IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL PATRICK LATHIGEE,

Appellant,

— *vs.* —

BRITISH COLUMBIA SECURITIES COMMISSION,

Respondent.

Case No. 78833

APPELLANT'S REPLY BRIEF

Appeal from Case No. A-18-771407-C
Eighth Judicial District Court For Clark County
Hon. Adriana Escobar

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I. INTRODUCTION

This is a very straightforward appeal in the sense that this Court may consider the tightly-framed technical legal issues before it without the distractions of numerous extant matters. There are no serious factual issues for this Court to consider, and both parties even agree to a large extent on the law to be employed, *i.e.*, this Court should take its guidance from the U.S. Supreme Court's opinion in *Huntington*[1] and its progeny, and this Court's own opinion in *City of Oakland*,[2] and apply the analytical constructs given in those opinions to decide how the instant disgorgement judgment is to be characterized for purposes of the Public v. Private Interest Rule.

As the opening and answering briefs indicate, it is *solely* on this issue of characterization that the parties have substantial disagreement. Lathigee contends that the Public v. Private Interest Rule should be tested from the *intended purpose* of section 161(1)(g) of

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

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

the British Columbia Securities Act ("BCSA"),[3] as repeatedly expressed by the Canadian courts, including Lathigee's own appeal in Canada, as embodied in the *Poonian*[4] decision, and by the other record evidence including the report of the BCSC's own expert witness, Mr. Gordon R. Johnson. 1 JAX131-39.

In contrast, the BCSC argues that all the evidence of the intended purpose of section 161(1)(g) should be ignored (including the report of the BCSC's own expert witness) and instead this Court should look at the *possible* effect of 161(1)(g), which might ultimately result in some investors receiving some money under an entirely different provision of the BCSA, namely section 15(1), which speaks to the BCSC's administrative use of moneys that it has collected.

Accordingly, the ultimate issue to be decided by this Court is: Whether the disgorgement judgment is to be tested under the Public v.

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[3] The BCSA in its entirety is available online at http://www.bclaws.ca/civix/document/id/complete/statreg/96418_01.

[4] *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 (B.C.App., 2017); 2 JAX127-39.

Private Interest Rule of *Huntington* and *City of Oakland* according to its *intended purpose* or by its *possible effect*.

II. DISCUSSION

A. THE PURPOSE OF DISGORGEMENT UNDER § 161(1)(g)

Lathigee will not belabor the intended purpose of disgorgement under BCSA § 161(1)(g) because he has already thoroughly addressed this issue in his Opening Brief. Appellant's Opening Brief ("AOB") 40-44. In essence, the intended purpose of a § 161(1)(g) disgorgement order is "protective and preventative, intended to be exercised to prevent future harm". 1 JAX61, ¶ 5. Or, as the BCSC's own expert witness, Mr. Johnson, in citing to pertinent Canadian law, concludes:

- "The purpose of the remedy is to deter non-compliance by removing the prospect of receiving and retaining moneys from non-compliance." 2 JAX133-34.
- "Its purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing." 2 JAX133, ¶ 112.
- "The 'disgorgement' remedy has the purpose of removing the incentive for non-compliance." 2 JAX134, ¶ 5.

Deterrence is in the Public Interest, not the Private Interest. Notably, the BCSC does not point to any evidence that deterrence is not the intended purpose of § 161(1)(g) disgorgement, and effectively concedes that point. NRAP 31(d)(2); *Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984).

B. COMPENSATION IS NOT A PURPOSE OF § 161(1)(g)

The entire record evidences that § 161(1)(g) does *not* have a compensatory purpose. AOB 45-50. This is made clear by the *Poonian* court: "The purpose of § 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention." 1 JAX119, ¶ 143(2). According to BCSC's own expert witness:

- "Its [disgorgement] purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing. It is not to punish or compensate. . . ." 1 JAX109.
- "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.

- "The British Columbia Court of Appeal expresses the purpose of the Section 161(1)(g) 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 JAX132-33.

Thus, as with the intended purpose of § 161(1)(g), the BCSC offers no contrary evidence that a purpose of that section is not to compensate investors.

