

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

MICHAEL PATRICK LATHIGEE,

Appellant,

vs.

BRITISH COLUMBIA SECURITIES  
COMMISSION,

Respondent.

Case No.: 78833 Electronically Filed  
Sep 16 2019 01:48 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Appeal from the Eighth Judicial District  
Court, the Honorable Adriana Escobar  
Presiding

**MOTION TO EXPEDITE**  
**ANY ORAL ARGUMENT HEARING AND DECISION**

Jay D. Adkisson, SBN 12546  
Adkisson PLLC  
2505 Anthem Village Dr  
Suite E599  
Henderson, NV 89052  
Ph: 702-953-9617  
Fax: 877-698-0678  
jay@jayad.com

Micah S. Echols, SBN 8437  
Marquis Aurbach Coffing  
10001 Park Run Drive  
Las Vegas, NV 89145  
Ph: 702-382-0711  
Fax: 702-382-5816  
mechols@maclaw.com

*Counsel for Appellant, Michael Patrick Lathigee*

MAC:15668-001 3844185\_1

Appellant, Michael Patrick Lathigee (“Lathigee”), by and through his counsel of record, Addkison PLLC and Marquis Aurbach Coffing, hereby moves this Court for an order to expedite any oral argument hearing and decision.

This appeal raises two issues of first impression in Nevada of statewide importance, being (1) the breadth of the Nevada Uniform Recognition of Foreign County Money Judgments Act (“NURF-CMJA”), NRS 17.700 *et seq.*, as it relates to disgorgement orders, and (2) the application of comity to a foreign-country disgorgement order. Lathigee appeals from the District Court’s summary judgment order granting Respondent, British Columbia Securities Commission (“BCSC”), judgment in the amount of \$21,700,000.00 CAD.<sup>1</sup> Essentially, the parties dispute how the underlying Canadian judgment should be characterized, and based upon this Court’s characterization of the judgment, whether the judgment should be recognized in Nevada. With the filing of Lathigee’s reply brief on September 16, 2019, the briefing before this Court is now complete.

Lathigee’s appeal from the judgment was docketed in this Court on May 29, 2019. The parties have diligently pursued the briefing schedule, and in fewer than four months have compiled a joint appendix and completed briefing. The

---

<sup>1</sup> The District Court’s Findings of Fact, Conclusions of Law, and Judgment is attached as **Exhibit 1**.

completion of briefing is closer to three months when measured by the Court's June 11, 2019 order reinstating briefing. In *Board of County Commissioners of Clark County v. Las Vegas Discount Golf and Tennis*, this Court allowed an appeal to be expedited based upon accruing fines and penalties that Clark County would suffer due to a prolonged appeal. See *Board of County Commissioners of Clark County*, 110 Nev. 567, 875 P.2d 1045 (1994). Similarly, Lathigee will suffer unnecessary damages due to mounting interest penalties in this case. And, Lathigee has no way to provide security and stay execution of the \$21,700,000.00 CAD judgment. The interest accruing daily on this large judgment amount is not insignificant, and if this appeal is heard in the normal course, the harm from the mounting penalties would be personally devastating to Lathigee. Notably, Lathigee is an individual and not a large operation such as Clark County and, therefore, cannot sustain the accrual of interest on the judgment and continuing execution efforts by the BCSC for a prolonged period. Therefore, Lathigee respectfully requests that this Court grant him relief to expedite any oral argument hearing and the decision in this appeal.

///

///

///

For good cause shown, Lathigee respectfully requests that this Court expedite any oral argument hearing and the issuance of a decision in this appeal to the earliest possible date that the Court's schedule and docket will allow.

Dated this 16th day of September, 2019.

/s/ Jay D. Adkisson

Jay D. Adkisson, SBN 12546  
Adkisson PLLC  
2505 Anthem Village Dr, Suite E599  
Henderson, NV 89052

/s/ Micah S. Echols

Micah S. Echols, SBN 8437  
Marquis Aurbach Coffing  
10001 Park Run Drive  
Las Vegas, Nevada 89145

*Counsel for Appellant,  
Michael Patrick Lathigee*

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **MOTION TO EXPEDITE ANY ORAL ARGUMENT HEARING AND DECISION** 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:

Jennifer Braster, Esq.  
John Naylor, Esq.  
Matthew Pruitt, Esq.  
Kurt Bonds, Esq.  
Andrew Sharples, Esq.

