IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL PATRICK LATHIGEE,

Appellant,

v.

BRITISH COLUMBIA SECURITIES COMMISSION,

Respondent.

Supreme Court Case No. 78833

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

RESPONDENT'S ANSWER TO APPELLANT'S AMENDED PETITION FOR REHEARING

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INTRODUCTION

On December 10, 2020, the Supreme Court entered its unanimous, *en banc* decision in this case (the "Decision"). The Court affirmed under the Uniform Foreign-Country Money Judgment Recognition Act ("Uniform Act") the enforcement of a judgment that the British Columbia Securities Commission ("BCSC") obtained in British Columbia against Michael Patrick Lathigee ("Mr. Lathigee").

The bulk of the Petition claims the Court "overlooked" Mr. Lathigee's arguments. On the contrary, the Decision demonstrates that the Court considered his arguments and found them without merit in the circumstances of this case. The remainder of the Petition demands a remand to the District Court, arguing the judgment can only be enforced to the extent it complies with United States law. The Decision, however, recognizes that United States law does not control here, given the remedial purpose of the disgorgement award at issue, and the remand Mr. Lathigee now demands would defeat the remedial effect of the BCSC judgment which is to provide full restitution to the defrauded investors.

ARGUMENT

A. Grounds for Rehearing

Mr. Lathigee brought his Petition under NRAP 40(c)(2)(A) and (B), which state that the Court may consider rehearing when it has overlooked or

misapprehended a material fact in the record or a material question of law or failed to consider a relevant statute, rule, regulation or precedent. A petition should not "reargue matters considered and decided in the court's initial opinion" and may not raise issues for the first time. *In re Estate of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984); *City of N. Las Vegas v. 5th & Centennial, LLC*, 130 Nev. 619, 622, 331 P.3d 896, 898 (2014).

B. The Nevada Supreme Court Did Not Overlook or Misapprehend Mr. Lathigee's Fully Briefed Arguments Regarding Section 161 and Section 15.1 of the BC Securities Act

In Section B of the Petition, Mr. Lathigee claims that the Court overlooked or misapprehended his arguments regarding Sections 161 and 15.1 of the British Columbia Securities Act ("BC Securities Act"). (Petition, pp. 3 - 5). He first claims that the Court improperly relied on argument of counsel when analyzing Section 15.1. (Petition, p. 4). He is wrong because Section 15.1 is exactly the type of statutory provision that distinguishes this case from *Kokesh v. SEC*, 581 U.S. ___, 137 S.Ct. 1635 (2017). A key point of *Kokesh's* analysis is the lack of a statutory command for federal district courts and the Securities and Exchange Commission ("SEC") to return disgorged funds to defrauded investors. 137 S.Ct. at 1644 ("Even though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so." (emphasis added)). Section 15.1 spells out that statutory command, mandating the BCSC to publish a notice and allow

defrauded investors to make their claims. (JAX986). This is the notice-and-claim procedure the Decision discusses at length and what makes these provisions of the BC Securities Act remedial in nature. (Decision, p. 2).

The application of Section 15.1 is not mere argument of counsel. Section 15.1's command to return the ill-gotten funds occurs by operation of law, and the Decision directly cites *Poonian v. BCSC,* 2017 BCCA 207 (CanLII), for this proposition to distinguish *Kokesh*. (Decision, p. 8 ("But the disgorgement award in this case deprives Lathigee and his associate of the money they obtained from the investors they defrauded. *See Poonian [v. BCSC,* 2017 BCCA 207 (CanLII)], at 20, 23, ¶¶ 61, 70.")). The Decision notes at pages 9 through 10: "And, unlike a BCSC disgorgement judgment, where any funds recovered are subject to the notice-and-claim procedure BC Securities Act section 15.1 provides victimized investors, no 'statutory command' charges the SEC with remitting the disgorged funds it recovers to victims. [*Kokesh*] at___, 137 S. Ct. at 1644.". The Court simply did not rely on argument of counsel but rather engaged in a rigorous analysis of the law and rejected Mr. Lathigee's argument.

Mr. Lathigee next asserts that the Court overlooked his arguments regarding Sections 155 and 157 of the BC Securities Act that he raised in the Reply Brief. (Petition, pp, 4 – 5; Reply Brief, pp. 9 – 11). Mr. Lathigee cites no authority for his proposition that this case should have been brought under those sections, and he

ignores their plain language. Those sections are merely another approach available to the BCSC for addressing violations of the BC Securities Act in addition to that provided by Section 161. (Sections 155.1 and 157(a), JAX1059 and JAX1060 – 1061). Simply put, those sections are just another option for the BCSC, and Section 161 as limited by the command in Section 15.1 is no less appropriate.

