MEMO

TO: Lisa Jacobs, Chair

FROM: Jay Adkisson

DATE: October 19, 2018

RE: Canadian Judgment Registration Act: Characterization Issue

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This memo relates to our proposed Section 3 (Applicability) which applies the Act "to a Canadian judgment to the extent that the Uniform Foreign-Country Money Judgments Recognition Act applies to the judgment", *i.e.*, an inbound extrapolation of UF-CMJRA § 3.

Paragraph (b) of UF-CMJRA § 3 provides to the effect that the UF-CMJRA does not apply to judgments arising from any of taxes, fines or penalties, or from domestic relations disputes.

This provision effectively presumes that what would be characterized as a tax, fine, penalty or domestic relations judgments under the laws of the United States would be the same under the laws of the foreign country, i.e., there is no conflict of law between the U.S. jurisdiction and the foreign jurisdiction.

Probably in the vast majority of cases, the presumption of no conflict of laws will be sustained. However, there are exceptional cases which arise where this presumption is not valid. I am attaching a brief in support of motion for summary judgment in a case involving a disgorgement order, in which a disgorgement order is considered to be in the nature of penalty under U.S. law, but does not appear to be in the nature of a penalty under Canadian law.

In such an event, neither our draft nor the UF-CMJRA gives guidance as to which country's laws should be used to characterize a judgment as arising from taxes, fines, penalties, or domestic relations. When that happens, the litigants fall into the swamp of conflicts of law, and end up having to go through a difficult analysis that winds up at Restatement (Second) Conflicts of Law § 7(2), which posits that classification issues are controlled by the law of the forum — but even that seemingly straightforward rule is a little odd in the registration of judgment context since the original "forum" was that where the judgment was first entered.

At any rate, I suggest that our Committee consider adding language to § 3 to make it clear that whether a judgment arises from taxes, fines, penalties or domestic relations is a characterization to be made under the laws of the U.S. forum, and not that of the foreign-country forum.

-- Jay

MEMO

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STATE OF NEVADA
EIGHTH JUDICIAL DISTRICT COURT AT CLARK COUNTY
Hon. Adriana Escobar, District Judge

BRITISH COLUMBIA SECURITIES COMMISSION, Plaintiff, — *vs.* — MICHAEL PATRICK LATHIGEE, Defendant.	Case No. A-18-771407-C {Dept. 14} **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT LATHIGEE** DATE/TIME:

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I. INTRODUCTION

This is the second case brought by the British Columbia Securities Commission ("BCSC") against defendant Lathigee seeking recognition of a Canadian order (hereinafter the "Disgorgement Order"), Ex. 1, causing Lathigee to disgorge $21.7 million to the BCSC, based on a prior finding by the BCSC that Lathigee had violated British Columbia securities laws.

The BCSC's first case, Clark County No. A-18-769386-F (Dept. 12), was filed on February 12, 2018, and sought recognition of the Canadian order under the Nevada Uniform Enforcement of Foreign Judgments Act ("NUEFJA"), NRS 17.330 *et seq.*, which is limited to judgments from other U.S. jurisdictions that are entitled to Full Faith & Credit under the U.S. Constitution, *i.e.*, "foreign" in the NUEFJA means "other states". After some minor prodding by Lathigee's counsel, the BCSC stipulated to dismiss that improvidently-filed action, which dismissal was ordered by Judge Leavitt on March 21, 2018.

The day before, on March 20, 2018, the BCSC had filed the instant lawsuit, seeking recognition of the Disgorgement Order under two causes of action: First, under the Nevada Uniform Foreign-Country Money Judgments Recognition Act ("NUF-CMJRA"), NRS 17.700 *et seq*., and, second, under comity. The parties each conducted some very limited discovery — no witnesses were deposed — which discovery has now been concluded. Though the parties have each engaged an expert witness who, though they squabble about certain *extant* things, appear to agree on the salient issues. Thus, the bottom line is that there are no material facts in dispute, and this matter is ripe for summary adjudication.

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, and is thus not subject to recognition under either the NUF-CMJRA or comity. That is, quite literally, the $21.7 million question before this Court. Resolution of this single issue determines entirely the outcome of this case: If the Disgorgement Order is in the nature of a fine or penalty, then judgment should be for Lathigee; if not, then judgment should be for the BCSC.

