No.

In the Supreme Court of the United States

CITY OF OAKLAND, CALIFORNIA,

Petitioner,

v.

DESERT OUTDOOR ADVERTISING, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268, 279 (1935), this Court expressly left open the question whether a court may invoke the judicially created "penal exception" to the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, to refuse to enforce a penal claim that another State's court has already reduced to civil monetary judgment. The questions presented are:

1. Whether a court can, as Colorado, the District of Columbia, Florida, and Nevada, hold, refuse to enforce a sister State's judgment because it rests on a penal cause of action or whether, as Arkansas, Illinois, Iowa, Massachusetts, Michigan, New Jersey, and Ohio, hold, it must enforce that judgment.

2. If a court may decline enforcement consistent with full faith and credit, whether awards for attorney's fees and costs, equitable disgorgement, and coercive per diem and statutory liquidated damages are penal for purposes of the exception—issues on which state supreme courts and federal courts of appeals are also deeply divided.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the Nevada Supreme Court (App., *infra*, 1a-27a) are currently unreported but can be found at 2011 WL 3359742. The Nevada District Court's Order Granting Motion to Set Aside Foreign Judgment and Motion to Quash Execution Upon Foreign Judgment (App., *infra*, 28a-34a) is unreported. The California Superior Court's Judgment (App., *infra*, 35a-47a) is also unreported.

JURISDICTION

The Nevada Supreme Court entered judgment on August 4, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Full Faith and Credit Clause, U.S. Const. art. IV, § 1, provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

STATEMENT

This case concerns two questions of considerable practical and constitutional importance. The first, which this Court expressly left open in *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268 (1935), asks whether the judicially created penal exception to the

Full Faith and Credit Clause, U.S. Const. art. IV, § 1, allows a State to refuse to enforce a civil judgment from another State because it deems the judgment penal. If it does, the second asks whether various civil remedies—specifically attorney's fees, equitable disgorgement, coercive per diem damages and statutory liquidated damages—are penal for purposes of the exception. The state supreme courts and federal courts of appeals stand in deep conflict on these questions.

A. Constitutional Background

Article IV of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. It "establishe[s] throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered." *Morris* v. *Jones*, 329 U.S. 545, 552 (1947) (internal quotations and citation omitted). This principle transformed "the several states as independent foreign sovereignties" into "integral parts of a single nation." *M.E. White*, 296 U.S. at 277. Recognizing that this precept is "central to our system of jurisprudence," *Underwriters Nat'l Assurance Co.* v. *N.C. Life & Accident Health Ins. Guar. Ass'n*, 455 U.S. 691, 703 (1982), this Court has found exceptions "few and far between," *Williams* v. *North Carolina*, 317 U.S. 287, 295 (1942); see Restatement (Second) of Conflict of Laws § 120, comt. d (1971) ("The privilege of refusing to enforce [a] sister State judgment, if it exists at all, is a narrow one.").

In *Huntington* v. *Attrill*, this Court recognized a penal exception to full faith and credit under which one State need not "execute the penal laws of another." 146 U.S. 657, 666 (1892) (quoting *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825)). In holding that Maryland state courts must enforce a New York judgment imposing liability on a corporation's officers for false representation, the Court laid out a test for identifying penal laws. It stated:

> The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.

Id. at 673-674. The Court determined that the New York statute was not penal because it provided a private right of action that was "clearly remedial." *Id.* at 676-677.

In *M.E. White*, this Court held that although "[w]hether one state must enforce the revenue laws of another remains an open question," 296 U.S. at 275, once one State has reduced a claim for revenue to judgment, other States must recognize and enforce that judgment, *id.* at 276-277. In so doing, it expressly noted that whether one State has to enforce a similar penal claim already reduced to judgment was an open question. It wrote:

> We intimate no opinion whether[, in] a suit [to enforce] a judgment for an obligation created by a penal law, in the international sense, * * * full

> faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.

Id. at 279; *Williams*, 317 U.S. at 289 n.6 ("[T]he question of whether a judgment based on a penalty is entitled to full faith and credit was reserved in *Milwaukee County* v. *M. E. White Co.*") (citation omitted).

B. Lower Court Proceedings

1. California Proceedings

In January 2003, Desert Outdoor Advertising, Inc. (Desert Outdoor) erected a 12-foot by 36-foot by 50-foot "advertising structure" in Oakland, California (Oakland). App., *infra*, 39a. Since the sign advertised a business that was not located on the premises, it violated Oakland Municipal Code § 14.04.270. *Id.* at 2a. In March 2003, Oakland sent Desert Outdoor a formal notice to abate, advising it that the billboard violated the city ordinance. *Id.* at 2a, 40a. But Desert Outdoor continued to use the sign to advertise a variety of businesses located elsewhere. *Id.* at 40a. After two months had passed, Oakland sent Desert Outdoor another notice to abate, alerting the company that it was violating additional provisions of the city ordinance, and instructing it to remove the structure. *Ibid.* After Desert Outdoor failed again to remove it, *id.* at 3a, Oakland brought suit against Desert Outdoor in California Superior Court under California's unfair competition law, *id.* at 3a, and Desert Outdoor appeared and defended. In 2006, during the course of the litigation, Oakland

sent Desert Outdoor yet another notice to abate. App., *infra*, 40a.

Since "[t]he sign [wa]s an advertising sign designed to be visible from the freeway and d[id] not relate to a business on the premises where the sign [wa]s located," the California Superior Court held that Desert Outdoor's construction and maintenance of the structure violated Oakland Municipal Code §§ 14.04.270, 17.10.850 and 17.70.05 and that these violations constituted an unlawful business practice under California law. App., *infra*, 42a. It then awarded Oakland statutory damages pursuant to Cal. Bus. & Prof. Code § 5485(b)(2) for "not [having] moved [the nonconforming structure] within thirty days of [receiving] notice from the * * * city," not for the original violation. *Id.* at 43a. These damages consisted of (1) $10,000 of statutory liquidated damages, see Cal. Bus. & Prof. Code § 5485(b)(2); (2) $43,600 of daily coercive damages representing $100 for each day the billboard remained beginning 30 days after Oakland sent the 2006 notice, see *ibid.*; (3) $263,000 of disgorged gross revenues, see *ibid.* § 5485(c); and (4) reasonable attorney's fees and costs to be later determined, see *id.* § 5485(e). App., *infra*, 42a-43a. The court later amended its original award of daily coercive damages to $114,000 to reflect a lower daily award of $75 for the longer period of time extending from 30 days after the date Oakland had sent Outdoor Advertising its first formal notice to abate in 2003. *Id.* at 46a-47a. In its later judgment, the court added $92,353.75 in costs and attorney's fees. *Id.* at 5a. Desert Outdoor appealed the judgment and the California Court of Appeals affirmed. *Ibid.*

2. Nevada Proceedings

After suffering judgment, Desert Outdoor "departed California for Nevada." App., *infra*, 19a (Pickering, J., dissenting). On February 28, 2008, Oakland filed and sought enforcement of its California judgment in Nevada's Second Judicial District Court, *id.* at 5a, and later attached Desert Outdoor's bank accounts and Nevada income to satisfy the judgment, *ibid.* More than a year later, Desert Outdoor moved to set aside the Oakland judgment and to quash its execution. *Ibid.* Desert Outdoor argued that "[b]ecause the Judgment is the result of a fine for a statutory violation, it is a penal judgment and not subject to enforcement in Nevada," Mot. to Set Aside Foreign J. & Mot. To Quash Execution Upon Foreign J. at 7, under *Huntington*'s "full faith and credit exception for penal judgments," *id.* at 4. Oakland argued in response that the judgment "is a civil monetary judgment, and not a penalty and therefore it is entitled to full faith and credit under Nevada law." App., *infra*, 31a.

The Nevada district court set aside the California judgment and quashed its execution. The court noted that "[t]he courts of no country execute the penal laws of another," App., *infra*, 31a (quoting *Huntington*, 146 U. S. at 666), and held that "the penal exception" is a "defense to full faith and credit," *ibid.* The Nevada court then looked through the California judgment to hold that the award of civil damages satisfied the *Huntington* test because the award was "penal in the sense that it addresses a public wrong rather than impos[es] damages to address a private injury." *Id.* at 33a. The district

court did not disaggregate the award to consider its individual components separately. *Ibid.*

Oakland appealed to the Nevada Supreme Court. It argued, among other things, that *Huntington*'s "penal exception" does not extend to "litigation once pursued to judgment." Appellant's Opening Br. at 11 (quoting *Morris* v. *Jones*, 329 U.S. 545, 552 (1947)); see *id.* at 14 ("Based on the plain text of the full faith and credit clause * * * Oakland's California judgment is clearly entitled to full faith and credit in Nevada even in light of *Huntington*."). It also argued that, even assuming the penal exception extended to civil judgments, the district court had "failed to examine the * * * elements comprising Oakland's judgment for damages to make an individualized determination as to whether each element was 'penal' in nature under the *Huntington* test," *id.* at 17, and that under that test no element was penal, *id.* at 18-20.

Desert Outdoor responded, in relevant part, (1) that *Huntington*'s penal exception controlled, Respondent's Answering Br. at 8-10, (2) that disaggregating the damages award "is not contemplated by * * * *Huntingto*[*n*] and lacks an element of common sense," *id.* at 16, and (3) that "Oakland's judgment is unquestionably a penal judgment [because] there is no private wrong or civil injury which is being addressed," *id.* at 18.

In a 4-3 decision, the Supreme Court of Nevada affirmed. The court held that the "*Huntington* penal exception to the Full Faith and Credit Clause is valid and binding law." App., *infra*, 14a. The majority drew no distinction between executing other States' penal laws and enforcing judgments based on such laws. And, although it pointed to this Court's

statement in *M.E. White* expressly leaving open the question of whether *Huntington*'s penal exception applies to claims reduced to judgment, *id.* at 11a, it maintained that this Court had later "reiterated that the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment * * * in *Nelson v. George*, 399 U.S. 224, 229 (1970)," *id.* at 11a, a habeas case. It also maintained that other state supreme courts and a federal court of appeals had "recognized the validity of *Huntington*'s penal exception." *Id.* at 11a; see *id.* 11a-12a (discussing cases).

The Nevada Supreme Court majority then looked through the California judgment to the underlying claim to determine "whether the California judgment in this case was penal in nature." App., *infra* 14a. It saw "the central question [a]s 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." *Id.* at 16a. Believing "that private parties could [not] have sued Desert Outdoor pursuant to California Business and Professions Code section 5466" and "that the legislature's intent * * * was to strengthen the ability of local government to enforce zoning ordinances governing advertising displays," it held that the purpose of the statute and resulting judgment was not to afford a private remedy to a person injured by the wrongful act, but its essential character and effect was to * * * punish an offense against the public justice of the state." *Ibid.*

Justice Pickering, joined by two other justices, dissented. She "distinguishe[d] between suits to

enforce claims arising under another state's laws and suits on final judgments rendered by a sister State." App., *infra*, 22a. In her view, *Huntington*'s penal exception applies only to the former, not to the latter. Thus, although Nevada would not have to allow Oakland to sue on a penal ordinance "originally in a Nevada court," *id.* at 19a, "a California judgment fully enforceable under [California] laws * * * presented to our Nevada courts for enforcement against a Nevada defendant that departed California after suffering judgment there" should be fully enforceable under the Full Faith and Credit Clause, *ibid.*

Huntington, she argued, may "contain language * * * suggesting that the Full Faith and Credit Clause permits a state court to refuse to enforce a sister State penal judgment on the same terms as it might deny effect to a foreign-country penal judgment," *id.* at 20a-21a (Pickering, J., dissenting), but "this language [i]s, dictum, perhaps necessary to frame the arguments presented, but not necessary to the actual holding," *id.* at 21a. She then noted that this Court had later expressly left this question open in *M.E. White*, *id.* at 21a-22a, and that the Restatement (Second) Conflict of Laws "recognize[s] that *Huntington* is sketchy authority, at best, on this point," *id.* at 22a; *ibid.* ("The Supreme Court of the United States has never squarely decided whether a state may look through the valid money judgment of a sister State and refuse to enforce the judgment on the ground that it was based on a penal cause of action.") (quoting Restatement (Second) Conflict of Laws § 120, cmt. d (1971)).

