UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-13927

In the Matter of

GORDON BRENT PIERCE, NEWPORT CAPITAL CORP., and JENIROB COMPANY LTD.,

Respondents.

Administrative Law Judge
Carol Fox Foelak

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT PIERCE

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INTRODUCTION

This Motion for Summary Disposition against respondent Gordon Brent Pierce ("Pierce") by the Division of Enforcement arises from his unregistered sales of shares of Lexington Resources, Inc. ("Lexington") through two nominees, respondents Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob"), in 2004.[1] Pierce's liability is uncontested, as he has admitted that he participated in the unregistered sales. The facts also establish that Pierce's sales of Lexington shares do not qualify for an exemption from registration. At a minimum, under principles of collateral estoppel, Pierce cannot deny that he controlled and therefore was an affiliate of Lexington. As such, under Section 2(a)(11) of the Securities Act of 1933 ("Securities Act"), he is treated as an issuer and cannot rely on an exemption under Section 4(1) of the Securities Act. The facts additionally indicate that he cannot rely on a Section 4(1) exemption because he acted as an underwriter under the Act. Accordingly, Pierce should be found liable for violating Sections 5(a) and 5(c) of the Securities Act. The Division further requests that Pierce be ordered to cease and desist from committing or causing any violations or future violations of Section 5 and that he be ordered to pay disgorgement in the total amount of $7,247,635.75 plus prejudgment interest, jointly and severally with Newport and Jenirob.

Given the undisputed facts, the Division's motion for summary disposition should be granted. Pierce can avoid this result only if he meets his burden to show that the Division's claims are barred by his affirmative defenses. This he cannot do, as none of his scattershot defenses have any merit. Pierce relies most heavily on his defense that this proceeding is barred by the doctrine of res judicata. This defense fails primarily because the present proceeding concerns transactions that the Hearing Officer explicitly ruled were beyond the scope of an earlier Order Instituting Proceedings (OIP) instituted on July 31, 2008. In that proceeding, a

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[1] This motion is supported by the declarations of Jeffrey Lyttle and Steven Buchholz in support of the Division of Enforcement's Motion for Sanctions And Entry Of Default Judgment Against Respondents Newport Capital Corp. and Jenirob Company, Ltd and Anticipated Motion for Summary Disposition Against Respondent Pierce ("Lyttle Decl." and "Buchholz Decl. I"), and by the Declaration of Steven Buchholz In Further Support of the Division of Enforcement's Motion for Summary Disposition Against Respondent Pierce ("Buchholz Decl. II").

cease and desist order was entered against Pierce for his unregistered sales of Lexington stock from his *personal* account and he was ordered to disgorge $2,043,362.33 plus prejudgment interest. Here, by contrast, the OIP concerns Pierce's sales of unregistered Lexington shares through the accounts of his nominees, Newport and Jenirob – the very transactions that the Hearing Officer ruled (as urged by Pierce) were beyond the scope of the earlier proceeding and thus were not adjudicated there. The defense fails for the additional reason that Pierce concealed evidence about Newport and Jenirob that prevented the Division from including claims for sales involving those entities in the first proceeding. Pierce's other defenses, too, have no merit, as explained more fully below.

In short, after avoiding disgorgement of the proceeds of his illegal sales through Newport and Jenirob in the first proceeding and after admitting the facts that would entitle the Division to summary disposition relating to these sales in the present proceeding, Pierce should not be allowed to benefit from his concealment and tactical choices to foreclose liability for these violations altogether. Accordingly, the Division's motion for summary disposition should be granted.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

In the prior proceeding, instituted July 31, 2008, the Division alleged that Pierce, Lexington, and Lexington's CEO each violated Sections 5(a) and 5(c) of the Securities Act through illegal sales of Lexington shares, and that Pierce also violated the Securities Exchange Act of 1934 ("Exchange Act") by failing to accurately report his Lexington stock ownership and transactions. *See* Buchholz Decl. II Ex. A. In that proceeding, the Division sought disgorgement from Pierce of the $2 million in net proceeds from his sale of 300,000 Lexington shares in his personal account at a Liechtenstein bank in June 2004. *Id.* ¶ 16. While the OIP mentioned generally that Pierce had distributed additional shares of Lexington stock, the Division clarified the parameters of its allegations in its December 2008 motion for summary disposition in which it sought disgorgement only of the proceeds of Pierce's unregistered sales in his personal

account. *See* Buchholz Decl. II Ex. B. Thereafter, a hearing was held on February 2-4, 2009 and the record of evidence was closed on March 6, 2009. *See* Buchholz Decl. II Ex. C.

In the investigation that led up to that proceeding, Pierce denied under oath during his testimony that he held any beneficial ownership interest in Newport, testifying as follows:

Q Do you have an ownership stake of any kind in Newport Capital Corp.?

A No.

Q Neither directly or indirectly through other entities?

A Correct.

Buchholz Decl. II Ex. D at 197:8-13. Pierce also refused to produce any documents concerning either Newport or Jenirob in response to Division document requests and an investigatory subpoena. As a result, beginning in 2006, the Division sought the documents through a regulator in Liechtenstein, although the regulator was not able to obtain the evidence for the Division at that time. *See* Buchholz Decl. II at ¶ 7 & Ex. F. In view of this lack of evidence, the OIP in the prior proceeding did not contain any specific allegations concerning Pierce's sales of Lexington shares through Newport and Jenirob or his ownership interest in these entities. *See id.* ¶ 7 & Ex. A. Later, during the prior proceeding, Pierce personally intervened to oppose production of the documents through the Liechtenstein regulator. *See id.* ¶ 9 & Ex. H.

After the evidentiary hearing and the close of evidence, the foreign regulator finally produced evidence that the Division had requested proving that in addition to Pierce's sale of 300,000 Lexington shares through his personal account, he had sold 1.6 million Lexington shares through two Liechtenstein accounts that he secretly controlled in the names of Newport and Jenirob. *See* Buchholz Decl. II Ex. F. Before a decision was issued by the Hearing Officer, the Division moved to admit the new evidence showing Pierce's sales through Newport and Jenirob, and also sought an additional $7.7 million in disgorgement of the sales proceeds. *See* Buchholz Decl. II Ex. E. This evidence consisted of the very documents that Pierce had refused to produce during the Division's investigation. *Id.* at 2-3.

Pierce opposed admission of the new evidence and opposed the adjudication of claims relating to his Lexington stock sales through Newport and Jenirob in the prior proceeding. *See* Buchholz Decl. II Ex. G. In particular, Pierce argued that re-opening the evidence would deny his "due process rights to notice of the claims" and "the reasonable opportunity to respond," including the right to discovery and to a hearing on the new evidence. *Id.* at 2-9. In an Order issued April 7, 2009, the Hearing Officer admitted the new evidence for use on the issue of liability, but found that a claim for disgorgement of the $7.7 million in proceeds from the different sales of shares through the Newport and Jenirob accounts – as evidenced by the documents that Pierce had withheld – was outside the scope of the proceeding because Newport and Jenirob were not named in the OIP.[2] *See* Buchholz Decl. II Ex. I.

In the Initial Decision issued on June 5, 2009, the Hearing Officer found that the Division had presented a *prima facie* case against Pierce for the sales of Lexington stock from his personal account and that Pierce had failed to prove his claimed exemption under Section 4(1) of the Securities Act, 15 U.S.C. § 77d(1). As a result, the Hearing Officer ruled that Pierce had violated Section 5 of the Securities Act. She ordered Pierce to cease and desist from further violations of Sections 5(a) and 5(c) and to disgorge $2,043,362.33 in proceeds from his sale of the 300,000 Lexington shares in his personal account, finding that this amount constituted the "actual profits Pierce obtained from his wrongdoing charged in the OIP." *See* Buchholz Decl. II Ex. J. The Hearing Officer again held that additional disgorgement for Pierce's sales through Newport and Jenirob was outside the scope of the OIP because Newport and Jenirob were not mentioned in the OIP. *Id.* Neither party appealed the Initial Decision and it became the final decision of the Commission on July 8, 2009.[3] *See* Buchholz Decl. II Ex. K.

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[2] The Hearing Officer further stated: "The Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing beyond the framework of the original OIP. *See* 17 C.F.R. §201.200(d); *J. Stephen Stout*, 52 S.E.C. 1162, 1163 n.2 (1996)." *See* Buchholz Decl. II Ex. J at 2 n.3.

[3] On June 8, 2010, because Pierce had not paid any of the disgorgement and prejudgment interest, the Division filed an application in federal district court on behalf of the Commission to

On June 8, 2010, the present proceeding was instituted alleging that Pierce, Newport and Jenirob each violated Sections 5(a) and 5(c) of the Securities Act through the illegal sales of Lexington shares in the accounts of Newport and Jenirob and seeking disgorgement of the proceeds of the sales. *See* Buchholz Decl. II Ex. M (OIP) at 1. Pierce sought without success to obtain an emergency order to enjoin this proceeding in federal district court.[4] On February 23, 2011, Pierce filed a motion seeking to divest the Commission of jurisdiction over this proceeding by staying it indefinitely. This motion was denied on March 11, 2011. *See* Buchholz Decl. II ¶ 23 & Ex. T.

B. Statement Of Pertinent Facts In Current Proceeding

In his Answer to the OIP in this proceeding, Pierce has admitted the facts supporting the Division's motion for summary disposition on Pierce's liability for his violations of Sections 5(a) and 5(c) of the Securities Act.[5] *See* Pierce Answer ("Ans.") at 3-5 ¶¶ 2-5 & statement at pg. 5 admitting ¶¶ 6-31 of OIP.[6] Under principles of collateral estoppel, as discussed below, the Division further relies upon the Hearing Officer's factual findings in her Initial Decision issued on June 5, 2009. Based upon the foregoing, the pertinent facts are summarized below.

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enforce the disgorgement order against Pierce. *See* Buchholz Decl. II Ex. L. Pierce has now paid in full. *Id.* ¶ 15.

[4] Specifically, on July 9, 2010, Pierce filed an emergency action against the Commission in federal district court seeking to enjoin the present cease-and-desist proceeding against Pierce on the primary ground that the proceeding is barred by res judicata. *See* Buchholz Decl. II Exs. N-R. On September 2, 2010, the district court dismissed Pierce's emergency action in its entirety on the grounds that the court lacked jurisdiction and that Pierce was required to exhaust his administrative remedies. *See Pierce v. SEC*, 737 F. Supp. 2d 1068, 1077 (N.D. Cal. 2010). On October 1, 2010, Pierce appealed the district court's dismissal of his action to the Ninth Circuit Court of Appeals. This appeal remains pending. *See* Buchholz Decl. II ¶ 22 & Ex. S.

[5] While Pierce maintains that these admissions are subject to his affirmative defenses, as shown below, these defenses are without merit. Moreover, as also discussed below, Pierce is collaterally stopped from denying the facts on which the Hearing Officer made findings in her Initial Decision in the prior proceeding.

[6] For ease of reference, a copy of Pierce's Answer to the OIP is attached as Exhibit U to the Buchholz II Declaration, but will be cited as "Ans." herein.

Lexington Resources, Inc. ("Lexington") is a Nevada corporation that was a public shell company known as Intergold Corp. until November 2003, when it entered into a reverse merger with a private company known as Lexington Oil and Gas LLC and changed its name to Lexington Resources. Lexington's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act from 2003 until June 4, 2009, when its registration was revoked. From 2003 to 2007, Lexington stock was quoted on the over-the-counter bulletin board under the symbol "LXRS." OIP ¶ 6 & Ans. at 5.

Pierce, a Canadian citizen, provided stock promotion and capital raising services to Lexington. OIP ¶ 3 & Ans. ¶ 3. Newport is a privately-held corporation organized in March 2000 under the laws of Belize. OIP ¶ 4 & Ans. ¶ 4. Pierce has been President and a director of Newport. *Id.* Jenirob is a privately-held corporation organized under the laws of the British Virgin Islands. OIP ¶ 5 & Ans. ¶ 5. Pierce is the beneficial owner of Newport and Jenirob. Buchholz Decl. II Ex. J (Initial Decision) at 5 (citing Division Exs. 80 & 84, which are attached as Exhibits V & W to Buchholz Decl. II.)

From 2002 to 2007, Pierce provided Intergold and then Lexington with operating funds, stock promotion services and capital-raising services through at least three different consulting companies that Pierce controlled, including Newport. Pierce used these companies to conceal his role and avoid being identified by name in Commission filings. OIP ¶ 7 & Ans. at 5. By October 2003, shortly before the reverse merger, Intergold owed one of Pierce's consulting companies nearly $1.2 million. On November 18, 2003, to satisfy part of this debt, the CEO and Chairman of Intergold agreed to issue to Pierce, through one of his consulting companies, vested options to acquire 950,000 shares of the public company. At the time, these shares constituted 64% of Intergold's outstanding shares (on a post-exercise basis). OIP ¶ 10 & Ans. at 5. Three days later, as part of the reverse merger, the CEO and Chairman agreed to issue 2.25 million additional shares with restrictive legends to another offshore company that Pierce formed and controlled. As a result, Pierce controlled more than 70% of Lexington's outstanding stock after

the reverse merger.[7] OIP ¶ 11 & Ans. at 5. The Hearing Officer also found that "the totality of circumstances – Pierce's sway over Lexington's CEO, Atkins, his substantial ownership of Lexington stock, his control over consultants assigned to work for Lexington -- all point to his control of Lexington." Buchholz Dec. Ex. J (Initial Decision) at 17.

Within days of the reverse merger, Lexington began issuing stock to Pierce and his associates pursuant to the stock options granted to Pierce's consulting company. OIP ¶ 13 & Ans. at 5. Between November 2003 and January 2004, Lexington issued 500,000 shares to Pierce and 300,000 shares to one of Pierce's associates. These became 1.5 million shares and 900,000 shares, respectively, upon Lexington's three-for-one stock split on January 29, 2004. OIP ¶ 14 & Ans. at 5. Lexington issued an additional 320,000 shares to Pierce and 495,000 shares to Pierce's associate in May and June 2004. In total, Pierce and his associate received 3.2 million shares (on a post-split basis) between November 2003 and June 2004, all without restrictive legends. OIP ¶ 15 & Ans. at 5. Lexington improperly attempted to register these issuances by filing registration statements on Form S-8, an abbreviated form of registration statement that may not be used for the issuance of shares to consultants who provide stock promotion or capital-raising services, like Pierce and his associate. Lexington's invalid S-8 registration statements only purported to cover issuances by Lexington, not any subsequent resales by Pierce. OIP ¶ 16 & Ans. at 5.

The stock option agreements between Lexington and Pierce's consulting company and the option exercise agreements signed by Pierce and his associate provided that all shares were to be acquired for investment purposes only and with no view to resale or other distribution. No registration statements were filed relating to any resales of Lexington stock by Pierce, Newport or Jenirob. OIP ¶ 20 & Ans. at 5.

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[7] Although Pierce admits the allegations of Paragraph 11 of the OIP regarding his ownership interest in Lexington, he somewhat inconsistently denies that he ever held a majority of Lexington stock. *Compare* Ans. at 5 (admitting the facts alleged in ¶¶ 6-31 of the OIP) *with* ¶ 2. This is a distinction without a difference, however, as the Hearing Officer's Initial Decision found that Pierce controlled Lexington. *See* Buchholz Decl. II Ex. J (Initial Decision) at 17.

Within days after Lexington issued the shares to him and his associate, Pierce began distributing 2.8 million of the Lexington shares by instructing Lexington's CEO and Chairman to transfer them all to Newport or Jenirob. OIP ¶¶ 21-22 & Ans. at 5. Pierce then transferred 1.2 million of the 2.8 million Lexington shares to individuals and entities in Canada and the U.S.; he transferred the remaining 1.6 million shares to accounts held in the name of Newport and Jenirob of which he was the beneficial owner. OIP ¶¶ 21-22, 25 & Ans. at 5.

During 2004, the Liechtenstein bank sold Lexington shares in the open market through an omnibus brokerage account in the U.S. held in the Liechtenstein bank's name. OIP ¶ 24 & Ans. at 5. During this same period, Pierce began actively promoting Lexington by sending millions of spam emails and newsletters through a publishing company he controlled and Lexington issued a flurry of optimistic press releases about its current and potential operations. OIP ¶ 17 & Ans. at 5. From February to June 2004, Lexington's stock price increased from $3.00 to $7.50, and Lexington's average trading volume increased from 1,000 to about 100,000 shares per day, reaching a peak of more than 1 million shares per day in late June 2004. OIP ¶ 19 & Ans. at 5.

Pierce sold the 1.6 million Lexington shares through the Newport and Jenirob accounts at the Liechtenstein bank in 2004.[8] OIP ¶ 25 & Ans. at 5. More specifically and as set forth in detail in the supporting Buchholz I and Lyttle declarations, under a first-in, first-out analysis, the Newport account received total proceeds of $5,264,466.64 from its sales of the Lexington shares through that account between February and September 2004. Likewise, the Jenirob account received total proceeds of $1,983,169.11 from its sales of the Lexington shares through that account in June 2004. *See* Lyttle Decl. ¶¶ 3-24 & Exs. A-B; Buchholz Decl. I ¶¶ 2-35 & Exs. A-GG.

[8] In addition, and as adjudicated in the prior proceeding, Pierce sold 300,000 Lexington shares through his personal account at the bank in Liechtenstein, in June 2004 for net proceeds of $2 million.

II. SUMMARY DISPOSITION IS PROPER AS TO PIERCE'S LIABILITY

A. The Grounds For Summary Disposition Against Pierce

In this motion filed under Rule 250(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.250(a), the Division seeks to establish Pierce's liability for violation of Section 5 of the Securities Act, as well as his disgorgement obligation. The motion should be granted because Pierce's liability is established by his admissions in his Answer, by principles of collateral estoppel arising from rulings in the earlier administrative proceeding described above and by documents submitted with the Lyttle and Buchholz I and II Declarations.

B. Principles Of Collateral Estoppel Preclude Pierce From Contesting Issues Determined In The Prior Proceeding

Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 155 (1979). The fundamental concept is that "an issue of law or fact actually litigated and decided . . . in a prior action may not be relitigated in a subsequent suit between the same parties or their privies." *United States v. Alcan-Aluminum Corp.*, 990 F.2d 711, 718-19 (2d Cir. 1993) (citation omitted).

In the prior proceeding, the Hearing Officer, after considering the evidence submitted by both the Division and Pierce, actually and necessarily determined the factual findings stated in the Initial Decision, as well as the following key issues against Pierce: (1) Pierce received, directly or indirectly, shares of Lexington stock from Lexington in 2003-2004; (2) during this period, Pierce controlled Lexington within the meaning of 17 C.F.R. § 230.405; and (3) Pierce was an affiliate of Lexington, within the meaning of 17 C.F.R. § 230.144(a)(1). Initial Dec. at 4-17. As a result of these findings, the Hearing Officer ruled that Pierce could not claim that the

sales of Lexington shares in his personal account were exempt from registration under Section 4(1) of the Securities Act, 15 U.S.C. § 77d(1).[9] *Id.* at 17.

In this proceeding, the Division similarly alleges that Pierce made unregistered sales of Lexington shares to public investors that he acquired from Lexington between November 2003 and June 2004, although the Division's claims concern *different* transactions, namely his unregistered sales of a *different* subset of Lexington shares through Newport and Jenirob. OIP ¶¶ 6-16, 20-22, 25 & Ans. at 5. If Pierce should argue that the Newport and Jenirob sales were exempt from registration under Section 4(1) of the Securities Act, he will be collaterally estopped from relitigating the Hearing Officer's prior rulings that he controlled Lexington and therefore was an affiliate of Lexington during the same time period. Further, because the Hearing Officer determined in the prior proceeding that Pierce beneficially owned both Newport and Jenirob, and that he directed sales of Lexington shares in the Newport and Jenirob accounts at the Liechtenstein bank, he is also collaterally stopped from relitigating those factual issues here. Buchholz Dec. II Ex. J (Initial Decision) at 4-17.

C. Pierce Violated Section 5 Of The Securities Act

a. The Division Has Established a Prima Facie Case Against Pierce for Violation of Section 5

Pierce violated Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. § 77e(a) & (c), in 2004 by, directly or indirectly, offering to sell and selling 1.6 million Lexington shares in 2004 as part of a distribution to the public when no registration statement had been filed or was in effect for these transactions. Section 5(a) of the Securities Act, 15 U.S.C. § 77e(a), provides in pertinent part:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly

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[9] Section 4(1) exempts from the registration requirements "transactions by any person other than an issuer, underwriter or dealer." *See* Section 2(a)(11) of the Securities Act, 15 U.S.C. § 77(b)(11); *see also SEC v. Cavanagh*, 155 F.3d 129, 134 (2d Cir. 1998).

> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise . . .

Section 5(c) of the Securities Act, 15 U.S.C. § 77e(c), provides in pertinent part:

> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . . .

The purpose of the Section 5 registration provisions is to "protect investors by promoting full disclosure of information thought necessary to informed investments decisions." *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953). It is well-established that improper intent is not an element of a Section 5 violation. *See, e.g., SEC v. Lybrand*, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002); *SEC v. Current Fin. Serv.*, 100 F. Supp. 2d 1, 6-7 (D.D.C. 2000), *aff'd sub nom. SEC v. Rayburn*, 2001 U.S. App. LEXIS 25870 (D.C. Cir. Oct. 15, 2001).

The registration requirements of Section 5 apply to every sale of securities, including those issued under a Form S-8 registration statement. *SEC v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998). SEC Interpretive Release No. 33-6188 (the "1980 Release"), which discusses the availability of the Form S-8 registration statement for stock issuances to employees of the issuer, states: "Section 5 provides that *every offer or sale of a security* made through the use of the mails or interstate commerce *must be accomplished through the use of a registration statement* meeting the Act's disclosure requirements, unless one of the several exemptions from registration set out in sections 3 and 4 of the Act is available." 45 Fed. Reg. 8960, 8962 (Feb. 11, 1980) (emphasis added). The 1980 Release also provides that affiliates of the issuer must separately register their sales of S-8 shares. *Id.* at 8976-77. The Form S-8 instructions specifically "advise all potential registrants that the registration statement does not apply to resales of the securities previously sold pursuant to the registration statement." Form S-8 General Instruction C.1 & n.2. Liability under Section 5 "is not confined only to the person who passes title to the security" but

includes "persons other than sellers who are responsible for the distribution of unregistered securities." *SEC v. Murphy*, 626 F.2d 633, 649 (9th Cir. 1980).

A *prima facie* case for a violation of Section 5 is established by showing that (1) no registration statement was in effect or filed as to the securities; (2) a person directly or indirectly sold or offered to sell the securities; and (3) the sale was made through the use of interstate facilities or the mails. *See SEC v. Continental Tobacco Co.*, 463 F.2d 137, 155 (5th Cir. 1972).

Pierce has admitted the following facts that establish a *prima facie* case against him for the unregistered offers to sell and sales of Lexington stock by Newport and Jenirob: First, Pierce, the beneficial owner of Newport and Jenirob, directed the transfer of 2.8 million shares to Newport and Jenirob, subsequently directed the transfer of 1.6 million of those shares to the Newport and Jenirob accounts at the Liechtenstein bank and then directed the sale of the Lexington shares through these accounts at the Liechtenstein bank. OIP ¶¶ 21, 22, 25 & Ans. at 3 ¶ 1 and at 5. Second, no registration statement was filed or in effect for these sales of Lexington shares, as Lexington's invalid S-8 registration statements did not cover the resales. OIP ¶¶ 16, 20 & Ans. at 5. Finally, Pierce, Newport and Jenirob used interstate commerce to sell the Lexington shares through an omnibus brokerage account in the United States held in the name of the Liechtenstein bank where they maintained the Newport and Jenirob accounts. OIP ¶¶ 21, 24, 25.

b. No Exemption Was Available To Pierce For the Newport and Jenirob Sales Of Lexington Shares

Because the Division has established a *prima facie* case that Pierce violated Section 5 of the Securities Act, the burden shifts to Pierce to prove the availability of any exemptions. *See SEC v. Ralston Purina*, 346 U.S. at 126. Exemptions from registration are affirmative defenses that must be proved by the person claiming the exemptions. *See Swenson v. Engelstad*, 626 F.2d 421, 425 (5th Cir. 1980); *Lively v. Hirschfield*, 440 F.2d 631, 632 (10th Cir. 1971). Given the undisputed *prima facie* case against Pierce, the Division is entitled to summary disposition on its Section 5 claims against him unless he can meet his burden to show that an exemption, or safe

harbor from registration, was available for the offer or sale of the Lexington shares through Newport and Jenirob. *See SEC v. Ralston Purina Co.*, 346 U.S. at 126; *SEC v. Lybrand*, 200 F. Supp. 2d at 392. Pierce cannot meet this burden.

Section 4(1) of the Securities Act, 15 U.S.C. § 77d(1), upon which Pierce attempted to rely in the prior proceeding, provides exemptions from registration for "transactions by any person other than an issuer, underwriter or dealer." This exemption "must be strictly construed against the person claiming its benefit, as public policy strongly supports registration." *Quinn and Co. v. SEC*, 452 F.2d 943, 945-46 (10th Cir. 1971). Pierce is not eligible for this exemption, as he falls within the Securities Act's definitions of an "issuer" and an "underwriter."

Section 2(a)(11) of the Securities Act, 15 U.S.C. § 77b(a)(11), defines an "issuer" to include "any person directly or indirectly controlling or controlled by the issuer." A person who is an "affiliate" of the issuer is deemed to be an "issuer" with respect to the distribution of securities. *SEC v. Cavanagh*, 155 F.3d at 134. As explained above, Pierce is collaterally estopped from denying that he was an affiliate of Lexington, and therefore that he was an issuer of the Lexington shares that were transferred to Newport and Jenirob and then distributed to the public. *See* Initial Dec. at 14-17. On this ground alone, Pierce is not entitled to claim a Section 4(1) exemption for his sales.

Pierce's sales through Newport and Jenirob do not qualify for an exemption under Section 4(1) for the additional reason that he acted as a statutory underwriter. Section 2(a)(11) of the Securities Act defines an "underwriter" as:

> "Any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, *or participates or has a direct or indirect participation in any such undertaking*, or participates or has a participation in the direct or indirect underwriting of any such undertaking; . . . As used in this paragraph, the term "issuer" shall include, in addition to an issuer, any person directly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

15 U.S.C. § 77b(a)(11) (emphasis added). *See In re Lorsin, Inc.*, Initial Decision Release No. 250 (Admin. Proc. File No. 3-11310), 2004 SEC LEXIS 961 (ALJ May 11, 2004) at *18-19

(citation omitted. The *Lorsin* decision pointed out that Congress refused to extend the Section 4(1) exemption to underwriters, "which it defined broadly to encompass 'all persons who might operate as conduits for securities being placed into the hands of the investing public.'" Further, an "acquisition is made with the requisite view to distribution if the shares are initially acquired from an issuer for the purpose of resale and not with an investment purpose in mind." Id. at *19.

The undisputed facts show that Pierce meets the definition of an "underwriter." He, directly or indirectly, acquired the Lexington shares in 2003-2004 via agreements providing that all shares were to be acquired for investment purposes only and with no view to resale or other distribution. (OIP ¶ 20 & Ans. at 5.) Despite these restrictions, Pierce's purchases were with a view to distribution because within days of Lexington's issuance of the shares he instructed Lexington to transfer 2.8 million shares to Newport and Jenirob and he then transferred 1.6 million of these shares to the Newport and Jenirob accounts at the Liechtenstein bank. Pierce then participated in the sale of those shares to the investing public with his nominees, Newport and Jenirob, over a seven-month period in 2004 without the benefit of registration. *See* Initial Dec. at 4-14; OIP ¶¶ 6-15 & Ans. at 5; *see Lorsin*, 2004 SEC LEXIS 961 at *18-19.

Accordingly, Pierce violated Section 5(a) of the Securities Act by selling this Lexington stock through Newport and Jenirob without a valid registration statement or exemption. *See SEC v. Lybrand*, 200 F. Supp. 2d at 3997-98; *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 361 (S.D.N.Y. 1998), *aff'd* 155 F.3d 129 (2d Cir. 1998). Because his Lexington stock sales through Newport and Jenirob necessarily involved his offer to sell those shares, Pierce also violated Section 5(c) of the Securities Act by offering to sell Lexington shares without filing a registration statement for those proposed sales. 15 U.S.C. § 77e(c).

D. Pierce's Affirmative Defenses Are Without Merit

Because the Division has met its burden to establish beyond dispute that Pierce violated Section 5 of the Securities Act, summary disposition must be granted to the Division unless

Pierce can meet his burden to show that an affirmative defense bars the Division's claims. As discussed below, Pierce cannot meet this burden inasmuch as all of his defenses are meritless.

1. The Doctrine Of Res Judicata Does Not Bar This Proceeding

As his primary affirmative defense, Pierce contends that the doctrine of res judicata (claim preclusion) bars the Commission from instituting this proceeding to determine whether he should be required to disgorge illegal proceeds he obtained through sales of Lexington shares through Jenirob and Newport because such a claim could have been decided in the prior action.[10] This defense is without merit.

The doctrine of res judicata "provides that a final judgment on the merits in one action bars subsequent relitigation of the same claim by the same parties and by those in privity with the parties." *Greenberg v. Board of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 168 (2d Cir. 1992). Preclusion is limited, however, "to the transaction at issue in the first action. Litigation over other transactions, though involving the same parties and similar facts and legal issues, is not precluded." *Id.* Moreover, res judicata does not apply when concealment "caused the plaintiff to fail to include a claim in a former action." *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986).

Most fundamentally, Pierce's res judicata defense fails factually under these principles. As an initial matter, there is no identity of claims between the present proceeding and the former one. "Identity of claims exists when two suits arise from the same transactional nucleus of operative facts." *Stratosphere Litig. v. Grand Casinos,* 298 F.3d 1137, 1143 (9th Cir. 2002) (internal quotation marks omitted). The prior proceeding adjudicated claims against Pierce regarding his unregistered sales of Lexington shares in his personal account. In that proceeding, the Division clarified in its December 2008 prehearing motion for summary disposition that it

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[10] The doctrine of res judicata may be raised as an affirmative defense under federal procedural rules and the burden of proving it rests with the party invoking it. See Fed. R. Civ. P. 8(c); *Computer Assocs., Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 369 (2d Cir. 1997). Pierce's res judicata defense is apparently related to his defense that the Commission lacks authority to hear this proceeding. Both fail for the same reason.

was only seeking disgorgement of the proceeds of Pierce's sales from his personal account. *See* Buchholz Decl. II Ex. B. In contrast, the present proceeding concerns different transactions involving different accounts and securities sold to different investors. Although the Division sought to adjudicate disgorgement of the proceeds of these transactions when it received the needed evidence after the hearing in the prior proceeding, the Hearing Officer ruled that such claims were beyond the scope of the prior OIP. *Id.* Exs. I-J. Because of that ruling, the prior proceeding did not adjudicate on the merits the Division's claims here: that Pierce's unregistered sales of Lexington stock through the Newport and Jenirob accounts violated Section 5 and that disgorgement of the proceeds of those sales should be ordered.

Moreover, in large measure owing to Pierce's concealment of necessary facts about Pierce's ownership and sales of Lexington stock through Newport and Jenirob, neither Newport nor Jenirob was named in the prior proceeding; the OIP did not contain any allegations that Pierce beneficially owned either entity; and the Division sought no specific remedies against them. Only after the hearing and after the close of evidence did the Division receive evidence from a foreign regulator about the Newport and Jenirob stock sales. The evidence proved that, in reality and contrary to his investigative testimony, Pierce did have an ownership interest in Newport.[11] The evidence also showed that he had an ownership interest in Jenirob. *See* Buchholz Decl. II ¶¶ 25-26 & Exs. V-W. At that point, the Division filed a motion seeking inclusion of the Newport and Jenirob sales of Lexington shares for disgorgement purposes so that they could be adjudicated in one setting. *See id.* Ex. E. Pierce vehemently opposed adjudication of the Newport and Jenirob claims in that proceeding. *See id.* Ex. G.

The Hearing Officer agreed with Pierce on this *procedural* point. Stating that she lacked the authority to expand the OIP to decide the Newport and Jenirob disgorgement claims, the Hearing Officer ruled that Newport and Jenirob "are not mentioned in the OIP" and that

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[11] Indeed, the Hearing Officer stated in the Initial Division: "He [Pierce] transferred the [Lexington] stock to Newport, in which Pierce testified he had no ownership interest, but the account documents demonstrate he was the beneficial owner." Buchholz Decl. II Ex. J (Initial Decision) at 17.

remedies pertaining to sales in the Newport and Jenirob accounts "would be outside the scope of the OIP." Buchholz Decl. II Ex. J (Initial Decision) at 20. Indeed, the Hearing Officer in the prior proceeding was explicit in stating that she could not—and, as importantly, did not—reach the merits of the Division's claims relating to the Newport and Jenirob transactions. Further, in finding that Pierce violated Section 5 in the previous proceeding, the Initial Decision specified that the Division's claim against Pierce was only "for the sales from his *personal* account" (i.e., *not* for sales from the Jenirob and Newport accounts). *Id.* Ex. J (Initial Decision) at 15 (emphasis added). The Hearing Officer ordered disgorgement of $2,043,362.31, which she held to be the "actual profits Pierce obtained from his wrongdoing charged in the OIP." *Id.* at 20. The Hearing Officer did *not* make any determination foreclosing the Division from seeking disgorgement of the sales through Newport and Jenirob in a subsequent proceeding. *See generally id.*

Courts have held that even when a second action or proceeding involves "essentially the same course of wrongful conduct ..., the same parties, similar or overlapping facts, and similar legal issues," res judicata may not apply. *SEC v. First Jersey Secs.*, 101 F.3d 1450, 1463 (2d Cir. 1996). One example is where the second action involves different transactions, even though the transactions involve the "same parties and similar facts and legal issues." *Greenberg v. Board of Governors*, 968 F.2d at 168; *SEC v. First Jersey Secs.*, 101 F.3d at 1463 (finding no claims preclusion where second suit involved different transactions). While the *First Jersey* case involved subsequent transactions, the Second Circuit in *Greenberg* declined to apply res judicata in a second action that involved different transactions that occurred during the same time period as transactions addressed in a previous action. *Id.* at 168-70.

As discussed above, Section 5 requires that each particular sale of Lexington shares must be registered or subject to an exemption. *See, e.g., SEC v. Cavanagh*, 155 F.3d at 133. Further, as the Initial Decision pointed out,: "Section 5 of the Securities Act is transaction specific . . . ." Buchholz Decl. II Ex. J at 15 (citing *SEC v. Cavanagh*, 155 F.3d at 133, and *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, 648 (7th Cir. 1990)). Thus, if no valid exemption applies, each separate unregistered sale constitutes a separate violation of Section 5. As in *Greenberg*, res

judicata does not bar the Division from pursuing a disgorgement claim for the Jenirob and Newport sales as they are different transactions from the sales by Pierce from his personal account, and constitute distinct violations giving rise to a separate disgorgement remedy. Further, Pierce faces the additional hurdle that the Commission order instituting this proceeding brings claims against not only Pierce, but Jenirob and Newport, which were not parties to the first action. *Cf. Facchiano Construction Co. v. U.S. Dept. of Labor*, 987 F.2d 206, 212 (3d Cir. 1993) (declining to apply res judicata in part because not all parties were the same in both actions).

Finally, res judicata is unavailable here for the additional reason that courts have recognized an exception to the application of res judicata when "fraud, concealment, or misrepresentation have caused the plaintiff to fail to include a claim in a former action." *Harnett v. Billman*, 800 F.2d at 1313.[12] Pierce conducted the sales in the Newport and Jenirob accounts through a bank in Liechtenstein, a country that had no applicable mechanism for assisting the Commission when the prior action was instituted. He misled the Division about his ownership interest in Newport and concealed the sales by refusing to produce records of the Newport and Jenirob sales. As explained above, this concealment prevented the Division from including claims pertaining to those sales when the OIP was instituted in the prior proceeding. Buchholz Decl. II ¶ 7. Accordingly, Pierce's res judicata defense must fail.

2. Pierce's Equitable And Judicial Estoppel Defenses Must Fail

a. Equitable Estoppel Principles Are Inapplicable

Pierce's equitable estoppel defense is also meritless. The "traditional" elements of equitable estoppel include: (1) the party to be estopped must have known the facts; (2) that party must have intended that its conduct would be acted on or must have acted such that the party

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[12] *See also In re Genesis Health Ventures, Inc.*, 355 B.R. 438, 454 (Bkrtcy. D. Del. 2006) (finding that "concealment prevented Plaintiffs from bringing [additional] claims during [prior] proceedings. As such, the Plaintiffs are not barred by the doctrine of claim preclusion from asserting them here.").

asserting estoppel had a right to believe it was so intended; (3) the asserting party must have been ignorant of the true facts; and (4) the asserting party must have relied on the other party's conduct to his injury. *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994) (stating that courts generally disfavor application of estoppel doctrine against the government) . A party seeking to estop another must show that he or she relied reasonably and detrimentally on another party's clear representation of fact. *Heckler v. Community Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984) (declining to find reasonable reliance by party seeking estoppel on ground party was presumed to know the law and declining to find detrimental reliance even where party might be adversely affected by Government's recoupment of funds party had already spent and even though party might have to curtail operations or seek bankruptcy relief).

In asserting estoppel against a government agency enforcing the law, in addition to the traditional elements, the claimant must also prove affirmative misconduct by the government. *Heckler v. Community Health Serv.*, 467 U.S. at 60. Furthermore, estoppel will apply only where the government's wrongful act will cause a serious injustice and the public's interest will not suffer undue damage by imposition of the liability." *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986)(litigant pressing estoppel as defense to government action must prove affirmative misconduct by government agent, as well as absence of harm to public interest).

None of the equitable estoppel elements can be established here. Nor can Pierce show any affirmative misconduct by the Division. In his district court action, Pierce argued that the "fact" the Division was aware of, and that Pierce somehow relied upon, was that Pierce would not appeal the Hearing Officer's Initial Decision in the prior proceeding if the Division did not appeal. Buchholz Dec. II Ex. O at 21-22. Pierce's estoppel defense collapses on this first element because the Division never made a factual representation of any kind concerning its appellate intentions upon which he could have relied, much less relied reasonably and detrimentally. Buchholz Decl. II ¶ 12. Further, until Division staff informed Pierce on January 12, 2010, that the Division planned to recommend that the Commission institute a new administrative proceeding against Pierce alleging that his sales through Newport and Jenirob

violated Section 5 of the Securities Act, the staff did not discuss with Pierce's counsel whether the Division would recommend a new proceeding against Pierce in connection with the Newport and Jenirob sales. Buchholz Decl. II ¶ 14.

Moreover, even if he could point to a representation about the Division's appellate intentions, which he cannot, Pierce cannot meet the high bar required to estop a Commission proceeding. Pierce cannot show that the alleged representation would cause a serious injustice, as he was represented by able legal counsel when he elected not to appeal the Initial Decision and he now has the opportunity to litigate fairly and fully the claims asserted against him in the present proceeding. Nor, given the Commission's mandate to enforce the federal securities laws, can Pierce show that the public's interest will not suffer undue damage if an estoppel is imposed barring this proceeding. Rather, it is in the public interest to adjudicate the securities law violations he is alleged to have committed.