As will be discussed, the historic and also contemporary test for whether a judgment is in the nature of a fine or penalty is whether the judgment is meant to further some public interest by the government of jurisdiction where the judgment was originally entered, as opposed to a purely compensatory private judgment for damages between private individuals. The BCSC contends that the Disgorgement Order is the latter, *i.e.*, are in the nature of damages meant to compensate the victims of Lathigee's violation of the British Columbia Securities Act. Lathigee contends the former, *i.e.*, the Disgorgement Order is meant to fulfill public purposes, such as protecting the British Columbia capital markets and to prevent Lathigee from using the funds to run another investment scheme, and that there might also be compensation to victims does not change the fundamentally public interest nature of the Disgorgement Order.

It is that controversy which this Court must resolve, one way or the other, based on the undisputed facts and discussion of the law that follows.

II. UNDISPUTED FACTS

1. Section 161(1)(g) of the British Columbia Securities Act ("BCSA") provides *in toto*:

> 161(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: … (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person 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;" Ex. 2, pg. 27 at ¶ 83 (emphasis added).

2. On March 16, 2015, during the "sanctions portion of a hearing", the BCSC obtained an order (hereinafter the "Disgorgement Order") against Lathigee that "under section 161(1)(g) [of the British Columbia Securities Act, RSBC, 1996, c. 418], Lathigee pay to

the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act . . .."[1] Ex. 1 at ¶ 62(b)(iv), pg. 12.

3. The Disgorgement Order was subsequently entered as a judgment of the British Columbia court on or about April 1, 2015. *See* Complaint, Ex. 1 at ¶ 4.

4. On May 31, 2017, the Court of Appeal for British Columbia issued its opinion in *Poonian v. BCSC (including Lathigee v. BCSC)*, 2017 BCCA 207 (2017). Ex. 2.[2]

III. DISCUSSION

A. PROCEDURAL ISSUES

1. The Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c); *Wood v. Safeway, Inc.*,

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[1] The BCSC also ordered that "under section 162, Lathigee pay an administrative penalty of $15 million". Ex. 1 at ¶ 62(b)(v) [sic], pg. 12. The BCSC has not sought to register this part of its judgment against Lathigee.

[2] The Court may consider the *Poonian* opinion, and other matters of Canadian, including British Columbia law, by way of NRCP 44.1 provides *in toto*:

> DETERMINATION OF FOREIGN LAW. A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

"Once an issue of foreign law has been properly raised, this court may make a determination of that law, and subsequently 'may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43.' NRCP 44.1. Further, this court's determination is treated as ruling on a question of law. See id. Thus, foreign law should be argued and briefed in the same manner as domestic law, and as with domestic law, judges should use both their own research and the evidence submitted by the parties to determine foreign law." *Dahya v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 17 Nev. 208, 214, 19 P.3d 239, 244, at fn. 21 (2001).

121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (discussing the summary judgment standard in considerable depth).[3]

3. Conflict-Of-Laws And Characterization

The Nevada Supreme Court has looked to the Restatement (Second) of Conflict of Laws to resolve conflict issues. *See, e.g., Dictor v. Creative Mgt. Services, LLC,* 126 Nev. 41, 45-46, 223 P.3d 332, 335 (2010) (tort liability).

Under the Restatement § 5, Nevada applies its own choice of law rules. See Restatement (Second) Conflict of Laws at *Cmt.* B ("A court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws. It derives this law from the same sources which are used for determining all its law: from constitutions, treaties and statutes, from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning.").

For the instant case, the most important provision is Restatement § 7, which provides the rules for what is known as "classification",[4] i.e., which forum's laws apply to characterize certain things, such as the instant Disgorgement Order. *Comment* b to § 7 explains the concept of characterization:

> Characterization is an integral part of legal thinking. In essence, it involves two things: (1) classification of a given factual situation under the appropriate legal categories and specific rules of law, and (2) definition or interpretation of the terms employed in the legal categories and rules of law. The factual situation must be

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[3] This Court's substantial familiarity with summary judgment standards is presumed.

[4] "[T]he nature of the conflicts of laws is a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed or entangled in it." ~ Prof. David C. Baldus as quoted in K. Lipstein, PRINCIPLES OF THE CONFLICT OF LAWS NATIONAL AND INTERNATIONAL, pg. 1 (Matrinus Nijhoff Publishers, 1981).

