IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL PATRICK LATHIGEE,

Appellant,

v.

BRITISH COLUMBIA SECURITIES COMMISSION,

Respondent.

Supreme Court Case No. 78833

Dist. Court Case No. A-18-771407-C

ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Respondent British Columbia Securities Commission (the "Commission") is is the independent government agency of the province of British Columbia, Canada responsible for regulating capital markets in British Columbia through the administration of the British Columbia Securities Act. The law firm of Alverson Taylor & Sanders represents the Commission before the District Court. The law firms of Naylor & Braster and Alverson Taylor & Sanders represent the Commission before the Supreme Court.

Date: August 23, 2019

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JURISDICTIONAL STATEMENT

This appeal arises from the District Court's denial of Appellant Michael Lathigee's ("Lathigee") motion for summary judgment and the granting of the British Columbia Securities Commission's (the "Commission") countermotion for summary judgment on all claims. The District Court entered its order on January 10, 2019, and the corresponding notice of entry was filed on January 14, 2019. The Court has jurisdiction because the District Court's order resolves all of the claims in the case. NRAP 3(b)(1). The Commission agrees that Lathigee's notice of appeal was timely filed on May 17, 2019.

ROUTING STATEMENT

The Commission believes that this matter should be presumptively retained by the Supreme Court pursuant to NRAP 17(a)(12) because it raises as a principal issue a question of statewide public importance. This case involves a matter of first impression which is what constitutes a penalty under NRS 17.740(2)(b). The resolution of that issue determines the applicability of the Uniform Foreign-Country Money Judgments Recognition Act as adopted in Nevada at NRS 17.700, *et seq*.

This matter is also important because of the size and scope of Lathigee's fraud in British Columbia, Canada. This case stems from an action taken by the Commission against Lathigee for a fraudulent securities investment scheme that he orchestrated in Canada. Lathigee committed one of the largest fraudulent securities

schemes in the history of British Columbia. Lathigee has left Canada and has moved to Nevada where he is believed to be conducting what he refers to as an "investment club" to members of the public. There are similarities between the investment scheme Lathigee ran in Canada what he is believed to be doing in Nevada.

STATEMENT OF THE ISSUES

1. Does Nevada's Uniform Foreign-Country Money Judgment Recognition Act (NRS 17.700, *et seq*.) apply to the money judgment that the Commission obtained against Lathigee in the courts of British Columbia, Canada or does the judgment constitute a "penalty" pursuant to NRS 17.730(2)(b) that cannot be enforced through the Act?

2. Should Nevada courts recognize the money judgement that the BSCS obtained against Lathigee in the courts of British Columbia, Canada under the principles of comity?

STATEMENT OF THE CASE

The Commission filed its complaint on March 20, 2018. (Joint Appendix ("JAX") JAX1 – 16). The basis for the Complaint was a judgment that the Commission obtained against Lathigee in British Columbia for $21,700,000. (*Id*. (Canadian)) The Complaint had two causes of action. The first was for recognition of the judgment under the Uniform Foreign-Country Money Judgment Recognition

Act, NRS 17.700, *et seq*. (JAX3 – 4). The second was for recognition of the judgment under the principles of comity. (JAX4).

Lathigee filed his Answer on April 9, 2018. (JAX17 – 20). He filed his Amended Answer on June 6, 2018. (JAX21 – 25). Lathigee did not assert any counterclaims. (JAX17 – 25).

Lathigee filed a motion for summary judgment on October 19, 2018. (JAX32 – 148). The Commission filed its opposition to the motion and countermotion for summary judgment on November 9, 2018. (JAX149 – 1217). On November 21, 2018, Lathigee filed a reply in support of his motion for summary judgment. (JAX1218 – 1235). On November 30, 2018, the Commission filed a reply in support of its countermotion for summary judgment. (JAX1236 – 1409).

The District Court heard the motion and countermotion on December 4, 2018. (JAX1410 – 1431). On May 14, 2019, the District Court entered Findings of Fact, Conclusions of Law and Order which denied Lathigee's motion for summary judgment and granted the Commission's countermotion for summary judgment. (JAX1487 – 1506). Notice of entry of the order was filed on May 14, 2019. (JAX1507 – 1528). The District Court's order resolved all of the issues in the case. (JAX1527 – 1528). Lathigee filed a notice of appeal on May 20, 2019. (JAX1529 – 1530).

On August 9, 2019, the District Court entered an order denying Lathigee's motion to stay enforcement of the judgment and granting the Commission's countermotion for a preliminary injunction enjoining Lathigee from disposing certain assets during the pendency of the appeal. (Respondent's Appendix, RESP APP 0015-0022).

STATEMENT OF THE FACTS

A. Lathigee's Fraudulent Scheme in British Columbia

This case arose from one of the largest securities fraud schemes in the history of British Columbia, Canada. Canada does not have a federal securities regulatory body comparable to the U.S. Securities and Exchange Commission. Instead, the securities markets are regulated at the provincial level with each province having its own regulatory body. (JAX153, ll. 21 – 24; JAX154, ll. 1 – 3). In the province of British Columbia, that regulatory body is the Commission. (*See, e.g.*, JAX172).

The Commission found that "The magnitude of fraud perpetrated in this case is among the largest in British Columbia history." (JAX177, ¶ 8). Lathigee and his colleague Earle Douglas Pasquill ("Pasquill") raised $21,700,000 from 698 investors in a group of Canadian entities called FIC Group without telling them that the company had severe cash flow problems which could have easily resulted in

bankruptcy.[1] (JAX175, ¶ 2(a) JAX177, ¶ 8). FIC Group was the brainchild of Lathigee. As the Commission found:

> FIC Group was Lathigee's concept. According to [Earle Douglas] Pasquill, the idea was that it would provide investors the opportunity to learn and develop investment skills, and would offer them the opportunity to participate in investments offered by FIC Group. FIC Group had regular meetings of members. The meetings typically had a so-called educational component accompanied by a presentation, typically made by Lathigee, about the current investment opportunities that FIC Group had on offer.

(JA757, ¶ 6).

Lathigee advertised FIC Group as a development company. (JAX758, ¶ 11). Lathigee would promote investments using seminars presented to potential investors under the name "InvestFest":

> FIC Group also held events called "InvestFest" which, according to Pasquill, were "kind of investment seminars, where outside speakers would come, products were sold, and we would receive some commissions on those."

(JAX757 ¶ 7).

Lathigee's investment fraud was sophisticated and used a variety of products to obtain $21,700,000 from nearly 700 investors:

[1] All monetary amounts in this brief are denominated in Canadian dollars. As of July 2019, one Canadian dollar is worth approximately 0.76 U.S. dollars. (RESP APP 0023-0024). The Court may take judicial notice of the exchange rate. *Air Canada v. Golowaty*, 142 Misc. 2d 259, 160, 636 N.Y.S.2d 962, 963 (N.Y.Dist.Ct. 1989).

> From February 1 through August 21, 2008, the corporate respondents raised $21.7 million from 698 investors by distributing securities as follows:
>
> • Between February and August 2008 FIC Foreclosure issued Class A shares to 331 investors for proceeds of $9.9 million. There were two offerings. The first, under the accredited investor exemption, was for $1.5 million to 39 investors in February through April. The second, under the offering memorandum exemption, was for $8.4 million to 292 investors in April through August.
>
> • In March, April and July 2008 FIC Projects issued promissory notes to 267 investors for proceeds of $9.8 million, $9.6 million of which was invested in March and April from 253 investors. The notes were to pay annual interest of 12% to 15% to investors in quarterly instalments.
>
> • In April and May 2008 WBIC issued Class A shares to 100 investors for proceeds of $2 million.