Pierce cannot establish an estoppel defense for the additional reason that the equities in this enforcement proceeding run strongly against him. *See Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (stating rule that "he who comes into equity must come with clean hands"). Pierce misled the Commission about his ownership interest in Newport; concealed documents about his sales in the Newport and Jenirob accounts that the Division was able to obtain from the foreign regulator (over Pierce's opposition) only after the close of evidence in the prior proceeding; and then vigorously and successfully objected to inclusion of claims for disgorgement of those sales proceeds in that proceeding. Now, after managing to avoid disgorgement of the Newport and Jenirob sales proceeds in the first proceeding and after admitting the facts concerning these illegal sales in the present proceeding, Pierce seeks to avoid disgorgement of the proceeds of these illegal sales altogether. This result is wholly contrary to the public interest in enforcing the securities laws. Accordingly, the defense must fail.

b. Judicial Estoppel Principles Are Inapplicable

Pierce's judicial estoppel defense is also meritless. The doctrine of judicial estoppel seeks to prevent an injustice to the court, not to the litigant. *See, e.g.*, Wright & Miller, 18B Fed. Prac. & Proc. § 4477 (describing judicial estoppel as the doctrine of inconsistent positions, likely to be considered by courts an affirmative defense). It "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Factors typically considered in deciding whether to apply the doctrine include: (1) "a party's later position must be clearly inconsistent with its earlier position;" (2) "whether the party has succeeded in persuading a court to accept that party's earlier position," in that "[a]bsent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations;" and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not stopped." *Id.* at 750-51. Pierce's judicial estoppel defense fails, at a minimum, on the second factor because it is indisputable that the Hearing Officer refused to permit the Division to adjudicate claims for disgorgement of the proceeds of Newport's and Jenirob's sales of Lexington stock in the prior proceeding.[13]

3. All Of Pierce's Other Affirmative Defenses Are Without Merit

All of Pierce's other defenses, including unclean hands, waiver, laches and statute of limitations, are also meritless. Generally, "the doctrine of unclean hands may not be invoked against a government agency which is attempting to enforce a Congressional mandate in the public interest." *SEC v. KPMG LLP*, No. 03 Civ. 671, 2003 U.S. Dist. LEXIS 14301 (S.D.N.Y. Aug. 20, 2003) (citation omitted). Like other equitable defenses, the doctrine may be raised only where "the agency's misconduct was egregious and the resulting prejudice to the defendant rose

[13] If anything, it is Pierce, having successfully argued in the prior proceeding that claims for disgorgement of the Newport and Jenirob sales proceeds should not be adjudicated in that proceeding, who should be judicially estopped from now reversing course and arguing, in essence, that those claims were adjudicated in the prior proceeding.

to a constitutional level." *Id.* (citations omitted). Pierce cannot credibly claim any misconduct by the Division, much less show misconduct that was egregious and rose to a constitutional level. Nor can he show that he has been prejudiced by any Division actions inasmuch as he now has a full and fair opportunity to litigate the claims asserted against him in this proceeding.

Waiver is the "intentional relinquishment of a known right." *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999). It appears from Pierce's Answer that this defense is based on his claim that by failing to appeal the Hearing Officer's ruling that it could not obtain disgorgement of the Newport and Jenirob sales proceeds in the first proceeding, the Division waived the ability to seek this remedy in this proceeding. This defense must fail because, as discussed above, the Hearing Officer did *not* make any determination preventing the Division from seeking disgorgement of the sales through Newport and Jenirob in a subsequent proceeding.[14] Nor, as explained in Section III.D.1 above, was there any legal requirement that the Division appeal the Initial Decision to the Commission rather than bring this second proceeding.

Pierce's laches defense fails because it is well-established that laches is not an affirmative defense against the United States. *See, e.g., Costello v. United States*, 365 U.S. 265, 281-84 (1961)); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1451 (W.D. Mich. 1989). Similarly, Pierce's defense that the statute of limitations bars this proceeding fails because, as numerous courts have held, civil enforcement actions seeking disgorgement or other equitable relief, as here, are not time-barred. Such a result would conflict with the underlying policies of the securities laws to safeguard the public interest. *See, e.g., SEC v. Rind*, 991 F.2d 1486, 1490-92 (9th Cir. 1993), *accord SEC v. Berry*, 589 F. Supp. 2d 911, 919 & n.5 (N.D. Cal. 2008) (same).

[14] The affirmative defense of "acquiescence," is unclear; if it exists at all, it appears to be a variant of the waiver defense and fails for the same reason.

III. DISGORGEMENT AND CEASE AND DESIST ORDERS ARE PROPER

1. A Cease and Desist Order Should be Imposed Against Pierce

Section 8A of the Securities Act authorizes the Commission to issue a cease-and-desist order against any person who "is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder." 15 U.S.C. § 77h-1(a). In determining whether to impose a cease-and-desist order, the Hearing Officer should analyze the risk of future violations. *In re CentreInvest*, Exchange Act Release No. 60413, 2009 SEC LEXIS 2611, at *19-20 (issuing cease-and-desist order on motion for default judgment against broker-dealer and two of its principals, citing *In re KPMG Peat Marwick*, Exchange Act Release No. 43862, 54 SEC 1135, 1185, 2001 SEC LEXIS 98 (Jan. 19, 2001)); *In re Phlo Corp.*, Exchange Act Release No. 55562, 90 SEC Docket 273, 2007 SEC LEXIS 604, at *54 (Mar. 30, 2007) (issuing cease-and-desist order against corporation that issued publicly traded securities and served as its own transfer agent). "Absent evidence to the contrary, a single past violation ordinarily suffices to raise a sufficient risk of future violations." *In re CentreInvest*, 2009 SEC LEXIS 2611, at *19-20; *see In re KPMG Peat Marwick*, 2001 SEC LEXIS 98 at *102 (issuing cease-and-desist order against accounting firm); *see also Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) (under Commission precedent, "the existence of a violation raises an inference that it will be repeated").

In addition, the Hearing Officer should consider the seriousness of the violation, the isolated or recurrent nature of the violation, the respondents' state of mind, the respondents' assurances against future violations, the respondents' recognition of the wrongful nature of their conduct, and the respondents' opportunity to commit future violations. *In re CentreInvest*, 2009 SEC LEXIS 2611, at *20-21; *see Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (listing similar factors), *aff'd on other grounds*, 450 U.S. 91 (1981). No one factor is controlling. *In re CentreInvest*, 2009 SEC LEXIS 2611, at *20-21. Because remedial sanctions should promote the "public interest," the Hearing Officer "weigh[s] the effect of [its] action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally."

In re Arthur Lipper Corp., Exchange Act Release No. 11773, 46 S.E.C. 78, 100, 1975 SEC LEXIS 527 (Oct. 24, 1975).

As in the prior proceeding, the above factors strongly support issuance of a cease-and-desist order against Pierce in light of his recurrent and deliberate violations of Section 5 of the Securities Act. *See, e.g., Lorsin*, 2004 SEC LEXIS 961 at *32-41 (issuing cease-and-desist order after finding that respondent sold unregistered shares). Pierce, the beneficial owner of both Newport and Jenirob, used them as nominees to sell more than 1.6 million shares of Lexington stock into the market in multiple transactions over an extended period, even though no registration statement was filed or in effect for the sales. (OIP ¶¶ 15, 16, 22, 25; *see* Buchholz Decl. I ¶¶ 2-35 & Exs. A-GG; Lyttle Decl. ¶¶ 3-24 & Exs. A-B.) These sales deprived investors of disclosures about the transactions. As the Hearing Officer found in the first proceeding, Pierce's conduct in distributing the Lexington shares without registration or a valid exception was "egregious and recurrent." Buchholz Decl. II Ex. J (Initial Decision) at 19. This finding is reinforced here, in large measure because Pierce concealed the evidence about the Newport and Jenirob transactions from the Division. Moreover, Pierce has the opportunity to commit future violations and did not show any remorse for his conduct in the prior proceeding. *Id.* Nor has Pierce shown any remorse since then, particularly given his attempts to delay or avoid adjudication of the Division's claims in this proceeding.

2. Pierce Should Pay Disgorgement with Prejudgment Interest

Because the Division has demonstrated, as a matter of law, Pierce's violation of Section 5 of the Securities Act through his unregistered sales of Lexington shares through Newport and Jenirob in 2004, the Hearing Officer should order Pierce to disgorge the proceeds Newport and Jenirob each received from those stock sales. *See SEC v. M&A West*, 538 F.3d 1043, 1054 (9th Cir. 2008) (upholding summary judgment disgorgement order); *Lorsin*, 2004 SEC LEXIS 961 at *38-40 (ordering disgorgement plus reasonable interest, holding that disgorgement is an "equitable remedy that requires a violator to give up wrongfully obtained profits causally related

to the proven wrongdoing" so that violator is "returned to where he would have been absent the violative activity").

Notably, the Division's disgorgement formula only has to be a reasonable approximation of the gains causally connected to the violation. *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). Any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty." *Patel*, 61 F.3d at 140 (quoting *SEC v. First City Fin. Corp.*, 890 F.2d at 1232).

Pierce has not contested the Division's allegation that Newport and Jenirob received approximately $7.7 million in proceeds from their unregistered sales of Lexington shares in 2004. (OIP ¶¶ 25, 29.) As a result, the total figure of $7.7 million is the starting point for disgorgement liability. In fact, as explained in detail in the supporting Buchholz I and Lyttle declarations, the Division has calculated that Newport received a total of $5,264,466.64 in proceeds from its unregistered sales of Lexington shares and Jenirob received a total of $1,983,169.11 in proceeds from its unregistered sales of the Lexington shares for aggregated disgorgement of $7,247,635.75. *See* Lyttle Decl. ¶¶ 3-24 & Exs. A-B; Buchholz Decl. I ¶¶ 2-35 & Exs. A-GG.

Award of prejudgment interest on the amount of Pierce's ill-gotten gains is another component of a disgorgement remedy. *SEC v. Cross Fin. Serv., Inc.*, 908 F. Supp. 718, 734 (C.D. Cal. 1995) ("ill gotten gains include prejudgment interest to ensure that the wrongdoer does not profit from the illegal activity"). By ordering prejudgment interest, the Hearing Officer will deprive Pierce, of the benefit of the time value of money on the proceeds of his illegal sales through Newport and Jenirob. *See SEC v. Moran,* 944 F. Supp. 286, 295 (S.D.N.Y. 1996); *see also SEC v. First Jersey Secs.*, 101 F.3d at 1476 (awarding prejudgment interest).

Pierce, the beneficial owner of Newport and Jenirob, should be jointly and severally liable with them for this disgorgement.[15] "Where two or more individuals or entities collaborate

[15] The Division does not contend that Newport and Jenirob should be jointly and severally liable for each other's disgorgement obligations, however.

or have a close relationship in engaging in the violations of the securities laws, they may be held jointly and severally liable for the disgorgement of illegally obtained proceeds." *SEC v. J.T. Wallenbrock & Assocs.*, 440 F.3d 1109, 1117 (9th Cir. 2006); *see SEC v. First Jersey Sec.*, 101 F.3d at 1475 (awarding disgorgement on joint and several basis where owner and chief executive collaborated in unlawful conduct with entity and profited from violations); *see also SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997) (same, noting that often defendants move funds through various accounts to avoid detection or use nominees to hold securities).

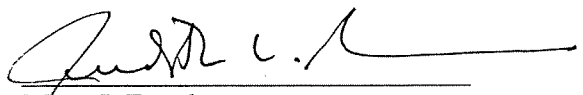
Accordingly, the Hearing Officer should order Pierce to disgorge a total of $7,247,635.75 plus prejudgment interest, jointly and severally with Newport and Jenirob, for his undisputed receipt of ill-gotten gains in violations of Section 5 of the Securities Act.

IV. CONCLUSION

For all the foregoing reasons, the Division requests that the Hearing Officer grant the Division's Motion for Summary Disposition as to Pierce's liability for violating Sections 5(a) and 5(c) of the Securities Act. The Division further requests that the Hearing Officer grant the requested remedies against Pierce, including an order that Pierce cease and desist from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act and an order that he pay disgorgement in the amount of $7,247,635.75 plus prejudgment interest, jointly and severally with Newport and Jenirob, as set forth above.

Dated: March 21, 2011

Respectfully submitted,



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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-13927

In the Matter of

GORDON BRENT PIERCE,
NEWPORT CAPITAL CORP., and
JENIROB COMPANY LTD.,

Respondents.

Administrative Law Judge
Carol Fox Foelak

DECLARATION OF STEVEN D. BUCHHOLZ IN FURTHER SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT PIERCE

I, Steven D. Buchholz, declare:

1. I am an attorney duly admitted to practice in the State of California, and a staff attorney in the Division of Enforcement ("Division") of the United States Securities and Exchange Commission ("Commission"). I am one of the attorneys appearing on behalf of the Division in this matter, and I was one of the attorneys with responsibility for the Division's investigation in the matter of Lexington Resources, Inc. ("Lexington"). I am familiar with the files and records in this proceeding and in the prior administrative proceeding involving Lexington, Grant Atkins, and Respondent Gordon Brent Pierce ("Pierce"), File No. 3-13109 (the "prior proceeding"). Unless otherwise specified, I have personal knowledge of the facts stated herein, and could and would testify competently to them if called to do so. I make this declaration in support of the Division's Motion for Summary Disposition Against Respondent Pierce.

2. Attached hereto as Exhibit A is a true and correct copy of the Commission's Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 ("OIP") in the prior proceeding, dated July 31, 2008.

3. Attached hereto as Exhibit B is a true and correct copy of the Division of Enforcement's Motion for Summary Disposition Against Respondent Gordon Brent Pierce in the prior proceeding, filed December 5, 2008.

4. Attached hereto as Exhibit C is a true and correct copy of the Order closing the record of evidence in the prior proceeding, dated March 6, 2009.

5. Attached hereto as Exhibit D is a true and correct copy of an excerpt from the transcript of Pierce's investigative testimony in the Lexington matter on July 27, 2006, which was admitted into evidence as part of Division's Exhibit 62 in the prior proceeding.

6. Attached hereto as Exhibit E is a true and correct copy of the Division of Enforcement's Motion for the Admission of New Evidence in the prior proceeding, filed March 18, 2009.

7. Attached hereto as Exhibit F is a true and correct copy of my declaration in support of the Division of Enforcement's Motion for the Admission of New Evidence in the prior proceeding, filed March 18, 2009. As further described in Exhibit F, Pierce did not produce any account records or other documents of Newport Capital Corp. ("Newport") or Jenirob Company Ltd. ("Jenirob") (or any other offshore companies under his control) in response to the Division's document request and investigatory subpoena during the Lexington investigation. As a result, the Division first requested assistance from the securities regulator in Liechtenstein in obtaining documents relating to sales of Lexington stock through Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank") in late 2006, but was informed at that time that the regulator could not obtain the documents for the Division. Because the Division did not have evidence relating to Pierce's beneficial ownership and sales of Lexington stock through the Newport and Jenirob accounts at Hypo Bank when the prior proceeding was instituted on July 31, 2008, the OIP in that proceeding did not contain any specific allegations concerning Pierce's sales of Lexington shares through Newport and Jenirob or his ownership interest in these entities.

8. Attached hereto as Exhibit G is a true and correct copy of Pierce's Opposition to the Division's Motion for the Admission of New Evidence in the prior proceeding, filed March 26, 2009.

9. Attached hereto as Exhibit H is a true and correct copy of a March 25, 2009 letter from Pierce's Liechtenstein counsel, filed March 26, 2009 in the prior proceeding as Exhibit A to the Declaration of Christopher B. Wells in support of Pierce's Opposition to the Division's Motion for the Admission of New Evidence. According to Exhibit H, Pierce filed appeals in Liechtenstein on November 4, 2008 and again on February 23, 2009 relating to the Division's request for assistance from the Liechtenstein regulator.

10. Attached hereto as Exhibit I is a true and correct copy of the Order granting the Division of Enforcement's Motion for the Admission of New Evidence in the prior proceeding, dated April 7, 2009.

11. Attached hereto as Exhibit J is a true and correct copy of the Initial Decision in he prior proceeding, dated June 5, 2009.

12. After the Initial Decision in the prior proceeding was issued on June 5, 2009, I made no representation of any kind to Pierce or his counsel regarding whether or not the Division would file a petition for review with the Commission.

13. Attached hereto as Exhibit K is a true and correct copy of the Commission's Notice that Initial Decision Has Become Final in the prior proceeding, dated July 8, 2009.

14. On January 12, 2010, I informed Pierce's counsel that the Division planned to recommend that the Commission institute a new cease-and-desist proceeding against Pierce alleging that his sales of Lexington stock through Newport and Jenirob violated Section 5 of the Securities Act of 1933. I did not discuss with Pierce or his counsel before January 12, 2010 whether or not the Division would recommend a new proceeding against Pierce in connection with the Newport and Jenirob sales.

15. Attached hereto as Exhibit L is a true and correct copy of the Commission's pplication for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce, filed in the United States District Court for the Northern District of California on June 8, 2010. The Commission's Application was granted on September 2, 2010 and Pierce completed payment of the disgorgement and interest ordered in the prior proceeding on January 31, 2011.

16. Attached hereto as Exhibit M is a true and correct copy of the Commission's Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 Against Respondents Pierce, Newport Capital Corp. and Jenirob Company Ltd., dated June 8, 2010.

17. Attached hereto as Exhibit N is a true and correct copy of Pierce's Ex Parte Application for a Temporary Restraining Order, Order to Show Cause, and Stay, filed in the United States District Court for the Northern District of California on July 9, 2010.

18. Attached hereto as Exhibit O is a true and correct copy of Pierce's Memorandum in Support of Motion for TRO, Preliminary Injunction and Stay, filed in Pierce's district court action on July 9, 2010.

19. Attached hereto as Exhibit P is a true and correct copy of the Declaration of Christopher B. Wells in Support of Motion for Preliminary Injunction, filed in Pierce's district court action on July 9, 2010.

20. Attached hereto as Exhibit Q is a true and correct copy of the Declaration of G. Brent Pierce filed in Pierce's district court action on July 9, 2010.

21. Attached hereto as Exhibit R is a true and correct copy of Pierce's Complaint for Declaratory and Injunctive Relief, filed in Pierce's district court action on July 9, 2010.

22. Attached hereto as Exhibit S is a true and correct copy of the docket in case number 10-17218 of the United States Court of Appeals for the Ninth Circuit, accessed via the PACER electronic filing system on March 18, 2011, showing that Pierce appealed the district court's dismissal of his action on October 1, 2010 and that the appeal remains pending.

23. Attached hereto as Exhibit T is a true and correct copy of the Order denying Pierce's Motion for a Postponement or Stay of the Enforcement Proceeding in the present proceeding, dated March 11, 2011.

24. Attached hereto as Exhibit U is a true and correct copy of Pierce's Answer in the present proceeding, filed July 9, 2010.

25. Attached hereto as Exhibit V is a true and correct copy of documents relating to Newport's Hypo Bank account, identifying Pierce as the beneficial owner at page SEC 159008. Exhibit V was admitted into evidence as Division's Exhibit 80 in the prior proceeding.

26. Attached hereto as Exhibit W is a true and correct copy of documents relating to Jenirob's Hypo Bank account, identifying Pierce as the beneficial owner at page SEC 158546. Exhibit W was admitted into evidence as Division's Exhibit 84 in the prior proceeding.

27. Consistent with the agreement reached during the hearing in the prior proceeding, account numbers and personal identification numbers (including social security numbers) have

been redacted wherever they appear in exhibits attached to this declaration to show only the last four digits.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed March 21, 2011, in San Francisco, California.

Steven D. Buchholz

A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 31, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13109

In the Matter of

Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce,

Respondents.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Lexington Resources, Inc. ("Lexington"), Grant Atkins ("Atkins") and Gordon Brent Pierce ("Pierce") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

Nature of the Proceeding

1. This matter involves the unregistered distribution of stock in a Las Vegas microcap company, allowing a Canadian stock promoter to reap millions of dollars in unlawful profits without disclosing to investors information mandated by the federal securities laws. Between 2003 and 2006, Lexington Resources, Inc., a purported oil and gas company, and its CEO and Chairman Grant Atkins, issued nearly five million shares of Lexington common stock to promoter Gordon Brent Pierce and his associates. Pierce and his associates then spearheaded a massive promotional campaign, including email spam and mass mailings. As Lexington's stock price skyrocketed to $7.50 per share, Pierce and his associates resold their stock to public investors through an account at an offshore bank, netting millions of dollars in profits; Lexington's operating subsidiary subsequently filed for bankruptcy and its stock now trades below $0.02 per share.

2. Lexington's issuance of stock to Pierce was supposedly covered by Form S-8 registration statements, a short form registration statement that allows companies to register offerings made to employees, including consultants, using an abbreviated disclosure format. Form S-8 is to be used by issuers to register the issuance of shares to consultants who perform bona fide services for the issuer and are issued by the company for compensatory or incentive purposes. However, Form S-8 expressly prohibits the registration of the issuance of stock as compensation for stock promotion or capital raising services. Pierce provided both of these services to Lexington, and thus the registration of these issuances of shares purportedly pursuant to Form S-8 was invalid. As a result, both Lexington's sales to Pierce, and Pierce's sales to the public, were in violation of the registration provisions of the federal securities laws.

Respondents

3. Lexington is a Nevada corporation formed in November 2003 pursuant to a reverse merger between Intergold Corp. ("Intergold"), a public shell company, and Lexington Oil and Gas LLC, a private company owned by an offshore entity. In connection with the reverse merger, Intergold changed its name to Lexington Resources, Inc. and Lexington Oil and Gas became a wholly-owned subsidiary of Lexington Resources, Inc. Lexington's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and quoted on the pink sheets under the symbol "LXRS." On March 4, 2008, Lexington's primary operating subsidiary, Lexington Oil and Gas, filed for Chapter 11 bankruptcy. The petition was converted to a Chapter 7 liquidation on April 22, 2008. Lexington's only other operating subsidiary filed for Chapter 7 liquidation on June 11, 2008.

4. Grant Atkins has been CEO and Chairman of Lexington since its inception in November 2003 and was CEO and Chairman of Lexington's predecessor, Intergold. Atkins, 48, is a Canadian citizen residing in Vancouver, British Columbia.

5. Gordon Brent Pierce has acted as a "consultant" to Lexington and other issuers in the U.S. and Europe through various consulting companies that he controls. Pierce, 51, is a Canadian citizen residing in Vancouver, British Columbia and the Cayman Islands.

Facts

Lexington and Atkins Issued Millions of Shares to Pierce Using Form S-8

6. On November 19, 2003, Atkins and Pierce formed Lexington through a reverse merger between Intergold (at that point a non-operational shell company) and Lexington Oil and Gas, a new private company owned by an offshore entity set up by Pierce. Atkins became the sole officer and director of Lexington, a purported natural gas and oil exploration company.

7. Within days of the reverse merger, Atkins caused Lexington to file a registration statement on Form S-8 and immediately began issuing stock to Pierce and several of Pierce's longtime business associates. Between November 2003 and March 2006, Atkins caused Lexington to issue more than 5 million shares to Pierce and his associates purportedly registered on Form S-8. Pierce told Atkins who should receive the shares and how many.

8. Form S-8 is an abbreviated form of registration statement that may be used to register an issuance of shares to employees and certain types of consultants; Form S-8 does not provide the extensive disclosures or Commission review required for a registration statement used for a public offering of securities. A company can issue S-8 shares to consultants only if they provide bona fide services to the registrant and such services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

9. Contrary to the express requirements of Form S-8, Pierce served as both a stock promoter and capital-raiser for Lexington. During the entire period from late 2003 to 2006, Pierce personally met with individual and institutional investors to solicit investments in Lexington and directed an investor relations effort that included speaking with and distributing promotional kits to thousands of potential investors. Pierce used some of his S-8 stock to compensate others who helped with this effort. Pierce also coordinated an extensive promotional campaign for Lexington through spam emails, newsletters, and advertisements on investing websites. All of these services promoted or maintained a market for Lexington stock and therefore could not be compensated with securities registered pursuant to Form S-8.

10. Pierce's stock promotion campaign was successful. From February to June 2004, Lexington's stock price increased from $3.00 to $7.50 per share, with average trading volume increasing from 1,000 to about 100,000 shares per day. (The price subsequently collapsed, and the stock currently trades at under $0.02 per share.)

11. Pierce also engaged in extensive capital-raising activities on behalf of Lexington, contrary to the plain terms of Form S-8. Pierce raised all of the capital for Lexington's first year of drilling operations by finding investors to provide loans to Lexington. He transferred some of his S-8 shares to these investors. Pierce also raised capital for Lexington by selling most of his S-8 shares through an offshore company that he operated, and funneling money back to Lexington and Atkins.

12. Lexington and Atkins also issued shares under Form S-8 to indirectly raise capital and exhibited control over the resale of shares by arranging to have individuals who received S-8 shares pay off Lexington's pre-existing debts.

13. Lexington's purported registration of stock issuances to Pierce on Form S-8 was invalid because Pierce was performing services expressly disallowed for Form S-8 registrations. By failing to register the issuance of shares to Pierce and his associates, Lexington failed to make all of the disclosures to the public for the registration of the issuances of shares for capital-raising transactions as required by law.

Pierce Engaged in a Further Illegal Distribution of Lexington Stock

14. After receiving the shares from Lexington, Pierce engaged in a further illegal distribution of his own. Pierce acted as an underwriter because he acquired the shares with a view to distribution. Almost immediately after receiving the shares, Pierce transferred or sold them through his offshore company.

15. Pierce and his associates deposited about 3 million Lexington shares in accounts at an offshore bank. Between February and July 2004, about 2.5 million Lexington shares were sold to the public through an omnibus brokerage account in the United States in the name of the offshore bank, generating sales proceeds of over $13 million.

16. Pierce personally sold at least $2.7 million in Lexington stock through the offshore bank in June 2004 alone. Pierce's sales were not registered with the Commission.

Pierce Failed to File Reports Disclosing His Stock Ownership

17. During most of the period from November 2003 to May 2004, Pierce owned or controlled between 10 and 60 percent of Lexington's outstanding stock. Pierce did not file the required Schedule 13D until July 25, 2006, however.

18. In the belatedly-filed Schedule 13D, Pierce inaccurately stated that he owned or controlled between 5 and 10 percent of Lexington's outstanding stock during late 2003, early 2004, and early 2006. In reality, Pierce owned or controlled more than 10 percent of Lexington's stock during most of the period from November 2003 to May 2004.

19. Although Pierce regularly traded Lexington stock in the open market for entities he controlled during 2004, Pierce never reported his ownership or changes in ownership on Forms 3, 4 or 5.

Violations

20. As a result of the conduct described above, Respondents Lexington, Atkins, and Pierce violated Sections 5(a) and 5(c) of the Securities Act, which, among other things, unless a registration statement is on file or in effect as to a security, prohibit any person, directly or indirectly, from: (i) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; (ii) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or (iii) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

21. Also as a result of the conduct described above, Respondent Pierce violated Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder, which require: (i) any beneficial owner of more than five percent of any class of equity security registered under Section 12 to file a statement with the Commission within 10 days containing the information required in Schedule 13D and promptly to file an amendment to Schedule 13D if any material change in beneficial ownership occurs, and (ii) any beneficial owner of more than ten percent of a class of equity security registered under Section 12 to file an initial statement of ownership on Form 3 within 10 days, statements of changes in ownership on Form 4 within two business days, and annual statements of ownership on Form 5 within 45 days of year-end.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate that cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. Whether, pursuant to Section 8A of the Securities Act, all Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a) and 5(c) of the Securities Act;

C. Whether, pursuant to Section 21C of the Exchange Act, Respondent Pierce should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder; and

D. Whether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answer, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within

the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Florence E. Harmon
Acting Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

B

Administrative Proceeding
File No. 3-13109

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce, Respondents	Administrative Law Judge Carol Fox Foelak

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT GORDON BRENT PIERCE

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INTRODUCTION

This Motion for Summary Disposition arises from the admission by respondent Gordon Brent Pierce ("Pierce") that he sold $2.7 million of Lexington Resources, Inc. ("Lexington") common stock in June 2004 without registering those sales. Pierce's Answer, ¶ 16. Pierce's June 2004 stock sales constitute a *prima facie* violation of Section 5 of the Securities Act of 1933 ("Securities Act") upon a showing by the Division of Enforcement ("Division") that (i) Pierce sold the Lexington shares, (ii) there was no registration statement for Pierce's sales of the Lexington shares and (iii) an instrument of interstate commerce was used in selling those shares. *E.g., SEC v. Lybrand*, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002). As described in the Division's Pre-Hearing Brief, Pierce's June 2004 stock sales were part of a larger scheme whereby Pierce and his companies sold millions of Lexington shares without registration during a thirty-month long period and took millions of dollars – much of it at the peak of Lexington's share price on the Over The Counter Bulletin Board ("OTCBB") – from investors who never received disclosures about Pierce and his activities.

As shown in this Motion, the undisputed facts establish Pierce's *prima facie* violation of Section 5. Pierce admits that he sold Lexington shares in June 2004 and that the "sales were not registered with the Commission." Answer, ¶ 16. Pierce also concedes that the sales were made using an account at Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank"). *See id.* Hypo Bank used vFinance Investments, Inc. ("vFinance") to sell those shares through the OTCBB, which involves instruments of interstate commerce. Although most of the shares that Pierce sold in June 2004 were originally issued to him by Lexington under a Form S-8 registration statement dated November 21, 2003 (the "November 2003 Form S-8"), that Form S-8 registration statement did not cover the resale of Lexington shares by anyone – including Pierce.

Because his *prima facie* violation is undisputed, Pierce has the burden of proving that his June 2004 sales of the Lexington shares were exempt from registration. *E.g., SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953). Because he offered and sold the Lexington shares within one year of receiving them, Pierce engaged in a distribution of the Lexington shares and was an "underwriter" for purposes of Section 2(11) of the Securities Act. 15 U.S.C. § 77b(11). This underwriter status

precludes Pierce from relying upon the exemption from registration found in Section 4(1) of the Securities Act. *See SEC v. M&A West Inc.*, 538 F.3d 1043, 1050-51 (9th Cir. 2008).

In contesting Section 5 liability, Pierce contends that he believed that he acquired Lexington shares that were already registered or exempt from registration. *See* Pierce's Answer, ¶¶ 12, 16. But scienter is not an element of a Section 5 violation, and Pierce's purported belief that his June 2004 sales of Lexington shares were already registered or exempt from registration is not a defense to liability. *E.g.*, *SEC v. Universal Major Indus.*, 546 F.2d 1044, 1047 (2d Cir. 1976). Pierce therefore lacks any defense for selling Lexington shares in June 2004 without registering the sales.

Because Pierce violated the Securities Act's registration requirements, he should disgorge his Lexington stock sale proceeds that flowed from his violations. *Geiger v. SEC*, 363 F.3d 481, 488-89 (D.C. Cir. 2004). The Division only has to offer a disgorgement formula that is a reasonable approximation of the gains causally connected to the violation. *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995). Pierce received about $2.1 million in proceeds that flowed from his unregistered sale of Lexington shares using a reasonable first-in, first-out calculation method. The Hearing Officer should therefore order Pierce to disgorge that amount – plus pre-judgment interest – in light of his undisputed violation of Section 5 of the Securities Act.

Finally, Pierce admits that he did not file a Schedule 13D reporting his beneficial ownership of at least 5% of Lexington's outstanding shares until July 2006. Pierce's Answer, ¶ 17. By virtue of that admission and the undisputed fact that Pierce's Schedule 13D did not disclose his beneficial ownership of Lexington shares through a company he controlled, International Market Trend AG ("IMT"), the Division is also entitled to summary disposition of its claims under Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 ("Exchange Act"). Given Pierce's undisputed violations of Section 5 of the Securities Act and the disclosure provisions in Sections 13(d) and 16(a) of the Exchange Act, issuing cease and desist orders is appropriate to protect investors. *In the Matter of Lorsin, Inc., et al.*, Initial Decision Release No. 250 at 12-14 (Admin. Proc. File No. 3-11310 May 11, 2004) (ALJ Mahony) (issuing cease and desist orders on summary disposition in light of violations of Section 5 of the Securities Act despite the respondents' good faith claims).

FACTUAL BACKGROUND

Lexington was formed on November 19, 2003 through a reverse merger between a publicly traded, but non-operational, shell company and a newly-formed private company called "Lexington Oil and Gas." Grant Atkins ("Atkins") was the president and sole director of the shell company, and became the president and a director of Lexington following the reverse merger.

Before the reverse merger, the shell company had 521,184 shares outstanding. As part of the reverse merger, Lexington issued three million restricted shares to the shareholders of Lexington Oil and Gas. As of November 19, 2003, Lexington's shares were quoted on the OTCBB under the symbol "LXRS."

On November 18, 2003, Lexington granted to IMT, a Swiss company controlled by Pierce, vested options to purchase 950,000 Lexington shares at an exercise price of $0.50 per share. *See* Declaration of Steven D. Buchholz ("Buchholz Decl.") filed herewith, at ¶ 2, and Exh. A attached thereto. On November 21, 2003, Lexington filed the November 2003 Form S-8 and began issuing the shares underlying IMT's vested options to Pierce or his associates. *See* Buchholz Decl. at ¶¶ 3-5 and Exhs. B-D. On November 24, 2003, Lexington instructed its transfer agent to issue 350,000 shares to Pierce. *See* Buchholz Decl. at ¶ 4 and Exh. C. Pierce then transferred the 350,000 shares on the same day to Newport Capital Corp. ("Newport"), a Belize company of which Pierce was president, treasurer and a director. Between November 25 and December 9, 2003, Newport sold 328,300 of the 350,000 Lexington shares to third persons. *See* Buchholz Decl. at ¶ 6.

Lexington issued another 150,000 shares to Pierce on November 25, 2003. *See* Declaration of Jeffrey A. Lyttle ("Lyttle Decl.") filed herewith, at ¶ 2, and Exh. A attached thereto. Three business days later, on December 2, 2003, Pierce transferred 50,000 of those Lexington shares to Newport. That same day, Newport sold all of those 50,000 shares to third parties. *See* Buchholz Decl. at ¶ 7. These transactions left Pierce with a balance of 100,000 shares that Lexington had issued to Pierce under the November 2003 Form S-8. Pierce transferred these 100,000 Lexington shares to his personal account at Hypo Bank where Pierce had previously deposited 42,651 shares that he retained from the original shell company merger that created Lexington. *See* Lyttle Decl. at

¶ 3 and Exh. B. On January 29, 2004, Lexington effected a three-for-one stock split and distributed to all current shareholders two new shares for each one they held. As a result of the stock split, Pierce retained in his Hypo Bank account a total of 300,000 post-split Lexington shares that were issued under the November 2003 Form S-8, plus a total of 121,683 post-split shares from the original shell company merger. *See* Lyttle Decl. at ¶ 4 and Exh. C.

Pierce admits – and the Hypo Bank records for his account show – that in June 2004, when Lexington's post-split share price hit an all-time high of over $7.00, Pierce sold nearly 400,000 Lexington post-split shares for proceeds of $2.7 million. *See* Lyttle Decl. at ¶ 5 and Exh. D. Hypo Bank had a trading account at vFinance, a registered brokerage firm based in Florida. For June 2004, vFinance account records show that Hypo Bank net sold 1.2 million post-split Lexington shares through the OTCBB for total net proceeds of $8.1 million. *See* Lyttle Decl. at ¶ 6 and Exh. E.

The 400,000 Lexington shares sold by Pierce in June 2004 through Hypo Bank included the 300,000 shares (post-split) that Pierce retained from the shares Lexington issued to him under the November 2003 Form S-8. After subtracting (under a first-in, first-out analysis) the sales of the 121,683 post-split Lexington shares that were in the Hypo Bank account from the original merger and that Pierce began selling in January 2004, Pierce received $2,077,969 from selling the 300,000 post-split shares issued under the November 2003 Form S-8. *See* Lyttle Decl. at ¶ 7 and Exh. F.

Pierce did not disclose his beneficial ownership of Lexington stock until he filed a Schedule 13D on July 25, 2006. This filing was after the staff sent him a subpoena for documents and testimony. In the belatedly-filed Schedule 13D, Pierce stated that he owned or controlled between 5% and 10% of Lexington's outstanding stock during late 2003, early 2004 and early 2006. *See* Buchholz Decl. at ¶ 8 and Exh. E.

LEGAL ARGUMENT

I. SUMMARY DISPOSITION IS PROPER AS TO PIERCE'S LIABILITY.

A. The Grounds For Summary Disposition Against Pierce

The Division seeks to establish Pierce's liability and disgorgement obligation under Rule 250(a) of the Commission's Rules of Practice. Commission's Rules of Practice, Rule 250(a) (March

2006), *published at* 17 C.F.R. § 201.250(a) (2008). This Motion for Summary Disposition is appropriate under Rule 250(a) because Pierce's liability and disgorgement obligation under the three statutory provisions identified in the OIP – *i.e.*, Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act – are established by his Answer and by business records reflecting his stock ownership and transactions.

B. Pierce's *Prima Facie* Violation Of Section 5 Of The Securities Act.

Section 5(a) of the Securities Act imposes a registration requirement for sales of securities in interstate commerce. 15 U.S.C. § 77e(a). Section 5(a) therefore prohibited Pierce's sales of the Lexington shares in June 2004 unless there was a registration statement in effect for those sales or unless the sales were exempt from registration. *E.g.*, *Anderson v. Aurotek*, 774 F.2d 927, 929 (9th Cir. 1985), *disapproved on other grounds in Pinter v. Dahl*, 486 U.S. 622 (1998). It is well-established that Pierce's *prima facie* violation of Section 5(a) is established upon the Division's showing that: (1) no registration was in effect as to Pierce's sale of Lexington shares, (2) Pierce directly or indirectly sold Lexington shares, and (3) Pierce's sale of Lexington shares involved the mails or interstate transportation or communication. *E.g.*, *SEC v. Corporate Relations Group, Inc.*, 2003 U.S. Dist. LEXIS 24925 at *46 (M.D. Fla. Mar. 28, 2003); *SEC v. Lybrand*, *supra*, 200 F. Supp. 2d at 392; *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 361 (S.D.N.Y. 1998), *aff'd* 155 F.3d 129 (2d Cir. 1998).[1]

The undisputed evidence establishes Pierce's *prima facie* violation of Sections 5(a). Pierce admits selling Lexington shares through his Hypo Bank account in June 2004 and that those sales were not registered with the Commission. Pierce's Answer, ¶ 16. Because Hypo Bank effected those sales through vFinance and the OTCBB, the instruments of interstate commerce were necessarily used for Pierce's June 2004 sales of Lexington shares. As a result, the Division has satisfied all three elements of a *prima facie* case against Pierce for violating Section 5(a).

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1 Because his Lexington stock sales necessarily involved his offer to sell those shares through Hypo Bank and vFinance, Pierce also violated Section 5(c) of the Securities Act by offering to sell Lexington shares without filing a registration statement for those proposed sales. 15 U.S.C. § 77e(c).

C. Pierce's June 2004 Stock Sales Were Not Exempt From Registration.

Given Pierce's undisputed *prima facie* violation of Section 5(a), the Division is entitled to summary disposition on its failure to register claim unless Pierce can point to evidence which could satisfy his legal burden of proving that his June 2004 sales of Lexington shares were exempt from registration. *See SEC v. Ralston Purina Co., supra*, 346 U.S. at 126; *SEC v. M&A West, supra*, 538 F.3d at 1050-51 (upholding summary judgment where defendant could not establish legal exemption from registration); *Sorrel v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982) (holding that exemptions are strictly construed and must be proven by party asserting exemption).

Section 4(1) of the Securities Act exempts from registration all "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1). This exemption "must be strictly construed against the person claiming its benefit, as public policy strongly supports registration." *Quinn and Co. v. SEC*, 452 F.2d 943, 945 (10th Cir. 1971) (footnotes omitted).

The undisputed facts show that Pierce cannot qualify for the Section 4(1) exemption because, among other reasons, he fell within the Securities Act's definition of an underwriter when he received and then sold the Lexington shares that he received under the November 2003 Form S-8. Section 2(a)(11) of the Securities Act defines an "underwriter" to mean "any person who has purchased from an issuer with a view to ... the distribution of any security, or participates or has a direct or indirect participation in any such undertaking ... ." 15 U.S.C. § 77b(a)(11). Pierce satisfies the first part of the "underwriter" definition by being a "person" who purchased from an "issuer" – *i.e.*, Lexington.

Pierce also satisfies the second part of the "underwriter" definition because he acquired shares from Lexington under the November 2003 Form S-8 with the intention of selling – or distributing – the shares to public investors. *See Ira Haupt & Co.*, 23 S.E.C. 589, 597 (1946) (defining "distribution" to be the entire process of moving shares from an issuer to the investing public); *In the Matter of Lorsin, Inc., et al., supra*, Initial Decision Release No. 250 at 9-12. One compelling indication of Pierce's "underwriter" status is the short time period between his acquisition of the 300,000 Lexington shares (post-split) in November 2003 and his sale of those

shares through Hypo Bank in June 2004.