C. THE BCSC'S ATTEMPT TO BOOTSTRAP SECTION 15.1 TO SECTION 161(1)(g) IS UNAVAILING

Since the BCSC cannot avoid the intended non-compensatory purpose of § 161(1)(g), the BCSC instead attempts to tie in BCSA § 15(1) and make the argument that the *effect* of combining § 161(1)(g) and § 15(1) together creates a hypothetical scenario where some investors may receive some moneys, which would then make the entire purpose of § 161(1)(g) to compensate investors. But, the BCSC's argument is unavailing.

D. *POONIAN* EXPRESSLY STATES THAT § 15(1) DOES NOT CHANGE THE PURPOSE OF § 161(1)(g)

Notably, the sanctions decision against Lathigee (which includes the disgorgement judgment) was not based on sections 15 and 15.1, but instead was based on only sections 161(1) and 162 of the Securities Act. Indeed, sections 15 and 15.1 are not mentioned in the sanctions decisions. 1 JAX10-16.

In paragraph 73 of *Poonian*, the Executive Director of the BCSC similarly argued to the Canadian court that section 15.1 causes section 161(1)(g) to be compensatory. 1 JAX97. Paragraph 74 recites the appellants' position. *Id.* Then, the next several paragraphs (76-78) of *Poonian* are devoted to that court *expressly rejecting* the Executive Director's argument that section 15.1 somehow causes section 161(1)(g) to be compensatory, holding that § 15(1) has no such effect:

> [76] While "compensation" may well be a possible effect of a s. 161(1)(g) order, I cannot say that is its purpose. Any analysis of restitution would arise under s. 15.1, not s. 161(1)(g). Although not determinative, I note s. 15.1 is contained in "Part 3 – Financial Administration" of the Act. Section 161(1)(g) (under "Part 18 – Enforcement") does not refer to "compensation" or "restitution". Nor do ss. 15 and 15.1, or Part 3 of the Securities Regulation, refer to "restitution". The only reference to "compensation" is in

> s. 7.4(3)(a) of the Securities Regulation, requiring the Commission to consider, in adjudicating a claim, "whether the applicant received or is entitled to receive compensation from other sources" [emphasis added].
>
> [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 (ss. 155.1(a) and 157(1) (i) and (j)). While a victim may receive money from the s. 15.1 mechanism, that is distinct from the power to order restitution.

1 JAX 97-98, ¶¶ 76-77. And, further in ¶ 78:

> 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).

Poonian, 1 JAX98, ¶ 78 (quoting *Re Streamline Properties Inc.*, 2015 BCSECCOM 66, ¶¶ 78-79).

In other words, the BCSC is attempting to persuade this Court to adopt the very position of the Executive Director that was rejected by the British Columbia appellate court in *Poonian*! The *Poonian* court is correct. Sections 15 and 15.1 are purely administrative provisions found in a completely different part of the BCSA that relate to the future event of what the BCSC must do with funds once they are received. As the *Poonian* court noted in paragraph 77 of the quoted *Streamline* opinion, if the BCSC sought compensation or restitution for investors, then it would have to seek relief under completely different sections of the BCSA, §§ 155.1(a) or 157(1)(i), in an action brought before the Supreme Court of British Columbia instead of just the BCSC. 1 JAX98. But, of course, that did not happen here. It is noteworthy that the opinion of the BCSC's own expert witness in his analysis of the purpose of § 161(1)(g) does not mention § 15(1). 1 JAX127-39.

The BCSC's citation to *Brady v. Daly*, 175 U.S. 148 (1899), likewise, misses the mark because the BCSC there, too, presumes that section 15.1 changes the character of section 161(1), and *Poonian* itself

tells us in no uncertain terms that such is not the case. Respondent's Answering Brief ("RAB") 32-33.

E. DISGORGEMENT UNDER §§ 155.1 AND 157.1 COMPARED

The BCSA includes a procedure at § 155.1(a) by which a disgorgement order can make compensation directly from the defendant to investors:

> 155.1 If the court finds that a person has committed an offence under section 155, the court may make an order that
>
> > (a) the person compensate or make restitution to another person. . . .