(JAX758, ¶ 17).

Lathigee and his colleagues led investors to believe that their money would be invested in foreclosed properties. (JAX177, ¶ 8). Instead, nearly all of the funds were used to make unsecured loans to various FIC Group entities. (*Id.*) Lathigee and Pasquill controlled these entities:

> Lathigee and Pasquill were directors and officers of all of the companies in FIC Group, including the corporate respondents FIC Foreclosure, FIC Projects and WBIC. Lathigee and Pasquill were, respectively, the CEO and president of FIC Projects and WBIC, and the president and secretary of FIC Foreclosure.

(JAX757, ¶ 8). These companies that made up the FIC Group functioned as a single entity with Lathigee and Pasquill at the head:

> It is not disputed that Lathigee and Pasquill were the acting and directing minds of FIC Group, including the corporate respondents, and were the sole individuals directing the affairs of FIC Group.

(JAX757, ¶ 9).

The scheme collapsed, and now the money is gone. (*Id.*) In total, the investors lost their original $21,700,000 investment:

> As a consequence of the respondents' [Lathigee and Pasquill's] dishonesty, the pecuniary interests of the investors in the corporate respondents were clearly put at risk. The 698 investors invested, and have lost, $21.7 million. It would be difficult to find a more compelling example.

(JAX805, ¶ 279).

Lathigee and two of his colleagues perpetrated a second fraud by raising another $9,900,000 from 391 investors in a company called FTC Foreclosure Fund Ltd. (JAX175, ¶ 2(b) JAX177, ¶ 8). This particular scheme is not the subject of the Judgment at issue here.

B. The Proceedings in British Columbia

The Commission initiated proceedings against Lathigee for contraventions of the British Columbia Securities Act (*Securities Act*, Revised Statutes of British Columbia (R.S.B.C.) 1996 c. 418) (the "B.C. Securities Act")), including having contravened section 57(b) of that statute. Section 57(b) prohibits a person from perpetuating a fraud in the securities industry against an investor:

> **57** A person must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct
>
> * * *
>
> (b) perpetrates a fraud on any person.

(JAX1000).

The noticed a hearing for March 20, 2019. (JAX193, ¶ 3). Lathigee, who at the time was a resident of British Columbia, appeared through counsel at the six-day hearing. (JAX196 – 204; JAX206 – 211; JAX213 – 265; JAX267 – 361; JAX363 – 394; JAX396 – 536; JAX538 – 655). At the hearing, Lathigee had the opportunity to call witnesses, cross-examine witness, and present evidence. (*Id*.; JAX194, ¶ 4). Several of the FIC Group of companies were also named as respondents and represented by the same counsel, however, as noted above, they were controlled by Lathigee and Pasquill. (JAX755, first page of Commission decision, identifying counsel).

After the hearing concluded, the Commission entered a decision on July 8, 2014, finding that Lathigee and Pasquill had perpetuated a securities fraud in violation of Section 57(b). (JAX755 – 820). This decision is referred to as the "Liability Findings" and established the liability of Lathigee for his fraud. (*Id*.)

The Commission then noticed and held a hearing on February 13, 2015 to determine the amount of the liability. (JAX822). Lathigee again appeared through counsel. (JAX824 – 858). After the hearing, on March 16, 2015, the Commission

entered what is called its "Sanctions Decision," which established the amount of the liability. (JAX175 – 188). The Sanctions Decision found that Lathigee and Pasquill were, among other things, jointly and severally liable for a total amount of $21,700,000. (JAX187). This represented the amount that they had taken from the defrauded investors. (JAX183, ¶ 49).

On April 15, 2015, the BSCS registered the Sanctions Decision with the British Columbia Supreme Court (the "B.C. Supreme Court"). (JAX144). The B.C. Supreme Court is roughly equivalent to Nevada's district courts. Upon registry with the B.C. Supreme Court, the decision became an enforceable judgment (the "Judgment") pursuant to Section 163 of the B.C. Securities Act, which states in pertinent part:

> **163** (1) If the commission has made a decision after a hearing, the commission may file the decision at any time in a Supreme Court registry by filing a copy of the decision certified by the chair of the commission.
>
> * * *
>
> (2) On being filed under subsection (1), (1.1) or (1.2), the decision has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

(JAX1066).

Lathigee was granted leave to appeal the Sanction Decision to the British Columbia Court of Appeal ("B.C. Court of Appeal"). The B.C. Court of Appeal is

the highest court in British Columbia. Lathigee appealed on the issue of whether he could be found jointly and severally liable with Pasquill. (JAX862, summarizing issues on appeal). Rejecting Lathigee's arguments, the B.C. Court of Appeal dismissed his appeal in an order entered on May 31, 2017, and, as a result, the Judgment is final and no longer appealable under the laws of British Columbia (the "Judgment"). (JAX860 – 911). Lathigee conceded that the Judgment is final, conclusive and enforceable within the meaning of NRS 17.740(1)(b). (JAX1190, Lathigee's Response to Request for Admission 1). This Judgment is the subject of the instant appeal before the Nevada Supreme Court.

C. The Sanctions Decision

The March 16, 2015 Sanctions Decision that underlies the Judgment is the order that is central to this appeal. In the Sanctions Decision, the Commission noted that Lathigee had been sanctioned at least twice before for securities violations, once in 2005 and again in 2007. (JAX178 – 179; ¶ 18). As a result of the 2007 violation, Lathigee was fined $600,000. (JAX178 – 179, ¶ 18(b)).

With respect to the securities violations at issue in this case, the Sanctions Decision imposed the following on Lathigee:

1. Lathigee is permanently barred from trading in the British Columbia securities markets except for his own account. (JAX185 – 186, ¶ 62(b)(ii)(a)).

2. Lathigee must disgorge to the Commission the amount of $21,700,000 which represents the amount that investors sent to him during his fraudulent scheme, i.e., it does not include profits. (JAX185 – 186, ¶ 62(b)(iv)). This disgorgement is pursuant to Section 161(1)(g) of the B.C. Securities Act, which states that:

> **Enforcement Order**
>
> **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 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;

(JAX1062; JAX 1063).

3. Lathigee must also pay a separate administrative penalty of $15,000,000 pursuant to Section 162 of the B.C. Securities Act (JAX185 – 186, ¶ 62(b)(iv) [sic]), which states that:

> **Administrative Penalty**
>
> **162** If the commission, after a hearing,
>
> (a) determines that a person has contravened
>
> (i) a provision of this Act or of the regulations, or

> (ii) a decision of the commission, the executive director or a designated organization, whether or not the decision has been filed under section 163, and
>
> (b) considers it to be in the public interest to make the order,
>
> the commission may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention.

(JAX 1064; JAX 1065). The BCSC **not** seeking to enforce the administrative penalty in Nevada. (JAX5). The BCSC is only seeking to enforce the disgorgement of the $21,700,000 that the investors lost. (*Id*.).

D. The B.C. Securities Act Mandates the Commission to Return Disgorged Funds To the Defrauded Investors

Pursuant to Section 15.1 of the B.C. Securities Act and regulations enacted thereunder, the Commission must attempt to return any disgorged funds to the defrauded investors:

> **Claim for Wrongful Benefit**
>
> **15.1** (1) The commission must notify the public in accordance with the regulations if the commission receives money from an order made under section . . . 161 (1) (g).
>
> (2) A person may make a claim to money referred to in subsection (1) by submitting an application in accordance with the regulations within 3 years from the date of the first notification made under subsection (1).