In *SEC v. M&A West, supra*, 538 F.3d at 1050-51, the Ninth Circuit Court of Appeals recently upheld the district court's summary judgment decision that a stock promoter sold shares as an "underwriter" – and therefore without a valid Section 4(1) exemption from registration. According to the *M&A West* Court, the promoter was an "underwriter" who could not qualify for the Section 4(1) exemption because he received shares from an affiliate of the issuer and then sold those shares within the two-year holding period required at the time under Securities Act Rule 144(k) for a safe harbor from registration. *Id.* at 1045-51.

According to the Securities Act Rule 144(k) that was in effect in June 2004, the minimum holding period for the safe harbor from registration was twelve months. 17 C.F.R. § 230.144(a)(1) (2004). It is undisputed that Pierce's June 2004 sales of Lexington shares took place just seven months after he received those shares from Lexington in November 2003. As a result, Pierce's sales were part of his distribution – as an underwriter – of the Lexington shares so as to preclude him from relying upon the exemption from registration set forth in Section 4(1) of the Securities Act. *SEC v. M&A West, supra*, 538 F.3d at 1050-51.

D. Pierce's Supposed Good Faith Is Not A Defense To Section 5 Liability.

In his Answer, Pierce contends that he believed in good faith that Lexington would issue shares to him that did not require any registration before he sold them to third parties. Pierce's Answer, ¶¶ 12, 16. The evidence regarding Pierce's supposed good faith belief is unpersuasive.[2] Even assuming, however, that Pierce had a good faith belief that he could sell his shares without registration, that belief does not defeat his liability for violating Section 5.

First, Pierce's supposed good faith belief is no defense to liability because the Division does not have to prove any improper intent by Pierce for a violation of Section 5. Instead, the case law is clear that strict liability attaches to the unregistered offer and/or sale of a security in interstate

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2 The Lexington option grants and Pierce's exercise agreements required that he hold the Lexington shares for investment purposes and comply with any stock registration requirements. Such evidence indicates that Pierce was on notice that he needed to register his sale of the shares.

commerce. *E.g.*, *SEC v. Lybrand*, *supra*, 200 F. Supp. 2d at 392; *SEC v. Current Fin. Serv.*, 100 F. Supp. 2d 1, 6-7 (D.D.C. 2000), *aff'd sub nom. SEC v. Rayburn*, 2001 U.S. App. LEXIS 25870 (D.C. Cir. Oct. 15, 2001). As a result, it is irrelevant whether Pierce believed that his Lexington shares were supposed to be "free trading," and not subject to a registration requirement. *See Geiger v. SEC*, *supra*, 363 F.3d at 485 (finding violations of Sections 5(a) and 5(c)) for sale of shares that the broker described as "free-trading").

Second, Pierce's contention that he instructed Lexington to provide him with unrestricted shares demonstrates that he acquired shares under the November 2003 Form S-8 with the intention of promptly selling those shares. If Pierce did not intend to sell the shares within the twelve-month holding period specified by Securities Act Rule 144, he should have been indifferent to whether the shares bore a Rule 144 restrictive legend. Pierce's desire to keep a restrictive legend off his Lexington shares shows that planned to sell the shares publicly, and this proves that he acquired the shares from Lexington as an "underwriter" who was engaged in a distribution of the shares. As a result, Pierce cannot rely upon the Section 4(1) exemption.

E. Pierce Violated Sections 13(d) and 16(a) Of The Exchange Act.

Section 13(d)(1) of the Exchange Act requires any "person" who acquires "directly or indirectly the beneficial ownership" of more than five percent of a publicly listed class of security to report that beneficial ownership within ten days. 15 U.S.C. § 78m(d)(1). Section 16(a) requires any beneficial owner of more than ten percent to file reports of holdings and changes in holdings on Forms 3, 4 and 5. 15 U.S.C. § 78p(a). A person is a "beneficial owner" if he or she has the right to acquire beneficial ownership through the exercise of an option within sixty days. Exchange Act Rule 13d-3(d)(1), *published at* 17 C.F.R. § 240.13d-3(d)(1) (2008). As with violations of Section 5 of the Securities Act, Pierce's violations of Sections 13(d)(1) and 16(a) do not require any showing that he acted with an improper intent or that he acted in bad faith. *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1167 (D.C. Cir. 1978) (no scienter required for Section 13(d) violation); *SEC v. Blackwell*, 291 F. Supp. 2d 673, 694-95 (S.D. Ohio 2003) (no scienter required for Section 16(a) violation).

Pierce admits that he did not disclose his ownership interest by filing a Schedule 13D until

July 2006. Pierce's Answer, ¶ 17. That Schedule 13D reflects Pierce's five percent ownership interest in Lexington common stock as far back as November 2003. Pierce therefore admits that he did not meet the filing requirements specified in Section 13(d)(1). Pierce's Schedule 13D also fails to reflect IMT's acquisition of 950,000 vested Lexington options in November 2003. Because Pierce had a control relationship with IMT, see Pierce's Answer, ¶ 9, his on-going failure to disclose the IMT holdings violates Sections 13(d)(1) and 16(a). *See* Lyttle Decl. at ¶ 8 and Exh. G.

II. DISGORGEMENT AND CEASE AND DESIST ORDERS ARE PROPER.

Because the Division has demonstrated, as a matter of law, Pierce's violation of Section 5 of the Securities Act through his unregistered sale of Lexington shares in June 2004, the Hearing Officer should order Pierce to disgorge the proceeds he received from those stock sales. *SEC v. M&A West, supra*, 538 F.3d at 1054 (upholding summary judgment order to disgorge all proceeds); *Geiger v. SEC, supra*, 363 F.3d at 488-89; *In the Matter of Lorsin, Inc., supra*, Initial Decision Release No. 250 at 15. Notably, the Division's disgorgement formula only has to be a reasonable approximation of the gains causally connected to the violation. *SEC v. Patel, supra*, 61 F.3d at 139; *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). Any "'risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty.'" *Patel*, 61 F.3d at 140 (quoting *First City Fin. Corp.*, 890 F.2d at 1232).

Pierce does not dispute the Division's allegations that he received $2.7 million from his unregistered sales of Lexington shares in June 2004. *Compare* OIP, ¶ III.16 *with* Pierce's Answer, ¶ 16. As a result, $2.7 million is the starting point for Pierce's disgorgement liability. Pierce must then meet his burden of showing that a lesser amount is properly attributable to his sale of the 300,000 post-split Lexington shares that he received under the November 2003 Form S-8. At best, Pierce could try to show that after subtracting the sale proceeds from the 121,683 post-split shares received through the merger (using a first-in, first-out method), his sale of the 300,000 post-split shares received under the November 2003 Form S-8 provided him with proceeds of $2,077,969.

Another component of a disgorgement remedy is the award of prejudgment interest on the principal amount of Pierce's ill-gotten gains. *SEC v. Cross Fin. Serv., Inc.*, 908 F. Supp. 718, 734

(C.D. Cal. 1995) (ruling that "ill-gotten gains include prejudgment interest to ensure that the wrongdoer does not profit from the illegal activity"). By imposing prejudgment interest, the Hearing Officer will deprive Pierce of the benefit of the time value of money on his illegal sale proceeds. *See Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1441 (9th Cir. 1996). The Hearing Officer should therefore order Pierce to disgorge $2,077,969 plus pre-judgment interest for his undisputed violation of Section 5.

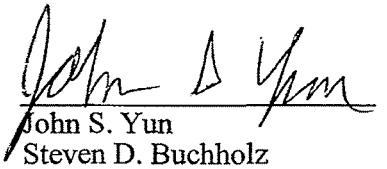
Pierce's violations also support cease and desist orders. His violation of Section 5 deprived Lexington stock purchasers of disclosures in a registration statement and prospectus; his violation of Sections 13(d) and 16(a) deprived investors of disclosures about Pierce's holdings and transactions. Pierce's Answer denies his misconduct, and shows no remorse. *See In the Matter of Lorsin, Inc., et al., supra*, Initial Decision Release No. 250 at 12-14 (issuing cease and desist order despite respondents' belief that conduct was lawful). Significantly, Pierce previously received a fifteen-year bar by Canadian regulators for securities violations. *See* Buchholz Decl. at ¶ 9 and Exh. F. A cease and desist order is therefore needed to prevent future violations by Pierce. *In the Matter of vFinance Investments, Inc., et al.*, Initial Decision Release No. 360 at 17-18 (Admin. Proc. File No. 3-12918 Nov. 7, 2008) (ALJ Mahony) (imposing cease and desist orders prohibiting violations of record keeping provisions based in part upon respondents' failure to show remorse).

CONCLUSION

For the foregoing reasons, the Division asks that the Hearing Officer grant the Division's Motion for Summary Disposition as to Pierce's liability under the OIP and the remedies of disgorgement and cease and desist orders.

Dated: December 5, 2008

Respectfully submitted,



John S. Yun
Steven D. Buchholz
Attorneys for
Division of Enforcement

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13109

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 6, 2009

In the Matter of	:	
	:	
LEXINGTON RESOURCES, INC.,	:	ORDER
GRANT ATKINS, and	:	
GORDON BRENT PIERCE	:	

The hearing in this proceeding as to Respondent Gordon Brent Pierce (Pierce) was held on February 2-4, 2009.[1] The hearing was closed on February 4, 2009, but the record was held open pending receipt of exhibits from the Division of Enforcement (Division) and Pierce consisting of excerpts from Pierce's investigative testimony. Those exhibits, Division Exhibits 76 and 77 and Respondent Exhibit 57, have now been submitted.

Accordingly, Division Exhibits 76 and 77 and Respondent Exhibit 57 will be admitted into evidence, and the record of evidence will be closed.

IT IS SO ORDERED.

Carol Fox Foelak
Administrative Law Judge

[1] The proceeding had ended previously as to Respondents Lexington Resources, Inc., and Grant Atkins. Lexington Res., Inc., Securities Act Release No. 8987 (Nov. 26, 2008).

D

197:
Q Do you have an ownership stake of any kind in Newport Capital Corp.?
A No.
Q Neither directly or indirectly through other entities?
A Correct.

E

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13109

In the Matter of **Gordon Brent Pierce,** **Respondent.**	**Administrative Law Judge** **Carol Fox Foelak**

DIVISION OF ENFORCEMENT'S MOTION FOR THE ADMISSION OF NEW EVIDENCE

Pursuant to Rule 154 of the Commission's Rules of Practice, 17 C.F.R. § 201.154, the Division of Enforcement ("Division") moves for the admission of new evidence which only became available after the hearing in this matter. The new evidence, which is material to respondent Gordon Brent Pierce's liability and the amount of disgorgement Pierce should be ordered to pay, was received by the Division on March 10, 2009 from a foreign securities regulator, the Liechtenstein Finanzmarktaufsicht ("FMA"), pursuant to a request that was first made in 2006. The evidence consists of account documents and Lexington stock trading summaries for accounts at Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank") that were controlled by Pierce, directly or through his wife and daughter. The evidence shows that Pierce's wife and daughter were the beneficial owners of Lexington's controlling shareholder, Orient Explorations, Inc. ("Orient") – even though Pierce testified under oath that neither he nor his wife held any interest in Orient, and argued in these proceedings that he is thus not an affiliate of Lexington. The evidence further shows that Pierce received millions of dollars in additional illegal proceeds from sales of Lexington stock through offshore entities under his control. Pierce refused to produce these documents to the Division, and Pierce's appeals in Liechtenstein further delayed the FMA's production of them to the Division.

A. The Rules for Administrative Proceedings Permit the Hearing Officer to Admit Additional Evidence After the Hearing.

Under the Commission's rules, the hearing officer has the ability to accept documentary or other evidence as may be required for a full and true disclosure of the facts. 17 C.F.R. § 201.326. Also, the hearing officer may, for good cause, permit for extensions to the periods set forth in the Commission's rules for accepting the parties' proposed findings of fact and conclusions of law. In short, while the rules do not specifically provide for the acceptance of evidence after the hearing is concluded, the rules do not prohibit it and they allow the hearing officer to admit such evidence, when it is necessary for a complete record of the facts.[1]

As described below, the new evidence offered by the Division is highly relevant and had been requested by the Division long before the institution of these proceedings. The delay in receiving the documents was through no fault of the Division, but through Pierce's refusal to produce them and through delays in Liechtenstein, including appeals by Pierce, that prevented the foreign authorities from producing them sooner.

B. The New Evidence Was Requested by the Division before these Proceedings.

On October 19, 2005, the Division requested from Pierce, among other things, all documents relating to transactions of any kind in Lexington stock. See Declaration of Steven D. Buchholz filed herewith, at ¶ 2 and Exh. A (Division's original document request to Pierce). The Division also requested all statements from securities accounts for which Pierce exercised control or held a beneficial interest. Id. After the Commission issued a formal order of investigation on May 4, 2006, the Division issued a subpoena to Pierce requiring production of the same documents covered by the October 2005 request. Id. at ¶ 3 and Exh. B. In response to the subpoena, Pierce produced copies of statements from his personal account at Hypo Bank

[1] The Commission's rules do provide a specific procedure for submitting additional evidence after the filing of a petition for review of an Initial Decision, but before the Commission's issuance of a decision on appeal. 17 C.F.R. § 201.452. Under Rule 452, such a motion "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." See, e.g., In the Matter of Vindman, Initial Decision at 17 and nn. 49-51 (Admin. Proc. File No. 3-11247, Apr. 14, 2006) (Commission Opinion) (admitting new evidence that satisfied the requirements of Rule 452). If the rules permit the admission of additional evidence after appeal of an Initial Decision, the same showing should permit the hearing officer to admit additional evidence before an Initial Decision.

showing sales of Lexington stock in June 2004 alone that generated proceeds of $2.7 million. See Div. Exh. 18 (previously admitted into evidence). Pierce refused to produce any account records or other responsive documents of offshore companies under his control, including Newport Capital Corp. ("Newport"). See Buchholz Decl. at ¶ 4; see also Div. Exh. 62 at 42:18 – 46:20 (previously admitted excerpts of Pierce's investigative testimony, including repeated objections by Pierce's counsel based on alleged privacy protections in Liechtenstein, Switzerland, and other offshore jurisdictions where the companies were formed or held accounts). Even after Pierce filed a belated Schedule 13D on July 25, 2006 disclosing his personal Lexington stock holdings and those of his wife Dana Pierce, Newport, and three other offshore companies, Pierce refused to produce documents or provide information of the offshore entities related to Lexington stock transactions that Pierce himself directed. See Div. Exh. 15 (previously admitted).

As the Division's evidence during the hearing established, Hypo Bank sold millions of Lexington shares through its omnibus account at vFinance Investments, Inc. in 2004 and 2005, including sales that generated net proceeds of more than $8 million in June 2004 alone. See Div. Exhs. 21, 23-24, and 49 (all previously admitted). During the investigation, the Division requested records of Hypo Bank through the Liechtenstein FMA, including records that would identify the customers for which Hypo Bank was making those sales. See Buchholz Decl. at ¶ 5. Given Pierce's refusal to provide certain requested records, this alternative was among the few avenues available, although it became a very difficult means. The Division first attempted to obtain documents of Hypo Bank through the FMA in late 2006, but was informed that the FMA could not obtain the documents for the Division. See Buchholz Decl. at ¶ 6. In late 2007, the Division learned that the FMA was working to amend Liechtenstein law to provide the FMA additional powers that may allow it to obtain documents for the Division. Id. at ¶ 7. As a result, the Division sent an additional request for documents to the FMA on February 20, 2008. Id. On July 31, 2008, when these proceedings were instituted, the FMA had not provided any materials in response to the Division's request. Id. at ¶ 8.

Finally, on December 10, 2008, Division staff in the San Francisco Regional Office learned that the FMA had been given additional powers and received a partial production of documents responsive to the Division's February 2008 request. Id. at ¶ 9. This production included responsive documents for only some of the Hypo Bank accounts that traded in Lexington stock. Id. at ¶ 10. Notably, the December 2008 production did not include any documents from Pierce's personal account at Hypo Bank, through which he had sold $2.7 million in Lexington stock. Id. at ¶ 11. The Division produced all of the FMA documents to Respondent on December 18, 2008. Id. at ¶ 12. The FMA informed the Division that the other Hypo Bank accountholders had filed appeals in Liechtenstein to prevent the FMA from providing the information to the Division, and that further responsive documents could not be produced until the appeals were resolved. Id. at ¶ 10.

On March 6, 2009, the Division learned that some of the appeals in Liechtenstein had been resolved and that the FMA would make another partial production of information for additional Hypo Bank accounts. Id. at ¶ 13. Division staff in the San Francisco Regional Office received these documents on March 10, 2009, and produced them to Respondent on March 13, 2009. Id. at ¶ 14. This production, unlike the December 2008 production, included documents related to Pierce's personal account at Hypo Bank, as well as Hypo Bank accounts of several offshore companies, including Newport, for which Pierce is identified as the beneficial owner and person authorized to conduct transactions in the accounts. Therefore, Pierce must have been one of the accountholders who appealed to prevent the FMA from producing responsive information to the Division.

C. The New Evidence Shows that Pierce's Wife and Daughter Owned the Controlling Block of Lexington Stock.

The March 2009 FMA production included certain records from an account held at Hypo Bank in Orient's name. In response to the Division's subpoena, Pierce did not produce any documents related to Orient. Orient is an offshore company that had been the majority shareholder of Lexington Oil and Gas and became the controlling shareholder of Lexington Resources on November 19, 2003 when it received 2,250,000 Lexington shares as a result of the

reverse merger, just over 50 percent of Lexington's outstanding stock. On January 21, 2004, Orient acquired another 750,000 shares, which increased its ownership stake to 64 percent. See Div. Exh. 55 at 8-9, 165 (previously admitted Lexington Form 10-K for fiscal year 2003); Div. Exh. 51 (previously admitted chart showing Lexington's total balance of share outstanding). Orient continued as Lexington's largest shareholder at least through 2006. See Div. Exh. 58 at 78 (previously admitted Form 10-K for 2006). Lexington's Form 10-K for 2003 attached a copy of the share exchange agreement by which Orient received the controlling stake in Lexington, which listed Orient's address as Pierce's personal address in the Cayman Islands. See Div. Exh. 55 at 165. Lexington's 10-K stated that Orient's sole shareholder was Meridian Trust, but did not disclose the beneficiaries of Meridian Trust. Id. at 71.

In his investigative testimony, Pierce admitted that the address listed for Orient was his personal address in the Cayman Islands, but stated that Lexington made an error in listing Orient as sharing Pierce's personal address. See Buchholz Decl. at ¶ 15 and Division's Exh. 78 attached thereto but not yet admitted, at 405:2-25 (additional excerpts from Pierce's investigative testimony). Pierce denied ever having an ownership interest in Orient or in the Lexington stock held by Orient:

Q: Have you ever had any ownership interest whatsoever in any of the stock that's referenced in the filing, the 2,250,000 shares?

A: Absolutely not.

Q: Has your wife?

A: No.

Id. at 406:1-6. Pierce testified that his current wife's name was Dana Marie Pierce and that he had a daughter named [redacted] Id. at 12:1-5 and 13:19-24.

The documents for Orient's Hypo Bank account produced by the FMA in March 2009 include a statement of beneficial ownership signed by the offshore director of Orient. That document states that the sole shareholder of Orient is Canopus TCI, Ltd. as trustee of Meridian Trust, and that the beneficiaries of Meridian Trust are Dana Marie Pierce and [redacted]. See Buchholz Decl. at ¶ 16 and Division's Exh. 79 attached thereto but not yet admitted, at page

SEC 158416. It also states that Meridian Trust was created on July 25, 2003. Id. at page SEC 158418. In addition, the March 2009 production included email correspondence from Pierce to his primary contact at Hypo Bank requesting documents related to transactions in Orient's account. See Buchholz Decl. at ¶ 20 and Division's Exh. 83 attached thereto but not yet admitted, at page SEC 159147.

D. The New Evidence Shows that Pierce Received Millions of Dollars In Additional Illegal Proceeds from Lexington Stock Sales.

The OIP alleges that Pierce orchestrated an illegal distribution of Lexington stock, that Pierce personally received at least $2.7 million in his personal account at Hypo Bank as a result of the illegal distribution, and that in total approximately $13 million in proceeds were generated by stock sales through Hypo Bank (including the $2.7 million in Pierce's personal account) as a result of Pierce's illegal distribution of Lexington stock. OIP ¶¶ 14-16. Pierce did not produce any documents related to Lexington sales through Hypo Bank by offshore companies under his control. Therefore, at the Hearing Officer's request and based on the Hypo Bank information available to it at the time, the Division stated in its Motion for Summary Disposition filed on December 5, 2008 that it was seeking $2,077,969 in disgorgement from Pierce, based on the portion of the $2.7 million in Lexington sales in his personal account at Hypo Bank that the Division traced to his illegal distribution of purported S-8 stock.

The FMA production in March 2009 shows that Pierce received far more than just the $2.1 million in illegal proceeds from his personal Hypo Bank account. Indeed, he made millions of dollars in additional unlawful profits by selling Lexington shares through Newport and other offshore companies that had accounts at Hypo Bank. See Buchholz Decl. at ¶¶ 17-25 and Division's Exhs. 80-88 attached thereto but not yet admitted (account documents and trading summaries showing sales of Lexington stock in Hypo Bank accounts controlled by Pierce). For example, the FMA documents include a summary of Newport's Lexington sales that show sales of more than 1.2 million Lexington shares between February and June 2004, when Lexington's stock price was steadily rising from $3.00 to more than $7.00 per share. Id. at ¶ 19 and Division's Exh. 82 attached thereto, at pages SEC 159071-73. In June 2004 alone, when

Lexington's stock price was at its peak, Pierce sold nearly 400,000 shares through the Newport account (in addition to selling 400,000 shares through his personal account). Id. It appears that the vast majority of these shares were issued by Lexington purportedly pursuant to Form S-8 registration statements, transferred to Newport or the other offshore companies, and then sold by Pierce into the open market through Hypo Bank.[2] Therefore, it appears that Pierce received millions of dollars in additional ill-gotten gains from sales of Lexington shares that were part of his illegal stock distribution.

E. The New Evidence Is Highly Relevant and Should Be Admitted.

The new evidence is material to these proceedings in two different respects. First, it shows that Pierce's wife and daughter were the beneficial owners of Orient, Lexington's controlling shareholder, contrary to the testimony of Atkins and the statements made by Pierce's counsel at the hearing that Pierce had no connection to Orient. See Transcript at 323:23-324:6; 607:5-25. This further rebuts Respondent's argument that he was not an affiliate of Lexington and therefore qualified for an exemption from registering his stock sales. In light of the new evidence, there can be no doubt that Pierce was an affiliate of Lexington and had the ability to, and in fact did, control Lexington and its president Grant Atkins. Atkins admitted at the hearing that he never consulted with Orient or received any direction or input from Orient even though it was Lexington's majority shareholder; now it is clear that Orient simply represented a control block of Lexington's shares that gave Pierce the ability to direct Lexington and Atkins. See Transcript at 456:2-12; see also In the Matter of Dudchik, Initial Decision at 15 (Admin. Proc. File No. 3-12943, Dec. 5, 2008) (ALJ Mahony) (finding that person who sold stock was an affiliate, despite his attempt to create the appearance that he was not a control person and affiliate by having the company issue a control block of shares to his son).

Second, the new evidence shows that Pierce received millions of dollars in additional illegal proceeds from his sales of Lexington stock through accounts at Hypo Bank in the names

[2] The Division is currently analyzing the new evidence and will include with its post-hearing brief a new chart, which will be labeled as proposed Division's Exhibit 89, calculating the exact amount of additional disgorgement that it intends to seek from Respondent as a result of the new Hypo Bank evidence.

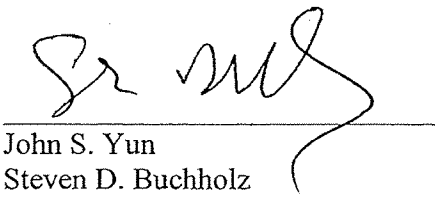
of offshore companies that he controlled. For example, through the Newport account at Hypo Bank, Pierce sold approximately 1.2 million shares between February and June 2004. Most of these shares had been issued by Lexington purportedly pursuant to registration statements on Form S-8, like the shares that Pierce sold in his personal Hypo Bank account for $2.7 million, as previously described at the hearing. Therefore, the new evidence shows that disgorgement far in excess of $2.1 million is warranted against Pierce in these proceedings.

In addition to being highly relevant, the new materials received from Hypo Bank had been requested by the Division long before the institution of these proceedings. The delay in the Division's receipt of the documents was due to Pierce's refusal to produce them and delays in Liechtenstein, including appeals by Pierce, rather than through any fault of the Division. Therefore, the Division can make even the showing required under Rule 452, which would permit the admission of additional evidence during appeal of an Initial Decision.

Accordingly, the Division hereby respectfully moves the Law Judge to admit Division's proposed Exhibits 78-89.

Dated: March 18, 2009

Respectfully submitted,



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F

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13109

In the Matter of

Lexington Resources, Inc.,
Grant Atkins, and
Gordon Brent Pierce,

Respondents.

Administrative Law Judge
Carol Fox Foelak

DECLARATION OF STEVEN D. BUCHHOLZ IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR THE ADMISSION OF NEW EVIDENCE

I, Steven D. Buchholz, declare:

1. I am an attorney duly admitted to practice in the State of California, and a staff attorney in the Division of Enforcement ("Division") of the United States Securities and Exchange Commission ("Commission"). I was one of the attorneys with responsibility for the Division's investigation in the matter of Lexington Resources, Inc. ("Lexington"). Unless otherwise specified, I have personal knowledge of the facts stated herein, and could and would testify competently to them if called to do so. I make this declaration in support of the Division's Motion for the Admission of New Evidence ("Motion").

2. Attached hereto as Exhibit A is a document production and preservation request sent by the Division to Respondent Gordon Brent Pierce on October 19, 2005 during the investigation in this matter (pages SEC 4248-59).

3. Attached hereto as Exhibit B is a subpoena for documents and testimony issued by the Division to Pierce on May 17, 2006 (pages SEC 3847-53).

4. Pierce did not produce any account records or other documents of offshore companies under his control, including Newport Capital Corp. ("Newport"), in response to either the Division's

October 2005 document request or May 2006 subpoena. Pierce has never produced documents related to Lexington stock transactions that he directed through Newport or any other offshore entities.

5. As part of its investigation in this matter, the Division requested records of an entity known as Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank") through the securities regulator in Liechtenstein, known as the Finanzmarktaufsicht ("FMA"). The Division requested from the FMA, among other things, records that would identify the customers for which Hypo Bank was selling Lexington stock.

6. The Division first requested documents of Hypo Bank through the FMA in late 2006, but was informed that the FMA could not obtain the documents for the Division.

7. In late 2007, the Division learned that the FMA was working to amend Liechtenstein law to provide the FMA additional powers that may allow it to obtain documents for the Division. As a result, the Division sent an additional request for documents to the FMA on February 20, 2008.

8. On July 31, 2008, when these proceedings were instituted, the FMA had not provided any materials in response to the Division's request and had not provided any assurances that it would ultimately be able to provide documents or how long it might take.

9. On December 10, 2008, I learned that the FMA had been given additional powers and received a partial production of documents responsive to the Division's February 2008 request.

10. I learned at that time that the production included responsive documents for only some of the Hypo Bank accounts that traded in Lexington stock because the other Hypo Bank account holders had filed appeals in Liechtenstein to prevent the FMA from providing the information to the Division. The FMA informed the Division that further responsive documents could not be produced until the appeals were resolved.

11. The December 2008 production did not include any documents from Pierce's personal account at Hypo Bank, through which he had sold $2.7 million in Lexington stock.

12. I produced all of the FMA documents to Respondent on December 18, 2008.

13. On March 6, 2009, I learned that some of the appeals in Liechtenstein had been resolved and that the FMA would make another partial production of documents for additional Hypo Bank accounts.

14. I received these documents on March 10, 2009 and produced them to Respondent on March 13, 2009.

15. Attached hereto as Exhibit 78 are additional excerpts from Pierce's investigative testimony on July 27 and 28, 2006.

16. Attached hereto as Exhibit 79 is a true and correct copy of certain documents related to Orient's account at Hypo Bank, which were included in the FMA's March 2009 production (pages SEC 158414-18).

17. Attached hereto as Exhibit 80 is a true and correct copy of certain documents related to Newport's account at Hypo Bank, which were included in the FMA's March 2009 production (pages SEC 159004-10).

18. Attached hereto as Exhibit 81 is a true and correct copy of additional documents related to Newport's account at Hypo Bank, which were included in the FMA's March 2009 production (pages SEC 159066-67).

19. Attached hereto as Exhibit 82 is a true and correct copy of certain documents related to trading activity in Lexington stock in Newport's account at Hypo Bank, which were included in the FMA's March 2009 production (pages SEC 159069-118).

20. Attached hereto as Exhibit 83 is a true and correct copy of additional documents related to trading activity in Lexington stock in Newport's account at Hypo Bank, which were included in the FMA's March 2009 production (pages SEC 159119-70).

21. Attached hereto as Exhibit 84 is a true and correct copy of certain documents related to an account at Hypo Bank in the name of Jenirob Company Ltd., for which Pierce was the beneficial owner, which were included in the FMA's March 2009 production (pages SEC 158544-51).

22. Attached hereto as Exhibit 85 is a true and correct copy of additional documents related to the Jenirob account at Hypo Bank, which were included in the FMA's March 2009 production (pages SEC 158576-78).

23. Attached hereto as Exhibit 86 is a true and correct copy of certain documents related to trading activity in Lexington stock in the Jenirob account at Hypo Bank, which were included in the FMA's March 2009 production (pages SEC 158580-602).

24. Attached hereto as Exhibit 87 is a true and correct copy of certain documents related to Pierce's personal account at Hypo Bank, which were included in the FMA's March 2009 production (pages SEC 159186-202).

25. Attached hereto as Exhibit 88 is a true and correct copy of certain documents related to trading activity in Lexington stock in Pierce's personal account at Hypo Bank, which were included in the FMA's March 2009 production (pages SEC 159204-42).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed March 18, 2009, in San Francisco, California.

Steven D. Buchholz

Administrative Law Judge Carol Fox Foelak

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6

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13109

In the Matter of **LEXINGTON RESOURCES, INC., GRANT ATKINS, and GORDON BRENT PIERCE,** **Respondents.**	**RESPONDENT PIERCE'S OPPOSITION TO DIVISION'S MOTION FOR THE ADMISSION OF NEW EVIDENCE**

I.

Summary of Opposition

The motion for the admission of the new evidence should be denied. Pierce is being denied basic due process, and the Division's latest ploy does not hold water. After investigating Pierce for almost three years, the Division elected last summer not to continue the investigation and await the outcome of its requests to a foreign securities regulator for the records of a foreign bank. Instead, the Division elected to commence this proceeding and impose substantial expense upon Pierce. Now, months after the close of the evidence, the

Division submits "new evidence" consisting of unauthenticated foreign bank records in a testimonial vacuum, conceals investigative testimony directly on point, and then makes speculative inferences about the ownership of Orient Explorations.

The Division has likewise elected to use the new documents before confirming that they were produced in compliance with local law. The March 25, 2009 letter from Lichtenstein attorney Oliver Nesensohn (Wells Decl., Ex. A) reflects that Mr. Nesensohn is prosecuting an appeal of a very novel action under a brand new act that appears to have been applied retroactively and otherwise in violation of Liechtenstein law. The Commission is not in the business of inducing foreign regulators to violate local laws.

As a result, Pierce is being denied his due process rights to notice of the claims, the reasonable opportunity to respond -- which ordinarily includes discovery and is much more than five days -- and a hearing where witnesses present testimony about documents lawfully procured. Pierce is further prejudiced because the Division relies on speculative inferences about the new evidence to seek disgorgement of many more millions of dollars.

Despite the prejudice and within a severely compressed time period (including, the week during which the Division had notice for two months that Pierce's primary counsel would be unavailable), Pierce has marshaled and is continuing to marshal evidence that refutes the Division's wild speculations. For example, the declarations of Alexander (Sandy) Cox and Grant Atkins; Affid. of Paul Dempsey, Lexington filings and investigative testimony of Lexington's former CFO, Vaughn Barbon, were available during the short response time to this motion, and are submitted with the Declaration of Christopher B. Wells.

Disturbingly, the Division has ignored public filings and prior investigative testimony to exploit a patent clerical error in a transparent attempt to overcome the shortcomings of its legal theories and proof at the hearing.

Pierce's opposition consists of two parts: first, an argument that acceptance of the new evidence would be a violation of the Rules of Practice and denial of due process; second, a response to the Division's substantive argument.

II.

The acceptance of new evidence after the hearing has been closed violates the Rules of Practice that afford Pierce the right to a fair hearing and to present evidence. It also violates Due Process.

The Division has twice rested its case. On February 2, 2009, the Division rested its case-in-chief:

> Mr. Yun: "With that, your Honor, unless I have forgotten something, and I don't think I have, the Division rests, again subject to the fact that it has called Mr. Pierce, so if he comes walking in tomorrow, we want to have first crack."[1]

Two days later, the Division rested its rebuttal case:

> Mr. Yun: "I am sorry, with the other two exhibits, the Division rests. Our case is submitted, your Honor, subject to briefing, and I guess if anyone wants closing statements."[2]

The record remained open for those two exhibits until the March 6, 2009 order closed the record completely. There is no basis under the rules to reopen the evidence, and for that reason alone the Division's motion should be denied.

A hearing is "for the purpose of taking evidence" and must "be conducted in a fair . . . and orderly manner."[3] Due process, the Administrative Procedure Act,[4] and Rule of Practice

[1] Feb. 2, 2009 Tr. at 210:20:24; *see also id.* at 211:3-10 (the court: "So the Division is resting").
[2] Feb. 4, 2009 Tr. at 582:230-583:1.

326[5] grant to Pierce the right to present a defense, present evidence and to conduct a cross-examination "for *a full and true disclosure of the facts*." Irrelevant and immaterial evidence must be excluded.[6] In addition to the right to a fair hearing, the Administrative Procedure Act and the Rules of Practice permit Pierce to conduct discovery to obtain both documentary and testimonial evidence.[7]

By filing this motion at this time, the Division has willfully violated the Commission's own rules. The Division readily admits "the rules do not specifically provide for the acceptance of evidence after the hearing is concluded." Division's Motion for the Admission of New Evidence at 2. Furthermore, the Division has failed to identify any precedent in which a hearing officer permitted the Division to reopen a hearing after the close of the evidence. The Division argues by analogy, however, that because the Commission on appeal has the power to consider new evidence, "the same showing should permit the hearing officer to admit additional evidence before an Initial Decision." *Id. at footnote 1.*

The fundamental flaw with the argument by analogy is that a hearing officer is not the Commission. The hearing officer must follow the rules -- not rewrite the rules. Rule of Practice 452 does grant the Commission the power to allow the submission of additional

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[3] **Rule 300. Hearings.** ("Hearings for the purpose of taking evidence shall be held only upon order of the Commission. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.").

[4] 5 U.S.C. § 556(d) ("party is entitled to present his [or her] case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.").

[5] **Rule 326. Evidence: Presentation, Rebuttal and Cross-examination** ("In any proceeding in which a hearing is required to be conducted on the record after opportunity for hearing in accord with 5 U.S.C. 556(a), a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Commission or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, in any other proceeding shall be determined by the Commission or the hearing officer in each proceeding.")

[6] **Rule 320. Evidence:** Admissibility. ("The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.").

[7] **Rule 232 (Subpoenas), Rule 233 (Depositions).**

evidence – but not until after an initial decision and an appeal of that decision to the Commission. Rule 410. Rule 452, Additional Evidence, states:

> Upon its own motion or the motion of a party, the Commission may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. The Commission may accept or hear additional evidence, may remand the proceeding to a self-regulatory organization, or may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

The cannon of construction, "express mention, implied exclusion," applies. Because the Rules of Practice expressly grant to the Commission the power to consider new evidence, the hearing officer necessarily does not have a similar power to "accept or hear additional evidence." Rule 452.

The Division's motion for the admission of new evidence is nothing more than a "Trojan Horse" designed to sneak in front of the hearing officer by pretext unreliable and even misleading evidence that it knows cannot be brought forward until an appeal of the initial decision, but which it knows will taint the hearing officer's initial decision whether the evidence is admitted or not. The Division has presumed that the hearing officer will grant its motion. The Division has peppered its post-hearing brief and proposed findings, conclusions and relief with the new evidence. This is a fiendishly clever – too clever – means to subvert a hearing that had gone badly for the Division under the rules.

Playing by the rules, the Division's recourse – after an initial decision and its appeal -- is to ask the Commission to "refer the proceeding to a hearing officer for the *taking* of additional evidence, as appropriate." Rule 452. Even if the hearing officer were to seize the

Commission's powers, the alternatives are "accept[ing] additional evidence, . . . or . . . the taking of additional evidence, as appropriate." In this case, accepting the evidence at this point would deny Pierce's due process right to a fair hearing. The so-called evidence is unauthenticated and even misleading. As explained below, any relevance is substantially outweighed by "unfair prejudice," ER 403.

Furthermore, the policy of finality militates against re-opening the record and including new evidence. *See In the Matter of the Application of Scott Epstein for Review of Disciplinary Action Taken by FINRA*, Exchange Act Release No. 59328, ___ SEC Docket ___ (Jan. 30, 2009) (finding that "public policy considerations favor the expeditious disposition of litigation," and parties cannot simply try "one course of action and, upon an unfavorable decision, to try another course of action" by seeking to introduce new evidence).[8] The Division cannot close and reopen the evidence like a spigot. Even if the Division could, its theory does not hold water.

The Division's intent is patently improper. All it had to do was follow the rules, Rule 452 in particular. Instead, the Division has knowingly filed an unauthorized motion to admit new evidence, and presumed it will be granted. By doing so, the Division has "poisoned the well." It is now inconceivable that the hearing officer can remain untainted by the "new evidence," which should not have been presented before an appeal. But now, in the inadequate amount of time allowed "under the rules," Rule 154(b), Pierce can do nothing

[8] Even if the hearing officer were to assume the powers granted to the Commission in Rule 452, the Division would be required to prove the materiality of the evidence and that there were reasonable grounds for the failure to adduce the evidence previously. If the information sought to be introduced is not material, then it should not be allowed in. *See In the Matter of the Application of CMG Institutional Trading, LLC and Shawn D. Baldwin for Review of Disciplinary Action Taken By NASD*, Exchange Act Release No. 59325, ___ SEC Docket ___ (Jan. 30, 2009); *see also In the Matter of IMPAX Laboratories, Inc.*, Exchange Act Release No. 57864, 93 S.E.C. Docket 853, *11, n.27 (May 23, 2008). The new evidence is not material, because it merely corroborates Pierce's testimony about the mistakes and confusion regarding Orient records.

more than "die trying," and reveal as best he can the Division's pretext concerning the overarching issue -- Orient Explorations.

Due process principles require that a party must be afforded a reasonable opportunity to challenge, through confrontation and cross-examination, the reliability of adverse evidence.[9]

Generally, an agency is required to follow its own regulations and rules. *Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988). Here, the Division must abide by its own rules, and "the logic [of this principle] derives from the self-evident proposition that the Government must obey its own laws." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979). An agency's failure to failure to abide by its own rules and regulations constitutes a violation of procedural due process. *Kohn v. Laird*, 460 F.2d 1318, 1391 (7th Cir. 1992) (Army violated reservist's due process rights, by granting a suspension without following its procedural requirements in administrative rules, even where a hearing was granted).