But, this section includes the very important language, "[i]f the court finds", which means that the BCSC must bring an original action before the British Columbia trial court to obtain that relief (which the BCSC did not do), as opposed to simply an administrative procedure before itself, *i.e.*, an action by the Executive Director appearing before the Commission.

Similarly, § 157(1)(i) and (j) provides that:

> 157(1) In addition to any other powers it may have, if the commission considers that a person has contravened or is contravening a provision of this Act or of the regulations,

> or has failed to comply or is not complying with a decision, and the commission considers it in the public interest to do so, the commission may apply to the Supreme Court for one or more of the following:
>
> > (i) an order that the person compensate or make restitution to any other person;
> >
> > (j) an order that the person pay general or punitive damages to any other person. . . .

Note that, as with § 155.1(a), this procedure would also have required the BCSC to file an original action with the British Columbia trial court, which the BCSC did not do.

Importantly, the BCSC cannot now pursue such an action before the British Columbia trial court under either §§ 155.1(a), or 157.1(i) or (j) because the complained-of conduct by Lathigee occurred in the 2007-2008 period, and BCSA § 159[5] provides a six-year limitations period that has long since run. Nor can the same result be presumed, since an action before the trial court would have offered Lathigee greater due process protections and a truly independent tribunal, as opposed to the BCSC have an enforcement hearing before itself.

[5] Section 159 provides: "Proceedings under this Act, other than an action referred to in section 140, must not be commenced more than 6 years after the date of the events that give rise to the proceedings."

The point is that §§ 155.1(a), and 157.1(i) and (j) demonstrate how the BCSC could have obtained by application to the British Columbia trial court an order by which any disgorged proceeds would go directly to investors *for the intended purpose of compensation*. Instead, the BCSC chose to pursue the administrative hearing[6] route of § 161(1)(g) *for the intended purpose of deterrence*.

This critical point did not escape the *Poonian* court:

> 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 (j)). 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.

Poonian, 1 JAX98, ¶ 77 (italics in original). *Poonian* continued:

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[6] Section 161(1) begins, in stark contrast to §§ 155.1 and 157.1: "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. . . ."

> 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.

Poonian, 1 JAX98, ¶ 78. If the BCSC wanted a disgorgement judgment that is cognizable as being in the private interest, as opposed to the public one, it should have brought an original action before the British Columbia trial court (Supreme Court) under §§ 155.1(a), and 157.1(i) and (j), instead of an administration action before the BCSC under § 161(1)(g). The BCSC's error is fatal, and this Court should now grant relief to Lathigee.

F. THE EFFECT OF § 15.1 IS, AT BEST, SPECULATIVE

The BCSC outlines the procedure under BCSA § 15.1 by which moneys that the BCSC receives from disgorgement are to be used, including payment to jilted investors. RAB 12-13. Sections 15.1(1) and (2) then discuss that any unused funds are to be spent on public education regarding the securities market. Notably, the BCSC states that "the Commission must *attempt* to return any disgorged funds to

the defrauded investors," RAB 12 (emphasis added),[7] which is quite different than saying that the Commission *will* return those funds to investors.

First, § 15.1(1) states that "[t]he commission must notify the *public* in accordance with the regulation if the commission receives money from an order made under section . . . 161(1)(g)," (emphasis added), which is much different than personally notifying each investor. Since the events giving rise to the disgorgement judgment occurred over a decade ago, individual investors may have passed away or moved elsewhere, and entity investors may no longer exist. Thus, it is pure speculation for the BCSC to suggest that some or all of the investors will actually receive notice that the BCSC is holding moneys.

Second, § 15.1(2) states that the investors must make their claims by filing an application within three years of the notice. Whether

[7] This use of "attempt" is not merely stylistic: The BCSC repeats this same usage on page 26 of the Answering Brief: "The B.C. Securities Act mandates that the Commission *attempt* to return those funds to the defrauded investors." (emphasis added).

investors, or how many of them, will make such an application would similarly be based upon speculation.

Third, as the Executive Director of the BCSC admitted, the claims of investors have to be "adjudicated" by the BCSC itself. 1 JAX97, ¶ 73. But, nobody can realistically predict what amount of claims will be made by investors and adjudicated in their favor; that requires a great amount of speculation, too.