/s/ Leah Dell  
Leah Dell, an employee of  
Marquis Aurbach Coffing

# Exhibit 1

ORIGINAL

Electronically Filed  
5/14/2019 3:06 PM  
Steven D. Grierson  
CLERK OF THE COURT

*Steven D. Grierson*

ALVERSON TAYLOR & SANDERS  
KURT R. BONDS, ESQ.  
Nevada Bar #6228  
MATTHEW M. PRUITT, ESQ.  
Nevada Bar #12474  
6605 Grand Montecito Parkway  
Suite 200  
Las Vegas, Nevada 89149  
(702) 384-7000  
[efile@alversontaylor.com](mailto:efile@alversontaylor.com)  
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

-\*-

BRITISH COLUMBIA SECURITIES  
COMMISSION,

CASE NO.: A-18-771407-C  
DEPT. NO.: XIV

Plaintiffs,

vs.

MICHAEL PATRICK LATHIGEE,

Defendant.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND JUDGMENT**

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

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

**FINDINGS OF FACT**

On March 30, 2018, Plaintiff, BRITISH COLUMBIA SECURITIES COMMISSION, commenced this action by filing a Complaint for recognition of foreign country judgment under the Recognition of Foreign-Country Money Judgments (Uniform Act), found at NRS 17.700 et. seq., and under Comity, naming MICHAEL PATRICK LATHIGEE as a Defendant. Defendant subsequently

ALVERSON TAYLOR & SANDERS  
LAWYERS  
6605 GRAND MONTECITO PARKWAY, SUITE 200  
LAS VEGAS, NEVADA 89149  
(702) 384-7000

<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Judgment of Arbitration
<input type="checkbox"/> Voluntary Dismissal
<input type="checkbox"/> Involuntary Dismissal
<input type="checkbox"/> Stipulated Dismissal
<input type="checkbox"/> Motion to Dismiss by Deft(s)

1 answered the Complaint on April 9, 2018, and filed an Amended Answer on June 6, 2018. Defendant  
2 filed a Motion for Summary Judgment on October 19, 2018, to which Plaintiff filed its Opposition  
3 and Countermotion on November 9, 2018.

4  
5 **A. The Underlying Judgment**

6 On March 16, 2015, the British Columbia Securities Commission (the "BCSC") rendered a  
7 decision (the "Decision") against Defendant pursuant to a hearing under British Columbia law and  
8 pursuant to sections 161(1) and 162 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "BC *Securities*  
9 *Act*").<sup>1</sup> On April 1, 2015, and pursuant to section 163 of the BC *Securities Act*,<sup>2</sup> the BCSC registered  
10 the Decision with the British Columbia Supreme Court, by which the Decision was deemed to be a  
11 judgment of the British Columbia Supreme Court (the "Judgment").<sup>3</sup> The Judgment was appealed by  
12 Defendant, but the appeal was denied by the Court of Appeal for British Columbia on May 31,  
13 2017.<sup>4</sup> The time for appeal has expired and no appeal is pending.<sup>5</sup>

14  
15 The Judgment is for disgorgement of \$21,700,000.00 CAD, and corresponds to the  
16 \$21,700,000.00 CAD which Defendant was found to have fraudulently raised from 698 investors.<sup>6</sup>  
17 Defendant was also assessed with an administrative penalty of \$15 Million CAD, which was also  
18 registered with the Supreme Court of British Columbia, but the Plaintiff is not requesting that this  
19 related judgment be recognized by this Court.<sup>7</sup>

20  
21 ///

22 ///

23 ///

24  
25 <sup>1</sup> Pltff's Opp & CM Ex 1, p.1.

26 <sup>2</sup> *Id.*

27 <sup>3</sup> *Id.*

28 <sup>4</sup> Pltff's Opp & CM Ex 16, BCSC\_001996 & BCSC\_002047.

<sup>5</sup> Pltff's Opp & CM Ex 1, p.1.

<sup>6</sup> *Id.* at Decision § 2.

<sup>7</sup> *Id.* at Decision § 62(b) (iv).



a. The Details

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

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

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

- a. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, FIC REAL ESTATE PROJECTS LTD., jointly and severally, \$9,800,000
- b. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, FIC FORECLOSURE FUND LTD., jointly and severally, \$9,900,000
- c. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, WBIC CANADA LTD., jointly and severally, \$2,000,000

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

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

///

<sup>8</sup> Pltff's Opp & CM Ex 1, Judgment, p.1 § 2.

<sup>9</sup> Pltff's Opp & CM Ex 1, Judgment.

<sup>10</sup> *Id* at p.9 §§ 43, 46, and 49, and p.13 § 62(d).