> classified to determine under what legal categories and rules of law it belongs. Likewise, the terms employed in the legal categories and rules of law must be interpreted in order that the factual situation may be placed under the appropriate categories and that the rules of law may properly be applied.

Under § 7(2), "[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum, except as stated in § 8."[5] In other words, and as applied here, § 7(2) requires that Nevada law — and not British Columbia law — governs the characterization of the Disgorgement Order at issue here. *See, e.g., Contreras v. Am. Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1226 at fn. 2 (D. Nev. 2015) ("Nevada law governs whether this claim is classified as being based in tort or contract. Restatement (Second) of Conflict of Laws § 7(2) ('Generally, "[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum").').[6]

B. Introduction To Substantive Argument: The Public v. Private Interest Rule

1. The U.S Follows The Public v. Private Interest Rule Of *Huntington*

The BCSC asserts only two causes of action seeking recognition of the Disgorgement Order, being: (1) Recognition under the Nevada Uniform Foreign-Country Money Judgment Recognition Act ("NUF-CMJRA"), NRS 17.700 *et seq.*; (2) Recognition under comity. Although the legal constructs for these causes of action are different -- the NUF-CMJRA arises by statute while comity is a common-law doctrine -- the critical rule for this case is exactly the same: A foreign-

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[5] Section 8 of the Restatement deals with the subject of *renvoi*, *i.e.*, what happens when local law directs the court to apply the law of the foreign forum, and which is not an issue here.

[6] Since nearly all of the Nevada conflict opinions deal with torts, mostly automobile and related insurance cases, and which state rules that are particular to tort cases and not at all applicable to the instant conflict, great caution is advised in the reading of those opinions.

country judgment may not be recognized if it seeks to further a public interest as opposed to redress a private injury.

The genesis of American law on the subject arises in 1825 in a statement by Justice Marshall that: "The Courts of no country execute the penal laws of another . . .." *The Antelope*, 23 U.S. 66, 1825 WL 3130, 10 Wheat. 66, 123 (1825). The meaning of "penal" in this context was the subject of a later U.S. Supreme Court opinion in *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed., 1123 (1892), a case where one private individual (Huntington) obtain a securities fraud judgment against another private individual (Attrill), wherein it was stated that:

> Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
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> 146 U.S. at 667, 13 S.Ct. at 227.

And later in the same opinion:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are 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 *669 are distinguished by the harsher appellation of 'crimes and misdemeanors." 3 Bl. Comm. 2.
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> 146 U.S. at 668-9, 13 S.C. at 228.

Thus, the rule of *Huntington* is this: The U.S. courts may only enforce judgments that are based on the purely private rights belonging to individuals, and cannot enforce judgments from a foreign nation that seek to protect the public interests of that nation; the latter are simply unenforceable by the U.S. courts and may not be recognized.

That *Huntington* was decided 126 years ago in 1892 does not mean that it is no longer "good law". To the contrary, as will be shown *infra*., the *Huntington* decision has become the seminal opinion and remains the basis for U.S. law on the subject, as was discussed at length and followed as late as 2017 in an opinion by Justice Sotomayor in *Kokesh*[7] that is on all fours with the case at bar and which opinion will be the subject of lengthy examination below, and by Justice Cherry as late as 2011 in the *City of Oakland* decision that will next be discussed.

2. Nevada Also Follows The Public v. Private Interest Rule of *Huntington*

The Nevada Supreme Court also adopted the *Huntington* rule in *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 267 P.3d 48 (2011), which involved a billboard fine issued by the City of Oakland, and that municipality's attempt to register the judgment in California as a sister-state judgment.[8] Writing for the majority, Justice Cherry held that:

> Recognizing that *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892), provides an exemption to the Full Faith and Credit Clause of the United States Constitution, such that other states' penal judgments are unenforceable in the State of Nevada, we conclude that the California judgment in this case was penal in nature and, as such, is not enforceable in Nevada.

Beginning at 127 Nev. 539, 267 P.3d 52, Justice Cherry discusses the *Huntington* opinion at considerable length, and then *Huntington's* progeny as those later cases related to recognition of a

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

[8] Uniform Enforcement of Foreign Judgments Act (UEFJA). NRS 17.330 *et seq.*

judgment under the U.S. Constitution's Full Faith & Credit clause, which is not at issue in the case at bar.