The hearing officer must follow the rules and cannot rewrite the rules. Indeed, "[t]o meet the basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or 'gut feeling' [and an] agency must not act in a totally subjective manner without any guidelines or criteria."[10] Especially "where individual interests are

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[9] *Goldberg v. Kelly*, 397 U.S. 254, 267–68, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

[10] *Board of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W. 3d 1, 11 (Mo. 2008). *See also Flaim v. Medical College of Ohio*, 418 F.3d 629, 640 (6th Cir. 2005) (noting that a due process violation occurs "when the agency's disregard of its rules or assurances results in a procedure which itself impinges upon due process rights").

implicated, the Due Process clause requires that an executive agency adhere to the standards by which it professes its action to be judged."[11]

In this case, accepting the new evidence violates Pierce's right to due process to a hearing. A fundamental premise of due process is that a tribunal cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved and to present evidence in rebuttal of the adverse material.[12]

The Division's so-called evidence is unauthenticated and misleading. As demonstrated below, any purported relevance is substantially outweighed by "unfair prejudice," Fed. Rule of Evid. 403. The Division's motion is also an attempt to end-run and thus avoid the requirements for authenticating documentary evidence. Under the Federal Rules of Evidence, business records must be authenticated and shown to be a business record.[13] The mere presence of a document in the files of a business entity does not qualify that document as a record of regularly conducted activity; there must be proof, either by testimony from the record custodian or through certification, satisfying the foundational requirements of the rule. Here, the bank's "business record" actually is multiple records that include separate records created by persons outside the bank. There is hearsay within hearsay, and each layer should conform to a recognized exception or have some guarantees of trustworthiness and reliability. Fed. Rule of Evid. 805. Even without application of the

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[11] *Bonitto v. Bureau of Immigration and Customs Enforcement*, 547 F. Supp. 2d 747, 756 (S.D. Tex. 2008) (*citing Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959)).

[12] *See Morgera v. Chiappardi*, 74 Conn. App. 442, 813 A.2d 89, 98 (Conn. App. 2003); *see also Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 211, 227 (2d Cir. 2003).

[13] Fed. R. Evid 803(6); *See United States v. Jarvara*, 474 F.3d 565, 584–85 (9th Cir. 2007) (finding that the proffered Gambian school examination records were properly admitted under the standard of Fed. R. Evid. 803(6) because they were accompanied by a high school principal's certification, confirming accuracy of the records); *see also Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1020 (9th Cir. 2004) (upholding the admission of business records after being authenticated by a records custodian).

referenced formal rules of evidence, these same general principles of due process apply in this proceeding. Furthermore, in addition to having illegible signatures on some records, the records also have both "intrinsic" and "extrinsic" ambiguities that amplify the prejudice resulting from the Division'send-run. *Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, 69 F.3d 785, 789-90 (7th Cir.1995) (describing the test for extrinsic ambiguity as "that the agreement itself is a perfectly lucid and apparently complete specimen of English prose, anyone familiar with the real-world context of the agreement would wonder what it meant with respect to the particular question that has arisen.").

III.

The new records corroborate Pierce's testimony that the Orient records were a mess. Other public reports and evidence already in the record undermine the Division's new theory about Orient. The new declarations by Cox, Atkins and Dempsey further undermine the Division's theory.

The Division contends that in November 2003, Orient was indirectly owned by Dana Pierce and [redacted] (Brent's wife and daughter), rather than by Alexander (Sandy) Cox, Wolfgang Raubal and Armando Ulrich.[14] The Division relies upon a newly produced Hypo Bank, Liechtenstein, account opening document dated June 25, 2005, which bears the document stamps SEC 158416-17.[15] That document indicates the Orient account is managed by Fitzroy Holdings, Ltd. ("Fitzroy"), a management company at 1 Caribbean Place, Leeward

[14] There is insufficient time to submit more evidence about Orient, and there is no time to address other aspects of the Division's motion. But evidence that Orient was not beneficially owned by any member of the Pierce family returns the record to the *status quo ante*. There is ample evidence to that effect.

[15] Lexington's two public reports in November 2003, Pierce Hearing Exhibits 5 and 8, filed on November 18 and November 20, 2003, both contained footnotes disclosing that the "sole shareholder of Orient" was "Meridian Trust" with an office at the Dempsey law firm address on Turks and Caicos. Consequently, the Division has misapplied a June 2005 unauthenticated document and jumped to the conclusion that Dana and [redacted]Pierce were beneficiaries of the Meridian Trust in November 2003, but there is no evidence of that. In fact, other evidence overwhelmingly contradicts that supposition.

Highway, Providenciales Turks and Caicos Islands, British West Indies. That is the address of the Dempsey Law Firm, where Barry Dempsey is one of the attorneys.[16] The same document item no. 2 identifies the "sole shareholder of Orient as Canopus TCI Ltd. as Trustee of Meridian Trust—Beneficiaries: Dana Marie Pierce; [redacted]." None of these documents is signed by Pierce, and the document erroneously listing Dana and [redacted] is not even signed by one of the Dempseys. (Div. Ex. 79, SEC 158416-17.)

The Division uses the Hypo Bank records in its new Exhibit 79 to contend in its motion:

> 1. Brent Pierce lied under oath when he denied that he or his wife "ever had any ownership interest whatsoever in any of the stock that's referenced in the filing [by Lexington reflecting Orient shareholdings], the 2,250,000 shares [for Lexington's reports of Orient's shareholdings, see Pierce Hearing Exhibits 5 and 8, for example]; and
>
> 2. Brent Pierce (through [redacted] and [redacted] owned and controlled Orient's shares and therefore owned the 64% of Lexington stock held by Orient after November 19, 2003, so that when Brent received S-8 grants he was an affiliate of Lexington and could not take free trading shares.[17]

But the fact that the public records for Orient were "messed up" had been established over two years earlier during the investigation. And Brent Pierce stands by his testimony. On July 28, 2006, Pierce explained that there was a series of mistakes in the filings concerning Orient:

> There is a series of public filings on that account that are all messed up.
>
> . . ..
>
> Well, I heard just as of recently that Barry Dempsey, who was on the company, had contacted Mr. Atkins because of all of the filings are incorrect, some of which put him down as the shareholder and some of which use my post office box.
>
> . . ..

[16] Dempsey is a lawyer with Dempsey and Company in the Turks and Caicos. (Wells Decl., Ex. G, Affid. of Paul Dempsey.)

> I don't know what he [Dempsey] does, but basically it says in the filing that it's a trust, and he is, I believe, the trustee from the filing that I read, which was the first filing.
>
> . . ..
>
> like I said, there's four or five filings on Orient that are wrong, and they have since been corrected.[18]

Accordingly, it should not have surprised the Division that Orient bank records would reflect the same confusion.

New testimony by Cox and Atkins submitted with this opposition demonstrates why the Division's theory does not make sense. To add the final word, attorney Paul Dempsey has provided an Affidavit to address the ownership of the referenced trusts. (Wells Decl., Ex. G.) Mr. Dempsey confirms that [redacted] and Dana Pierce were never beneficial owners of the Meridian Trust, nor did Brent Pierce ever have any interest in the Meridian Trust or its assets. *Id.*

At the hearing, Grant Atkins testified that around mid-2003, Intergold's management and consultants began to consider a reorganization of the failing mining company into a new oil and gas company. (Feb. 3, 2009 Tr. at 291:1-23, 311:13-312:16, 333:2-338:8 (Atkins Test.), Wells Decl., Ex. C.) One of the new Hypo Bank documents, SEC 158418, shows that the Meridian Trust was "created July 25, 2003."[19] (Orient reportedly had been created on March 8, 2000, see SEC 158414.) The late July 2003 formation date of Meridian Trust correlates with early steps to create the reorganization vehicle described by Atkins and Vaughn Barbon in their testimony. (Feb. 3, 2009 Tr. at 291:1-23, 311:13-312:16, 333:2-

[18] July 28, 2006 Tr. at 403:8-9, 404:7-11, 404:19-22, 405:22-25 (Pierce Test.) (Wells Decl., Ex. B).

[19] In contrast to SEC 158416-417, 158418 was actually signed by one of the Dempseys.

338:8 (Atkins Test. describing the reorganization and Humphreys returning his shares to Orient), Wells Decl., Ex. C.)

Indeed, the beginnings of the Meridian Trust's creation are manifest in the Form 8-K report filed by Intergold on March 28, 2003. (Wells Decl., Ex. D.) Note that attached to that report – just four months before the Meridian Trust was formed – is an agreement between Intergold and "Sonanini Holdings, Ltd." under which Sonanini forgave indebtedness of about $660,000 in exchange for nearly 33 million shares of Intergold common stock. The signer for Sonanini was – Wolfgang Rauball.

Also attached to Intergold's March 28, 2003 8-K was a settlement agreement with Tristar Financial (Marcus Johnson) to which was attached a letter to the transfer agent regarding "restructuring initiatives." Sonanini's address was shown as "Kartnerring 5-7/ Top 3D, A, 1010 Vienna, Austria." *Id.* Another company, EuroGas GmbH, was listed at "Kartner Ring 5-7, Top 4d, 1010 Wien [Vienna], Austria." *Id.*[20]

Intergold's March 28, 2003 8-K also reflected large shareholdings by Alexander Cox, McCallan Oil & Gas GesmbH and Oxbridge Ltd. Armando Ulrich represented McCallan and Oxbridge. (Wells Decl., Ex. E (Atkins Decl. dated March 25, 2009) and Ex. F (Cox Decl. dated March 25, 2009).) Orient's relation to Cox, Rauball and Ulrich was explained by Vaughn Barbon, who structured the transactions to provide these three critical investors a sufficiently large stake in the reorganized company to gain their cooperation.

During the investigation, Vaughn Barbon, Lexington's CFO, testified that the shareholders of Intergold involved in Orient were Sandy Cox, Wolfgang Rauball, and Armando Ulrich. *See generally*, Wells Decl., Ex. H (Barbon investigative transcript dated

[20] An amendment to this 8-K report of the same date provided a West Vancouver BC address for Sonanini.

09/28/06 at pp. 65-96.)[21] Barbon proposed setting up an off-shore company to provide what was initially to be a 75% stake in Lexington Oil & Gas because the three owners were all non-residents of the U.S. (*Id.* at 73:23-74:14.) Brent Pierce referred Barbon to Barry Dempsey to set up the off shore company. (*Id.* at 74:22-75:11.) Barbon talked to Sandy Cox about setting up the company through Barry Dempsey, who already had established Orient, and formed the trust that held Orient's shares on July 25, 2003.[22] Barbon further testified that he learned Cox transferred his shares in Orient to Longfellow Industries. (*Id.* at 92:9-17.)

At the hearing, Atkins testified that to his knowledge, Brent Pierce was "not an owner or manager of Orient . . ." (Feb. 3, 2009 Tr. at 324:3-5 (Atkins Test.), Wells Decl., Ex. C.) Atkins testified that Mr. Cox was involved with Orient: "He was one of the old investors in the Intergold that lost a lot of money. There were two others, Wolfgang Rubbell [Rauball] and Amando Allridge [Ulrich] of Austria, that were also large investors in Intergold that lost a lot of money." *(Id.* at 376:20-377:9.) The gist of Barbon's testimony was that information

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[21] Initially, Barbon set up Lexington Oil & Gas (which became a subsidiary of the reporting company upon the November 19, 2003 reorganization), and the initial owners were Doug Humphreys and Orient. *Id.* at 69-72. Because the three individuals who were to be the beneficial owners of Orient's Lexington shareholdings "were not happy" with only 2,250,000, while 750,000 shares were to be allocated to Humphreys, Humphreys reversed his contribution of several oil and gas properties, leaving only three indirect owners of Orient by January 2004. *Id.* at 80:10-23 and more generally at 80-84. Lexington's reports corroborate the testimony about Humphreys' initial interest and Cox's ultimate interest in Orient during the reorganization. (Supplement No. 1, Oct. 12, 2005 to the Prospectus dated Jan. 19, 2005 of Lexington Resources at 47, Wells Decl., Ex. I) states that through Paluca Petroleum, Humphreys initially owned part of Orient by vending in several properties, which Orient transferred into Lexington in exchange for Lexington stock, 2.25 million shares initially to Orient and 750,000 shares initially to Humphreys. Then, in January 2004, Orient and Humphreys agreed to transfer Humphreys' 750,000 Lexington shares to Orient (raising its total to 3,000,000) and Lexington assigned several oil and gas interests back to Humphreys. Humphreys had contributed several oil and gas interests to Orient in exchange for 25% of Orient, which had been exchanged for 750,000 Lexington shares that show on the November 2003 SEC filings. This was reversed in the January 2004 transactions. This is also what Barbon testified to. (Sept. 28, 2006 Tr. at 70:21-73:21, 76:2-4, 76:23-77:3; 80:3-81:25, 83:19-84:13 (Barbon), Wells Decl., Ex. H.)

[22] This July 25, 2003 Meridian Trust establishment date was about four months after the debt restructuring agreements described in the March 28, 2003 8-K and four months before the November 19, 2003 reorganization effective date. But note also that the July 25, 2003 date identified as the date the Meridian Trust was created according to Div. Ex. 79 at SEC 158418 is the date the "Emerald Trust" was "settled" according to the Affidavit of Paul Dempsey (Wells Decl., Ex. G), while the "Meridian Trust" was "settled" on July 26, 2003 – yet another mix-up.

about the identities of the key investors identified by Atkins derived from Pierce, who was concerned about them. Atkins also acknowledged that he was not involved in "dealings among those three Orient Explorations people . . ." (*id.* at 377:10-13), although Atkins had met with them concerning Intergold/Lexington.

In response to the Division's latest contention, Grant Atkins has testified that Alexander (Sandy) Cox, Wolfgang Rauball and Armando Ulrich were three Intergold investors, that Atkins had met with Rauball and Ulrich in British Columbia and Austria, and associated Rauball with Sonanini and EuroGas, and Ulrich with McCallan Oil and Oxbridge. (Atkins Decl., Wells Decl., Ex. E.) Atkins learned those three were indeed the beneficiaries of Orient's stock, when Atkins assisted Cox with a Schedule 13D beneficial ownership report filed in 2005, when Cox's one third share in Lexington was transferred to Longfellow Industries, a Cox family entity. (*Id.*, see also Wells Decl., Ex. K (13D Schedule).) Those three investors had been referred to Intergold by Pierce, Wells Decl., Ex. H, Barbon testimony at 73:9-22, and Pierce had been told by Cox that they were not pleased with Intergold, but decided to back the reorganization in keeping with their allocation of shares in the new oil and gas company through Orient. (Wells Decl., Ex. F, Cox Decl.)

Also in response to the Division's latest contention, Cox has testified that in 2003, Rauball, Ulrich and he became, as part of the reorganization, the sole beneficiaries of the trust that owned Orient. (*Id.*) He also testified about his transfer of shares to Longfellow and the 13D report filed by Longfellow in 2006. (*Id.*) His family still owns the shares. (*Id.*) Cox also confirms: "the two other groupings of Lexington shares transferred into Orient as of the date of the reorganization were for the future benefit of Ulrich and Rauball, not Dana and [redacted]." (*Id.*)

Other records corroborate this scenario and flatly contradict the Division's manufactured theory. (Wells Decl., Ex. J at 28 and 29 of the Form SB-2 Registration Statement filed by Lexington on October 14, 2005.)

At page 29 of the Form SB-2, a change in the beneficial ownership of Orient Explorations is disclosed. *(Id.)* First, though, recall that Lexington had a 3 to 1 stock split at the end of January 2004, so that by February 2004, Orient held 9 million shares, rather than 3 million. The Form SB-2 excerpt shows that as of October 14, 2005, Orient was the beneficial owner of 6 million shares of Lexington, not 9 million. It also shows that Longfellow Industries (B.C.) Ltd. owned 3 million shares (totaling with Orient, 9 million). Footnote 6 shows that the sole shareholder of Orient remained Canopus for Meridian Trust. Footnote 7 states that the "sole shareholder of Longfellow Industries (B.C.) Ltd. is Irene V. Cox." This distribution of 3 million shares from Orient was reported in a Schedule 13D filing by Longfellow Industries on February 18, 2005. (*Id.*)

Irene Cox is the wife of Sandy Cox, and the directors of Longfellow Industries included Sandy and Irene Cox's children. (Wells Decl., Ex. K, Schedule 13D filed by Longfellow Industries and Alexander Cox on August 24, 2006; and Wells Decl., Ex. F, Cox Decl. dated March 25, 2009.) Sandy Cox was irrefutably one of the Orient beneficiaries. Note that 3 million shares out of 9 million is exactly 1/3 of the former shareholdings of Orient.[23]

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[23] According to the investigative testimony of Barbon at p. 72 and Cox's Declaration, that he had sunk about $3 million into Intergold/Lexington and held one third of the interest in Orient, the total value of Orient's holdings targeted by the allotment of 3 million shares around November 2003 was in the $9 million dollar range. According to Pierce Hearing Exhibit 6, which tracked Lexington's stock price in a document Grant Atkins prepared, Lexington's stock price was about $1.27 per share in early November, and jumped to $2.50 - $3.00 per share upon the late November reorganization. But this was a very thinly traded security. Consequently, assuming a market price of roughly $1.00 to $3 per share, 3 million shares of Lexington stock, if placed in trust through Orient for the benefit of Cox, Rauball and Ulrich, would have had a rough market value of about $3-9 million in late 2003. That correlates to Barbon's testimony.

The current shareholder list for Lexington reflects that Orient still holds six certificates of one million shares each, for a total of six million shares. (Wells Decl., Ex. L.) These six certificates were issued on November 24, 2004. *(Id.)* The Division contends that Pierce trades like a whirlwind, not just for his own account, but for others as well. Yet, it cannot explain why Orient continued to hold six million shares and Cox continued to hold another three million, when it now contends that one document in June 2005 not signed by Pierce reveals that his wife and daughter were the beneficial owners of these shares since 2003. Indeed, the Division did not disclose Orient's retention of these shares to the hearing officer in its motion. But Cox has explained that he held on to his three million share block and another two million shares because he thought Lexington's prospects would improve. Cox Decl. (Wells Decl., Ex. F.)[24]

Curiously, the Division has not submitted any Orient Hypo Bank account records reflecting Orient's transactions in or current holdings of Lexington. According to the Division's contentions, those 6 million shares would have been transferred into the Hypo Bank account for Orient in June 2005 (or earlier) and sold soon thereafter. That did not happen.

The evidence most destructive to the Division's thesis, however, is the beneficial ownership report filed by Longfellow Industries on February 18, 2005. It disclosed a 17.04% ownership of Lexington. No person in his or her right mind would willingly file a 10% beneficial ownership report unless he or she truly was the beneficial owner of the securities.

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[24] The Division's email inquiry by Pierce of Maste in mid-2006 about "copies" of Rule 144 documents regarding Orient's shareholdings shows nothing more than concern for Cox and the other two investors for whom Pierce felt responsible, Rauball and Ulrich. If anything, it confirms what the lack of Pierce's signature on any documents in Div. Ex. 79 shows – that Pierce had no access to the Orient records at Hypo Bank or at Dempsey's office.

For example, exposure to liability for short swing profits under 1934 Act Section 16(b) arises with beneficial ownership in excess of 10%. Yet Cox filed. It is irrefutable that Cox or his family business had 1/3 of Orient's Lexington shares after the reorganization in November 2003 (after the Humphreys share reversal).

Brent Pierce's SEC investigative testimony was true: neither he nor his wife "ever had any ownership interest whatsoever in any of the stock that's referenced in the filing, the 2,250,000 shares." Pierce stands by that testimony and has no control over errors in documents he has not seen or signed.[25]

Not only are the Division's new documents offered in violation of the Commission's own rules and due process requirements, they do not alter the pivotal evidence that Brent Pierce was not a controlling person of Lexington at the time his S-8 stock option grants were awarded or the shares were issued upon exercise. Consequently, all resales of Brent's S-8 shares were unrestricted and not in violation of Section 5. Moreover, all trading profits of purchasers of Pierce's S-8 shares, whether in private transactions or in public markets, were lawful and not in violation of Section 5, as Herrick Lidstone observed at the hearing. (Wells Decl., Ex. M, Tr. at 536:18-538:2 and 540:15-543:2.)

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[25] In fact, while not relevant to the key issues at this point, it would not surprisingly be a common practice for foreign nationals not fluent in German to sign European banking documents in blank, leaving bank personnel to complete the forms afterward. Any Lexington shares the Division disingenuously attributes to Brent Pierce after June 2005 as a result of [redacted] and Dana Pierce erroneously, unwittingly and inadvertently becoming beneficiaries of Meridian Trust at a time when Orient opened a Hypo Bank account would only affect Brent Pierce's status as a control person for purposes of S-8 option awards for option grants during or after June 2005. (See Pierce Hearing Exhibit 40, which recaps his S-8 grants, and shows a grant on May 23, 2005 that would not be affected, then four grants in 2006 that would be affected.)
Similarly, if the Division has not filed its motion in good faith, and Orient Hypo Bank account records reflect no transfer of the 6 million shares of Lexington stock (in six certificates of one million shares each since November 24, 2004) into the Orient Hypo Bank account opened in June 2005, then that missing evidence would strengthen the overwhelming circumstantial evidence that the Division's proposed Ex. 79 contains a clerical error.

The evidence of trading profits by entities lawfully permitted to make the sales, which the Division also plans to submit, is irrelevant. In other words, even attributing sales by Newport Capital and other companies listed in Pierce's Schedule 13D, the resulting profits of those lawful resales leave a result no different than if Pierce had directly resold from his own account to those who subsequently purchased through Newport or other entities. For purposes of the allegations of registration and reporting violations on which a hearing was conducted, Pierce has already treated Newport Capital and the other companies included in his 13D report as if they were his own resales.

IV.

Conclusion.

The documents submitted by the Division as new exhibits are unauthenticated – except as to newly submitted testimony by Paul Dempsey that the featured record is not accurate. Apparently, a clerk at the Dempsey law firm confused beneficiaries of the Meridian Trust with beneficiaries of another trust.

The Division seeks to "have its cake and eat it too." The Division chose to go forward and institute these proceedings on July 31, 2008, rather than to wait for a response from the FMA in Liechtenstein, verify its legality and continue taking investigative testimony about any documents produced. Having made that choice, the Division represented to Mr. Pierce, the hearing officer, the Commission and the public that it had completed its submission of evidence. It is grossly unfair to Pierce to force him within the confines of a 5-day response time to gather and submit new evidence to refute and impeach so many new documents. The Division's unauthorized ploy has also robbed Pierce of precious time available to prepare his

post-hearing brief and proposed findings and conclusions responsive to the Division's. The Division's motion to admit the new Hypo Bank account records should be denied.

DATED this 26th day of March , 2009.

LANE POWELL PC

By _____
Christopher B. Wells, WSBA No. 08302
Attorneys for Respondent G. Brent Pierce

H

EXHIBIT A TO WELLS DECL.

LNR | ENZ NESENSOHN KABANSER, RECHTS VALTE
LANDSTRASSE 33 POSTFACH 207 FL 9490 VADUZ

Christopher Wells
Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338

Vaduz, 25 March 2009
guh

FMA/Brent Pierce and others

Dear Mr. Wells

I am the Liechtenstein attorney to present Brent Pierce in the procedure for administrative assistance requested by the SEC of the Finanzmarktaufsicht („FMA") Liechtenstein in relation to share tradings in Lexington Resources Inc.

We have appealed the order of the FMA of October 16, 2008, on November 4, 2008, by way of complaint to the Administrative Court of Liechtenstein. We got the judgment of the Administrative Court on January 15, 2009, and have in part been successful.

On February 23, 2009, we have filed our complaint against the unsuccessful part of the judgment of the Administrative Court with the Constitutional Court of Liechtenstein by claiming a violation of the constitutional rights of Brent Pierce and others whom we represented in almost identical procedures also in the context of trading in shares in Lexington Recourses Inc.

The following nine arguments for the violation of constitutional rights of Brent Pierce and others have been raised:

1. Based on the wording of Art 18 para 2 MG (Market Manipulation Act) we believe the FMA has discretion in its treatment of requests from third countries (non-EU). The FMA has however not used its discretion and is actually of the opinion to not have any, which is against the wording of the law.

2. The fundamental principal of secrecy and long-arm jurisdiction in relation to third countries seem to have been given up and the right of bank secrecy (which is a constitutional right) has been violated by the provision of Art 18 para 2 lit b second part MG which requires secret treatment by the receiving foreign authority but subjects such secrecy to foreign disclosure and publicity regulations such as the freedom of information act.

3. Art 24 para 4 MG violates Brent Pierce and others in his constitutional right to effectively complain and appeal by explicitly denying the Constitutional Court the right

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to grant suspension for the decision of the Administrative Court and also to grant preliminary injunctions.

4. The taylor-made transitory periods according to the amendment of the Market Manipulation Act is a classic example of deliberate legislation aimed to interfere with pending procedures.

5. By giving administrative assistance retro-actively and delivering information going back to the year 2003 thereby lifting the bank secrecy despite that the offense of market manipulation did not exist in Liechtenstein prior to February 1, 2007, is a violation of the constitutional right to rely on and trust in the authorities and is a breach of good faith.

6. The scope of the Market Manipulation Act is confined to actions and omissions performed in Liechtenstein. We are of the opinion that these actions and omissions must be relevant in the sense of the Market Manipulation Act. As none of potential Market Manipulation Acts have in the case at hand been performed in Liechtenstein in Liechtenstein we argue that no market manipulation took place in Liechtenstein and therefore the Liechtenstein rules do not apply.

7. The FMA has complied with the SEC request without any reservations and limitations. The SEC request is in our opinion a proscribed fishing expedition.

8. Share purchases under US regulations are not subject of the market manipulation act and are exceeding the scope and purpose of the market manipulation acts and that the requests as far as they relate to illegal share trading is not apt to administrative assistance.

9. The scope of the information which shall be released is without any limitation. Art 18 para 2 lit a MG allows the delivery of information for as long as such information is necessary to prevent market manipulation. Neither the FMA nor the Administrative Court have given substantive reasons why and which information is required for this purpose. That would have been the task of the FMA.

If need be I can easily substantiate each of this arguments.

I hope this is of assistance to you.

Yours sincerely

Dr. Oliver Nesensohn

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13109

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
April 7, 2009

In the Matter of	:	
	:	
LEXINGTON RESOURCES, INC.,	:	ORDER
GRANT ATKINS, and	:	
GORDON BRENT PIERCE	:	

The hearing in this proceeding as to Respondent Gordon Brent Pierce (Pierce) was held on February 2-4, 2009.[1] The hearing was closed on February 4, 2009, and the record of evidence was closed on March 6, 2009. Lexington Res., Inc., Admin. Proc. No. 3-13109 (A.L.J. Mar. 6, 2009) (unpublished). The Division of Enforcement (Division) and Pierce filed their proposed findings of fact and conclusions of law and post-hearing briefs on March 20 and April 3, 2009, respectively.

The Order Instituting Proceedings (OIP) authorizes disgorgement. At the October 10, 2008, prehearing conference, the undersigned advised that the disgorgement figure must be fixed so that Pierce could evaluate whether he wanted to present evidence concerning his ability to pay at the hearing, as required by the Securities and Exchange Commission's rules;[2] the Division stated that it was seeking $2.7 million in disgorgement. Tr. 8-9. The Division refined this figure in its December 5, 2008, Motion for Summary Disposition to $2,077,969 plus prejudgment interest, which it alleged are ill-gotten gains from Pierce's sale of allegedly unregistered stock.

Under consideration is the Division's Motion for the Admission of New Evidence, filed March 19, 2009, and responsive pleadings. The new evidence consists of information that the Division received from a foreign securities regulator, the Liechtenstein Finanzmarktaufsicht (FMA), on March 10, 2009. The Division argues that the new material bears on the issue of liability and also shows that over $7 million in additional ill-gotten gains should be disgorged, representing alleged profits from the sale of allegedly unregistered stock by two corporations that Pierce allegedly controlled, Jenirob Company, Ltd. (Jenirob), and Newport Capital Corp. (Newport). Pierce argues that admitting new evidence at this late date violates due process and provides additional exhibits that contravene the Division's new exhibits or diminish their weight. In reply, the Division states that the delay in producing the new material to the Division was entirely Pierce's

[1] The proceeding had ended previously as to Respondents Lexington Resources, Inc., and Grant Atkins. Lexington Res., Inc., 94 SEC Docket 11844 (Nov. 26, 2008).

[2] See 17 C.F.R. §201.630; Terry T. Steen, 53 S.E.C. 618, 626-28 (1998).

fault, as he refused to supply it in response to a 2006 subpoena and actively opposed its release to the Division by the FMA.

Under the circumstances the record of evidence will be reopened to admit Division Exhibits 78 – 89 for use on the issue of liability, but not for the purpose of disgorgement based on sales of stock by Newport and Jenirob. These entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP.[3] To ensure fairness, Respondent Exhibits A – M will also be admitted, and Pierce may offer additional exhibits and a supplement to his proposed findings of fact and conclusions of law and post-hearing brief by April 17, 2009, if desired.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

[3] The Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing beyond the framework of the original OIP. See 17 C.F.R. §201.200(d); J. Stephen Stout, 52 S.E.C. 1162, 1163 n.2 (1996).

INITIAL DECISION RELEASE NO. 379
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13109

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	
LEXINGTON RESOURCES, INC.,	:	INITIAL DECISION
GRANT ATKINS, and	:	June 5, 2009
GORDON BRENT PIERCE	:	

APPEARANCES: John S. Yun and Steven D. Buchholz for the Division of Enforcement, Securities and Exchange Commission

Christopher B. Wells for Gordon Brent Pierce

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision orders Gordon Brent Pierce (Pierce) to cease and desist from violations of Sections 5(a) and 5(c) of the Securities Act of 1933 (Securities Act) and of Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 (Exchange Act) and Rules 13d-1, 13d-2, and 16a-3 thereunder, and to disgorge ill-gotten gains of $2,043,362.33.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on July 31, 2008, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act. The proceeding has ended as to Respondents Lexington Resources, Inc. (Lexington), and Grant Atkins (Atkins). Lexington Res., Inc., Securities Act Release No. 8987 (Nov. 26, 2008).

The undersigned held a three-day hearing in Seattle, Washington, on February 2 through 4, 2009. The Division of Enforcement (Division) called three witnesses from whom testimony was taken, and Pierce called an additional three witnesses, including an expert witness. Pierce

himself, who was called as a witness by the Division, did not appear in person at the hearing and thus did not testify.[1] Numerous exhibits were admitted into evidence.[2]

The findings and conclusions in this Initial Decision are based on the record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the following post-hearing pleadings were considered: (1) the Division's March 23, 2009, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief; (2) Respondent's April 6, 2009, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief; and (3) the Division's April 27, 2009, Reply. All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

B. Allegations and Arguments of the Parties

The proceeding concerns the alleged unregistered distribution of Lexington stock. The allegations against Pierce are that he violated the registration provisions of the Securities Act, Sections 5(a) and 5(c), and reporting provisions of the Exchange Act, Sections 13(d) and 16(a) and Rules 13d-1, 13d-2, and 16a-3 thereunder. Specifically, the OIP alleges that Pierce violated Securities Act Sections 5(a) and 5(c) by reselling shares he received from Lexington without a valid registration statement or exemption from registration, obtaining at least $2.7 million in proceeds from such sales in June 2004. Pierce's Answer to the OIP admits the June 2004 sales for proceeds of at least $2.7 million but states that the sales were not registered with the Commission because the shares sold were already registered and freely trading in the open market. The Division is seeking a cease-and-desist order and disgorgement plus prejudgment interest for this alleged violation.

As to the alleged reporting violations, Exchange Act Section 13(d) applies to those who own or control more than five percent of any class of equity security registered under Exchange Act Section 12, while Exchange Act Section 16(a) applies to those who own or control more than ten percent. The OIP alleges that Pierce late-filed, on July 25, 2006, a Schedule 13D, as required by Exchange Act Section 13(d) and Rules 13d-1 and 13d-2, concerning his ownership or control of Lexington stock during the period from November 2003 to May 2004. Pierce's Answer admits the late filing. The OIP also alleges that Pierce owned or controlled and traded in more than ten percent of Lexington stock during that period but that the Schedule 13D stated that he owned or controlled less than that amount and that he did not file Forms 3, 4, or 5, as required by Exchange Act Section 16(a) and Rule 16a-3 thereunder. Pierce denies that he owned or controlled more than ten percent,

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[1] Pierce's failure to appear in person at the hearing was unexpected. At the September 29, 2008, prehearing conference, Pierce's counsel urged that the hearing not be scheduled during December as Pierce would not be available during that month. See Prehearing Tr. 7 (Sept. 29, 2008). Pierce was listed as a witness on his December 15, 2008, filing, "Designation of Witnesses," for his case in chief. However, at the hearing, Pierce's counsel represented that Pierce is a target of a federal criminal investigation involving CellCyte Genetics Corporation and was concerned that he might be arrested if his whereabouts became known in the United States Courthouse in Seattle, where the hearing was held and where the United States Attorney's Office is located. Tr. 5-7.

[2] Citations to the transcript will be noted as "Tr. __." Citations to exhibits offered by the Division and Pierce will be noted as "Div. Ex. __" and "Resp. Ex. __" respectively.

and thus denies that he filed an inaccurate Schedule 13D or that he violated Exchange Act Section 16(a) and Rule 16a-3. The Division is seeking a cease-and-desist order for the alleged reporting violations.

C. Procedural Issues

1. Adverse Inference from Refusal to Testify

By not appearing in person at the hearing, Pierce declined to testify on his own behalf or as a witness called by the Division. An adverse inference may be drawn from a respondent's refusal to testify in a Commission administrative proceeding. See Pagel, Inc. v. SEC, 803 F.2d 942, 946-47 (8th Cir. 1986); N. Sims Organ & Co. v. SEC, 293 F.2d 78, 80-81 (2d Cir. 1961); see also Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (Fifth Amendment privilege against self-incrimination does not forbid drawing adverse inferences from an inmate's failure to testify at his own disciplinary proceedings). Therefore, Pierce's silence may be considered along with other relevant evidence in assessing the evidence against him. See Pagel, Inc., 803 F.2d at 947.

Pierce argues that his failure to appear at the hearing results from the Division's violation of his due process rights, and that the Division is acting with unclean hands. Tr. 5-11; Resp. G. Brent Pierce's Motion for Dismissal for Violation of Due Process, Estoppel, and Unclean Hands (Due Process Motion). Pierce claims that the Division used "unfair and deceptive means . . . to accomplish service of the OIP on [him]." Answer at 8. As a basis for his claims, Pierce says that he agreed to give testimony in the CellCyte Genetics Corporation matter at his office building in Vancouver, British Columbia, on July 31, 2008. Decl. of Christopher B. Wells at 2 (Sept. 29, 2008). Pierce's counsel stated on the record that Pierce would not be served "as a result of documents handed to him in the course of his testimony." Id. at 4. The Division effected service of the Lexington OIP on Pierce, in the lobby of his building, after his testimony had concluded. Id. For relief, Pierce requests dismissal of the OIP, or in the alternative, a stay of this proceeding.

Pierce's arguments set out in the Due Process Motion fail as a matter of law. First, he cannot invoke estoppel or unclean hands claims against the Division while it is pursuing an enforcement matter in the public interest. See SEC v. Blavin, 557 F. Supp. 1304, 1310 (E.D. Mich. 1983), aff'd, 760 F.2d 706 (6th Cir. 1985); SEC v. Gulf & W. Indus., Inc., 502 F. Supp. 343, 348 (D.D.C. 1980) (citations omitted). Next, Pierce's due process claim fails because he does not articulate any particular constitutional violation, and only refers to a vague risk of being served with pleadings relating to another investigation. See United States v. Stringer, 535 F.3d 929, 940 (9th Cir. 2008) (SEC's duty is to refrain from misleading about the existence of a parallel investigation). Neither continuing with the instant civil administrative proceeding, nor the facts surrounding service of the OIP, in light of Pierce's nebulous fear of receiving service of process in another matter, are "so shocking to due process values that it must be dismissed."[3] United States v. Doe, 125 F.3d 1249, 1254 (9th Cir. 1997). Indeed, maintenance of parallel criminal and civil proceedings does not violate due process. See SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980), cert. denied, 449 U.S. 933 (1980).

[3] Accordingly, Pierce's Due Process Motion is denied.

2. Investigative Testimony

The Division took investigative testimony concerning the events at issue from Pierce on July 27 and 28, 2006. Because of his refusal to testify at the hearing concerning the events at issue, the undersigned admitted excerpts of the investigative testimony as Div. Exs. 62, 76, and 77, and Resp. Ex. 57. Excerpts rather than the entire transcripts were admitted in order to avoid burdening the record. See Del Mar Fin. Servs., Inc., 56 S.E.C. 1332, 1350-51 (2003). Fairness to Pierce was ensured through admitting Resp. Ex. 57, consisting of excerpts designated by him.

II. FINDINGS OF FACT

A. Relevant Parties

1. Lexington

Lexington was a Nevada corporation located in Las Vegas, Nevada. It was formed in 1996 under the name All Wrapped Up, Inc., and changed its name to Intergold, Inc. (Intergold), in 1997, when it began the business of exploration of gold and precious metals in the United States. Div. Ex. 55 at SEC 103234. Intergold subsequently acquired Lexington Oil & Gas Co. Ltd. (Lexington Oil & Gas), an Oklahoma limited liability company, and changed its name to Lexington Resources, Inc. Id.; Resp. Ex. 5. It exited the gold exploration business, and billed itself as being "engaged in the acquisition and development of oil and gas properties in the United States." Div. Ex. 55 at SEC 103235. Lexington had no full time employees; instead, the day-to-day operations were carried out by Atkins and one of the directors, Douglas Humphries (Humphries). Tr. 338-39; Div. Ex. 55 at SEC 103239. Other necessary functions were performed by outside consultants. Div. Ex. 55 at SEC 103239. Lexington employed the consulting firm International Market Trend AG (IMT) to provide administrative support and various other services. Tr. 311-13; Resp. Ex. 4. Lexington did not have its own offices; instead, the company was managed out of IMT's offices in Blaine, Washington. Tr. 457-58.

On November 19, 2003, the shareholders of Intergold and Lexington Oil & Gas entered into a share exchange agreement whereby Intergold acquired all of the outstanding stock of Lexington Oil & Gas. Div. Ex. 55 at SEC 103237; Resp. Ex. 5. The newly merged company, Lexington, issued three million restricted common shares to Lexington Oil & Gas's shareholders. Tr. 321; Div. Ex. 55 at SEC 103237; Resp. Ex. 5-6. The new capital structure left Lexington Oil & Gas's shareholders owning eighty-five percent of the new company's shares. Div. Ex. 55 at SEC 103278. Orient Explorations Ltd. (Orient) owned sixty-four percent of Lexington. Resp. Ex. 5. Humphries was a significant shareholder after the acquisition, holding twenty-two percent of Lexington's stock. Id. Lexington's new ticker symbol was LXRS, and it began trading on the over-the-counter market under that symbol on November 20, 2003. Resp. Ex. 8.

During 2003 and 2004, Lexington never held a shareholder meeting. Tr. 457. Lexington's Board of Directors did not meet regularly during this period either. Tr. 457-58. Instead, important matters were resolved via consent resolutions on an ongoing basis. Tr. at 457-58.

On March 4, 2008, Lexington filed a Chapter 11 bankruptcy petition. Answer at 3. The petition was converted to Chapter 7 liquidation on April 22, 2008. Id.; Div. Ex. 52.

2. Pierce

Pierce was born in 1957 and is a citizen of Canada. Div. Ex. 62 at 10-11. He attended the University of British Columbia for a short time. Id. at 158. He has no academic training in accounting or finance. Id. At the time he gave his investigative testimony, he resided in Vancouver, British Columbia. Resp. Ex. 57 at SEC-2329. Pierce is the beneficial owner of, and works as president and director for Newport Capital Corporation (Newport), an entity based in Switzerland.[4] Div. Exs. 62 at 20, 80. He is also the beneficial owner of Jenirob Company Ltd. (Jenirob). Div. Ex. 84. At the time of his investigative testimony, he had worked for Newport for more than seven years. Div. Ex. 62 at 21. He received a salary of $800,000 to $900,000 from Newport in 2005. Id. at 66. Prior to his affiliation with Newport, Pierce was self-employed. Id. at 158-59. He worked with start-up companies in many different industries, helping take them public. Id. at 159. Pierce first met Atkins in the early 1990's, when he hired Atkins to write the business plan for a company he founded. Id. He and Atkins have worked together at approximately ten companies, most of them publicly traded. Id. at 160. Atkins consulted Pierce in the restructuring of Intergold into Lexington. Tr. 339-41. Atkins continued to consult Pierce about Lexington, speaking to him multiple times every week during 2003 and 2004. Tr. 455-56.

