

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9584 / May 15, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 72174 / May 15, 2014

Admin. Proc. File No. 3-13927

In the Matter of

GORDON BRENT PIERCE

ORDER DENYING MOTION FOR
RECONSIDERATION

Gordon Brent Pierce seeks reconsideration of our March 7, 2014 opinion and order (the "Opinion")¹ finding that Pierce violated Section 5 of the Securities Act of 1933.² As explained below, we deny Pierce's motion because it fails to meet the standard for such motions set forth in our Rule of Practice 470 and cases applying that Rule.

I. Background

Pierce was found to have violated Section 5 in two proceedings. In the first proceeding, Pierce was charged with violating Section 5 by selling shares of stock of Lexington Resources, Inc. ("Lexington") from a personal account when no registration statement was filed or in effect as to the stock and no exemption from registration was available (the "First Proceeding").³ In the second proceeding, Pierce was charged with violating Section 5 by selling Lexington stock from two corporate accounts he controlled without registration or an exemption from registration (the "Second Proceeding"). He asserted the defense of res judicata, but the law judge rejected the defense and found Pierce liable for the Section 5 violations.

¹ *Gordon Brent Pierce*, Securities Exchange Act Release No. 71664, 2014 SEC LEXIS 839 (Mar. 7, 2014).

² 15 U.S.C. § 77e.

³ *Lexington Res., Inc.*, Initial Decision Release No. 379, 2009 SEC LEXIS 2057 (June 5, 2009).

On appeal, Pierce reasserted the defense of *res judicata*. We rejected this defense, finding that Pierce failed to show the required identity of the causes of action in both the earlier and later suits. We stated:

Because registration is transaction-specific, whether an offer or sale of securities violates §5 requires an inquiry into whether those securities have been registered, or whether an exemption applies, with respect to that *particular* offer or sale. Similarly, when an [order instituting proceedings ("OIP")] charges violations of §5, those charges must be framed in terms of particular transactions, not merely in terms of the securities themselves.

(Emphasis in original.) We also noted that *res judicata* does not apply simply because two proceedings involve "essentially the same course of wrongful conduct" or "the same parties, similar or overlapping facts, and similar legal issues." Rather, it applies "only where the transaction or connected series of transactions is the same, that is, 'where the same evidence is needed to support both claims.'" Because the OIP in the First Proceeding had charged Section 5 violations based solely on sales through the personal account, and different evidence was necessary "to state a claim against Pierce based on unregistered sales from the Corporate Accounts," we concluded that "the § 5 cause of action in the First Proceeding did not embrace the unlawful transactions charged in the Second Proceeding."

The fact that the Division discovered the corporate account trades during the course of the First Proceeding did not alter our conclusion. The Division was diligent in its pursuit of claims against Pierce and the late discovery of the trades was the result of Pierce's fraudulent concealment of the evidence.⁴ Thus, even if *res judicata* could have served as a bar to the Second Proceeding, Pierce's fraudulent concealment of his involvement in the unregistered sales from the corporate accounts would defeat any application of *res judicata*. We concluded that it was in the public interest to impose a cease-and-desist order and to order disgorgement in the amount of \$7,247,635.75, for which Pierce is jointly and severally liable with the corporations through whose accounts the trading was conducted.

⁴ As we noted in the Opinion, Pierce opposed the Division's motion in the First Proceeding to introduce the previously concealed evidence. Pierce argued that admitting the evidence after the hearing had concluded would violate due process. *Pierce*, 2014 SEC LEXIS 839, at *42 n.49. The law judge ruled on the Division's motion and Pierce's opposition by admitting the evidence only for the limited purpose of supporting other charges already at issue in the First Proceeding. The law judge found that she lacked the authority to amend the OIP by adding a Section 5 charge against Pierce based on his sales in the corporate accounts. She accordingly made no findings of Section 5 liability and ordered no disgorgement based on the trading in those accounts. We therefore concluded in the Opinion that the admission of the new evidence for this limited purpose "did not add new charges to the First Proceeding."

II. Analysis

We analyze Pierce's motion for reconsideration under Rule of Practice 470, which requires that a motion for reconsideration "briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought."⁵ We have stated that reconsideration is "an extraordinary remedy"⁶ that is "designed to correct manifest errors of law or fact, or to permit the presentation of newly discovered evidence."⁷ Applicants may not use motions for reconsideration to reiterate arguments previously made or to cite authority previously available, and we will accept additional evidence only if the movant could not have known about or adduced that evidence before entry of the order for which reconsideration is sought.⁸ Motions for reconsideration, therefore, are granted only in exceptional cases.⁹ Under these standards, Pierce's motion does not establish that reconsideration is merited. Rather, it essentially reiterates claims made during the appeal and addressed in the Opinion. These arguments provide no basis for reconsideration.¹⁰ We nevertheless address certain points below.

The motion posits that the Opinion mistakenly found that the law judge in the First Proceeding ruled against the Division's request to disgorge profits from the sales in the corporate accounts on the grounds that such a request "was beyond the scope of that proceeding" and "was not part of that proceeding" (quotations from Opinion; emphasis provided by Pierce). Pierce argues that, in fact, the law judge "ruled only that the claim 'would be outside the scope of the OIP'" (emphasis provided by Pierce). This is not a substantive distinction because the term "OIP" is the short form for "Order Instituting Proceedings," the charging document in our administrative proceedings that defines the scope of any given proceeding.

⁵ 17 C.F.R. § 201.470.

⁶ See, e.g., *Eric J. Brown*, Order Denying Collins's Motion for Reconsideration of Civil Penalties, Exchange Act Rel. No. 66752, 2012 SEC LEXIS 1127, at *3 (Apr. 5, 2012), *aff'd sub nom. Collins v. SEC*, 736 F.3d 521, 524-26 (2013).

⁷ *Perpetual Sec., Inc.*, Order Denying Motion for Reconsideration, Exchange Act Rel. No. 56962, 2007 SEC LEXIS 2922, at *2 (Dec. 13, 2007).

⁸ *Eric J. Brown*, 2012 SEC LEXIS 1127, at *3-4; *Perpetual Sec.*, 2007 SEC LEXIS 2922, at *2.

⁹ *Eric J. Brown*, 2012 SEC LEXIS 1127, at *4.

¹⁰ See *id.* at *3.

Pierce argues that the Opinion excessively relied on "the policy that 'special considerations apply in an administrative forum'" and that the Commission "is charged with adjudicating matters as fairly as if it were a court." Although the Opinion recognizes that res judicata can apply more flexibly in the administrative context, the Opinion's application of res judicata in this proceeding is entirely consistent with the application of res judicata in the federal courts.

Finally, Pierce contends that "[t]he Opinion's departure from the established law on res judicata and the fraudulent concealment exception . . . requires reversal of rulings on the remaining affirmative defenses as well." Because Pierce provides no basis for reconsidering our rejection of his arguments based on res judicata and fraudulent concealment, there is no basis for reconsidering his other affirmative defenses.

Accordingly, IT IS ORDERED that the motion for reconsideration filed by Gordon Brent Pierce be, and it hereby is, denied.

By the Commission.

Jill M. Peterson
Assistant Secretary