

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL PATRICK LATHIGEE,

Appellant,

vs.

BRITISH COLUMBIA SECURITIES
COMMISSION,

Respondent.

No. 78833

Electronically Filed
Apr 08 2021 02:57 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S MOTION TO STAY ISSUANCE OF REMITTITUR

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APPELLANT’S MOTION TO STAY ISSUANCE OF REMITTITUR

Pursuant to NRAP 41(b)(3), Appellant, Michael Patrick Lathigee (“Lathigee”), moves this Court to stay the issuance of the remittitur, pending the resolution of Lathigee’s petition for a writ of certiorari to the United States Supreme Court. Based upon the Court’s order denying rehearing filed on March 18, 2021, the remittitur would normally issue on April 12, 2021. However, if the Court grants this motion, a stay of the remittitur would remain in place until the final disposition by the United States Supreme Court. *See* NRAP 41(b)(3)(B).

A. Lathigee Satisfies the Procedural Requirements to Obtain a Stay of the Remittitur Pending the Resolution of His Petition for a Writ of Certiorari.

NRAP 41(b)(3)(B) places a presumptive limit of 120 days on the stay of the remittitur “unless the period is extended for good cause shown” and then through the final disposition of the case in the United States Supreme Court. According to Supreme Court Rule 13(1) (Review on Certiorari: Time for Petitioning), the normal time to petition the United States Supreme Court for a petition for certiorari is 90 days from the order denying Lathigee’s petition for rehearing in this Court, which would fall on June 16, 2021. Thus, a normal stay under NRAP 41(b)(3)(B) would begin on July 16, 2021 and continue through the final disposition of the United States Supreme Court. Essentially, this Court allows a party petitioning to the United

States Supreme Court for a writ of certiorari to have a 30-day stay beyond the normal time to file the petition. This buffer period allows the United States Supreme Court to notify this Court of the filing of the certiorari petition, after which the stay of the remittitur remains in place until the final disposition of United States Supreme Court case.

With the onset of the COVID-19 pandemic in March 2020, the United States Supreme Court automatically extended the 90-day deadline to file a certiorari petition to 150 days. *See* Order (dated Thursday, March 19, 2020), attached as **Exhibit 1**. In November 2020, the United States Supreme Court reconfirmed the extended 150-day deadline to file a petition for a writ of certiorari. *See* Guidance Concerning Clerk's Office Operations (dated November 13, 2020), attached as **Exhibit 2**. Thus, under the extended 150-day deadline, Lathigee will have until August 16, 2021 to file his petition for a writ of certiorari. Accordingly, for this good cause demonstrated, the Court should extend the stay of the remittitur under NRAP 41(b)(3)(B) until September 15, 2021 and through the final disposition of the United States Supreme Court case.

B. Lathigee Also Satisfies the Substantive Requirements to Obtain a Stay of the Remittitur Pending the Resolution of His Petition for a Writ of Certiorari.

According to Supreme Court Rule 10(b) and (c), Lathigee can petition the Supreme Court for a writ of certiorari for the following reasons: “(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” As the Court is aware, its December 10, 2020 opinion is based, in part, upon important federal questions that have been decided by the United States Supreme Court. The importance of these issues is demonstrated by the Court’s published opinion. According to this Court’s Internal Operating Procedures, Rule 9(a) (amended Feb. 2020), “[a]n opinion shall be prepared if the case presents a novel question of law, an issue of public importance, or sets a new legal precedent.” NRAP 36(c) reaches the same conclusion.

As most recently outlined in his petition for rehearing, Lathigee challenges this Court’s interpretation and application of *Kokesh v. SEC*, 581 U.S. ___, 137 S.Ct.

1635 (2017), *Liu v. SEC*, 591 U.S. ___, 140 S.Ct. 1936 (2020), and *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224 (1892).

Importantly, Justice Sotomayor’s discussion within *Kokesh* concludes that because disgorgement orders, as in the instant case, are a penalty, any secondary purpose does not remove the punitive nature of such disgorgement orders. 137 S.Ct. at 1644-45.

In *Huntington*, one private individual (Huntington) obtained a securities fraud judgment against another private individual (Attrill), wherein it was stated that “[w]rongs are divisible into two sorts or species: private wrongs and public wrongs. The former is an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed ‘civil injuries;’ the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of ‘crimes and misdemeanors.’” 146 U.S. at 668-69, 13 S.Ct. at 228 (citation omitted).

Further, this Court’s opinion suggests that the holding of *Liu* limits *Kokesh* to its facts and allows a penalty judgment to be *ipso facto* construed as sounding in equity to avoid the entire penalty analysis. But, the Court’s opinion omits that the United States Supreme Court required certain factual issues to be determined before

any such *sua sponte* conversion could take place, including the fact that BCSC's judgment cannot exceed the gains when both the receipts and payments are taken into account. *Liu*, at 140 S.Ct. at 1949-50.

In summary, Lathigee respectfully requests that this Court grant this motion and extend the stay of the remittitur under NRAP 41(b)(3)(B) until September 15, 2021 and through the final disposition of Lathigee's petition for writ of certiorari and the United States Supreme Court case.