Justice Cherry rejected the City of Oakland's assertion that it was asserting a private right to halt a private harm, and instead noted that the salient issue is not how some statute characterizes the relief granted in the judgment:

> The test is not by what name the statute is called by the legislature ..., but whether it appears ... to be in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.[9]
>
> Thus, here, the central question is whether the statute provided civil penalties as a means to punish a violator for an offense against the public or whether the statute created a private right of action to compensate a private person or entity.

127 Nev. at 542, 267 P.3d at 54.

Looking at the City of Oakland's underlying lawsuit, Justice Cherry concluded that City of Oakland was not enforcing any private right, but was instead acting towards Oakland's public interest. Thus, under *Huntington*, Nevada would not recognize the City of Oakland's judgment. 127 Nev. at 543, 267 P.3d at 54.

With the "public v. private interest" rule expressed in *Huntington* and approved by *City of Oakland* fresh in mind, we now turn to how the instant Disgorgement Order falls into that rule.

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[9] *Quoting Huntington*, 146 U.S. at 683, 13 S.Ct. at 224 (internal quotation marks and citation omitted).

C. THE BCSC'S FIRST CAUSE OF ACTION: RECOGNITION UNDER NUF-CMJRA

1. Applicability of NUF-CMJRA

The BCSC's first cause of action seeks the recognition of the Disgorgement Order pursuant to the Nevada Uniform Foreign-Country Money Judgment Recognition Act ("NUF-CMJRA"), NRS 17.700 *et seq.*

The application of NUF-CMRJA in any aspect is apparently one of first impression in Nevada. Although NUF-CMJRA was originally enacted in 2007, the courts of this state have apparently not presented with any case that has implicated NUF-CMJRA issues. A Westlaw search for the NUF-CMJRA in Nevada indicates only a single opinion (involving a sister-state judgment under the somewhat analogous Nevada Uniform Enforcement of Foreign Judgment Act, NRS 17.330 *et seq.*) wherein the NUF-CMJRA was mentioned only in passing, being the aforementioned *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 547, 267 P.3d 48, 57 (2011) (Pickering, J., dissenting).

The section of NUF-CMJRA that determines the applicability of NUF-CMJRA is NRS 17.740. For the instant dispute, the salient provision is paragraph 2 of NRS 17.740 which provides in relevant part that the NUF-CMJRA does not apply to foreign-country judgments for taxes, fines or other penalties, and divorce and support judgments and the like. That paragraph 2 provides *in toto*:

> 2. NRS 17.700 to 17.820, inclusive, do not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is:
>
> (a) A judgment for taxes;
>
> (b) A fine or other penalty; or
>
> (c) A judgment for divorce, support or maintenance or other judgment rendered in connection with domestic relations.
>
> NRS 17.740(2).

The inquiry here turns on the meaning of paragraph 2 subpart (b), *i.e.*, whether the Disgorgement Order is a "fine or other penalty". If the Disgorgement Order is in the nature of a "fine or other penalty" then it is not subject to recognition in Nevada under the NUF-CMJRA, *see City of Oakland v. Desert Outdoor Advert., Inc*., *supra*., 127 Nev. at 547, 267 P.3d at 57 (2011) (Pickering, J., dissenting) (The NUF-CMJRA "provides that a foreign-country judgment for a sum of money need not be enforced if it is for a fine or other penalty.").

Finally, and very importantly, NUF-CMJRA at NRS 17.740(3) places the burden of establishing that NUF-CMJRA applies to a judgment on the party seeking recognition, *i.e.*, upon the BCSC. By contrast, NUF-CMJRA as applied here imposes utterly no burden on the party resisting recognition, being Lathigree.

2. A Securities Law Disgorgement Order Is A Penalty

The issue of whether a securities law disgorgement judgment (or any other disgorgement order) is a "penalty" under either the NUF-CMJRA, or even the UF-CMJRA nationwide, also appears to be one of first impression.

Fortuitously, the U.S. Supreme Court has very recently addressed in significant depth the nature of a securities law disgorgement order in *Kokesh v. SEC*, ___ U.S. ____, 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017). The *Kokesh* case involved an SEC enforcement action for an alleged violation of the federal securities laws, wherein the SEC sought a disgorgement judgment against the defendant. At issue in the appeal before the U.S. Supreme Court was whether was a penalty within the five-year limitations period of 28 U.S.C. § 2464, which provides *in toto*:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The U.S. District Court held that the disgorgement is not a penalty, and that § 2462 did not apply; the U.S. Tenth Court of Appeals for the 10th Circuit affirmed that decision. *SEC v. Kokesh,* 834 F.3d 1158 (2016). The U.S. Supreme Court reversed. 137 S.Ct. at 1646.