Whether a particular judgment is based on a statute that furthers a public or private interest should not be based upon speculation. Yet, this is precisely the BCSC's position here: The BCSC effectively asks this Court to simply presume that all investors will actually receive notice, timely file a proper application, and have their claims adjudicated in their favor, which amounts to speculation.

The proper analytical construct is for courts to focus upon the *intended purpose* of the statute giving rise to a foreign judgment, since that purpose can be precisely determined from the legislative history of the statute or (as here via *Poonian* and other court opinions) from the holdings of courts in interpreting the statute.

G. THE *CHASE MANHATTAN* OPINION HAS LITTLE APPLICATION TO THE INSTANT FACTS

In its Answering Brief, the BCSC cites to *Chase Manhattan Bank, N.A. v. Hoffman*, 665 F.Supp. 73 (D.Mass. 1987). RAB 19. In that case, a purely private actor, the Level Export Sales Corporation ("Level") brought an action before the Tribunal de Premiere Instance in Belgium against the defendants relating to their activities as directors of a non-party corporation, which had been declared bankrupt. 665 F.Supp. at 74. Importantly, Level's complaint included a civil damages petition. *Id.*

As a civil plaintiff, Level was allowed to bring both criminal charges and its civil claim damages for damages. The Belgian court ruled on Level's civil damages petition, awarding damages to Level in the amount of $96,964 for embezzlement. *Id.* Level then assigned its judgment to Chase Manhattan, *id*, who then filed an action to register the judgment in the U.S. District Court which rendered this opinion. *Id.* The defendants challenged the attempted registration on the basis that it was a "fine or other penalty." *Id.*

The *Chase Manhattan* court first looked to *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892), for the general rule that whether a foreign law is penal turns on "whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act." 665 F.Supp. at 75 (quoting *Huntington*, 146 U.S. at 673-74, 13 S.Ct. 229-30). The court next recited a Massachusetts opinion, *Sullvan v. Hustis*, 237 Mass. 441, 130 N.E. 247 (1921), to the effect that if a civil right is founded on a criminal statute, then the civil right may be enforced. 665 F.Supp. at 75. Finally, court noted that the Belgian proceeding was primarily (but not entirely) a criminal proceeding that resulted in the defendants being sentenced to prison and required to pay a fine. But, the purely civil part of the award was subject to recognition, since that was only private litigation between Level and the individual defendants. *Id.* at 76 ("Thus, the judgment was remedial: it afforded a private remedy rather than punished an offense against the public justice of Belgium."). But, how this opinion assists the BCSC is beyond peradventure, since

the BCSC is not a private actor, itself did not suffer any damages, and is enforcing a statute with a purpose that is *not* compensatory.

Here, the BCSC argues that "[t]he Massachusetts court also emphasized the judgment was designed to return funds to lost investors rather than punish the wrongdoers." RAB 21. But, the opinion says nothing of the sort, since the case was strictly about Level recovering its own damages as a private party.

Despite *Chase Manhattan* being inapposite, the BCSC notes that this decision was adopted in *Desjardins Ducharme v. Hunnewell*, 411 Mass. 711, 714, 585 N.E.2d 321, 323 (1992), which is correct. RAB 22. But, the Answering Brief does not state what the Massachusetts court actually said about *Chase Manhattan*:

> That court concluded that whether a judgment is 'a fine or other penalty' depends on whether its purpose is remedial in nature, affording a private remedy to an injured person, or penal in nature, punishing an offense against the public justice.

411 Mass. at 714, 585 N.E.2d at 323 (1992) (quoting *Chase Manhattan*, 665 F.Supp. at 75-76). *Hunnewell* involved a Canadian law firm (Dejardins Ducharme), which in its own capacity won a civil costs

award (which in Canada includes attorney's fees) in the amount of $60,065 in a purely civil action involving a garnishment against assets. The Massachusetts court explained that the Dejardins Ducharme's judgment was remedial because it was compensatory:

> [T]he Superior Court judge correctly held that the Quebec judgments were remedial and not a penalty. The judge relied on Canadian legal authority cited in an affidavit in support of Desjardins Ducharme's motion for summary judgment to find that the sole purpose of the costs assessed by the Quebec courts against Hunnewell was 'to compensate his adversary for the damage inflicted on him in compelling him to incur expenses in support of a just claim.' It is clear that the costs were remedial in nature rather than penal under Canadian law.

