IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL PATRICK LATHIGEE,

Appellant,

— *vs.* —

BRITISH COLUMBIA SECURITIES COMMISSION,

Respondent.

Case No. 78833

APPELLANT'S OPENING BRIEF

Appeal from Case No. A-18-771407-C
Eighth Judicial District Court For Clark County
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NRAP 26.1 DISCLOSURE

The undersigned counsel certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. The British Columbia Securities Commission ("BCSC") is a governmental body of the nation of Canada and has no corporate affiliation.

2. Michael Patrick Lathigee, an individual, is represented by Adkisson PLLC and Marquis Aurbach Coffing.

DATED this 28th day of June, 2019, by:

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JURISDICTIONAL STATEMENT

Michael Patrick Lathigee ("Lathigee") appeals from the Findings of Fact, Conclusions of Law and Judgment ("Judgment"), 8 JAX1487, entered on May 14, 2019, by the Eight Judicial District Court sitting *nisi prius* in Case No. A-18-771407-C. The Judgment is a "final judgment" per NRAP 3A(b)(1).

The Judgment was noticed on May 14, 2019, 8 JAX1507, and Lathigee's Notice of Appeal was filed on May 17, 2019, 8 JAX1529.

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11) and (12) insofar as it raises two issues of first impression in Nevada of statewide importance, being (1) the breadth of the Nevada Uniform Recognition of Foreign County Money Judgments Act ("NURF-CMJA"), NRS 17.700 *et seq*., as it relates to disgorgement orders, and (2) the application of comity to a foreign-country disgorgement order.

ISSUES ON APPEAL

(1) ***Whether a disgorgement judgment is in the nature of a penalty such that it is not subject to recognition under the Nevada Uniform Recognition of Foreign-Country Money Judgments Act ("NURF-CMJA"), NRS 17.700 et seq., and more specifically NRS 17.740(2)(b).***

(2) ***Whether a disgorgement judgment is in the nature of a penalty such that it is not subject to recognition in Nevada under the doctrine of comity.***

STATEMENT OF THE CASE

The British Columbia Securities Commission ("BCSC") on March 20, 2018, filed its Complaint, 1 JAX1, to register a Disgorgement Order, 1 JAX10-16, which will be described in detail below, against defendant Michael Patrick Lathigee ("Lathigee"). Lathigee filed his Original Answer on April 9, 2018, 1 JAX17, and a First Amended Answer on June 6, 2018. 1 JAX21.

On October 19, 2018, Lathigee filed his Motion for Summary Judgment. 1 JAX32. The BCSC filed its Opposition and

Countermotion for Summary Judgment on November 9, 2018. 1 JAX149. Further briefing on the competing summary judgment motions was submitted by the parties. 7 JAX1218 (Lathigee) and 7 JAX1236 (BCSC).

The District Court held a hearing on the competing motions for summary judgment on December 4, 2018, which resulted in the only transcript in this matter. 8 JAX1410. The Court took the matter under advisement, and asked the parties to submit proposed orders (a/k/a "Statements of Fact") which they did. 8 JAX1432 (Lathigee) and 8 JAX1461 (BCSC).

On May 14, 2019, the District Court signed the proposed order submitted by the BCSC, apparently without any modification, which became the final Judgment. 8 JAX1487. The BCSC that same day gave its Notice of the entry of the judgment. 8 JAX1507. On May 17, 2019, Lathigee filed his Notice of Appeal. 8 JAX1529.

I. INTRODUCTION

This case has the distinction of being the first case in Nevada to consider the circumstances under which a judgment from a foreign

country, here Canada, may be recognized as a Nevada judgment. The BCSC has correctly identified and seeks recognition of the Canadian judgment under the two possible basis for such recognition, being the statutory basis of the Nevada Uniform Recognition of Foreign-Country Money Judgments Act ("NURF-CMJA"),[1] NRS 17.700 *et seq*., and the common-law doctrine of comity.

This Court has had no previous opportunity to examine NURF-CMJA in the context of an actual attempt by a litigant to seek recognition of a foreign-country judgment. The NURF-CMJA is mentioned in the lengthy dissent by Justice Pickering in *City of Oakland v. Desert Outdoor Advert., Inc*., 127 Nev. 533, 543, 267 P.3d 48, 54 (2011), by way of comparison to the Nevada sister-state judgment recognition, the Nevada Uniform Enforcement of Foreign Judgments Act ("NUEFJA"), NRS 17.330 *et seq*., but the instant case is the first one where this Court has an actual foreign-country money judgment before it.

1 Phonetic "nurf-sim-juh."

Similarly, this Court has had no previous opportunity to examine the application of comity to a foreign-country money judgment, which presumably will require this Court to delve into the complex nuances of the common law and the American Law Institute's Restatement (Third or Fourth[2]) of the Law of Foreign Relations.

Indeed, it may rightfully be argued that the issues here are of national importance, insofar as whether a disgorgement order (which is what is involved here) is subject to registration under the Uniform Foreign-Country Money Judgment Recognition Act, of which NURF-CMJA is simply Nevada's variant, or under comity, appear to be ones of first impression in the United States.

The characterization of a foreign-country money judgment as a judicial interloper is made with substantial basis, as such a judgment is indeed an odd duck within our legal system. Unlike sister-state

2 Which is a minor drama all its own, discussed below, as the American Law Institute published the Restatement (Fourth) of the Law of Foreign Relations during the briefing of these issues before the District Court, and the parties had to re-orient their arguments from the Restatement (Third) to the Restatement (Fourth) in anticipation that this Court would adopt the latter.

judgments which must be recognized under the Full Faith & Credit Clause of the U.S. Constitution, Art. IV § 1, foreign-country judgments carry no such constitutional imprimatur. Instead, a District Court sits *nisi prius* and free of any constitutional mandate to consider whether the foreign-country judgment is worthy of recognition.

By way of NURF-CMJA, our Assembly has authorized certain foreign-country money judgments to be recognized—and similarly mandated that some such judgments *not* be recognized—whereas such recognition under comity is much more complicated.

Lathigee asserts but a single defense that is common to both the NURF-CMJA and to comity, which is that the Disgorgement Order is in the nature of a fine or penalty, and is thus not subject to recognition under either the NURF-CMJA or comity. That is, quite literally, the CAD$21.7 million question before this Court. Resolution of this single issue determines entirely the outcome of this case: If the Disgorgement Order is in the nature of a fine or penalty, then judgment should be for Lathigee and reversal is required; if not, then judgment should be for the BCSC and affirmance is required.