She argued that "[t]he case law the majority cites to show the vitality of [its] rule * * * offers little true support." App., *infra*, 23a (Pickering, J., dissenting). Those cases, she believed, either (1) supported the opposite position, *ibid.*, (2) represented "dictum about dictum," *ibid.*, (3) concerned whether a state's law could be "*applied* extraterritorially, not whether [a state's] judgment should be *enforced* extraterritorially," *id.* at 24a, or (4) concerned actual criminal convictions, to which all agreed the penal exception should apply, *id.* at 25a n.2. Because she believed that "[t]he law distinguishes between suits to enforce claims arising under another state's laws and suits on final judgments rendered by a sister State," *id.* at 22a, she "would [have] enforce[d] the City of Oakland's judgment, even though it may embody a fine," *id.* at 26a. Although the logic of her position did not require her to address the second question presented—whether the different components of damages awarded represented penalties—she did note that the "fine[s]" the civil judgment included were "imposed to coerce compliance with an Oakland outdoor advertising ordinance after warnings and lesser remedies had failed." *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

I. The Nevada Supreme Court's Refusal To Enforce The California Judgment Because It Deems That Judgment "Penal" Deepens A Split Among State Supreme Courts And Violates The Full Faith And Credit Clause

In *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268 (1935), this Court left open whether a state court must give full faith and credit to a sister-state civil judgment founded on a penal cause of action. Although it made clear that States have no duty to entertain a suit on the underlying penal claim, the question whether such a duty existed once a sister State's courts had reduced the claim to civil judgment was, it recognized, different. "We intimate no opinion," it stated, "whether full faith and credit must be given to * * * a judgment [for an obligation created by a penal law, in the international sense] even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed." *Id.* at 268; see *Williams* v. *North Carolina*, 317 U.S. 287, 319 n.6 (1942) ("[T]he question of whether a judgment based on a penalty is entitled to full faith and credit was reserved in *Milwaukee County* v. *M.E. White Co.*") (citation omitted); Restatement (Second) Conflict of Laws § 120 cmt. d ("The Supreme Court of the United States has never squarely decided whether a State may look through the valid money judgment of a sister State and refuse to enforce the judgment on the ground that it was based on a penal cause of action.").

1. State courts of last resort have answered the question in conflicting ways. Three states—Colorado,

Florida, and Nevada—and the District of Columbia hold that states need not enforce monetary sister-state judgments based on penal laws. Seven states, by contrast—Arkansas, Illinois, Iowa, Massachusetts, Michigan, New Jersey, and Ohio—hold that once such a claim has been reduced to judgment the Full Faith and Credit Clause requires courts of sister States to enforce that judgment. Given the starkness of the conflict, the pervasiveness of lower-court confusion about this fundamental and recurring question of constitutionally required respect for other States' judgments, and the practical importance of the question, this Court's review is warranted.

State courts of last resort in four jurisdictions have held that the penal exception to full faith and credit applies to civil monetary judgments from sister States. In the first case, *Arkansas* v. *Bowen,* 20 D.C. (9 Mackey) 291 (1891), the Supreme Court of the District of Columbia refused to enforce an Arkansas civil judgment on a collector's bond guaranteeing the faithful performance of a tax collector, *id.* at 299. The judgment included two components—one for unaccounted-for-but-collected taxes and one for a penalty due from the collector. *Id.* at 295. The Supreme Court of the District of Columbia held that the tax exception to the Full Faith and Credit Clause barred enforcement of the first component and that the penal exception barred enforcement of the second. *Id*. at 299. Full faith and credit, it held, "does not relate to actions to recover penalties and fines, nor to actions authorized by statutes relating directly to the collection of the revenues of a State, or the enforcement of fines, penalties and forfeiture for noncompliance with or violations of such statutes." *Id.* at 296. It then held that a civil judgment creditor

"cannot avoid this provision of law by first obtaining a judgment upon the cause of action in the courts of Arkansas, and then take a transcript of that judgment to another jurisdiction, and ask the courts of the latter to receive it as a judgment of the former jurisdiction." *Id.* at 298. "[C]ourts * * * besought to enforce [such a] judgment of another state [should] look to what precedes the judgment * * * to determine whether or not it is such a judgment as they are authorized to * * * enforce as the judgment of another state." *Id.* at 298-299. This case law represents binding precedent for the current court of last resort for the District of Columbia. See, *e.g.*, *718 Associates* v. *Banks*, 21 A.3d 977, 981 (D.C. 2011).

In *Interstate Savings & Trust Co.* v. *Wyatt,* 63 Colo. 1 (1917), the Colorado Supreme Court decided whether Colorado courts had to enforce a Texas civil judgment awarding damages "under a [Texas] statute * * * giv[ing] to a person paying more than the legal rate of interest a right to recover, in an action of debt, double the amount of interest so paid," *id.* at 2. Simply noting *Huntington*, it held the penal exception applicable without discussion, *id.* at 2, and then proceeded to apply what it saw as the *Huntington* test. It ultimately "held that, while the Texas statute is in a sense penal as to the party exacting the usurious interest, it is remedial as to the party paying it [and so t]he Texas judgment is entitled to recognition in this state." *Id.* at 4.

More recently, the Florida Supreme Court adopted this same approach in *Holbein* v. *Rigot,* 245 So. 2d 57 (1971). In this case, the Florida Supreme Court enforced a Texas court judgment awarding punitive damages to Texas plaintiffs. Rather than discuss

whether *Huntington*'s penal exception should apply to claims already reduced to judgment, it simply assumed that it did. It then held, however, that full faith and credit nonetheless required Florida courts to enforce the punitive damage award because the "Texas suit insofar as it sought to recover punitive damages was based on common law liability arising from fraud to redress a private wrong * * * and did not purport to redress a public wrong predicated on a statute that is penal in the international sense which may not be enforced in the courts of other states." *Id.* at 61 (citing *Huntington*).

In the present case, the Nevada Supreme Court joined this group. It held that *Huntington*'s penal exception applies not only to penal causes of action but also to "penal judgments." App., *infra*, 8a. The only issue in the case, then, was whether Oakland's civil monetary judgment was penal or not. Because the court believed that the "remedies do not address private harms but rather address only public wrongs," *id.* at 16a, it pronounced the whole judgment penal and denied enforcement, *id.* at 15a-17a.

By contrast, courts of last resort in seven states—Arkansas, Illinois, Iowa, Massachusetts, Michigan, New Jersey, and Ohio—have held that the penal exception to full faith and credit does *not* extend to civil monetary judgments. *Jordan* v. *Muse*, 115 S.W. 162, 162 (Ark. 1909); *Schuler* v. *Schuler*, 71 N.E. 16, 18 (Ill. 1904); *Indiana* v. *Helmer*, 21 Iowa 370, 371 (1866); *Healy* v. *Root*, 28 Mass. (11 Pick.) 389, 397 (1831); *Ohio Dep't of Taxation* v. *Kleitch Bros.*, 98 N.W.2d 636 (Mich. 1959); *City of Philadelphia* v. *Bauer*, 478 A.2d 773, 776-777 (N.J. 1984); *City of*

Philadelphia v. *Austin*, 429 A.2d 568 (N.J. 1981); *Spencer* v. *Brockway*, 1 Ohio 259, 260 (1824). In other words, these jurisdictions all hold that once a court has reduced a claim to judgment, full faith and credit prohibits a sister State from denying it recognition because its underlying cause of action was penal. And they reason largely identically, holding that a penal law and a judgment based on that law are entirely different. Once a court reduces a penal claim to monetary judgment, these courts hold, that claim is merged in the judgment and a suit to enforce that judgment is a suit to enforce a debt, not to enforce the original cause of action.[1]

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[1] *Jordan*, 115 S.W. at 162 (holding penal exception not applicable to judgments because "[t]he original cause of action was merged in the decree of the Tennessee court, and we are commanded * * * to give full faith and credit to judicial proceedings of every other state"); *Schuler*, 71 N.E. at 18 (holding that although "full faith and credit * * * does not require a state to enforce the penal laws * * * of another state * * * where a court of a sister state * * * has taken cognizance and rendered judgment in a sum of money for the penalty prescribed * * * the judgment so rendered is entitled to full faith and credit in every other state"); *Helmer*, 21 Iowa at 371-372 (holding that although one state need not enforce another state's penal law in its courts "where * * * the courts of that state * * * have properly taken cognizance of the matter, and rendered judgment for such penalty, such judgment is entitled to full faith and credit"); *Healey*, 28 Mass. (11 Pick.) at 397 (enforcing judgment for *qui tam* penalty because "after the plaintiff had by a verdict and judgment reduced his damages to a certainty, the original cause of action [was] merged in the judgment"); *Bauer,* 478 A.2d at 777 ("Applying the doctrine of merger * * * leaves no doubt that the judgment is not a judgment based on [the original] cause of action * * * but a money judgment. The original cause of action is not before the New Jersey courts.");

2. Nevada's refusal to enforce a civil monetary judgment of a sister State both misreads *Huntington* and violates the central precepts of the Full Faith and Credit Clause. For starters, *Huntington* does not stand for the broad proposition the Nevada Supreme Court held it does. In *Huntington,* this Court decided only that a New York statute making corporate directors personally liable for a corporation's debts when they made certain false representations, see 146 U.S. at 660-661, was not a "penal law," see *id.* at 686 (holding "[t]he statute under which [the] judgment was recovered was not * * * a penal law"). It nowhere decided what consequences would have followed *had* the law been penal. In particular, it did not decide whether a civil monetary judgment into which a cause of action for violating that law had been merged would itself be "penal." These were independent issues the Court did not have to—and did not—reach. It was on this basis, in fact, that the Court could expressly reserve the question in *M.E. White*:

> We intimate no opinion * * * whether full faith and credit must be given to * * * a judgment [for an obligation created by a penal law, in the

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Austin, 429 A.2d at 571 ("[T]he reduction of [a] penalty to a civil judgment is a significant change in its status. That metamorphosis diminishes the penal nature of the claim and enhances the enforceability of the judgment under the Full Faith and Credit Clause."); *Spencer*, 1 Ohio at 260 ("The suit is for the recovery of a sum of money. It is founded on judgments obtained in the Supreme Court of the State of Connecticut, and not on the penal laws of that state."); but see *Kleitch Bros.,* 98 N.W.2d 636 (granting full faith and credit to another state's penal judgment without expressly invoking the merger doctrine).

> international sense, see *Huntington* v. *Attrill, supra*,] even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.

296 U.S. at 279 (bracketed text included in original quotation at different point). This Court could hardly have cited *Huntington* in reserving the question if *Huntington* itself had already decided it.