411 Mass. at 715, 585 N.E.2d at 324.

The rule of both *Chase Manhattan* and *Hunnewell* are, thus, the same: A judgment is not penal in nature if it is meant to compensate private individuals. But, as Lathigee has demonstrated at great length, the purpose of the subject disgorgement order is *not* compensatory. AOB 45-50.

H. THE *HYUNDAI SECURITIES* OPINION ALSO HAS LITTLE APPLICATION TO THE INSTANT FACTS

The BCSC next discusses the decision of the California Court of Appeals in *Hyundai Securities Co. v. Lee*, 232 Cal.App.4th 1379 (2015). RAB 22. The *Hyundai Securities* decision involved purely civil litigation in the form of a derivative action brought by that company against its former CEO, defendant Lee. Hyundai won a judgment in Korean Won (KRW) against Lee for KRW26.54 billion, of which KRW7 billion indemnified Hyundai for a criminal fine, which the company had paid because of Lee's acts. Post-judgment interest was also tacked on to the judgment at the Korean rate of 20% per annum. In his defense, Lee asserted that the KRW7 billion amounted to a fine or penalty, since it was indirectly based on the fine paid by Hyundai.

Under the facts of this case, the holding of the California Court of Appeals was relatively easy and straightforward:

> The language of the Act does not support Lee's position. The Korean Judgment was a damage award to compensate Hyundai for the damages it suffered from having to pay a fine. That judgment was not to any extent a 'fine or other penalty.' There is nothing in the legislative history of the Act that suggests otherwise.

Hyundai Securities, 232 Cal.App.4th at 1387. Tellingly, however, the BCSC does not quote this holding, but instead moves down into the longer discussion of the background of the Act in search for more favorable language.

In an effort to support its misplaced position, BCSC's Answering Brief omits the explanation of the *Chase Manhattan* holding within the *Hyundai Securities* opinion. RAB 24. The BCSC uses ellipses to suppress the following quotation in bold: "*Chase Manhattan Bank, N.A. v. Hoffman*, 665 F.Supp. 73 (D.Mass.1987) (**finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium**)." *Hyundai Securities*, 232 Cal.App.4th at 1388 (emphasis added). Note that the *Hyundai Securities* court's characterization of *Chase Manhattan* is markedly

different than how the BCSC attempts to portray it in the Answering Brief.

The Answering Brief next emphasizes that "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." RAB 24 (quoting *Hyundai Securities*, 232 Cal.App.4th at 1388). But, this passage is not relevant to the instant case because, as the British Columbia courts and even the BCSC's own expert witness have explained, the disgorgement judgment is neither compensatory nor restitutionary. AOB 44-51. Rather, the purpose of § 161(1)(g) is the exclusively public purpose of depriving the defendant of any wrongful profits and to deter future violations. AOB 40-44. Therefore, *Hyundai Securities* does not support the BCSC's position in this case.

I. THE BCSC CANNOT AVOID THE *POONIAN* DECISION

The BCSC argues that because the administrative penalty of the judgment is admittedly a penalty then, *ergo*, the disgorgement

judgment must not be a penalty. RAB 26-27. The BCSC cites no authority for this position, and of course the disgorgement judgment (which is the only part of the judgment sought to be recognized herein) must stand or fall on its own in relation to the Public vs. Private Interest Test. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that appellate courts need not consider issues that are not cogently argued). The BCSC then argues that this Court should ignore *Poonian* altogether in deciding this appeal. RAB 27-28.

However, the BCSC's argument for this Court to ignore *Poonian* would be inconsistent with the BCSC's own position. The BCSC's entire position requires this Court to look to other Canadian law, namely BCSA § 15(1), even though § 15(1) at the time was not considered important enough to merit even a passing reference in the judgment. So, what the BCSC really seeks is a form of selective incorporation, *i.e.*, this Court should look only at those things Canadian which support the BCSC's position, and ignore all things Canadian which do not support the BCSC's position. Distilled to its essence, the BCSC argues that the

so-called "classification" rule (AOB 13-19) that requires this Court to apply its own law to classify a judgment from an outside jurisdiction means that this Court is prohibited from looking to any of the law where the judgment originated. But, the BCSC's broad proposition does not find any support in the law.