(JAX986). The regulations outline a specific procedure for investors to make their claims. (*Id.*).

Pursuant to Section 15(3) of the B.C. Securities Act, any monies not returned to investors must be spent on public education regarding the securities markets:

> **Revenue and Expenditure**
>
> (3) Money received by the commission under section . . . 161 (1) (g) or 162 may be expended only for the purpose of educating securities market participants and members of the public about investing, financial matters or the operation or regulation of securities markets.
>
> (3.1) The commission may not expend money received under section . . . 161 (1) (g) unless the period referred to in section 15.1 (5) has expired [i.e., three years].

(JAX986). In other words, any remaining amounts do not go into the general fund and the Commission may not use them to cover operating expenses. (*Id*.).

E. Lathigee's Activities in Nevada

The Commission noted that Lathigee had set up shop in Nevada, running an entity called the Las Vegas Investment Club that mirrors the FIC Group. (JAX179, ¶ 25 (a) and (b)). In a promotional video for the club, Lathigee touted his past successes without mentioning his regulatory issues, including the judgment that is the subject of this appeal. (JAX179, ¶ 25 (c); JAX180 ¶ 25 (d) and (e)).

F. The Current Action Only Seeks to Enforce the Portion of the Order Requiring Lathigee To Pay the $21,700,000 That He Took From the Defrauded Investors

In this action, the Commission seeks only to enforce the Judgment with respect to the $21,700,000 taken from the defrauded from investors. (JAX5). The

Commission is not attempting to enforce the separate judgment with respect to the $15,000,000 administrative penalty or Orders the barring of Lathigee form the securities industry. (*Id*.)

SUMMARY OF ARGUMENT

This is an appeal from the District Court's grant of summary judgment in favor of the Commission on its two causes of action: (i) application of NRS 17.700, *et seq.*, to a money judgment from British Columbia, Canada, and (ii) recognition of that judgment under the principles of comity.

NRS 17.700, *et seq.*, contains Nevada's adoption of the Uniform Foreign-Country Money Judgment Recognition Act, which generally requires the recognition of money judgments of foreign countries. Lathigee claims the Act does not apply to the Judgment because it is a penalty, which is an exception to the Act's application. The Act uses the term "penalty" but does not define it. Nevada has not looked at what constitutes a penalty under the Act.

Other jurisdictions that have adopted the Uniform Act have looked at the issue, and they employ an approach based on whether the judgment to be enforced contains a component that is designed to give victims of wrongdoers' restitution. If the judgment contains an element of restitution, it is generally not considered a penalty. That is the case here. The point of the Judgment is to provide funds that the Commission must use to recompense victims of Lathigee's fraud. Therefore, it

is not a penalty, and the Act applies. The analysis below first looks at how other jurisdictions have interpreted the Uniform Act to demonstrate that the Court should affirm the grant of summary judgment. The second part of the analysis focuses on Lathigee's emphasis on the U.S. Supreme Court's *Kokesh* opinion, which, as proven below, has no application here.

Even if the Act does not apply, the Court should affirm the District Court's granting of summary judgment under the principles of comity. Recognizing the Judgment under the principles of comity is consistent with Nevada's policy considerations, fairness and protecting its citizens.

Lathigee argues that recognition under the principles of comity is improper because of Nevada's recognition of § 483 of the Restatement (Third) of Foreign Relations Law (1987). Nevada has not adopted § 483 but rather adopted § 482, which has no application here and which Lathigee does not argue. Section 483 states that a court is not required to, but is not prohibited from, recognizing a penalty. Even if Nevada does adopt § 483, the Judgment should nevertheless be enforced. The jurisdictions that have adopted § 483 use the same analysis used when analyzing the Uniform Act, i.e., does the judgment at issue have a component that compensates victims for their losses? The answer in this case is yes, the Court should recognize the Judgment because it is designed to return lost funds to the defrauded investors.

ARGUMENT

A. The Supreme Court Reviews Grants of Summary Judgment De Novo

The Supreme Court reviews "a district court's decision to grant summary judgment and its conclusions of law de novo." *Daisy Trust v. Wells Fargo Bank, N.A.*, 135 Nev. Adv. Op. 30, at *5, ___ P.3d ___ (July 25, 2019) (citing *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)); *Pressler v. City of Reno,* 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002).

"Pursuant to NRCP 56, a party may properly move for summary judgment where the party establishes that there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law." *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 439, 135 Nev. Adv. Op. 25, at *2 (July 3, 2019) (citations and internal quotations omitted). Summary judgment is appropriate when there are no genuine issues of material fact and the movant should prevail as a matter of law. *Id*.; *Wood,* 121 Nev. at 731, 121 P.3d at 1031.

B. Nevada Adopted the Uniform Foreign-Country Money Judgment Recognition Act in 2007

The Uniform Law Commission first promulgated the Uniform Foreign-Country Money Judgment Act in 1962 and later amended it in 2005 (the "Uniform Act"). (National Conference of Commissioners of Uniform State Laws, Uniform Foreign-Country Judgment Recognition Act (2005) (With Prefatory Note or

Comments)). Twenty-four states and the District of Columbia have adopted the Uniform Act.[2]

Nevada adopted the 2005 Uniform Act in 2007, and it is codified at NRS 17.700, *et seq*. (the "Nevada Act"). Prior to the Nevada Act, Nevada had no specific statutory scheme for enforcing foreign-country money judgments, which are judgments of a court of a foreign country as opposed to a different state within the United States. NRS 17.730.

Application of the Nevada Act requires a two-step analysis. First, the party seeking enforcement must prove that the Nevada Act applies to the judgment at issue. NRS 17.700(3). To do that, the party must prove that the judgment has the following two characteristics:

[2] Alabama (Ala. Code § 6-9-250, *et seq.*); Arizona (A.R.S. § 12-3251, *et seq.*); California (Cal.C.C.P. § 1713, *et seq.*); Colorado (Colo. Rev Stat § 13-62-101, *et seq.*); Delaware (10 Del.C § 4801, *et seq.*); District of Columbia (DC ST § 15-361, *et seq.*); Georgia (O.C.G.A. § 9-12-110, *et seq.*); Hawaii (Haw. Rev. Stat. § 658F-1, *et seq.*); Idaho (I.C. § 10-1401, *et seq.*); Illinois (735 ILCS 5/12-661, *et seq.*); Indiana (IC 34-54-12, *et seq.*); Iowa (I.C.A. § 626B.101, *et seq.*); Massachusetts (M.G.L.A. 235); Michigan (MCL 691.1131, *et seq.*); Minnesota (M.S.A. 548.54, *et seq.*); Montana (MCA 25-9-601, *et seq.*); Nevada (NRS 17.700, *et seq.*); New Mexico (N.M.S.A. § 39-4D-1, *et seq.*); North Carolina (NDCC, 28-20.3-01, *et seq.*); North Dakota (NDCC, 28-20.3-01, *et seq.*); Oklahoma (12 Okl.St.Ann. § 12-718, *et seq.*); Oregon (O.R.S. § 24.350, *et seq.*); Tennessee (T.C.A. § 26-6-201, *et seq.*); Texas (V.T.C.A., Civil Practice & Remedies Code § 36A.001, *et seq.*); Virginia (VA Code § 8.01-465.13:1, *et seq.*); Washington (RCWA § 6.40A.010, *et seq.*).

1. The judgment must grant recovery for a sum of money. NRS 17.740(1)(a).

2. Under the laws of the foreign country, the judgment must be considered final, conclusive and enforceable. NRS 17.700(1)(b).

