.

The BCSC also imposed a $15 million (CAD) administrative penalty on Lathigee.

The BCSC registered its decision with the British Columbia Supreme Court—roughly, the equivalent of a Nevada district court. Upon registry, the decision became an enforceable judgment by operation of section 163(2) of the BC Securities Act. Lathigee sought and obtained leave to appeal to British Columbia's highest court, its Court of Appeal, which rejected Lathigee's appeal on the merits. *Poonian* v. *BCSC*, 2017 BCCA 207 (CanLII). With this, the judgment became final and enforceable under British Columbia law.

Lathigee left Canada and relocated to Nevada without paying the judgment. The BCSC then filed the two-count complaint underlying this appeal in Nevada district court. In its complaint, the BCSC asked the district court to recognize and enforce the $21.7 million (CAD) disgorgement portion of its judgment against Lathigee: (1) under NRS 17.750(1), which directs recognition and enforcement of foreign-country money judgments except, as relevant here, "to the extent that the judgment is ... [a] fine or other penalty," NRS 17.740(1), (2)(b); and/or (2) as a matter of comity. The complaint did not seek to enforce the $15 million (CAD) administrative penalty the judgment imposed. Despite this, Lathigee objected that the disgorgement portion of the BCSC judgment also constitutes a fine or penalty, so neither NRS 17.750(1) nor comity supports its recognition and enforcement in Nevada.

The case came before the district court on cross-motions for summary judgment. Ruling for the BCSC, the district court recognized the disgorgement judgment as enforceable under NRS 17.750(1). It held that the judgment did not constitute a penalty but, rather, an award designed to afford eventual restitution to the defrauded investors under the notice-and claim mechanism provided by section 15.1 of the BC Securities Act. In addition, citing the close ties between Canada and the United States and the fact that Canadian courts have recognized and enforced United States Securities Exchange Commission (SEC) disgorgement judgments, the district court recognized the judgment based on comity. Lathigee timely appealed.

II.

Nevada has adopted the Uniform Foreign-Country Money Judgments Recognition Act (2005), 13 pt. II U.L.A. 18-43 (Supp. 2020) (Uniform Act), in NRS 17.700 through NRS 17.820. The Act applies to foreign-country judgments that grant or deny monetary recovery and are "final, conclusive, and enforceable" under the law of the jurisdiction where rendered. NRS 17.740(1). A Nevada court "shall recognize a foreign country judgment to which NRS 17.700 to 17.820, inclusive, apply," NRS 17.750(1) (emphasis added), unless one of the grounds for non-recognition stated in NRS 17.750(2) or (3) is proved or

one of the categorical exceptions stated in NRS 17.740(2)(a), (b), or (c) applies.[1]

By its terms, the Act does not apply "to the extent that the judgment is . . . [a] fine or other penalty." NRS 17.740 (2)(b). But the Act contains a "savings clause," *see* NRS 17.820, under which "courts remain free to consider" whether a judgment that falls outside the Act "should be recognized and enforced under comity or other principles." Uniform Act § 3, cmt. 4, *supra*, 13 pt. II U.L.A. at 26. Essentially, the Act sets base-line standards, not outer limits. It "delineates a minimum of foreign-country judgments that must be recognized by the courts of adopting states, leaving those courts free to recognize other foreign-country judgments not covered by the Act under principles of comity or otherwise." Uniform Act prefatory note, 13 pt. II U.L.A. at 19.

Statutory interpretation presents a question of law to which de novo review applies. *See Friedman* v. *Eighth Judicial Dist. Court*, 127 Nev. 842, 847, 264 P.3d 1161, 1165 (2011). "In applying and construing

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[1] "A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in [NRS 17.750] subsection 2 or 3 exists." NRS 17.750(4). Conversely, "A party seeking recognition of a foreign-country judgment has the burden of establishing that NRS 17.700 to 17.820, inclusive, apply to the foreign country judgment." NRS 17.740(3).

the Uniform Foreign-Country Money Judgments Recognition Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." NRS 17.810. To this end, we accept as persuasive authority the official comments to the Uniform Act and the decisions of courts elsewhere interpreting it. *See Friedman*, 127 Nev. at 847, 264 P.3d at 1165.

A.

Lathigee admits that the disgorgement judgment grants monetary recovery; that it is final, conclusive, and enforceable under British Columbia law; and that neither the grounds for non-recognition specified in NRS 17.750(2) and (3) nor the categorical exceptions stated in NRS 17.740(2)(a) and (c) apply. NRS 17.750(1) thus mandates recognition of the BCSC's disgorgement judgment except "to the extent" that it is a "fine or other penalty." NRS 17.740(2)(b). That is, in this case, the $21.7 million (CAD) question.

The Uniform Act does not define what constitutes a judgment for a "fine" or "penalty." Its fine-or-penalty exception codifies the common law rule against one sovereign enforcing the criminal laws and penal judgments of another. *Chase Manhattan Bank, N.A.* v. *Hoffman*, 665 F. Supp. 73, 75 (D. Mass. 1987) (cited in Uniform Act § 3, cmt. 4, 13 pt. II U.L.A. at 26); *see The Antelope*, 23 U.S. 66, 123 (1825) ("The Courts of no country execute the penal laws of another . . . ."). The Supreme Court's decision in *Huntington* v. *Attrill*, 146 U.S. 657 (1892), stands as the seminal

authority on the common law rule against enforcing foreign penal judgments. *Chase Manhattan Bank*, 665 F. Supp. at 75; see *City of Oakland* v. *Desert Outdoor Advert., Inc*., 127 Nev. 533, 538, 267 P.3d 48, 51 (2011). As *Huntington* recognizes, 146 U.S. at 666, the word "penal" has "different shades of meaning," depending on context. "The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon . . . whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act." *Id*. at 673-74.

Consistent with *Huntington*, "the test for whether a judgment is a fine or penalty"—and so outside the Uniform Act's (and NRS 17.750(1)'s) recognition mandate— "is determined by whether its purpose is remedial in nature with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice." Uniform Act § 3, cmt. 4, 13 pt. II U.L.A. at 26. The test is more nuanced than its binary phrasing suggests. A single judgment can include both an unenforceable penalty and an enforceable remedial award. *See* Restatement (Fourth) of the Foreign Relations Law of the United States § 489 cmt. d (Am. Law Inst. 2018). And a money judgment, particularly one that runs in favor of a governmental entity, can serve both remedial and public or penal purposes. Under the Uniform Act, "a judgment that awards compensation or restitution for the benefit of private individuals

should not automatically be considered penal in nature and therefore outside the scope of the Act simply because the action is on behalf of the private individuals by a government entity." *Id.* § 3, cmt. 4, 13 pt. II U.L.A. at 26. On the contrary, when a foreign "government agency obtains a civil monetary judgment for purpose[s] of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, [the] judgment generally should not be denied recognition and enforcement on [the] ground[s] that it is penal . . . in nature or based on . . . foreign public law." *Id.*; *see* Restatement (Third) of the Foreign Relations Law of the United States § 483 cmt. b (Am. Law Inst. 1987) (defining an unenforceable foreign "penal judgment" as "a judgment in favor of a foreign state or one of its subdivisions" that is "*primarily* punitive rather than compensatory is character") (emphasis added).

Applying these principles to the disgorgement portion of the BCSC judgment, we reject the contention that it constitutes an unenforceable penalty. The BCSC recovered its disgorgement award under section 161(1)(g) of the BC Securities Act. This statute authorizes the BCSC to recover "any amount obtained[,] directly or indirectly, as a result of" the Securities Act violation. Standing alone, section 161(1)(g)'s purpose is "neither punitive nor compensatory." *Poonian*, 2017 BCCA 207, at 23, ¶ 70. But, unlike the $15 million (CAD) penalty portion of the judgment, which was calculated according to the $1 million (CAD) per violation schedule set by section 162 of the BC Securities Act, the $21.7 million (CAD)

disgorgement award represents the exact amount of money Lathigee and his associate obtained from the 698 investors they defrauded. Such disgorgement serves "to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (Am. Law Inst. 2011) (noting that "Restitution remedies that pursue this object are often called 'disgorgement' or 'accounting'"); *see id.* cmt. e ("The object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing—is one of the cornerstones of the law of restitution and unjust enrichment.").[2] The fact that section 161(1)(g) calculates the disgorgement award by the amount of money the wrongdoer "obtained," not by reference to a schedule of fines or penalties, weighs in favor of treating the BCSC's disgorgement award as remedial, not punitive.

---

[2] We recognize that the BCSC disgorgement judgment imposes joint and several liability on Lathigee and his associate and the entities they controlled. It did so based on findings that established that Lathigee and his associate and their corporate entities were "effectively one person." *Poonian*, 2017 BCCA 207, at 42-13, 49-51, ¶¶ 133, 154-162. The equally culpable, concerted wrongdoing in which the BCSC found Lathigee and his associate engaged supports the imposition of collective liability without transmuting the award from restitutionary to punitive. *See Liu* v. *SEC*, 591 U.S. ___, ___, 140 S. Ct. 1936, 1949 (2020).

The judgment subjects any recovery the BCSC makes on its section 161(1)(g) disgorgement award to section 15.1 of the BC Securities Act. Section 15.1 and its related regulations provide a notice-and-claim procedure for the BCSC to return any money it collects on the disgorgement award to the investors the Securities Act violation harmed. The award does not represent a fine or penalty that, once collected, the BCSC can keep without obligation to the victims of the fraud. *Cf. City of Oakland*, 127 Nev. at 542, 267 P.3d at 54 (deeming a fine imposed and kept by the City of Oakland for violating its zoning ordinances penal and not compensatory). This, too, weighs in favor of treating the disgorgement award as more remedial than punitive.