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

3 “We find we have the authority to order disgorgement against the individual  
4 respondents in this case, up to \$21.7 million, the full amount obtained by fraud.”<sup>12</sup>

5 “The amounts obtained from investors need not be traced to them specifically and  
6 we find that \$21.7 million was obtained, directly or indirectly, as a result of their  
7 individual contraventions of the Act.”<sup>13</sup>

8 “Each respondent’s misconduct contributed to the raising of the \$21.7 million  
9 fraudulently. We find that it is in the public interest to order the respondents to pay  
10 the full amount obtained as a result of their fraud.”<sup>14</sup>

11 Prior to the proceedings which led to the Judgment, Defendant was served with a Notice of  
12 Hearing, dated March 1, 2012, which set forth the allegations and gave a date, time, and location for  
13 a hearing.<sup>15</sup> Defendant’s counsel, H. Roderick Anderson of Harper Grey LLP, accepted service of the  
14 notice on March 8, 2012, and then appeared for all respondents at the March 20, 2012 hearing.<sup>16</sup>  
15 Defendant continued to be represented by such counsel throughout the proceedings of the case.<sup>17</sup> In  
16 fact Defendant was afforded at least six days of trial wherein his counsel was able to call and cross-  
17 examine witnesses, and present evidence.<sup>18</sup> There is no question regarding personal jurisdiction over  
18 Defendant, as Defendant was a resident of British Columbia at all material times during the  
19 proceedings.<sup>19</sup>

21 <sup>11</sup> See *Id* at p.7 § 34-37.

22 <sup>12</sup> *Id* at p.9 § 43.

23 <sup>13</sup> *Id* at p.9 § 46.

24 <sup>14</sup> *Id* at p.9 § 49.

25 <sup>15</sup> Pltf’s Opp & CM Ex 2, Notice of Hearing, BCSC\_000054-000067.

26 <sup>16</sup> Pltf’s Opp & CM Ex 3, Transcript of March 20, 2012 Hearing, at 2:8-12.

27 <sup>17</sup> See Pltf’s Opp & CM Ex 4, Transcript of April 11, 2012 Hearing, at 1:25-27;  
28 Ex 5, Transcript of September 16, 2013 Proceedings, at 0:5-8; Ex 6, Transcript  
of September 17, 2013 Proceedings, at 1:15-20; Ex 7, Transcript of September  
18, 2013 Proceedings; Ex 8, Transcript of September 19, 2013 Proceedings; Ex  
9, Transcript of September 20, 2013 Proceedings; Ex 10, Transcript of  
September 21, 2013 Proceedings; Ex 11, Transcript of September 23, 2013  
Proceedings; Ex 12, Transcript of September 24, 2013 Proceedings.

<sup>18</sup> *Id*.

<sup>19</sup> See Pltf’s Opp & CM Declaration of Plaintiff § 9.

1 Ultimately Defendant was found liable for fraud, and the findings on liability were set forth  
2 by the BCSC on July 8, 2014.<sup>20</sup> Another Notice of Hearing was served on Defendant on October 16,  
3 2014, giving a date and time for hearing on sanctions.<sup>21</sup> A hearing on sanctions was held on February  
4 13, 2015, which was again attended by Defendant's counsel.<sup>22</sup> The BCSC's decision on sanctions  
5 was set forth on March 16, 2015, wherein disgorgement was ordered against Defendant.<sup>23</sup>  
6

7 Defendant was granted leave to appeal the decisions of the BCSC to the Court of Appeal for  
8 British Columbia, with the Court of Appeal, after hearing submission of counsel for Defendant,  
9 unanimously dismissing the appeal by order pronounced May 31, 2017, as a result of which the  
10 Judgment, including the disgorgement order, remains in full force and effect.<sup>24</sup>  
11

12 As set forth in the Decision, given that the Defendant is "permanently prohibited" from  
13 engaging in investment activities in British Columbia, and such other Canadian jurisdictions in  
14 which a reciprocal may have been made, he instead has based his operations in Nevada.<sup>25</sup> Defendant  
15 has been involved in operations of at least 19 entities in Nevada, the latest being "LVIC  
16 BLOCKCHAIN AND CRYPTOCURRENCY FUND LLC".<sup>26</sup>  
17

#### 18 **B. Canadian Disgorgement Law**

19 In regard to enforcement of securities law, whereas the U.S. has the federal Securities  
20 Exchange Commission (the "SEC"), Canada has thirteen such organizations, one for each province  
21 and territory of Canada. The BCSC is the senior provincial securities regulator for the province of  
22 British Columbia.  
23

24 <sup>20</sup> Pltf's Opp & CM Ex 13, Panel Findings on Liability, BCSC\_1512-1577.

25 <sup>21</sup> Pltf's Opp & CM Ex 14, Notice of Hearing dated October 16, 2014, BCSC\_001692.

26 <sup>22</sup> Pltf's Opp & CM Ex 15, Transcript of February 13, 2015 Hearing.