As will be discussed, the historic and also contemporary test for whether a judgment is in the nature of a fine or penalty is whether the judgment is meant to further some public interest by the government of the jurisdiction where the judgment was originally entered, as opposed to a purely compensatory private judgment for damages between private individuals. The District Court ultimately held that the Disgorgement Order is the latter, *i.e.*, are in the nature of damages meant to compensate the victims of Lathigee's violation of the British Columbia Securities Act. Lathigee contends the former, *i.e.*, the Disgorgement Order is meant to fulfill public purposes, such as protecting the British Columbia capital markets and to prevent Lathigee from using the funds to run another investment scheme, and that there might also be compensation to victims does not change the fundamentally public interest nature of the Disgorgement Order.

II. FACTS

The BCSC bifurcates its 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 BCSA. 5 JAX755-820.

The decision of the "sanctions portion" of the BCSC's hearing, a/k/a the "Disgorgement Order", was issued on March 16, 2015. 1 JAX10 at ¶ 1. The Disgorgement Order required "under section 161(1)(g) [of the British Columbia Securities Act ("BCSA" or sometimes "the Act"), 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 . . . ."[3] 1 JAX71 at ¶ 62(b)(iv). Relevant passages from the Disgorgement Order will be treated below in respect to particular issues.

To digress, § 161(1)(g) of the British Columbia Securities Act ("BCSA"), provides *in toto*:

> 161(1) 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

[3] The BCSC also ordered that "under section 162, Lathigee pay an administrative penalty of $15 million." 1 JAX71 ¶ 62(b)(iv) [sic]. The BCSC has not sought to register this part of its judgment against Lathigee.

> 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 JAX78 at ¶ 1

The BC Securities Commission 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 JAX144 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, through a quirk of British Columbia appellate procedure whereby similar appeals involving different cases and litigants are resolved in a single opinion, also resolved *Lathigee v. BCSC*. 1 JAX74-125. Relevant passages from *Poonian* will be treated below in respect to particular issues.

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 case no. A-18-769386-F (Dept. 12), under the Nevada Uniform Enforcement of Foreign Judgments Act ("NUEFJA"), NRS 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 & 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, and the dismissal was ordered by Judge Leavitt on March 21, 2018, thus ending that attempt stillborn.

The day before, on March 20, 2018, the BCSC had filed the instant lawsuit, 1 JAX1, seeking recognition of the Disgorgement Order, 1 JAX10-16, under two causes of action: First, under the Nevada Uniform Recognition of Foreign-Country Money Judgments Act ("NURF-CMJA"), NRS 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 JAX32 (Lathigee) and

1 JAX149 (BCSC). 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. 8 JAX1487. This appeal followed.

III. DISCUSSION

A. PROCEDURAL ISSUES

1. The Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c); *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026 (2005) (discussing the summary judgment standard in considerable depth). Neither party to this case contended that a material issue of undisputed fact existed as of the time the District Court resolved the competing motions for summary judgment.

2. Standard of Review

The statutory interpretation of NURF-CMJA raises questions of law that are reviewed *de novo*. *Gonor v. Dale*, 134 Nev. Adv. Op. 109, 432 P.3d 723 (2018); *J.D. Constr. v. IBEX Int'l Grp*., 126 Nev. 366, 375, 240 P.3d 1033 (2010).

The standard of review of an issue relating to comity is not so clear. In the most oft-cited opinion on the subject, *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 425 (1983), this court held that comity "is appropriately invoked according to the sound discretion of the court acting without obligation."

Attention is drawn to a thoughtful analysis of the subject found in *Greenwell v. Davis*, 180 S.W.3d 287, 294-95 (Tex. App. 2005):

> Several Texas courts of appeals have held that a trial court's decision concerning comity should be reviewed for an abuse of discretion. The Texas Supreme Court, though, has stated that it "will not defer to the trial court on matters involving relations between Texas and other sovereigns." *K.D.F.*, 878 S.W.2d at 593 (discussing the standard of review for mandamus concerning whether Kansas sovereign immunity should apply based on comity). We believe de novo review rests on a firmer foundation than abuse of discretion. In general, we review de novo issues of law and only defer to the trial court when factual findings are at

> issue. *See id.* Further, choice of law issues are normally reviewed de novo. **The discretion in applying comity is a discretion of law rather than the discretion of the trial court.** 16 Am. Jur. 2d Conflicts of Laws § 17 (1998). We will review de novo the trial court's decision.

Id., at 294-95 (emphasis added). The *Greenwell* approach makes sense: The recognition of foreign and foreign-country judgments is not a fact-based analysis, but rather evinces at a decision as to whether or not Nevada will extend comity to particular *types* of judgments, as is principally the issue in this case. Thus, to promote uniformity in the types of judgments that will be recognized in Nevada, this Court should reserve *de novo* review for foreign and foreign-country judgments arising in comity.

3. Conflict-Of-Laws And Classification

This Court has looked to the Restatement (Second) of Conflict of Laws to resolve conflict issues. *See, e.g., Dictor v. Creative Mgt. Services, LLC*, 126 Nev. 41, 45-46, 223 P.3d 332, 335 (2010) (tort liability).

Under the Restatement (Second) § 5, Nevada applies its own choice of law rules. *See* Restatement (Second) Conflict of Laws § 5 at

Cmt. b ("A court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws. It derives this law from the same sources which are used for determining all its law: from constitutions, treaties and statutes, from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning.").

For the instant case, the most important provision is Restatement (Second) Conflict of Law § 7, which provides the rules for what is known as "classification",[4] *i.e.*, which forum's laws apply to characterize certain things, such as the instant Disgorgement Order. *Comment* b to § 7 explains the concept of characterization:

> Characterization is an integral part of legal thinking. In essence, it involves two things: (1) classification of a given factual situation under the appropriate legal categories and specific rules of law, and (2) definition or interpretation of the terms employed in the legal

[4] "[T]he nature of the conflicts of laws is a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed or entangled in it." ~ Prof. David C. Baldus as quoted in K. Lipstein, PRINCIPLES OF THE CONFLICT OF LAWS NATIONAL AND INTERNATIONAL, pg. 1 (Matrinus Nijhoff Publishers, 1981).

> categories and rules of law. The factual situation must be classified to determine under what legal categories and rules of law it belongs. Likewise, the terms employed in the legal categories and rules of law must be interpreted in order that the factual situation may be placed under the appropriate categories and that the rules of law may properly be applied.