Disgorgement in securities enforcement actions can take various forms, not all of them restitutionary. *See Jennifer L. Schulp, Liu* v. *SEC: Limited Disgorgement, But by How Much?*, 2019-2020 Cato Sup. Ct. Rev. 203, 207-10 (2020). But the disgorgement award in this case deprives Lathigee and his associate of the money they obtained from the investors they defrauded. *See Poonian*, 2017 BCCA 207, at 20, 23, ¶¶ 61, 70. And, under section 15.1 and its related regulations, any recovery is designed to "provid[e] restitution to . . . investors . . . who suffered economic harm due to fraud," not to enrich the BCSC. Uniform Act § 3, cmt. 4, 13 pt. II U.L.A. at 26. We therefore conclude that, for purposes of NRS 17.750(1), the primary purpose of the disgorgement award "is remedial in nature with its benefits accruing to private individuals," not penal,

"punishing an offense against public justice." Uniform Act § 3, cmt. 4, 13 pt. II U.L.A. at 26. *See* Restatement (Fourth) of the Foreign Relations Law of the United States § 489 note 4 ("Although courts in the United States applying these rules frequently look to foreign practice, . . . the character of a foreign judgment as [penal] is a question of U.S. law.").

Lathigee acknowledges the statutes and authorities just cited but insists that *Kokesh* v. *SEC*, 581 U.S. ___, 137 S. Ct. 1635 (2017), compels a different conclusion. We cannot agree. *Kokesh* did not concern recognition of a foreign-country disgorgement judgment. "The sole question" in *Kokesh* was "whether disgorgement, as applied in SEC enforcement actions, is subject to [the five-year] limitations period," *id.* at ___ n.3, 137 S. Ct. at 1642 n.3, that 28 U.S.C. § 2462 establishes for an "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture."

In *Kokesh*, both the district court and the Tenth Circuit Court of Appeals held that § 2462 did not apply to SEC disgorgement claims, which left them with "no limitations period" at all. *Kokesh*, 581 U.S. at ___,137 S. Ct. at 1641. The Supreme Court reversed. It held that "[d]isgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty under § 2462." *Id.* at ___, 137 S. Ct. at 1645. En route to this holding, the Court acknowledged that "disgorgement serves compensatory goals in some cases." *Id.* at ___, 137 S. Ct. at 1645. But SEC disgorgement actions are not limited to recovery of

funds the wrongdoer obtained. *Id.* at ___, 137 S. Ct. at 1644-45 (noting that "[i]ndividuals who illegally provide confidential trading information have been forced to disgorge profits gained by individuals who received and traded based on that information—even though they never received any profits). And, unlike a BCSC disgorgement judgment, where any funds recovered are subject to the notice-and-claim procedure BC Securities Act section 15.1 provides victimized investors, no "statutory command" charges the SEC with remitting the disgorged funds it recovers to victims. *Id.* at ___, 137 S. Ct. at 1644.

In *Liu* v. *SEC*, 591 U.S. ___, 140 S. Ct. 1936 (2020), the Supreme Court returned to *Kokesh*. It confirmed that the sole question *Kokesh* decided was whether 28 U.S.C. § 2462's limitations period applies to SEC disgorgement claims. *Liu*, 591 U.S. at ___, 140 S. Ct. in 1941. What *Kokesh* did not decide was "whether a § 2462 penalty can nevertheless qualify as 'equitable relief under [15 U.S.C.] § 78u(d)(5), given that equity never 'lends its aid to enforce a forfeiture or penalty.'" *Id.* at ___, 140 S. Ct. at 1941 (quoting *Marshall* v. *Vicksburg*, 82 U.S. 146, 149 (1873)); *see id.* at ___, 140 S. Ct. at 1946 (brushing aside the claim that the Court "effectively decided in *Kokesh* that disgorgement is necessarily a penalty, and thus not the kind of relief available at equity" with a blunt, "Not so."). Citing the Restatement (Third) of Restitution and Unjust Enrichment § 51, *Liu* recognizes that to the extent a disgorgement award redresses unjust enrichment and achieves restitution, it is situated "squarely within the heartland of

equity," 591 U.S. at ___, 140 S. Ct. at 1943, and does not constitute an impermissible penalty. *See id.* at ___, 140 S. Ct. at 1944. Unlike *Kokesh*, which adopted a bright-line rule appropriate to its statute-of-limitations context, *Liu* counsels a case-by-case assessment of whether a disgorgement claim seeks restitution, consistent with equitable principles, or a penalty, which equity does not allow. See id. at ___, 140 S. Ct. at 1947-50.

B.

Alternatively, even crediting Lathigee's argument that NRS 17.740(2)(b) takes the disgorgement judgment outside NRS 17.750(1)'s mandatory recognition provisions, the district court properly recognized it as a matter of comity. The comity doctrine is "a principle of courtesy by which 'the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect.'" *Gonzales-Alpizar* v. *Griffith*, 130 Nev. 10, 18, 317 P.3d 820, 826 (2014) (quoting *Mianecki* v. *Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983)); *see Hilton* v. *Guyot*, 159 U.S. 113, 165 (1895) (stating that comity "contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations") (internal quotation marks omitted). Under comity, Nevada courts will not "recognize a judgment or order of a sister state if there is 'a showing of fraud, lack of due

process, or lack of jurisdiction in the rendering state.'" *Gonzales-Alpizar*, 130 Nev. at 19-20, 317 P.3d at 826 (quoting *Rosenstein* v. *Steele*, 103 Nev. 571, 573, 747 P.2d 230, 231 (1987), and adopting the limits on comity stated in the Restatement (Third) of the Foreign Relations Law of the United States § 482 (Am. Law Inst. 1987)). But otherwise, comity may be "appropriately invoked according to the sound discretion of the court acting without obligation." *Mianecki*, 99 Nev. at 98, 658 P.2d at 425; *see In re Stephanie M.*, 867 P.2d 706, 716 (Cal. 1994) (reviewing grant of comity for abuse of discretion).

Lathigee does not raise any of the defenses to comity recognized in *Gonzales-Alpizar* or the Restatement (Third) of Foreign Relations Law § 482. Instead, citing the Restatement (Third) of Foreign Relations Law § 483, he argues that Nevada need not and, under *Kokesh*, should not grant comity to a foreign-country disgorgement judgment, because such a judgment constitutes a penalty. But neither the Restatement (Third) § 483 nor its comments speak to comity; section 483 simply restates the rule that "[c]ourts in the United States are not required to recognize or enforce judgments for the collection of [fines] or penalties" that NRS 17.740(2)(b) already provides. And, as discussed, supra, § II.A, *Kokesh* does not establish the profound policy against recognizing and enforcing foreign-country disgorgement judgments that Lathigee says it does.

The policy of promoting cooperation among nations has special strength as between Canada and

the United States. The United States shares a long border with Canada. As the district court found, the SEC and the securities commissions of each of the provinces, including the BCSC, often work together, since the proximity and relations of the two countries make it easy for fraud to move between them. In fact, the United States and Canada have signed a Memorandum of Understanding, which provides that the "Authorities will provide the fullest mutual assistance" "to facilitate the performance of securities market oversight functions and the conduct of investigations, litigation or prosecution." And Canadian courts have upheld SEC disgorgement judgments repeatedly. *United States (SEC)* v. *Cosby*, 2000 BCSC 338, at 3, 15, ¶¶ 4, 26 (CanLII) (enforcing the disgorgement portion of an SEC judgment against an individual who engaged in fraudulent schemes to raise capital for a Nevada corporation and rejecting the argument that the U.S. disgorgement judgment was "unenforceable" in British Columbia "because it is a foreign penal judgment"); *id.* at 3, 14, ¶¶ 5, 24 (discussing the Canadian decision in *Huntington* v. *Attrill*, [1893] A.C. 150 (P.C.)); *see United States (SEC)* v. *Peever*, 2013 BCSC 1090, at 6, ¶ 18 (CanLII) (to similar effect; citing *Cosby*); *United States (SEC)* v. *Shull*, [1999] B.C.J. No. 1823 (S.C.) (same).

"[I]nternational law is founded upon mutuality and reciprocity. . . ." *Hilton*, 159 U.S. at 228. Recognizing these principles, "Canadian judgments have long been viewed as cognizable in courts of the *United States." Alberta Sec. Comm'n* v. *Ryckman*, 30 P.3d 121, 126 (Ariz. Ct. App. 2001). The district court

properly recognized the BCSC disgorgement judgment under principles of comity.

We therefore affirm.

Pickering, C.J.
Pickering

We concur:

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J.
Silver

APPENDIX B

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

No. A-18-771407-C

BRITISH COLUMBIA SECURITIES COMMISSION,
Plaintiff,

v.

MICHAEL PATRICK LATHIGEE,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

FILED: May 14, 2019

Before: JUDGE ADRIANA ESCOBAR

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter came before the Court pursuant to Defendant's Motion for Summary Judgment, and Plaintiff s Countermotion for Summary Judgment. At a hearing on December 4, 2018 Matthew Pruitt, Esq. appeared on behalf of Plaintiff, and Jay Adkisson, Esq. appeared on behalf of Defendant.

The Court having reviewed the pleadings and papers on file, being fully advised in the premises, and having heard the arguments of counsel, for reasons stated on the record and good cause appearing therefor, enters the following findings of fact and conclusions of law in this matter.