In *City of Oakland*, this Court, in determining whether California Business and Professions Code § 5485 should be classified as a penalty, refused to place itself in the isolation box the BCSC suggests, and instead looked to other provisions of California law. 127 Nev. at 542-43, 267 P.3d at 54. The *Huntington* court, likewise, refused to place itself into an isolation box and instead spent a good deal of time discussing a Canadian appellate opinion which was closely situated in relevance to that case as *Poonian* is here. *See Huntington v. Attrill*, 146 U.S. at 680-83, 13 S. Ct. at 232-33, 36 L. Ed. at 1123. Thus, contrary to the BCSC's bare argument, this Court should look to *Poonian* to the extent necessary to determine this matter.

J. *KOKESH* PROVIDES A VIABLE ANALYTICAL CONSTRUCT FOR CHARACTERIZING A DISGORGEMENT JUDGMENT, AND THE BCSC OFFERS NO ALTERNATIVE CONSTRUCT

As with *Poonian*, the BCSC asks this Court to simply ignore the decision of Justice Sotomayor in the *Kokesh* opinion[8] as well. RAB 27. Indeed, the BCSC devotes a substantial amount of its brief attempting to persuade this Court not to adopt the analytical construct of Justice Sotomayor to evaluate the character of a disgorgement judgment. RAB 28-37. Very importantly:

- The BCSC does not even attempt to argue that Justice Sotomayor's construct was in any way flawed; and
- The BCSC does not present this Court with any alternative construct for how a disgorgement judgment is to be treated.

As such, the BCSC misses the point of the application of *Kokesh* to the case at bar, which is to apply a well-reasoned and viable analytical construct for this Court to determine the character of a disgorgement judgment. Indeed, the BCSC offers no other legal opinion for this Court

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

that directly addresses the character of a disgorgement order, other than the *Poonian* decision (Lathigee's appeal), which the BCSC does not want the Court to apply in its entirety.

The BCSC's primary basis for encouraging this Court to simply ignore *Kokesh* is that *some* lower courts have refused to extend that decision to their own peculiar facts, none of which are similar to those present here. But, the BCSC offers an overbroad analysis: "Subsequent decisions have recognized the narrow holding of *Kokesh* and that it is specifically limited to 28 U.S.C. § 2462." RAB 29. If the BCSC meant to convey that *all* of *Kokesh*'s progeny have restricted its application to § 2462, then this analysis is wrong, as other courts have, in fact, followed *Kokesh* in non-§ 2462 cases.

Just to take one example of where *Kokesh* has been followed outside of the 28 U.S.C. § 2462 context is *J.P. Morgan Securities, Inc. v. Vigilant Insurance Company*, 166 A.D.3d 1, 84 N.Y.S.3d 436 (N.Y.App.Div. 2018). *J.P. Morgan Securities* did not involve § 2462, but instead addressed whether a $160 million disgorgement judgment against Bear Stearns was payable by its insurance carriers. The court

there noted that "***Kokesh* has significance beyond the narrow issue of the statute of limitations because the Supreme Court analyzed the fundamental nature and purpose of the SEC's disgorgement remedy**, which does not change into some different nature for purposes of insurance coverage." 166 A.D.3d at 10; 84 N.Y.S.3d at 443-44 (emphasis added).

