

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

MICHAEL PATRICK LATHIGEE,

Appellant,

v.

BRITISH COLUMBIA SECURITIES
COMMISSION,

Respondent.

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Elizabeth A. Brown
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Supreme Court Case No. 78833

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RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITY

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INTRODUCTION

Pursuant to NRAP 31(e), the British Columbia Securities Commission (the “Commission”) brings to the attention of the Court the United States Supreme Court case entitled *Liu v. Securities and Exchange Commission*, 591 U.S. ____ (2020), Case No. 18-1501, 2020 WL 3405845 (slip op.), which was decided on June 22, 2020. *Liu* provides further guidance regarding the United States Supreme Court case entitled *Kokesh v. Securities and Exchange Commission*, 581 U.S. ____, 137 S.Ct. 1635 (2017). The briefs of both Appellant Michael Patrick Lathigee (“Lathigee”) and the Commission discuss extensively *Kokesh*.

REFERENCES TO RESPONDENT’S ANSWERING BRIEF

Liu supplements the Commission’s arguments at pages 28 to 36 of the Answering Brief where *Kokesh* is discussed.

THE LEGAL PROPOSITIONS FOR WHICH *LIU* IS CITED

In the Opening Brief, Lathigee argued that *Kokesh* laid down the broad rule that disgorgement in a securities case is a penalty. (Opening Brief, p. 35 (“This definition [of penalty] resulted in the conclusion that disgorgement is a penalty.”)). The Commission argued that the holding in *Kokesh* was not so broad and that the decision also recognized that disgorgement is a form of restitution. (Answering Brief, p. 29).

Liu looked at the issue of whether a court had the authority in the context of a securities case to order disgorgement as an equitable remedy. *Liu*, slip op. at p. 3. *Liu* circulated an offering memorandum to raise money for a cancer treatment center. *Id.* at p. 4. *Liu* raised about \$20,000,000, and the Securities and Exchange Commission (“SEC”) brought a civil action claiming that he had misappropriated most of that money in violation of the offering Memorandum. *Id.* The federal district court ordered disgorgement of the \$20,000,000 less approximately \$235,000 that was still in the corporate bank accounts. *Id.* The Ninth Circuit affirmed, and *Liu* appealed to the United States Supreme Court. *Id.* at p. 5. The specific issue on appeal was “whether [15 U.S.C.] §78u(d)(5) authorizes the SEC to seek disgorgement beyond a defendant’s net profits from wrongdoing.” *Id.* Section 78u(d)(5) provides that in an action brought by the SEC, a federal court may order “any equitable relief that maybe appropriate or necessary for the benefit of investors.” *Id.* at p. 2.

The Supreme Court noted that while *Kokesh* found disgorgement to be a penalty for purposes of § 2462 (the statute of limitations), it did not decide whether disgorgement could also be an equitable remedy pursuant to § 78u(d)(5). *Id.* at p. 3.

The Supreme Court found that stripping wrongdoers of their net profits from ill-gotten gains has long been considered an equitable remedy. *Liu* contains an

extensive review of jurisprudence on equity, disgorgement, and restitution. The Supreme Court noted:

These works on equity jurisprudence reveal two principles. First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims.

Id. at p. 6. The Supreme Court also noted that “Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts.” *Id.* at p. 7.

The Supreme Court ultimately held that § 78u(d)(5) permits disgorgement as an equitable remedy when limited to a wrongdoer's net profits. *Id.* at p. 19.

Date: July 2, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Naylor & Braster and that on the 2nd day of July 2020, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITY** as follows:

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