27 <sup>23</sup> Pltf's Opp & CM Ex 1, Judgment.

28 <sup>24</sup> Pltf's Opp & CM Ex 16, Appellate Court Decision, BCSC\_001996-002047, at BCSC\_002047 § 167.

<sup>25</sup> See Pltf's Opp & CM Ex 1, Judgment § 62(b).

<sup>26</sup> Pltf's Opp & CM Ex 17, Lathigee Corporate Vehicles.

The statute under which the Judgment was granted provides, in s. 161(1)(g), for the judgment debtor to “pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention.”<sup>27</sup> If the Commission recovers money pursuant to a judgment under 161(1)(g), it must give notice, and persons who have been harmed by the fraud can submit an application to have such funds distributed to them.<sup>28</sup> Pursuant to section 15.1 of the BC *Securities Act*, and Securities Regulation 196-97 enacted under that statute, it is *mandatory* that the Commission distribute disgorgement funds to proper claimants, and it is therefore the Commission’s strict mandate to do so.<sup>29</sup> This is illustrated by the fact that the Commission advertises on its website, under a section entitled “Returning Funds to Investors,” the cases which have received funds pursuant to a judgment under section 161(1)(g), and provides guidance to victims on how they can lay claim to such funds.<sup>30</sup> In other words, disgorgement orders made under 161(1)(g) of the BC *Securities Act* are not fines or penalties, but are orders for the funds to be disgorged from the judgment-debtor for any amounts obtained, directly or indirectly, as a result of the judgment-debtor’s misconduct, to then by the Commission to repay the individuals harmed by the judgment-debtor’s misconduct.

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

The Commission must follow the claims process set forth by law to distribute the disgorgement funds to proper claimants.<sup>31</sup> As such, these funds are compensatory in nature.

<sup>27</sup> Pltf’s Opp & CM Ex 19, Canada Securities Act [RSBC 1996] Chapter 418, Part 18, § 161(1)(g).

<sup>28</sup> *Id* at Part 3, § 15.1.

<sup>29</sup> *Id* at Part 3, § 15.1; See Pltf’s Opp & CM Declaration of Plaintiff § 6; Pltf’s Opp & CM Ex 20, Securities Regulation, B.C. Reg. 196/97, Ministerial Regulation M244/97, Part 3, § 7.4(6).

<sup>30</sup> Pltf’s Opp & CM Ex 21, BCSC Website, “Returning Funds to Investors,” accessed August 30, 2018.

<sup>31</sup> Pltf’s Opp & CM Ex 19, Canada Securities Act [RSBC 1996] Chapter 418, Part



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

### CONCLUSIONS OF LAW

#### **A. Motion for Summary Judgment Standard.**

The primary purpose of a summary judgment procedure is to secure a "just, speedy, and inexpensive determination of any action."<sup>36</sup> Although summary judgment may not be used to deprive litigants of trials on the merits where material factual doubts exist, it enables the trial court to "avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried."<sup>37</sup> "Summary judgment is appropriate if, when viewed in the light most

///

///

---

<sup>18</sup>, § 161(1)(g).

<sup>32</sup> Pltf's Opp & CM Ex 1, Judgment, §§ 18(b), 62(b) (iv-v (erroneously labeled iv)).

<sup>33</sup> Pltf's Opp & CM Ex 30, Plaintiff's Expert's Report p. 3-4.

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

<sup>35</sup> *Id.*

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

<sup>37</sup> *Id.*

1 favorable to the nonmoving party, the record reveals there are no genuine issues of material fact and  
2 the moving party is entitled to judgment as a matter of law."<sup>38</sup>

3 Parties resisting summary judgment cannot stand on their pleadings once the movant has  
4 submitted affidavits or other similar materials.<sup>39</sup> Though inferences are to be drawn in favor of the  
5 non-moving party, an opponent to summary judgment must show that he can produce evidence at  
6 trial to support his claim.<sup>40</sup> The Nevada Supreme Court has rejected the "slightest doubt" standard,  
7 under which any dispute as to the relevant facts defeats summary judgment.<sup>41</sup> A party resisting  
8 summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation,  
9 and conjecture."<sup>42</sup> Rather, the non-moving party must demonstrate specific facts as opposed to  
10 general allegations and conclusions.<sup>43</sup> Indeed, an opposing party "is not entitled to have [a] motion  
11 for summary judgment denied on the mere hope that at trial he will be able to discredit movant's  
12 evidence; he must at the hearing be able to point out to the court something indicating the existence  
13 of a triable issue of fact."<sup>44</sup>

14  
15  
16 **B. British Columbia Disgorgement Judgments Must be Recognized Pursuant to**  
17 **NRS 17.700 – 17.820**

18 The Judgment in issue was pronounced by the BCSC, and recognized as a judgment of the  
19 British Columbia Supreme Court and, subsequently upheld on appeal. The Judgment is, in all  
20 respects, a foreign-country judgment, being a judgment of one of the superior courts of Canada.  
21

22  
23 <sup>38</sup> NRCP 56(c); *DTJ Design, Inc. v. First Republic Bank*, 318 P.3d 709, 710 (Nev. 2014).