Limiting the penal exception to executing penal *laws* rather than extending it to enforcing civil monetary *judgments* also best promotes the purposes of the Full Faith and Credit Clause, which the Framers intended to preclude interstate friction by "transforming an aggregation of independent, sovereign States into a nation." *Sherrer* v. *Sherrer*, 334 U.S. 343, 355 (1948) (citing *M.E. White*, 296 U.S. at 276, 277). As this Court explained in *M.E. White*,

> [t]he very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

296 U.S. at 276-277.

Along with Article IV's other provisions, the Full Faith and Credit Clause was intended to foster interstate cooperation and, in particular, avoid the interstate discord that would result if individuals could evade liability from judgment by seeking shelter in a sister State. See *Hicklin* v. *Orbeck*, 437

U.S. 518, 523-524 (1978); Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 Ill. L. Rev. 1, 2-5, 18-19 (1945) (discussing how the Founders "were concerned not with the problems of comity or international courtesy, but with the attempt to render 'foreign attachment' ineffective by the simple process of removing attachable property"). Accordingly, commentators have noted that while the Full Faith and Credit Clause was generally intended to institute settled principles of comity and promote national unity among states, it did so by targeting one particularly threatening source of friction: runaway judgment debtors. See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 Yale L.J. 1584, 1587 (2009) ("Madison expressed confidence that '[t]he power here established, may be rendered a very convenient instrument of justice,' noting by way of example that Congress could prescribe enforcement (without further judicial proceedings) of sister-state court orders against judgment debtors absconding with goods.") (quoting THE FEDERALIST NO. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961) (footnote omitted)); Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 Minn. L. Rev. 497, 512-513, 515 (2002) ("The Framers were obviously concerned about judgment debtors using interstate borders to evade collection of judgments."); Radin, *supra* at 18-19. This case thus presents an important aspect of the primary problem the Framers designed the Full Faith and Credit Clause to overcome.

This Court has long recognized that treating an underlying claim as merged into the eventual monetary judgment strengthens these central

safeguards of federalism. For one thing, doing so helps make the several States "integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *M.E. White*, 296 U.S. at 277. In the absence of civil extradition, moreover, merger and enforcement provide the only guarantee—short of imposing a criminal sanction—that a State can vindicate its important regulatory interests against those who can flee with their assets outside the jurisdiction. For another, merger and enforcement of the judgment pose "no greater possibility of embarrassment [to individual states' interests] than any other [litigation over the validity and enforcement of a judgment] for the payment of money." *Id.* at 276. Thus, in *M.E. White*, this Court recognized that although allowing one State to sue private parties for taxes in another State's courts might create interstate friction, *id.* at 275, requiring the other State to enforce the first State's own monetary judgment for those same taxes would not:

> Trial of these issues, even though the judgment be for taxes incurred under the laws of another state, requires no scrutiny of its revenue laws or of relations established by those laws with its citizens, and calls for no pronouncement upon the policy of a sister state. It involves no more embarrassment than the interstate rendition of fugitives from justice, the constitutional command for which is no more specific than that requiring full faith and credit. Foreign judgments are not liens and are not entitled to execution in the state to which they are brought. They can no more demand priority over domestic claims for taxes than a judgment upon a simple contract debt,

> which is equally a binding obligation of the judgment debtor where rendered, and to which full faith and credit must be accorded.

Id. at 276.

So different, in fact, are the concerns over requiring States to execute other States' civil *laws* from those requiring states to enforce other States' civil *judgments* that this Court has

> differentiate[d] the credit owed to laws (legislative measures and common law) and to judgments. In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded. The Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.

Baker v. *General Motors Corp.*, 522 U.S. 222, 232-233 (1998) (internal quotation marks and citations omitted). Similarly, in *Titus* v. *Wallick*, 306 U.S. 282 (1939), this Court held that Ohio courts could not refuse to enforce a New York judgment on the ground that Ohio, unlike New York, did not allow the assignment of the underlying cause of action to a third party. The merger of the original claim in the

New York judgment, this Court noted, completely changed the nature of the suit in Ohio:

> The suit [for payment on the New York judgment] is upon a different cause of action from that merged in the judgment. It is the judgment and not the cause of action which gave rise to it for which credit is claimed, and the constitutional mandate requires credit to be given to a money judgment rendered on a civil cause of action in another state, even though the forum would have been under no duty to entertain the suit on which the judgment was founded.

Id. at 291.

II. The Nevada Supreme Court's Holding That Oakland's Civil Damage Award Was Penal In Its Entirety Creates Or Deepens Six Different Conflicts And Is Wrong On The Merits

As noted nearly a century ago, "[u]pon the question of what laws are penal in an international sense so that they will not be enforced by [another State's] court, the decisions are in hopeless conflict." *Christilly* v. *Warner*, 88 A. 711, 714 (Conn. 1913) (Beach, J., dissenting); see also Peter B. Kutner, *Judicial Indentification of "Penal Laws" in the Conflict of Laws*, 31 Okla. L. Rev. 590, 590 (1978) ("[T]here is no judicial consensus on what is and what is not a 'penal law.'"). The Nevada Supreme Court confused this murky area of law even further by creating or deepening six different conflicts in holding that Oakland's damages were "penal in nature." App., *infra*, 15a.

For starters, the Nevada Supreme Court overlooked the fact that California law grants

individuals, not just governments, a right of action to sue in these circumstances. Cal. Bus. & Prof. § 5466(a) (West 2011) allows "a private party" to sue for violations of city ordinances "as to an advertising display in place as of August 12, 2004 [unless it] has been in continuous existence in its current location for a period of five years." At the time of the original violation, in fact, California law did not even foreclose private suits against signs in existence for more than five years. See 2004 Cal. Stat. 4185 § 1 (enacting five-year restriction). If private parties can sue for the same violation Oakland did, the underlying law "afford[s] a private remedy to a person injured by the wrongful act," *Huntington,* 146 U.S. at 673-674, and the law should not be considered penal, even if the remedies may not be identical. Cf. Kutner, 31 Okla. L. Rev. at 599 ("The fact that an action is initiated by a government or an agency of government does not, in itself, subject it to the injunction that foreign penal laws are unenforceable. A civil action may be maintained by a foreign government if a similarly situated individual could obtain compensation in the same manner."). By refusing to enforce any judgment for damages when private parties could have sued on an analogous cause of action, moreover, the Nevada Supreme Court stands in conflict with at least Minnesota. See *Desper* v. *Warner Holding Co.*, 19 N.W.2d 62, 66 (Minn. 1945) ("With respect to the argument that the cause of action is penal * * * it is sufficient to note that the section in question provides for a private remedy to the person wronged by the violation of the act.") (quoting *Huntington*, 146 U.S. at 667).

Second, the Nevada Supreme Court deepened an existing conflict by refusing to disaggregate

Oakland's damages award into its different components to analyze each separately. App., *infra*, 15a-17a. Nevada, *ibid.*, and the District of Columbia, *Arkansas* v. *Bowen*, 20 D.C. (9 Mackey) 291 (1891), do not disaggregate damages awards—at least in some circumstances. By contrast, New Jersey, see, *e.g.*, *City of Philadelphia* v. *Smith*, 413 A.2d 952 (N.J. 1980) (analyzing one-percent fine separately from rest of award), and Florida, see, *e.g.*, *Holbein* v. *Rigot*, 245 So. 2d 57 (Fla. 1971) (treating punitive and compensatory damages separately under *Huntington*), do disaggregate them. The Nevada Supreme Court's failure to disaggregate is also wrong on the merits. It conflicts with this court's long-standing practice in applying *Huntington*. See, *e.g.*, *James-Dickinson Farm Mortgage Co.* v. *Harry*, 273 U.S. 119, 125-126 (1927) (applying *Huntington* analysis to only part of monetary judgment).

Further, in holding that the overall damages award was penal, the Nevada Supreme Court created or deepened four additional, distinct conflicts over whether the award's separate components were penal, in each instance ignoring this Court's precedents.

A. Attorney's Fees And Court Costs

Cal. Bus. & Prof. Code § 5485(e) provides for the award of "reasonable attorneys' fees." By its terms, the provision aims to provide recovery of the expenses incurred in pursuing the cause of action. It aims not to punish but to make the plaintiff whole. Under any tenable view of *Huntington*, damages that compensate cannot be penal. This Court itself has, in fact, enforced awards of costs granted by foreign courts, *e.g.*, *Ingenohl* v. *Olsen & Co.*, 273 U.S. 541,

543 (1927), which in many cases would have included attorney's fees, see R. at 8, *Ingenohl*, 273 U.S. 541 (1927) (No. 174) (enforcing English court in Hong Kong's judgment of costs for $26,244.33 in Hong Kong currency); Arthur L. Goodhart, *Costs*, 38 Yale L.J. 849, 856-858 (1929) (noting that English law at that time included solicitor and barrister fees in assessed costs). And this Court has enforced these awards under comity, a less respectful and demanding doctrine than domestic full faith and credit. See *Ingenohl*, 273 U.S. 541.

Unlike the Nevada Supreme Court, the other state supreme courts and the federal court of appeals that have considered this question have enforced attorney's fees and costs awarded by foreign, let alone domestic, courts. In *Spann* v. *Compania Mexicana Radiodifusora Fronteriza*, 131 F.2d 609, 610 (5th Cir. 1942), for example, the Fifth Circuit enforced an award of attorney's fees and costs amounting to 12 percent of the damages sought by an unsuccessful plaintiff. It held that "[t]he costs imposed are not by way of penalty." *Id.* at 611. Similarly, in *Desjardins Ducharme* v. *Hunnewell*, 585 N.E.2d 321, 324 (Mass. 1992), the Massachusetts Supreme Judicial Court held a foreign judgment for attorney's fees to be remedial, not penal, even though the fees were "based on a percentage of the [recovery and had] little to do with the actual costs." *Id.* at 323-324. "[T]here is no real difference," the court held, "between the judgment [and Massachusetts'] own contingency fee agreements which are recognized as valid measures of legal services rendered." *Id.* at 324.

B. Disgorgement

The California Superior Court also awarded Oakland $263,000 as disgorgement of Desert Outdoor's "gross revenues [obtained] from the unauthorized advertising display" under Cal. Bus. & Prof. Code § 5485(c). Since disgorgement requires the surrender of money obtained illicitly, it represents a traditional equitable remedy to prevent unjust enrichment, not a penalty. See *Masters* v. *UHS of Delaware, Inc.*, 631 F.3d 464 (8th Cir. 2011); *Coll* v. *First American Title Ins. Co.*, 642 F.3d 876 (10th Cir. 2011); *Cruz* v. *Pac. Care Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003). Disgorgement functions solely "to restore the *status quo ante,*" *Johnson* v. *SEC*, 87 F.3d 484, 491 (D.C. Cir. 1996), and "merely deprives [wrongdoers] of the gains of their wrongful conduct," *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971). It exacts no punishment in addition.

The Nevada Supreme Court's holding that disgorgement is penal not only errs but also creates a conflict with all those federal courts of appeals that have considered the issue in related contexts. In *SEC* v. *Bilzerian*, 29 F.3d 689 (D.C. Cir. 1994), for example, the D.C. Circuit held that court-ordered disgorgement of over $33 million was not penal. The D.C. Circuit rejected Bilzerian's contention that the civil sanction constituted punishment in violation of the Double Jeopardy Clause because it did not aim to make victims whole. *Id.* at 696. "Disgorgement is no less remedial in nature," it held, "merely because victims other than the government have been injured by Bilzerian's violations of the securities laws." The district court ordered Bilzerian to give up only his ill-

gotten gains; *it did not subject him to an additional penalty*." *Ibid.* (emphasis added). Although the D.C. Circuit did not expressly rely on *Huntington*, but rather on closely related double jeopardy principles, it later cited *Bilzerian* as an example of a non-penal remedy in a case turning on the *Huntington* definition. See *Johnson*, 87 F.3d at 491 (citing *Bilzerian* as authority that disgorgement is non-penal under *Huntington* because it seeks "to restore the *status quo ante*").