If the Nevada Act applies, a court "shall recognize a foreign-country money judgment . . . ." NRS 17.750(1). The Nevada Act does not apply to any judgment which constitutes "fines or other penalties." NRS 17.740(2)(b).[3] Whether the Judgment constitutes a fine or other penalty is the central issue in this case.

The second step of the analysis is to determine whether, if the Nevada Act applies, the judgment at issue falls within an exception to enforcement. *See* NRS 17.700(2)(a) – (c) and NRS 17.700(3)(a) – (h). For example, courts cannot enforce

[3] All the states that have adopted the Uniform Act as well as the District of Columbia have provisions against judgments that constitute "fines or other penalties." Alabama (Ala. Code § 6-9-252(b)(2)); Arizona (A.R.S. § 12-3252(B)(1)(b)); California (Cal.C.C.P. § 1715(b)); Colorado (Colo. Rev Stat § 13-62-103(2)(b)); Delaware (10 Del.C § 4802(b)(2)); District of Columbia (DC ST § 15-361, *et seq.*); Georgia (O.C.G.A. § 9-12-112(b)(2)); Hawaii (Haw. Rev. Stat. § 658F-3); Idaho (I.C. § 10-1403(2)(b)); Illinois (735 ILCS 5/12-663 (b)(2)); Indiana (IC 34-54-12-1(b)(2)); Iowa (I.C.A. § 626B.103(2)(b)); Massachusetts (M.G.L.A. 235 § 23A (legislation pending)); Michigan (MCL 691.1131, *et seq.*); Minnesota (M.S.A. 548.56(b)(2)); Montana (MCA 25-9-603 (2)(b)); Nevada (NRS 17.740.); New Mexico (N.M.S.A. § 39-4D-3(B)(2)); North Carolina (N.C.G.S.A. § 1C-1852(b)(2)); North Dakota (NDCC, 28-20.3-02(2)(b)); Oklahoma (12 Okl.St.Ann. § 718.3(B)(2)); Oregon (O.R.S. 24.355(2)(b)); Tennessee (T.C.A. § 26-6-203(b)(2)); Texas (V.T.C.A., Civil Practice & Remedies Code § 36.001(2)(A)); Virginia (VA Code § 8.01-465.13:2(B)(2)); Washington (RCWA § 6.40A.020(2)(b).).

a judgment if the foreign court lacked subject matter jurisdiction. NRS 17.750(2)(b). Lathigee has not argued that any of these exceptions apply, and the only issue is whether the Judgment is a penalty pursuant to NRS 17.740(2)(b).

C. The Nevada Supreme Court Has Not Looked at the Issue of What Constitutes a Penalty Under 17.740(2)(b), However, Other States Have and Focus on the Purpose of the Judgment at Issue

Neither the Uniform Act nor the Nevada Act defines the term "penalty," and the Supreme Court has not analyzed NRS 17.740(2)(b). Other states, however, have, and they focus on the purpose of the judgment when determining applicability of the Uniform Act.

Those states generally use the analytical framework first discussed in *Chase Manhattan Bank, N.A. v. Hoffman*, 665 F. Supp. 73 (D. Mass. 1987). *Hoffman* holds that a judgment should not automatically be considered a penalty within the meaning of the Uniform Act simply because the action is brought by a governmental entity. In reaching this conclusion the court looked beyond the labels of actions (e.g., criminal or civil) and focused on their effect. The court specifically looked at how the foreign court handled the claim under its own jurisprudence.

Defendant Herbert S. Hoffman ("Hoffman") was an officer of a Belgian company. 665 F.Supp. at 74. A Belgian court entered a judgment against him for criminal conduct related to his actions as an officer. *Id*. The Belgian court's judgment included a suspended jail sentence and a criminal fine. *Id*. Part of the

criminal proceedings involved a petition for civil damages made by the Belgian company. *Id*. The Belgian court ruled that it could award damages to the company even through it was primarily a criminal proceeding. *Id*. The court in *Hoffman* quoted the reasoning of the Belgian court, namely, that under Belgian jurisprudence, the court could award civil damages in a criminal proceeding:

> [E]xamination of the criminal jurisprudence . . . indicates that nothing prevents the admissibility of the plaintiff's civil damages complaint against the bankrupt for a violation of criminal law.... [P]laintiff's action is well-founded . . . . [T]he damages claimed by the plaintiff, arising out of the non-payment of two bills of an aggregate amount of 96,964.94 U.S. dollars is the direct consequence of the embezzlement of assets committed by the accused . . . .

Id., 665 F. Supp. at 74.

The Belgian company assigned its judgment to Chase Manhattan Bank ("Chase"), which sought to enforce it in Massachusetts federal court. *Id*. Similar to the instant case, Chase brought two claims, the first was to enforce the judgment under Massachusetts' state law for the enforcement of foreign judgments. *Id*. Even though Massachusetts had not adopted a version of the Uniform Act, its law similarly prohibited the enforcement of a judgment constituting a fine or penalty. 665 F. Supp. at 74-75. Hoffman opposed Chase's collection action arguing that the judgment resulted from a criminal case and therefore was an impermissible fine or penalty. 665 F. Supp. at 75. As is the case in Nevada, Massachusetts' statute did not define the terms "fine" or "penalty," and there was no case law on the issue. *Id*.

The Massachusetts court looked to a U.S. Supreme Court case called *Huntington v. Attrill,* 146 U.S. 657 (1892). In *Huntington*, the U.S. Supreme Court held that the issue of whether a judgment is a penalty turns on 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." *Hoffman*, 665 F. Supp. at 75 (quoting *Huntington*, 146 U.S. at 673-74). The Massachusetts court found that Chase could enforce the judgment. The court found that even though the Belgian proceedings were primarily criminal in nature, the Belgian court had dealt with the civil damages separately:

> In the present case, it is clear that the Belgian proceeding forming the basis of this suit was primarily a criminal proceeding. Defendants point out the language of the decision: the defendants were termed "the accused"; the court was "ruling in criminal matters" and "sentence[d]" the defendants to a conditionally suspended one year prison term and a 1,000 francs fine. Moreover, the court permitted the civil damages petition in evidence according to the tenets of "criminal jurisprudence."

Id., 665 F. Supp. at 75-76.

The Massachusetts court also emphasized the judgment was designed to return lost funds to investors rather than punish the wrongdoer:

> It is equally clear, however, that the Belgian court dealt with the damages petition of Level Export as a civil remedy. The court titled that portion of its opinion "On the Civil Damages Petition of the Plaintiff." In addition, Level's petition for damages was presented on its own behalf for actual damages. The Belgian court noted that the damages claimed by the plaintiff arose out of the non-payment of two bills of an aggregate amount of $96,964.94. The judgment against defendants was for precisely this amount. **Thus, the judgment was**

> **remedial: it afforded a private remedy rather than punished an offense against the public justice of Belgium.**

Id., 665 F. Supp. at 76 (emphasis added).

The Massachusetts court, specifically citing *Huntington*, noted that the benefit of the judgment inured to Chase, who stood in the shoes of the party bearing the loss:

> Moreover, the benefit of the judgment accrued in in [sic] its particulars to the private party plaintiff, not the state. Consequently, under the *Huntington, supra,* and *Sullivan, supra,* formulation of what is a penalty in the international sense, the judgment Chase now seeks to enforce is clearly not "a fine or other penalty." Accordingly, defendants' motion for judgment on the pleadings on Count One should be denied.

Id.