Pierce was sanctioned by the British Columbia Securities Commission (BCSC) in 1993 for conduct that occurred in 1989. Div. Exs. 47, 62 at 167. He settled a proceeding with the BCSC in which he agreed the following facts were true. He was a control person behind an entity called Valet Video and Pizza Services Ltd. (Valet), and his nominee served as president and sole director of Valet. Div. Ex. 47. Bu-Max Gold Corp. (Bu-Max), a publicly traded British Columbia company, circulated a prospectus and made a securities offering that garnered proceeds for an exploration program. Id. Almost half the proceeds were paid by Bu-Max's directors to Valet for purposes that did not benefit Bu-Max; instead, those monies benefitted Pierce and his nominee at Valet. Id. During the BCSC's investigation, Pierce provided documents that "were not genuine." Id. As a sanction, Pierce was barred from using certain exemptions available under the British Columbia Securities Act for fifteen years. Id. Additionally, he was barred from serving as an officer or director of any reporting issuer, or serving as the officer or director for any issuer that provides management, administrative, promotional, or consulting services to a reporting issuer for fifteen years. Id. Finally, he was fined $15,000. Id.

During his investigative testimony, and in his Answer, Pierce admitted he violated the reporting requirements under Section 13 of the Exchange Act. Answer at 7; Div. Ex. 62 at 31-33.

At the time of his investigative testimony, Pierce served as an officer or director of the following entities: Newport, IMT, Parc Place Investments, AG (Parc Place), Sparten Asset

[4] Pierce testified that he did not have an ownership stake of any kind in Newport. Div. Ex. 62 at 197.

Group (Sparten), Waterside Developments [Cayman], Inc., Palm Tree Properties [Cayman] Ltd., and Pierco Petroleum. Id. at 35-36. Pierce negotiated with consultants on behalf of Investor Communications International, Inc. (ICI) and IMT, and generally entered into oral contracts with these consultants for the services they would provide to the clients. Id. at 91. Pierce never served as an officer or a director of Lexington. Tr. 372. Newport provided Pierce with a revolving line of credit. Div. Ex. 62 at 107. Pierce used draws on the line of credit to pay the exercise price on his Lexington options, and he sometimes transferred Lexington shares to Newport to pay down the loan. Tr. 107, 109, 122.

Pierce had brokerage accounts with Piper Jaffrey and Hypo Bank in Liechtenstein. Piper Jaffrey closed his account when the Commission began its investigation of the Lexington matter. Id. at 38-39. He opened the brokerage account at Hypo Bank in 2003. Id. at 40, Div. Ex. 87. Pierce testified that these were the only accounts in which he held Lexington stock. Div. Ex. 62 at 210-11. Hypo Bank, in turn, opened an omnibus account with Nicholas Thompson (Thompson)[5] at vFinance, Inc., (vFinance) (Hypo account). Div. Ex. 21. Newport also had brokerage accounts with Hypo Bank, Thompson at vFinance,[6] Craig Sommers at Peacock Hislop Staley & Givens, Inc. (Peacock Hislop), and Rich Fredericks at SG Martin, LLC. Div. Exs. 25, 29, 62 at 114, 71, 80. Pierce traded Lexington stock on behalf of Newport in all these accounts. Div. Ex. 62 at 215-16. Thompson was given discretionary power to trade Newport's account at one point. Id. at 224-25. Pierce did not have a personal account with Thompson at vFinance. Id. at 115. Pierce also traded Lexington stock on behalf of Sparten in Sparten's account with Peacock Hislop. Id. at 180, 182.

At the end of Intergold's fiscal year 2002, Pierce held the rights to 1.35 million common shares of Intergold through options granted to him by Intergold's Board of Directors. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003) (official notice).

3. Atkins

Atkins is a resident of Vancouver, British Columbia. Tr. 288. He attended the University of British Columbia and graduated with a degree in commerce and business. Tr. 288-89. He has worked primarily as a start-up and small business consultant. Tr. 289. He became an officer and director of Intergold in the late 1990s. Tr. 291. At the end of 2002, he was the sole officer and director of Intergold. Tr. 292-93. His compensation as president of Intergold/Lexington for 2003 was $19,625, and $60,000 as president of Lexington in 2004. Tr. 452-53; Div. Ex. 55 at SEC 103258, Div. Ex. 56 at SEC 101304. Though he regularly consulted Pierce on the management of Lexington, Atkins was unaware of who the representatives for Lexington's largest shareholder, Orient, were. Tr. 455-56. In addition to working as a consultant for ICI, he also consulted for Newport, and Pierce controlled his assignments there. Tr. 371-72; 453-54. Pierce and Newport also arranged for loans for Atkins from time to time. Tr. 372-73; 453-54. Newport's banking records show payments to Atkins totaling $268,000 for the period from December 2003 to November 2004. Div. Ex. 70. At one point, Newport's loans to Atkins may have totaled $400,000. Tr. 453. According to Atkins, the loans were eventually

[5] Thompson was also a market-maker for Lexington's stock. Div. Ex. 62 at 114.

[6] Pierce opened Newport's vFinance account on July 11, 2002. Div. Ex. 25.

repaid. Tr. 453. Atkins testified that despite his financial relationship with Newport, it did not control any of his decision-making as head of Lexington. Tr. 373.

4. Newport

Newport is incorporated in Belize and domiciled in Switzerland. Div. Ex. 29 at SEC 142764, 142774. Newport invests in public companies and helps them raise capital, provides investor relation services, and aids companies in finding suitably-matched acquisition opportunities. Div. Ex. 62 at 20. Newport invested $718,000 in Lexington in a private placement in April 2004. Tr. 410; Resp. Ex. 41. Newport has no employees, only consultants. Div. Ex. 62 at 27. It does not contract directly with publicly traded U.S. companies for providing its services, but uses other entities to enter into direct relationships with its clients. Id. at 53. At the time of the Intergold/Lexington Oil & Gas merger, Newport owned 2.6% of Intergold's stock. Resp. Ex. 5. As noted above, Pierce is the beneficial owner of Newport.

5. ICI

ICI was a consulting company that provided many services to its clients. It provided services such as merger and acquisition and joint venture recruitment. Tr. 239-40. ICI helped companies become listed on different stock exchanges around the world. Tr. 239-40. ICI was the vehicle used by Newport to contract with client companies in the United States. Div. Ex. 62 at 53. Pierce was either a president or director of ICI, and the driving force behind it. Id. at 54. Consultants affiliated with ICI included Pierce, Atkins, Richard Elliot-Square (Elliot-Square), Len Braumberger, Marcus Johnson (Johnson), Vaughn Barbon (Barbon), and Alexander Cox (Cox). Tr. 306-07. Intergold had a consulting agreement with ICI, which it signed January 1, 1999. Div. Ex. 55 at SEC 103239. ICI provided a variety of services to Intergold, including strategy development, investor relations, bookkeeping and other backoffice functions, and litigation management. Id. Atkins provided his services as President/Chief Executive Officer, and Barbon provided his services as Chief Financial Officer, to Intergold through ICI. Id. at SEC 103293, 103301. Those two were the only ICI consultants that provided corporate officer or director services to Intergold. Tr. 310-11. ICI provided Atkins and Barbon with their salaries. Div. Ex. 56 at SEC 101304. ICI did not provide Intergold with invoices that tracked the hours its consultants spent working for Intergold. Tr. 493. ICI consultant Elliot-Square reported to Pierce, and not Atkins, when he provided services to Intergold/Lexington. Tr. 393.

On September 27, 1999, Intergold filed suit against AuRIC Metallurgical Laboratories, LLC (AuRIC), and Dames & Moore Group (Dames & Moore) (collectively, defendants) in district court in Utah for breach of contract and related claims. Tr. 291-92; Resp. Ex. 56. The defendants filed several counterclaims against Intergold. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003). Pierce was a named party in the defendants' counterclaims. Id. Intergold entered into a funds sharing agreement with Tristar Financials Services, Inc. (Tristar), and Cox, in which Tristar and Cox agreed to fund the litigation for Intergold in exchange for a share of any proceeds obtained by Intergold from the litigation. Id.[7] The parties engaged in extensive discovery, but the matter settled in September 2001 before trial. Resp. Ex. 56;

[7] Cox owned seventeen percent of Intergold's common stock. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003).

Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003). In 2000, Dames & Moore filed suit against Intergold in Idaho to foreclose on property against which it had liens. Id. That litigation was settled in conjunction with the litigation occurring in Utah. Id.

Pierce, Atkins, and Johnson worked on behalf of Intergold to manage the litigation. Tr. 296-97. All three provided their services to Intergold through ICI as consultants. Tr. 298-99. Intergold did not pay any of the three directly for their services; Atkins received payment from ICI, if he was compensated with cash at all. Tr. 299. Pierce never submitted an invoice or an expense statement for his work on the litigation. Tr. 493-94. The settled litigation yielded $798,000 in cash for Intergold, but it all went to cover the costs of the litigation incurred by Intergold's counsel and Tristar. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003).

At the end of 2002, ICI owned over nine percent of Intergold's stock. Id. At the time of the Intergold/Lexington Oil & Gas merger, ICI owned 4.5% of Intergold's stock. Resp. Ex. 5.

6. Parc Place

Parc Place provided capital raising services to Lexington in at least one instance, and was compensated with a finder's fee. Tr. 343-47; Resp. Ex. 57 at SEC-02467-69. Pierce represented Parc Place in its dealing with Lexington. Tr. 346. On November 20, 2003, Lexington entered into a consulting agreement with Parc Place, in which Parc Place contracted to aid Lexington in securing a private placement of capital for a twenty percent finder's fee.[8] Div. Ex. 55 at SEC 103257; Resp. Ex. 9. On November 26, 2003, James Dow invested $250,000 with Lexington through Parc Place, and received 100,000 shares of restricted common stock. Tr. 343-45. Parc Place received $25,000 for a finder's fee on December 1, 2003. Tr. 347-49. Earlier in the year, on October 13, 2003, Intergold issued 10,000 shares of restricted common stock to Parc Place for partial payment of a prior debt. Div. Ex. 55 at SEC 103257.

7. IMT

IMT provided services similar to Newport and ICI, including sending client company material to potential investors. Div. Ex. 62 at 37, 49-50, 97-98. Pierce was instrumental in the formation of the company, which occurred three to four years prior to his investigative testimony. Id. at 51. For consultants who submitted invoices to IMT, Pierce reviewed and approved payment of those invoices. Id. at 104-05. IMT borrowed money from Newport to cover expenses, with Pierce approving the loan on behalf of Newport. Id. at 257.

IMT took over when ICI ceased its services to Lexington in 2003. Tr. 244, 312-13, 316-17, 339. Most of the consultants who had served Lexington through ICI continued to serve Lexington through IMT. Id. at 308-09, 312-13. On November 10, 2003, Lexington entered into a Financial Consulting Services Agreement with IMT (IMT Agreement)[9] under which IMT

[8] The finder's fee was payable in ten percent cash and ten percent restricted stock. Resp. Ex. 9.

[9] Atkins is listed in the Agreement as the agent of notice for Lexington and executed the agreement on behalf of Lexington; Elliot-Square is listed as the agent of notice for IMT and executed the agreement on behalf of IMT. Resp. Ex. 4 at IMT 57-58.

contracted to provide financial and business development services to Lexington. Div. Ex. 55 at SEC 103239; Resp. Ex. 4. The IMT Agreement specifically excluded capital raising activities from IMT's functions. Resp. Ex. 4 at IMT 54-55. IMT had not provided any services to Lexington prior to the signing of the IMT Agreement. Tr. 313. On November 18, 2003, Lexington and IMT entered into a Stock Option Plan Agreement (IMT Option Plan). Tr. 317-18; Resp. Ex. 7. The IMT Option Plan granted IMT 950,000 Lexington vested common stock option shares with an exercise price of $0.50 per share. Id. The IMT Option Plan did not specifically limit the stock option grant to shares registered on a Form S-8. Tr. 481-82; Resp. Ex. 7. Pierce testified that the exercise price and the number of shares were set by Atkins and Lexington without input from him, while Atkins testified the number of shares and the exercise price were resolved in negotiations with Pierce and Johnson. Tr. 463-64; Resp. Ex. 57 at SEC-02392-94. Pierce, as the president and a director of IMT as of November 10, 2003, agreed to those terms on behalf of IMT. Div. Ex. 62 at 59; Resp. Ex. 57 at SEC-2395. Pierce testified that in addition to the stock option compensation, Lexington paid IMT $10,000 per month in cash. Id. at SEC-02396.

Pierce provided his services to IMT through Newport, and he was compensated for his services through Newport. Div. Ex. 62 at 64-65. In the Lexington matter, he was never compensated by IMT for services he provided to Lexington. Id. Pierce claims he provided a wide range of services to Lexington, including sourcing oil and gas company properties, setting up drilling activities, engaging in financing activities, and providing investor relation services. Id. at 66-68, 70. He provided the same services to Lexington through ICI. Id. at 72. Other consultants provided similar investor relation services to Lexington through IMT, and were compensated, at Pierce's direction, with Lexington options. Id. at 102-03.

8. Global Securities Transfer, Inc.

Global Securities Transfer, Inc. (a/k/a X-Clearing Corp.) (Global) served as Intergold's, and subsequently Lexington's, transfer agent. Tr. 80-81, 360-61. Robert Stevens (Stevens) was the head of Global. Id. at 80. Newport owned approximately twenty-five percent of the transfer agent. Div. Ex. 62 at 336-37. Whenever Stevens had trouble getting paid by Lexington in a timely manner, he went to Pierce to rectify the situation. Tr. 104-05.

B. Lexington's Stock-For-Debt Program with Pierce and ICI/IMT

At the time of the Intergold/Lexington Oil & Gas merger, Intergold owed ICI approximately $1.3 million (ICI debt).[10] Div. Ex. 55 at SEC 103287; Resp. Exs. 2, 15b at IMT 87. The debt owed by Intergold to ICI consisted of both outstanding payments due for services and advances made by ICI on Intergold's behalf, incurred before the acquisition of Lexington Oil

[10] The debt amounts owed ICI as of November 19, 2003, were: $672,805 in accrued management fees, loans of $356,998, and accrued interest of $282,477. Div. Ex. 55 at SEC 103287.

& Gas. Div. Ex. 55 at SEC 103255. A substantial amount of the tally had accrued during the pendency of the Dames & Moore/AuRIC litigation. Tr. 299-306.

Intergold and ICI agreed, as part of the reorganization of Intergold into Lexington, that stock would be issued to settle the debts to ICI and its consultants. Tr. 302-04, 315. The agreement called for an allocation of stock directly to ICI to cover part of the debt, with the remainder of the debt being assigned to ICI's consultants. Tr. 304, 311. The newly created Lexington would then issue stock options to the consultants, and allow the consultants to use the debt to cover the exercise price of the options. Tr. 304. In anticipation of this plan, on August 7, 2003, Intergold's Board of Directors approved an employee stock option plan (Stock Option Plan).[11] Div. Ex. 55 at SEC 103249. Officers, directors, employees, and consultants were all eligible beneficiaries of the Stock Option Plan. Id. at SEC 103249. The Stock Option Plan authorized the Board to issue up to one million common share options, to set the options' exercise price, and to determine acceptable forms of consideration for exercising the options. Id. at SEC 103249-50.

Under the IMT Agreement, Lexington agreed to grant 950,000 common share stock options, pursuant to the Stock Option Plan, with an exercise price of $0.50 per share to IMT.[12] Tr. 315-17; Div. Ex. 55 at SEC 103239, 103251; Resp. Ex. 4 at IMT 55. As part of the IMT Agreement, Lexington contracted to issue the stock to IMT's designees, consultants, and employees who had performed services for it. Id. It promised to issue the securities "with a mutually acceptable plan of issuance as to relieve securities or [IMT] from restrictions upon transferability of shares in compliance with applicable registration provisions or exemptions." Id. The consultants wanted free trading shares, and Lexington intended to accommodate them. Tr. 351-52, 355-56. However, the IMT Option Plan specifically required the consultants to represent to Lexington, when they exercised options, that "all Option Shares shall be acquired solely . . . for investment purposes only and with no view to their resale or other distribution of any kind." Resp. Ex. 7 at IMT 62. The shares were to be denoted "Clearstream eligible" so that the transfer agent could make the shares tradable in street name in Europe. Tr. 366-67. Pierce directed Atkins to have the shares so marked. Resp. Ex. 57 at SEC-02450-51.

Intergold/Lexington began to enact its reorganization plan. On October 15, 2003, Intergold issued 100,000 shares of restricted common stock to ICI, and ICI accepted those shares as payment for $250,000 of the ICI debt. Div. Ex. 55 at SEC 103255, 103285; Resp. Exs. 2-3. The effective date of the restricted stock settlement was November 30, 2003. Tr. 379-80; Resp. Ex. 2. As noted above, Lexington and IMT entered into the IMT Option Plan on November 18, 2003, which granted IMT 950,000 common share options of Lexington. Resp. Ex. 7. On November 19, 2003, Lexington had 4,521,184 shares outstanding as of this date, and thus the grant made under the IMT Option Plan represented twenty-one percent of Lexington's float. Resp. Exs. 5-6. On November 21, 2003, Lexington filed a "Form S-8 For Registration Under the Securities Act of 1933 of Securities to be Offered to Employees Pursuant to Employee Benefit

[11] In a Form 8-K filed on November 20, 2003, Lexington notes the Board of Directors approved the Stock Option Plan on March 15, 2003, and that the shareholders ratified it on August 7, 2003. Resp. Ex. 8. This discrepancy does not affect the findings of fact in this Initial Decision.

[12] Humphries received the remaining 50,000 option shares approved in the Stock Option Plan. Div. Ex. 55 at SEC 103251.

Plans" (First S-8). Div. Ex. 55 at SEC 103250. The First S-8 did not contain a reoffering prospectus. Tr. 60; Div. Ex. 6. It registered one million shares of Lexington common stock. Tr. 314-15. On November 20, 2003, Lexington filed a Form 8-K, covering issues in its change of control, and listed IMT as a beneficial owner of 21.25% of its common stock. Resp. Ex. 8.

IMT served as a placeholder for distribution of stock option shares to the ICI/IMT consultants, but IMT did not exercise the options. Tr. 318-19. Pierce, Atkins, and to a lesser extent, Johnson, decided how to allocate the 950,000 stock options among the consultants. Tr. 326; Div. Ex. 62 at 80, 112, 133-34, 146. On November 24, 2003, Braumberger was allocated 25,000 option shares. Tr. 357; Resp. Ex. 11a. Concurrent with the allocation of option shares by IMT to Braumberger, ICI allocated $12,500 in debt owed it by Lexington to Braumberger. Tr. 357; Res. Ex. 11b. Braumberger then assigned the debt to Lexington, in consideration of the $0.50 per share option exercise price. Tr. 357; Resp. Ex. 11c. The process was repeated as to Stevens, who also received 25,000 option shares and $12,500 in ICI debt, which he assigned to Lexington. Tr. 358-59; Resp. Ex. 14a-c. Pierce received 350,000 option shares and $209,435.08 in ICI debt. Tr. 359-60; Resp. Ex 15a-c. The next day, November 25, 2003, Pierce received another 150,000 option shares and $34,435.08 in ICI debt, which he again assigned to Lexington. Tr. 360-61; Resp. Ex. 18a-c. The two allocations to Pierce were attempts by him and Atkins to avoid pushing Pierce over the ten percent beneficial ownership threshold. Tr. 360-61. Pierce, while giving his investigative testimony, claimed that he did not remember why he executed two options grants on back-to-back days. Resp. Ex. 57 at SEC-2441-42.

Several Lexington share blocks were immediately assigned to Newport, and then other individuals and entities, at Pierce's direction. On November 24, 2003, Atkins, at Pierce's direction, sent a letter to Stevens directing him to cancel the issuance of Pierce's 350,000 share block and issue those shares to Newport, based on a November 24, 2003, private sale between Pierce and Newport. Tr. 370-373; Resp. Ex. 13. Pierce testified that he transferred 350,000 shares to Newport to satisfy some of his debt to Newport; Atkins testified that the transfer was to enable Pierce to avoid having a ten percent beneficial ownership in Lexington. Tr. 360-61; Div. Ex. 62 at 107, 133, 206; Resp. Ex. 57 at SEC-2445. The next day, Atkins, at Pierce's direction, sent a letter to Stevens, cancelling the previous day's order regarding the 350,000 share block, and, instead, directing him to issue shares to various individuals and entities, based on private sale agreements between those entities and Newport dated November 25, 2003. Tr. 378-79; Div. Ex. 62 at 200; Resp. Ex. 16. Newport retained 41,700 shares out of the 350,000 share block. Resp. Ex. 16.

On November 30, 2003, Atkins sent Stevens a letter, instructing him to issue 100,000 restricted shares to ICI, pursuant to the restricted stock settlement agreement executed on October 15, 2003. Tr. 379-81; Resp. Ex. 19. Atkins recognized that these shares were not registered. Tr. 381-83. On December 1, 2003, Atkins sent Stevens a letter requesting that he issue the 100,000 restricted shares allocated to ICI on October 15, 2003, to Newport pursuant to a private share sale between ICI and Newport dated the same day. Id. at 381-82; Resp. Ex. 20. The same day, Atkins sent Stevens a letter, instructing him to issue 66,667 shares of the 100,000 restricted share block to an individual and an entity, based on a private share sale between them and Newport. Newport retained 33,333 restricted shares. Tr. 383-84; Resp. Ex. 21. It is found

that all the restricted stock distributions were made at Pierce's behest, as he was the beneficial owner, agent, and officer for Newport. Tr. 371-73.

On December 2, 2003, Atkins sent Stevens a letter, at Pierce's direction, instructing him to issue 50,000 shares of the 150,000 share block exercised by Pierce on November 25, 2003, to Newport, based on a private sale between Pierce and Newport. Tr. 383-84; Resp. Ex. 22. That same day Atkins sent Stevens a letter, at Pierce's direction, instructing him to issue the 50,000 shares just assigned to Newport, to two individuals based on a private sale between Newport and those individuals. Tr. 385-86; Resp. Ex. 23. Those individuals were already investors in Lexington. Tr. 385-86.

On December 31, 2003, Lexington's Board of Directors amended the Stock Option Plan to allow it to issue up to four million common share options. Div. Ex. 55 at SEC 103250. On January 14, 2004, Lexington's Board of Directors approved a forward stock split of three-for-one of the issued and outstanding common shares. Id. at SEC at 103247. The forward stock split was effectuated on January 26, 2004. Id. at SEC 103249. At that time, Lexington's issued and outstanding common shares increased from 4,281,184 to 12,843,552. Id. at SEC 103258.

On January 22, 2004, Elliot-Square exercised 300,000 Lexington option shares in the manner described above. Tr. 392-93; Resp. Ex. 26a-c. That same day, Atkins sent Stevens a letter directing those shares be issued to Elliot-Square. Resp. Ex. 27. On January 26, 2004, Atkins sent Stevens a letter, at Elliot-Square's request, instructing him to cancel the 300,000 shares issued to Elliot-Square, and, instead, to issue those shares to Newport because a private sale had occurred between Newport and Elliot-Square. Tr. 393; Resp. Ex. 28.

On February 2, 2004, Lexington and IMT entered into a second Stock Option Plan Agreement (Second IMT Option Plan). Tr. 394-95; Resp. Ex. 31. Lexington agreed to allocate 895,000 common share options to IMT, with 495,000 options shares having an exercise price of $1.00 and the other 400,000 shares having an exercise price of $3.00. Tr. 394-95; Resp. Ex. 31.

On May 18, 2004, IMT directed 495,000 option shares and assigned $495,000 in ICI debt to Elliot-Square, and Elliot-Square assigned the debt to Lexington as consideration for his exercise price for the options. Tr. 395-96; Resp. Ex. 32a-c. The assignment of ICI debt to Elliot-Square represented the last of the debt Lexington owed ICI and its consultants. Tr. 405. On May 19, 2004, Atkins sent Stevens a series of letters directing him how to issue Elliot-Square's Lexington shares. Resp. Exs. 33-35. The first letter directed Stevens to issue 495,000 shares to Elliot-Square. Resp. Ex. 33. The second letter instructed Stevens to cancel that certificate, and to issue the shares in two certificates of 10,000 shares and 485,000 shares to Kingsbridge SA, based on a private sale agreement between Elliot-Square and Kingsbridge SA. Resp. Ex. 34. The third letter directed Stevens to cancel the issuance to Kingsbridge SA for the 485,000 share certificate, and, instead, to issue 50,000 shares to Eiger East Finance Ltd. and two share blocks to Jenirob of 400,000 and 35,000. Resp. Ex. 35.

C. Pierce's Sales of Lexington Stock

As of December 31, 2003, Pierce had 142,561 shares of Lexington deposited in the Hypo account. Div. Ex. 16 at SEC 106712. Of those, 100,000 shares were granted under the IMT Option Plan. Div. Ex. 50. Pierce forwarded the stock certificate for those 100,000 shares to Hypo Bank on December 3, 2003. Div. Ex. 88 at SEC 159213. In turn, Hypo Bank sent the stock certificate to Brown Brothers Harriman and Co. in New York so that the shares could be held in street name. Id. at SEC 159214. Pierce sold 2,000 shares January 26, 2004, leaving his account holding 40,561 pre-split Lexington shares that were not granted under the IMT Option Plan. Id. at 159204. On February 2, 2004, Stevens directed 25,000 post-split shares that he had received from Lexington, as part of the First S-8 issuance, to be deposited in Pierce's Hypo brokerage account.[13] Id. at SEC 159221. After the stock splint, as of April 30, 2004, Pierce held 446,683 shares of Lexington in the Hypo brokerage account, of which 325,000 shares were distributed from the IMT Option Plan. Div. Ex. 18 at SEC 106679. During May 2004, Pierce sold 5,000 shares of Lexington from his Hypo brokerage account. Id. at SEC 106676. During June 2004, Pierce sold 395,675 Lexington shares from his Hypo brokerage account. Id. at SEC 106668-69. Using a first-in, first-out method, he exhausted his holdings of Lexington stock acquired prior to the IMT Option Plan shares on June 24, 2004. Id. at SEC 106668. In July 2004, Pierce sold 3,500 Lexington shares for $13,348.90; in September 2004, Pierce sold the remaining 42,508 shares of Lexington for a total of $111,048.60. Div. Ex. 19 at SEC 106661, 106647. Thus, Pierce's gross sales in his personal Hypo brokerage account from Lexington stock granted under the IMT Option Plan were $2,113,362.33. Div. Ex. 18. His cost basis for the 300,000 IMT Option Plan shares was $50,000 and $20,000 for the shares transferred by Stevens; his total profit for selling shares acquired under the IMT Option Plan was $2,043,362.33. Id.; Div. Ex. 88.

vFinance statements from the Hypo Bank omnibus account reflect many trades in Lexington shares during this period. Div. Ex. 24. While no one trade perfectly matches the trades that Pierce ordered from his personal account, several trades appear to be blocks of Lexington shares that were sold through Hypo Bank's omnibus vFinance account from different accounts that Pierce controlled. On June 24, 2004, Pierce sold 50,000 Lexington shares from his personal account, 50,000 shares from the Jenirob account, and 10,052 shares from the Newport account, and all transactions had a settlement date of June 29, 2004. Div. Exs. 82 at SEC 159071, 86 at SEC 158581, 88 at SEC 159204. The account statement for the Hypo Bank omnibus account shows a block of 153,052 Lexington shares sold, with a settlement date of June 29, 2004. Div. Ex. 24 at SEC 9409.42. On June 25, 2004, Pierce sold 73,432 Lexington shares from his personal account, 30,000 shares from the Jenirob account, and 22,000 shares from the Newport account, and all transactions had a settlement date of June 30, 2004. Div. Exs. 82 at SEC 159071, 86 at SEC 158581, 88 at SEC 159204. The account statement for the Hypo Bank omnibus account shows a block of 170,432 Lexington shares sold, with a settlement date of June 30, 2004. Div. Ex. 24 at SEC 9409.43.

D. Pierce's Ownership of Lexington

[13] Stevens directed 25,000 shares be deposited in Newport's and Pierce's account. The share deposits were repayment for a $40,000 note owed to Pierce. Div. Ex. 88 at SEC 159221. Thus, Pierce's cost basis for the 25,000 shares deposited in his personal account is $0.80 per share, or $20,000.

As of December 31, 2003, Newport held 11,833 shares of Lexington stock in its vFinance account. Div. Ex. 26 at SEC 9409.125. As noted above, Newport retained 75,033 shares of Lexington stock after distributing part of the allocations Pierce made to third parties. Newport also owned 250,000 shares of Lexington restricted stock transferred to it by ICI. Pierce held 142,561 shares personally. Pierce also retained control over 400,000 Lexington shares granted to IMT that were as yet unassigned. Lexington had 4,281,184 common shares outstanding on December 31, 2004, giving Pierce an 11.2% direct interest in Lexington through his personal shares and the shares owned by Newport. Including the unexercised options granted to IMT, over which Pierce had dispositive power, he had a 20.5% interest in the company.

As noted above, Elliot-Square transferred 400,000 shares to Newport on January 26, 2004. Resp. Ex. 28. On February 2, 2004, Lexington and IMT agreed to the Second IMT Option Plan, which granted IMT 895,000 shares. That same day, Stevens transferred 25,000 shares to both Newport and Pierce. Div. Ex. 88 at SEC 159221. This left Pierce personally holding 446,683 post-split Lexington shares, with Newport holding 1,935,589 post-split Lexington shares. Lexington's stock split increased outstanding common shares to 12,843,552, giving Pierce an 18.5% beneficial interest in Lexington. The execution of the Second IMT Option Agreement added 895,000 shares to the common shares, for a total of 13,738,552 shares. Div. Ex. 55 at SEC 103258. Including the unexercised options granted to IMT, over which Pierce had dispositive power, he had 23.9% interest in Lexington on February 2, 2004.

III. CONCLUSIONS OF LAW

It is concluded that Pierce violated Sections 5(a) and 5(c) of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder.[14]

A. Pierce's Violations of Section 5 of the Securities Act

The OIP alleges that Pierce violated Sections 5(a) and 5(c) of the Securities Act by offering to sell, selling, and delivering after sale to members of the public, Lexington stock when no registration statement was filed or in effect and no exemption from registration was available.

Section 5(a) of the Securities Act provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

[14] On February 2, 2009, at the conclusion of the Division's direct case, Pierce moved for summary disposition dismissing the charges against him. Tr. 211-19. The undersigned deferred ruling on the motion. Tr. 219. In light of the decision herein, Pierce's motion for summary disposition is denied.

> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. § 77e(a) (2008). Section 5(c) of the Securities Act provides:

> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

15 U.S.C. § 77e(c) (2008). The purpose of the registration requirement, and the Securities Act as a whole, is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions." SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953).

A prima facie case for a violation of Section 5 of the Securities Act is established by showing that: (1) no registration statement was in effect or filed as to the securities; (2) a person, directly or indirectly, sold or offered to sell the securities; and (3) the sale was made through the use of interstate facilities or the mails. See SEC v. Cont'l Tobacco Co., 463 F.2d 137, 155 (5th Cir. 1972). A showing of scienter is not required. See SEC v. Universal Major Indus. Corp., 546 F.2d 1044, 1047 (2d Cir. 1976).

The Division argues that it has presented a prima facie case against Pierce for the sales from his personal account of Lexington stock that he acquired from the First S-8. Pierce argues, however, that he did not violate Section 5 of the Securities Act because the shares were registered on Form S-8, and he provided legitimate services to receive those shares.

The Division has shown that Pierce committed a prima facie violation of Section 5 of the Securities Act. Section 5 of the Securities Act is transaction specific, and, thus, the prima facie inquiry focus is on Pierce's transactions, not Lexington's filing of a Form S-8. SEC v. Cavanagh, 155 F.3d 129, 133 (2nd Cir. 1998); see Allison v. Ticor Title Ins. Co., 907 F.2d 645, 648 (7th Cir. 1990). Pierce admits he relied on Lexington's filing of a Form S-8, though that registration statement did not contain a reoffer prospectus to cover Pierce's subsequent trades. Pierce's reliance on the Form S-8 filed by Lexington is misplaced; his subsequent transactions must be registered, or he must present a valid exemption. The instructions accompanying Form S-8 say as much. See General Instructions C.1 and C.2 to Form S-8. The Division has shown Pierce sold the stock while it was held in street name at Brown Brothers Harriman and Co. in New York, through the Hypo Bank omnibus account at vFinance, satisfying the second and third prongs of the prima facie case.

Thus, the burden shifts to Pierce to prove the availability of any exemptions. See Ralston Purina, 346 U.S. at 126. Exemptions from registration are affirmative defenses that must be proved by the person claiming the exemptions. See Swenson v. Engelstad, 626 F.2d 421, 425

(5th Cir. 1980) (collecting cases); Lively v. Hirschfeld, 440 F.2d 631, 632 (10th Cir. 1971) (collecting cases). Claims of exemption from the registration provisions of the Securities Act are construed narrowly against the claimant. See SEC v. Murphy, 626 F.2d 633, 641 (9th Cir. 1980) (citing SEC v. Blazon Corp., 609 F.2d 960, 968 (9th Cir. 1979)); Quinn & Co. v. SEC, 452 F.2d 943, 946 (10th Cir. 1971) (citing United States v. Custer Channel Wing Corp., 376 F.2d 675, 678 (4th Cir. 1967)). "Evidence in support of an exemption must be explicit, exact, and not built on mere conclusory statements." Robert G. Weeks, 56 S.E.C. 1297, 1322 (2003) (citing V.F. Minton Securities, Inc., 51 S.E.C. 346, 352 (1993)).

Pierce claims that his sales of Lexington stock were exempt under Section 4(1) of the Securities Act. Section 4(1) exempts from the registration requirements "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1). The intent of Section 4(1) is "to exempt routine trading transactions between members of the investing public and not distributions by issuers or the acts of others who engage in steps necessary to those distributions." Owen V. Kane, 48 S.E.C. 617, 619 (1986), aff'd, 842 F.2d 194 (8th Cir. 1988). Pierce argues that the burden is not on him to prove the Section 4(1) exemption because the Lexington shares he sold were registered on Form S-8, and therefore not "restricted securities," but he cites no authority supporting his position. Indeed, the courts have held the contrary position. See, e.g., SEC v. Parnes, No. 01 CIV 0763 LLS THK, 2001 WL1658275, at *6 (S.D.N.Y. Dec. 26, 2001) ("[A] plaintiff need not plead the inapplicability of an exemption, as the party claiming exemption from registration requirements bears the burden of proving that the exemption applies."); SEC v. Tuchinsky, No. 89-6488-CIV 1-1 RYSKAMP, 1992 WL 226302, at *4 (S.D. Fla. June 29, 1992) (asserting that a defendant who sold stock that he collected as collateral for a loan bore the burden of proving he had an exemption from registration at trial). Thus, it is incumbent on Pierce to prove his claimed exemption.

Pierce has failed to prove his claimed exemption. Indeed, the Division has adduced a significant amount of evidence that disaffirms Pierce's position. The Division convincingly argues that Pierce was an affiliate and cannot avail himself of the Section 4(1) exemption. Section 2(a)(11) defines "issuer" to include "any person directly or indirectly controlling or controlled by the issuer . . . ." Id. "A control person, such as an officer, director, or controlling shareholder, is an affiliate of an issuer, and is treated as an issuer when there is a distribution of securities." Cavanagh, 155 F.3d at 134. An "affiliate of an issuer" is "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." 17 C.F.R. § 230.144(a)(1) (2008).

"Control" is defined as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405. "The affiliate inquiry is based on the totality of the circumstances, 'including an appraisal of the influence upon management and policies of a corporation by the person involved.' Affiliates are most often officers, directors, or majority shareholders—people who exercise control and influence over the company's policies or finances." SEC v. Freiberg, No. 2:05-CV-00233PGC, 2007 WL 2692041, *15 (D. Utah Sept. 12, 2007). Courts have looked to whether or not the person in question was capable of obtaining the required signatures of the issuer and its officers and directors on a

registration statement. See SEC v. Lybrand, 200 F. Supp. 2d 384, 395 (S.D.N.Y. 2002) (quoting Cavanagh, 1 F. Supp. 2d 337, 366 (S.D.N.Y. 1998)).

As noted above, Atkins and Pierce were associates for many years. Atkins admitted that Pierce loaned him substantial sums of money and controlled his consulting assignments. Pierce, through Newport, provided Atkins with additional funds in 2003-04. Atkins' assertion that he could manage Lexington independently despite his relationship with Newport/Pierce is not consistent with this evidence. In fact, standing alone, Pierce's relationship with Atkins is sufficient to demonstrate his status as a control person.

Additionally, Pierce was a significant owner of Intergold stock, and after the acquisition, Lexington stock. He took measures to disguise his ownership of Lexington after he exercised his option shares. He and Atkins attempted to structure Pierce's first stock option exercise so that he would not cross the ten percent ownership threshold. He transferred the stock to Newport, in which Pierce testified he had no ownership interest, but the account documents he submitted to Hypo Bank demonstrate he was the beneficial owner. Pierce caused Newport to purchase Lexington stock in a private placement.

Other evidence points to Pierce's control of Lexington. Pierce controlled ICI and IMT, which provided consultants to Lexington, so Pierce determined who worked at Lexington. Elliot-Square, when he consulted for Lexington, reported to Pierce, not Atkins. Lexington operated out of the same office as IMT. Stevens knew that when he needed to get paid by Lexington, he should go to Pierce. Certainly, Pierce had the requisite power over Lexington to secure the signatures of its officers and directors on a registration statement.

The totality of the circumstances—Pierce's sway over Lexington's CEO, Atkins, his substantial ownership of Lexington stock, his control over the consultants assigned to work for Lexington—all point to Pierce's control of Lexington. His control of Lexington demonstrates that he was an affiliate, and thus cannot claim the Section 4(1) exemption. Thus, it is concluded that Pierce sold his Lexington stock without a valid registration statement or exemption from registration, violating Section 5 of the Securities Act.

B. Pierce's Violations of Sections 13(d) and 16(a) of the Exchange Act

The OIP alleges that Pierce violated Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder, by failing to make timely required filings disclosing his beneficial ownership of Lexington stock.

Section 13(d)(1) of the Exchange Act requires any person who acquires a direct or indirect beneficial ownership of five percent or more of an equity security registered under the Securities Act to file statements with the Commission within ten days of acquiring that interest. 15 U.S.C. § 78m(d)(1). Exchange Act Rule 13d-1 requires a person reporting his ownership to file a Form 13D with the Commission, and Exchange Act Rule 13d-2 requires reporting persons to update their Forms 13D if their holdings increase or decrease by one percent. 17 C.F.R. §§ 240.13d-1, .13d-2, .13d-101. Exchange Act Rule 13d-3 defines beneficial ownership to include

any person who has the right to acquire ownership within sixty days via exercise of an option contract. 17 C.F.R. § 240.13d-3(d)(1)(A).

Section 16(a) of the Exchange Act places similar filing requirements on any person who acquires a direct or indirect beneficial interest in more than ten percent of any class of any equity security registered under the Securities Act. 15 U.S.C. § 78p(a). Exchange Act Rule 16a-3 requires beneficial owners to file an initial report of ownership on a Form 3, report changes in beneficial ownership by filing a Form 4, and annually file a Form 5. 17 C.F.R. § 240.16a-3(a). A finding of scienter is not required to demonstrate a violation of either section. See SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1167 (D.C. Cir. 1978) (holding scienter not required for violation of Section 13(d)(1) of the Exchange Act); SEC v. Blackwell, 291 F. Supp. 2d 673, 694-95 (S.D. Ohio 2003) (holding scienter not required for violation of Section 16(a) of the Exchange Act).

The Division argues that Pierce violated Section 13(d) of the Exchange Act during much of the time he owned Lexington stock, and he admits as much. He failed to file a Form 13D when he became a five percent beneficial owner in November 2003, and he did not make any filings to update his status as he sold his Lexington stock. He was also a five percent beneficial owner of Intergold, prior to the merger, through his control of Intergold shares owned by ICI and Newport. He first filed a Form 13D in July 2006.