Under § 7(2), "[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum, except as stated in § 8."[5] In other words, and as applied here, § 7(2) requires that Nevada law—and not British Columbia law—governs the characterization of the Disgorgement Order at issue here. *See, e.g., Contreras v. Am. Family Mut. Ins. Co.*, 135 F.Supp.3d 1208, 1226 at fn. 2 (D. Nev. 2015) ("Nevada law governs whether this claim is classified as being based in tort or contract. Restatement (Second) of Conflict of Laws § 7(2) ('Generally, "[t]he classification and

[5] Restatement (Second) of Conflict of Laws § 8 deals with the subject of *renvoi*, *i.e.*, what happens when local law directs the court to apply the law of the foreign forum, and which is not an issue here.

interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum").'").[6]

Citing to *Illustration 1* of § 7 of the Restatement (Second) of Conflict of Laws (1971), the BCSC argued below that since British Columbia is the "place with the most significant relationship to the judgment . . . then the local law of [British Columbia] will apply in regard to the definition and classification of the disgorgement judgment." 1 JAX158, lines 3-8.

The problem here is that *Illustration 1* is based on the tort rule of Restatement (Second) Conflict of Laws § 145 which contemplates purely private tort actions between the injured party and the tortfeasor. The BCSC's action and judgment does not arise in tort—and thus the significant-relationship test is inapplicable—but instead is an administrative action under the British Columbia Securities Act, and more particularly § 161(1)(g) of that Act. Thus, *Illustration 1* is simply

[6] Since nearly all of the Nevada conflict opinions deal with torts, mostly automobile and related insurance cases, and which apply conflict rules that are particular to tort cases and not at all applicable to the instant conflict, particular care has been taken in the reading of those opinions.

not relevant and, as will be shown, courts considering the classification issue in the area of foreign judgments and foreign-country judgments use their own local law to determine classification issues.

The BCSC also referenced § 98 of the Restatement (Second) Conflict of Laws as requiring recognition of a foreign-country judgment. 1 JAX 158, line 6. Section 98 provides, however in *Comment g*:

> g. Defenses: Enforcement of a foreign nation judgment can be resisted, in among other ways, on the ground that . . . the judgment was on a governmental claim (§ 120).

The referenced Restatement (Second) Conflict of Law § 120 then states that a "non-penal governmental claim" will be recognized, *i.e.*, a penal claim will not be recognized, which merely completes the circle to the salient issue of this case, which is whether the Disgorgement Order constitutes a penalty.

The proper choice-of-law analysis begins with para. (2) of § 7 of the Restatement, which states unambiguously that:

> (2) The classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum, except as stated in § 8.[7]

The law of the forum is that of Nevada; therefore, under § 7(2) of the Restatement, questions of classification and interpretation are to be resolved in accordance with Nevada law.

The U.S. District Court for the District of Nevada has held that pursuant to § 7(2) of the Restatement, Nevada law governs classification and interpretation of conflict-of-laws concepts and terms. *Contreras v. American Family Mut. Ins. Co.*, 135 F.Supp.3d 1208 (D.Nev. 2015) ("Nevada law governs whether this claim is classified as being based in tort or contract. Restatement (Second) of Conflict of Laws § 7(2) (Generally, '[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum')."). *Id.*, at 1226 *fn.* 2.

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[7] Section 8 of the Restatement deals with that subject known as *renvoi*, being the situation where a state is directed by statute or court rule, etc., to apply the law of another state or jurisdiction, and which is plainly inapplicable here.

Admittedly, these conflict-of-laws issues are extremely difficult to maneuver. It is much easier to see how these issues were resolved in the context of actual court cases in the judgment recognition context. For instance, in all three cases cited by the BCSC where the Canadian courts had considered disgorgement orders, the Canadian courts applied their own local Canadian law—not U.S. law—to determine what constituted a "penalty" for purposes of Canadian law. *See*, *e.g.*, *U.S. v. Peever*, 2013 BCSC 1090 (2013); *U.S. v. Shull*, BCJ No. 1823 (1999); and *U.S. v. Cosby*, 2000 BCSC 338 (2000).[8]

However, the best example is found in Nevada, in *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 267 P.3d 48 (2011), where Justice Cherry applied the law of the forum, being Nevada law, to resolve the penalty classification issue in that case relating to a California judgment.

[8] The BCSC effectively takes the position that Canadian law governs entirely, *i.e.*, the Canadian courts should apply Canadian law when considering a U.S. judgment as happened in the three referenced Canadian opinions, and the U.S. courts should also apply Canadian law when considering the instant Canadian judgment.

B. THE PUBLIC V. PRIVATE INTEREST RULE

The singularly critical issue in this case, controlling both recognition under NURF-CMJA and comity, is whether the BCSC's judgment furthers a public interest or a private interest. Neither the NURF-CMJA nor comity will recognize a foreign judgment brought in the public interest, as well-established by the precedential trifecta of *Huntington*,[9] adopted by Nevada in *City of Oakland*,[10] and applied to disgorgement orders in *Kokesh*.[11]

1. The U.S. Follows the Public v. Private Interest Rule of *Huntington*

The BCSC asserts only two causes of action seeking recognition of the Disgorgement Order, being: (1) Recognition under the Nevada Uniform Recognition of Foreign-Country Money Judgment Act ("NURF-CMJA"), NRS 17.700 *et seq.*; (2) Recognition under comity. Although the legal constructs for these causes of action are different—the NURF-

[9] *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct., 224, 36 L.Ed. 1123 (1892).

[10] *City of Oakland v. Desert Outdoor Advert., Inc.*, 127 Nev. 533, 267 P.3d 48 (2011).

[11] *Kokesh v. SEC*, ___ U.S. ____, 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017).

CMJA arises by statute while comity is a common-law doctrine — the critical rule for this case is exactly the same: A foreign-country judgment may not be recognized if it seeks to further a public interest as opposed to redress a private injury.

The genesis of American law on the subject arises in 1825 in a statement by Justice Marshall that: "The 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, 36 L.Ed., 1123 (1892), a case where one private individual (Huntington) obtain a securities fraud judgment against another private individual (Attrill), wherein it was stated that:

> 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.C. at 228. Thus, the rule of *Huntington* is this: The 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 may not be recognized.