FINDINGS OF FACT

On March 30, 2018, Plaintiff, BRITISH COLUMBIA SECURITIES COMMISSION, commenced this action by filing a Complaint for recognition of foreign country judgment under the Recognition of Foreign-Country Money Judgments (Uniform Act), found at NRS 17.700 et seq., and under Comity, naming MICHAEL PATRICK LATHIGEE as a Defendant. Defendant subsequently answered the Complaint on April 9, 2018 and filed an Amended Answer on June 6, 2018. Defendant filed a Motion for Summary Judgment on October 19, 2018, to which Plaintiff filed its Opposition and Countermotion on November 9, 2018.

A. The Underlying Judgment

On March 16, 2015, the British Columbia Securities Commission (the "BCSC") rendered a decision (the "Decision") against Defendant pursuant to a hearing under British Columbia law and pursuant to sections 161(1) and 162 of the Securities Act, R.S.B.C. 1996, c. 418 (the "BC *Securities Act*").[1] On April 1, 2015, and pursuant to section 163 of the BC *Securities Act*,[2] the BCSC registered the Decision with the British Columbia Supreme Court, by which the Decision was deemed to be a judgment of the British Columbia Supreme Court (the "Judgment").[3] The Judgment was appealed by Defendant, but the appeal was denied by the Court of Appeal for British Columbia on May 31, 2017.[4] The time for appeal has expired and no appeal is pending.[5]

The Judgment is for disgorgement of $21,700,000.00 CAD, and corresponds to the $21,700,000.00 CAD which Defendant was found to have fraudulently raised from 698 investors.[6] Defendant was also assessed with an administrative penalty of $15 Million CAD, which was also registered with the Supreme Court of British Columbia, but the

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[1] Pltf's Opp & CM Ex 1, p.1.
[2] *Id.*
[3] *Id.*
[4] Pltf's Opp & CM Ex 16, BCSC_001996 & BCSC_002047.
[5] Pltf's Opp & CM Ex 1, p.1.
[6] *Id.* at Decision § 2.

Plaintiff is not requesting that this related judgment be recognized by this Court.[7]

a. The Details

In a decision dated July 8, 2014 (the "Liability Findings"), the BCSC found that Defendant, Mr. Lathigee, together with others (often referred to as the FIC Group), perpetrated a fraud, contrary to section 57(b) of the BS Securities Act when:

> (a) he raised $21.7 million (CAD) from 698 investors without disclosing to those investors important facts about FIC Group's financial condition; and
>
> (b) he raised $9.9 million (CAD) from 331 investors for the purpose of investing in foreclosure properties, and instead used most of the funds to make unsecured loans to other members of the FIC Group, the proceeds of which were used at least in part to pay salaries and other overhead expenses of the FIC Group.[8]

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[7] *Id.* at Decision § 62 (b) (iv).
[8] Pltf's Opp & CM Ex 1, Judgment, p.1 § 2.

On March 16, 2015, the Commission issued the Decision which included disgorgement orders against the following parties in the following amounts:

a. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, FIC REAL STATE PROJECTS LTD., jointly and severally, $9,800,000

b. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, FIC FORECLOSURE FUND LTD., jointly and severally, $9,900,000

c. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, WBIC CANADA LTD., jointly and severally, $2,000,000

On April 15,2015, the Decision was registered in the Vancouver Registry of the British Columbia Supreme Court, pursuant to section 163 of the BC Securities Act as a judgment of that Court, under registry file no. L-150117.[9]

The amount of the Judgment ordered to be payable by Michael Patrick Lathigee, jointly and severally with other defendants, excluding administrative penalties, is $21,700,000 CAD.[10] That

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[9] Pltf's Opp & CM Ex 1, Judgment.
[10] *Id.* at p.9 §§ 43, 46, and 49, and p.13 § 62 (d).

amount of the Judgment was granted for disgorgement of funds fraudulently obtained from investors, pursuant to section 161(1)(g) of the BC Securities Act.[11] Specifically the tribunal stated:

> "We find we have the authority to order disgorgement against the individual respondents in this case, up to $21.7 million, the full amount obtained by fraud."[12]
>
> "The amounts obtained from investors need not be traced to them specifically and we find that $21.7 million was obtained, directly or indirectly, as a result of their individual contraventions of the Act."[13]
>
> "Each respondent's misconduct contributed to the raising of the $21.7 million fraudulently. We find that it is in the public interest to order the respondents to pay the full amount obtained as a result of their fraud."[14]

Prior to the proceedings which led to the Judgment, Defendant was served with a Notice of Hearing, dated March 1, 2012, which set forth the

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[11] *See id.* at p.7 § 34-37.
[12] *Id.* at p.9 § 43.
[13] *Id.* at p.9 § 46.
[14] *Id.* at p.9 § 49.

allegations and gave a date, time, and location for a hearing.[15] Defendant's counsel, H. Roderick Anderson of Harper Grey LLP, accepted service of the notice on March 8, 2012, and then appeared for all respondents at the March 20, 2012 hearing.[16] Defendant continued to be represented by such counsel throughout the proceedings of the case.[17] In fact Defendant was afforded at least six days of trial wherein his counsel was able to call and cross-examine witnesses, and present evidence.[18] There is no question regarding personal jurisdiction over Defendant, as Defendant was a resident of British Columbia at all material times during the proceedings.[19]

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[15] Plft's Opp & CM Ex 2, Notice of Hearing, BCSC_000054-000067.

[16] Plft's Opp & CM Ex 3, Transcript of March 20, 2012 Hearing, at 2:8-12.

[17] *See* Plft's Opp & CM Ex 4, Transcript of April 11, 2012 Hearing, at 1:25-27; Ex 5, Transcript of September 16, 2013 Proceedings, at 0:5-8; Ex 6, Transcript of September 17, 2013 Proceedings, at 1:15-20; Ex 7, Transcript of September 18, 2013 Proceedings; Ex 8, Transcript of September 19, 2013 Proceedings; Ex 9, Transcript of September 20, 2013 Proceedings; Ex 10, Transcript of September 21, 2013 Proceedings; Ex 11, Transcript of September 23, 2013 Proceedings; Ex 12, Transcript of September 24, 2013 Proceedings.

[18] *Id*.

[19] *See* Plft's Opp & CM Declaration of Plaintiff § 9.

Ultimately Defendant was found liable for fraud, and the findings on liability were set forth by the BCSC on July 8, 2014.[20] Another Notice of Hearing was served on Defendant on October 16, 2014, giving a date and time for hearing on sanctions.[21] A hearing on sanctions was held on February 13, 2015, which was again attended by Defendant's counsel.[22] The BCSC's decision on sanctions was set forth on March 16, 2015, wherein disgorgement was ordered against Defendant.[23]

Defendant was granted leave to appeal the decisions of the BCSC to the Court of Appeal for British Columbia, with the Court of Appeal, after hearing submission of counsel for Defendant, unanimously dismissing the appeal by order pronounced May 31, 2017, as a result of which the Judgment, including the disgorgement order, remains in full force and effect.[24]

As set forth in the Decision, given that the Defendant is "permanently prohibited" from engaging in investment activities in British Columbia, and

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[20] Pltf's Opp & CM Ex 13, Panel Findings on Liability, BCSC_1512-1577.
[21] Pltf's Opp & CM Ex 14, Notice of Hearing dated October 16, 2014, BCSC_001692.
[22] Plft's Opp & CM Ex 1-5, Transcript of February 13, 2015 Hearing.
[23] Pltf's Opp & CM Ex 1, Judgment
[24] Pltf's Opp & CM Ex 1-6, Appellate Court Decision, BCSC_001996-002047, at BCSC_002047 § 167.

such other Canadian jurisdictions in which are a reciprocal may have been made, he instead has based his operations in Nevada.[25] Defendant has been involved in operations of at least 19 entities in Nevada, the latest being "LVIC BLOCKCHAIN AND CRYPTOCURRENCY FUND LLC."[26]

B. Canadian Disgorgement Law

In regard to enforcement of securities law, whereas the U.S. has the federal Securities Exchange Commission (the "SEC"), Canada has thirteen such organizations, one for each province and territory of Canada. The BCSC is the senior provincial securities regulator for the province of British Columbia.

The statute under which the Judgment was granted provides, in s. 161(1)(g), for the judgment debtor to "pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention."[27] If the Commission recovers money pursuant to a judgment under 161(l)(g), it must give notice, and persons who have been harmed by the fraud can submit an application to have such funds distributed to them.[28] Pursuant to section 15.1 of the

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[25] *See* Pltf's Opp & CM Ex 1, Judgment § 62 (b).
[26] Pltf's Opp & CM Ex 14, Lathigee Corporate Vehicles
[27] Plft's Opp & CM Ex 19, Canada Securities Act [RSBC 1196] Chapter 418, Part 18, § 161(1)(g).
[28] *Id.* at Part 3, § 15.1.

BC *Securities Act*, and Securities Regulation 196-97 enacted under that statute, it is *mandatory* that the Commission distribute disgorgement funds to proper claimants, and it is therefore the Commission's strict mandate to do so.[29] This is illustrated by the fact that the Commission advertises on its website, under a section entitled "Returning Funds to Investors," the cases which have received funds pursuant to a judgment under section 16l(1)(g), and provides guidance to victims on how they can lay claim to such funds.[30] In other words, disgorgement orders made under 161(1)(g) of the BC *Securities Act* are not fines or penalties, but are orders for the funds to be disgorged from the judgment-debtor for any amounts obtained, directly or indirectly, as a result of the judgment-debtor's misconduct, to then by the Commission to repay the individuals harmed by the judgment-debtor's misconduct.