The Division also argues that Pierce violated Section 16(a) of the Exchange Act between November 2003 and May 2004, by failing to file Forms 3, 4, or 5 disclosing his ten percent ownership interest in Lexington. Pierce counters that the Division's inclusion of the 950,000 option shares allocated to IMT in its calculation of his beneficial ownership is improper. However, Pierce's argument regarding the IMT options is irrelevant, as he passed the threshold for reporting under Section 16(a) of the Exchange Act through his holding Lexington stock in Newport's name. His acquisition of Lexington stock from his options exercise on November 23 and 24, 2003, took him over the ten percent reporting threshold. Because he is the beneficial owner of Newport, the attempt to evade reporting his beneficial ownership of Lexington by transferring Lexington stock to Newport was ineffectual. Pierce was required by Exchange Act Rule 16a-3 to file an initial report of ownership on a Form 3. He held more than ten percent of Lexington's outstanding stock on December 31, 2003, triggering a requirement to file a Form 5 under Exchange Act Rule 16a-3. Newport's acquisition of Elliot-Square's Lexington stock on January 26, 2004, represented an acquisition of more than one percent of Lexington outstanding stock, triggering the requirement to file a Form 4 under Exchange Act Rule 16a-3. Thus, on at least three occasions, Pierce violated Exchange Act Section 16(a) and Rule 16a-3 thereunder.

IV. SANCTIONS

The Division requests a cease-and-desist order and disgorgement of $9,601,347. As discussed below, Pierce will be ordered to cease and desist from violations of Sections 5(a) and 5(c) of the Securities Act and of Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder, and to disgorge ill-gotten gains of $2,043,362.33.

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See 15 U.S.C. § 78ao(b)(6) of the Exchange Act. The Commission considers factors including:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. See Schield Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006).

B. Sanctions

1. Cease and Desist

Sections 8A of the Advisers Act and 21C of the Exchange Act authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of the Acts or rules thereunder. KPMG Peat Marwick LLP, 54 S.E.C. 1135 (2001), reh'g denied, 55 S.E.C. 1 (2001), pet. denied, 289 F.3d 109 (2002), reh'g en banc denied, 289 F.3d 109 (D.C. Cir. 2002).

Pierce's conduct was egregious and recurrent. He sold 325,000 shares of Lexington stock acquired from the IMT Option Plan over a period of four months without filing a registration statement to cover the transactions. As a control person making unregistered sales, he deprived the investing public of valuable information. He took measures to evade the beneficial ownership reporting requirements under Section 16(a) of the Exchange Act, and ignored the reporting requirements of Section 13(d) of the Exchange Act for more than two years. Pierce's failure to make disclosures regarding his beneficial ownership also deprived the investing public of valuable information. Pierce's failure to give assurances against future violations or to recognize the wrongful nature of his conduct is underscored by his failure to appear in person and give testimony on these or any other topics. Although a finding of scienter is not required to find any of the violations of Section 16(a) of the Exchange Act, the record is replete with evidence that Pierce acted with a high degree of scienter in attempting to conceal his ownership of Lexington stock.

Pierce's occupation will present opportunities for future violations. His violations are recent, and, in many ways, mirror the behavior for which the BCSC sanctioned him. The degree of harm to investors and the market place is quantified in his ill-gotten gains of at least $2,043,362.33. Further, as the Commission has often emphasized, the public interest

determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975).

2. Disgorgement

Sections 8A of the Securities Act and 21C of the Exchange Act authorize the Commission to order Pierce to disgorge ill-gotten gains. Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989); see also Hateley v. SEC, 8 F.3d 653, 655-56 (9th Cir. 1993). It returns the violator to where he would have been absent the violative activity. The amount of the disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation. See Laurie Jones Canady, 69 SEC Docket 1468, 1487 n.35 (April 5, 1999) (quoting SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996)); see also SEC v. First Pac. Bancorp, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998) (holding disgorgement amount only needs to be a reasonable approximation of ill-gotten gains); accord First City Fin. Corp., 890 F.2d at 1230-31.

The Division requests disgorgement of $9,601,347. The actual profits Pierce obtained from his wrongdoing charged in the OIP amount to $2,043,362.33. Pierce will be ordered to disgorge that amount, with prejudgment interest. This is roughly consistent with the sum that the Division represented, before the hearing, that it was seeking as ill-gotten gains from the sale of unregistered stock alleged in the OIP. At the September 29, 2008, prehearing conference, the undersigned advised that the disgorgement figure must be fixed so that Pierce could evaluate whether he wanted to present evidence concerning his ability to pay at the hearing, as required by the Commission's rules;[15] the Division stated that it was seeking $2.7 million in disgorgement. Prehearing Tr. 8-9 (Sept. 29, 2008). The Division refined this figure in its December 5, 2008, Motion for Summary Disposition to $2,077,969 plus prejudgment interest.

Subsequently, based on newly discovered evidence that the Division received after the hearing, the Division argued that over seven million dollars in additional ill-gotten gains should be disgorged, representing profits from the sale of unregistered stock by Jenirob and Newport. However, as the undersigned ruled previously, these entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP.[16] The Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing beyond the framework of the original OIP. See 17 C.F.R. §201.200(d); J. Stephen Stout, 52 S.E.C. 1162, 1163 n.2 (1996).

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on May 21, 2009.

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[15] See 17 C.F.R. §201.630; Terry T. Steen, 53 S.E.C. 618, 626-28 (1998).

[16] Lexington Res., Inc., Admin. Proc. No. 3-13109 (A.L.J. Apr. 7, 2009) (unpublished).

VI. ORDER

IT IS ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce CEASE AND DESIST from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 and of Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 and Rules 13d-1, 13d-2, and 16a-3 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce DISGORGE $2,043,362.33 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600. Pursuant to Rule 600(a), prejudgment interest is due from July 1, 2004, through the last day of the month preceding the month in which payment is made.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge

beyond the framework of the original OIP. See 17 C.F.R. §201.200(d); J. Stephen Stout, 52 S.E.C. 1162, 1163 n.2 (1996).

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on May 21, 2009.

VI. ORDER

IT IS ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce CEASE AND DESIST from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 and of Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 and Rules 13d-1, 13d-2, and 16a-3 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce DISGORGE $2,043,362.33 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600. Pursuant to Rule 600(a), prejudgment interest is due from July 1, 2004, through the last day of the month preceding the month in which payment is made.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9050 / July 8, 2009

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 60263 / July 8, 2009

Admin. Proc. File No. 3-13109

In the Matter of

GORDON BRENT PIERCE

NOTICE THAT INITIAL DECISION HAS BECOME FINAL

The time for filing a petition for review of the initial decision in this proceeding has expired. No such petition has been filed by Gordon Brent Pierce, and the Commission has not chosen to review the decision as to him on its own initiative.

Accordingly, notice is hereby given, pursuant to Rule 360(d) of the Commission's Rules of Practice, 1/ that the initial decision of the administrative law judge 2/ has become the final decision of the Commission with respect to Gordon Brent Pierce. The orders contained in that decision are hereby declared effective. The initial decision ordered that, pursuant to Section 8(a) of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce cease and desist from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 and Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 and Rules 13d-1, 13d-2, and 16a-3 thereunder. The initial decision further ordered that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce disgorge $2,043,362.33 plus

1/ 17 C.F.R. § 201.360(d).

2/ Gordon Brent Pierce, Initial Decision Rel. No. 379 (June 5, 2009), ___ SEC Docket ___.

prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600.

For the Commission by the Office of the General Counsel, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

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ORIGINAL

FILED
2010 JUN -8
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JSW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CV 10 80129MISC

SECURITIES AND EXCHANGE COMMISSION, Applicant, vs. GORDON BRENT PIERCE, Respondent.	Misc. No. **SECURITIES AND EXCHANGE COMMISSION'S APPLICATION FOR AN ORDER ENFORCING ADMINISTRATIVE DISGORGEMENT ORDER AGAINST RESPONDENT GORDON BRENT PIERCE** **(Administrative Enforcement Action)**

APPLICATION FOR AN ORDER ENFORCING

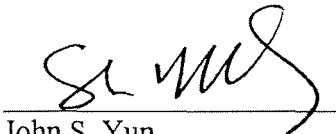
ADMINISTRATIVE DISGORGEMENT ORDER

Pursuant to Section 20(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77t(c), and Section 21(e) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78u(e), the Securities and Exchange Commission ("Commission") hereby applies for an order compelling payment by Gordon Brent Pierce of the $2,043,362 in disgorgement and $867,495 in prejudgment and post-judgment interest that the Commission has ordered Pierce to pay. On July 8, 2009, the Commission ordered Pierce to pay disgorgement and interest based on the finding, after an evidentiary hearing, that Pierce violated Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and (c), by making unregistered offers and sales of securities and that Pierce violated Sections 13(d) and 16(a) of the Exchange Act, 15 U.S.C. §§ 78m(d) and 78p(a), by not disclosing his beneficial ownership and transactions in securities. The Commission ordered Pierce to pay $2,043,362 in disgorgement, plus prejudgment interest, by no later than July 9, 2009, but Pierce has not done so. This motion is being made on the grounds that the Commission may apply to any federal district court for the enforcement of the Commission's order against Pierce. 15 U.S.C. §§ 77t(c) and 78u(e).

This Application is supported by the attached Memorandum of Points and Authorities, the attached Declaration of Steven D. Buchholz, the [Proposed] Order and such evidence and oral argument as the Court chooses to entertain.

Dated: June 8, 2010

Respectfully submitted,



John S. Yun
Steven D. Buchholz
Attorneys for Applicant
SECURITIES AND EXCHANGE COMMISSION

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

During February 2009, Administrative Law Judge Carol Fox Foelak conducted a three-day evidentiary hearing based upon the institution of an administrative proceeding by the Securities and Exchange Commission ("Commission") against respondent Gordon Brent Pierce ("Pierce") at the request of the Commission's Division of Enforcement. As alleged and ultimately determined after the full evidentiary hearing, Pierce violated Section 5 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77e, by making unregistered offers and sales of the common stock of Lexington Resources, Inc. ("Lexington") and violated Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78m(d) and 78p(a), by failing to report his beneficial ownership interests and transactions in Lexington's common stock. In her June 5, 2009 Initial Decision, Administrative Law Judge Foelak ordered Pierce to disgorge his ill-gotten gains in the amount of $2,043,362, plus prejudgment and post-judgment interest calculated through the last day of the month preceding the month in which payment is made. Supporting Declaration of Steven D. Buchholz ("Buchholz Declaration"), Exhibit A. Pierce did not appeal the Initial Decision to the Commission within twenty-one days, and the Commission therefore made the Initial Decision final on July 8, 2009. Buchholz Declaration, Exhibit B. Under the Commission's Rules of Practice, Pierce was required to pay disgorgement and prejudgment interest to the Commission no later than July 9, 2009, the first day after the Initial Decision became final. 17 C.F.R. § 201.601.

Pierce has failed to make any payment, and is therefore in violation of the Commission's order. The Court should therefore order Pierce to comply with the Commission's disgorgement order by paying the full amount of $2,043,362 in disgorgement, along with $867,495 in prejudgment and post-judgment interest accrued through May 31, 2010. 15 U.S.C. § 77t(c) (authorizing Commission's application to any district court to obtain writs of mandamus compelling compliance with "any order of the Commission made in pursuance of" the Securities Act); 15 U.S.C. § 78u(e) (similar provision regarding the Exchange Act).

II. FACTUAL BACKGROUND

On July 31, 2008, the Commission provided notice to Pierce that an evidentiary hearing would be held to determine whether Pierce committed securities law violations as alleged in the Order Instituting Cease-and-Desist Proceedings ("OIP") in a proceeding entitled *In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce*, Admin Proc. File No. 3-13109 (the "Administrative Proceeding"). Buchholz Declaration, Exhibit C.

According to the OIP, between approximately November 2003 and March 2006, Lexington issued shares of common stock to Pierce and his associates purportedly pursuant to registration statements which, however, could only be used in certain circumstances that did not legally apply. During the course of Lexington's stock issuances, Pierce and his associates illegally received more than 5 million shares of Lexington common stock. Pierce then resold his shares without the necessary registration for his sales and pocketed millions of dollars. Pierce dumped his Lexington shares on an unwary public while he and his associates conducted a massive promotional campaign to pump up the price of Lexington's stock. OIP, ¶¶ 7, 10, 16.

The OIP also alleged that Pierce violated Sections 5(a) and 5(c) of the Securities Act by offering and selling Lexington shares without the necessary registration for those offers and sales. The Division of Enforcement further alleged that Pierce violated Sections 13(d) and 16(a) of the Exchange Act by failing to file the required forms with the Commission to disclose his beneficial ownership of – and transactions in – Lexington shares as required by Exchange Act Rules 13d-1, 13d-2 and 16a-3. OIP, ¶¶ 20-21.

In her Initial Decision, Administrative Law Judge Carol Fox Foelak determined that the Division of Enforcement had proven Pierce's violation of Sections 5(a) and 5(c) of the Securities Act by offering and selling Lexington shares in interstate commerce without registering his offers and sales, and rejected Pierce's defense. Initial Decision at 15-16. Administrative Law Judge Foelak also determined that Pierce violated the requirement under Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d), that he report his ownership interest by filing the appropriate disclosure, and that Pierce violated the requirement under Section 16(a) of the Exchange Act, 15 U.S.C. § 78p(a), that he report his transactions in Lexington stock. *Id.* at 17-18.

In determining what remedies to impose upon Pierce in light of his securities law violations, the Administrative Law Judge found:

> Pierce's conduct was egregious and recurrent. . . . As a control person making unregistered [Lexington stock] sales, he deprived the investing public of valuable information. . . . Pierce's failure to make disclosures regarding his beneficial ownership also deprived the investing public of valuable information. Pierce's failure to give assurances against future violations or to recognize the wrongful nature of his conduct is underscored by his failure to appear in person and give testimony on these or any other topics. Although a finding of scienter is not required to find any of the violations of Section 16(a) of the Exchange Act, the record is replete with evidence that Pierce acted with a high degree of scienter in attempting to conceal his ownership of Lexington stock.

Id. at 19.[1]

The Initial Decision also describes in detail the factual basis for the further finding that Pierce was unjustly enriched as a result of his securities law violations. Based on the evidence as presented at the hearing, the amount by which he was enriched was calculated as $2,043,362. Pierce was therefore ordered to pay that amount in disgorgement, plus interest. *Id.* at 20. According to the Initial Decision, interest should be calculated based on Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600, and is due from July 1, 2004 through the last day of the month preceding the month in which payment is made. *Id.* at 21. Through May 31, 2010, interest of $867,495 was due. *See* 17 C.F.R. § 201.600(b) (providing that interest on disgorgement is computed at the IRS underpayment rate established by 26 U.S.C. § 6621(a)(2) and compounded quarterly); *see also* Buchholz Declaration, Exhibit D (chart calculating amount of interest owed as of May 31, 2010).

As described in the Initial Decision, the recommended sanctions were to take effect unless a party filed an appeal from the Initial Decision within twenty-one days. Initial Decision at 21. No party filed an appeal of the Initial Decision, and the Commission therefore issued notice that the Initial Decision became final on July 8, 2009. Notice That Initial Decision Has Become Final, *In the Matter of Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (July 8, 2009) (Buchholz

[1] The Initial Decision ordered Pierce to cease and desist from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act and of Sections 13(d) and 16(a) of the Exchange Act and of Exchange Act Rules 13d-1, 13d-2 and 16a-3. *Id.* at 19-21.

Declaration, Exhibit B). Under the Commission's Rules of Practice, Pierce was required to pay the disgorgement and prejudgment interest to the Commission by July 9, 2009, the first day after the Initial Decision became final. 17 C.F.R. § 201.601(a). Pierce has, however, failed to pay any amount of the disgorgement and interest that was ordered by the Commission. Buchholz Declaration, ¶ 5.

III. LEGAL ARGUMENT

A. Congress Has Authorized This Action To Enforce The Payment Order.

Congress has authorized the Commission to seek judicial assistance in enforcing its orders under the federal securities laws. In particular, Section 20(c) of the Securities Act, 15 U.S.C. § 77t(c), provides in pertinent part:

> Upon application of the Commission, the district courts of the United States and the United States courts of any Territory shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any order of the Commission made in pursuance thereof.

Similarly, Section 21(e) of the Exchange Act, 15 U.S.C. § 78u(e), authorizes any federal district court to issue a writ of mandamus or order compelling any person to comply with an order by the Commission issued under the provisions of the Exchange Act.

B. An Order Compelling Pierce's Compliance Is Appropriate.

After notice and a full evidentiary hearing, Pierce was ordered to pay $2,043,362 in disgorgement, based on the "actual profits Pierce obtained from his wrongdoing charged in the OIP." Initial Decision at 20. The wrongdoing alleged and established against Pierce included his unregistered offer and sale of Lexington securities in violation of Sections 5(a) and 5(c) of the Securities Act. As a result, Section 20(c) of the Securities Act authorizes the Court to enforce the disgorgement award by issuing a writ commanding Pierce's compliance. 15 U.S.C. § 77t(c). Because Pierce also was found to have violated Sections 13(d) and 16(a) of the Exchange Act by deliberately failing to disclose his holdings and transactions, Section 21(e) of the Exchange Act

provides further basis for enforcing the disgorgement award by issuing an order directing Pierce's compliance. 15 U.S.C. § 78u(e).[1]

Enforcing a disgorgement order – such as the Commission's order against Pierce – is an important component of the statutory scheme for protecting investors from securities law violations. Because Pierce was found to have violated the federal securities laws, the Commission had the power to order his disgorgement of his ill-gotten gains. *See, e.g., SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985).

The "purpose of disgorgement is to force 'a defendant to give up the amount by which he was unjustly enriched.'" *Id.* (quoting *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978)). Disgorgement may encompass all benefits derived by a violator. *See SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1192 (9th Cir. 1998); *C.F.T.C. v. British American Commodity Options Corporation*, 788 F.2d 92, 93-94 (2d Cir. 1986).

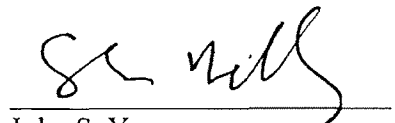
As proven in the Administrative Proceeding, Pierce derived over $2 million in personal profits by making unregistered sales of securities and failing to make the required disclosures to investors. This Court's enforcement of the Commission's disgorgement order will help protect investors by depriving Pierce, a securities law violator, of his profits from such illegal activities.

IV. CONCLUSION

This Court should enforce the Commission's payment order by compelling Pierce to pay to the Commission $2,043,362 in disgorgement, $867,495 in interest, and all additional interest that may accrue before payment is made.

Dated: June 8, 2010

Respectfully submitted,



John S. Yun
Steven D. Buchholz
Attorneys for Applicant
SECURITIES AND EXCHANGE COMMISSION

[1] Venue is proper in any district of the United States under 28 U.S.C. § 1391 because Pierce is a Canadian citizen who resides in Vancouver, British Columbia. *See* Initial Decision at 5.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9125 / June 8, 2010

ADMINISTRATIVE PROCEEDING
File No. 3-13927

In the Matter of **Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") against Gordon Brent Pierce ("Pierce"), Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement ("Division") alleges that:

Nature of the Proceeding

1. This matter involves an unregistered distribution of stock by Gordon Brent Pierce, a Canadian stock promoter. Pierce reaped $7.7 million in unlawful profits by selling stock in Lexington Resources, Inc. ("Lexington"), a now defunct oil and gas company, through two offshore companies that he controlled, Newport Capital Corp. and Jenirob Company Ltd. Pierce, Newport and Jenirob did not register their sales or qualify for an exemption from registration.

2. Beginning in late 2003, Pierce controlled Lexington by holding the majority of its stock and by providing Lexington a consultant CEO who was employed by Pierce. In 2003 and 2004, Pierce directed the CEO to issue 3.2 million Lexington shares without restrictive legends to Pierce and one of Pierce's associates. Pierce then distributed these shares during 2004 while he conducted a massive spam and newsletter campaign touting Lexington stock. As Lexington's stock

price skyrocketed to $7.50 per share, Pierce sold 1.6 million of the 3.2 million shares to the public through accounts of Newport and Jenirob at an offshore bank for profits of $7.7 million. This was in addition to $2 million in profits Pierce made through sales of Lexington stock in his personal account, sales found to be in violation of the federal securities laws in a previous action filed by the Division. See In the Matter of Gordon Brent Pierce, Admin. Proc. File No. 3-13109 (Initial Decision dated June 5, 2009; Notice that Initial Decision Has Become Final dated July 8, 2009).

Respondents

3. Pierce has provided stock promotion and capital raising services to Lexington and other issuers in the U.S. and Europe through various consulting companies that he controls. Pierce, 52, is a Canadian citizen residing in Vancouver, British Columbia and the Cayman Islands.

4. Newport is a privately-held corporation organized in March 2000 under the laws of Belize. Newport has a registered agent in Belize and maintains offices in Zürich, Switzerland and London, England. Pierce has been President and a director of Newport since 2000.

5. Jenirob is a privately-held corporation organized in January 2004 under the laws of the British Virgin Islands. Jenirob has a registered agent in the British Virgin Islands and uses the mailing address of a law firm in Liechtenstein.

Facts

Pierce Controlled Lexington

6. Lexington is a Nevada corporation that was a public shell company known as Intergold Corp. until November 2003, when it entered into a reverse merger with a private company known as Lexington Oil and Gas LLC and changed its name to Lexington Resources. Lexington's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act from 2003 until June 4, 2009, when its registration was revoked. From 2003 to 2007, Lexington stock was quoted on the over-the-counter bulletin board under the symbol "LXRS." In 2008, Lexington's only operating subsidiaries entered Chapter 7 bankruptcy.

7. From 2002 to 2007, Pierce provided Intergold and then Lexington with operating funds, stock promotion services and capital-raising services through at least three different consulting companies that Pierce controlled, including Newport. Pierce used these companies to conceal his role and avoid being identified by name in Commission filings.

8. From 2002 to 2004, an individual who worked for Pierce served as CEO and Chairman of Intergold and then Lexington through a consulting arrangement with one of the companies that Pierce controlled. The individual was paid by Pierce's consulting company, not by Intergold or Lexington. The individual also worked for Pierce through Newport and received more than $250,000 from Newport in 2004.

9. Intergold and Lexington did not have their own offices, but used the offices of Pierce's consulting companies in northern Washington State, near Vancouver, Canada. Pierce's employees answered telephones, responded to shareholder inquiries, and performed all other administrative functions for Intergold and Lexington.

10. By October 2003, shortly before the reverse merger, Intergold owed one of Pierce's consulting companies nearly $1.2 million. On November 18, 2003, to satisfy part of this debt, the CEO and Chairman of Intergold agreed to issue to Pierce, through one of his consulting companies, vested options to acquire 950,000 shares of the public company. At the time, these shares constituted 64% of Intergold's outstanding shares (on a post-exercise basis).

11. Three days later, as part of the reverse merger, the CEO and Chairman agreed to issue 2.25 million additional shares with restrictive legends to another offshore company that Pierce formed and controlled. As a result, Pierce controlled more than 70% of Lexington's outstanding stock after the reverse merger.

12. Shortly after the reverse merger, Lexington purchased an interest in an oil and gas property owned by Pierce, and then Lexington hired another company controlled by Pierce to drill a well on that property. Lexington later purchased interests in a handful of other oil and gas properties and drilled a few additional wells that produced small amounts of natural gas, but Lexington never generated any meaningful revenue.

Lexington Issued Millions of Shares to Pierce and His Associates

13. Within days of the reverse merger, Lexington began issuing stock to Pierce and his associates pursuant to the stock options granted to Pierce's consulting company. Pierce told Lexington's CEO and Chairman who should receive the shares and how many.

14. Between November 2003 and January 2004, Lexington issued 500,000 shares to Pierce and 300,000 shares to one of Pierce's associates. These became 1.5 million shares and 900,000 shares, respectively, upon Lexington's three-for-one stock split on January 29, 2004.

15. In February 2004, Pierce told Lexington's CEO and Chairman to grant his company additional stock options. Lexington then issued an additional 320,000 shares to Pierce and 495,000 shares to Pierce's associate in May and June 2004. In total, Pierce and his associate received 3.2 million shares (on a post-split basis) between November 2003 and June 2004, all without restrictive legends.

16. Lexington improperly attempted to register these issuances by filing registration statements on Form S-8, an abbreviated form of registration statement that may not be used for the issuance of shares to consultants who provide stock promotion or capital-raising services, like Pierce and his associate. Lexington's invalid S-8 registration statements only purported to cover issuances by Lexington, not any subsequent resales by Pierce and his associate.

Pierce Conducted a Promotional Campaign Touting Lexington Stock

17. In late February 2004, Pierce and his associate began actively promoting Lexington by sending millions of spam emails and newsletters through a publishing company that Pierce controlled. At the same time, Lexington issued a flurry of optimistic press releases about its current and potential operations.

18. During the promotional campaign, Pierce personally met with potential Lexington investors and distributed folders with promotional materials and press releases. Pierce's associate worked for Pierce's publishing company and was responsible for communicating with potential Lexington investors in Europe through Pierce's consulting company.

19. From February to June 2004, Lexington's stock price increased from $3.00 to $7.50, and Lexington's average trading volume increased from 1,000 to about 100,000 shares per day, reaching a peak of more than 1 million shares per day in late June 2004.

Pierce Distributed Lexington Stock Through Newport and Jenirob

20. The stock option agreements between Lexington and Pierce's consulting company and the option exercise agreements signed by Pierce and his associate provided that all shares were to be acquired for investment purposes only and with no view to resale or other distribution. No registration statements were filed relating to any resales of Lexington stock by Pierce, Newport or Jenirob.

21. Of the 3.2 million shares Lexington issued to Pierce and his associate between November 2003 and June 2004, Pierce sold 300,000 through his personal account at a bank in Liechtenstein and distributed 2.8 million through Newport and Jenirob.

22. Within days of Lexington's issuance of these 2.8 million shares, Pierce instructed Lexington's CEO and Chairman to transfer them all to Newport or Jenirob. Pierce then further transferred 1.2 million of the 2.8 million shares to ten individuals and entities in Canada and the U.S., and Pierce transferred the remaining 1.6 million shares to the bank in Liechtenstein.

23. Pierce produced to the Division copies of statements from his personal account at the bank in Liechtenstein showing that he sold 300,000 Lexington shares in June 2004 for net proceeds of $2 million. Pierce refused to produce any documents relating to sales of Lexington stock that he made through accounts at the Liechtenstein bank other than his personal account.

24. During 2004, the Liechtenstein bank sold 2.5 million Lexington shares in the open market through an omnibus brokerage account in the U.S. held in the Liechtenstein bank's name for proceeds of more than $13 million, including $8 million in June 2004 alone.

25. In March 2009, the Division received additional documents relating to the Liechtenstein bank's sales of Lexington stock. These documents showed that, in addition to Pierce's sales through his personal account, Pierce deposited 1.6 million Lexington shares in accounts at the Liechtenstein bank in the names of Newport and Jenirob. Pierce was the beneficial owner of the Newport and Jenirob accounts. Pierce sold the 1.6 million shares

through the Newport and Jenirob accounts between February and December 2004 for net proceeds of $7.7 million.

26. In addition to his refusal to produce records pertaining to Newport and Jenirob, Pierce filed appeals in Liechtenstein that further delayed the Division's efforts to obtain documents related to Pierce's Lexington stock sales through the Newport and Jenirob accounts.

Pierce Was Previously Found Liable For Unregistered Lexington Stock Sales In His Personal Account

27. On July 31, 2008, the Commission instituted cease-and-desist proceedings against Pierce, Lexington and Lexington's CEO/Chairman to determine whether all three respondents violated Sections 5(a) and 5(c) of the Securities Act and whether Pierce also violated the Securities Exchange Act of 1934 (the "Exchange Act") by failing to accurately report his Lexington stock ownership and transactions. Admin. Proc. File No. 3-13109. In that action, the Division sought disgorgement from Pierce of the $2 million in net proceeds from his sale of the 300,000 Lexington shares in his personal account at the Liechtenstein bank in June 2004.

28. An evidentiary hearing in the prior action was held regarding Pierce February 2-4, 2009.

29. Before issuance of the Initial Decision in the prior action, the Division moved to admit the new evidence first received in March 2009 showing that Pierce sold an additional 1.6 million Lexington shares through the Newport and Jenirob accounts, and also sought the additional $7.7 million in disgorgement. The new evidence was admitted in the prior action, but the Administrative Law Judge ruled that disgorgement of the $7.7 million in proceeds from Pierce's sales in the Newport and Jenirob accounts was outside the scope of the Order Instituting Proceedings ("OIP") in the prior action because Newport and Jenirob were not named in the OIP.

30. The Initial Decision in the prior action, issued June 5, 2009, found that Pierce committed the alleged violations of the Securities Act and Exchange Act and ordered Pierce to disgorge $2,043,362.33 in proceeds from his sale of the 300,000 Lexington shares in his personal account. Neither party appealed the Initial Decision and it became the final decision of the Commission on July 8, 2009.

Violations

31. As a result of the conduct described above, Respondents Pierce, Newport and Jenirob violated Sections 5(a) and 5(c) of the Securities Act, which, among other things, unless a registration statement is on file or in effect as to a security, prohibit any person, directly or indirectly, from: (i) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; (ii) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or (iii) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. Whether, pursuant to Section 8A of the Securities Act, all Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a) and 5(c) of the Securities Act; and

C. Whether Respondents should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answer, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within

the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GORDON BRENT PIERCE,

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant.

Case No.

PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER, ORDER TO SHOW CAUSE, AND STAY

Date: None set
Courtroom: B
Judge: Chief Magistrate Judge Maria-Elena James

TO: DEFENDANT AND ITS ATTORNEYS

Please take notice that, at a time to be set by the Court, Plaintiff Gordon Brent Pierce ("Pierce"), in the courtroom of Hon. _____, United States Court House, 450 Golden Gate Avenue, San Francisco, California, will and hereby does apply pursuant to Rule 65 of the Federal Rules of Civil Procedure for (1) a temporary restraining order and order to show cause why a preliminary injunction should not be issued against defendant Securities and Exchange Commission ("SEC"), enjoining it from proceeding in an administrative proceeding entitled *In the Matter of Gordon Brent Pierce, Newport Capital Corp. and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 (the "Second Action"), and (2) a temporary stay of the matter entitled *Securities and Exchange Commission v. Gordon Brent Pierce*, No. CV-10-80-129 MISC in this Court (the "Administrative Enforcement Action") in which the SEC has applied for an order enforcing a prior administrative order in a proceeding entitled *In the Matter of Lexington Resources, Inc., Grant Atkins and Gordon Brent Pierce, Admin.* Proc. File No. 3-13109 (the "First Action").

This application is made on the grounds that (1) Pierce is likely to succeed on the merits in establishing that the Second Action is barred by res judicata, estoppel and the Due Process Clause of the United States Constitution because it seeks to re-litigate a matter previously decided in favor of Pierce and against the SEC in the First Action; (2) immediate and irreparable injury to Pierce may result unless the Second Action is enjoined pending trial in this action, the balance of hardships tips in favor of Pierce, and the public interest supports the issuance of a TRO and order to show cause why a preliminary injunction should not be entered; and (3) a temporary stay of the Administrative Enforcement Action is warranted pending determination of the merits of the issues raised in this action.

This application is based on the accompanying Complaint for Declaratory and Injunctive Relief; Plaintiff's Memorandum in Support of Motion for TRO, Preliminary Injunction and Stay; Declaration of Christopher B. Wells; Declaration of Gordon Brent Pierce; (Proposed) Temporary Restraining Order and Order to Show Cause; Order for Temporary Stay; (Proposed) Order for Preliminary Injunction; and on such argument and evidence as may be presented at the

hearing.

Notice of this application has been given to the SEC by (1) telephonic communication from plaintiff's counsel William F. Alderman to SEC attorney John Yun at 3:35 p.m. on July 9, 2010 and (2) hand delivery of this application and all supporting papers to Mr. Yun that will be made on July 9, 2010 immediately upon the signing of this application.

Plaintiff will promptly present to the Court applications for the admission pro hac vice in this case of his attorneys Christopher B. Wells, David C. Spellman and Ryan P. McBride of Lane Powell PC.

Dated: _July 9, 2010

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GORDON BRENT PIERCE,

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant.

Case No. 10-1036

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR TRO, PRELIMINARY INJUNCTION AND STAY

Date: **None Set**
Courtroom:
Judge:

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STATE CASES

FEDERAL STATUTES AND RULES

I. INTRODUCTION

This motion is made necessary by the commencement of a duplicative administrative proceeding that is barred by fundamental principles of res judicata and due process, inasmuch as it attempts to re-litigate a claim that the agency argued and lost in a prior administrative proceeding from which it did not appeal.

Plaintiff Gordon Brent Pierce ("Pierce") moves for a stay and TRO regarding two proceedings that defendant Securities and Exchange Commission ("Commission" or "SEC") filed on June 8, 2010. Pierce requests a temporary stay of the Commission's application to this Court in Case No. CV-10-80-129 MISC for a summary order (the "Administrative Enforcement Action") enforcing the remedy in the prior administrative action (*In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109), which Pierce refers to as the "First Action." Pierce also requests a TRO and order to show cause why the Order Initiating Proceedings *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 which Pierce refers to as the "Second Action," should not be preliminarily enjoined.

The Administrative Procedure Act's "Relief Pending Review" provision and other powers authorize this Court to issue "all necessary and appropriate process to postpone the effective date of an agency action or to preserve status and rights pending conclusion of the review proceedings." 5 U.S.C. § 705 (Relief Pending Review). A stay suspending the Administrative Enforcement Action and enjoining the Second Action is necessary to permit the judicial review of Pierce's claim that res judicata, equitable estoppel and fundamental principles of due process bar the Commission from relitigating the remedy resulting from the First Action.

The Second Action seeks to relitigate one of the claims the SEC had brought against Pierce in the First Action. On the same day it commenced the Second Action, the Commission filed the Administrative Enforcement Action in this Court to enforce the remedy in the First Action. Having elected to enforce the benefits of the First Action as a final order, the Commission is bound by the burdens of that same final order.

In the First Action, the Commission's Division of Enforcement ("Division") claimed Pierce was liable for approximately $9.6 million in profits as a result of alleged registration violations in the resale of Lexington Resources shares. At the hearing, the Division submitted evidence that roughly $2.1 million derived from Pierce's personal account. After the hearing, the Division moved to admit new evidence of violations and add to the disgorgement claim against Pierce about $7.5 million from the sale of Lexington stock by two "offshore company" "associates" Pierce allegedly controlled – Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob"). Although the ALJ admitted the Division's evidence and relied on it to hold Pierce liable for registration violations, the ALJ's initial decision refused to grant the Division all of the disgorgement relief it sought regarding the sales by Newport and Jenirob.

Before the ALJ rendered the initial decision, the Division never moved the Commission to amend the Order Instituting Proceedings ("OIP") in the First Action. The Division's inaction confirmed its belief that Pierce's liability for the trading profits of Newport and Jenirob as his alleged "associates" was already covered by the OIP.

The Division did not appeal the ALJ's initial decision denying disgorgement of the Newport and Jenirob profits. Nevertheless, the Commission on its own initiative could have modified the initial decision or notified Pierce that disgorgement was still to be adjudicated. The Commission instead entered an order of finality that adopted the ALJ's decision. When it entered that final order, the Commission avoided the risk that by altering the initial decision or requiring further hearings on the Division's $7.5 million disgorgement request, the Commission might induce Pierce to appeal and potentially avoid liability altogether on the registration claims. The Commission availed itself of the ALJ's questionable findings and conclusions on liability but balanced the scales by limiting the disgorgement remedy to $2.1 million.

Eleven months after the final decision and after Pierce's rights of appeal had expired, the Commission commenced the Second Action raising the same $7.5 million claim that had been extinguished in the First Action. The Commission does not get a second bite at the apple. Nor does it get a third or fourth. The Commission's Second Action again references unnamed "associates," a pleading device that threatens still more administrative proceedings based on facts

and claims litigated in the First Action. Pierce brings this action to immediately forestall further unlawful, costly and vexatious litigation in which the Commission had previously persuaded Pierce it had no further remedial interest.

II. STATEMENT OF ISSUES TO BE DECIDED

Whether the Commission should be preliminarily enjoined from prosecuting a second administrative enforcement proceeding seeking relief from Pierce that was before the Commission in an earlier administrative proceeding involving the same transactions and claims but which relief the Commission denied in its "final decision."

Whether the Commission's application in this court for an order enforcing the "final decision" in its first administrative proceeding should be temporarily stayed pending resolution of the question whether the Commission is barred from prosecuting Pierce in the new enforcement action.

III. STATEMENT OF FACTS

A. The First Action Requested Disgorgement of Profits from over $13 million in Stock Sale Proceeds Generated By Pierce and his Associates

Beginning sometime in 2005, the Commission initiated an investigation of trading in Lexington Resources, Inc. (Lexington) common stock. On July 31, 2008, the Commission brought the First Action by filing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") against Pierce, a Canadian citizen, and others. Decl. of Christopher B. Wells ("Wells Decl."), Ex. A. The Commission claimed that Pierce violated the registration provisions of the Securities Act, Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c), and the reporting provisions of the Exchange Act, Sections 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a). No antifraud claims were brought against any of the respondents, including Pierce.[1]

The First OIP was broad and malleable. It alleged that Pierce violated the registration provisions through resale by Pierce and others in 2004 of shares he had purchased from

[1] The other Respondents, Lexington and Grant Atkins, separately settled registration claims with the Commission in consent orders. The First OIP further alleged that Pierce violated the reporting provisions by late-filing a Schedule 13D concerning his ownership or control of Lexington stock during the period November 2003 to May 2004, and failing to file Forms 3, 4 or 5 in connection with Pierce's alleged ownership or control of more than ten percent of Lexington stock during that period.

Lexington under a stock option plan registered on Form S-8. The First OIP provided, "[T]he Commission deems it necessary and appropriate that cease-and-desist proceedings be instituted to determine ... [w]hether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act," *id.* Section III, for registration violations resulting from Lexington stock sales by "Pierce and ***his associates***," "sold ... through ***his offshore company***" and "generating sales proceeds over $13 million ..."*Id.* ¶¶ 14-16 (emphasis added).

When Pierce insisted that the Commission identify the "associates" and "his offshore company," the Division took the position, permitted by the ALJ, that transaction documents with which Pierce was familiar identified the "associates" and Pierce's "offshore company." Documents used in the First Action indicated that the "offshore company" was Newport, and that Jenirob was another one of the "associates" whose Lexington stock sales collectively generated $13 million.[2] As a result of this informal amendment process, without ever actually moving to amend the First OIP, the Commission itself specifically claimed that, to the extent Newport and Jenirob were involved in the resale of Lexington stock by Pierce, the OIP included both for purposes of "determin[ing]" whether Mr. Pierce committed registration violations, and "[w]hether Respondent Pierce should be ordered to pay disgorgement."

A three-day hearing was held before Administrative Law Judge Foelak in February 2009. The hearing was closed on February 4 and the record of evidence was closed on March 6, 2009. Wells Decl. Ex. H (ALJ Order dated March 6, 2009).

[2] Wells Decl. Ex. B (Division Hearing Exs. 43, at SEC -2702, and 51). Wells Decl., Exs. C, D, E and F (Pierce's Mot. for a More Definite Statement, the Division's Opp., Pierce's Reply and excerpt of Tr. of 9/29/08 pre-hearing teleconference at 14:16-27:6). The Division told Pierce and the ALJ that the scope of the OIP necessarily included the "associates" and "offshore company" to hold respondents Atkins and Lexington accountable for their registration violations (*id.*, Tr. at 19:25-21:10). Without moving to amend the OIP under the Commission's Rule of Practice 200(d), the Division revised its theory that Pierce was liable as a result of providing ineligible services, *id.* at 24:5-25:2 and abandoned any claim that Pierce's registration liability derived from control of Lexington, *id.* at 23:8-23 -- if any was even included in the OIP, which did not explicitly allege that Pierce controlled Lexington or was an "affiliate" of Lexington. Based on the unamended OIP, the Division later argued that Pierce was liable because he controlled Lexington. Wells Decl. Ex. G (Division's Post-Hearing Br. at 7-10 and 18-20).

B. The ALJ Granted a Post-Hearing Order that Admitted New Evidence For Liability Purposes But Restricted the Disgorgement Remedy to $2.1 Million

Twelve days after the close of the evidence, the Division moved for the admission of new evidence (the "New Evidence"). Wells Decl., Ex. I (Division's Mot. for the Admission of New Evidence at 1-2). The Commission had induced a foreign regulator to produce the New Evidence by representing in February 2008 that the Commission was investigating antifraud claims against Pierce. *Id.* at 1-4. But no antifraud claims were included in the OIP.