That *Huntington* was decided 126 years ago in 1892 does not mean that it is no longer "good law." To the contrary, as will be shown *infra*., the *Huntington* decision has become the seminal opinion and remains the basis for U.S. law on the subject, as was discussed at length and followed as late as 2017 in an opinion by Justice Sotomayor

in *Kokesh*[12] which will be the subject of examination below, and by Justice Cherry as late as 2011 in the *City of Oakland* decision that will next be discussed.

2. Nevada Also Follows the Public v. Private Interest Rule of *Huntington*

The critical importance of the Public Interest vs. Private Interest Rule for the Nevada courts is illustrated by the decision of the Nevada Supreme Court in *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 267 P.3d 48 (2011), which involved disgorgement.

Desert Outdoor had a billboard in Oakland which violated that city's municipal laws. Oakland sued Desert Outdoor for unlawful business practices, and obtained a judgment against Desert Outdoor for the following:

> (1) $124,000 in statutory civil penalties, which were calculated by adding the statutory penalty of $10,000, plus $75 per day for 1,520 days of violation;
>
> (2) $263,000 in *disgorged profits*; and
>
> (3) costs and attorney fees in the amount of $92,353.75.

127 Nev. at 50, 267 P.3d at 536 (*italics* added).

[12] *Kokesh v. SEC*, ___ U.S. ____, 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017).

Oakland registered its judgment under Nevada's Uniform Enforcement of Foreign Judgments Act (UEFJA), NRS 17.330 *et seq*. Desert Outdoor filed a motion to set aside the foreign judgment, which motion was granted by the Nevada District Court on the basis that California judgment was penal in nature, and thus not entitled to full faith and credit.[13] Oakland appealed. 127 Nev. at 50, 267 P.3d at 536.

Oakland's appeal presented two issues to this Court, the first of which was whether a penal judgment of another state must be given full faith & credit by the Nevada courts. On this point, Oakland argued that *Huntington*[14] is a "relic [of] questionable authority" which was effectively supplanted by Nevada's adoption of the UEFJA. 127 Nev. at 50, 267 P.3d at 536.

Writing for the majority, Justice Cherry did not buy Oakland's argument but instead held "that the penal exception set forth in

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[13] U.S. Constitution, Art. IV § 1.

[14] *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892).

Huntington warrants against enforcement of the California judgment in Nevada." 127 Nev. at 50, 267 P.3d at 536-37.

"To further the principle of comity," Justice Cherry wrote, Nevada had adopted the UEFJA to allow a properly filed sister-state judgment to be treated like a Nevada judgment for all purposes. *Id.* But that does not end the issue since the UEFJA itself, he continued, is limited to the registration of a judgment "*which is entitled to full faith and credit in this state*." 127 Nev. at 51, 267 P.3d at 537 (*italics* in original).

Justice Cherry then went on to note that there are numerous exceptions to full faith and credit, and then turned back to the case at hand:

> In addition, the United States Supreme Court has determined that the Full Faith and Credit Clause does not apply to penal judgments. *Huntington v. Attrill*, 146 U.S. 657, 666, 672-73, 13 S.Ct. 224, 36 L.Ed. 1123 (1892); *Nelson v. George*, 399 U.S. 224, 229, 90 S.Ct. 1963, 26 L.Ed.2d 578 (1970) (reiterating that "the full faith and credit clause does not require that sister states enforce a foreign penal judgment"). This exception for penal judgments, most notably analyzed in *Huntington*, is the law at issue here.

127 Nev. at 51, 267 P.3d at 537-38.

This was followed by Justice Cherry's analysis of the facts of *Huntington* and his description of salient issue of that case:

> After determining that the question of whether full faith and credit was denied to the New York judgment in Maryland was a federal question, the *Huntington* Court stated that "in order to determine this question, it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law stated by Chief Justice Marshall in the fewest possible words: 'The courts of no country execute the penal laws of another.' " *Id.* at 666, 13 S.Ct. 224 (citing *The Antelope*, 23 U.S. 66, 123, 10 Wheat. 66, 6 L.Ed. 268 (1825)). The *Huntington* court then determined that
>
> > [t]he 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 the question 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, 13 S.Ct. 224.

127 Nev. at 51, 267 P.3d at 538.

Four paragraphs were next spent by Justice Cherry in deflating Oakland's claim that the critical language of *Huntington* is mere dictum. 127 Nev. at 51-54, 267 P.3d at 538-40. Two more paragraphs

were spent rejecting the argument that Nevada's adoption of UEFJA had the effect of superseding *Huntington*. 127 Nev. at 53, 267 P.3d at 540-41.

The second issue before the Court was "whether the California judgment in this case was penal in nature." 127 Nev. at 53, 267 P.3d at 541. Oakland argued that it was enforcing its non-public individual rights under California's unfair competition laws, and had brought its action to stop a private harm against that city. Justice Cherry disagreed, and held that Oakland's judgment was penal in nature. 127 Nev. at 54, 267 P.3d at 542. Justice Cherry began his analysis by quoting *Huntington*:

> Under the *Huntington* test,
>
> > [t]he 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 the question 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. 146 U.S. at 673-74, 13 S.Ct. 224.

127 Nev. at 54, 267 P.3d at 542.

Justice Cherry also noted that, under *Huntington*, the relevant test is not what the remedy is called by the foreign legislature, but whether the remedy seeks to redress an offense against the public as opposed to grant a right of recovery to a private person. *Id.* As applied to Oakland's judgment, Justice Cherry continued:

> Thus, here, the central question is whether the statute provided civil penalties as a means to punish a violator for an offense against the public or whether the statute created a private right of action to compensate a private person or entity.

Id.

Applying this test, Justice Cherry concluded that Oakland "was not a private entity enforcing a civil right." *Id.* Instead, Oakland was suing for Desert Outdoor's having violated its zoning ordinances, under which ordinances affected private parties could not have brought their own suit for damages. *Id.* Thus,

> As such, it is clear that the statutes' remedies do not address private harms but rather address only public wrongs—in this case, the abatement of a public nuisance—and were intended to deter conduct deemed wrongful under California law.

127 Nev. at 54, 267 P.3d at 543.

Because Oakland was a public actor enforcing a public interest, Justice Cherry concluded, "this penal judgment cannot be enforced in Nevada pursuant to *Huntington* . . . ." *Id.* Thus, the entity of Oakland's judgment, *which contained a substantial disgorgement portion*, was deemed to be unenforceable in Nevada.

Very importantly, Justice Cherry finishes his opinion with the following footnote 10:

> We have carefully considered Oakland's contention that the question of whether Nevada will enforce a penal judgment is still permissive in nature and that the judgment here should be enforced based on public policy grounds, and we conclude that this contention is unpersuasive.