The Supreme Judicial Court of Massachusetts adopted this approach of the U.S. District Court in *Hoffman* when it interpreted the Uniform Act. *Ducharme v. Hunnewell*, 411 Mass. 711, 585 N.E.2d 321 (Mass. 1992).

Other states that have adopted the Uniform Act have followed this lead of looking at how the judgment was rendered in the foreign court. For example, in *Hyundai Securities Co., Ltd. v. Lee*, 232 Cal.App.4th 1379 (Cal. Ct. App. 2015), the California court upheld the enforcement of a Korean judgment based on a criminal fine. Ik Chi Lee ("Lee") was the president of Hyundai Securities Co., Ltd. ("Hyundai"). *Id*. at 1383. During his tenure, several shareholders brought a derivative action against Lee and prevailed, obtaining a money judgment on behalf of Hyundai. *Id*. at 1384. A component of the monetary judgment was indemnity to

the company for a criminal fine it had to pay to the government due to Lee's misdeeds. *Id*.

Hyundai filed an action in California state court against Lee to enforce the judgment under California's version of the Uniform Act. *Id*. Like the Nevada Act, California's statute barred enforcement of penalties and that term was undefined. *Id*. at 1386.

Hyundai moved for summary judgment, and Lee opposed, claiming that the portion of the judgment that was for indemnification of the criminal fine was an unenforceable penalty. *Id*. at 1384-85. The trial court rejected Lee's argument and granted summary judgment in favor of Hyundai. Lee appealed. *Id*. at 1385.

In affirming the trial court's decision, the California Court of Appeals relied on the comments to the Uniform Act to conclude that "the prohibition against the recognition of a judgment based on a fine or taxes—enforcing the revenue laws or a penal judgment—*does not include an award to compensate a plaintiff*." *Id*. at 1389 (emphasis added). To reach this conclusion, the California court relied on the official comments of the Uniform Law Commission which drafted the Uniform Act. *Id*. at 1388. The California court quoted the commentary, which stated that in the context of the Uniform Act a judgment should not be deemed a penalty out of hand merely because a governmental agency obtains a civil monetary judgment for purpose of providing restitution to investors:

> Courts generally hold that the test for whether a judgment is a fine or penalty 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. *E.g., Chase Manhattan Bank, N.A. v. Hoffman*, 665 F.Supp. 73 (D.Mass.1987) . . . **Thus, 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 brought on behalf of the private individuals by a government entity.** *Cf.* U.S.-Australia Free Trade Agreement, art. 14.7.2, U.S.–Austl., May 18, 2004 (providing that when government agency obtains a civil monetary judgment for purpose of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, judgment generally should not be denied recognition and enforcement on ground that it is penal or revenue in nature, or based on other foreign public law).

Id. at 1388.

D. Nevada Has Adopted *Huntington* When Analyzing the Uniform Enforcements of Foreign Judgments Act

While Nevada has not defined "penalty" in terms of the Nevada Act, the Supreme Court has looked at the issue in the context of NRS 17.330, *et seq.*, the Uniform Enforcements of Foreign Judgments Act (the "UEFJA"). The UEFJA is the statutory framework for enforcing judgments originating in sister states within the United States. The UEFJA provides for recognition of judgments rendered by courts that are entitled to "full faith and credit." NRS 17.340. In *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 267 P.3d 48 (2011), the Supreme Court looked at whether a municipal fine levied by the City of Oakland, California relating to a billboard was "entitled to full faith and credit in this state." *Id*., 127

Nev. at 534, 267 P.3d at. 49. The Nevada Supreme Court held that it was not because the fine was penal in nature. *Id*. In reaching its conclusion, the Nevada Supreme Court adopted the test in *Huntington* to determine whether the judgment is penal in nature. *City of Oakland*, 127 Nev. at 538-39, 137 P.3d at 51-52.

At issue in *City of Oakland* was a fine against defendant for an illegal billboard erected in within the Oakland city limits. *Id*., 127 Nev. at 535-36, 137 P.3d at 49-50. The City attempted to enforce in Nevada its California judgment for an unpaid fine. *Id.*, 127 Nev. at 536, 137 P.3d at 50. The Supreme Court, applying the test in *Huntington*, determined that the fine was a penalty and not entitled to recognition under full faith and credit. In reaching that conclusion, the Supreme Court looked at the purpose of the municipal penalty and how it was applied under California law. *Id*., 127 Nev. at 542, 137 P.3d at 54. Thus, the approach was identical to that in *Hoffman* and *Hyundai Securities,* meaning that the court must look at the purpose behind the judgment and its practical effects.

E. The Supreme Court Should Affirm the District Court's Grant of Summary Judgment

The Supreme Court should apply framework for analysis used in *Hoffman* and *Hyundai Securities* and affirm the grant of summary judgment. Those cases set out the basic analytical framework for determining what is a penalty under the Uniform Act. The result is not simply a function of the law of the state in which the judgment is to be enforced (i.e., the Uniform Act as adopted in that state) but also consideration

as to how the foreign court reached the judgment. This approach is contemplated under the Uniform Act because, as the commentators noted, "[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 brought on behalf of the private individuals by a government entity." *Hyundai Securities*, 232 Cal.App.4th at 1388. In short, a court must look at the nature of the judgment.

Likewise, *City of Oakland* also adopts the view of *Hoffman* and *Hyundai Securities* in looking at the practical effect and why the judgment was imposed in the first place. *City of Oakland* found the judgment unenforceable because it did not contain an element of restitution or otherwise making a private, harmed party whole. *Hoffman* and *Hyundai Securities*, both also based on *Huntington*, found that such a restitutionary purpose exists in the judgments at issue there, and therefore the Uniform Act applied.

The same is true here. The Commission is not trying to enforce the portion of the Sanction Decision that relates to the $15,000,000 administrative penalty but rather the disgorgement of the $21,700,000 that Lathigee directly took from the investors. The B.C. Securities Act mandates that the Commission attempt to return those funds to the defrauded investors. Thus, the Judgment and the Securities Decision upon which it is based is remedial in nature. Therefore, the Nevada Act

applies even though the Sanctions Decision has elements that also can act as a deterrent.

The approach of *Hoffman* and *Hyundai Securities* does not offend any of the goals Nevada seeks when performing its conflict of laws analysis. When performing a conflict of laws analysis, Nevada attempts to avoid unjustifiably harsh results and to achieve "the goal of a higher degree of certainty, predictability and uniformity of result." *General Motors Corp. v. Eighth Judicial Dist. Ct.*, 122 Nev. 466, 472, 134 P.3d 111, 115 (2006) (quoting *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 1042, 921 P.2d 933, 935 (1996)). Indeed, despite asserting that Nevada law governs, Lathigee has in effect utilized the approach of *Hoffman* and *Hyundai Securities* as well as *City of Oakland.* The rules of interpretation of a Nevada statute is certainly governed by Nevada law. Like *Hoffman, Hyundai Securities* and *City of Oakland,* Lathigee examines the law of the foreign country, in this case British Columbia, when analyzing whether the Judgment constitutes a penalty. (*See* Opening Brief at p. 0, where Lathigee begins an extensive discussion of the British Columbia case entitled *Poonian v. British Columbia Securities Commission,* 2017 BCCA 207). Consideration of British Columbia law is inevitable because it is important to determine the nature of the Judgment. That is impossible to do without considering the legal framework from which it came. Lathigee cannot claim that this approach, which he himself uses, produces an unjustifiably harsh result or somehow runs afoul

of Nevada's other goals. Rather than rely on labels, this approach looks to the substance of the judgment at issue.[4]

F. The *Kokesh* Decision Does Not Hold That All Disgorgements Are Penalties

Lathigee places great emphasis on *Kokesh v. S.E.C.*, 137 S.Ct. 1635 (2017), but that decision has no application here.[5] Lathigee would have the Court believe that the U.S. Supreme Court determined that a disgorgement is always a penalty. That is incorrect. The U.S. Supreme Court itself recognized that "'Penalty' is a term of varying and uncertain meaning. There are penalties recoverable in vindication of the public justice of the state." *Life & Cas. Ins. Co. of Tenn. v. McCray*, 291 U.S. 566, 574 (1934).