Mr. Lathigee further argues in passing that the judgment is an administrative action lacking the proper due process safeguards. (Petition, p. 5). The Court did not overlook or misapprehend this point. The Decision goes into great detail about the procedural safeguards afforded to Mr. Lathigee, including a six-day hearing and an appeal to British Columbia's highest court. (Decision, p. 2).

His last argument in Section B is that the Court overlooked or misapprehended the holding in *Kokesh*. Mr. Lathigee's discussion is limited to *Kokesh* and does not take into any consideration the holding in *Liu v. SEC,* 591 U.S.___, 140 S. Ct. 1936 (2020). As discussed below in Section D, *Kokesh* does not stand for the ironclad rule that all disgorgements are penalties. *Liu* rejected Mr. Lathigee's argument. *See* Section D, below.

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C. The Supreme Court Did Not Overlook or Misapprehend the Public Versus Private Analysis Because It Discussed the Issue at Length and Considered All of Lathigee's Arguments

In Section C of the Petition, Mr. Lathigee argues that the Court overlooked and misapprehended the analysis of the public interest versus private interest. The Decision actually discusses this point at length on pages 5 – 7. To remind the Court, none of the disgorged funds go to British Columbia's general fund, and BSCS is not seeking to enforce the administrative penalty. (Decision, pp. 2 – 3; Answering Brief, pp. 11 – 13).

The Petition raised nothing new and merely attempted to relitigate the public versus private issue. The Petition fails to address the Court's analysis which points out that the issue of whether a remedy is public or private is not binary in nature and is far more nuanced. The Court recognized that "A single judgment can include both an unenforceable penalty and an enforceable remedial award. *See* Restatement (Fourth) of the Foreign Relations Law of the United States§ 489 cmt. d (Am. Law Inst. 2018)." (Decision, p. 6). The Court went on to hold that a statute whose primary purpose is to recompense victims should be enforced under the Uniform Act. (Decision, p. 6, citing Restatement (Fourth) of the Foreign Relations Law of the United States, § 3, cmt. 4, 13 pt. II U.L.A. at 26).

Turning to the $21.7 Million (CAD) disgorgement, the Court found that it "represents the exact amount of money Lathigee and his associate obtained from the

698 investors they defrauded ." (Decision, p. 7). What drives home the point of the remedy being restitution are two factors, both of which the Decision addresses. First, the amount is not calculated by some objective table contained in the statute that applies to all cases but instead is determined by the specific amount that Mr. Lathigee swindled from the defrauded investors. (Decision, pp. 7 – 8). Second, Section 15.1 of the BC Securities Act requires that the funds be returned to the investors as much as possible. (*Id*.). The Court pointed out that unlike the governmental agencies in *City of Oakland v. Desert Outdoor Advert., Inc.,* 127 Nev. 533, 267 P.3d 48 (2011), and *Kokesh*, the BCSC could not simply keep the funds "without obligation to the victims of the fraud." (Decision, p. 8). Citing the comments to the Uniform Act, the Court correctly concluded that under Section 15.1 and its related regulations, any recovery is designed to "'provid[e] restitution to . . . investors . . . . who suffered economic harm due to fraud,' not to enrich the BCSC. Uniform Act § 3, cmt. 4, 13 pt. II U .L.A. at 26." (*Id*.). Thus, not only did the Court squarely address the issue, its conclusions were completely consistent with the purpose and intent of the Uniform Act. The Decision notes that the comments to the Uniform Act are persuasive authority as to how it will be interpreted. (Decision, p. 5, citing *Friedman, v. Eighth Judicial Dist. Court,* 127 Nev. 842, 847, 264 P.3d 1161, 1165 (2011)). Rejecting Mr. Lathigree's argument, the Supreme Court held that

remedial nature of the statute places it "squarely within the heartland of equity." (Decision, p. 10, citing *Liu*). Rehearing simply is not warranted.

D. The Supreme Court Did Not Overlook or Misapprehend the *Liu* Case and Remand Is Unnecessary – *Liu* Does Not Apply Because of the Statutory Command to Return the Recovered Funds

Mr. Lathigee's last argument is that the Court overlooked or misapprehended the analysis in *Liu*. Even the Petition notes that the Decision discusses this issue "in some detail," abrogating any claim that it was overlooked. (Petition, p. 10).