Writing for a unanimous court, Justice Sotomayor began her opinion with the Court's holding:

> A 5–year statute of limitations applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. This case presents the question whether § 2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law. The Court holds that it does. *Disgorgement in the securities-enforcement context is a "penalty"* within the meaning of § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues.
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> 137 S.Ct. at 1639 (emphasis added).

Going through the history of the SEC's disgorgement powers, Justice Sotomayor noted that beginning in the 1970's, the courts began ordering disgorgement in SEC enforcement proceedings for two reasons: (1) to deprive defendants of their profits and thus remove any perceived reward for violating the securities laws, and (2) to protect the public by providing a deterring to future violations. 137 S.Ct. at 1640 *citing SEC v. Texas Gulf Sulpher Co.,* 312 F.Supp. 77, 92 (S.D.N.Y. 1970).

Justice Sotomayor went on to describe in considerable detail the definition of "penalty":

> A "penalty" is a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws." *Huntington v. Attrill,* 146 U.S. 657, 667, 13 S.Ct. 224, 36 L.Ed. 1123 (1892). This definition gives rise to two principles. First, whether a sanction represents a penalty turns in part on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." *Id.*, at 668, 13 S.Ct. 224. Although statutes creating private causes of action against wrongdoers may appear—or even be labeled—penal, in many cases

> "neither the liability imposed nor the remedy given is strictly penal." *Id.*, at 667, 13 S.Ct. 224. This is because "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." *Ibid.* Second, a pecuniary sanction operates as a penalty only if it is sought "for the purpose of punishment, and to deter others from offending in like manner"—as opposed to compensating a victim for his loss. Id., at 668, 13 S.Ct. 224.
>
> 137 S.Ct. at 1642.

This resulted in the conclusion that disgorgement is a penalty. 137 S.Ct. at 1643. Justice Sotomayor then identified at several factors that characterized disgorgement as a penalty, which shall next be related and applied to the instant undisputed facts.

a. Disgorgement Arises From Public Law And Furthers A Public Interest

First, Justice Sotomayor states that disgorgement is a penalty because it is a public law that gives rise to disgorgement. 137 S.Ct. at 1643. "The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Ibid*.

As applied here, § 161(1)(g) of the British Columbia Securities Act is clearly a public law, which is implicated if, and only if, "the commission or the executive director considers it to be in the public interest". *See* Undisputed Fact No. 1. Thus, the Disgorgement Order at ¶ 49 declares that: "We find that it is in the public interest to order the respondents to pay the full amount obtained as a result of their fraud."Ex. 1 at ¶ 49.

The *Poonian* decision repeatedly states that disgorgement under § 161(1)(g) must further the public interest. Ex. 2, pg. 14 at ¶ 40 ("To be clear, the issue to be resolved on this appeal is not whether a disgorgement order would be in the public interest, nor is the issue whether there has been non-compliance with the *Act*. Those requisite elements of a § 161(1)(g) order are not before this Court."); Ex. 2, pg. 16 at ¶ 49 ("I recognize the Commission's important public interest

mandate that informs the Commission's exercise of discretion to make an order under § 161(1), which provides a host of tools to the Commission to use alone or in combination."); Ex. 2, pg. 36, at ¶ 112 ("Disgorgement is a specific tool, and the Commission must not, in the name of the public interest, use that tool in such a way as to extend it beyond its specific, permissible purpose."); Ex. 2, pg. 47 at ¶ 144 ("I agree with and adopt the two-step approach identified by Vice Chair Cave in *SPYru*[10] at paras. 131–32: * * * [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence."); Ex. 2, pg. 51 at ¶ 165 ("Of course, it is also for the Commission to determine whether it is in the pubic interest to make any order under s. 161(1)(g)."

The BCSC's expert witness, Mr. Gordon R. Johnson, *see Plaintiff's NRCP 16.1(a)(2) Expert Disclosures*, Ex. 3 hereto,[11] included as support for his opinion a long passage from the British Columbia Court of Appeals in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 (B.C.App., 2017), which internally quotes a similar opinion, *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 201 SCC 37 at ¶ 42 (CanLII, 2001), arising from a similar law in Ontario:

> "The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. * * * The focus of the regulatory law is on the protection of societal interests, not the punishment of an individual's moral faults . . .."
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> Johnson Opinion, Ex. 3 at pp. 3-4.