24 <sup>39</sup> NRCP 56(e).

25 <sup>40</sup> *Van Cleave v. Kietz-Mill Minit Mart*, 633 P.2d 1220, 1222 (Nev. 1981).

26 <sup>41</sup> *Wood v. Safeway*, 121 P.3d at 1031.

27 <sup>42</sup> *Collins v. Union Fed. Savings & Loan*, 622 P.2d 610, 621 (Nev. 1983).

28 <sup>43</sup> *LaMantia v. Redisi*, 38 P.3d 877, 879 (Nev. 2002); *Wayment v. Holmes*, 912 P.2d 816, 819 (Nev. 1996).

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

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

9  
10 Defendant admits in its responses to Plaintiff’s Requests for Admission numbers 1-4, that the  
11 Judgment, against Defendant is final, conclusive and enforceable under the laws of Canada, that the  
12 time for appeal has expired, that no payments have been made, and that the Judgment is not for taxes  
13 or domestic relations.

14  
15 In addition to Defendant’s admissions, the Commission has clearly proven that the Judgment  
16 grants the recovery of a sum of money, and that under the laws of British Columbia specifically, and  
17 Canada generally, the Judgment is final, conclusive and enforceable.<sup>48</sup> The certificate of the British  
18 Columbia Supreme Court, exemplifying the Judgment, states that:

19  
20 “The Decision was entered as a Judgment on April 1, 2015.”<sup>49</sup>

21 “The Time for appeal has expired and no appeal is pending under s. 167 of the  
22 *Securities Act*.”<sup>50</sup>

23 “With no payments being made, and the full amount remaining due on the Judgment,  
24 as noted above”<sup>51</sup>

25 <sup>45</sup> NRS 17.750(1) .

26 <sup>46</sup> NRS 17.740(1) .

27 <sup>47</sup> NRS 17.740(2) .

28 <sup>48</sup> See Pltff’s Opp & CM Ex 1, Judgment.

<sup>49</sup> Pltff’s Opp & CM Ex 1, Judgment, § 3.

<sup>50</sup> *Id* at § 4.

<sup>51</sup> *Id* at § 6.

1 Additionally, the Judgment is not a judgment for taxes or domestic relations as  
2 acknowledged by Defendant's First Amended Answer.<sup>52</sup>

3 **a. Defendant Waived or Withdrawn all of His Affirmative Defenses to**  
4 **Recognition of Foreign Country Judgment under NRS 17.700 – 17.820,**  
5 **Except for the Argument that the Judgment is a Penalty**

6 The only grounds for denying recognition of a foreign-country judgment to which the  
7 Recognition of Foreign-Country Money Judgments act is applicable are found in NRS 17.750(2) and  
8 (3):

9 “2. A court of this State may not recognize a foreign-country judgment if:

- 10 (a) The judgment was rendered under a judicial system that does not provide  
11 impartial tribunals or procedures compatible with the requirements of due process of  
12 law;  
13 (b) The foreign court did not have personal jurisdiction over the defendant; or  
14 (c) The foreign court did not have jurisdiction over the subject matter.”

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

- 16 (a) The defendant in the proceeding in the foreign court did not receive notice  
17 of the proceeding in sufficient time to enable the defendant to defend;  
18 (b) The judgment was obtained by fraud that deprived the losing party of an  
19 adequate opportunity to present its case;  
20 (c) The judgment or the cause of action on which the judgment is based is  
21 repugnant to the public policy of this State or of the United States;  
22 (d) The judgment conflicts with another final and conclusive judgment;  
23 (e) The proceeding in the foreign court was contrary to an agreement between  
24 the parties under which the dispute in question was to be determined otherwise than  
25 by proceedings in that foreign court;  
26 (f) In the case of jurisdiction based only on personal service, the foreign court  
27 was a seriously inconvenient forum for the trial of the action;  
28 (g) The judgment was rendered in circumstances that raise substantial doubt  
about the integrity of the rendering court with respect to the judgment; or  
(h) The specific proceeding in the foreign court leading to the judgment was  
not compatible with the requirements of due process of law.”

“4. A party resisting recognition of a foreign-country judgment has the burden  
of establishing that a ground for nonrecognition stated in subsection 2 or 3 exists.”