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[4] The District Court utilized a Conflict of Laws analysis to resolve the matter below. That analysis reached a correct result as the public policy considerations in support of the Canadian judgment are in complete harmony with those extant in Nevada. That said, this brief reaches the more salient issues raised in this controversy. The Opening Brief seems to agree upon this particular point. To the extent that the District Court did not expressly consider matters in this Answering Brief, consideration of those matters is still appropriate and supports upholding the denial of the preliminary injunction. *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("Although the court below apparently denied appellant's motion on the sole ground that appellant had not demonstrated excusable neglect, this court will affirm the order of the district court if it reached the correct result, albeit for different reasons.").

[5] Lathigee also refers to the expert opinions that were part of the parties' NRCP 16.1 disclosures. These are legal opinions that are not necessary to decide this matter.

Kokesh analyzed the narrow issue of whether a SEC disgorgement order was a "penalty" within the meaning of 28 U.S.C. § 2462. This statutory provision provides a 5-year statute of limitation on the SEC's ability to bring an action for a fine or "penalty." *Kokesh,* 137 S.Ct. at 1639. Subsequent decisions have recognized the narrow holding of Kokesh and that it is limited specifically to 28 U.S.C. § 2462. *U.S. v. Bank*, 378 F.Supp.3d 451, 466 (E.D.Va. 2019) ("Also crucial to this Court's decision is the explicitly limited nature of *Kokesh* which declared disgorgement a penalty only for the purposes of the statute of limitations in 28 U.S.C. § 2462, and explicitly refers to the penalty as civil." (emphasis in original) (internal citations and quotation marks omitted). At the beginning of its analysis, the U.S. Supreme Court recognized that "Generally, disgorgement is a form of [r]estitution measured by the defendant's wrongful gain." 137 S.Ct. at 1640, (citing Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment *a,* p. 204 (2010) (Restatement (Third)) (internal quotation marks omitted). The U.S. Supreme at the outset also recognized a distinction between true penalties and statutes that sought to redress harms to private individuals. In the latter case, those statutes were not strictly penalties:

> "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." 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**.

Kokesh, 137 S.Ct. at 1642 (citing *Huntington*, 146 U.S. at 668) (internal citations omitted) (emphasis added).

Here, the B.C. Securities Act provides for restitution of the victims of Lathigee's fraud. Read in conjunction with Sections 15 and 15.1 of the B.C. Securities Act, disgorgement under Section 161 acts to compensate victims, which is a goal of restitution. (JAX119, ¶ 143). Section 15.1 specifically mandates the Commission to attempt to recompense the victims using the disgorged funds.

Lathigee places great emphasis on the British Columbia Court of Appeal case of *Poonian v. British Columbia Securities Commission,* 2017 BCCA 207 (beginning at JAX74), which actually illustrates the point that Section 161 and Section 15.1 do not operate as a penalty but rather operate together as a mechanism for restitution. The Sanctions Decision against Lathigee was part of the *Poonian* case because his appeal of his fraud judgment was consolidated with other unrelated cases, including that of two individuals, Thalbinder Poonian and Shaliu Poonian. (JAX74). The only issue before the Court of Appeal with respect to Lathigee was whether he should be held jointly and severally liable with Pasquill for disgorgement and other payments. (JAX908. ¶ 154; JAX909, ¶¶ 155 – 160; JAX910, ¶¶ 161 – 162).

First, the court in *Poonian* was only looking at Section 161(1)(g) of the B.C. Securities Act. The court held that read in isolation Section 161(1)(g) of the B.C. Securities Act is "is neither punitive nor compensatory." (JAX96, ¶ 70). Indeed,

the court endorsed the view that looking *only* at Section 161(1)(g), the provision "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 [B.C. Securities] Act." (JAX97, ¶ 75). Importantly, *Poonian* was only looking at Section 161(1)(g) when it reached this conclusion and not Section 15.1. (JAX97, ¶ 74). *Poonian* specifically found that restitution may be achieved through other provisions in the B.C. Securities Act:

> The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the *Act*, such as the claims process set up under Part 3 of the *Securities Regulation* or the s. 157 compliance proceedings in the *Act*.

(JAX119, ¶ 143). Part 3 of the B.C. Securities Act contains the provisions regarding the Commission's mandate to return funds and how investors are to make claims. (JAX986).

The court did go as far as to describe the procedure for recovered funds back into the hands of investors under Section 15.1. (JAX96, ¶ 72; JAX87 ¶ 72). The court went on to note that the Executive Director of the Commission, the body that can order disgorgement, considers Section 161(1)(g) when read in conjunction with Section 15.1 as making defrauded investors whole:

> The Executive Director characterizes this procedure under s. 15.1 as an "expeditious" mechanism for victims to receive compensation for losses suffered as a result of conduct giving rise to a s. 161(1)(g) order. Therefore, the Executive Director says, s. 161(1)(g) has a compensatory

> purpose: the order produces money that must be used to compensate victims (or if not paid on adjudicated claims, for public education purposes).

(JAX97, ¶ 73).

The court then noted that "Any analysis of restitution would arise under s. 15.1, not s. 161(1)(g)." (JAX98, ¶ 76). The court declined to perform that analysis as that issue (i.e., Section 15.1) was outside the scope of the appeal, and its holding was limited to looking solely at Section 161(1)(g). *Id.*

What is important here is that the Commissioner looks to Section 15.1 as a mechanism for returning to victims the money that they lost and to recompense them. That purpose is important because it helps determine whether the payment or judgment is a penalty. As an example of this approach which reached the conclusion that such a payment was not a penalty, the U.S. Supreme Court in *Kokesh* discussed *Brady v. Daly,* 175 U.S. 148 (1899). In that case, a playwright sued in a U.S. circuit court under an infringement statute that prescribed minimum statutory damages. *Kokesh,* 137 S.Ct. at 1642. The defendant argued that the circuit court lacked jurisdiction because the district court had original jurisdiction over cases involving penalties. *Id*. The U.S. Supreme Court upheld the circuit court's jurisdiction because, among other things, all of the recovered money, including the statutory amounts, would go to the infringed playwright. *Id*. In *Kokesh*, the U.S. Supreme Court summed up the holding in *Brady*, stating that "By providing a compensatory

remedy for a private wrong, the [*Brady*] Court held, the statute did not impose a 'penalty.'" *Id*. Here, Section 15.1 of the B.C. Securities Act mandates that the Commission attempt to return the fraudulently obtained funds to Lathigee's victims – e.g. a "compensatory remedy for a private wrong."

Turning specifically to the SEC disgorgement order at issue in *Kokesh*, the U.S. Supreme Court noted the SEC's admission that when seeking disgorgement, "it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties," e.g. *not* a "compensatory remedy for a private wrong." *See Kokesh,* 137 S.Ct. at 1643. That is not the case here. As pointed out in *Poonian*, the purpose of Section 161(1)(G) is not to punish, and, when read together with Section 15.1, mandates the Commission to return money to the defrauded investors. This is also exactly the situation that the drafters of the Uniform Act were focusing on, given their commentary that governmental actions should not be dismissed out of hand as a "penalty" and there must be an analysis of whether there is compensation or restitution to victims for their losses in those governmental actions. *Hyundai Securities*, 232 Cal.App.4th at 1388.