Similarly, in *Texas Gulf Sulphur*, 446 F.2d at 1308, the Second Circuit held that a civil order requiring restitution of ill-gotten profits was not penal because "[r]estitution of the profits on the transactions merely deprives the appellants of the[ ] gains of their wrongful conduct." And, in *United States* v. *Tilley*, 18 F.3d 295 (5th Cir. 1994), the Fifth Circuit held that civil forfeiture of the overall proceeds, not just profits, of drug sales, which is a form of disgorgement, did not represent punishment that would bar a subsequent criminal prosecution for the underlying crimes under double jeopardy. "The forfeiture of proceeds of illegal drug sales," it held, "serves the wholly remedial purpose of reimbursing the government for the costs [of enforcement]." *Id.* at 299. This Court has similarly held in the context of double jeopardy that civil forfeiture ordinarily does not represent punishment but rather "provides a reasonable form of liquidated damages for violation of [government regulations] and serves to reimburse the Government for investigation and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (per curiam).

C. Coercive Per Diem And Statutory Liquidated Damages

This Court has long recognized a distinction between prospective coercive fines, which a defendant can avoid by taking affirmative actions, and retrospective or penal fines, which are imposed for prior, completed bad acts. The former are designed to modify future behavior, not punish conduct that has already occurred, and are accordingly not penal in nature. See *U.S. Dept. of Energy* v. *Ohio,* 503 U.S. 607, 623-628 (1992); see also, *e.g.*, *International Union, United Mine Workers of America* v. *Bagwell*, 512 U.S. 821, 829 (1994) ("[C]ivil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience."); cf. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 442-443 (1911) (holding that a prison sentence imposed retroactively for a "completed act of disobedience" was criminal, not civil, since the defendants were "furnished no key, and . . . [could not] shorten the term by promising not to repeat the offense").

Section 5485(b)'s daily damages and $10,000 statutory liquidated damages operate in exactly this way. They are completely avoidable if the advertising structure's owner brings its conduct into compliance with the ordinance within 30 days of receiving an official notice to abate. They aim solely to "exert a constant coercive pressure," *Bagwell*, 512 U.S. at 829, on the owner to bring its future behavior into compliance with applicable regulations. In short, Desert Outdoor held the key to relief from both the per diem and $10,000 liquidated statutory damages.

It had only to remove the sign within 30 days of having received Oakland's first notice to abate. Because both these components of the damages operated completely prospectively and Desert Outdoor could have easily avoided their bite through forward compliance, they cannot be considered penal—that is, as punishment for past behavior.

In refusing to enforce these coercive damages, the Nevada Supreme Court created a conflict with at least Indiana. In *Hamilton* v. *Hamilton*, 914 N.E.2d 747 (Ind. 2009), the Indiana Supreme Court affirmed a lower-court judgment that extended full faith and credit to a Florida civil contempt order. Although it allowed that court to refuse to order the contemnor jailed (as the Florida order required if he refused to make overdue child support payments) it did so in recognition that "*remedies* for contempt are discretionary and do not bind responding tribunals." *Id*. at 749 (emphasis added). The other remedies ordered by the lower court, it held, were adequate to fully enforce the underlying judgments. *Id.* at 750-754. Similarly, many lower state courts grant full faith and credit to other States' civil contempt judgments and enforce at least their monetary components. See, *e.g.*, *Robinson* v. *Robinson*, 487 So. 2d 67, 68 (Fla. Dist. Ct. App. 1986) (holding "[a civil contempt] order need only be valid in the state in which it was issued for full faith and credit to attach and not the state in which suit is brought to enforce it"); *New York* v. *Sacco*, 577 A.2d 1333, 1337 (N.J. Super. Ct. Law Div. 1990) (holding *Huntington*'s penal exception inapplicable to New York civil contempt judgment because "[t]he court in New York did not * * * impose a monetary sanction for past derelictions. The purpose of the sanction was not to

punish an offense against the public justice of the state, but rather to motivate timely payment. Its purpose was neither reparation to one aggrieved, nor vindication of the public justice; rather, it was intended to be coercive, to induce defendants to post the bond which the court had previously decreed be posted. Further, the fines were prospective only. Had retroactive fines been imposed, a different issue would be presented.").

Finally, in refusing to enforce the $10,000 statutory liquidated damages, the Nevada Supreme Court created a sixth conflict and violated principles established by this Court in yet another way. In *City of Philadelphia* v. *Austin*, 429 A.2d 568 (N.J. 1981), and *City of Philadelphia* v. *Smith*, 413 A.2d 952 (N.J. 1980), the New Jersey Supreme Court granted full faith and credit to Pennsylvania civil judgments awarding fines of $2,400 and one-percent of unpaid taxes per month, respectively, against two individuals for unpaid city wage taxes. In enforcing the Pennsylvania lump-sum fine, the court held that the

> penalty * * * is imposed for failure to file an income tax return, an offense closely related to the collection of revenues. In fact, the * * * penalty may be necessary to compensate Philadelphia for its expense in collecting delinquent taxes. As an aid to the collection of taxes, the nature and purpose of the * * * penalty neutralizes its penal sting. We conclude that the purpose of the * * * penalty is not to punish, but to grant a civil remedy to the City.

Austin, 429 A.2d at 571. Similarly, in enforcing the percentage fine the court held that the "'penalty'

herein involved is not punishment but rather a surcharge imposed to compensate Philadelphia for its trouble and expense in collecting delinquent taxes." *Smith*, 413 A.2d at 954. In both cases, the fact that the damages could be seen to compensate the government for its expenses in enforcing valid regulatory measures "neutralize[d their] penal sting." *Austin*, 429 A.2d at 571.

This Court has likewise held that civil forfeiture is not ordinarily penal for related purposes of double jeopardy but rather "provides a reasonable form of liquidated damages for violation of [government regulations] and serves to reimburse the Government for investigation and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions." *One Lot Emerald Cut Stones*, 409 U.S. at 237. In the present case, the $10,000 statutory liquidated damages award should be viewed similarly. It can be seen, in large part, as reimbursing the government for its initial administrative "investigation and enforcement expenses," *ibid.*, a cost separate from attorney's fees. The New Jersey courts would have recognized this feature and have enforced at the very least this part of the California judgment.

III. This Case Presents An Ideal Vehicle For Resolving Several Practically Important And Recurring Issues Of Constitutional Law

This case presents two questions of constitutional law that go to the heart of interstate relations—whether a court may deny full faith and credit to a sister-state civil judgment on the ground that the underlying cause of action is penal and, if so, whether

particular remedies granting attorney's fees, disgorgement, and coercive per diem and statutory liquidated damages are penal in nature. The facts in this case are undisputed and the issues of law—upon which state supreme courts and federal courts of appeal stand in deep conflict—have all been argued, considered, and decided in the courts below.

The Full Faith and Credit Clause establishes a norm of reciprocity and finality that ensures nationwide respect for valid civil judgments. Few other areas of constitutional law speak so directly to interstate relations. See, *e.g.*, *Sherrer* v. *Sherrer*, 334 U.S. 343, 355 (1948) ("The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation."). Because of the increased ease of transportation and the growth of interstate commerce, the original purposes of the Full Faith and Credit Clause—particularly preventing judgment debtors from fleeing across state lines to evade collection, see pp. 17-18, *supra*—are even more important today than they were at the Founding. The Nevada Supreme Court's decision disrespects the civil judgments of other state courts and runs counter to the original policies of comity, efficiency, and fairness underlying the Full Faith and Credit Clause.

Should this Court hold, moreover, that full faith and credit does *not* require one State's courts to enforce the penal judgments of another, this case would allow it to clarify the scope of *Huntington*'s exception, an issue that has deeply divided and confused the lower courts. This case concerns a civil judgment awarding four different types of costs and

damages: attorney's fees and costs, disgorgement, and coercive daily and statutory liquidated damages. It thus presents an ideal vehicle for defining the contours of *Huntington*'s penal exception across a wide variety of contexts.

This petition gives the Court an opportunity to dispel confusion in the lower courts over a central structural protection of our federalism: whether and how the Full Faith and Credit Clause applies to penal claims reduced to civil monetary judgment. The case is, moreover, a particularly strong vehicle—one that presents two important, recurring, and related questions in the context of a single dispute. Either alone would warrant this Court's attention. Together they present a unique opportunity for this Court to resolve several long-standing and interrelated full faith and credit conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2011

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF OAKLAND, Appellant, vs. DESERT OUTDOOR ADVERTISING, INC., Respondent.	No. 53973

Appeal from a district court order granting a motion for NRCP 60(b) relief from a domesticated foreign judgment. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Affirmed.

Porter Simon, PC, and Brian C. Hanley and Peter H. Cuttitta, Reno, for Appellant.

Robison Belaustegui Sharp & Low and Frank C. Gilmore, Reno, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, CHERRY, J.:

This appeal involves an attempt by appellant City of Oakland to enforce, in Nevada, a California civil judgment against respondent Desert Outdoor Advertising, Inc. We consider whether the California judgment is entitled to full faith and credit in Nevada. Recognizing that Huntington v. Attrill, 146 U.S. 657 (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. Accordingly, we affirm the district court's decision in this matter.

FACTUAL AND PROCEDURAL HISTORY

In 2003, Desert Outdoor erected an outdoor billboard for advertising purposes within Oakland, California, city limits. Upon learning of the advertisement, Oakland sent a notice to abate to Desert Outdoor, advising it that the billboard was in violation of Oakland's municipal code. Specifically, the sign in question contained advertisements for businesses that were not located on the property on which the sign was erected, in violation of Oakland Municipal Code section 14.04.270.[1] After two months had passed and Desert Outdoor had taken no action, Oakland sent Desert Outdoor another notice to abate, advising Desert Outdoor that it was in violation of Oakland

[1] Oakland Municipal Code section 14.04.270 provides, among other things, that any billboard on a property that is adjacent to a freeway must relate to a business that is located on that property.

Municipal Code sections 14.04.270, 17.10.850,[2] and 17.70.050(B).[3] The second notice to abate also instructed Desert Outdoor to remove the billboard and its supporting pole within the next month.

After Desert Outdoor failed to remove the sign, Oakland filed suit against it in California for, among other things, unlawful business practices, with the consent of the Alameda County District Attorney. See Cal. Bus. & Prof. Code § 5466(b) (providing for civil actions brought by government entities). The California district court ultimately found that Desert Outdoor engaged in unlawful business practices through its violation of the aforementioned Oakland Municipal Code sections. Thus, the California district court imposed civil statutory penalties upon Desert Outdoor. On November 2, 2007, the California district court entered a civil judgment in favor of Oakland pursuant to California Business and Professions Code Section 5485.[4] The judgment was for (1) $124,000 in

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[2] Oakland Municipal Code section 17.10.850 defines advertising signs, in relevant part, as "[a] sign directing attention to, or otherwise pertaining to, a commodity, service, business, or profession which is not sold, produced, conducted, or offered by any activity on the same lot."

[3] Oakland Municipal Code section 17.70.050(B) provides that special, development, realty, civic, and business signs are to be permitted.