<sup>52</sup> Pltff's Opp & CM Ex 18, Defendant's First Amended Answer § 17.



Judging from Defendant's affirmative defenses, Defendant previously rested its defense on §§ 2(a), 3(g) and 3(h). Defendant, however, has waived or withdrawn each of these defenses. In response to Plaintiff's Request for Admission No. 11, Defendant states "Defendant hereby withdraws his lack of due process claim other than as may be affected by defendant's defense that the Disgorgement Judgment is a penalty..."<sup>53</sup> Defendant further admits that he was represented by counsel in the proceedings against him, that multiple hearings were held in the proceedings against him, and that he received notice of those hearings.<sup>54</sup> Defendant further expressly withdraws any claim that the proceedings were inherently biased, that the judgment was rendered in circumstances raising doubts about the integrity of the BCSC, that the proceedings were not compatible with US due process, and that the BCSC delayed this action.<sup>55</sup>

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

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

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

<sup>53</sup> See Pltff's Opp & CM Ex 28, Def's Rsps to Pltff's RFAs, Response No. 11.

<sup>54</sup> See Pltff's Opp & CM Ex 28, Def's Rsps to Pltff's RFAs, Responses No. 12-14.

<sup>55</sup> See Pltff's Opp & CM Ex 29, Def's Rsps to Pltff's ROGs, Responses No. 2-4, & 6.

<sup>56</sup> Def's MSJ, Memorandum 1:21-23.

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

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

13 In particular this Court finds that the British Columbia judgment sought to be recognized by  
14 this Court is not penal, but is a form of restitution, as the funds collected under British Columbia  
15 disgorgement judgments are mandated by law to become subject to a claims process in which the  
16 judgment funds are used to restore the losses of victims affected by the fraud on which the judgment  
17 is based. The statute under which the judgment was granted provides for the judgment debtor to  
18 “pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a  
19 result of the failure to comply or the contravention.”<sup>59</sup> If the commission receives money pursuant to  
20 a judgment under 161(1)(g), it must give notice, and persons who have been harmed by the fraud  
21 can submit an application to have such funds distributed to them.<sup>60</sup> Pursuant to section 15.1 of the  
22  
23  
24  
25

26 <sup>57</sup> Pltff’s Opp & CM Ex 18, Def’s Amended Answer, p. 3-4.

27 <sup>58</sup> *Kokesh v. S.E.C.*, 137 S.Ct. 1635, 1640 (2017).

28 <sup>59</sup> Pltff’s Opp & CM Ex 2, Canada Securities Act [RSBC 1996] Chapter 418, Part 18, § 161(1)(g).

<sup>60</sup> *Id* at Part 3, § 15.1.

1 BC *Securities Act*, and Securities Regulation 196-97, it is *mandatory* that the BCSC distribute  
2 disgorgement funds to proper claimants, and it is therefore the BCSC's strict policy to do so.<sup>61</sup>  
3 Whatever the "purpose" of the law, clearly the effect is to compensate victims – something the law  
4 mandates by its terms.  
5

6 In this particular case, Plaintiff's judgment is dollar for dollar a disgorgement of amounts  
7 actually held by British Columbia's securities regulator to have been fraudulently taken from  
8 individual investors. The effect of the disgorgement judgment then is to take back those funds  
9 actually taken from individual investors, and to grant restitution to victims through the legally-  
10 mandated claims process.  
11

### 12 *Kokesh*

13 While this Court has considered the *Kokesh* court's defining disgorgement as penal for the  
14 purposes of a US statute of limitations period, this part of *Kokesh* applies only to US disgorgement,  
15 as the *Kokesh* court specifically stated "We hold that **SEC disgorgement** constitutes a penalty."<sup>62</sup>

16 While *Kokesh* is persuasive coming from the US Supreme Court, this Court does not believe  
17 *Kokesh* is binding or even on point for this particular matter, because the *Kokesh* court limited its  
18 application to SEC disgorgement, and the case was strictly in regard to a statute of limitations  
19 matter. While in *Kokesh* the statute of limitations matter was a black and white test of whether the  
20 cause of action would be held to a certain time frame requirement, the issue of a judgment being a  
21 penalty for purposes of recognizing foreign country judgments is a very different analysis, wherein  
22 this Court recognizes that "Enforcement of a judgment affording a private remedy is not barred ...  
23  
24

25 ///

26  
27 <sup>61</sup> *Id* at Part 3, § 15.1; See Pltf's Opp & CM Declaration of Plaintiff § 6; Pltf's  
28 Opp & CM Ex 3, Securities Regulation, B.C. Reg. 196/97, Ministerial Regulation  
M244/97, Part 3, § 7.4(6).