Further, any remaining funds, after payment of the claims of investors, are to be used by the BCSC for investor education, and not taken in as general revenue or used for operating expenses.

The Commission must follow the claims process set forth by law to distribute the

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[29] *Id.* at Part 3, § 15.1; see Pltf's Opp & CM Declaration of Plaintiff § 6; Pltf's Opp & CM Ex 20, Securities Regulation, B.C. Reg. 196/97, Ministerial Regulation M244/97, Part 3, § 7.4 (6).

[30] Pltf's Opp & CM Ex 21, BCSC Website, "Returning Funds to Investors," accessed August 30, 2018.

disgorgement funds to proper claimants.[31] As such, these funds are compensatory in nature. Penalties and fines were dealt with separately by the orders made by the Commission's panel. Defendant has an additional judgment against him in the amount of $15 Million CAD for administrative penalties.[32] These fines and penalties are set forth separately from the portion of the Judgment for disgorgement, for which the Commission seeks recognition before this Court. Plaintiff's expert has stated unequivocally that disgorgement is a remedy, and not a penalty.[33] Canadian case law, and particularly case law in British Columbia, holds that disgorgement is not a penalty.[34] In *United States (Securities Exchange Commission)* v. *Peever*, the British Columbia Court recognized a US SEC disgorgement order, finding that evidence of the SEC's policy to distribute proceeds of the judgment to injured investors, even when not strictly required to do so, was enough to recognize the judgment and not deem it a penalty for purposes of recognition.[35]

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[31] Pltf's Opp & CM Ex 19, Canada Securities Act [RSBC 1996] Chapter 418, Part 18, § 161 (1) (g).

[32] Pltf's Opp & CM Ex 1, Judgment, §§ 18 (b), 62 (b) (iv-v (erroneously labeled iv)).

[33] Pltf's Opp & CM Ex 30, Plaintiff's Expert's Report p. 3-4.

[34] Pltf's Opp & CM Ex 22, *US (SEC)* v. *Peever*, 2013 BCSC 1090, §§ 27-29.

[35] *Id*.

CONCLUSIONS OF LAW

A. Motion for Summary Judgment Standard.

The primary purpose of a summary judgment procedure is to secure a "just, speedy, and inexpensive determination of any action."[36] Although summary judgment may not be used to deprive litigants of trials on the merits where material factual doubts exist, it enables the trial court to "avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried."[37] "Summary judgment is appropriate if, when viewed in the light most favorable to the nonmoving party, the record reveals there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."[38]

Parties resisting summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials.[39] Though inferences are to be drawn in favor of the non-moving party, an opponent to summary judgment

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[36] *Albatross Shipping Corp.* v. *Stewart*, 326 F. 2d 208, 211 (5th Cir. 1964); *accord McDonald* v. *D.P. Alexander & Las Vegas Boulevard, LLC*, 123 P.3d 748, 750 (Nev. 2005).

[37] *Id*.

[38] NRCP 56 (c); *DTJ Design, Inc. v. First Republic Bank*, 318 P.3d 709, 710 (Nev. 2014).

[39] NRCP 56 (e).

must show that he can produce evidence at trial to support his claim.[40] The Nevada Supreme Court has rejected the "slightest doubt" standard, under which any dispute as to the relevant facts defeats summary judgment.[41] A party resisting summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture."[42] Rather, the non-moving party must demonstrate specific facts as opposed to general allegations and conclusions.[43] Indeed, an opposing party "is not entitled to have [a] motion for summary judgment denied on the mere hope that at trial he will be able to discredit movant's evidence; he must at the hearing be able to point out to the court something indicating the existence of a triable issue of fact."[44]

B. British Columbia Disgorgement Judgments Must be Recognized Pursuant to NRS 17.700-17.820

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[40] *Van Cleave* v. *Kietz-Mill Minit Mart*, 633 P.2d 1220, 1222 (Nev. 1981).

[41] *Wood* v. *Safeway*, 121 P.3d at 1031.

[42] *Collins* v. *Union Fed. Savings & Loan*, 622 P.2d 610, 621 (Nev. 1983).

[43] *LaMantia* v. *Redisi*, 38 P.3d 877, 879 (Nev. 2002); *Wayment* v. *Holmes*, 912 P.2d 816, 819 (Nev. 1996).

[44] *Hickman* v. *Meadow Wood Reno*, 617 P.2d 871, 872 (Nev. 1980); *see also Aldabe* v. *Adams*, 402 P.2d 34, 37 (Nev. 1965) ("The word 'genuine' has moral overtones; it does not mean a fabricated issue."); *Elizabeth E.* v. *ADT Sec. Sys. W.*, 839 P.2d 1308, 1310 (Nev. 1992).

The Judgment in issue was pronounced by the BCSC, and recognized as a judgment of the British Columbia Supreme Court and, subsequently upheld on appeal. The Judgment is, in all respects, a foreign-country judgment, being a judgment of one of the superior courts of Canada.

A Nevada court "*shall* recognize a foreign-country judgment," to which NRS 17.700 to 17.820 apply, except as provided for under NRS 17.750 sections 2 and 3.[45] NRS 17.740 sets forth the applicability of NRS 17.700 to 17.820. It states that such statutes apply to the extent that the judgment "(a) Grants or denies recovery of a sum of money; and (b) Under the law of the foreign country where rendered, is final, conclusive and enforceable."[46] Further, it provides that such statutes do not apply to the extent that the judgment is "(a) A judgment for taxes; (b) A fine or other penalty; or (c) A judgment for divorce, support or maintenance or other judgment rendered in connection with domestic relations."[47]

Defendant admits in its responses to Plaintiff's Requests for Admission numbers 1-4, that the Judgment, against Defendant is final, conclusive, and enforceable under the laws of Canada, that the time for appeal has expired, that no payments have been

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[45] NRS 17.750 (1).
[46] NRS 17.740 (1).
[47] NRS 17.740 (2).

made, and that the Judgment is not for taxes or domestic relations.

In addition to Defendant's admissions, the Commission has clearly proven that the Judgment grants the recovery of a sum of money, and that under the laws of British Columbia specifically, and Canada generally, the Judgment is final, conclusive, and enforceable.[48] The certificate of the British Columbia Supreme Court, exemplifying the Judgment, states that:

> "The Decision was entered as a Judgment on April 1, 2015."[49]
>
> "The Time for Appeal has expired, and no appeal is pending under s. 167 of the Securities Act."[50]
>
> "With no payments being made, and the full amount remaining due of the Judgment, as noted above."[51]

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[48] *See* Pltf's Opp & CM Ex 1, Judgment.
[49] Pltf's Opp & CM Ex 1, Judgment, § 3.
[50] *Id.* at § 4.
[51] *Id.* at § 6.

Additionally, the Judgment is not a judgment for taxes or domestic relations as acknowledged by Defendant's First Amended Answer.[52]

a. Defendant Waived or Withdrew all of His Affirmative Defenses to Recognition of Foreign Country Judgment under NRS 17.700-17.820, Except for the Argument that the Judgment is a Penalty

The only grounds for denying recognition of a foreign-country judgment to which the Recognition of Foreign-Country Money Judgments act is applicable are found in NRS 17.750(2) and (3):

> "2. A court of this State may not recognize a foreign-country judgment if:
>
> (a) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
>
> (b) The foreign court did not have personal jurisdiction over the defendant; or
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> (c) The foreign court did not have jurisdiction over he subject matter."

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[52] Pltf's Opp & CM Ex 18, Defendant's First Amended Answer § 17.

"3. A court of this State need not recognize a foreign-country judgment if:

(a) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(b) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;

(c) The judgment or the cause of action on which the judgment is based is repugnant to the public policy of this State or of the United States;

(d) The judgment conflicts with another final and conclusive judgment;

(e) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(f) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(g) The judgment was rendered in circumstances that raise substantial doubt

> about the integrity of the rendering court with respect to the judgment; or
>
> (h) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."
>
> "4. A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection 2 or 3 exists."

Judging from Defendant's affirmative defenses, Defendant previously rested its defenses on §§ 2(a), 3(g) and 3(h). Defendant, however, has waived or withdrawn each of these defenses. In response to Plaintiff's Request for Admission No. 11, Defendant states "Defendant hereby withdraws his lack of due process claim other than as may be affected by defendant's defense that the Disgorgement Judgment is a penalty. . . ."[53] Defendant further admits that he was represented by counsel in the proceedings against him, that multiple hearings were held in the proceedings against him, and that he received notice of those hearings.[54] Defendant further expressly withdraws any claim that the proceedings were inherently biased, that the judgment was rendered in

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[53] *See* Pltf's Opp & CM Ex 28, Def's Rsps to Pltf's RFAs, Response No. 11.

[54] *See* Pltf's Opp & CM Ex 28, Def's Rsps to Pltf's RFAs, Responses No. 12-14.

circumstances raising doubts about the integrity of the BCSC, that the proceedings were not compatible with US due process, and that the BCSC delayed this action.[55]

Through its discovery responses, Defendant has waived, or withdrawn, its first, third, fourth, and fifth affirmative defenses. Defendant even waived his second affirmative defense through his Motion for Summary Judgment, which states, "Defendant Lathigee asserts but a single defense that is common to both the NUF-CMJRA and to comity, which is that the Disgorgement Order is in the nature of a fine or penalty."[56] This leaves only one affirmative defense, that the Judgment "is clearly denoted as a 'sanction' and is otherwise a fine and/or penalty that is not subject to recognition or to comity."[57]

b. **Plaintiff's Judgment is not a Penalty**

The Restatement (Second) of Conflict of Laws states, "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned." Plaintiff has a valid disgorgement

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[55] *See* Pltf's Opp & CM Ex 29, Def's Rsps to Pltf's ROGs, Responses No. 2-4, & 6.