The Division claimed that the New Evidence proved Pierce's violations and showed that—in addition to the $2.1 million Pierce allegedly made from the sale of Lexington shares in his personal account—Pierce had "made millions of dollars in additional unlawful profits by selling Lexington shares" through two offshore company "associates" he purportedly controlled, specifically Newport and Jenirob. *Id.* at 6-8. This allegation was consistent with the Division's earlier construction of the First OIP in response to Pierce's request for a more definite statement. The First OIP expressly included the "associates" as to respondents' alleged registration liability, and the First OIP expressly covered "[w]hether Pierce should be ordered to pay disgorgement" regarding sales of Lexington shares by Pierce involving "his associates" and "offshore company," "generating sales proceeds of over $13 million." As a result of its consistent position, the Division did not move the ALJ or the Commission to expand the First OIP in any respect, as it was permitted to do. *See* 17 C.F.R. § 201.200(d)(1) - (d)(2) ("Amendment of Order Instituting Proceeding").

Several days later, the Division filed its post-hearing brief. The Division repeatedly relied on the New Evidence to support its claim that Pierce violated registration provisions of the Securities Act and reaped alleged profits from the sale of unregistered Lexington stock by his associates, Newport and Jenirob. Wells Decl., Ex. G (Division's Post-Hearing Br.). Specifically, in addition to the $2.1 million Pierce allegedly made on his personal account, the Division requested disgorgement of an additional $7.5 million, which reflected alleged net proceeds from the sale of Lexington shares by Newport and Jenirob in 2004.

The Division's Proposed Findings of Fact and Conclusions of Law similarly contained a myriad of proposed findings pertaining to the New Evidence, including:

> ... As revealed in the new records produced by the Division on March 10, 2009, Pierce also controlled accounts at Hypo Bank in the names of Newport and another offshore company, Jenirob ...[.]
>
> * * *
>
> ... Based upon documents that it received from Liechtenstein authorities ..., the Division has determined that by June 2004, Pierce had moved to the Newport and Jenirob accounts a total of 1,6,34,400 Lexington shares that had been issued purportedly pursuant to Form S-8 registration statements.... Pierce sold these shares in the open market through Newport and Jenirob accounts at the Hypo Bank between February and December 2004.

Wells Decl., Ex. J (Division's Proposed Findings of Fact 32, 50 & 55). The Division likewise proposed a conclusion of law that, because the Newport and Jenirob "sales were in violation of Section 5's registration requirements, Pierce should disgorge total net proceeds of $9,601,347," of which $7,523,378 was derived from Newport and Jenirob sales. (Division's Proposed Conclusions of Law 21-28, 46, 50-51).

Pierce opposed the Division's motion to admit the New Evidence. Among other things, Pierce pointed out that 17 C.F.R. § 201.452 allowed the Division to move the Commission to admit additional evidence, but no rule allowed the Division to seek the introduction of new evidence directly to the ALJ following the close of evidence. Wells Decl., Ex. K (Resp't Pierce's Opp'n to Division's Mot. for the Admission of New Evidence at 3-9). Pierce also argued that the New Evidence did not support the Division's theories of liability and disgorgement in any event. *Id.* at 9-18.

On April 7, 2009, the ALJ issued an order granting the Division's motion. The ALJ ruled: "Under the circumstances the record of evidence will be reopened to admit [the New Evidence] for use on the issue of liability, but not for the purpose of disgorgement based on sales of stock by Newport and Jenirob. These entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP." Wells Decl., Ex. L.

Having admitted the New Evidence as material to the issue of liability, the ALJ's ruling that she could not consider it for purposes of determining disgorgement was plainly inconsistent

with the Division's and the ALJ's prior position that the First OIP included allegations related to Newport and Jenirob as the "offshore compan[ies]" and "associates" who had received portions of the $13 million in stock sale proceeds. The First OIP specifically alleged that Pierce had "transferred or sold [Lexington stock] through his offshore company," and asked, "[w]hether *Respondent Pierce should be ordered to pay disgorgement* pursuant to Section 8A(e) of the Securities Act" because of registration violations involving Pierce's resale or distribution through his "offshore company" and profits on "sales proceeds of over $13 million" by "Pierce and his associates."

In response to the ALJ's ruling, the Division did not move to amend, seek interlocutory review, or make any submission to the Commission to address the ALJ's determination that Pierce could not be ordered to pay disgorgement as it related to his alleged control of Newport and Jenirob accounts. *See* 17 C.F.R. § 201.200(d) (Amendment of OIP); § 201.400 ("Interlocutory Review"). The Division's acquiescence confirmed to Pierce that the Division, like the ALJ, had determined that, to the extent remedial relief were granted, the approximately $2.1 million figure would be adequate. Indeed, as discussed below, the Division never took any steps to appeal or otherwise reverse any of the ALJ's rulings.

C. The Initial Decision Granted a Disgorgement Remedy

On June 5, 2009, the ALJ issued an Initial Decision in the First Action, Release No. 379 (the "Initial Decision"). Wells Decl., Ex. M. The Initial Decision accepted the Division's new claim that Pierce controlled Newport and Jenirob, and, among other things, that Pierce violated the reporting requirements of Sections 13(d)(1) and 16(a) of the Exchange Act by virtue of the Lexington stock he purportedly controlled and sold through Newport. The Initial Decision ordered Pierce to disgorge $2,043,362.33, which the ALJ concluded was the amount of profit Pierce allegedly made from the sale of Lexington stock from his personal account.

With respect to the New Evidence, the Initial Decision incorporated the ALJ's prior ruling, noting further that, "based on newly discovered evidence ..., the Division argued that over seven million dollars in additional ill-gotten gains should be disgorged, representing profits from the sale of unregistered stock by Jenirob and Newport. However, as the undersigned ruled

previously, *these entities are not mentioned in the OIP*, and such disgorgement would be outside the scope of the OIP. The Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing beyond the framework of the original OIP." The Initial Decision also specifically noted that "[a]ll arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected." Of course, Newport and Jenirob ***were*** "mentioned in the OIP," in light of Pierce's motion for a more definite statement and the ensuing statements by the Division in hearings and pleadings. The Division did not request the ALJ to reconsider or the Commission to grant immediate discretionary review of the Initial Decision that "determined" that the cease and desist orders and the amount "Respondent Pierce should be ordered to pay disgorgement" were adequate to serve the remedial interests of the public.

D. The Initial Decision Became a Final Decision After the Commission Elected Not to Modify or Take Other Action Regarding the Initial Decision

The Initial Decision and the Commission's Rules of Practice granted both parties 21 days to seek review of the Initial Decision with the Commission. *See* 17 C.F.R. §§ 201.360(b) and 410(a). The Division did not seek review. Instead, the Division accepted the benefits and burdens of the ALJ's decision to deny the Division's claim that "Pierce should be ordered to pay disgorgement" of profits made from the sale of Lexington stock by Newport and Jenirob. Indeed, the Division manifested its agreement that the remedial relief ordered by the Initial Decision was complete and adequate to redress all the conduct litigated in the First Action; that is, that "Pierce should be ordered to pay disgorgement" of approximately $2.1 million rather than $9.6 million.

Although Pierce believed that the Initial Decision (including the ruling that registration violations had occurred) was erroneous, Pierce did not seek review by the Commission. In electing not to seek review and challenge the Initial Decision with the Commission, Pierce specifically relied on the prior decisions by the Division not to (a) seek interlocutory review of the ALJ's disgorgement ruling by the Commission or (b) request the Commission to amend the OIP to further confirm that it included a claim for an order that Pierce pay disgorgement of the

alleged Newport and Jenirob profits. Pierce desired finality with respect to the Division's approximately $9.6 million disgorgement claim against him.

There was good reason for the Division not to appeal the Initial Decision. Although the Division had taken the position, contrary to the ALJ's ruling, that the First OIP did not require amendment – because Newport and Jenirob were "offshore companies" and "associates" of Pierce within the use of that term in the First OIP and, thus, sufficiently "mentioned in the OIP" – the Division also understood that, if it were to appeal the Initial Decision, a cross-appeal by Pierce could ultimately lead to reversal of the ALJ's underlying liability findings, and a ruling by the Commission that no disgorgement ***of any amount*** was warranted.

Indeed, had the Division appealed or sought any other relief from the Commission, Pierce would have filed a petition for cross-review and vigorously contested both the liability determination in the Initial Decision as well as any effort to increase the disgorgement order beyond the $2.1 million. *See* 17 C.F.R. § 410(b) ("[i]n the event a petition for review is filed, any other party to the proceeding may file a cross-petition for review within ... ten days from the date that the petition for review was filed"). Decl. of G. Brent Pierce ("Pierce Decl.) ¶¶ 3-4. Because he relied on the Division's actions and acquiescence in the total disgorgement amount, Pierce also surrendered his right to seek judicial review of the Initial Decision since "a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review of a final order entered pursuant to such decision." *See* 17 C.F.R. §201.410(e) ("Prerequisite to Judicial Review").

Even though neither party filed a petition for review, the Commission still had plenary authority "on its own initiative" to review, reverse, modify, set aside or remand any or all of the Initial Decision, including the ALJ's prior decision to consider the New Evidence for purposes of Pierce's alleged liability but denying the Division's claim that Pierce should be ordered to disgorge an additional $7.5 million in connection with the sale of Lexington stock by Newport and Jenirob. *See* 17 C.F.R. § 201.411(a) & (c). The Commission also retained the authority "[u]pon its own motion," to accept and consider the New Evidence for any purpose, or order further proceedings with the ALJ. *See* 17 C.F.R. § 201.452.

The Commission, however, decided not to modify the Initial Decision or order further proceedings in the First Action. Rather, on July 8, 2009, the Commission issued a finality order informing the parties that "the Commission has not chosen to review the decision as to [Pierce] on its own initiative" and, thus, pursuant to 17 C.F.R. § 201.360(d), the Initial Decision "has become the final decision of the Commission with respect to Gordon Brent Pierce. The orders contained in that decision are hereby declared effective." And with that, the Initial Decision became the Commission's "Final Decision." In short, that "Final Decision" decided the entire question posed in the First OIP and litigated in the First Action: "Whether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act" for registration violations by Pierce or his associates.

E. The Second Action Relitigates the Disgorgement Remedy

Some months later, Pierce and Commission staff negotiated terms upon which Pierce could satisfy the $2,043,362.33 disgorgement remedy, plus prejudgment interest, imposed on Pierce by the Commission's Final Decision in the First Action. In doing so, Pierce relied on the Division's manifest agreement that disgorgement had been "determined" with finality when Pierce exchanged compromise and settlement offers with the Division in an effort to resolve his disgorgement obligations. Pierce Decl. ¶ 5.

Only after Pierce had increased his offer, to an amount the Division had represented would be acceptable, did the Division staff inform Pierce that the Commission intended to initiate a new action against him to re-litigate the disgorgement remedy for the alleged $7.5 million in net proceeds received by Newport and Jenirob from the sale of Lexington stock in 2004. Facing the prospect of another burdensome and costly administrative action sparking a new round of bad publicity on a claim that had been finally decided as unnecessary to the remedial relief ordered against him in the First Action, and believing that Commission staff had not been dealing with him in good faith, Pierce immediately broke off further negotiations for payment under the Final Decision. *Id.*

In an effort to avoid the Commission's threatened action, in February 2010, Pierce delivered a Wells Committee Submission arguing, among other things, that the Commission was

barred by res judicata and estopped from re-litigating a remedy extinguished in the First Action. Wells Decl., Ex. N (Wells Submission without exhibits). Pierce specifically reminded the Commission that the Division did not appeal the rejected $7.5 million disgorgement claim, nor did the Commission itself choose to review, modify or overrule the Initial Decision's disgorgement remedy, although it had the authority and discretion to do so. *Id.* The Commission rejected Pierce's Wells Submission arguments.

On June 8, 2010, the Commission brought the Second Action against Pierce by issuing an Order Instituting Cease-and-Desist Proceedings (the "Second OIP") against Pierce. Wells Decl. Ex. O. As in the First Action, the Division claims that Pierce violated the registration provisions of the Securities Act, Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c) in connection with the unregistered sale of Lexington stock in 2004. The Commission again chose to prosecute claims in its own internal forum before an ALJ, when it could have brought them in a federal district court before an independent Article III judge with legal and equitable powers.

The allegations contained in the Second OIP are based exclusively on the same transactions, the same time period, and the same New Evidence that the Commission considered in the First Action. Indeed, the Second OIP is replete with language culled nearly verbatim from the Proposed Findings of Fact and Conclusions of Law the Division proffered, but which the ALJ refused to adopt, in the First Action, including:

> ... In March 2009, the Division received additional documents relating to the Liechtenstein bank's sales of Lexington stock. These documents showed that, in addition to Pierce's sales through his personal account, Pierce deposited 1.6 million Lexington shares in accounts at the Liechtenstein bank in the names of Newport and Jenirob. Pierce was the beneficial owner of the Newport and Jenirob accounts. Pierce sold the 1.6 million shares through the Newport and Jenirob accounts between February and December 2004 for net proceeds of $7.7 million.

(Second OIP ¶ 25).

Just as important, in the Second Action, the Division seeks the more than $7.5 million disgorgement award (now $7.7 million) that the ALJ rejected in the Initial Decision, which the Division and later the Commission chose not to challenge or disturb in the First Action. The Division admits all of this on the face of the Second OIP:

> ... On July 31, 2008, the Commission instituted cease-and-desist proceedings against Pierce ... [.] In that action, the Division sought disgorgement from Pierce of the $2 million in net proceeds from the sale of 300,000 Lexington shares in his personal account...in 2004....
>
> ... Before issuance of the Initial Decision in the prior action, the Division moved to admit the new evidence...***and also sought the additional $7.7 million in disgorgement.*** The new evidence was admitted in the prior action, but the Administrative Law Judge ruled that disgorgement of the $7.7 million in Pierce's sales in the Newport and Jenirob accounts was outside the scope of the [OIP] in the prior action because Newport and Jenirob were not named in the OIP.
>
> ... The Initial Decision in the prior action, issued June 5, 2009, found that Pierce committed the alleged violations of the Securities Act and Exchange Act and ordered Pierce to disgorge $2,043,362.33 in proceeds from his sale of the 300,000 Lexington shares in his personal account. ***Neither party appealed the Initial Decision and it became the final decision of the Commission on July 8, 2009.***

Id. (Second OIP ¶¶ 27, 29 & 30 (emphasis added)). In short, the Commission hopes to benefit from the preclusive effect of the Final Decision to establish Pierce's liability in the Second Action, while escaping the preclusive effect of the Final Decision on the Commission's ability to re-litigate the amount to be disgorged from Pierce. Indeed, the Second OIP admits its purpose is "to determine: ...Whether Respondents [Pierce, Newport and Jenirob] should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act," which is precisely what was decided in the Final Decision in the First Action, at least as to Pierce.

There is another troublesome aspect of the Second OIP. The Commission again uses the term "associates." Through this pleading device, the Commission threatens another round of repetitive litigation if it does not achieve all it wants in the Second Action against Pierce. This threat of future administrative actions against Pierce and "associates" will become a reality if, as the Commission apparently hopes, reference to "associates" in the body of the OIP allows it to escape established principles of res judicata.

F. The Commission Has Brought in this Court A Summary Enforcement Proceeding Based on the Final Decision in the First Action

The Commission's intention to have it both ways is manifested further by its simultaneous application to enforce the Final Decision in the First Action. On the same day it filed the Second Action, the Commission filed the Administrative Enforcement Action in this Court, to enforce the disgorgement remedy imposed by the Final Decision. Wells Decl. Ex. P. By filing its application, the Commission seeks an equitable writ of mandamus remedy (the entry of a court order enforcing its Final Decision) in a "summary proceeding" that does not necessarily include or trigger "the full array of legal, procedural and evidentiary rules governing" an "action" in federal court[3] while the Commission is inequitably abusing its power to act in a quasi-judicial capacity. The Commission's application in the Administrative Enforcement Action did not disclose to this court that the Commission had commenced the Second Action on the same day. *Id.*

Notwithstanding the unprecedented nature of the Second Action, the ALJ has denied a motion by Pierce to strike the July 19, 2010 hearing date, even though the motion was not opposed by the Division. Wells Decl. Exs. Q (June 23 Motion) and R (June 24 Order).

IV. ARGUMENT

A. Pierce Is Not Required To Exhaust Administrative Remedies In The Second Action Before Seeking Relief In This Court

This Court has jurisdiction over Pierce's claims for a stay, declaratory and injunctive relief.[4] Ordinarily, a party must exhaust its administrative remedies before seeking judicial relief,

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[3] *SEC v. McCarthy*, 332 F.3d 650, 656-59 (9th Cir. 2003) (distinguishing an "action" in federal court from a summary proceeding to enforce commission orders).

[4] 5 U.S.C. § 705 ("Relief pending review"). The Court also has inherent authority to control its docket including the power to stay pending litigation. When granting a stay, the court must weigh the equities, taking into account: (1) the possible damage caused by a stay, (2) the hardships of proceeding without a stay, and (3) "the orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 269 (9th Cir. 1962); *cf. Adams v. St. of Cal. Dep't of Health Servs.*, 487 F.3d 684, 688-89 (9th Cir. 2007) (court may consider claim splitting in the context of staying or enjoining duplicative later-filed action). The Court further has ancillary authority under the Declaratory Judgment Act and the All Writs Act to stay proceedings and restrain parties to secure the benefits and preserve and protect the rights of the parties. 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act) and 28 U.S.C. § 1651 (the All Writs Act). *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685 (9th Cir. 1981) ("We have interpreted § 1651 as authorizing a district court to enjoin a party from attempting to relitigate a cause of action relating to the same subject matter of an earlier action.").

but "other factors occasionally outweigh the preference for a preliminary agency determination." *Casey v. FTC*, 578 F.2d 793, 796 (9th Cir. 1978); *see also S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 n. 4 (9th Cir. 1981) (exhaustion not required "where administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury would result, or the administrative proceedings would be void"). When deciding whether to stay and enjoin ongoing agency action, as here, a court must consider: (1) the extent of the injury from pursuing an administrative remedy; (2) the degree of doubt about agency jurisdiction; and (3) the involvement of agency expertise in the question of jurisdiction. *Casey*, 578 F.2d at 796; *California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1323 (9th Cir. 1977). These factors should be weighed on a case-by-case basis. *G.C. George*, 637 F.2d at 688 n. 4. All three factors weigh strongly in favor enjoining the Commission from continued prosecution of the Second Action.

Extent of Injury. Where agency action exposes a party to irreparable injury, judicial intervention is permitted. *Casey*, 578 F.2d at 796. The very initiation of the Second Action has already exposed Pierce to irreparable injury that, unless enjoined, will continue and increase. As discussed in greater detail below, the Second Action is causing damage to Pierce's reputation and depriving him of valuable business opportunities as an investment consultant and securities trader. Pierce Decl. ¶¶ 7-10. This ongoing injury to Pierce's reputation and business cannot be undone, or compensated for, if Pierce is forced to wait until the Second Action is concluded before getting judicial review of the fact that the Second Action is barred and should not have been brought at all.

Courts have recognized that enjoining unlawful agency action plainly barred by res judicata is a sound justification for bypassing the exhaustion requirement. In *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979), the Seventh Circuit affirmed the district court's injunction of pending and future OSHA citations on the grounds of res judicata. The court held that the plaintiff was not required to exhaust administrative remedies, reasoning:

> The present case provides a classic situation for deviating from the exhaustion rule. Exhaustion is not required if the established administrative procedures would prove unavailing or futile. The essence of Continental's due process claim is that

> the Secretary's duplicative prosecutions are vexatious and harassing. Exhaustion of the administrative remedy causes the unconstitutional injury. If Continental is forced to defend the numerous prosecutions on the merits before the Commission prior to seeking a judicial determination that the prosecutions were unwarranted, the injury will have already been complete and uncorrectable. For these reasons exhaustion would not serve the purposes for which it was intended.

Id. at 597; *also Safir v. Gibson*, 432 F.2d 137, 143 (2d 1970) ("the reason for applying res judicata to administrative agencies is ... to protect a successful party from being vexed with needlessly duplicitous proceedings. If [that] interest is not protected at the outset, it will be lost irreparably"). This case is no different. Unwarranted prosecution is the cause of Pierce's injury. He should not be forced to re-litigate issues in the Second Action, thereby incurring even more irreparable injury, before finally obtaining judicial review. Even if fully vindicated in the Second Action, Pierce's "injury will have already been complete and uncorrectable."

Agency Jurisdiction. For the reasons discussed below, the Commission has no authority in the Second Action to prosecute the same disgorgement claim it raised, litigated, lost and elected not to appeal in the First Action. This is not a case where the Commission's jurisdiction should be determined by the agency in the first instance, for the Commission's authority to proceed with the Second Action does not turn on any factual determination or statutory interpretation. *Cf. Safir*, 432 F.2d at 143 ("In this respect, a claim of res judicata differs from a claim that an administrative agency has no jurisdiction over the subject matter of the investigation ... an issue which Congress meant to be decided in the first instance by the agency itself."). By ignoring Pierce's Wells Committee submission, and then initiating proceedings in its own tribunal, rather than court, the Commission demonstrated that it will not apply res judicata to itself. Nor will the Commission apply the doctrines of judicial and equitable estoppel, since its very commencement of the Second Action is part and parcel of the "affirmative misconduct" underlying Pierce's equitable estoppel claim. Since only a court will decide these matters, "there is nothing to be gained and much to be lost by waiting for the agency to finish its deliberations" before Pierce can obtain judicial review. *Id.* at 144-45.

Agency Expertise. Where it applies, administrative exhaustion "makes sense in terms of both judicial economy and agency efficiency ... because it permits an administrative agency to

perform functions within its special competence to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Marshall v. Burlington N., Inc.*, 595 F.2d 511, 513 (9th Cir. 1979) (citations and internal quotation marks omitted). None of these factors apply here; there is no need for or benefit from agency fact-finding or expertise. Res judicata is a ***question of law***, and judicial and equitable estoppel must be a question of ***judicial*** discretion where, as here, the agency is both the trier of fact and the party accused of wrongdoing. Indeed, as discussed above, the Commission has already refused to consider Pierce's arguments when it initiated the Second Action over Pierce's objection, and it is clear that it will continue to do so until a court intervenes. It would be a futile act to request the Commission to stay the Second OIP and Second Action.[5] Meanwhile, the ALJ has denied a postponement of the rushed hearing in mid-July in the Second Action. The result is that Pierce must, on short notice, address in two fora the relitigation that the Commission is attempting to pursue. Requiring Pierce to exhaust administrative remedies is both unnecessary and futile in this instance.

B. Pierce Is Entitled to a Temporary and Preliminary Injunction Prohibiting the Commission from Prosecuting the Second Action And a Stay of the Administrative Enforcement Action

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F.Supp. 1320, 1323 (N.D. Cal. 1995). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (*quoting Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ---, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008)). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Indep. Liv. Cntr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009)

[5] 17 C.F.R. § 201.401 (Consideration of Stays); *see also* § 201.401(c) ("Stay of Commission Order"). Moreover, this rule and its subsections fail to set forth any standards for the consideration of stays and thus fail to provide parties like Pierce fair notice and due process.

(*quoting Winter*, 129 S.Ct. at 376) (internal quotation marks omitted). Pierce satisfies the requirements for a TRO and preliminary injunction.

1. Pierce is Likely to Succeed on the Merits

a. The Second Action is Barred by Res Judicata

"Where an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S. Ct. 1545, 1560, 16 L. Ed. 2d 642 (1966). "The doctrine of res judicata 'is motivated primarily by the interest in avoiding repetitive litigation, conserving judicial resources, and preventing the moral force of court judgments from being undermined.' For this reason, res judicata bars not only all claims that were actually litigated, but also all claims that "could have been asserted" in the prior action." *Int'l Union of Operating Engineers-Employers Constr. Indus. Pension, Welfare & Training Trust*, 994 F.2d 1426, 1431 (9th Cir. 1993) (citation omitted).

"[T]he criteria most often stressed" in Ninth Circuit decisions are whether the claim "arises out of the same transactional nucleus of facts ...." *Id.* at 1430. Here, the successive claims arise from the same transactional nucleus of facts, involve substantially the same evidence, the same rights and interests. *Id.* at 1429 (setting forth four-part test for determining whether successive claims constitute the same cause of action). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Nevada v. United States*, 463 U.S. 110, 130, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983).

The doctrine against claim splitting is one application of the general doctrine of res judicata. *Sutcliff Storage & Warehouse Co. v. United States*, 162 F.2d 849, 852 (1st Cir. 1947). Even when a party brings a claim in a court which could grant it only limited relief, the party cannot insist upon maintaining another action on the same claim. *Id.* (affirming dismissal of claims). Here, there was no statutory restriction on the SEC's adjudicatory powers to grant the disgorgement remedy and the Final Decision did not expressly reserve a right by the SEC to maintain a second action and split the disgorgement remedy.

The First Action was clearly an adjudicatory proceeding where the Commission exercised the equitable remedy of disgorgement. Ten months later the Commission has elected to file in this Court a summary proceeding (one reserved for a writ of mandamus, injunctions, similar orders) as the means to enforce the Final Decision granting limited equitable relief. By applying for the kind of summary relief reserved for enforcement of final judgments, the Commission has accepted the benefits of the First Action and avoided bringing "a full blown civil action under the Federal Rules...."[6] The Commission must accept the restrictions inherent in the adjudicated remedy in the First Action.

The First Action extinguished all other rights of the Commission to a disgorgement remedy against Pierce with respect to the sale of Lexington shares – at least as to transactions described in the First OIP and issues of remedial relief raised to address those transactions before the Final Decision. Other courts have precluded similar attempts to re-litigate. *SEC v. Crofters, Inc.* 351 F. Supp. 236, 257-58 (S.D. Ohio 1972) (granting summary judgment on the basis of *res judicata* barring SEC's second suit for injunction against deception in the offer or sale of "any security" and for "other or further relief..." because earlier SEC injunction action against same defendant had enjoined it from deception in the offer of sale of "its own securities"), *rev'd on other grounds sub nom., SEC v. Coffey*, 493 F.2d 1304, 1309 (6th Cir. 1994) (stating SEC had not appealed the dismissal of company on the basis of res judicata), *cert. denied*, 420 U.S. 908 (1975) [7]

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[6] *McCarthy*, 322 F.3d at 656-60 (holding the § 21(e) of the Exchange Act authorizes the Commission to use summary proceedings to enforce its orders in district court, which differ from a full blown civil action; also ruling fairness and due process require an opportunity to respond, but declining to rule on whether affirmative defenses were potentially valid).

[7] *Harnett v. Billman*, 800 F.2d 1308, 1314-15 (4th Cir. 1986) (holding prior adjudication barred a claim that arose out of the same transactions and that could have been raised in the prior suit; claims arising out of corporate spin-offs and freeze-out mergers formed the basis for a prior action and were precluded under the doctrine of res judicata; barred claims included those under the 1933 and 1934 Acts; stating rule that claims may arise out of the same transaction or series of transactions even if they involve different harms or different theories or measures of relief); *Mack v. Utah State Dep't of Commerce*, 221 P.3d 194, Blue Sky L. Rep. ¶ 74,782 (Utah 2009) (upholding an injunction against the Utah Division of Securities where the Division had initially opted to bring action in state court against the branch manager of a securities firm and successfully obtained a civil fine and suspension in that action, and then subsequently sought the additional remedy of restitution in an administrative action; holding that (i) injunction was warranted and that the administrative remedy of going through the entire administrative action was not necessary, and (ii) the Division's claims were barred by res judicata); *Doherty v. Cuomo*, 76 A.D.2d 14, 430 N.Y.S.2d 168 (1980) (holding the New York Secretary of State was barred from bringing a second proceeding against a real estate broker where the two actions brought against the broker resulted from acts in nearly the identical

This is not a case where after the First OIP was initiated subsequent events and acts occurred that are the basis for a bona fide new second action. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1462-65 (2nd Cir. 1996) (rejecting res judicata defense where new action was based on ***subsequent*** acts that occurred after the commencement of the first action). Rather, since "the transaction or connected series of transactions at issue . . . is the same, that is 'whe[re] the same evidence is needed to support both claims, and whe[re] the facts essential to the second were present in the first,'" the Final Decision has preclusive effect on the Second Action. *Id.* at 1464. Claim preclusion means that "[a] valid final adjudication of a claim precludes a second action on that claim *or any part of it.*" *Baker v. General Motors Corp.*, 522 U.S. 222, 233 n. 4, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (citation omitted). The disgorgement claims here arose from the same nucleus of operative facts – resale of Lexington shares in 2004 by Pierce through "offshore company" "associates" Newport and Jenirob, "generating" a substantial portion of the "sales proceeds of over $13 million." The facts are so interwoven as to constitute a single claim and cannot be "dressed up" to look different and to support a separate new claim.[8]

In addition to requesting disgorgement of profits from Pierce due to Lexington stock sales by Newport and Jenirob in the First Action, the Division argued that the transactions with Newport and Jenirob proved that Pierce acted as an underwriter and violated § 5(a) of the Securities Act (registration). *See, e.g.*, Wells Decl. Ex. G (Div. Of Enforcement's Post-Hearing Br. at 1) ("Pierce also used Newport . . . to sell Lexington shares granted to him, or to associates . . . for additional net proceeds of $7.4 million dollars during 2004."). *Id.* at 3 ("Pierce . . . became a statutory 'underwriter' . . . Pierce transferred to Newport most of the shares issued by Lexington within a few days, and then quickly resold the shares to other persons or deposited them into a brokerage account."). *Id.* at 21 ("One compelling indication of Pierce's underwriter

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time frame, the statutory violations were virtually identical, and the penalty, legal theory, hearing office and basic violations were identical, and holding that the second proceeding merged into the final judgment obtained in the first proceeding).

[8] *See, e.g., Lane v. Peterson*, 889 F.2d 737, 744 (8th Cir. 1990) (holding res judicata applied and stating "it prevents parties from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different. Thus, where a plaintiff fashions a new theory of recovery or cites a new body of law that was arguably violated by a defendant's conduct, res judicata will still bar the second claim if it is based on the same nucleus of operative facts as the prior claim.").

status is the short time period between his acquisition of the Lexington shares . . . and his sale of those shares through Newport's account . . ."). *Id.* at 22 ("Additionally, Pierce distributed 1.6 million other Lexington shares using accounts for Newport and Jenirob at Hypo Bank. These facts establish that Pierce is an 'underwriter' . . ."). *See also id.* at 6, 10-11, 13-17, 28. Compare the foregoing examples of factual and legal arguments the Division litigated in the First Action to the facts and violations alleged in the Second OIP ¶¶ 6-31 and Section III (Wells Decl. Ex. O). They are identical. And the ALJ relied on the New Evidence underpinning the $7.5 million disgorgement claim to rule that Mr. Pierce had committed registration violations. The twenty-one page Initial Decision (Wells Decl. Ex. M) ***refers to Newport over sixty-five times and Jenirob six times***.

b. The Second Action is Barred by Equitable Estoppel

Pierce is also entitled to injunctive relief under the doctrines of equitable and judicial estoppel. *See Syngenta Crop Protection, Inc. v. E.P.A.*, 444 F. Supp. 2d 435, 454-55 (M.D. N.C. 2006) (plaintiff stated valid cause of action for injunctive relief against agency for equitable estoppel). Equitable estoppel is available against the Commission. *SEC v. Sands*, 902 F. Supp. 1149, 1166 (C.D. Cal. 1995) The four traditional elements of estoppel are: "(1) the party to be estopped knows the facts, (2) he or she intends his or her conduct will be acted on or must so act that the party invoking estoppel has a right to belief it is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conduct." *U.S. v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007) (citation omitted). When a party seeks to estop the government, it must also show: "(1) the government has engaged in affirmative misconduct going beyond mere negligence, and (2) the government's act will cause a serious injustice and the imposition of estoppel will not unduly harm the public interest." *Id.* (citation and internal quotation marks omitted).

Pierce satisfies all these elements. Judicial estoppel applies as well, given the summary proceeding that the Commission filed and the Division's statements in the First Action. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (holding

that judicial estoppel may be warranted if, among other things, a party's later position is "clearly inconsistent" with its earlier position).[9]

When the ALJ rejected the Division's $7.5 million disgorgement claim regarding the Newport and Jenirob sales—both in her ruling admitting the New Evidence and in the Initial Decision—the Division could have (a) petitioned the Commission to consider the ALJ's ruling on an interlocutory basis, 17 C.F.R. § 201.400(b) moved the Commission to amend the First OIP to expressly specify that it included Newport and Jenirob, 17 C.F.R. § 201.200, and/or (c) appealed the Initial Decision to the Commission, 17 C.F.R. § 201.410. The Division did none of these things, confirming that it agreed that the Initial Decision's $2.1 million disgorgement order was adequate to redress all the conduct litigated in the First Action. Further, the Commission could have reviewed the Initial Decision "on its own initiative," 17 C.F.R. § 201.411, but did not, choosing instead to make the Initial Decision its own. In refusing to appeal or review the Initial Decision, the Commission manifested its election to avail itself of the ALJ's rulings on Pierce's liability in exchange for the ALJ's disgorgement order.

The Commission's apparent acquiescence in the Initial Decision was strategic and intended to induce Pierce to sacrifice his right to appeal the ALJ's rulings. It worked. Had the Division appealed, Pierce would have filed for cross-review and vigorously contested liability and disgorgement. Likewise, had the Commission reviewed and affirmed the Initial Decision, Pierce would have appealed that ruling to the Court of Appeals. Pierce Decl. ¶¶ 3, 4. But Pierce wanted finality. In specific reliance on the Commission's acceptance in the Initial Decision, including its $2.1 million disgorgement order, Pierce declined to challenge the decision. *Id.* The Commission further induced Pierce to rely on the finality of the Initial Decision over the next several months, as the parties negotiated Pierce's obligation to satisfy the "final" disgorgement order; only after

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[9] While courts do not apply a specific "concrete formula" to determine the appropriateness of the doctrine's applicability, courts "typically apply judicial estoppel where (1) a party's later position is *clearly* inconsistent with its earlier position, (2) the party has succeeded in persuading a court to accept its earlier position and judicial acceptance of the later position would create the perception that either court was misled, and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." 532 U.S. at 750 (emphasis in original).

Pierce had made an offer the Commission was prepared to accept did it reveal its plans to file a Second Action to seek the same $7.5 million that it had been denied in the First Action. *Id.*, ¶ 5.

Courts have applied equitable estoppel in similar situations. In *Gamboa-Cardenas*, for example, the defendant chose to waive his right to testify at trial based on the government's assurances that his pre-trial statements would qualify him for a reduction in sentence. After trial, the government reversed itself, and argued that no reduction in sentence was warranted. In estopping the government from reversing course, the Court held that "the government's abrupt change of position in this case ... goes beyond 'mere negligence' and would cause a 'serious injustice'[.]" 508 F.3d at 503-504.

The same is true here. The Initial Decision ordered Pierce to disgorge $2.1 million and rejected the Division's claim for an additional $7.5 million. The Commission accepted the finality of the Initial Decision's disgorgement award when it adopted the remedial relief. Neither the Division nor the Commission sought to further press the Division's contention that Pierce should be ordered to pay additional disgorgement of $7.5 million. Notwithstanding that Pierce was already a respondent in a proceeding in which the Commission was assessing disgorgement of $9.6 million from Pierce resulting in part from stock trading by Newport and Jenirob that was included in the First OIP, neither the Division nor the Commission sought to appeal or alter the ALJ's adverse determination – instead allowing it to become final.

Pierce detrimentally relied on the Commission's conduct when he waived his own right to appeal. Like *Gamboa-Cardenas*, the Commission's repudiation of the finality of the Initial Decision is an "abrupt change of position" that cannot be ascribed to mere negligence. Because Pierce's right to appeal the Initial Decision cannot be revived, the Commission must be equitably estopped from arguing that the Initial Decision does not preclude its efforts to re-litigate the $7.5 million disgorgement claim. Put simply, the Commission cannot have its cake and eat it too.

2. Pierce Will Suffer Irreparable Harm Absent Injunctive Relief

Courts have repeatedly recognized that forcing a party to re-litigate claims and issues previously decided in an earlier proceeding, in and of itself, constitutes an irreparable harm. *See, e.g., Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425, 1428-29 (9th Cir. 1986); *In re SDDS, Inc.*,

97 F.3d 1030, 1041 (8th Cir. 1996). And, as noted above, this principle applies equally to justify enjoining ongoing administrative proceedings on the basis of res judicata. *SEC v. Crofters, supra, Continental Can*, 603 F.2d at 597 ("If Continental is forced to defend numerous prosecutions on the merits ... prior to seeking a judicial determination that the prosecutions were unwarranted, the injury will have already been complete and uncorrectable"); *Safir*, 432 F.2d at 143-144 (if the right of "a successful party from being vexed with needlessly duplicitous proceedings" "is not protected at the outset of the second proceeding, it will be lost irreparably").

This is particularly true where, as here, re-litigation of claims and unwarranted duplicitous proceedings damage the reputation of the defendant. The Commission's commencement of the Second Action has damaged Pierce's business reputation, and has and will continue to deprive him of business opportunities. Pierce Decl. ¶ 7. Specifically, articles in publications frequently read by private and institutional investors, stock brokers, investment firms, bankers and financial intermediaries, and others erroneously imply that Pierce has engaged in improper conduct different than, or subsequent to, that litigated and finally decided in the First Action. *Id.* ¶ 8. The Second Action thus threatens Pierce's business and will damage his efforts to re-establish valuable financial relationships that were lost following his decision, induced by the Commission's conduct, not to challenge liability in the First Action. *Id.* ¶¶ 9, 10. Such damage cannot be measured monetarily and cannot be remedied *post hoc*, even if the defendant ultimately prevails in the second proceeding. Pierce has shown a likelihood of irreparable harm.

3. The Balance of Equities and the Public Interest Favor An Injunction

A temporary stay to permit judicial review harms no one. The facts supporting waiver and estoppel weigh in favor of a stay and injunction, as do the Commission's unclean hands.[10] In the First Action, the Commission surrendered its claim for an additional $7.5 million in order to

[10] *SEC v. Sands*, 902 F. Supp. at 1166 (citing decisions declining to strike affirmative defense of unclean hands; but granting summary judgment dismissing defense after discovery was completed); *SEC v. Elecs. Warehouse Inc.*, 689 F. Supp. 53, 73 (D. Conn. 1988), *aff'd* 891 F.2d 457 (2d Cir. 1989); *See Jacobs v. United States*, 239 F.2d 459, 461–62 (4th Cir. 1956), *cert den.* 353 U.S. 904, 77 S.Ct. 666, 1 L. Ed. 2d 666 (1967) ("[H]e who seeks equity must do equity, a principle binding upon the government, as well as upon individuals"); *see also Sierra Club v. Hickel*, 467 F.2d 1048, 1052 (6th Cir. 1972) ("Equitable principles apply to the Government as well as to private individuals except when limited by statutory provisions."); *City of Fredericksburg v. Bopp*, 126 S.W.3d 218, 223 (Tex. App. 2003) ("[A] governmental entity, like any litigant, must do equity when seeking equitable relief").

assure finality of the $2.1 million disgorgement order. By commencing the Second Action, the Commission is now proceeding as if the First Action were not yet final. At the very same time, the Commission is telling this court that the First Action *was* final – in the Commission's Administrative Enforcement Action. Such duplicity cannot afford Pierce due process in the Commission's forum or support assistance from this court under such unusual circumstances. Consequently, until the *res judicata* and estoppel issues raised by the Second Action have been resolved, the Commission's application for enforcement should be stayed.

C. Pierce Should Not Be Required to Post a Bond

This Court should waive the bond requirement or set the bond at a nominal amount. "Despite the seemingly mandatory language, Rule 65(c) invests the district court with discretion as to the amount of security required, if any. In particular, the district court may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (citation and internal quotation marks omitted). This is particularly true in cases against the government, where, if the injunction is later vacated, the harm to the government is nominal. *Cf. Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (affirming on basis of lack of evidence of costs to the government). This principle applies here. Pierce will likely succeed on the merits, but even if he does not, the Commission will not be harmed by an injunction pending a decision on the merits.