Dated this 8th day of April 2021.

By /s/ John W. Muije

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Michael Patrick Lathigee*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S MOTION TO STAY
ISSUANCE OF REMITTITUR** was filed electronically with the Supreme Court of Nevada on the 8th day of April 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jay D. Adkisson
Jennifer Braster
Micah S. Echols
John Naylor
Matthew Pruitt
Kurt Bonds
Andrew Sharples

/s/ Carrie Kovacs

Carrie Kovacs, an employee of
John W. Muije & Associates

EXHIBIT “1”

(ORDER LIST: 589 U.S.)

THURSDAY, MARCH 19, 2020

ORDER

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.

EXHIBIT “2”

**SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK
WASHINGTON, D. C. 20543-0001**

November 13, 2020

SCOTT S. HARRIS
CLERK OF THE COURT

AREA CODE 202
479-3011

GUIDANCE CONCERNING CLERK'S OFFICE OPERATIONS

In light of the ongoing COVID-19 pandemic, the Clerk's Office is providing guidance on potential impacts of the virus on operations. This guidance provides updates to a similar document that was issued on April 17, 2020. It will be updated again as new information becomes available.

Modification to Paper Filing Requirements

On April 15, 2020, the Court [ordered](#) that for any document filed in a case prior to a ruling on a petition for a writ of certiorari or for an extraordinary writ, or prior to a decision to set a direct appeal for argument, a single paper copy of the document may be submitted on 8½ x 11 inch paper. The filer may choose to format the document under the standards set forth in Rule 33.2 (in which case the page limits of Rule 33.2 apply), or under the standards set forth in Rule 33.1 but printed on 8½ x 11 inch paper (in which case the word limits of Rule 33.1 apply). A single copy of cert-stage *amicus* briefs and petitions for rehearing may also be filed on 8½ x 11 inch paper as outlined above. This order does not alter the requirements for filings in original cases, or in other cases after a petition for a writ of certiorari has been granted or a direct appeal has been set for argument.

The Court's order of April 15, 2020, also identifies certain categories of documents that, if filed through the Court's electronic filing system, need not be submitted in paper form at all. Those categories are: (1) motions for an extension of time under Rule 30.4; (2) waivers of the right to respond to a petition under Rule 15.5; (3) blanket consents to the filing of *amicus* briefs under Rules 37.2(a) and 37.3(a); and (4) motions to delay distribution of a cert petition under the Court's

Order of March 19, 2020. These types of filings should be filed electronically in cases governed by Rule 34.6, although other types of documents in those cases should still be filed in paper form only. Filers not authorized to file documents through the Court's electronic filing system should continue to send a single copy of such documents to the Clerk's Office.

The Court's order of April 15, 2020, also encourages parties to reach agreement among each other to serve filings through electronic means only, eliminating the need for paper service.

Filing Deadlines

On March 19, 2020, the Court extended the deadline to file petitions for writs of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This is the maximum extension allowed by statute and rule, so the Court will not docket extension requests with respect to cert petitions covered by this order.

The Court's order of March 19, 2020, also addresses other types of extension requests in existing cert-stage cases, noting that they will ordinarily be granted by the Clerk's Office where the request is reasonable and based upon difficulties relating to COVID-19. The order also authorizes the filing of motions to delay distribution of a cert petition to allow the petitioner time to file a reply brief; such motions are not contemplated by the Court's Rules because Rules 15.5 and 15.6 provide that distribution and consideration of the petition will not be deferred pending receipt of a reply. Motions to defer distribution of a cert petition in these circumstances may be presented in the form of a letter to the Clerk under Rule 30.4. At this time, the Clerk's Office will not send letters to the parties reflecting the result of such Rule 30.4 extension requests, but the results will be reflected on the public docket for the case in question.

While the Court building is closed to the public in light of COVID-19, this closure does not itself affect filing deadlines under Rule 30.1.

Case Distribution and Conference Schedules

The Court is continuing to consider cert petitions and other documents at its regularly scheduled conferences, and order lists addressing the results of those conferences are also being issued. The [schedule](#) for the distribution of petitions for conference consideration is also unaffected.

Delivery of Documents to the Clerk's Office

Filings to be hand-delivered to the Supreme Court Building may be directed to the North Drive on Second Street. Until further notice, all such filings are being directed first offsite for screening before being delivered to the Clerk's Office. In light of health concerns relating to COVID-19, the Court is temporarily suspending its practice of allowing filings delivered to the North Drive in an open container before 2:00 p.m. to be sent to the Clerk's Office on the same day as delivery. It may take up to two days for documents arriving at the North Drive to be physically delivered to the Clerk's Office. Parties are strongly encouraged to send filings by mail or commercial carrier rather than by hand-delivery. In unusual circumstances where especially fast docketing of a particular document is needed, contact the Clerk's Office.

Clerk's Office Staffing

While the Clerk's Office remains in operation, staffing in the building is substantially reduced in order to protect the health and safety of employees. If you need to speak to someone in the Clerk's Office, please leave a detailed voicemail at 202-479-3011; every effort will be made to return calls and emails promptly.