Mr. Lathigee argues that the Court misapprehended the law by failing to remand the case for further examination under the so-called "equity exemption" allegedly created by *Liu*. (Petition, p. 8). He inaccurately characterizes the Court as holding that "a penalty judgment to be *ipso facto* construed as sounding in equity to avoid the entire penalty analysis." (*Id*.). What the Court actually held was that remedial nature of the judgment placed it squarely within equity. The Court correctly concluded that *Liu* held that *Kokesh* did not create a blanket rule that all disgorgements are penal in nature. (Decision, p. 10, describing *Liu* as "brushing aside the claim that the Court 'effectively decided in *Kokesh* that disgorgement is necessarily a penalty, and thus not the kind of relief available at equity' with a blunt, 'Not so.'"). The analysis focuses on whether the award achieves restitution thereby placing it directly within the boundaries of equity:

> Citing the Restatement (Third) of Restitution and Unjust Enrichment § 51, *Liu* recognizes that to the extent a disgorgement award redresses

> unjust enrichment and achieves restitution, it is situated "squarely within the heartland of equity," 591 U.S. at___, 140 S. Ct. at 1943, and does not constitute an impermissible penalty. *See id.* at ___, 140 S. Ct. at 1944.

(Decision, p. 10 (emphasis added)). As the Court points out and what Mr. Lathigee cannot contest is that the judgment strips him of the exact amount he took from investors and commands its return to them. (*See* Section C, above). That command is what takes this case out of the concerns that *Liu* and *Kokesh* have with the SEC's discretion on the use of recovered funds, and place it within the heartland of equity. Thus, there is no need to remand to the district court for any calculations as Mr. Lathigee demands. Those calculations in *Liu* simply do not apply here because BCSC does not have the discretion that the U.S. statutes afford the SEC.

This approach to equity is entirely consistent with the Uniform Act. Relying on Comment 4, the Court held that:

> Consistent with *Huntington* [*v. Attrill,* 146 U.S. 657 (1892)], "the test for whether a judgment is a fine or penalty" – and so outside the Uniform Act's (and NRS 17.750(1)'s) recognition mandate – "is determined by whether its purpose is remedial in nature with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice." Uniform Act § 3, cmt. 4, 13 pt. II U.L.A. at 26.

(Decision, p. 6 (emphasis added)). Further quoting the comment, the Court held if a "government agency obtains a civil monetary judgment for purpose[s] of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, [the] judgment generally should not be denied recognition and enforcement

on [the] ground[s] that it is penal . . . in nature, or based on ... foreign public law." (Decision, p. 6 (emphasis added)). This is exactly the nuanced approach and analysis contemplated by *Liu* and *Kokesh*. The Court simply did not misapprehend *Liu* but rather recognized its analytical approach. The Court came to the correct decision, and rehearing is not necessary.

E. The Petition Ignores Enforcement of the Judgment Based on Comity

The Petition does not challenge the Court's holding on comity, which is an independent ground for enforcing the judgment. (Decision, pp, 10 – 11). Comity does not require that a judgment conform to U.S. law but rather hinges on respect of another sovereignty. (Decision, p. 11, citing *Gonzales-Alpizar v. Griffith,* 130 Nev. 10, 18, 317 P.3d 820, 826 (2014)). Quoting *Hilton v. Guyot,* 159 U.S. 113, 165 (1895), the Court noted that comity "contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties . . ." (Decision, p. 10). The Court spent a good portion of the Decision on this point, referring to the relationship with Canada, and the fact that British Columbia courts historically enforce SEC disgorgement orders even though they do not have the same restrictions on the use of recovered funds as the BC Securities Act. (Decision, p. 12).

Finally, the Court found that Mr. Lathigee did not raise any of the defenses to comity recognized in *Gonzales-Alpizar* or the Restatement (Third) of Foreign

Relations Law § 482. (*Id*., 11). Instead, Mr. Lathigee relied on Restatement (Third) of Foreign Relations Law § 483, but the Court rejected that argument because the section does not mention comity. (*Id*.). Mr. Lathigee addresses none of this in his Petition.

CONCLUSION

For the reasons stated above, BCSC requests that the Court deny the Petition.

Date: February 22, 2021.

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ATTORNEY'S CERTIFICATE PURSUANT TO NRAP 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6), and either the page- or type-volume limitations stated in NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,298 words.

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

3. I hereby certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of NRAP 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

Date: February 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Naylor & Braster and that on the 22nd day of February 2021, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENTS' ANSWER TO APPELLANT'S AMENDED PETITION FOR REHEARING** as follows:

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