Id. at *fn.* 10.

With the "public v. private interest" rule expressed in *Huntington* and approved by *City of Oakland* fresh in mind, we now turn to how the instant Disgorgement Order falls into that rule.

C. THE BCSC'S FIRST CAUSE OF ACTION: RECOGNITION UNDER NURF-CMJA

1. Applicability of NURF-CMJA

The BCSC's first cause of action seeks the recognition of the Disgorgement Order pursuant to the Nevada Uniform Foreign-Country Money Judgment Recognition Act ("NURF-CMJA"), NRS 17.700 *et seq*.

The application of NURF-CMJA in any aspect is apparently one of first impression in Nevada. Although NURF-CMJA was originally enacted in 2007, the courts of this state have apparently not been presented with any case that has implicated NURF-CMJA issues. A Westlaw search for the NURF-CMJA in Nevada indicates only a single opinion (involving a sister-state judgment under the somewhat analogous Nevada Uniform Enforcement of Foreign Judgment Act ("NUEFJA"), NRS 17.330 *et seq*.) wherein the NURF-CMJA was mentioned only in passing, being the aforementioned *City of Oakland v. Desert Outdoor Advertising, Inc*., 127 Nev. 533, 547, 267 P.3d 48, 57 (2011) (Pickering, J., dissenting).

The section of NURF-CMJA that determines the applicability of NURF-CMJA is NRS 17.740. For the instant dispute, the salient

provision is paragraph 2 of NRS 17.740, which provides in relevant part that the NURF-CMJA does not apply to foreign-country judgments for taxes, fines or other penalties, and divorce and support judgments and the like. That paragraph 2 provides *in toto*:

> 2. NRS 17.700 to 17.820, inclusive, do not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, 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.

NRS 17.740(2).

The inquiry here turns on the meaning of paragraph 2 subpart (b), *i.e.*, whether the Disgorgement Order is a "fine or other penalty." If the Disgorgement Order is in the nature of a "fine or other penalty" then it is not subject to recognition in Nevada under the NURF-CMJA, *see City of Oakland v. Desert Outdoor Advert., Inc.*, *supra.*, 127 Nev. at 547, 267 P.3d at 57 (2011) (Pickering, J., dissenting) (The NURF-CMJA

"provides that a foreign-country judgment for a sum of money need not be enforced if it is for a fine or other penalty.").

Finally, and very importantly, NURF-CMJA at NRS 17.740(3) places the burden of establishing that NURF-CMJA applies to a judgment on the party seeking recognition, *i.e.*, upon the BCSC. By contrast, NURF-CMJA as applied here imposes utterly no burden on the party resisting recognition, being Lathigee.

2. A Securities Law Disgorgement Order Is A Penalty

The issue of whether a securities law disgorgement judgment (or any other disgorgement order) is a "penalty" under either the NURF-CMJA, or even the NURF-CMJA nationwide, also appears to be one of first impression.

Fortuitously, the U.S. Supreme Court has very recently addressed in significant depth the nature of a securities law disgorgement order in *Kokesh v. SEC*, ___ U.S. ____, 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017). The *Kokesh* case involved an SEC enforcement action for an alleged violation of the federal securities laws, wherein the SEC sought a disgorgement judgment against the defendant. At issue in the appeal

before the U.S. Supreme Court was whether there was a penalty within the five-year limitations period of 28 U.S.C. § 2464, which provides *in toto*:

> 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 U.S. Tenth Court of Appeals affirmed that decision. *SEC v. Kokesh,* 834 F.3d 1158 (10th Cir. 2016). The U.S. Supreme 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 (emphasis 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 deterrant 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, which shall next be related and applied to the instant undisputed facts.

a. Disgorgement Arises from Public Law and Furthers a Public Interest

First, Justice Sotomayor states 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 British Columbia Securities Act 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." *See* 1 JAX100 at ¶ 83. Thus, the Disgorgement Order at ¶ 49 declares that: "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." 1 JAX68 at ¶ 49.

The *Poonian* decision repeatedly states that disgorgement under § 161(1)(g) must further the public interest. 1 JAX85 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 JAX85 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 JAX85 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 JAX89 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 JAX93 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 JAX95 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 JAX119 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 JAX120 at ¶ 144 ("I agree with and adopt the two-step approach identified by Vice Chair Cave in *SPYru*[15] at paras. 131-32: * * * [132] 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 JAX124 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, *see Plaintiff's NRCP 16.1(a)(2) Expert Disclosures*, 1 JAX131-39, 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 internally quotes a similar opinion, *Committee for the Equal Treatment of Asbestos Minority*

[15] *Re SPYru Inc.*, 2015 BSCECCOM 452 (2015).

Shareholders v. Ontario (Securities Commission), 201 SCC 37 at ¶ 42 (CanLII, 2001), arising from a similar 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 JAX132-33.

Lathigee's expert, Mr. Sullivan, opines 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 JAX146 at ¶ 3.

The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, arise from a public law, and further public interests, not private ones.

b. Disgorgement Is Imposed to Deprive the Defendant of Wrongful Profits and Deter Future Violations

Second, Justice Sotomayor states that disgorgement is imposed for punitive purposes, to both deprive the defendant 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).

Here, the Disgorgement Order states at ¶ 5 that: "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. 1 JAX61 at ¶ 5. The Disgorgement Order states at ¶ 6 that relevant considerations in determining whether to order sanctions include:

- "the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct;"

- "the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets;" and
- "the need to deter those who participate in the capital markets from engaging in inappropriate conduct."

1 JAX62 at ¶ 6.

The *Poonian* decision affirms that a purpose of § 161(1)(g) is deterrence. 1 JAX100 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 JAX105 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 emphasis, quotation marks and citation omitted); 1 JAX106 at ¶ 105 (same effect); 1 JAX108 at ¶ 112 (Disgorgement's "purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing."); 1 JAX111 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 JAX119 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 makes clear that the purpose of the British Columbia law under which disgorgement is authorized is to deprive the defendant of wrongful profits and deter future violations, and thereby force compliance with British Columbia' 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 JAX133-34.
>
> "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 JAX133 at ¶ 112.
>
> "The 'disgorgement' remedy has the purpose of removing the incentive for non-compliance." 1 JAX134 at ¶ 5.