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[10] *Re SPYru Inc.*, 2015 BSCECCOM 452 (2015).

[11] The Opinion of Lathigee's expert witness, Mr. Patrick Sullivan, is included herewith for completeness as Ex. 4. Importantly, to avoid even the hint of a dispute of material fact on this Motion for Summary Judgment, Lathigee does not herein rely upon Mr. Sullivan's opinion herein.

The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, arise from a public law, and furthers public interests, not private ones.

b. Disgorgement Is Imposed To Deprive The Defendant Of Wrongful Profits And Deter Future Violations

Second, Justice Sotomayor states that disgorgement is imposed for punitive purposes, to both deprive the defendant of the profits of their activities and to deter future violations. 137 S.Ct. at 1643. "Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objective. *Ibid*.[12] [internal quotation marks and citations omitted].

Here, the Disgorgement Order states at ¶ 5 that: "Orders under sections 161(1) and 162 are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 SCC 37. Ex. 1 at ¶ 5. The Disgorgement Order states at ¶ 6 that a relevant considerations in determining whether to order sanctions include:

- "the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct";
- "the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets"; and
- "the need to deter those who participate in the capital markets from engaging in inappropriate conduct".

Ex. 1 at ¶ 6.

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[12] Internal quotation mark and citations omitted.

The *Poonian* decision affirms that a purpose of § 161(1)(g) is deterrence. Ex. 2, pg. 27 at ¶ 82 ("The taking away of any amounts obtained or payment or loss avoided deprives a person who fails to comply of any benefit. Therefore, the person is deterred from non-compliance. In that sense, s. 161(1)(g) also has a deterrence purpose. This purpose is consistent with the *Act*'s overarching remedial and protective nature."); Ex. 2, pg. 32 at ¶ 102 ("[S]ummarizing the underlying principles of disgorgement . . . . disgorgement reflects the equitable policy designed to remove all money unlawfully obtained by a respondent so that the respondent does not retain any financial benefit from breaching the Act." (internal emphasis, quotation marks and citation omitted)); Ex. 2, pg. 33 at ¶ 105 (same effect); Ex. 2, pg. 36, at ¶ 112 (Disgorgement's "purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing."); Ex. 2, pg. 46 at ¶ 143(1) ("The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e., by ensuring the person does not retain the "benefit" of their wrongdoing.")

The opinion of the BCSC's own expert, Mr. Johnson, repeatedly makes clear that the purpose of the British Columbia law under which disgorgement is authorized is to deprive the defendant of wrongful profits and deter future violations, and thereby force compliance with British Columbia' security laws:

> "The British Columbia Court of Appeal expresses the purpose of the Section 161(1)(g) remedy 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." Ex. 3, at pp. 2-3.
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> "Disgorgement is a specific tool, and the Commission must not, in the name of public interest, use that tool in such a way as to extend it beyond its specific, permissible purpose. Its purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing."Ex. 3, at pg. 3.

"The 'disgorgement' remedy has the purpose of removing the incentive for non-compliance." Ex. 3, at pg. 4.

The bottom line is that there can be no reasonable dispute that disgorgement orders, imposed under § 161(1)(g), including the instant Disgorgement Order, are imposed to deprive the defendant of wrongful profits and deter future violations.

c. Disgorgement Is Not Compensatory

Justice Sotomayor also states that disgorgement is not compensatory, since courts "have required disgorgement regardless of whether the disgorged funds will be paid to such investors as restitution." 137 S.Ct. at 1644.[13] In the case of the SEC (as with the BCSC), Justice Sotomayor noted that while some of the funds may go to investors, other of the funds may go to the U.S. Treasury, and (as with the BCSC) there is no statutory law that commands the distribution of funds to investors. *Ibid.* "When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Ibid.* "Disgorgement . . . is intended not only to prevent a wrongdoer's unjust enrichment but also to deter others' violations of the securities laws." 137 S.Ct., at 1645.