[56] Def's MSJ, Memorandum 1:21-23.

[57] Pltf's Opp & CM Ex 18, Def's Amended Answer, p. 3-4.

judgment rendered by the courts of British Columbia Canada after a fair trial in a contested proceeding.

The US Supreme Court, in *Kokesh* v. *S.E.C.*, adopted the position of the Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment a, p. 204 (2010), by holding that "disgorgement is a form of '[r]estitution measured by the defendant's wrongful gain."[58] The Restatement (Fourth) of Foreign Relations Law of the United States makes clear that "A judgment in favor of a foreign state awarding restitution for the benefit of private persons is not penal. . . ." As this is a case of first impression in Nevada on this subject matter, and is believed to be so also in the United States, this Court adopts the law of Section 489 cmt. 4 of the Restatement (Fourth) of Foreign Relations Law of the United States as the law of Nevada, and holds that disgorgement judgments are restitutionary under US law and *Kokesh*, and are not penal for purposes of recognition of foreign judgments.

In particular this Court finds that the British Columbia judgment sought to be recognized by this Court is not penal, but is a form of restitution, as the funds collected under British Columbia disgorgement judgments are mandated by law to become subject to a claims process in which the judgment funds are used to restore the losses of victims affected by the fraud on which the judgment is based. The statute under which the judgment was granted provides for

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[58] *Kokesh* v. *S.E.C.*, 137 S. Ct. 1635, 1640 (2017).

the judgment debtor to "pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention."[59] If the commission receives money pursuant to a judgment under 161(1)(g), it must give notice, and persons who have been harmed by the fraud can submit an application to have such funds distributed to them.[60] Pursuant to section 15.1 of the BC *Securities Act*, and Securities Regulation 196-97, it is mandatory that the BCSC distribute disgorgement funds to proper claimants, and it is therefore the BCSC's strict policy to do so.[61] Whatever the "purpose" of the law, clearly the effect is to compensate victims—something the law mandates by its terms.

In this particular case, Plaintiff's judgment is dollar for dollar a disgorgement of amounts actually held by British Columbia's securities regulator to have been fraudulently taken from individual investors. The effect of the disgorgement judgment then is to take back those funds actually taken from individual investors, and to grant restitution to victims through the legally-mandated claims process.

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[59] Plft's Opp & CM Ex 2, Canada Securities Act [RSBC 1996] Chapter 418, Part 18, § 161(1)(g).

[60] *Id.* at Part 3, § 15.1.

[61] *Id.* at Part 3, § 15.1; See Pltf's Opp & CM Declaration of Plaintiff § 6; Pltf's Opp & CM Ex 3, Securities Regulation, B.C. Reg. 196/97, Ministerial Regulation M244/97, Part § 7.4(6)

Kokesh

While this Court has considered the Kokesh court's defining disgorgement as penal for the purposes of a US statute of limitations period, this party of Kokesh applies only to disgorgement as the Kokesh court specifically states, "We hold that **SEC disgorgement** constitutes a penalty."[62] While *Kokesh* is persuasive coming from the US Supreme Court, this Court does not believe *Kokesh* is binding or even on point for this particular matter, because the *Kokesh* court limited its application to SEC disgorgement, and the case was strictly in regard to a statute of limitations matter. While in *Kokesh* the statute of limitations matter was a black and white test of whether the cause of action would be held to a certain time frame requirement, the issue of a judgment being a penalty for purposes of recognizing foreign country judgments is a very different analysis, wherein this Court recognizes that "Enforcement of a judgment affording a private remedy is not barred . . . because it is joined with, or awarded in the same proceedings as, a judgment the enforcement of which would be barred. . ." such as a penalty.[63]

In other words, the *Kokesh* court effectively held that because the judgment in that case was partially penal, it was held to a particular statute of

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[62] *Kokesh* v. *S.E.C.*, 137 S. Ct. 1635, 1642 (2017) (emphasis added).

[63] Restatement (Fourth) of Foreign Relations Law of the United States § 489 cmt. d.

limitations, but in the analysis of recognizing foreign judgments, a partially penal purpose is not dispositive, as the penal portion of a judgment can be separated from the restitution portion of the judgment, and the restitution portion given full recognition. This Court holds that the entire $21.7 Million judgment sought to be recognized in this case is restitution under US and Nevada law, and should be recognized in its entirety.

Huntington

This Court has also considered the decision in *Huntington* v. *Attrill*.[64] *Huntington* did not involve a disgorgement judgment, or even a foreign country judgment, but it instead determined that the Full Faith and Credit Clause does not apply to penal judgments.[65] So it did not say that courts could not recognize penal judgments, but instead decided only the constitutional question of whether courts were *required* to recognize them under the Full Faith and Credit Clause.[66] While *Huntington* does not apply to foreign country judgments, the court developed a test for whether a sister-state judgment is penal, determining that the penal status of such a judgment "depends upon the question whether its purpose is to punish an offense against the public justice of the

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[64] *Huntington* v. *Attrill*, 146 US 657, 673-674 (1892).
[65] *City of Oakland* v. *Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 538 (2011)
[66] *Id*.

state, or to afford a private remedy to a person injured by the wrongful act."[67]

While *Huntington's* test is not binding on this case, because it does not apply to foreign country judgments, the test still leads to a conclusion that a British Columbia disgorgement judgment is not a penalty. As discussed at length herein and in Plaintiff's Countermotion, such a judgment's purpose is not to punish an offense against the public justice of the state, but to disgorge the Defendant of his ill-gotten gains, and then those gains are mandatorily returned to the claimants who are Defendant's victims.[68]

The British Columbia disgorgement judgment does not perfectly fall into the *Huntington* test, but it is much more similar, for the purpose of this analysis, to a private remedy than a punishment. The funds from disgorgement orders are strictly required to compensate victims and not go into the general operating revenue.[69] This is different from administrative penalties which don't compensate victims.[70]

The more appropriate test to follow in this case is that which is set forth by the Restatement (Fourth)

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[67] *Huntington* v. *Attrill*, 146 US 657, 673-674 (1892).
[68] *See* Pltf's Reply Declaration of Plaintiff § 4.
[69] *See* Pltf's Reply Declaration of Plaintiff § 5.
[70] *City of Oakland* v. *Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 534 (2011).

of Foreign Relations of the United States, which states that when the judgment (1) is in favor of a foreign state, and (2) results in restitution for the benefit of private persons, then it is not a penalty.[71]

Oakland

This Court has also considered the decision in *City of Oakland* v. *Desert Outdoor Advertising, Inc.*[72] The *Oakland* case focused on a judgment with a strictly public purpose where no private injury was had, and no right to compensation for individuals existed. Indeed, the judgment in the *Oakland* case came from a municipal code violation for the erection of a billboard determined to be a public nuisance.[73] Plaintiff's judgment is not for some public nuisance, but for the disgorgement of stolen funds and profits, and a return of such funds to Defendant's victims. Plaintiff's judgment is not the result of some municipal code prescribing penalties and fines, like a traffic ticket or zoning violation, but is a judgment based on important securities regulations which provide disgorgement which results in those funds being available to victims of the fraud.[74]

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[71] Restatement (Fourth) of Foreign Relations Law of the United States § 489 n. 4; *see also* § 489(b).
[72] *City of Oakland* v. *Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 534 (2011).
[73] *City of Oakland* v. *Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 534 (2011).
[74] *See* Pltf's Reply Declaration of Plaintiff § 4.

C. British Columbia Disgorgement Judgments May be Recognized Pursuant to Principles of Comity

NRS 17.820 states that "NRS 17.700 to 17.820, inclusive, do not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of NRS 17.700 to 17.820, inclusive." Under that authority, this Court finds good cause for recognizing Plaintiff's judgment under both NRS 17.700-17.80, and comity.

A Court may grant comity in recognizing a foreign country judgment even if the judgment is a tax, fine or penalty, as nonrecognition is such cases is permitted but not required.[75]

> "'[C]omity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect.'"[76]

> "A court applying the principle of comity should consider the 'duties, obligations, rights, and convenience of its own

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[75] Restatement (Third) of Foreign Relations Law of the United States, § 483 cmt a ("Nonrecognition not required but permitted").

[76] *In re Chao-Te*, 2015 WL 3489560 (Nev., May 29, 2015) (citing *Mianecki* v. *Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983)).

> citizens and of persons who are within the protection of its jurisdiction.'"[77]

Comity is a rule of practice, convenience, and expediency, rather than rule of law, that courts have embraced to promote cooperation and reciprocity with foreign lands.[78] Principles of Comity are embraced by both Canada and the United States, in each of their countries endeavor to promote cooperation and offer reciprocity between two similar legal systems.

While Courts should consider whether due process was given in their decision to grant comity, such requires only that the basic requisites for due process are necessary—including notice and a hearing.[79] The seminal comity case, *Hilton* v. *Guyot*, declares:

> "[Comity] contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have

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[77] *Id*.
[78] *Mujica* v. *AirScan Inc*., 771 F.3d 580, 598 (9th Cir. 2014) (citing *Pravin Banker Assocs., Ltd.* v. *Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997) (quoting *Somportex Ltd. Phila. Chewing Gum Corp*., 453 F.2d 435, 440 (3d Cir. 1971)).
[79] *Soc'y of Lloyd's* v. *Hudson*, 276 F. Supp. 2d 1110, 1112 (D. Nev. 2003).