[4] California Business and Professions Code section 5485 provides, in relevant part, that

> (b) If a display is placed or maintained without a valid, unrevoked, and unexpired permit, the following penalties shall be assessed:

statutory civil penalties, which were calculated by adding

> (1) If the advertising display is placed or maintained in a location that conforms to the provisions of this chapter, a penalty of one hundred dollars ($100) shall be assessed.
>
> (2) If the advertising display is placed or maintained in a location that does not conform to the provisions of this chapter or local ordinances, and is not removed within thirty days of written notice from the department or the city or the county with land use jurisdiction over the property upon which the advertising display is located, a penalty of ten thousand dollars ($10,000) plus one hundred dollars ($100) for each day the advertising display is placed or maintained after the department sends written notice shall be assessed.
>
> (c) In addition to the penalties set forth in subdivision (b), the gross revenues from the unauthorized advertising display that are received by, or owed to, the applicant and a person working in concert with the applicant shall be disgorged.
>
> (d) The department or a city or a county within the location upon which the advertising is located may enforce the provisions of this section.
>
> (e) Notwithstanding any other provision of law, if an action results in the successful enforcement of this section, the department may request the court to award the department its enforcement costs, including, but not limited to, its reasonable attorneys' fees for pursuing the action.
>
> (f) It is the intent of the Legislature in enacting this section to strengthen the ability of local governments to enforce zoning ordinances governing advertising displays.

(Emphasis added).

the statutory penalty of $10,000, plus $75 per day for 1,520 days of violation; (2) $263,000 in disgorged profits; and (3) costs and attorney fees in the amount of $92,353.75. Desert Outdoor appealed the judgment, and the California Court of Appeal affirmed.

On February 28, 2008, Oakland filed its California judgment in Nevada's Second Judicial District Court, seeking enforcement of the judgment under the Uniform Enforcement of Foreign Judgments Act (UEFJA). NRS 17.330–.400. Thereafter, Oakland attached Desert Outdoor's bank accounts and income from Desert Outdoor's Nevada properties. Approximately 13 months after the judgment was filed in Nevada, Desert Outdoor filed a motion to set aside the foreign judgment and quash execution of the judgment. The district court granted Desert Outdoor's motion, concluding that because California's judgment was penal, it was not entitled to full faith and credit. This appeal followed.

DISCUSSION

On appeal, Oakland argues that the district court: (1) improperly relied on the United States Supreme Court's decision in Huntington v. Attrill, 146 U.S. 657 (1892), to conclude that the penal judgment of a sister state need not be given full faith and credit by Nevada courts; and (2) erred in concluding that the California civil monetary judgment was penal in nature. We disagree with Oakland's contentions, and we affirm the district court's decision.

The California judgment falls within the penal exception to the Full Faith and Credit Clause set forth in Huntington v. Attrill

On appeal, Oakland argues that the district court erred when it relied upon Huntington v. Attrill, (1892), to set aside the California judgment. Oakland contends that Huntington is a "relic" of "questionable authority," and that its enforcement is contrary to the purpose of the UEFJA, codified in Nevada at NRS 17.330 through 17.400, which is to "provide a speedy and economical method to enforce foreign judgments and to make uniform the laws of the states that enact it." As a result, Oakland argues, citing Rosenstein v. Steele, 103 Nev. 571, 573, 747 P.2d 230, 232 (1987), that the district court erred in setting aside the judgment because the only defenses available to Desert Outdoor under the UEFJA are those that a "judgment debtor may constitutionally raise under the Full Faith and Credit Clause and which are directed to the validity of the foreign judgment." For the reasons set forth below, we reject Oakland's contentions and conclude that the penal exception set forth in Huntington warrants against enforcement of the California judgment in Nevada.

The Full Faith and Credit Clause and the UEFJA

Under the Full Faith and Credit Clause of the United States Constitution, a final judgment entered in a sister state must be respected by the courts of this state. See U.S. Const. art. IV, § 1; Rosenstein, 103 Nev. at 573, 747 P.2d at 231; Donlan v. State, 127 Nev. ——, —— & n.1, 249 P.3d 1231, 1233 & n.1 (2011). "For the States of the Union, the

constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity." Broderick v. Rosner, 294 U.S. 629, 643 (1935).

To further the principle of comity, Nevada adopted the UEFJA in NRS 17.330 through 17.400. Under this act, a properly filed foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a Nevada district court judgment, and may be enforced or satisfied in like manner. NRS 17.350. Nevada's UEFJA applies to all foreign judgments filed in Nevada district court for the purpose of enforcing the judgment in Nevada. NRS 17.340; NRS 17.350. The act defines a foreign judgment "as any judgment of a court of the United States or of any other court which is entitled to full faith and credit in this state." NRS 17.340 (emphasis added).

However, not all judgments are entitled to full faith and credit in Nevada. Notably, "defenses such as lack of personal or subject-matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, satisfaction, or other grounds that make the judgment invalid or unenforceable may be raised by a party seeking to reopen or vacate a foreign judgment." 30 Am. Jur. 2d Executions and Enforcement of Judgments § 787 (2005); see also Rosenstein, 103 Nev. at 573, 747 P.2d at 232; Marworth, Inc. v. McGuire, 810 P.2d 653, 656 (Colo. 1991); Wooster v. Wooster, 399 N.W.2d 330, 333 (S.D. 1987) (quoting Baldwin v. Heinold Commodities Inc., 363 N.W.2d

191, 194 (S.D. 1985)). In addition, the United States Supreme Court has determined that the Full Faith and Credit Clause does not apply to penal judgments. Huntington v. Attrill, 146 U.S. 657, 666, 672–73 (1892); Nelson v. George, 399 U.S. 224, 229 (1970) (reiterating that "the full faith and credit clause does not require that sister states enforce a foreign penal judgment"). This exception for penal judgments, most notably analyzed in Huntington, is the law at issue here.

Huntington v. Attrill

In Huntington, Huntington obtained a judgment against Attrill in New York based on a statutory provision imposing joint and several liability on the officers of a corporation for the debts of the corporation itself if the officer made any materially false representation in a certificate, report, or public notice. Id. at 660–62. Huntington then brought a bill in Maryland state court seeking to have the New York judgment enforced in Maryland. Id. at 660–61. Attrill demurred to the bill on the grounds that Huntington's claim "was for recovery of a penalty against Attrill arising under a statute of the state of New York, and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the State of Maryland." Id. at 663. The circuit court of Baltimore overruled the demurrer, and the Maryland Court of Appeals reversed the decision of the circuit court and dismissed the bill on the grounds that "liability imposed by section 21 of the statute of New York ... was intended as a punishment for doing any of the forbidden acts, and was, therefore, ... a penalty which could not be enforced in the state of Maryland." Id.

Huntington then sought a writ of error in the United States Supreme Court, arguing that the Maryland court unconstitutionally denied full faith and credit to the New York judgment. Id. at 665. After determining that the question of whether full faith and credit was denied to the New York judgment in Maryland was a federal question, the Huntington Court stated that "in order to determine this question, it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law stated by Chief Justice Marshall in the fewest possible words: 'The courts of no country execute the penal laws of another.' " Id. at 666 (citing The Antelope, 23 U.S. 66, 123 (1825)). The Huntington court then determined that

> [t]he question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.

Id. at 673–74.

In analyzing whether the penal exception applies in this case, we must first resolve whether the penal analysis and exception in Huntington is dictum. Dictum is not controlling. Argentena Consol. Mining Co. v. Jolley Urga, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009); Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 282, 21 P.3d 16, 22

(2001). "A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.' " Argentena Consol., 125 Nev. at 536, 216 P.3d at 785 (quoting St. James Village, Inc. v. Cunningham, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009)).

We conclude that the statement in Huntington regarding the penal exception does not constitute dictum because it was necessary to determine the questions involved. While it has been indicated that this analysis is dictum, we disagree. See Enforcement by One State of Penal Statutes of Another, 26 Harv. L. Rev. 172 n.1 (1912) (stating that the penal exception discussion in Huntington was "dictum, since the case only decided that a judgment on such a statute must be given full faith and credit under the constitution"); Kersting v. Hardgrove, 48 A.2d 309, 310 (N.J. Cir. Ct. 1946) (stating that "courts of one sovereignty will not enforce the penal laws of a foreign sovereignty" is "oft repeated dictum" that goes back to Huntington and "the maxim of international law that '[t]he courts of no country execute the penal laws of another' " (quoting The Antelope, 23 U.S. 66, 123 (1825))).

As stated by the United States District Court in the Eastern District of Virginia, "the only issue before the Court in Huntington was the meaning of the terms 'penal' and 'penalty' in the context of the international law doctrine that penal laws of one jurisdiction will not be enforced in a foreign jurisdiction." Fisher v. Virginia Electric and Power Co., 243 F. Supp. 2d 538, 543 (E.D. Va. 2003).[5] The Huntington Court clearly stated that "[i]n order

5 The dissent misconstrues the court's statements in Fisher in an

to determine this question [of whether full faith and credit was denied], it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law ...: 'The courts of no country execute the penal laws of another.' " Huntington, 146 U.S. at 666 (quoting The Antelope, 23 U.S. at 123). The Huntington Court later concluded its decision on the fact that the "statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law in the international sense." *Id.* at 686, 13 S.Ct. 224.

After Huntington was decided, the United States Supreme Court impliedly questioned the penal exception in Milwaukee County v. White Co., 296 U.S. 268, 279 (1935), when it "intimate[d] no opinion whether a suit upon a judgment for an obligation created by a penal law, in the international sense, ... is within the jurisdiction of the federal district courts" (citation omitted). However, the Court then reiterated that "the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment" for a second time in Nelson v. George, 399 U.S. 224, 229 (1970) (citing Huntington, 146 U.S. 657). The Court noted that "until the obligation to extradite matures, the Full Faith and Credit Clause does not require California to enforce the North Carolina penal judgment in any way." Id. at 229 n.6; see also Philadelphia v. Austin, 429 A.2d 568, 572 (N.J. 1981) (stating that "the United

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attempt to bolster its position. When Fisher discusses "the Huntington fallacy," it is not disparaging the penal exception, as the dissent suggests, but is referring to Huntington's discussion of the local action doctrine, a real property trespass doctrine that is inapplicable in this case. Fisher, 243 F. Supp. 2d at 543–44.

States Supreme Court has continued to recognize the vitality of the penal exception" (citing Nelson, 399 U.S. at 229)).[6] Furthermore, numerous courts have recognized the viability of Huntington's penal exception. See, e.g., Schaefer v. H.B. Green Transportation Line, 232 F.2d 415, 418 (7th Cir. 1956) ("It is generally recognized that penalties fixed by state laws are not [enforceable] in federal courts or even in other State courts."); People v. Laino, 87 P.3d 27, 34 (Cal. 2004) (recognizing Huntington's penal exception and determining that "[i]f California need not give full faith and credit to penal judgments of another state, then it is free to determine under its own laws whether defendant's Arizona plea constitutes a conviction for purposes of the three strikes law"); Wellman v. Mead, 107 A. 396, 398–400 (Vt.

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6 The dissent points out that in Austin, the court enforced a sister state judgment but fails to explain that the holding in Austin was limited to a penalty for failure to pay taxes that the court recognized was not intended to punish but was "a civil remedy to the City in its role as tax collector." 429 A.2d at 571. In concluding that the Full Faith and Credit Clause requires enforcement of a sister state tax judgment, the court determined that

> it is not necessary to reject outright the penal exception to the Full Faith and Credit Clause. Indeed, that conclusion would be inappropriate lower court since the United States Supreme Court has continued to recognize the vitality of the penal exception. Nelson v. George, 399 U.S. 224, 229 (1970). In this decision, we distinguish between a purely penal law and a tax law with penal provisions.