The final factor that the U.S. Supreme Court looked at in *Kokesh* drives home the point. As admitted by Lathigee, the SEC is not required to return any disgorged funds to defrauded investors. (JAX1415, ll. 19 – 25; JAX1416, ll. 1 – 21). The U.S. Supreme Court stressed this point in its analysis by recognizing that SEC

disgorgement orders may at times be compensatory in nature but most of the time they are not:

> Finally, in many cases, SEC disgorgement is not compensatory. As courts and the Government have employed the remedy, disgorged profits are paid to the district court, and it is "within the court's discretion to determine how and to whom the money will be distributed." *Fischbach Corp.*, 133 F.3d, at 175. Courts have required disgorgement "regardless of whether the disgorged funds will be paid to such investors as restitution." *Id.*, at 176; see *id.*, at 175 ("Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal"). Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury. See, *e.g., id.,* at 171 (affirming distribution of disgorged funds to Treasury where "no party before the court was entitled to the funds and ... the persons who might have equitable claims were too dispersed for feasible identification and payment"); *SEC v. Lund,* 570 F.Supp. 1397, 1404–1405 (C.D.Cal. 1983) (ordering disgorgement and directing trustee to disperse funds to victims if "feasible" and to disperse any remaining money to the Treasury). **Even though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so.** 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. See *Porter v. Warner Holding Co.,* 328 U.S. 395, 402, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) (distinguishing between restitution paid to an aggrieved party and penalties paid to the Government).

Kokesh, 137 S.Ct. at 1644 (emphasis added).

That is certainly not the case here. As noted, Section 15.1's obligation to attempt to recompense the defrauded investors is mandatory.

Finally, Lathigee's comments on *Kokesh* lose sight of what the U.S. Supreme Court was analyzing. The U.S. Supreme Court was looking at a statute of limitations. Statutes of limitation have several purposes, the primary of which is

making sure that matters are adjudicated in a timely manner. *See, e.g.*, *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980); *see also U.S. v. Kubrick*, 444 U.S. 111, 117, (1979) (asserting that statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories. disappearance of documents. or otherwise"); *Bell v. Morrison*, 26 U.S. 351, 360 (1828) (noting that statutes of limitation "afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses"). Few of these purposes could be achieved if a defendant had to analyze each SEC disgorgement order individually to determine whether the five-year statute of limitations in 28 U.S.C. § 2462 applied. If that were the case, then some SEC disgorgement orders might be subject to the limitation while others did not. Such an approach would not "afford security against stale demands." Therefore, there needs to be a blanket rule.

That is not the case with the Uniform Act or NRS 17.700, *et seq*. The Nevada Act requires a judgment by judgment analysis. NRS 17.740(1) and (2). That is why the commenters, as recognized in *Hyundai Securities*, 232 Cal.App.4th at 1388, emphasized that a judgment should not be dismissed out of hand as a "penalty" merely because it is secured by a governmental entity. If the judgment's purpose is

to compensate, as is the case here with the judgment entered under Section 15, the applicability of the Nevada Act should be affirmed.

G. Lathigee's Other Arguments Regarding *Kokesh* Do Not Apply

1. The Public Interest Is Not Dispositive Because the Benefit of the Disgorgement Accrues to Lathigee's Victims

Citing *Kokesh*, Lathigee argues that because the Commission is a public entity enforcing the securities laws, they serve a public rather than private purpose, and therefore not subject to the Nevada Act. (Opening Brief, p. 35). This is incorrect. First, even *Kokesh* recognized the distinction between laws that are enforced for the public good as opposed to those that compensate a private person. *Kokesh,* 137 S.Ct. at 1642. This distinction is mirrored in *Hoffman's* analysis of the Belgian judgment, holding that the it is recognized under the Uniform Act because it goes to compensating the victim of the embezzlement. *Hoffman*, 665 F. Supp. at 76. Here, it is no different. The Commission is not seeking to enforce that portion of the Sanctions Decision which constitutes the $15,000,000 administrative fine but rather only to have Lathigee return the money that he took from the victims. Thus, the Commission only seeks to enforce the restitution portion of the judgment.

2. The Judgement Requires Lathigee To Disgorge What He Took from the Defrauded Investors

Lathigee argues that the Judgment should not be recognized because it may exceed his profits. (Opening Brief, p. 51). This argument simply has no application

here. This argument relies on the portion of *Kokesh* recognizing that sometimes SEC disgorgement orders result in a wrongdoer having to give up more than the profit they have made. (Opening Brief at p. 51, *Kokesh*, 137 S.Ct. at 1644). According to *Kokesh*, that characteristic is another hallmark of being a penalty.

The problem is that *Kokesh* was speaking about insider trading, not defrauding investors of their hard-earned money. Insider trading occurs when a person received material, non-public information and trades on it to gain a profit. *Id*. Under an SEC Disgorgement Order, an insider trader may be required to disgorge their ill-gotten profit, but also the ill-gotten profit of others:

> 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. Thus, for example, "an insider trader may be ordered to disgorge not only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct."

Kokesh, 137 S.Ct. at 1644, (quoting *S.E.C. v. Contorinis,* 743 F.3d 296, 302 (C.A.2 2014)). The U.S. Supreme Court held that in this context, SEC Disgorgement Orders are a penalty because they do more than return the wrongdoer to the status quo, meaning that they can actually make the defendant worse off. *Id*.

That is far from the situation here. The Judgment requires Lathigee to pay back the $21,700,000 that he took from investors. He is not worse off by any stretch the imagination. Indeed, he will be returned to the status quo, i.e., he will be returned

"to the place he would have occupied had he not broken the law."

3. Lathigee Did Benefit from The Funds He Obtained from the Defrauded Investors

Finally, Lathigee's argument that the Judgment was a penalty because there was no finding that he personally obtained the funds. (Opening Brief, p. 52). This argument rings hollow, because, as the Opening Brief points out, the funds went to the payment of obligations of the several related companies, i.e., the unsecured loans rather than the promised real estate investments. (Opening Brief, p. 52-53). Lathigee and Pasquill were found to have controlled these related companies and perpetrated the fraud through them. (JAX183, ¶ 46). As the Commission found, "They should not be protected or sheltered from sanctions by the fact that the illegal actions they orchestrated were carried out by corporate vehicles." (*Id.*).

Lathigee also raised this argument in *Poonian,* and the court specifically rejected it. Whether the FIC Group started out as a vehicle for Lathigee's fraud or eventually turned into one made no difference:

> Whether the corporate entity was initially created for a fraudulent purpose or later became a vehicle for fraud does not change the fact that the corporate entity, controlled and directed by the individual wrongdoers, was a vehicle for fraud. The critical finding is that these entities obtained funds as a result of the fraud, and the individuals controlling and directing them received the funds *indirectly.*

(JAX123, ¶ 157 (emphasis in original).