> continually acted upon it as a part of the voluntary law of nations."[80]
>
> "Where there has been opportunity for a full and fair trial before a foreign court of competent jurisdiction, conduction the trial on regular proceedings, after due citation of voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of that country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of the United States should not allow it full effect, the merits of the case should not, in an action brought in this respective Provinces and States, as the two close country on the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of a party that the judgment was erroneous in law or in fact."[81]

Canada and the U.S. have a long history together as two nations which sprung up in close

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[80] *Hilton* v. *Guyot*, 159 U.S. 113, 165 (1895).
[81] *Id.* at 123.

proximity at similar times. The two nations' legal systems are largely similar, as they both arose from British and European jurisprudence.

The SEC and securities commissions of each of the Provinces, including the BCSC, often work together, as the nature of the proximity and relations of the two countries makes it easy for fraud to move between the countries.[82] The U.S. and many provinces of Canada are actually parties to a Memorandum of Understanding, to which the SEC and BCSC are signatories, which provides that the "Authorities will provide the fullest mutual assistance," "to facilitate the performance of securities market oversight functions and the conduct of investigations, litigation or prosecution. . . ."[83] Canadian courts, including the British Columbia Courts, have upheld SEC disgorgement judgments on multiple occasions.[84] One of the more recent cases, *United States (Securities Exchange Commission)* v. *Peever*, recognized, and permitted enforcement of, an SEC disgorgement

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[82] *See S.E.C.* v. *Lines*, 2009 WL 2431976, p.1 (S.D.N.Y.).

[83] Pltf's Opp & CM Ex 24, Memorandum of Understanding between SEC and BCSC.

[84] *See* Pltf's Opp & CM Ex 22, *United States (Securities Exchange Commission* v. *Peever*, 2013 BCSC 1090 (CanLII); Ex 25, *United States (Securities and Exchange Commission)* v. *Shull*, (1999) B.C.J. No. 1823 (S.C.); and Pltf's Opp & CM Ex 26, *United States (Securities and Exchange Commission)* v. *Cosby*, 2000 BCSC 338.

judgment, even though the defendant alleged that its purpose was partially penal in nature.[85] The same Court also gave effect to an SEC disgorgement judgment in *United States (Securities and Exchange Commission)* v. *Cosby*, holding that "as it is only the disgorgement aspect of the foreign judgment that the plaintiff seeks to enforce, the judgment is not a foreign penal claim and it is enforceable or actionable in this jurisdiction."[86] That Court held again, in *United States of America* v. *Shull*, that the disgorgement order sought to be enforced by the SEC in Canada was "neither a penal sanction nor a taxation measure."[87]

It is critically important that we maintain our good relations and ties with Canada by giving effect to its Province's judgments, as it gives effect to ours, especially those meant to provide some restoration to the victims of securities fraud. "International law is founded upon mutuality and reciprocity."[88] If we want Canada's Provinces to continue to recognize our

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[85] Pltf's Opp & CM Ex 22, *United States (Securities Exchange Commission* v. *Peever*, 2013 BCSC 1090 (CanLII).
[86] Pltf's Opp & CM Ex 26, *United States (Securities and Exchange Commission)* v. *Cosby*, 2000 BCSC 338.
[87] Pltf's Opp & CM Ex 25, *United States (Securities Exchange Commission)* v. *Shull*, (1999) B.C.J. No. 1823 (S.C.).
[88] *Hilton* v. *Guyot*, 159 U.S. 113, 228 (1895).

securities judgments, then we need to recognize theirs.

If we fail to uphold Canada's Provinces' securities judgment, and more particularly, disgorgement judgments, then they may very likely refuse to uphold ours, and in that situation the citizens of both countries are worse off. U.S. and Nevada citizens who are victimized by securities fraud would be less likely to receive any recompense.

ORDER

Based on the foregoing; the Court finding that it has jurisdiction over the subject matter and the parties hereto, and being otherwise fully advised in the premises and good cause appearing; hereby enters this judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that PLAINTIFF'S Countermotion for Summary Judgment is **GRANTED**.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that DEFENDANT'S Motion for Summary Judgment is **DENIED**.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Judgment in the amount of $21.7 Million CAD, is hereby recognized and entered, and is fully enforceable in the State of Nevada.

IT IS ORDERED AND ADJUDGED that the plaintiff, the BRITISH COLUMBIA SECURITIES COMMISSION, recover of the defendant MICHAEL PATRICK LATHIGEE the sum of $21,700,000.00 CAD plus interest on that sum at the statutory rate pursuant to NRS 17.130 or, at the option of the judgment debtor, the number of United States dollars which will purchase the Canadian Dollar with interest due, at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with assessed costs of $1,173.39 United States dollars.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that trial deadline currently on calendar shall be vacated.

DATED this 14th day of May, 2019.

Adriana Escobar
DISTRICT COURT JUDGE

APPENDIX C

In the Supreme Court of British Columbia

No. L-150117

BRITISH COLUMBIA SECURITIES COMMISSION,
Petitioner,

v.

MICHAEL PATRICK LATHIGEE; EARLE DOUGLAS PASQUILL; FIC REAL ESTATE PROJECTS LTD.; FIC FORECLOSURE FUND LTD., AND WBIC CANADA LTD.,

Respondents.

DECISION

FILED: April 1, 2015

Before Commissioners: AUDREY T. HO and JUDITH DOWNES

Michael Patrick Lathigee and Earle Douglas Pasquill, FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBIC Canada Ltd.

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Audrey T. Ho	Commissioner
	Judith Downes	Commissioner
Hearing Date	February 13, 2015	
Date of Decision	March 16, 2015	

Appearing

Derek Chapman	For the Executive Director
H. Roderick Anderson	For the Respondents
Owais Ahmed	

Decision

I. Introduction

¶ 1 This is the sanctions portion of a hearing pursuant to sections 161(1) and 162 of the *Securities Act*, RSBC, 1996, c.418. The Findings on liability, made on July 8, 2014 (2014 BCSECCOM 264), are part of this decision. Since the Findings, the panel chair, Vice Chair Brent W. Aitken, retired and did not participate in the sanctions hearing or any deliberations regarding sanctions.

¶ 2 The Findings panel found that:

a) all the respondents perpetrated a fraud, contrary to section 57(b) of the Act, when they raised $21.7 million from 698 investors without disclosing to them the important fact of FIC Group's financial condition; and

b) Michael Patrick Lathigee, Earle Douglas Pasquill and FIC Foreclosure Fund Ltd. perpetrated a second fraud, contrary to section 57(b), when they raised $9.9 million from 331 investors in FIC Foreclosure for the purpose of investing in foreclosure properties and instead used most of the funds to make unsecured loans to other FIC Group companies.

II. Position of the Parties

¶ 2 The executive director seeks:

a) permanent market prohibitions against the respondents, under sections 161(1)(b), (c) and (d) of the Act;

b) disgorgement orders against the respondents under section 161(1)(g), for the amounts obtained by them, respectively, in contravention of the Act, as follows:

- Lathigee - $21.7 million
- Pasquill - $21.7 million

- FIC Real Estate Projects Ltd. - $9.8 million
- FIC Foreclosure - $9.9 million
- WBIC Canada Ltd. - $2 million; and

c) administrative penalties against the respondents under section 162, in the same amount as the section 161(1)(g) order sought against each of them.

¶ 4 The respondents submitted that the appropriate sanctions are as follows:

a) 10-year market prohibitions against the respondents, under sections 161(1)(b) and (d), subject to two carve-outs:

- Lathigee and Pasquill may trade through a registered dealer in their own RRSP and cash accounts
- Lathigee and Pasquill may each act as a director and officer of an issuer whose shares are solely owned by him or by him and his immediate family;

b) no disgorgement orders against any of the respondents;

c) administrative penalties against each of Lathigee and Pasquill in the amount of $500,000; and

d) no administrative penalties against the corporate respondents.

III. Analysis
A. Factors

¶ 5 Orders under sections 161(1) and 162 are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 SCC 37.

¶ 6 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,

- the extent to which the respondent was enriched,
- factors that mitigate the respondent's conduct,
- the respondent's past conduct,
- the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, or officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate - conduct, and
- orders made by the Commission in similar circumstances in the past.

B. Application of the Factors

Seriousness of the conduct

¶ 7 The Commission has consistently held that fraud is the most serious misconduct prohibited by the Act. In *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595, the Commission, at paragraph

18, said, "Nothing strikes more viciously at the integrity of our capital markets than fraud."

¶ 8 The magnitude of the fraud perpetrated in this case is among the largest in British Columbia history. The respondents raised $21.7 million from 698 investors without telling them that the FIC Group had a severe cash flow problem. A relatively small number of potential events could have triggered its insolvency in a very short time frame. Three of the respondents led FIC Foreclosure's 331 investors to believe that the $9.9 million raised from them would be invested in foreclosure properties and soon. Instead, FIC Foreclosure used most of the funds to make unsecured loans to other FIC Group companies.

Harm to investors; damages to capital markets

¶ 9 The Commission has consistently held that fraud is the most serious misconduct prohibited by the Act. In *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595, the Commission, at paragraph 18, said, "Nothing strikes more viciously at the integrity of our capital markets than fraud."

¶10 The harm to the reputation and integrity of our capital markets is also clear.

Enrichment

¶ 11 The executive director and the respondents each tendered evidence to establish (or refute) if, and to what extent, Lathigee and Pasquill received

any of the fraudulently raised funds for their personal benefit.