<sup>62</sup> *Kokesh v. S.E.C.*, 137 S.Ct. 1635, 1642 (2017) (*emphasis added*).

1 because it is joined with, or awarded in the same proceeding as, a judgment the enforcement of  
2 which would be barred...” such as a penalty.<sup>63</sup>

3 In other words, the *Kokesh* court effectively held that because the judgment in that case was  
4 partially penal, it was held to a particular statute of limitations, but in the analysis of recognizing  
5 foreign judgments, a partially penal purpose is not dispositive, as the penal portion of a judgment  
6 can be separated from the restitution portion of the judgment, and the restitution portion given full  
7 recognition. This Court holds that the entire \$21.7 Million judgment sought to be recognized in this  
8 case is restitution under US and Nevada law, and should be recognized in its entirety.  
9

### 10 *Huntington*

11 This Court has also considered the decision in *Huntington v. Attrill*.<sup>64</sup> *Huntington* did not  
12 involve a disgorgement judgment, or even a foreign country judgment, but it instead determined that  
13 the Full Faith and Credit Clause does not apply to penal judgments.<sup>65</sup> So it did not say that courts  
14 could not recognize penal judgments, but instead decided only the constitutional question of whether  
15 courts were *required* to recognize them under the Full Faith and Credit Clause.<sup>66</sup> While *Huntington*  
16 does not apply to foreign country judgments, the court developed a test for whether a sister-state  
17 judgment is penal, determining that the penal status of such a judgment “depends upon the question  
18 whether its purpose is to punish an offense against the public justice of the state, or to afford a  
19 private remedy to a person injured by the wrongful act.”<sup>67</sup>  
20  
21

22 While *Huntington*'s test is not binding on this case, because it does not apply to foreign  
23 country judgments, the test still leads to a conclusion that a British Columbia disgorgement judgment  
24

25 <sup>63</sup> Restatement (Fourth) of Foreign Relations Law of the United States § 489  
26 cmt. d.

27 <sup>64</sup> *Huntington v. Attrill*, 146 US 657, 673-674 (1892).

28 <sup>65</sup> *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev 533, 538  
(2011).

<sup>66</sup> *Id.*

<sup>67</sup> *Huntington v. Attrill*, 146 US 657, 673-674 (1892).



1 is not a penalty. As discussed at length herein and in Plaintiff's Countermotion, such a judgment's  
2 purpose is not to punish an offense against the public justice of the state, but to disgorge the  
3 Defendant of his ill-gotten gains, and then those gains are mandatorily returned to the claimants who  
4 are Defendant's victims.<sup>68</sup>

5  
6 The British Columbia disgorgement judgment does not perfectly fall into the *Huntington*  
7 test, but it is much more similar, for the purpose of this analysis, to a private remedy than a  
8 punishment. The funds from disgorgement orders are strictly required to compensate victims and  
9 not go into the general operating revenue.<sup>69</sup> This is different from administrative penalties which  
10 don't compensate victims.<sup>70</sup>

11  
12 The more appropriate test to follow in this case is that which is set forth by the Restatement  
13 (Fourth) of Foreign Relations of the United States, which states that when the judgment (1) is in  
14 favor of a foreign state, and (2) results in restitution for the benefit of private persons, then it is not a  
15 penalty.<sup>71</sup>

### 16 ***Oakland***

17  
18 This Court has also considered the decision in *City of Oakland v. Desert Outdoor*  
19 *Advertising, Inc.*<sup>72</sup> The *Oakland* case focused on a judgment with a strictly public purpose where no  
20 private injury was had, and no right to compensation for individuals existed. Indeed, the judgment  
21 in the *Oakland* case came from a municipal code violation for the erection of a billboard determined  
22 to be a public nuisance.<sup>73</sup> Plaintiff's judgment is not for some public nuisance, but for the  
23 disgorgement of stolen funds and profits, and a return of such funds to Defendant's victims.

24  
25 <sup>68</sup> See Pltf's Reply Declaration of Plaintiff § 4.

26 <sup>69</sup> See Pltf's Reply Declaration of Plaintiff § 5.

27 <sup>70</sup> *Id.*

28 <sup>71</sup> Restatement (Fourth) of Foreign Relations Law of the United States § 489 n. 4;  
see also § 489(b).

<sup>72</sup> *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev 533, 534  
(2011).

Plaintiff's judgment is not the result of some municipal code prescribing penalties and fines, like a traffic ticket or zoning violation, but is a judgment based on important securities regulations which provide disgorgement which results in those funds being available to victims of the fraud.<sup>74</sup>

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

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

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

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

"A court applying the principle of comity should consider the 'duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction.'"<sup>77</sup>

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.<sup>78</sup> Principles of Comity are embraced by both Canada and the United States, in each of their respective Provinces and States, as the two close countries endeavor to promote cooperation and offer reciprocity between two similar legal systems.