Lathigee's expert, Mr. Sullivan, opines that the purpose of the § 161(1)(g) remedy is deterrence: "Section 161(1)(g) like the other sub-sections of Section 161(1), is intended to achieve deterrence." 1 JAX142. "With respect to the title, it is clear that the purpose of the orders is to assist in enforcement of the *Securities Act*. While a BCSC Panel's jurisdiction under Section 161 of the BC *Securities Act* is limited to sanctions that are protective and preventative, specific and general deterrence are appropriate considerations in imposing penalties. In other words, a key goal of orders made pursuant to Section 161 is to prevent the Respondent from committing similar acts in the future and to prevent others from committing those acts." 1 JAX146. "In particular, the case law is now clear that Section 161 (1)(g) is specifically intended to deter persons from contravening the BC *Securities Act* by removing the incentive to contravene the BC *Securities*

Act by ensuring the person does not retain the 'benefit' of their wrongdoing. In other words, the goal is deterrence and deterrence is an objective achieved by imposing appropriate penalties. 1 JAX147 at ¶ 5.

The bottom line is that 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 of wrongful profits and deter future violations.

c. Disgorgement Is Not Compensatory

Justice Sotomayor also states 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.

Here, the *Poonian* decision repeatedly states that the disgorgement under § 161(1)(g) is not punitive or compensatory. 1 JAX96 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 JAX97 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 JAX98 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 JAX98 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 JAX98 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 JAX99 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 JAX105 at ¶ 102 (Disgorgement "is not a compensation mechanism for victims of the wrongdoing.") (internal quotation marks and citation omitted); 1 JAX109 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 JAX119 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 recognizes 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. *See* 1 JAX96 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)).").

Finally, the BCSC's own expert, Mr. Johnson, himself points 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 JAX109. 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 JAX135.

Lathigee's expert, Mr. Sullivan, opines that the purpose of the § 161(1)(g) remedy is not compensatory. 1 JAX142 ("While commonly referred to as disgorgement orders, an Enforcement Order under Section 161(1)(g) of the BC *Securities Act* is not intended as a compensation mechanism."); 1 JAX142 ("Compensation is dealt with elsewhere in the Act under different legislative provisions"); 1 JAX147

("The case [law] also establishes that the purpose of Section 161(1)(g) of the BC *Securities Act* is not to compensate the public or victims of the contravention. The Court of Appeal made it clear that to the extent compensation is an objective, it is achieved through other mechanisms in the BC *Securities Act* in the same way that if criminal prosecution is an objective, it can be achieved through other provisions in the BC *Securities Act*. In other words, while Section 161(1)(g) has been called a disgorgement provision, its purpose is not disgorgement.").

The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, are not compensatory in nature.

Both the *Poonian*[16] decision (which consolidated Lathigee's appeal) and the opinion of the BCSC's own expert witness make clear that the purpose of disgorgement is not — repeat not — compensatory as shown by the numerous statements on that topic quoted above. Argument aside, the undisputed facts demonstrate that compensation

[16] *Poonian v. BCSC (including Lathigee v. BCSC)*, 2017 BCCA 207 (2017). 1 JAX74-125.

of investors is not a purpose of § 161(1)(g) of the British Columbia Securities Act.

d. Disgorgement Can Exceed Wrongful Profits

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.*

This point is also addressed by the *Poonian* court, in response to the Poonians' argument (at ¶ 84) that they should be allowed to reduce their disgorgement order by their trading and other expenses incurred, *i.e.*, the disgorgement order should have been limited to their net profits. The *Poonian* court responded:

> I reject this argument. The words of the provision do not support a "profit" interpretation. The words the Legislature chose, "any amount obtained", refer to any amount received. They do not contemplate any

> deductions. If the Legislature had intended to import a profit element, it could have used the word "profit", or "net", or some other language that connotes allowance for losses or expenses.

1 JAX101-02, pg. 28 at ¶ 85. This point is made crystal-clear by ¶ 93 of the *Poonian* decision: "In sum, I conclude § 161(1)(g) does not require the amount obtained to be 'profit' or that there be a 'netting' or deduction of expenses, costs, or of amounts paid to the Commission by other persons." 1 JAX103 at ¶ 93.

Similarly, the *Poonian* court noted that such deductions would not be allowed in insider trading cases, 1 JAX101 at ¶¶ 85-86—exactly as mentioned by Justice Sotomayor.

This factor is particularly highlighted in this case, where there was no finding that Lathigee personally received any of the moneys raised from investors. Liability.Dec., BCSC. Opp. 5 JAX803 at ¶ 263 ("This was borne out by how the money was used. None of it was spent on anything that was going to produce cash flow for these investors. Half of it, $5 million, was used to top up the 076 investment portfolio and to pay the Genesis contractors so the liens could be removed. Another $3.4 million was split between funds returned to PIC

Foreclosure and funds held in reserve to pay interest on the promissory notes themselves. That left $1.6 million, which went to overhead and third-party payments."); BCSC. Opp. 5 JAX813 at ¶ 324-25 ("The evidence shows that of the $9.9 million raised from investors, FIC Foreclosure spent $1.4 million to acquire foreclosure properties, and another $751,000 on rental properties and tax liens." "FIC Foreclosure transferred the rest, about $7.8 million, to other FIC Group companies to fund, among other things: payments due on third-party loans; payment of outstanding trades invoices on Genesis and other properties owned by other FIC Group companies; payment towards the 076 tax liability; payment of salaries and other overhead expenses of the FIC Group.").

The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, can and did exceed Lathigee's wrongful profits and so therefore cannot be considered remedial in nature.

Despite the numerous and unequivocal statements of the Canadian court in *Poonian* and the BCSC's own expert witness that

disgorgement is not compensatory, the BCSC takes the position that because the BSCS promises on its website to use the funds to repay those investors who make a claim for the funds, that somehow that takes the Disgorgement Order out of the penalty box.

This misses the point made by Justice Sotomayor that disgorgement is not compensatory, since courts "have required disgorgement regardless of whether the disgorged funds will be paid to investors as restitution." 137 S.Ct. at 1644 (mentioning insider trader cases where there is disgorgement by the defendant but no payments to investors). It also misses the point that if the amount disgorged by the defendant exceeds investor claims, then the BCSC cannot return the money to the defendant but instead must use the moneys for other purposes, such as public education about investing. 1 JAX96-97 at ¶ 72.

e. That Disgorgement Serves Multiple Purposes Does Not Make It Any Less of a Penalty

The BCSC also makes the "mixed motives" argument, *i.e.*, that even if the Disgorgement Order serves the public interest, there is also a compensatory purpose which takes it out of the penalty box. 1 JAX158, pg. 10, lines 16-17. As noted above, the BCSC cannot refute

the statements as found in *Poonian* and the opinion of its own expert witness that there is no compensatory purpose of § 161(1)(g).