Id. at 572. The court then left "the question of enforcement of an extrastate civil judgment containing penalties for violation of laws other than tax laws, such as parking ordinances," unresolved. Id.

1919) (recognizing that Huntington's penal exception applies to criminal laws and to penalties arising from municipal laws and concluding that the law at issue was not penal). Accordingly, we conclude that the Huntington penal analysis is not dictum.

Oakland further asserts that Huntington was effectively superseded by the passage of time and UEFJA, as recognized by Rosenstein, 103 Nev. at 573, 747 P.2d at 232. Oakland contends that according to Rosenstein, the only defenses to the UEFJA are not applicable here because the defenses are limited to those "that a judgment debtor can constitutionally raise under the full faith and credit clause and which are directed to the validity of the foreign judgment." Id.

We reject Oakland's argument because we conclude that Huntington's penal exception is an exception to the Full Faith and Credit Clause as it removes the judgment from the scope of the clause altogether. Because the California judgment is not one entitled to full faith and credit, it does not fall under Nevada's UEFJA. See NRS 17.340 (stating, in relevant part, that "unless the context otherwise requires, 'foreign judgment' means any judgment of a court of the United States or of any other court which is entitled to full faith and credit in this state" (emphasis added)); see also Farmers & Merchants Trust Company v. Madeira, 68 Cal.Rptr. 184, 188 (Ct. App. 1968) ("If the judgment is a penal judgment it is not enforceable in this state under either the full faith and credit clause of the United States Constitution or as a matter of comity."); S.H. v. Adm'r of Golden Valley Health Ctr., 386 N.W.2d 805, 807 (Minn. Ct.

App. 1986) (while not deciding the merits of the case, recognizing that "[t]he full faith and credit clause ... does not require a state to enforce the penal judgment of another state"); MGM Desert Inn, Inc. v. Holz, 411 S.E.2d 399, 402 (N.C. Ct. App. 1991) (" 'One exception to the full faith and credit rule is a penal judgment; a state need not enforce the penal judgment of another state.' " (quoting FMS Management Systems v. Thomas, 309 S.E.2d 697, 699–700 (NC. Ct. App. 1983))); Russo v. Dear, 105 S.W.3d 43, 46 (Tex. App. 2003) (recognizing that penal judgments are not entitled to full faith and credit as they are among the recognized exceptions to the full faith and credit requirements). Thus, not all judgments are entitled to full faith and credit under Nevada's UEFJA, as recognized by Rosenstein, and these exceptions include the applicable penal exception in this case.[7]

Based on the foregoing discussion, we conclude that the Huntington penal exception to the Full Faith and Credit Clause is valid and binding law. Because we conclude that penal laws are exempted from the requirements of full faith and credit in Nevada, we next turn to the determination of whether the California judgment in this case was penal in nature.[8]

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[7] While we have not discussed Huntington in the past, we disagree with Oakland that this somehow renders the Huntington doctrine not viable in Nevada. Huntington's penal exception has been repeatedly cited to over the years, has never been overruled by the United States Supreme Court, and has been enforced in other cases. See, e.g., Russo, 105 S.W.3d at 46; Holz, 411 S.E.2d at 402; S.H., 386 N.W.2d at 807.

[8] The dissent begins its argument that the California judgment

The California civil monetary judgment

Oakland contends that the civil judgment is remedial and not penal because it resulted from Oakland's enforcement of its individual rights under California's unfair competition laws and was brought to halt a private harm against Oakland. We disagree and conclude that pursuant to the language used in California Business and Professions Code section 5485, the assessed statutory civil penalties were penal in nature.

Under the Huntington test,

> [t]he question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.

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should be enforced in Nevada by pointing out that gambling debts are entitled to enforcement in sister states that prohibit gambling and prohibit the enforcement of gambling debts. However, the dissent fails to consider that it is illegal to cause a casino marker to be issued when the individual has insufficient funds to pay back the marker. See NRS 205.0832; NRS 205.130. It is not illegal to erect and maintain billboards in violation of zoning codes. Accordingly, these two situations are not analogous.

146 U.S. at 673–74. "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." Id. at 683.

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.

We conclude that Oakland was not a private entity enforcing a civil right. Instead, pursuant to California Business and Professions Code section 17206, Oakland filed suit, with the permission of the Alameda County District Attorney, seeking penalties for Desert Outdoor's violations of Oakland zoning ordinances. Under these circumstances, it does not appear that private parties could have sued Desert Outdoor pursuant to California Business and Professions Code section 5466. However, each principal, agent, or employee of Desert Outdoor is also guilty of a misdemeanor for violating the billboard code sections. Cal. Bus. & Prof. Code § 5464. Moreover, California Business and Professions Code section 5485(f) makes plain that the legislature's intent in mandating such penalties was "to strengthen the ability of local governments to enforce zoning ordinances governing advertising displays." As such, it is clear that the statutes' remedies do not address private harms but rather address only public wrongs—in this case, the abatement of a public nuisance—and were intended to

deter conduct deemed wrongful under California law. While Oakland contends that it suffered damages, we conclude that the purpose of the statute and resulting judgment was not to "afford a private remedy to a person injured by the wrongful act," but its essential character and effect was to "to punish an offense against the public justice of the state," as evidenced by Oakland implementing suit. Huntington, 146 U.S. at 673–74.[9]

Accordingly, we conclude that this penal judgment cannot be enforced in Nevada pursuant to Huntington, and we affirm the judgment of the district court.[10]

/s/, J.
Cherry

We concur:

/s/, J.
Saitta

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[9] Our conclusion that the judgment is unenforceable renders moot the question of whether the doctrine of equitable estoppel bars Desert Outdoor's attempt to set aside the domesticated judgment under NRCP 60(b)(4). Accordingly, we will not discuss this contention further.

[10] We have carefully considered Oakland's contention that the question of whether Nevada will enforce a penal judgment is still permissive in nature and that the judgment here should be enforced based on public policy grounds, and we conclude that this contention is unpersuasive.

/s/, J.
Gibbons

/s/, J.
Parraguirre

PICKERING, J., with whom DOUGLAS, C.J., and HARDESTY, J., agree, dissenting:

A Nevada judgment on a gambling debt is entitled to enforcement in a sister state, even though the sister state has statutes that outlaw gambling and prohibit judicial enforcement of gambling debts. MGM Desert Inn., Inc. v. Holz, 411 S.E.2d 399, 401–03 (N.C. Ct. App. 1991) (citing the Full Faith and Credit Clause analysis in Fauntleroy v. Lum, 210 U.S. 230, 237 (1908), and the Uniform Enforcement of Foreign Judgments Act). I would extend the same reciprocal courtesy to the California judgment presented here. True, the California judgment, while civil, embodies a fine imposed to coerce compliance with an Oakland outdoor advertising ordinance, after warnings and lesser remedies failed. But the issue is not whether Nevada must allow Oakland to sue on its ordinance originally in a Nevada court. We have here a California judgment, fully enforceable under its laws for enforcing civil judgments, presented to our Nevada courts for enforcement against a Nevada defendant that departed California for Nevada after suffering judgment there. This California judgment is as enforceable under the Full Faith and Credit Clause of the United States Constitution[1][2][1] and the

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[1] The Full Faith and Credit Clause of the United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.

Uniform Enforce-ment of Foreign Judgments Act, NRS 17.330–.400, as the gambling debt judgment in MGM Desert Inn. For these reasons, and as a matter of comity, I respectfully dissent.

The majority takes Huntington v. Attrill, 146 U.S. 657 (1892), as gospel. But Huntington's holding, as distinct from its dictum, is that a Maryland court violated the Full Faith and Credit Clause and erred in not enforcing a New York judgment based on a New York statute that made a corporation's directors who violated the state's corporation laws automatically liable for the entity's debts. In so ruling, the Supreme Court rejected the defendant's argument that the underlying claim was based on "a penal law, in the international sense," id. at 673, and thus did not deserve full faith and credit. The "international sense" of the New York judgment and law figured in Huntington, at least in part, because the record showed a Canadian tribunal had enforced the same New York judgment that Maryland had declined to enforce. Id. at 680–81 (noting that a "Committee of the Privy Council of England, upon an appeal from Canada, in an action brought by the present plaintiff [Huntington] against Attrill in the province of Ontario upon the judgment to enforce which the present suit was brought" had deemed the New York judgment enforceable in Canada). The New York judgment received more full faith and credit in Canada, in other words, than it did in Maryland, an anomaly Huntington rectified.

Huntington does contain language, cited by the majority, suggesting that the Full Faith and Credit

Clause permits a state court to refuse to enforce a sister state penal judgment on the same terms as it might deny effect to a foreign-country penal judgment, and, drawing on international law, Huntington deems "penal" a judgment based on a law whose "purpose is to punish an offense against the public justice of the State." Id. at 673–74. However, unlike the majority, I view this language as dictum, perhaps necessary to frame the arguments presented but not necessary to the actual holding in Huntington. See Note, Enforcement by One State of Penal Statutes of Another, 26 Harv. L. Rev. 172 n.1 (1912) (the penal exception discussion in Huntington is "dictum, since the case only decided that a judgment on such a statute must be given full faith and credit under the constitution"); Kersting v. Hardgrove, 48 A.2d 309, 310 (N.J. Cir. Ct. 1946) (stating that "courts of one sovereignty will not enforce the penal laws of a foreign sovereignty" is "oft repeated dictum" that goes back to Huntington and "the maxim of international law that '[t]he courts of no country execute the penal laws of another' " (quoting The Antelope, 23 U.S. 66, 123 (1825))). And in a later decision, the Court cited Huntington but reserved (or revived) the question whether a sister state judgment for a monetary penalty is entitled to full faith and credit: "We intimate no opinion whether[, in] a suit upon a judgment for an obligation created by a penal law, in the international sense, ... full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed." Milwaukee County v. White Co., 296 U.S. 268, 279 (1935).

Milwaukee County suggests considerable uncertainty as to the scope and/or viability of Huntington's so-called penal exception, as applied to a sister state money judgment, even where, as here, that judgment runs in favor of a local governmental entity. Certainly, Huntington does not compel the holding that a state must, under the Full Faith and Credit Clause, refuse to enforce a sister state's money judgment because that judgment may be based on a law that is "penal ... in the international sense." Commentators, too, recognize that Huntington is sketchy authority, at best, on this point. As noted in the Restatement (Second) of Conflict of Laws section 120, comment d (1971): "The Supreme Court of the United States has never squarely decided whether a State may look through the valid money judgment of a sister State and refuse to enforce the judgment on the ground that it was based on a penal cause of action." It goes on to say that "[t]he privilege of refusing to enforce the sister State judgment, if it exists at all, is a narrow one." *Id.* (emphasis added); see also Robert A. Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv. L. Rev. 193, 202 (1932) ("Essentially civil claims should never be denied extrastate enforcement merely because the epithet penal can be attached to them.").