Interestingly, the court in *J.P. Morgan Securities* also addressed (and rejected) the BCSC's argument primary argument here, which is that disgorgement is somehow not a penalty because disgorged funds go into a fund for jilted investors:

> The fact that the disgorgement payment was later placed in a Fair Fund for distribution and could be used to offset Bear Stearns's civil liability does not require a different result. The use of disgorged funds to benefit investors is entirely consistent with the SEC's statutory authority, and "does not change the nature of the remedy" (*SEC v. First Pacific Bancorp*., 142 F.3d 1186, 1192 [9th Cir.1998], *cert denied* 525 U.S. 1121, 119 S.Ct. 902, 142 L.Ed.2d 901 [1999]). As the Supreme Court stated in *Kokesh* simply because "sanctions frequently serve more than one purpose" does not change the fact that disgorgement orders "are intended to punish" and "represent a penalty" (137 S.Ct. at 1645; *see also SEC v. Fishbach Corp*., 133 F.3d 170, 175 [2d Cir.1997] ["Although disgorged funds may often go to compensate securities fraud

> victims for their losses, such compensation is distinctly a secondary goal"]).

166 A.D.3d at 11-12; 84 N.Y.S.3d at 444.

Similarly, *Marcus v. Allied World Ins. Co.*, 384 F. Supp. 3d 115 (D. Me. 2019) also involved a coverage issue, involving whether a bar carrier must provide the litigation defense of an attorney (Marcus) and his law firm that had received moneys from those engaged in investment fraud. The *Marcus* court acknowledged: "Certainly the 2017 *Kokesh* decision is not determinative of what the Allied World LPL policy meant when the parties agreed to its language earlier, but it is instructive because *Kokesh*'s reasoning is broad and persuasive. . . . Those principles for determining what is a penalty were not invented out of whole cloth in *Kokesh*, and they are pertinent here."[9] *Id.* at 121-22.

The BCSC next attempts to use the vehicle of BCSA § 15.1 to distinguish *Kokesh*. RAB 28-36. As previously discussed, however, the

[9] *Marcus* acknowledges, but rejects **some** cases attempting to limit the holding of *Kokesh*. 384 F. Supp. 3d at 122 n.13.

purpose of § 161(1)(g) is to remove wrongful gains from the defendant and deter similar future conduct, but § 161(1)(g) is not meant to be a compensatory mechanism, **and § 15.1 changes none of this**. Thus, the BCSC's argument, attempting to limit *Kokesh* based upon § 15.1, fails for the same reasons. RAB 36.

K. THE JUDGMENT REQUIRES LATHIGEE TO DISGORGE MONEYS THAT HE NEVER PERSONALLY RECEIVED

In its Answering Brief, the BCSC argues that "[t]he Judgment requires Lathigee to pay back the $21,700,000 that *he* took from investors." RAB 37 (emphasis added). This argument is plainly incorrect from the face of the Judgment itself. In the Disgorgement Order, 1 JAX13, ¶¶ 34-35, Lathigee and Pasquill argued that there was no evidence that they personally received anything from their conduct. In response, the Executive Director of the BCSC argued that "section 161(1)(g) is not limited to requirement payment of the amount obtain by a respondent. He cited *Oriens Travel & Hotel Management Ltd.*, 2014 BCSBCCOM91 and *Michaels." Id.*, ¶ 36 (underline in original). The court then agreed with the Executive Director:

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

1 JAX13-14, ¶¶ 37-38 (underline in original). The BCSC misses the point of this exchange. Lathigee is not asking this Court to sit as a reviewing court and reverse the Disgorgement Order or its findings. Rather, Lathigee is pointing out that § 161(1)(g) can be entered in the fashion described by Justice Sotomayor in *Kokesh*, *i.e.*, without proof that the defendant personally received any moneys from the deals. Likewise, the BCSC's own expert witness, Mr. Johnson, commented on this very point: "Certainly, I agree the impact of the remedy is significant in that the order in question requires Mr. Lathigee to pay $21,700,000 Canadian *without proof that Mr. Lathigee personally received that amount*." 1 JAX132 (emphasis added). This case is very

much like the insider trading hypothetical referenced in *Kokesh* insofar as the scheme may have variously hurt or benefitted investors, but the defendant himself did not receive a personal benefit though he is personally required to disgorge all the amounts involved the scheme. *Kokesh*, 137 S. Ct. at 1644, 198 L. Ed. 2d 86. Thus, the BCSC cannot make the representation to this Court that Lathigee personally retained moneys from investors, when the BCSC did not need to (or actually make) this evidentiary showing in the Canadian hearing, due to the very nature of § 161(1)(g).