Here, The *Poonian* decision repeatedly states that the disgorgement under § 161(1)(g) is not punitive or compensatory. Ex. 2, pg. 23 at ¶ 70 ("It is clear, in my opinion, that the purpose of s. 161(1)(g) is neither punitive nor compensatory. This view is held consistently among the various decisions of the Commission and the securities commissions of other provinces". (citations omitted)); Ex. 2, pg. 25 at ¶ 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)."); Ex. 2, pg. 26 at ¶ 80 ("I also agree with the decisions of securities commissions in British Columbia and across the country concluding s. 161(1)(g), or its

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[13] Internal quotation marks and citations omitted.

counterparts, is not compensatory in nature"); Ex. 2, pg. 32 at ¶ 102 (Disgorgement "is not a compensation mechanism for victims of the wrongdoing." (internal quotation marks and citation omitted)); Ex. 2, pg. 36, at ¶ 112. (Disgorgement "is not to punish or compensate, although those aims are achievable by other means in the *Act*, or in conjunction with other sections of the *Act*."); Ex. 2, pg. 46 at ¶ 143(2) ("The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention.").

The *Poonian* also decision recognizes that any disgorged funds remaining, after all claims have been made, are not returned to the defendant but may be used by the BCSC for educational purposes. *See Poonian*, Ex. 2, pp. 23-4 at ¶ 72 ("Sections 15 and 15.1 of the Act address what the Commission may do with funds received under s. 161(1)(g). * * * After the requisite period of time has expired, the Commission may use any remaining funds only for educating securities market participants and the public about investing, financial matters or the operation or regulation of securities markets (s. 15(3)).").

Finally, the BCSC's own expert, Mr. Johnson, himself points out that the purpose of disgorgement is not — repeat, not — to compensate investors: "Its [disgorgement] purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing. It is not to punish or compensate . . .." Ex. 3, at pg. 3. And later, "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." Ex. 3, at pg. 5.

The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, are not compensatory in nature.

d. Disgorgement Can Exceed Wrongful Profits

Justice Sotomayor also rejected the SEC's contention that disgorgement is remedial in nature, since "disgorgement sometimes exceeds the profits gained as a result of the violation." 137 S.Ct. at 1644. Thus, inside traders may be subject to disgorgement even if they do not profit from their

information. *Ibid*. Further, as happened in the case at bar, "disgorgement is sometimes ordered without consideration of a defendant's expenses that reduce the amount of illegal profit." *Ibid*.

This point is also addressed by the *Poonian* court, in response to the Poonians argument (at ¶ 84) that they should be allowed to reduce their disgorgement order by their trading and other expenses incurred, i.e., the disgorgement order should have been limited to their net profits. The *Poonian* court responded:

> I reject this argument. The words of the provision do not support a "profit" interpretation. The words the Legislature chose, "any amount obtained", refer to any amount received. They do not contemplate any deductions. If the Legislature had intended to import a profit element, it could have used the word "profit", or "net", or some other language that connotes allowance for losses or expenses.
>
> *Poonian*, Ex. 2, pg. 28 at ¶ 85.

This point is made crystal-clear by ¶ 93 of the *Poonian* decision: "In sum, I conclude s. 161(1)(g) does not require the amount obtained to be 'profit' or that there be a 'netting' or deduction of expenses, costs, or of amounts paid to the Commission by other persons." Ex. 2, pg. 30 at ¶ 93.

Similarly, the *Poonian* court noted that such deductions would not be allowed in insider trading cases, Ex. 2, pp. 28-29 at ¶¶ 85-86 — exactly as mentioned by Justice Sotomayor.

The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, can exceed the defendant's wrongful profits and so therefore cannot be considered remedial in nature.

e. That Disgorgement Serves Multiple Purposes Does Not Make It Any Less Of A Penalty

It is anticipated that the BCSC will attempt to make an argument with the flavor of: "Even if the primary purpose § 161(1)(g) is to protect the public interest, there is still the chance that investors will make claims and get some money back, and that is enough to convert § 161(1)(g) to what amounts to a "remedial" sanction that is similar to a private cause of action for damages.

Justice Sotomayor donates an entire section "C" just to nixing this particular argument. 137 S.Ct. at 1644-5.