The law distinguishes between suits to enforce claims arising under another state's laws and suits on final judgments rendered by a sister state. States may not be obligated to entertain suits based on sister state tax laws or laws that deeply offend local public policy. Milwaukee County, 296 U.S. at 274–75;

Nevada v. Hall, 440 U.S. 410, 421–22 (1979). Once the claim has been reduced to judgment, however, the Full Faith and Credit Clause makes the judgment portable from state to state and requires interstate enforcement of the civil judgment that results. Milwaukee County, 296 U.S. at 275–76; Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438 (1943) (while "there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, ... [w]e are aware of no such exception in the case of a money judgment rendered in a civil suit [or] of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition").

The case law the majority cites to show the vitality of the rule it takes from Huntington offers little true support. In one case, Wellman v. Mead, 107 A. 396, 398 (Vt. 1919), the Vermont Supreme Court discussed the penal exception only to decide whether Vermont courts would entertain a suit arising under Massachusetts law. The majority's reliance on this case confuses the distinction—drawn in Milwaukee County and discussed above—between suits to adjudicate *claims* arising under another state's laws and suits to enforce final judgments rendered by a sister state. Milwaukee County, 296 U.S. at 275–76. Another case, Fisher v. Virginia Electric and Power Co., 243 F. Supp. 2d 538, 543–44 (E.D. Va. 2003), is dictum about dictum. Fisher cites Huntington only to inform a discussion on which law—state or federal—determines whether an action is local or

transitory in nature (and disparages "the Huntington fallacy" as "broad discourse" involving a "rather obvious misapprehension" of law modernly rejected as "dictum").

In a third case, Schaefer v. H.B. Green Transportation Line, 232 F.2d 415, 418 (7th Cir. 1956), the Seventh Circuit Court of Appeals discussed the penal exception in the context of whether an Illinois law applied extraterritorially, not whether an Illinois judgment would be enforced extraterritorially. In that case, the plaintiff brought suit in the federal district court of Illinois seeking to enforce an Illinois corporate statute against an Iowa corporation for corporate conduct that occurred in Iowa. Id. at 417. The court held that the statute could not be applied. Id. at 418. But it is one thing to deny extraterritorial application of a state's statute, and quite another to deny enforcement of a sister state judgment embodying a civil fine imposed for erecting and maintaining billboards in the sister state's airspace and against its zoning laws. Indeed, the majority's fourth case, Philadelphia v. Austin, 429 A.2d 568, 572 (N.J. 1981), makes this point—and does so in the context of a local governmental entity's suit on a sister state money judgment for a fine. Thus, in Austin, the New Jersey Supreme Court enforced a Pennsylvania judgment in favor of the City of Philadelphia for a penalty incurred for not complying with a Philadelphia wage tax ordinance, doing so both as a matter of full faith and credit under Milwaukee County, id. at 571, and as a matter of

comity. Id. at 572–73.[132]

Differences between the Uniform Enforcement of Foreign Judgments Act and the Uniform Foreign–Country Money Judgments Act, both of which have been adopted in Nevada, provide statutory support for recognizing the California judgment in this case. In Overmyer v. Eliot Realty, 371 N.Y.S.2d 246, 256 (Sup. Ct. 1975), a New York court observed that the Uniform Enforcement of Foreign Judgments Act, which governs enforcement of sister state judgments, does not have a penal exception, id. at 256, while its Uniform Recognition of Foreign–Country Money Judgments Act, which governs enforcement of international judgments, contains an exception to recognition when the foreign country judgment is for "penalties or taxes." Id. From this, the Overmyer court concluded that, as a matter of comity, a sister

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[2] Nelson v. George, 399 U.S. 224, 229 (1970), and People v. Laino, 87 P.3d 27, 33–34 (Cal. 2004), cited by the majority, involve instances where the penal exception actually applies, *i.e.,* in assessing a sister state criminal conviction and its consequences under the host state's criminal laws. See Nelson, 399 U.S. at 229 n.6 (discussing the penal exception in connection with a habeas petition challenging a North Carolina criminal conviction/detainer claimed to affect a California parole determination); Laino, 11 Cal.Rptr.3d 723, 87 P.3d at 37–38 (discussing the effect of an Arizona judgment of conviction on California's three-strikes law). Of note, even in this context, Nevada can—though it is not constitutionally required to—recognize and attach consequences to a sister state criminal conviction. See Donlan v. State, 127 Nev. ——, 249 P.3d 1231 (2011) (California judgment of conviction required sex offender to register in Nevada, even though the registration requirement had expired in California, where the conviction originated).

state civil judgment embodying a fine or penalty will be enforced, whereas a comparable foreign country judgment will not.

Our statutes contain the same differences as those in Overmyer. Nevada's version of the Uniform Recognition of Foreign–Country Money Judgments Act includes a section on applicability, and provides that a foreign-country judgment for a sum of money need not be enforced if it is for a fine or other penalty. NRS 17.740(2)(b); see Unif. Foreign Money–Judgments Recognition Act § 1(2), 13 U.L.A. 44 (2002); Unif. Foreign–Country Money Judgments Recognition Act § 3(b)(2), 13 U.L.A. 12 (Supp.2010). On the other hand, our Uniform Enforcement of Foreign Judgments Act, which outlines procedures for enforcement of sister state judgments, lacks an applicability provision, much less a penal exception. See NRS 17.330–.400. It requires only that the sister state judgment be filed with the clerk of court. NRS 17.350. "A judgment so filed has the same effect ... as a judgment of a district court of this state and may be enforced or satisfied in a like manner" and is to be treated "in the same manner as a judgment of the district court of this state." NRS 17.350.

For these reasons, I would enforce the City of Oakland's judgment, even though it may embody a fine. Such a judgment might not be internationally enforceable, but it should be enforceable when rendered by a sister state.

/s/, J.
Pickering

We concur:

/s/, C.J.
Douglas

/s/, J.
Hardesty

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CITY OF OAKLAND,

Plaintiff,

vs.

DESERT OUTDOOR ADVERTISING, INC., DOES I-V, inclusive,

Defendants.

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Case No. CV08-00519

Dept. No. 8

ORDER GRANTING MOTION TO SET ASIDE FOREIGN JUDGMENT AND MOTION TO QUASH EXECUTION UPON FOREIGN JUDGMENT

Desert Outdoor Advertising, Inc. ("Defendant") presents this Court with a *Motion to Set Aside Foreign Judgment and Motion to Quash Execution Upon Foreign* Judgment ("Motion"). The City of Oakland ("Plaintiff") opposes the Motion. This Court, having considered all papers and pleadings on file herein, finds and concludes as follows.

On November 2, 2007, the Plaintiff secured a judgment against Defendant in the Superior Court of

California, Alameda County. That judgment incorporated the California court's Statement of Decision ("Decision") following a bench trial. On February 28, 2008, Plaintiff filed the judgment with the Clerk of the Second Judicial District Court, pursuant to the Uniform Enforcement of Foreign Judgments Act. On January 2, 2009, Plaintiff filed a Writ of Execution, commanding the Washoe County Sheriff to seize any non-exempt property for satisfaction of the judgment. Plaintiff has garnished Defendant's bank accounts and is currently garnishing income from property Defendant owns in Nevada.

The Superior Court of California found that Defendant's construction and maintenance of an outdoor advertising sign was in violation of Oakland Municipal Code §§14.04.270, 17.10.850, and 17.70.05(B), because it is "an advertising sign designed to be visible from the freeway and does not relate to a business on the premises where the sign is located." Decision, p.4. The court found that it has "the authority to impose civil penalties for defendant Desert Outdoor Advertising's violation of California's statutory prohibitions against unfair business practices. [Bus. & Prof. Code §17200]. The statutory remedies include civil penalties under Bus. & Prof. Code §17206."

The California Business and Professions Code provides "In assessing the amount of the penalty, the court shall consider the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of defendant's

misconduct, and the defendant'[] assets, liabilities and net worth." Decision, pp. 4-5 (citing Bus. & Prof. Code §17206(b)). "If the advertising display is placed or maintained in a location that does not conform to the provision of this chapter or local ordinance, and is not removed within thirty dates of written notice from the department or the city…which the advertising display is located, a penalty of ten thousand dollars ($10,000) plus one hundred dollars ($100) for each day the advertising display is placed or maintained after the department sends written notice shall be assessed." Decision, p. 5 (citing Bus. & Prof. Code 5485(b)(2)).

Because Defendant failed to remove the sign within thirty days of written notice from the Plaintiff, the court found that it "must impose statutory civil penalties against defendant pursuant to Bus. & Prof. Code §5485(b)(2) in the amount of $43,600." Decision, p. 5. In addition to the civil penalties, the court found that it had the authority to disgorge gross revenues from Defendant's unauthorized advertising display in the amount of $263,000 pursuant to Bus. & Prof. Code §5485(c), and awarded Plaintiff reasonable attorney's fees and costs (to be determined) pursuant to Bus. & Prof. Code §5485(e). Decision, p.6.

In the instant Motion Defendant moves this Court for relief from judgment pursuant to NRCP 60(b). Defendant argues that the execution and garnishment of Defendant's property is improper. Defendant argues that Plaintiff's judgment, upon which the execution relies, should not have been given full faith and credit according to the U.S. Constitution and Nevada state law, because the

execution is an improper attempt to execute a penal fine against the Nevada assets of Defendant, a Nevada Corporation. Defendant argues that because the fine is a sister-state "penalty," it is not entitled to full faith and credit, and as a result this Court, as a court of the State of Nevada, cannot enforce the judgment. See Nevada Uniform Enforcement of Foreign Judgments Act, NRS 17.330 *et seq*. Therefore, Defendant moves this Court to set aside Plaintiff's Foreign Judgment, and to quash the Writ of Execution.

In opposition, Plaintiff argues that the California Superior Court's judgment is a civil monetary judgment, and not a penalty, and therefore it is entitled to full faith and credit under Nevada law. NRS 17.330 *et seq*. Plaintiff also argues that Defendant's Motion is time barred by the six month requirement provided for in NRCP 60(b).

Pursuant to Nevada's Uniform Enforcement of Foreign Judgments Act, any judgment of a sister-state "which is entitled to full faith and credit" is to be enforced in Nevada as if the judgment had been procured in a district court in the State of Nevada. NRS 17.340, 17.350. Not all sister-state judgments are entitled to full faith and credit, however. Defenses preserved by Nevada's Uniform Enforcement of Foreign Judgments Act are preserved and available under NRCP 60(b). One such defense to full faith and credit is the penal exception: "The courts of no country execute the penal laws of another." Huntington v. Attrill, 146 U.S. 657, 666, 13 S.Ct. 224, 227 (1892) (citing The Antelope, 10 Wheat. 66, 123).

The United States Supreme Court explained the penal exception to the Full Faith and Credit Clause as follows:

> "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 are distinguished by the harsher appellation of 'crimes and misdemeanors…' Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states… Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state; and the authorities, legislative, executive, or judicial, of other states take no action with regard to them" Huntington v. Attrill,supra, at 668-669, 228, (internal citation omitted).

Plaintiff correctly points out that not all jurisdictions have followed the Huntington formulation. For example, California courts have

declined to follow Huntington's analysis in evaluating whether statutorily mandated payments constitute penalties. See Prudential Home Mortgage Co. v. Superior Court, 66 Cal.App.4th 1236, 78 Cal.Rptr.2d 566 (1998); see also Moss v. Smith, 171 Cal. 777, 784, 155 P.90 (1916) (Huntington's analysis limited to a determination of what is penal in an "international" sense). Instead, the California Supreme Court developed a test for determining whether a statutory payment constitutes a penalty: whether the payment punishes wrongdoing and imposes an amount unrelated to actual damages. Prudential, supra, 66 Cal.App.4th at 1242, 1245, 78 Cal.Rptr.2d 566; see also Goehring v. Chapman University, 121 Cal.App.4th 353, 386-387, 17 Cal.Rptr.3d 39 (2004) (provision requiring refund of fees to students misinformed about school's accreditation describes a penalty because amount due bears no relation to actual damages, distinguishing Huntington).