L. COMITY

Relying upon its own flawed analysis, the BCSC suggests that unless Nevada extends comity to the BCSC's judgments, then British Columbia might not extend comity to similar Nevada judgments. This principle is known as *reciprocity*, a doctrine which "has been widely criticized and seldom invoked." *Tahan v. Hodgson*, 662 F.2d 862, 868 *fn.* 21 (D.C. Cir. 1981) (noting that "in the absence of an action by the legislature, the courts should refrain from creating or resurrecting a reciprocity doctrine"). At any rate, the BCSC's argument is wholly

undermined by the fact that the BCSC could have instead obtained a judgment in the purely private interests of investors through the procedure set forth in BCSA §§ 155.1 and 157.1, by bringing an original action before the British Columbia trial court. In other words, if the BCSC wants a judgment to which comity might be extended, there is already a provision for that in BCSA §§ 155.1 and 157.1.

Similarly, that some Canadian provinces have recognized SEC disgorgement judgments in comity is interesting, but here also it must be called that this classification issue is to be determined by the law of Nevada and the United States, and not Canadian law. AOB 13-19; RAB 42. Whatever law Canada applies, as related to the specific judgments obtained by the SEC in the United States, is not persuasive to what law this Court will apply to Canadian judgments sought to be enforced here in Nevada. The BCSC's broad argument on comity essentially asks the Court to ignore the nature of its judgment. The Court should reject the BCSC's invitation to adopt a broad rule without any contours.

The BCSC's citation to *Gonzales-Alpizar v. Griffith*, 130 Nev. 10, 317 P.3d 820 (2014) is correct in the sense that the decision indicates that the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW has been looked to by Nevada courts. *Id.*, 130 Nev. at 18, 317 P.3d at 826. But, it is difficult to see how *Gonzales-Alpizar* has any application to this case, insofar as it involved the enforcement of a child spousal support order, which is far removed from the facts of the case at bar. Indeed, *Gonzales-Alpizar* does not even use the word "penal" or consider the Public v. Private Interest Test. Lathigee does not dispute that Canadian judgments have *generally* been cognizable in the United States, but that is much different than the BCSC's suggestion that such recognition between the U.S. and Canada should be automatic in every case—it is not. *See*, *e.g.*, *Jaffe v. Snow*, 610 So. 2d 482, 485 n.9 (Fla. Dist. Ct. App. 1992) (applying § 482 of the RESTATEMENT). Note further that the cases on this point which are cited by the BCSC go to § 482 of the RESTATEMENT (the general rule), as opposed to § 483 of the RESTATEMENT (the specific rule dealing with penal judgments).

To this latter point, the BCSC offers no reason why this Court should not adopt § 483 of the RESTATEMENT (THIRD) in addition to § 482. Nor does the BCSC address why this Court should not now adopt the new RESTATEMENT (FOURTH), which contains a rewritten § 483 (which is now renumbered in the RESTATEMENT (FOURTH) as § 489), which makes crystal clear that U.S. courts "do not" recognize foreign judgments "for taxes, fines, or other penalties" in the absence of a statute or treaty. *See* AOB 64-65. In the end, the Court should reject the BCSC's broad notions of comity to automatically recognize every Canadian judgment.

III. CONCLUSION

In summary, this Court should reverse the District Court's summary judgment order because the Disgorgement Order is a penalty and, therefore, not subject to recognition in Nevada. The BCSC cannot escape the conclusion that (1) deterrence is the intended purpose of § 161(1)(g); (2) compensation is not a purpose of § 161(1)(g); and (3) section 15(1) is a completely irrelevant analysis and does not change the purpose of § 161(1)(g). The BCSC's attempt to distinguish *Huntington*, *City of Oakland*, and *Kokesh* is also unavailing.

Therefore, Lathigee respectfully requests that this Court reverse the District Court's summary judgment order in favor of the BCSC, and instead direct the District Court to enter summary judgment in his favor.

RESPECTFULLY SUBMITTED this 16th day of September, 2019, by:

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IV. 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.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 6,418 words; or

☐ does not exceed _____ pages.

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.

DATED this 16th day of September, 2019, by:

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V. CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on the 16th day of September, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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