Justice Sotomayor donates an entire section "C" just to nixing this particular argument. 137 S.Ct. at 1644-45.

> As an initial matter, it is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply returns the defendant to the place he would have occupied had he not broken the law. SEC disgorgement sometimes exceeds the profits gained as a result of the violation. * * * And, as demonstrated by this case, SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit. * * * In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off. The justification for this practice given by the court below demonstrates that disgorgement in this context is a punitive, rather than a remedial, sanction: Disgorgement, that court explained, is intended not only to "prevent the wrongdoer's unjust enrichment" but also "to deter others' violations of the securities laws." * * *
>
> 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. Conclusion

The Disgorgement Order satisfies all the elements identified by Justice Sotomayor in *Kokesh*, and thus falls squarely into the public interest prong of the Public vs. Private Interest Test of that opinion, as well as *Huntington* and *City of Oakland*. As such, the Disgorgement Order is in the nature of a penalty, and thus falls squarely into the "fine or penalty" exclusion from registration under NRS 17.740(2)(b).

Here, it must also be recalled that the NURF-CMJA at NRS 17.740(3) places the burden of establishing that NURF-CMJA applies to a judgment on the party seeking recognition, *i.e.*, upon the BCSC. In other words, a "tie"—or anything less than the BCSC satisfying its burden of proof—means that the judgment cannot be recognized under NURF-CMJA.

D. THE BCSC'S SECOND CAUSE OF ACTION: RECOGNITION UNDER COMITY

In considering issues of comity in the context of international judgments, Nevada courts have looked to the Restatement (Third) of Foreign Relations Law of the United States. S*ee, e.g., Gonzales-Alpizar v. Griffith*, 130 Nev. 10, 18, 317 P.3d 820, 826 (2014); *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 578, 583, 331 P.3d 876, 879 (2014).

Section 483 of the Restatement provides in toto:

> Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.

The Reporter's Comment to § 483 at ¶ 4 cites to *Huntington* as the authority supporting this rule, indicating that the analysis of recognition of a foreign judgment under comity is the same as under NRS 17.740, *i.e.*, the Public vs. Private Interest Test of *Huntington*, *Kokesh*, and *City of Oakland* is to be followed.

For example, the U.S. Ninth Circuit Court of Appeals in interpreting § 483 notes, "A civil remedy is penal, as the term is understood in private international law, if it awards a penalty to a

member of the public, suing in the interest of the whole community to redress a public wrong." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1219 (9th Cir. 2006). The *Yahoo!* court also noted in interpreting § 483 that "Judgments designed to deter conduct that constitutes a threat to the public order are typically penal in nature." *Id.* at 1220.

As noted above, application of the Public vs. Private Interest Test as applied to the facts of this case leads to the conclusion that the Disgorgement Order is public in nature. Thus, the Disgorgement Order is not to be given comity either.

The tenor of the BCSC's argument regarding international comity is that so long as due process is afforded to the defendant, the U.S. courts can do whatever they want because comity is not statutory, citing *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L. Ed. 95 (1895). 1 JAX165. Indeed, considered in the abstract, one finds sympathy with the observation about international comity by the Second Circuit that:

> The doctrine has never been well-defined, leading one scholar to pronounce it "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith."

JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005). (quoting Harold G. Maier, EXTRATERRITORIAL JURISDICTION AT A CROSSROADS: AN INTERSECTION BETWEEN PUBLIC AND PRIVATE INTERNATIONAL LAW, 76 Am.J.Int'l L. 280, 281 (1982)).

Fortunately, this Court is not confronted by the doctrine of international comity in the abstract, but rather as applied to the instant case with undisputed material facts. And, quite unlike the Second Circuit in the *JP Morgan Chase Bank* case, which had no relevant Restatement guidance upon which to rely as to the peculiar Mexican bankruptcy issue before it, the instant case has plentiful guidance about how to resolve this issue, including the Restatement (Third) of Foreign Relations Law, which has been adopted as guidance in this area by the Nevada courts in *Gonzales-Alpizar v. Griffith*, 130 Nev. 10, 18, 317 P.3d 820, 826 (2014) and *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 578, 583, 331 P.3d 876, 879 (2014).

Comity is not a purely discretionary or arbitrary concept, but instead there exist "rules of comity." *City of Oakland*, 127 Nev. at 50, 267 P.3d at 537. As previously noted, § 483 of the Restatement adopts the Public Interest v. Private Interest Test of *Huntington* and its progeny, including Justice Sotomayor's opinion in *Kokesh* and Justice Cherry's opinion in *City of Oakland*, which has the practical effect of harmonizing Nevada's statutory law of the NURF-CMJA with Nevada's common law doctrine of comity since the underlying test is exactly the same, *i.e.*, under both the NURF-CMJA and comity, if the judgment sought to be recognized furthers a private interest, the judgment will be recognized, but if the judgment furthers a public interest then the judgment will not be recognized.

1. The Limits of Reciprocity

While certainly the promotion of reciprocity is something that is generally desirable between nations, as Judge Calabrese has noted, that also has its limits:

> Although courts in this country have long recognized the principles of international comity and have advocated them in order to promote cooperation and reciprocity with foreign lands, comity remains a

> rule of "practice, convenience, and expediency" rather than of law. *Somportex Ltd*.,[17] 453 F.2d at 440; *see also id.* ("Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation."); *Cunard S.S. Co.,*[18] 773 F.2d at 457 (quoting *Somportex*).

Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997).

As repeatedly noted, the limits to comity have been established by *Huntington* and its progeny, recalling that *Huntington* was itself a comity case.[19] Thus, just by way of one example, the court in *Bank Leumi Trust Co. v. Wulkan*, 735 F.Supp. 72 (S.D.N.Y. 1990), in refusing to extend comity to Israeli currency laws, noted, after citing to *Huntington*, that "where there is confliction between our public policy and application of comity, our own sense of justice and equity embodied

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[17] *Somportex Ltd. v. Philadelphia Chewing Gum Corp*., 453 F.2d 435, 440-44 (3d Cir. 1971).

[18] *Cunard Steamship Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 456-60 (2d Cir. 1985).

[19] *See Huntington v. Attrill*, 146 U.S. 657, 669, 13 S.Ct. 224, 228, 36 L. Ed. 1123 (1892).

in our public policy must prevail." *Id.*, at 76-77 (internal quotation and citation omitted).