Poonian noted that the economic reality of financial fraud was that corporate

entities receive the funds, not individuals such as Lathigee. As a result, Lathigee did receive the funds through the companies that he controlled with Pasquill:

> As to the receipt of the funds by the corporate, and not the personal, entities, this argument founders when one considers the economic reality of raising capital. It is the nature of fraudulent fundraising that funds raised are received (obtained) by the corporate vehicle, and not the personal fraudster. Indeed, the entire transaction the exchange for money of securities of the issuer. The money goes to the issuer, not to the individual. An interpretation sensitive to economic reality would hold jointly and severally liable the fraudster and the vehicle he was found to have directed and controlled for the amounts they received because the fraudster had indirectly received those funds.

(*Id.* at ¶ 159). The argument should also be rejected here.

H. The Supreme Court Should Affirm the District Court's Recognition of the Judgment Pursuant to Principles of Comity

The Commission's second cause of action was for recognition of the Judgment under principles of comity. The Nevada Act specifically provides that a judgment not recognized under the Act may still be recognized under principles of comity. NRS 17.820. "In general, comity 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." *Mianecki v. Second Jud. Dist. Ct.*, 99 Nev. 93, 98-99, 658 P.2d 422, 424-25 (1983). Nevada adopted § 482 of the Restatement (Third) of Foreign Relations Law (1987), which lists a variety of grounds for not recognizing a foreign judgment. *Gonzales-Alpizar v. Griffith*, 130 Nev. 10, 19, 317 P.3d 820, 826 (2014). These grounds include such things as a judgment procured by fraud and

insufficient due process. § 482(2)(b) and (c). Lathigee does not raise any of the issues listed in § 482.

Lathigee only focuses on § 483, which states that a court does not have to recognize judgments that are penalties: "Courts in the United States are not required to recognize or to enforce judgment that are for the collection of taxes, fines or penalties rendered by the courts of other states." (Opening Brief, p. 57). Contrary to what Lathigee implies, Nevada has not adopted this section of the Third Restatement. (Opening Brief, p. 59). Lathigee cites *Gonzales-Alpizar v. Griffith*, 130 Nev. at 18, 317 P.3d at 826; *Las Vegas Sands v. Eighth Judicial Dist. Ct.*, 130 Nev. 578, 583, 331 P.3d 876, 879 (2014), for the general proposition that Nevada relies on the Third Restatement, but neither of those cases adopted § 483.

As discussed below, the Supreme Court should affirm the District Court's grant of summary judgment in favor of recognizing the Judgment on the grounds of comity. Furthermore, as discussed below, the result would not be different if Nevada adopted § 483.

1. The General Principles of Comity Compel Recognition of the Judgment

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. *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. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)); *see also, Hilton v. Guyot*, 159 U.S. 113, 165 (1895) ("[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.").

This notion of promoting cooperation among nations is particularly true with respect to securities regulation. The SEC and securities commissions of each of the Provinces, including the Commission, 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. *See S.E.C. v. Lines*, No. 07 Civ. 11387(DLC), 2009 WL 2431976, *1 (S.D.N.Y. Aug. 7, 2009). The U.S. and provinces of Canada are actually parties to a Memorandum of Understanding, to which the SEC and Commission 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…" (JAX1128 – 1152) (Memorandum of Understanding between SEC and Commission)).

Canadian courts, including the British Columbia Courts, have upheld SEC disgorgement judgments on multiple occasions. *See United States (Securities Exchange Commission) v. Peever*, 2013 BCSC 1090 (CanLII) (JAX1115 – 1122); *United States (Securities and Exchange Commission) v. Shull*, [1999] B.C.J. No.

1823 (S.C.) (JAX1153 – 1158); *and United States (Securities and Exchange Commission) v. Cosby*, 2000 BCSC 338 (JAX1160 – 1174). One of the more recent cases, *United States (Securities Exchange Commission) v. Peever*, recognized, and permitted enforcement of, an SEC disgorgement judgment, even though the defendant alleged that its purpose was partially penal in nature. (JAX1121, ¶¶ 25 – 28). 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." (JAX1165, ¶ 9). 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." (JAX1157, ¶ 29).

It is critically important that the U.S. maintain its good relations and ties with Canada by giving effect to its Province's judgments, as it gives effect to those of the states, especially those meant to provide some restoration to the victims of securities fraud. "International law is founded upon mutuality and reciprocity." *Hilton v. Guyot*, 159 U.S. at 228. If we want Canada's Provinces to continue to recognize U.S. securities judgments, then we need to recognize theirs.

Nevada has implicitly recognized these policy issues in *Gonzales-Alpizar,* which cited with approval the Arizona decision in *Alberta Securities Commission v.*

Ryckman, 200 Az. 540, 30 P.3d 121 (Az. App. 2001). Analyzing a judgment obtained in Alberta by the Alberta Securities Commission which it sought to enforce in Arizona, the Arizona court noted that "Canadian judgments have long been viewed as cognizable in courts of the United States." *Id*. 200 Az. at 545, 30 P.3d at 126 (citing *Roy v. Buckley,* 698 A.2d 497, 501–02, ¶ 11 (Me. 1997) and *Petition of Breau,* 132 N.H. 351, 565 A.2d 1044, 1049–50 (N.H. 1989) (Souter, J., writing for the Supreme Court of New Hampshire)). The court was analyzing an Alberta judgment for investigative costs under § 482. *Id*. The court upheld the enforcement of the judgment under principles of comity (*Id*., 200 Az. at 125-26, 30 P.3d 544-45), and the Nevada Supreme Court cited this decision when adopting § 482 in *Gonzales-Alpizar*. *Gonzales-Alpizar*, 130 Nev. at 19, 317 P.3d at 826. There is no reason why the result should not be the same here, as Lathigee raises no issues under § 482.

2. Even If Nevada Adopted § 483, the Result Would Not Change

The result would not change even if Nevada were to adopt § 483. First, § 483 does not prohibit the District Court from recognizing the Judgment. *See* § 483, Comment a (recognition of a penal judgment is permitted). Section 483 defines penal judgments as those that are primarily punitive in nature and lack a compensatory component:

> *b. Penal judgments defined.* A penal judgment, for purposes of this section, is a judgment in favor of a foreign state or one of its subdivisions, **and primarily punitive rather than compensatory in character . . . .**

§ 483, Comment b (emphasis added).

Courts that have reviewed § 483 employ the same type of analysis *Hoffman* and *Hyundai Securities.* Indeed, the Reporter's Notes cites *Huntington*, which forms the basis for the analysis in *Hoffman*, *Hyundai Securities* and *City of Oakland* with approval. § 483, Reporter's Note 4. In *Hyundai Securities*, the court cited § 483, and it used the same analysis of determining whether a judgment constituted a penalty as that used when evaluating a judgment under the Uniform Act. *Hyundai Securities*, 232 Cal.App.4th at 1389. Thus, the analysis is no different – as discussed above, the Judgment is not an unenforceable penalty.

CONCLUSION

Lathigee attempts to create a rule that all foreign country judgments born of public policy considerations should be barred from enforcement in Nevada regardless of whether they are designed to directly recompense victims. This is an inflexible approach that results in a harsh result, namely, fraudsters can merely move to Nevada to avoid repaying their victims. This approach also represents an improper merger of the rule allowing governmental judgments that recompense victims as provided for in *Hoffman* and *Hyundai Securities,* into the rule that a state need not enforce another country's criminal sanctions. The two approaches are separate particularly here given that British Columbia *must* use efforts to repay the victims with any recovered funds. The repayment of victims of fraud is certainly

consistent with Nevada public policy, and, therefore, the District Court's grant of summary judgment should be affirmed.

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ATTORNEY'S CERTIFICATE PURSUANT TO NRAP 28.2

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2. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Naylor & Braster and that on the 23rd day of August 2019, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENTS' ASWERING BRIEF** as follows:

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