<sup>73</sup> *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev 533, 534 (2011).

<sup>74</sup> See Pltff's Reply Declaration of Plaintiff § 4.

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

<sup>76</sup> *In re Chao-Te*, 2015 WL 3489560, p.2 (Nev.) (citing *Miannecki v. Second Judicial Dist. Court*, 99 Nev, 93, 98, 658 P.2d 422, 424-25 (1983)).

<sup>77</sup> *Id.*

<sup>78</sup> *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

1 While Courts should consider whether due process was given in their decision to grant  
2 comity, such requires only that the basic requisites for due process are necessary – including notice  
3 and a hearing.<sup>79</sup> The seminal comity case, *Hilton v. Guyot*, declares:

4 “[Comity] contributes so largely to promote justice between individuals, and to  
5 produce a friendly intercourse between the sovereignties to which they belong, that  
6 courts of justice have continually acted upon it as a part of the voluntary law of  
7 nations.”<sup>80</sup>

8 “Where there has been opportunity for a full and fair trial before a foreign court of  
9 competent jurisdiction, conduction the trial on regular proceedings, after due citation  
10 of voluntary appearance of the defendant, and under a system of jurisprudence likely  
11 to secure an impartial administration of justice between the citizens of that country  
12 and those of other countries, and there is nothing to show either prejudice in the  
13 court, or in the system of laws under which it was sitting, or fraud in procuring the  
14 judgment, or any other special reason why the comity of the United States should not  
15 allow it full effect, the merits of the case should not, in an action brought in this  
16 country on the judgment, be tried afresh, as on a new trial or an appeal, upon the  
17 mere assertion of a party that the judgment was erroneous in law or in fact.”<sup>81</sup>

18 Canada and the U.S. have a long history together as two nations which sprung up in close  
19 proximity at similar times. The two nations’ legal systems are largely similar, as they both arose from  
20 British and European jurisprudence.

21 The SEC and securities commissions of each of the Provinces, including the BCSC, often  
22 work together, as the nature of the proximity and relations of the two countries makes it easy for  
23 fraud to move between the countries.<sup>82</sup> The U.S. and many provinces of Canada are actually parties  
24 to a Memorandum of Understanding, to which the SEC and BCSC are signatories, which provides  
25 that the “Authorities will provide the fullest mutual assistance,” “to facilitate the performance of  
26 securities market oversight functions and the conduct of investigations, litigation or prosecution...”<sup>83</sup>

27 Cir.1997) (quoting *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435,  
28 440 (3d Cir.1971)).

<sup>79</sup> *Society of Lloyd’s v. Hudson*, 276 F.Supp.2d 1110, 1112 (D. Nev. 2003).

<sup>80</sup> *Hilton v. Guyot*, 159 U.S. 113, 165 (1895).

<sup>81</sup> *Id* at 123.

<sup>82</sup> See *S.E.C. v. Lines*, 2009 WL 2431976, p.1 (S.D.N.Y.).

<sup>83</sup> Pltf’s Opp & CM Ex 24, Memorandum of Understanding between SEC and BCSC.

Canadian courts, including the British Columbia Courts, have upheld SEC disgorgement judgments on multiple occasions.<sup>84</sup> 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.<sup>85</sup> 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.”<sup>86</sup> 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.”<sup>87</sup>

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

If we fail to uphold Canada's Provinces' securities judgments, and more particularly, disgorgement judgments, then they may very likely refuse to uphold ours, and in that situation the

///

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

<sup>85</sup> Pltf's Opp & CM Ex 22, *United States (Securities Exchange Commission) v. Peever*, 2013 BCSC 1090 (CanLII).

<sup>86</sup> Pltf's Opp & CM Ex 26, *United States (Securities and Exchange Commission) v. Cosby*, 2000 BCSC 338.

<sup>87</sup> Pltf's Opp & CM Ex 25, *United States (Securities and Exchange Commission) v. Shull*, [1999] B.C.J. No. 1823 (S.C.).

<sup>88</sup> *Hilton v. Guyot*, 159 U.S. 113, 228 (1895).



1 citizens of both countries are worse off. U.S. and Nevada citizens who are victimized by securities  
2 fraud would be less likely to receive any recompense.

3 **ORDER**

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

7  
8 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that PLAINTIFF'S  
9 Countermotion for Summary Judgment is **GRANTED**.

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

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

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

22  
23  
24  
25 ///

26 ///

27 ///

DATED this 14<sup>th</sup> day of May, 2018.

22798.131136.WLR.16027114.3