However, in this case, regardless of whether this Court adopts the Huntington or the Prudential analysis, the conclusion is the same. Adhering to a Huntington analysis, the Court finds that the "penalty" assessed by the California Superior Court is penal in the sense that it addresses a public wrong rather than imposing damages to address a private injury. Adhering to the California approach under Prudential, the Court finds that the statutory penalty must be considered penal in nature being that the amount assessed against Defendant—approximately $420,000 including attorney fees—was fixed without reference, and bears no relation to actual damages.

In conclusion, because this Court finds that the judgment entered by the California Superior Court is a deterrent statutory penalty, the Court finds that the penal exception to the Full Faith and Credit clause applies.[1] Therefore the Plaintiff's domestication of the judgment is void, and Defendant's *Motion to Set Aside Foreign Judgment* and *Motion to Quash Execution upon Foreign Judgment* are hereby GRANTED.[2]

IT IS SO ORDERED.

Dated this 15 day of May, 2009.

/s/
DISTRICT JUDGE

[1] Although Defendant has filed the instant *Motion to Set Aside Foreign Judgment and Motion to Quash Execution upon Foreign Judgment* beyond NRCP 60(b)'s six month requirement, the question of whether Defendant's Motion was filed within a "reasonable amount of time" is one within this Court's discretion. Considering the complexity of the legal issue in this case, this Court finds Defendant's Motion timely. In re Harrison Living Trust, 121 Nev. 217, 222, 112 P.3d 1058, 1061 (2005).

[2] Pursuant to this Order, Defendant's *Emergency Ex Parte Motion to Stay Execution on Foreign Judgment* is moot.

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA, the CITY OF OAKLAND Plaintiffs, CITY OF OAKLAND, a municipal corporation, Real Party in Interest, v. PAUL R. JURICH, an individual, DESERT OUTDOOR ADVERTISING, INC. a California Corporation, DESERT OUTDOOR ADVERTISING, INC. a Nevada Corporation and DOES 1 to 20,	Case No. RG03132111 **JUDGMENT**

This matter was tried before this Court, trial by jury having been waived, Deputy City Attorney Jannie L. Wong, Esq. appeared for Plaintiffs The People of the State of California and the City of Oakland; Gerald Murphy, Esq. appeared for Defendants, Paul R. Jurich and Desert Outdoor Advertising, Inc.

In accordance with the Court's Statement of Decision, filed on September 25, 2007 attached and

incorporated herein as Exhibit "A," and the Court's Amendment to Statement of Decision, filed on October 19, 2007, attached and incorporated herein as Exhibit "B" and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Judgment be entered in favor of plaintiffs The People of the State of California and City of Oakland against defendants Desert Outdoor Advertising, Inc., a California corporation, and Desert Outdoor Advertising, Inc., a Nevada corporation.

2. Desert Outdoor Advertising Inc., a California corporation and Desert Outdoor Advertising, Inc., a Nevada corporation are to pay plaintiffs' recoverable costs, attorney's fees, disbursements and expenses as will be stated in their Memorandum of Costs to be filed separately.

Dated: November 1, 2007

/s/
Honorable Gordon Baranco
Superior Court Judge

EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

CITY OF OAKLAND, a municipal corporation Plaintiff, vs. PAUL R. JURICH, an individual, DESERT OUTDOOR ADVERTISING, INC. A California Corporation, and does 1 to 20 inclusive Defendants.	RG03-132111 STATEMENT OF DECISION (California CCP §632)

The matter came on for trial by Court in Department 15, Superior Court of the State of California, County of Alameda on May 7, 2007, on a First Amended Complaint (filed March 25, 2004), First and Third Causes of Action, and was submitted on May 10, 2007.

Plaintiff, City of Oakland was represented by Jannie Wong, Deputy City Attorney; Defendants Paul Jurich and Desert Outdoor Advertising were

represented by Gerald Murphy.

The court received evidence and testimony from the following witnesses: Jeffrey Herson, Paul Jurich, Joe Wang and Joan Jurich. Defendant requested a Statement of Decision pursuant to Civil Code of Procedure Section 632 on August 1, 2007, after the Court issued a Notice of Decision on July 27, 2007.

As to the First Cause of Action of the First Amended Compliant for Fraud and Intentional Misrepresentation (as to both defendants) and the Third Cause of Action for Unlawful Business Practices (as to Defendant Desert Outdoor only), the plaintiff has the burden of proving the allegations are "more likely to be true than not true."

This action arises out of defendants Paul Jurich and Desert Outdoor Advertising, Inc.'s construction and maintenance of an outdoor advertising sign on Paul Jurich's property located at 3350 East 9th Street, Oakland, California. Plaintiffs allege that defendants constructed and maintained the sign in violation of Oakland Municipal Code ("OMC") § 14.04.270 (the "Sign Code").

On November 12, 2001, defendant Paul Jurich and defendant Desert Outdoor Advertising entered into an agreement for the construction of an advertising sign on Jurich's property a 3350 East 9th Street, Oakland, California. The agreement was for construction of an outdoor advertising structure (12'x36'x50') that was intended to be viewed from the freeway.

In January of 2003, defendant Desert Outdoor advertising erected on defendant Jurich's property a

sign visible from the freeway stating "Smog Busters Coming Soon". There was no Smog Busters occupying the premises, and there has never been a Smog Busters at that site. Although Desert Outdoor Advertising subsequently removed the advertising copy for Smog Busters by covering up the sign, they never removed the sign. Since 2003, Desert Outdoor Advertising has replaced the Smog Busters sign with other advertising signs (Cingular, River Rock Casino, Oaks Card Club and Toyota of Alameda).

On March 4, 2003, the City of Oakland sent defendant a Notice to Abate and advised them that the sign was in violation of Oakland Municipal Code § 14.04.270.

On April 28 2006, the City of Oakland sent defendants a Notice to Abate and advised they were in violation of Oakland Municipal Codes §§14.04.270, 17.10.850 and 17.70.050(B). Defendants were instructed to remove the sign and pole by May 28, 2006.

Plaintiff City of Oakland is authorized to bring this action for Unlawful Business Practices, Violation of Section 17206 with the consent of the Alameda County District Attorney (which was granted on February 23, 2004).

The uncontroverted testimony of Paul Jurich and Jeffery Herson indicates Paul Jurich did not erect nor operate the sign. Both defendants believe the sign (and its contents) are controlled by Jeffery Herson and Desert Outdoor Advertising.

As to the First Cause of Action (as to Defendant Jurich), and based primarily on the testimony of each

Defendant, the City has failed to present evidence with the requisite convincing force regarding "intent" to sustain its allegations against Defendant Paul Jurich. (California Civil Code Section 1710). Plaintiff shall take nothing as against Defendant Paul Jurich.

As to the First Cause of Action (as to Defendant Desert Outdoor), the testimony of Jeffrey Herson, (particularly as it pertains to Plaintiff's Exhibit#1) provides sufficient convincing force to deny Plaintiff's claim that Defendant misrepresented the "visibility" of the sign at 3350 East 9th Street, Oakland, California. Plaintiffs shall take nothing against Defendant Desert Outdoor as to the First Cause of Action of the First Amended Complaint.

Under California Business and Professions Code section 17200 et seq., businesses are prohibited from engaging in "any unlawful, unfair, or fraudulent business act or practice. Violation of local zoning laws constitutes and "unlawful business practice."

Defendant Desert Outdoor Advertising's construction and maintenance of the advertising sign at 3350 East 9th Street violates OMC§§14.040270, 17.10.850 and 17.70.05(B). The sign is an advertising sign designed to be visible from the freeway and does not relate to a business on the premises where the sign is located.

The Court has the authority to impose statutory civil penalties for defendant Desert Outdoor Advertising's violation of California's statutory prohibitions against unfair business practices. [Bus. & Prof. Code §17200]. The statutory remedies include civil penalties under Bus. & Prof. Code §17206. In

determining what constitutes a "violation," the Court considers the type of violation involved, the number of victims and the repetition of the conduct constituting the violation.

In assessing the amount of the penalty, the court shall consider the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of defendant's misconduct, and the defendant' assets, liabilities and net worth. (Bus. 7 Prof. Code §17206(b).

Bus. & Prof. Code §5485(b)(2) provides that, "If the advertising display is placed or maintained in a location that does not conform to the provision of this chapter or local ordinance, and is not removed within thirty dates of written notice from the department or the city…which the advertising display is located, a penalty of ten thousand dollars ($10,000) plus one hundred dollars ($100) for each day the advertising display is placed or maintained after the department sends written notice shall be assessed."

On April 28, 2006, the City of Oakland gave defendants written notice to remove the sign by May 28, 2006. Defendants failed to remove the sign within thirty days of written notice from the City. Business and Professions Code Section 5485(b)(2) mandates a penalty of $10,000 plus $100 per day for an advertising displayed after written notice of an ordinance violation (April 28, 2006). The Court must impose statutory civil penalties against defendant pursuant to Bus. & Prof. Code §5485(b)(2) in the amount of $43,600 (Forty-three thousand six hundred

dollars), $10,000 plus 336 days @ $100/day from April 28, 2006 through May 4, 2007.

The Outdoor Advertising Act, Bus. & Prof. Code §5845(c) provides that, "In addition to the penalties set forth in subdivision (b), the gross revenues from the unauthorized advertising display that are received by, or owed to, the applicant and a person working in concert with the applicant shall be disgorged."

Business and Professions Code Section 5485(c) requires that defendant Desert Outdoor Advertising disgorge gross revenues from an unauthorized advertising display, in addition to the penalties imposed by Business and Professions Code Section 5485(b)(2). The gross revenues are $263,000 (two thousand sixty-three thousand dollars).

Bus. & Prof. Code §5485(e) provides that, "Notwithstanding any other provision of law, if an action results in successful enforcement of this section, the department may request the court to award the department its enforcement costs, including but not limited to, its reasonable attorney's fees for pursuing the action".

Reasonable attorney's fees and costs (to be determined) are awarded plaintiffs pursuant to Business and Professions Code Section 5485(e). In accordance with the forging, Plaintiff shall have judgment against defendant Desert Outdoor Advertising on the Second Cause of Action for unlawful business practices, Violation of Bus. & Prof. Code §§17200 et. seq.

DATED: September 25, 2007 /s/
Gordon S. Baranco
Judge of the
Superior Court

EXHIBIT B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

CITY OF OAKLAND, Plaintiff, vs. PAUL R. JURICH, an individual, DESERT OUTDOOR ADVERTISING, INC. A California Corporation, and does 1 to 20 inclusive Defendants.	No. RG03-132111 AMENDMENT TO STATEMENT OF DECISION (CCP §473d)

Pursuant to CCP §472(d), the Court, on its own motion, corrects the following mistake in its Statement of Decision filed September 25, 2007. This paragraph shall be added to the aforementioned Statement of Decision:

"The Court has considered all factors to be considered in imposing civil penalties per California Business and Professionals Code Section 17206(b).

Said amount is calculated from the date of the Notice to Abate (March 4, 2003) as follows: 1,520 days times $75.00 equals $114,000 (one hundred fourteen thousand dollars)"

Date: October 18, 2007 /s/

Gordon Baranco
Judge of the Superior Court