¶ 12 The FIC Group was run, from a financial point of view, as one entity. The evidence before us indicates that the bulk of the $21.7 million was used for the benefit of the FIC Group of companies.

Mitigating or aggravating factors

¶ 13 There are no mitigating factors. There are no aggravating factors beyond the ones cited below under the heading "Past Conduct".

¶ 14 Lathigee and Pasquill argued that their conduct after 2008, the year in which the funds at issue were raised, is a mitigating factor. They said that they (and Pasquill in particular) have worked to help the FIC Group recover assets through various means including lawsuits against third parties, kept the companies' filings in good standing, worked with the companies' receiver, and communicated with investors to keep them up to date on progress and answer all their questions.

¶ 15 We do not see how Lathigee's and Pasquill's conduct after the funds were raised, as described in paragraph 14, lessens the gravity of their fraudulent acts, and we do not consider it to be a mitigating factor. In addition, we do not consider their co-operation in the other proceedings to be a mitigating factor in considering sanctions in this proceeding. See:

Rashida Samji et al 2015 BCSECCOM 29 (paragraph 16).

¶ 16 Lathigee and Pasquill also argued that the fact that the fraud was not designed to enrich them is a mitigating factor. We do not agree. If we had found that the fraud was designed to enrich them, that would be an aggravating factor. The absence of an aggravating factor does not equate to the presence of a mitigating factor.

Past conduct

¶ 17 Lathigee, Pasquill and WBIC have a history of regulatory misconduct.

¶ 18 As more particularly described in paragraphs 14-16 of the Findings,

a) In December 2005, Commission staff issued cease trade orders against three FIC Group companies (WBIC, FIC Investments Ltd. and China Dragon Fund Ltd.) for using forms of offering memoranda that did not comply with the requirements of the Act. Lathigee and Pasquill were directors and officers of each company at the time.

b) In June 2007, Lathigee, Pasquill, WBIC and China Dragon entered into a settlement agreement with the Commission and admitted to certain securities law violations. Lathigee agreed to pay a $60,000 fine and Pasquill agreed to pay a $30,000 fine.

¶ 19 In addition, on September 2, 2008 (after the fund raising period in this case), the executive director issued a further cease trade order against WBIC. This order was related to inadequate disclosure in WBIC's offering memoranda dated June 1, 2007 and February 1, 2008 regarding: risk factors related to the investments, investments made by WBIC in related companies, and material agreements entered into by WBIC including loan guarantees. Lathigee and Pasquill were directors and officers of WBIC at the time.

Risk to investors and markets

¶ 20 For the reasons discussed below, we find the respondents to be a serious ongoing risk to the capital markets and permanent market bans are warranted.

¶ 21 First, those who commit fraud represent the most serious risk to our capital markets. Here, the fraud is significant.

¶ 22 Second, WBIC and the individual respondents' multiple past infractions show they do not respect securities laws. They were not deterred by orders and sanctions from prior infractions.

¶ 23 Third, Lathigee remained active in the capital markets after his involvement in the FIC Group, co-founding an investment club in Las Vegas with a mandate that resembles the FIC Group's mandate. When talking about his background,

he was not forthcoming about his regulatory history.

¶ 24 The executive director submitted a video posted on YouTube in April 2014. This was a year after the issuance of the Notice of Hearing in this case but before the liability hearing.

¶ 25 According to the video, entitled "Experts of Southern Nevada," which is in the format of an interview of Lathigee:

a) Lathigee now lives in Las Vegas and is a co-founder and leader of an investment club called the Las Vegas Investment Club;

b) The mandate of the club appears quite similar to the mandate of the FIC Group;

c) Lathigee talked about the strategy of investing in tax liens and tax deeds, and claimed a lot of success in the past with investing in these liens and deeds;

d) Lathigee claimed that he had previously built the largest investment club in North America that grew to $100 million in assets under management; and

e) Lathigee talked about some of his past successes and background but there was no mention of his regulatory history in British Columbia.

Specific and general deterrence

¶ 26 The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

Previous orders

¶ 27 The executive director referred us to three recent decisions of this Commission that dealt with fraud: *IAC – Independent Academies Canada Inc.* 2014 BCSECCOM 260, *David Michael Michaels et al* 2014 BCSECCOM 457, and *Samji*.

¶ 28 In *IAC*, the respondents raised $5.1 million from investors without filing a prospectus. Of that amount, $1.645 million was raised fraudulently. The respondents did not tell investors that the property to be developed with their money was in foreclosure. The panel ordered permanent market bans, an administrative penalty of $7 million against the individual respondents on a joint and several basis, plus a section 161(1)(g) order against all the respondents for the money that was raised illegally.

¶ 29 In *Michaels*, the panel found that Michaels convinced people to purchase $65 million of securities through fraud, misrepresentation and unregistered advising. Michaels received $5.8 million in commissions and fees from the

scheme. The circumstances in *Michaels* are different from the present case in that the investments made by Michaels' clients went into investments in accordance with their intentions. However, the panel found that the seriousness of the misconduct was heightened by Michaels' predatory behavior in targeting seniors. The panel there ordered permanent market bans, an administrative penalty of $17.5 million, plus a section 161(1)(g) order for $5.8 million against Michaels.

¶ 30 In *Samji*, the panel found that Samji operated a $100 million Ponzi scheme and defrauded at least 200 investors. The panel ordered permanent market bans, an administrative penalty of $33 million, plus a section 161(1)(g) order of approximately $11 million representing the difference between the monies deposited by investors under the Ponzi scheme and the monies paid out to them, against Samji and the corporate respondents on a joint and several basis.

C. Appropriate Orders

a) Market prohibitions

¶ 31 Fraud is the most serious misconduct prohibited by the Act. Permanent market prohibitions are common for those found to have committed fraud.

¶ 32 For the reasons already stated, we conclude that it is not in the public interest to allow the

respondents to operate in the capital markets. We find that a permanent market ban against the respondents is necessary to protect the markets and the investing public, subject to two carve-outs:

I. We are prepared to allow Lathigee and Pasquill to trade for their own accounts through a registered dealer. We do not see any risk to the investing public by doing so.

II. We are also prepared to allow Lathigee to act as a director and officer of one private issuer whose securities are owned solely by him or by him and his immediate family. He is currently the director and officer of such a company, and we see no risk to the investing public by allowing him to continue. We are not granting this carve-out to Pasquill as he indicated that he has no need for it.

b) Orders under section 161(1)(g)

¶ 31 Section 161(1)(g) states that the Commission may order:

> "(g) if a person has not complied with this Act, . . . that the person pay to the commission <u>any amount obtained</u>, or payment or loss avoided, <u>directly or indirectly, as a result of the failure to</u>

comply or the contravention;" (emphasis added)

¶ 34 The respondents challenged our authority to make a section 161(1)(g) order (sometimes referred to as a "disgorgement order") against the individual respondents. They argued that, for section 161(1)(g) to apply, the respondent against whom the order is issued must have obtained a payment or avoided a loss, directly or indirectly, as a result of the contravention of the Act. They said there is no evidence that Lathigee and Pasquill obtained any payment or avoided any loss as a result of their contraventions of the Act.

¶ 35 The respondents argued that to order disgorgement against a respondent who has not obtained any money as a result of a contravention would improperly punish the respondent or, alternatively, wrongly duplicate the purpose of an administrative penalty. They relied on Manna Trading, which stated (in paragraph 36) that the purpose behind section 161(1)(g) orders is to remove "the incentive of profiting from illegal misconduct" and to return money obtained by contravening the Act.¶ 36 According to the video, entitled "Experts of Southern Nevada," which is in the format of an interview of Lathigee:

¶ 36 The executive director disagreed. He argued that it is clear from a plain reading of section

161(1)(g) that it is not limited to requiring payment of the amount obtained by a respondent. He cited *Oriens Travel & Hotel Management Ltd*. 2014 BCSECCOM 91 and *Michaels*.¶ 38 According to the video, entitled "Experts of Southern Nevada," which is in the format of an interview of Lathigee:

¶ 37 The Commission in Oriens and Michaels held that an order against a respondent for payment of the full amount obtained as a result of his contravention of the Act is possible without having to establish that the amount obtained through the contravention was obtained by that respondent. We agree.

¶ 38 We do not read Manna Trading as supporting the respondents' interpretation of section 161(1)(g). The panel there found four individual respondents to have perpetrated a fraud and ordered each of them to pay to the Commission under section 161(1)(g) the full amount obtained by the fraud without regard to the finding that they were personally enriched by different amounts. That panel concluded it was not necessary, in making orders under section 161(1)(g), to trace investor funds into the hands of the respondents. It said (at paragraph 44) that each respondent's individual contraventions, directly or indirectly, resulted in the investment of US$16 million in the Manna Ponzi scheme and ordered each of them to pay that amount under section 161(1)(g), as it was "the amount

obtained, directly or indirectly, as a result of their individual contraventions of the Act."

¶ 39 We also find instructive the decision of the Ontario Securities Commission (OSC) in *Limelight Entertainment Inc.* (2008) 31 O.S.C.B. 12030 (cited in *Michaels*).