> As an initial matter, it is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply returns the defendant to the place he would have occupied had he not broken the law. SEC disgorgement sometimes exceeds the profits gained as a result of the violation. * * * And, as demonstrated by this case, SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit. * * * In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off. The justification for this practice given by the court below demonstrates that disgorgement in this context is a punitive, rather than a remedial, sanction: Disgorgement, that court explained, is intended not only to "prevent the wrongdoer's unjust enrichment" but also "to deter others' violations of the securities laws." * * *
>
> True, disgorgement serves compensatory goals in some cases; however, we have emphasized the fact that sanctions frequently serve more than one purpose. * * * A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. * * * Because disgorgement orders "go beyond compensation, are intended to punish, and label defendants wrongdoers" as a consequence of violating public laws, * * * they represent a penalty and thus fall within the 5–year statute of limitations of § 2462.
>
> 137 S.Ct. at 1644-5.

3. Conclusion

There can be no reasonable dispute that the Disgorgement Order satisfies all the elements identified by Justice Sotomayor in *Kokesh*, and thus falls squarely into the public interest prong of the Public vs. Private Interest Test of that opinion, as well as *Huntington* and *City of Oakland*. As such, the Disgorgement Order is in the nature of a penalty, and thus falls squarely into the "fine or penalty" exclusion from registration under NRS 17.740(2)(b).

If there is any doubt as to this conclusion, then it will be further remembered that the NUF-CMJRA at NRS 17.740(3) places the burden of establishing that NUF-CMJRA applies to a judgment on the party seeking recognition, *i.e.*, upon the BCSC. In other words, a "tie" — or anything less than the BCSC satisfying its burden of proof —means that the judgment cannot be recognized under NUF-CMJRA.

D. THE BCSC'S SECOND CAUSE OF ACTION: RECOGNITION UNDER COMITY

In considering issues of comity in the context of international judgments, Nevada courts have looked to the Restatement (Third) of Foreign Relations Law of the United States, *see, e.g.*, *Gonzales-Alpizar v. Griffith*, 130 Nev. 10, 18, 317 P.3d 820, 826 (2014); *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 578, 583, 331 P.3d 876, 879 (2014).

Section 483 of the Restatement provides in toto:

> Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.

The Reporter's Comment to § 483 at ¶ 4 cites to Huntington as the authority supporting this rule, indicating that the analysis of recognition of a foreign judgment under comity is the same as under NRS 17.740, *i.e.*, the Public vs. Private Interest Test of *Huntington*, *Kokesh*, and *City of Oakland* is to be followed.

For example, the U.S. Ninth Circuit Court of Appeals in interpreting § 483 notes that "A civil remedy is penal, as the term is understood in private international law, if it awards a penalty to a member of the public, suing in the interest of the whole community to redress a public wrong.

Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1219 (9th Cir. 2006). The *Yahoo!* court also noted in interpreting § 483 that "Judgments designed to deter conduct that constitutes a threat to the public order are typically penal in nature." *Id*., at 1220.

For brevity, the Public vs. Private Interest Test as applied to the facts of this case, will not be repeated, but in the interests of brevity is instead hereby adopted by incorporation. *See* Section III(C)(2)(a-e), *supra*. at pp. 12-19. Same analysis; same result.

IV. CONCLUSION

Based on the language of the British Columbia Securities Act § 161(g)(1), the nature of an statements contained within the Disgorgement Order, statements made by the British Columbia Court of Appeals in the *Poonian* opinion, and admissions by the BCSC's own expert witness, Mr. Johnson, it is clear that under the decisional trifecta of *Huntington*, *City of Oakland*, and *Kokesh* that the Disgorgement Order must be characterized as a "penalty" under both the NUF-CMJRA and comity, such that the Disgorgement Order is not subject to recognition in Nevada. Summary judgment against the BCSC and in favor of Lathigee is therefore appropriate.

V. PRECAUTIONARY REQUEST

NRS 17.790 provides *in toto*:

> **Stay of proceedings pending appeal of foreign-country judgment.** If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires or the appellant has had sufficient time to prosecute the appeal and has failed to do so.

In the event that this Court were to enter summary judgment against Lathigee, Lathigee hereby expresses his intention to appeal, and requests a stay of any further proceedings before this Court, per NRS 17.790 until his appeal has concluded.

Respectfully submitted this ____ day of October, 2018, by:

/s/ Jay D. Adkisson
Jay D. Adkisson
Counsel for Defendant
Michael Patrick Lathigee

CERTIFICATE OF SERVICE

The following signature certifies that on the date of e-filing, a full, true, and correct copy of the above and foregoing document was deposited in the U.S. Mail, with correct first-class postage affixed thereto, and address to counsel for the Plaintiff, British Columbia Securities Commission, to wit:

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