The very same argument that the BCSC attempts here—that comity is permissive and thus should be recognized on public policy grounds — was considered and rejected by the *City of Oakland* court:

> We have carefully considered Oakland's contention that the question of whether Nevada will enforce a penal judgment is still permissive in nature and that the judgment here should be enforced based on public policy grounds, and we conclude that this contention is unpersuasive.

127 Nev. at 54, 267 P.3d at 543., at *fn.* 10. This Court should reach the same conclusion in the instant case.

2. The Bottom Line: Comity Cannot Be Extended Because American and Canadian Law Take Fundamentally Different Positions on Disgorgement as a Penalty

The *sine qua non* of this case is whether a disgorgement order is in the nature of a penalty. On the one hand, the British Columbia courts have concluded that it is not based on their own unique laws and precedents. On the other hand, the highest U.S. court, through the rigorous analysis of Justice Sotomayor in *Kokesh*, has unequivocally held that "[b]ecause disgorgement orders go beyond compensation, are

intended to punish, and label defendants wrongdoers as a consequence of violating public laws . . . they represent a penalty . . . ." 137 S.Ct. at 1646.

Thus, the British Columbia courts will recognize a disgorgement order and give it comity. But American courts will not, because per *Kokesh* the disgorgement order is a penalty and thus is not enforceable under *Huntington* and its progeny, which includes this Court's holding in *City of Oakland*.

For this same reason, the BCSC's assertion that "[i]f we want Canada's Provinces to continue to recognize our securities judgments, then we need to recognize theirs" rings false. The Canadian courts simply take a different viewpoint of "penalty" than do the courts of the United States and Nevada; that is neither wrong or right, but simply different. Among other differences with Americans, Canadians have a Prime Minister, not a President, follow the metric system; and Canadian football teams use 12 players (which would be a penalty in the NFL). There are similar differences in our legal systems, for

example, Canada typically does not recognize a right to a jury trial in civil cases.

There simply is no evidence in the instant record that Canada will suddenly refuse to start recognizing some U.S. judgments unless this Court recognizes the BCSC's judgment against Lathigee. Further, were this to be a larger concern, then the solution would be in the nature of treaty or other reciprocal agreement between the two nations, as opposed to abrogating *Huntington* and its progeny, including *City of Oakland*.

3. Consideration of Restatement (Fourth) of Foreign Relations Laws § 489 (2018)

In October 2018, the American Law Institute published the Restatement (Fourth) of Foreign Relations Law, in which the former § 483 as found in the Restatement (Third) has been renumbered as a new § 489. As the Restatement (Fourth) was published in the midst of the parties' briefing, it did not receive the same level of attention the other issues briefed by the parties, and in fact was discussed only in the BCSC's Reply on its Countermotion for Summary Judgment which was the last brief filed. A fuller consideration of § 489 is thus in order.

It is presumed that this Court will adopt the Restatement (Fourth) just as it has adopted the Restatement (Third). The new § 489 provides as follows:

> Courts in the United States do not recognize or enforce judgments rendered by the courts of foreign states to the extent such judgments are for taxes, fines, or other penalties, unless authorized by a statute or an international agreement.

For purposes of this case, the primary difference is that the new § 489 uses the phrase "do not recognize or enforce judgments," whereas § 483 uses the phase "are not required to recognize or to enforce judgments." Very simply, the newer § 489 does not imply discretion, whereas the older § 483 was amenable to an interpretation that the court's lending of comity in such cases was discretionary.

Application of § 489 would seem to end the comity discussion in this case in favor of Lathigee, but the BCSC points to the Reporter's Notes at Note 4 which states:

> A judgment in favor of a foreign state awarding restitution for the benefit of private persons is not penal for the purposes of this Section. *See U.S. Sec. Exch. Comm'n v. Manterfield,* [2009] EWCA (Civ) 27 [24] (Eng. & Wales) ("The substance of what the SEC will seek to enforce (if they prevail in the action), and

> in relation to which they seek to preserve the assets, is the disgorgement of what they allege to be the proceeds of fraud."); *Evans v European Bank Ltd*, [2004] NSWCA 82 para 83 (Austl.) (enforcing U.S. judgment under Federal Trade Commission Act for disgorgement of credit-card fraud even though surplus might go to U.S. Treasury because "as a matter of substance, this is a proceeding designed to compensate persons who have been defrauded").

Unlike the Restatement itself, however, the Nevada courts have not adopted the Reporter's Notes as law, although, of course, such Notes generally may provide elucidate particular issues.

It is noteworthy that the Reporter's Note 4 does not reference U.S. or Nevada opinions, but rather those from Commonwealth countries, *i.e.*, England & Wales in *Manterfield* and Australia in *Evans*. Moreover, these two opinions, decided in 2009 and 2004 respectively, could not have taken into account that American law went a different direction entirely in 2017 with *Kokesh*. Nor does the Reporter's Note mention *Kokesh*, which is not particularly surprising since *Kokesh* is a relatively recent decision.

At any rate, the primary authority of *Kokesh* will control over such secondary authorities as the Restatement (Fourth) of Foreign Relations

Law where the two may conflict, and certainly *Kokesh* as a primary authority is dominant over what amounts to such tertiary guidance as is found in the Reporter's Notes. While Reporter's Notes are certainly of interest, they should not be given more weight than they deserve, which weight is arguably that of something akin to a law review article on steroids.

IV. CONCLUSION

Based on the language of the British Columbia Securities Act § 161(g)(1); the nature of an statements contained within the Disgorgement Order; statements made by the British Columbia Court of Appeals in the *Poonian* opinion; and admissions by the BCSC's own expert witness, Mr. Johnson, it is clear that under the decisional trifecta of *Huntington*, *City of Oakland*, and *Kokesh* that the Disgorgement Order must be characterized as a "penalty" under both the NURF-CMJA and comity, such that the Disgorgement Order is not subject to recognition in Nevada. Reversal of the decision of the District

Court and entry of judgment against the BCSC and in favor of Lathigee is therefore appropriate.

RESPECTFULLY SUBMITTED this 28th day of June, 2019, by:

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CERTIFICATE OF COMPLIANCE WITH NRAP 32(A)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Century font.

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3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where

the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF AND JOINT APPENDIX, VOLUMES 1–8** were filed electronically with the Nevada Supreme Court on the 28th day of June, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Kurt Bonds, Esq.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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