¶ 40 The Ontario Securities Act contains provisions that are identical in all relevant respects to section 161(1)(g). In *Limelight*, the OSC stated, in paragraph 49:

> "We noted that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. … In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that

> were obtained from investors as a result of that illegal activity. …"

¶ 41 In *Limelight*, the OSC found two individual respondents, Da Silva and Campbell, to be the directing minds and principal shareholders of Limelight, and to have committed illegal acts both personally and through their control and direction over Limelight and its salespersons. The OSC ordered disgorgement jointly from Limelight, Da Silva and Campbell of the entire amount raised. In doing so, the OSC stated, in paragraph 59:

> "In our view, individuals should not be protected or sheltered from administrative sanctions by the fact that the illegal actions they orchestrated were carried out through a corporation which they directed and controlled. In this case, Limelight, Da Silva and Campbell acted in concert with a common purpose in breaching key provisions of the Act."

¶ 42 We agree with the principles articulated and approaches taken in the illegal distribution and fraud cases canvassed above. They are even more compelling in cases of fraud. We should not read section 161(1)(g) narrowly to shelter individuals from that sanction where the amounts were obtained by the companies that they directed and controlled.

¶ 43 We find we have the authority to order disgorgement against the individual respondents in this case, up to $21.7 million, the full amount obtained by fraud.

¶ 44 We next considered whether we should exercise our discretion to make section 161(1)(g) orders against each respondent and in what amount.

¶ 45 With respect to the individual respondents, they submitted that the panel should not make such an order against them even if we have the authority, because they were not personally enriched and they only received reasonable compensation from the FIC Group.

¶ 46 The principles articulated in the cited cases apply equally to this case. Lathigee and Pasquill, personally and with the corporate respondents that they directed, committed fraud on close to 700 investors. They were the directing and controlling minds of the corporate respondents. They should not be protected or sheltered from sanctions by the fact that the illegal actions they orchestrated were carried out through corporate vehicles. The amounts obtained from investors need not be traced to them specifically and we find that $21.7 million was obtained, directly or indirectly, as a result of their individual contraventions of the Act.

¶ 47 With respect to the corporate respondents, they obtained the amount raised by them respectively as a result of their individual contraventions of

the Act. But, they submitted that a section 161(1)(g) order should not be made against them as they have no ability to pay, and such an order may result in their entering into bankruptcy to the prejudice of the investors.

¶ 48 A respondent's ability to pay is not a relevant consideration. Even if it were, the respondents did not provide any evidence that the corporate respondents would have the money to pay the investors if we decline to make a section 161(1)(g) order.

¶ 49 Each respondent's misconduct contributed to the raising of the $21.7 million fraudulently. We find that it is in the public interest to order the respondents to pay the full amount obtained as a result of their fraud. Accordingly, we order the respondents to pay to the Commission, jointly and severally, the respective amounts set out in paragraph 62(d) below.

III. Administrative Penalty

¶ 50 Under section 162 of the Act, where the Commission has determined that a person has contravened a provision of the Act, it "may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention".

¶ 51 The respondents first argued that the executive director had only alleged, and the Findings panel had only found, that the respondents committed one act of fraud when they raised the

$21.7 million and three respondents committed a second act of fraud when they raised the $9.9 million. Therefore, the respondents argued that this panel has no authority to order any penalty under section 162 in excess of $2 million against the three respondents who committed fraud twice and $1 million against the remaining respondents.

¶ 52 The executive director disagreed. He said the notice of hearing alleged that the fraudulent conduct involved 698 investors who invested $21.7 million, and 331 investors who invested the $9.9 million. Therefore, a separate fraud was perpetrated with respect to each investor, which means the respondents contravened section 57(b) a total of 1,029 times (698 with respect to the FIC Group investors and 331 with respect to the FIC Foreclosure investors).

¶ 53 We agree with the executive director. His interpretation is consistent with the language in the Findings. The Findings panel stated, "We find that the respondents perpetrated a fraud on those investors, contrary to section 57(b) of the Act" [emphasis added], with respect to the 698 FIC Group investors (paragraph 303), and again with respect to the 331 FIC Foreclosure investors (paragraph 357).

¶ 54 Therefore, the respondents perpetrated a fraud each time they traded securities to an investor. As with *Manna* Trading and *Samji*, where a

similar argument was advanced, the respondents in this case contravened section 57(b) multiple times in their dealings with hundreds of investors. There are, therefore, hundreds of contraventions for which we could order an administrative penalty.

¶ 55 Much of the parties' submissions focused on the quantum of the administrative penalty against the individual respondents.

¶ 56 Some Commission panels had used a two or three times multiplier on the amount of the fraud as a guide in determining the appropriate sanction. See, for example, *IAC*. There is no hard and fast rule. It is trite to say that each case is different and we must look at the circumstances unique to the case.

¶ 57 The respondents here suggested that the administrative penalty should be $500,000 for each individual respondent. But if the panel applies a multiplier, then it should be based only on the amounts paid by the corporate respondents to the individual respondent personally or to his holding companies.

¶ 58 Even if we consider the amounts paid by all the FIC Group companies to each individual respondent since January 2008, the evidence suggests they totaled less than $400,000, and a three times multiplier would be $1.2 million. In our view, that is far too low for specific and

general deterrence in light of the magnitude of the fraud.

¶ 59 Here, the misconduct is greater in magnitude and seriousness than that in *IAC*, and not as egregious as that in Michaels. In our view, an administrative penalty of $21.7 million (in addition to the $21.7 million disgorgement) against each individual respondent as requested by the executive director is not necessary for meaningful specific and general deterrence. We find $15 million to be proportionate to the harm done, making it appropriate for the respondents personally and sufficient to serve as a meaningful and substantial general deterrence to others. A $15 million administrative penalty against each respondent is in line with the penalties ordered in *IAC* and *Michaels*.

¶ 60 We do not draw any material distinction between the responsibility that Lathigee and Pasquill have for the misconduct. The administrative penalty should be the same with respect to both of them.

¶ 61 We do not find it serves the public interest or any useful purpose to impose an administrative penalty against the corporate respondents. They were controlled by Lathigee and Pasquill and did not act independently of the directions from the two individuals. There is no need for specific deterrence against them. In our opinion, general deterrence can be achieved through

administrative penalties against the individual respondents.

IV. Orders

¶ 62 Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

***a) FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBIC Canada Ltd.* (the "*corporate respondents*")**

i. under section 161(1)(b)(i), all persons permanently cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts of the corporate respondents;

ii. under section 161(1)(d)(v), the corporate respondents are permanently prohibited from engaging in investor relations activities;

iii. under section 161(1)(c), on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to any of the corporate respondents; and

iv. subject to paragraph 62(d) below, under section 161(1)(g), the corporate respondents pay to the Commission the amounts obtained, directly or indirectly, as a result of their contraventions of the Act, as follows:

- FIC Projects - $9.8 million
- FIC Foreclosure - $9.9 million
- WBIC - $2 million;

b) Lathigee

i. Subject to the exception in paragraph 62(b)(ii)(b) below, under section 161(1)(d)(i), Lathigee resign any position he holds as a director or officer of an issuer or registrant;

ii. Lathigee be permanently prohibited:

a) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase them for his own account through a registrant if he gives the registrant a copy of this decision;

b) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant, except that he may act as a director or officer of one issuer whose securities are solely owned by him or by him and his immediately family members (being: Lathigee's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law, or brother or sister-in-law);

c) under section 161(1)(d)(iii), from becoming or acting as a promoter;

d) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

e) under section 161(1)(d)(v), from engaging in investor relations activities;

iii. under section 161(1)(c), except for those exemptions necessary to allow Lathigee to trade or purchase securities and exchange contracts for his own account, on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to Lathigee;

iv. subject to paragraph 62(d) below, under section 161(1)(g), Lathigee pay to the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act; and

v. under section 162, Lathigee pay an administrative penalty of $15 million;

c. Pasquill

i. under section 161(1)(d)(i), Pasquill resign any position he holds as a director or officer of an issuer or registrant;

ii. Pasquill be permanently prohibited:

(a) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase them for his own account through a registrant if he gives the registrant a copy of this decision;

(b) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;

(c) under section 161(1)(d)(iii), from becoming or acting as a promoter;
(d) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
(e) under section 161(1)(d)(v), from engaging in investor relation activities;

iii. under section 161(1)(c), except for those exemptions necessary to allow Pasquill to trade or purchase securities and exchange contracts for his own account, on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to Pasquill;

iv. subject to paragraph 62(d) below, under section 161(1)(g), Pasquill pay to the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act; and

v. under section 162, Pasquill pay an administrative penalty of $15 million.

d) Section 161(1)(g) payments

i. The respondents' respective obligations to pay under paragraphs 62(a)(iv), 62(b)(iv) and 62(c)(iv) above shall not exceed the following:
(a) $9.8 million (distributions relating to FIC Projects) – FIC Projects, Lathigee and Pasquill only, on a joint and several basis;
(b) $9.9 million (distributions relating to FIC Foreclosure) - FIC Foreclosure, Lathigee and Pasquill only, on a joint and several basis; and

(c) $2 million (distributions relating to WBIC) - WBIC, Lathigee and Pasquill only, on a joint and several basis.

¶ 63 March 16, 2015

¶ 64 For the Commission

Audrey T. Ho

Audrey T. Ho
Commission

Judith Downer

Judith Downer
Commission

APPENDIX D

In the Supreme Court of the United States

No. 78833

MICHAEL PATRICK LATHIGEE
Appellant,

v.

BRITISH COLUMBIA SECURITIES COMMISSION,
Respondent.

ORDER DENYING REHEARING

FILED: March 18, 2021

Before: HARDESTY, PARRAGUIRRE, STIGLICH, CADISH, SILVER, PICKERING, HERNDON

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Hardesty, C.J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J.
Silver

Pickering, J.
Pickering

Herndon, J.
Herndon