At most, a preliminary injunction will temporarily delay the Commission's ability to prosecute its duplicative $7.5 million disgorgement claim in the Second Action. But the profits the Commission seeks to disgorge in the Second Action were realized over six years ago, and the Commission will be unable to show how a further delay of a few months will prejudice its ability to establish liability or a disgorgement remedy in the Second Action. A temporary delay as a result of a preliminary injunction will not harm the government.

V. CONCLUSION

The Second Action violates principles of res judicata (claim preclusion), equitable and judicial estoppel, laches and waiver and must be preliminarily enjoined pending assessment of

permanent declaratory and injunctive relief. Meanwhile, until permanent relief is determined, the Commission should be estopped from treating as a final order a decision that it improperly treats as incomplete. Pending the final determination whether the Second Action is barred by the First Action, the Court should temporarily stay the prosecution of the Administrative Enforcement Action.

Dated: July 9, 2010

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GORDON BRENT PIERCE, Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION, Defendant.	Civil No. **DECLARATION OF CHRISTOPHER B. WELLS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Upon penalty of perjury under the laws of the United States, the undersigned declares that the following is true.

1. I am the attorney for plaintiff Gordon Brent Pierce with regard to the filing of a Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunction and

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Temporary Restraining Order against the Defendant Securities and Exchange Commission in the above-described captioned case.

2. Attached as Exhibit A is a true and correct copy of the Order Instituting Cease-and-Desist Proceedings against Pierce and others on July 31, 2008 in a proceeding captioned In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce, Admin. Proc. File No. 3-13109.

3. Attached as Exhibit B are true and correct copies of the Division's Hearing Exhibits 43, at SEC 2702, and 51.

4. Attached as Exhibit C is a true and correct copy of Pierce's Motion for a More Definite Statement.

5. Attached as Exhibit D is a true and correct copy of the Division's Opposition to Pierce's Motion for a More Definite Statement.

6. Attached as Exhibit E is a true and correct copy of Pierce's Reply in Support of Motion for a More Definite Statement.

7. Attached as Exhibit F is a true and correct copy of excerpts of the transcript for the September 29, 2008 pre-hearing teleconference.

8. Attached as Exhibit G is a true and correct copy of the Division's Post-Hearing Brief.

9. Attached as Exhibit H is a true and correct copy of the Order closing the record of evidence issued by Administrative Law Judge Foelak on March 6, 2009.

10. Attached as Exhibit I is a true and correct copy of the Division's Motion for the Admission of New Evidence.

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11. Attached as Exhibit J is a true and correct copy of the Division's Proposed Findings of Fact and Conclusions of Law.

12. Attached as Exhibit K is a true and correct copy of Respondent Pierce's Opposition to Division's Motion for the Admission of New Evidence.

13. Attached as Exhibit L is a true and correct copy of Administrative Law Judge Foelak's Order granting the Division's Motion to Admit New Evidence.

14. Attached as Exhibit M is a true and correct copy of the Initial Decision dated June 5, 2009 in the First Action, Release No. 379.

15. Attached as Exhibit N is a true and correct copy of the February 11, 2010 Wells Submission of G. Brent Pierce without exhibits.

16. Attached as Exhibit O is a true and correct copy of the Order Instituting Cease-and-Desist Proceedings against Pierce in a proceeding captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927.

17. Attached as Exhibit P is a true and correct copy of the SEC's Application for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce.

18. Attached as Exhibit Q is a true and correct copy of the Motion to Extend Deadline for Answer of Respondent Gordon Brent Pierce and Strike Pre-Set Hearing Date as to Pierce.

19. Attached as Exhibit R is a true and correct copy of the June 24, 2010 Order issued by Administrative Law Judge Kelly.

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DATED: this 8th day of July, 2010 at Seattle, Washington.

Christopher B. Wells

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GORDON BRENT PIERCE, Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION, Defendant.	Civil No. **DECLARATION OF G. BRENT PIERCE**

Upon penalty of perjury under the laws of the United States and British Columbia, Canada, the undersigned declares that the following is true.

1. I am a respondent in a new administrative proceeding (the "Second Proceeding") together with Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") (together, the "Corporate Respondents") brought by the U.S. Securities and

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Exchange Commission (the "Commission" or "SEC"). The Second Proceeding covers the same transactions and claims that were addressed and resolved in an earlier SEC administrative proceeding.

2. On July 31, 2008, the Commission brought the earlier administrative proceeding by issuing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (the "First Proceeding"). In the First Proceeding, the Commission's Division of Enforcement (the "Division") claimed that the other respondents and I had violated the registration provisions of the Securities Act of 1933 (the "Securities Act"), Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c), and that I had violated the reporting provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), Sections 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a). The First OIP contended that my "associates" and I had generated resale proceeds of $13 million in Lexington stock distributions in 2004 through an "offshore company" (obviously Newport) resulting from registration violations of the Securities Act caused by my resale of shares registered under Lexington's Form S-8 stock option plan. Documents recording the Lexington S-8 stock transfers upon my resale and through Newport made clear that Jenirob was one of my alleged "associates" that had received a portion of the $13 million in resale proceeds.

3. On June 5, 2009, ALJ Foelak issued an Initial Decision in the First Proceeding (the "Initial Decision"). I did not agree with ALJ Foelak's grounds for holding me liable for registration violations and ordering me to pay disgorgement. I refrained from filing a petition for review or a motion to correct a manifest error or otherwise appealing the Initial Decision to the Commission, because the amount for which I was "ordered to pay disgorgement" could have been increased from just over $2 million to roughly $9.5 million. If I had appealed any aspect of the Initial Decision to the Commission, the Division could have cross-appealed, seeking to increase the disgorgement order to $7.5 million. Conversely, I would have

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appealed every aspect of the Initial Decision with which I disagreed, on numerous grounds, had the Division appealed to the Commission to expand the OIP as necessary and otherwise to increase the disgorgement order by $7.5 million before a final decision. The Division did not petition or otherwise appeal, and I relied on the Division's election, and manifest representation that a $2 million rather than $9.5 million disgorgement order was adequate remedial relief, when I declined to prosecute my rights of appeal.

4. The ALJ had ruled in her Initial Decision that the Commission had the authority to order me to pay disgorgement of the additional $7.5 million sought by the Division. Had the Commission notified me that it would consider doing so, I would have challenged all aspects of the Initial Decision timely at every stage of an appeal. On July 8, 2009, the Commission issued a Notice informing me that "the Commission has not chosen to review the decision as to [my liability for disgorgement] on its own initiative" and, thus, pursuant to 17 C.F.R. § 201.360(d), the Initial Decision "has become the final decision of the Commission with respect to Gordon Brent Pierce. The orders contained in that decision are hereby declared effective." I relied on the Commission's decision not to increase the amount I was ordered to disgorge in the "orders contained in that decision," just as I had relied on the ALJ's observation in the Initial Decision and the Rules of Practice promulgated by the Commission that the Commission had the power to alter the Initial Decision and conduct further hearings before entering a final order of disgorgement. I had likewise relied on the Division's apparent acquiescence in a final order to pay disgorgement of just over $2 million rather than the roughly $9.5 million the Division had previously thought necessary for remedial relief. Consequently the "Final Decision" on "Whether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act" for registration violations was that I should be ordered to pay $2,043,362.33. Based on that representation, in contrast to the $9.5 million under consideration, I declined to exercise my right of appeal of the Commission's Final Decision to a court of appeals. The Final Decision

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contained no notice by the Commission that it was reserving its right to institute new proceedings concerning the $7.5 million in disgorgement already resolved in my favor. Not until after my rights of appeal had expired on the liability rulings and $2.1 million disgorgement order did the Commission so notify me. I relied on the absence of any such notice or reservation in the Final Decision when I declined to challenge the Final Decision with a timely appeal to a court of appeals.

5. Further relying on the Final Decision, through counsel I undertook settlement negotiations with the Commission to satisfy my obligations under the order to pay disgorgement. After several exchanges, I offered an amount and terms the Division had previously identified as sufficient to earn its recommendation that the Commission accept. When I made that offer, I was informed for the first time that the Division was recommending that the Commission commence another administrative proceeding seeking another order to pay disgorgement, this time for the $7.5 million that the Commission had declined to order in its Final Decision. I was advised only then that the settlement offer the Division had elicited from me would not resolve the new disgorgement order the Division was recommending.

6. On June 8, 2010, the Commission brought the Second Proceeding against me based on the same 2004 transactions in Lexington shares that were covered by the First Proceeding. The new OIP entails an order that I pay disgorgement of the same $7.5 million the Division had unsuccessfully urged the ALJ to order but then declined to urge the Commission to order, after the ALJ's refusal. The new June 8, 2010 Order Instituting Cease-and-Desist Proceedings (the "Second OIP") is captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 (the "Second Admin Proceeding").

7. The Second Proceeding is causing me irreparable harm, including damage to my business reputation. It is depriving me of business opportunities, adding to financial pressures from newly circumspect lenders, and imposing costs, expense and prejudice I am

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now suffering in a variety of ways. The Second Proceeding implies that I have engaged in illegal conduct supplemental to that litigated in the First Proceeding, so that a new regulatory action is required, which is false. Not only do persons with whom I do business have difficulty understanding that the Second Proceeding does not involve alleged misconduct different than the First Proceeding, members of the press have the same problem, and spread the same false impression.

8. Attached as Exhibit A is a sampling of articles from widely read and quoted publications. This sample includes articles from "Trading Markets" dated June 9, 2010, and "Stockwatch" and "Investor Village," both by the same author and dated June 10, 2010. Each of these publications appears throughout North America and Europe on the internet. These and others like them are read by private and institutional investors, stock brokers, investment firms, bankers and financial intermediaries, government agencies and securities market regulators. They also serve as primary sources of financial news information for local and regional news and wire services. In other words, this information in one form or other is delivered to virtually everyone who knew or cared about my regulatory dispute with the Commission in the First Proceeding and its resolution. The sample news articles and others reporting the Second Proceeding convey the message that I have been engaged in additional misconduct not resolved earlier. They do not mention that the Commission considered and declined to disgorge the $7.5 million, or that the Division unsuccessfully asked that I be ordered to pay that amount in disgorgement due to control of Newport and Jenirob, or that the Division declined to appeal the adverse ruling, or that the Commission never notified me it would revisit the issue after my appeal rights on the relief it did order had expired. Other news articles have publicized the Second Proceeding in the same misleading fashion.

9. Since the Final Decision in the First Proceeding, long time bankers coincidentally and unilaterally have closed bank accounts belonging to me, my wife, my daughter and my private companies, without explanation. I was attempting to mitigate the

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adverse effects of the Final Decision in the First Proceeding, and was about to make further progress by settling the disgorgement order therein, when I was informed that a second proceeding would be recommended by the Division. This surprise came after I had made significant and somewhat successful efforts to re-establish financial relations with new bankers for myself, my family members and businesses. These new relations are now being threatened by the Second Proceeding, even though it was part and parcel of the First Proceeding.

10. Prior to the Final Decision, I had conducted business involving many financings and transactions with public companies other than Lexington for many years, without findings of violations by any court or securities regulator. The Final Decision in the First Proceeding affected my ability to continue lawful investment activities, but I was resigned to tolerate the consequences of not challenging the Final Decision in the First Proceeding in order to end the Lexington matter and start afresh. Publication of the Second Proceeding, however, has created an unfair impression of new violations that is threatening my ability to carry on with lawful activities and lawfully pursue my occupation as an investment consultant and securities trader.

11. I believe that the irreparable financial harm and emotional hardship my family and I are experiencing will continue unless the Commission is precluded from prosecuting the Second Proceeding.

DATED this 30th day of June, 2010, in Vancouver, British Columbia, Canada.

G. Brent Pierce, Declarant

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EXHIBIT A

TRADING MARKETS .COM
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ENFORCEMENT PROCEEDINGS - In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.

Posted on: Wed, 09 Jun 2010 16:19:08 EDT
Symbols: LXRS

Jun 09, 2010 (SECURITIES AND EXCHANGE COMMISSION RELEASE/ContentWorks via COMTEX) --

On June 8, 2010, the Commission issued an Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 (Order) against Gordon Brent Pierce, 52, of Vancouver, Canada, Newport Capital Corp., and Jenirob Company Ltd.

Pierce was found in a previous Commission action to have violated the federal securities laws in connection with his trading in the stock of Lexington Resources, Inc., a now defunct oil and gas company. Pierce was ordered to disgorge approximately $2 million in illegal trading profits from Lexington sales in his personal account.

In the new enforcement action, the Division of Enforcement seeks to recover an additional $8 million in profits from Lexington sales that Pierce reaped through accounts in the names of two offshore companies, Newport Capital Corp. and Jenirob Company Ltd., which the Division of Enforcement alleges Pierce secretly controlled and concealed from the Commission.

The Division of Enforcement alleges in the Order that in 2004, Pierce controlled Lexington by holding the majority of its stock and by providing Lexington a consultant CEO employed by Pierce. According to the allegations, Pierce sold 1.6 million shares of Lexington stock to the public through the Newport and Jenirob accounts for nearly $8 million while Pierce and his business associates conducted a massive spam and newsletter campaign touting Lexington stock.

The Division of Enforcement alleges that Pierce, Newport and Jenirob violated the registration provisions of Sections 5(a) and 5(c) of the Securities Act of 1933.

An administrative hearing will be scheduled to determine whether the allegations in the Order are true, and to provide Pierce, Newport and Jenirob an opportunity to establish any defenses to the allegations. The proceedings also will determine whether remedial actions are appropriate. As directed by the Commission, the administrative law judge shall issue an initial decision in this matter no later than 300 days from the date of service of the Order. (Rel. 33-9125; File No. 3-13927)

For full details on (LXRS) LXRS, (LXRS) has Short Term PowerRatings at TradingMarkets. Details on (LXRS) Short Term PowerRatings is available at This Link.

SEC files second case against Pierce for Lexington

2010-06-10 14:16 ET - Street Wire

Also Street Wire (U-*SEC) U.S. Securities and Exchange Commission
Also Street Wire (U-LXRS) Lexington Resources Inc

by Mike Caswell

U.S. Securities and Exchange Commission	
Symbol	*SEC
Shares Issued	n/a
Close	n/a
Recent Sedar Documents	

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The case marks the second time that the SEC has filed an enforcement action against Mr. Pierce over Lexington. The regulator previously won an order directing him to pay $2.04-million in illicit profits after a judge found that he pumped the stock to $7.50 through spam and newsletters and then sold 300,000 shares.

The current case cites the same promotion, but it seeks money the SEC was not aware of when it filed the initial action. This time the regulator is asking for the proceeds of sales made through accounts held in the names of two companies that Mr. Pierce controlled, Newport Capital Corp. and Jenirob Company Ltd. The companies held accounts at Hypo Bank, which operates in Liechtenstein, a small country that values privacy laws. The SEC had previously been unable to determine the beneficial owner of the shares.

The second Lexington case

The second case came in the form of an order instituting proceedings filed on June 8, 2010. The nine-page document mostly repeats the allegations set forth in the initial case. According to the SEC, the scheme began in October, 2003, when Lexington's predecessor, Intergold Corp., entered the oil and gas business by conducting a reverse merger with a private company called Lexington Oil and Gas LLC. As part of the transaction, Mr. Pierce and an associate received 3.2 million free-trading shares.

The men then embarked on a promotional campaign that pushed the stock from $3 to $7.50, according to the SEC. The regulator says that a publishing company Mr. Pierce controlled sent millions of spam e-mails and newsletters, which coincided with a flurry of optimistic news releases from the company. From February to June, 2004, the stock's daily volume rose from 1,000 shares to a peak of more than one million shares.

At the same time, Mr. Pierce sold 300,000 shares through his personal account and transferred 1.6 million shares to Newport and Jenirob's accounts at Hypo Bank. The bank, which also held stock owned by Mr. Pierce's associate, sold 2.5 million Lexington shares, the SEC claims. Proceeds from the sales totalled $13-million, including $8-million in June, 2004, alone.

The SEC says it took a lengthy period of time to determine the beneficial owner of the 1.6 million shares because Mr. Pierce not only refused to co-operate, he filed appeals in Liechtenstein that delayed the SEC's efforts to uncover the true ownership. It is not clear how the SEC eventually learned that Mr. Pierce was the beneficial owner of the shares. The order simply states that the "Division received additional documents" that allowed it to trace the ownership to Mr. Pierce.

The SEC has not yet set a date for a hearing.

The case against Mr. Pierce is not the first time that regulators have been interested in Hypo Bank. On May 28, 2008, the B.C. Securities Commission issued a cease trade order against it, stating that the bank was a conduit for suspicious trading. The bank had refused to disclose the identities of clients who had sold $165-million worth of stock in several pink sheets and OTC Bulletin Board companies, citing privacy laws in Liechtenstein.

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The judge also noted that Mr. Pierce took active steps to avoid reporting himself as a shareholder of Lexington, transferring stock between himself and his companies so that he did not surpass the 10-per-cent reporting threshold. In addition to the $2.04-million financial penalty, she entered an order preventing future violations of the U.S. Securities Act.

BCSC banned Pierce

The SEC cases are not the first regulatory actions Mr. Pierce has faced. On June 8, 1993, the BCSC banned him for 15 years after he improperly received money from Bu-Max Gold Corp., a former Vancouver Stock Exchange listing. In an agreed statement of facts, Mr. Pierce admitted that the company raised $210,000 (Canadian) in May, 1989, for exploration, and then paid $100,000 (Canadian) of the money to a private company he controlled "for purposes which did not benefit Bu-Max." In addition to the 15-year ban (which expired on June 8, 2008), Mr. Pierce agreed to pay a $15,000 (Canadian) fine.

A West Vancouver home

The SEC says it will attempt to serve its most recent action on Mr. Pierce by sending it through the Office of International Affairs, and by sending it directly to Mr. Pierce at his home. It lists his address as [redacted]. in West Vancouver, a house that is listed for sale for $9.98-million (Canadian). According to real estate advertising, the house is on a waterfront lot overlooking Vancouver's inner harbour. The 7,000-square-foot, five-bedroom home has a full gym, three-car garage, hot tub, outdoor pool, tiled waterslide, movie theater and a separate guest suite. Property records show that Mr. Pierce and his wife Dana purchased it on Aug. 15, 2007, for $10.4-million (Canadian).

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this guy is going to jail forsure

Posted by stockman @ 2010-06-10 14:42

These guys never learn despite being represented by former Assistant US Attorneys, do they?

Nice house. Would make a great location for an SEC and/or DOJ office in British Columbia. It's readily apparent that's the only way to clean Vancouver up.

Print

EOR.V msg # 16688 6/11/2010 11:25:10 AM
By: Jeauxmon

Re: some things don't change in Vancouver

SEC files second case against Pierce for Lexington

2010-06-10 14:16 ET - Street Wire

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GORDON BRENT PIERCE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GORDON BRENT PIERCE,

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant.

Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Plaintiff Gordon Brent Pierce ("Pierce") brings this Complaint for Declaratory and Injunctive Relief against the Defendant Securities and Exchange Commission ("Commission") to preliminarily and permanently enjoin the Commission from prosecuting or otherwise continuing

the pending administrative proceedings against Pierce captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 (the "Second Action), or any other agency action involving claims and conduct previously litigated, finally decided and not appealed from in the Commission's prior administrative proceedings captioned *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (the "First Action").

2. The Commission lacks jurisdiction and authority to prosecute the Second Action, which is barred by res judicata, collateral estoppel, issue preclusion, equitable estoppel and fundamental principles of due process. In the First Action, the Commission's Division of Enforcement ("Division") claimed that Pierce realized approximately $7.5 million in profits from the improper sale of unregistered stock by two offshore companies which the Division alleged Pierce controlled. The ALJ admitted the Division's evidence and considered its disgorgement claim, but refused to grant the Division the relief it sought. In response to the ALJ's decision, the Division did not move to amend the order instituting proceedings in the First Action or appeal the ALJ's decision denying its disgorgement claim and, although it had authority to do so on its own initiative, the Commission similarly refused to review, reverse or modify the ALJ's decision. Instead, the Commission adopted the ALJ's decision as its own final judgment in the First Action.

3. Months later, the Division ignored the preclusive effect of that prior judgment and its own acquiescence therein, when it filed the Second Action against Pierce. The Second Action alleges the very same $7.5 million disgorgement claim the Division asserted, the ALJ rejected and the Commission refused to reconsider in the First Action—all of which Pierce relied upon when he elected not to appeal the First Action in the interests of finality. The Commission does not get a second bite at the apple. Pierce brings this action to immediately forestall further unlawful, costly and vexatious litigation by the Commission.

II. JURISDICTION AND VENUE

4. This action arises under the Securities Act of 1933, 15 U.S.C. § 77 *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.*, the Administrative Procedure Act, 5 U.S.C. §§ 702 - 706, and the Due Process Clause of the United States Constitution.

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 (the Administrative Procedure Act). The Court has authority to grant the declaratory and injunctive relief sought herein pursuant to 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act) and 28 U.S.C. § 1651 (the All Writs Act).

6. Pierce is not required to exhaust administrative remedies with the Commission in the Second Action as a prerequisite to judicial declaratory and injunctive relief in this action because:

(a) Pierce will suffer irreparable injury from the Commission's continued prosecution of the Second Action and its threat therein to bring still more such actions;

(b) the Commission lacks authority and jurisdiction to prosecute the Second Action because (1) that action is absolutely barred by the doctrines of res judicata and/or equitable estoppel, and (2) continued prosecution of that unlawful and unauthorized action and the threat to bring still more of such actions would constitute harassing and vexatious duplicative litigation, which would constitute an abuse of process and would be in violation of Pierce's due process rights;

(c) no agency expertise or fact-finding is necessary to the determination of the purely legal, constitutional or judicial discretionary issues raised herein, none of which pertains to the merits of the substantive allegations raised in the Second Action; and

(d) resort to administrative processes would be futile inasmuch as the Commission has already considered and rejected Pierce's demand that the Commission observe the finality of the First Action and refrain from initiating a Second Action.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). Further, the Commission has conceded proper venue in this Court by filing an action against Pierce to enforce the First Action, Case No. 3:10-mc-80129, in this Court, which action remains pending, as described further below.

III. PARTIES

8. Plaintiff Gordon Brent Pierce is a Canadian citizen residing in Vancouver, British Columbia and the Cayman Islands.

9. Defendant the Securities and Exchange Commission is the federal administrative agency of the United States with authority to enforce the Securities Act of 1933 and the Securities Exchange Act of 1934.

IV. GENERAL ALLEGATIONS

A. The First Action

10. Beginning sometime in 2005, the Commission initiated an investigation of Pierce in connection with alleged violation of securities registration and reporting requirements in connection with the trading of Lexington Resources, Inc.'s ("Lexington") common stock. Following its investigation, on July 3, 2007, the Commission informed Pierce that it intended to bring an administrative action against Pierce. At the Commission's invitation, Pierce filed a Wells Committee Submission, 17 C.F.R. § 202.5(c), in response to the Commission's threatened action, to no avail.

11. On July 31, 2008, the Commission's Division of Enforcement brought the First Action by filing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") against Pierce and others in a proceeding captioned *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109. The Division claimed that Pierce violated the registration provisions of the Securities Act, Sections 5i. and 5(c), 15 U.S.C.§ 77e(a) & (c), and the reporting provisions of the Exchange Act, Sections 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a).[1]

12. The First OIP alleged, among other things, that Pierce and "his associates" violated the registration provisions by reselling shares they received from Lexington without a valid registration statement or exemption from registration in 2004. The First OIP further alleged that Pierce violated the reporting provisions by late-filing a Schedule 13D concerning his ownership or control of Lexington stock during the period November 2003 to May 2004, and failing to file Forms 3, 4 or 5 in connection with Pierce's alleged ownership or control of more than ten percent of Lexington stock during that period.

[1] The other Respondents, Lexington and Grant Atkins, separately settled with the Commission in consent orders.

13. The First OIP was broad and, as it turned out, malleable. It provided, "[T]he Commission deems it necessary and appropriate that cease-and-desist proceedings be instituted to determine ... [w]hether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act" for registration violations resulting from Lexington stock sales by "Pierce and ***his associates***," "sold ... through ***his offshore company***" and "generating sales proceeds over $13 million ... " *Id.* ¶¶ 14-16 (emphasis added). The First OIP alleged that proceeds from such sales exceeded $13 million. *Id.*, ¶15.

14. When Pierce insisted that the Commission identify the "associates" and "his offshore company," the Division took the position, permitted by the ALJ, that transaction documents with which Pierce was familiar identified the "associates" and Pierce's "offshore company." Documents used in the First Action made it obvious that the "offshore company" was Newport Capital Corp. ("Newport"), and that Jenirob Company ("Jenirob") was another one of the "associates" whose Lexington stock sales collectively generated $13 million. As a result of this informal amendment process, without ever formally moving to amend the First OIP, the Division and ALJ, and thus the Commission itself, specifically claimed that, to the extent Newport and Jenirob were involved in the resale of Lexington stock by Pierce, the OIP included both for purposes of "determin[ing]" whether Mr. Pierce committed registration violations, and "[w]hether Respondent Pierce should be ordered to pay disgorgement."

15. Pierce answered the First OIP and denied liability. His motion for a more definite statement accompanied the answer and was resolved as described above. Several months of discovery and other preliminary proceedings followed. On December 5, 2008, the Division filed a motion for Summary Disposition in which it clarified that it sought $2,077,969 in disgorgement, plus interest, from Pierce, which represented the amount Pierce individually realized on the sale of Lexington stock during 2004.

16. A three-day hearing was held before Administrative Law Judge Foelak in the First Action in February 2009. The hearing was closed on February 4, 2009, and the record of evidence was closed on March 6, 2009.

B. <u>The Commission's Claim for Additional Disgorgement</u>

17. On March 18, 2009, the Division moved for the admission of new evidence that had become available after the record of evidence had closed (hereinafter, the "New Evidence"). The Commission had induced a foreign regulator to produce the New Evidence in March 2009 by representing in February 2008, apparently without any correction, that the Commission was investigating antifraud claims by Pierce. But no antifraud claims were included in the OIP.

18. The Division claimed that the New Evidence showed that—in addition to the $2,077,969 Pierce allegedly made from the sale of Lexington shares on his personal account—Pierce had "made millions of dollars in additional unlawful profits by selling Lexington shares" through two offshore company "associates" he purportedly controlled, specifically Newport and Jenirob. The Division alleged that "the new evidence shows that disgorgement far in excess of $2.1 million is warranted against Pierce in these proceedings." The Division perceived no need to seek expansion of the First OIP in light of the position it had previously taken in response to Pierce's request for a more definite statement; that is, the First OIP covered the issue of "[w]hether Pierce should be ordered to pay disgorgement" regarding sales of Lexington shares by Pierce involving "his associates" and "offshore company." As such, the Division did not move the ALJ or the Commission to expand the First OIP in any respect, as it was plainly permitted to do. *See* 17 C.F.R. § 201.200(d)(2).

19. Less than a week later, the Division filed its post-hearing brief. The Division repeatedly cited to the New Evidence in support of its claim that Pierce reaped alleged profits from the sale of unregistered Lexington stock by Newport and Jenirob. Specifically, in addition to the $2,077,969 million Pierce allegedly made from the sale of Lexington stock on his personal account, the Division argued that the New Evidence showed that Pierce should be ordered to pay disgorgement of an additional $7,523,378, which reflected alleged net proceeds from the sale of Lexington shares by Newport and Jenirob in 2004.

20. The Division's Proposed Findings of Fact and Conclusions of Law, filed in conjunction with the Division's post-hearing brief, similarly contained a myriad of proposed findings pertaining to the New Evidence, including:

> ... As revealed in the new records produced by the Division on

> March 10, 2009, Pierce also controlled accounts at Hypo Bank in the names of Newport and another offshore company, Jenirob ...[.]
>
> * * *
>
> ... Based upon documents that it received from Liechtenstein authorities ... , the Division has determined that by June 2004, Pierce had moved to the Newport and Jenirob accounts a total of 1,634,400 Lexington shares that had been issued purportedly pursuant to Form S-8 registration statements. ... Pierce sold these shares in the open market through Newport and Jenirob accounts at the Hypo Bank between February and December 2004.

(Proposed Findings of Fact 32 & 55). The Division likewise proposed a conclusion of law that, because the Newport and Jenirob "sales were in violation of Section 5's registration requirements, Pierce should disgorge total net proceeds of $9,601,347," of which $7,523,378 was derived from Newport and Jenirob sales.

21. Pierce opposed the Division's motion to admit the New Evidence. Among other things, Pierce pointed out that the Commission's own Rule of Practice 452, 17 C.F.R. § 201.452, allowed the Division to move the Commission to admit additional evidence, but no rule allowed the Division to seek the introduction of new evidence directly to the ALJ following the close of evidence. Pierce also argued that the New Evidence did not support the Division's theories of liability and disgorgement in any event.

22. On April 7, 2009, ALJ Foelak issued an order granting the Division's motion to admit the New Evidence. ALJ Foelak ruled: "Under the circumstances the record of evidence will be reopened to admit [the New Evidence] for use on the issue of liability, but not for the purpose of disgorgement based on sales of stock by Newport and Jenirob. These entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP."

23. Having admitted the New Evidence as material to the issue of liability, ALJ Foelak's ruling that she could not consider it for purposes of determining disgorgement was plainly inconsistent with the Division's and the ALJ's prior position that the First OIP included allegations related to Newport and Jenirob as the "offshore compan[ies]" and "associates" who had received portions of the $13 million in stock sale proceeds. As noted above, the First OIP specifically alleged that Pierce had "transferred or sold [Lexington stock] through his offshore

company," and asked, "[w]hether *Respondent Pierce should be ordered to pay disgorgement* pursuant to Section 8A(e) of the Securities Act" because of registration violations involving Pierce's resale or distribution through his "offshore company" and profits on "sales proceeds of over $13 million" by "Pierce and his associates."

24. In response to the ALJ's ruling, the Division could have requested either the ALJ or the commission to expressly add Newport and Jenirob as parties in the caption and include them in the determination of whether they – in addition to Mr. Pierce – should be ordered to pay disgorgement; and then served them with process for a hearing. The Division did not move to amend, nor did it otherwise appeal or make any submission to the Commission to address the ALJ's determination that Pierce could not be ordered to pay disgorgement as it related to his alleged control of Newport and Jenirob accounts. *See* 17 C.F.R. § 201.200(d). The Division's acquiescence signaled to Pierce that the Division, like the ALJ, had determined that, to the extent remedial relief were granted, the approximately $2.1 million figure previously identified would be adequate. Indeed, as discussed below, the Division never took any steps to appeal or otherwise reverse any of ALJ Foelak's rulings.

C. <u>The Initial Decision</u>

25. On June 5, 2009, ALJ Foelak issued an Initial Decision in the First Action, Release No. 379 (the "Initial Decision"). The Initial Decision was replete with cites to the New Evidence and accepted the Division's claim that Pierce controlled Newport and Jenirob, and, among other things, that Pierce violated the reporting requirements of Sections 13(d)(1) and 16(a) of the Exchange Act by virtue of the Lexington stock he purportedly controlled and sold through Newport. The Initial Decision ordered Pierce to disgorge $2,043,362.33, which ALJ Foelak concluded was the amount of profit Pierce allegedly made from the sale of Lexington stock from his personal account.

26. With respect to the New Evidence, the Initial Decision incorporated ALJ Foelak's prior ruling, noting further that, "based on newly discovered evidence ..., the Division argued that over seven million dollars in additional ill-gotten gains should be disgorged, representing profits from the sale of unregistered stock by Jenirob and Newport. However, as the undersigned ruled

previously, *these entities are not mentioned in the OIP*, and such disgorgement would be outside the scope of the OIP. The Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing beyond the framework of the original OIP." The Initial Decision also specifically noted that "[a]ll arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected." Of course, Newport and Jenirob *were* "mentioned in the OIP," in light of Pierce's motion for a more definite statement and the ensuing statements by the Division in hearings and pleadings. The Division did not seek reconsideration or immediate discretionary review of ALJ Foelak's Initial Decision on behalf of the Commission, in which she "determined" that the cease and desist orders she entered and the amount "Respondent Pierce should be ordered to pay disgorgement" were adequate to serve the remedial interests of the public.

D. <u>The Division Does Not Appeal</u>

27. Pursuant to the Commission's Rules of Practice, both parties had 21 days to seek review of the Initial Decision with the Commission. *See* 17 C.F.R. §§ 201.360(b) and 410(a). The Division did not file a petition for review. In so doing, the Division chose not to appeal, and in fact accepted, ALJ Foelak's decision—manifested in both her order admitting the New Evidence and the Initial Decision itself—to deny the Division's claim (as well as its proposed findings and conclusions) that "Pierce should be ordered to pay disgorgement" of profits made from the sale of Lexington stock by Newport and Jenirob. Indeed, the Division manifested its agreement that the remedial relief ordered by the Initial Decision was complete and adequate to redress all the conduct and litigated in the First Action; that is, that "Pierce should be ordered to pay disgorgement" of approximately $2.1 million rather than $9.6 million.

28. Although Pierce believed that the Initial Decision was erroneous, including the ruling that registration violations had occurred, Pierce did not file a petition for review with the Commission. In electing not to file a petition for review, thereby foregoing his right to challenge the Initial Decision with the Commission, Pierce specifically relied on the decision by the Division not to (a) seek review of ALJ Foelak's disgorgement ruling by the Commission or (b) request the Commission to amend the OIP as necessary to include a claim for an order that Pierce

pay disgorgement of the alleged Newport and Jenirob profits. Pierce had incurred substantial expense during the Commission's investigation and proceedings, and desired finality with respect to the Division's approximately $9.5 million disgorgement claim against him.

29. There was good reason for the Division not to vindicate its position through an appeal of the Initial Decision. Although the Division had taken the position, contrary the ALJ Foelak's ruling, that the First OIP did not require amendment – because Newport and Jenirob were "offshore companies" and "associates" of Pierce within the meaning of the First OIP and, thus, sufficient "mentioned in the OIP" – the Division also understood that, if it were to appeal the ALJ's Initial Decision in this respect, a cross-appeal by Pierce could ultimately lead to reversal of the ALJ's underlying liability findings, and a ruling by the Commission that no disgorgement of any amount was warranted.

30. Indeed, had the Division appealed or sought any other relief from the Commission, Pierce would have filed a petition for review and/or cross-review and vigorously contested liability under the Initial Decision as well as any effort to increase the order to pay disgorgement beyond the $2.1 million ALJ Foelak ordered. *See* 17 C.F.R. § 410(b) ("[i]n the event a petition for review is filed, any other party to the proceeding may file a cross-petition for review within ... ten days from the date that the petition for review was filed"). Because he did not file a petition for review in reliance on the Division's actions and acquiescence in the total disgorgement amount, Pierce also surrendered his right to seek judicial review of the Initial Decision. *See* 17 C.F.R. § 410(e) ("a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review of a final order entered pursuant to such decision").

31. Even though neither party filed a petition for review, the Commission still had plenary authority "on its own initiative" to review ALJ Foelak's Initial Decision, and to reverse, modify, set aside or remand any or all of the Initial Decision, including ALJ Foelak's decision to consider the New Evidence for purposes of Pierce's alleged liability, but denying the Division's claim that Pierce should be ordered to disgorge an additional $7.5 million in connection with the sale of Lexington stock by Newport and Jenirob. *See* 17 C.F.R. § 201.411(a) & (c). As noted above, the Commission also retained the authority "[u]pon its own motion," to accept and

consider the New Evidence for any purpose, or order further proceedings with the ALJ thereon. *See* 17 C.F.R. § 201.452.

32. The Commission, however, decided not to review or modify ALJ Foelak's Initial Decision or order further proceedings in the First Action. Rather, on July 8, 2009, the Commission issued a Notice informing the parties that "the Commission has not chosen to review the decision as to [Pierce] on its own initiative" and, thus, pursuant to 17 C.F.R. § 201.360(d), the Initial Decision "has become the final decision of the Commission with respect to Gordon Brent Pierce. The orders contained in that decision are hereby declared effective." And with that, the Initial Decision became the Commission's "Final Decision." In short, that "Final Decision" decided the question posed in the First OIP and litigated in the First Action: "Whether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act" for registration violations by Pierce "and his associates."

E. The Second Action

33. Over the next several months, Pierce and Commission staff negotiated terms upon which Pierce could satisfy the $2,043,362.33 disgorgement remedy, plus prejudgment interest, imposed on Pierce by the Commission's Final Decision in the First Action. In doing so, Pierce relied on the Division's manifest agreement that disgorgement had been "determined" with finality when Pierce exchanged compromise and settlement offers with the Division in an effort to resolve his disgorgement obligations.

34. Only after Pierce had increased his offer to an amount the Division had represented would be acceptable, did the Commission staff inform Pierce that the Commission intended to initiate a new administrative action against him in an effort to re-litigate its determination that Pierce be ordered to pay disgorgement for registration violations resulting from his resale and distribution of Lexington shares. The Commission intended to revive the question whether Pierce should be ordered to pay disgorgement of the alleged $7.5 million in net proceeds received by Newport and Jenirob from the sale of Lexington stock in 2004. Facing the prospect of another burdensome and costly administrative action sparking a new round of bad publicity on a claim that had been considered and finally decided as unnecessary to the remedial

relief ordered against him in the First Action, and believing that Commission staff had been dealing with him in bad faith, Pierce immediately broke off further negotiations for payment under the Final Decision.

35. In an effort to forestall the Commission's threatened action, in February 2010, Pierce delivered a Wells Committee Submission to the Commission arguing, among other things, that the Commission was barred by res judicata and estopped from re-litigating claims previously litigated and decided in the First Action. Pierce specifically reminded the Commission that the Division did not appeal its rejected $7.5 million disgorgement claim to the Commission, nor did the Commission itself choose to review, modify or overrule the Initial Decision's disgorgement remedy, although it had the authority and discretion to do so. The Commission either rejected or ignored Pierce's Wells Submission arguments.

36. On June 8, 2010, the Commission brought the Second Action against Pierce by issuing an Order Instituting Cease-and-Desist Proceedings (the "Second OIP") against Pierce in a proceeding captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927. As in the First Action, the Division claims that Pierce violated the registration provisions of the Securities Act, Sections 5i. and 5(c), 15 U.S.C.§ 77(e)(a) & (c) in connection with the sale of unregistered Lexington stock in 2004. The Commission again chose to prosecute claims in its own internal forum, when it could have brought them in a federal district court, because it understood that a court would recognize immediately that the Commission's statutory authority and jurisdictional basis under Section 8A of the Securities Act for the Second OIP no longer existed as to Pierce.

37. The allegations contained in the Second OIP are based exclusively on the same transactions, the same time period, and the same New Evidence that the Division litigated and the Commission considered in the First Action. Indeed, the Second OIP is replete with language culled nearly verbatim from the Proposed Findings of Fact and Conclusions of Law which the Division proffered, but ALJ Foelak refused to adopt, in the First Action, including:

> ... In March 2009, the Division received additional documents relating to the Liechtenstein bank's sales of Lexington stock. These documents showed that, in addition to Pierce's sales through his

> personal account, Pierce deposited 1.6 million Lexington shares in accounts at the Liechtenstein bank in the names of Newport and Jenirob. Pierce was the beneficial owner of the Newport and Jenirob accounts. Pierce sold the 1.6 million shares through the Newport and Jenirob accounts between February and December 2004 for net proceeds of $7.7 million.

(Second OIP, ¶ 25).

38. Just as important, in the Second Action, the Division seeks the more than $7.5 million disgorgement award (now $7.7 million) that ALJ Foelak rejected in the Initial Decision, which the Division and later the Commission chose not to challenge or disturb in the First Action. The Division admits all of this on the face of the Second OIP:

> ... On July 31, 2008, the Commission instituted cease-and-desist proceedings against Pierce ... [.] In that action, the Division sought disgorgement from Pierce of the $2 million in net proceeds from the sale of 300,000 Lexington shares in his personal account ... in 2004. ...
>
> ... Before issuance of the Initial Decision in the prior action, the Division moved to admit the new evidence ... ***and also sought the additional $7.7 million in disgorgement.*** The new evidence was admitted in the prior action, but the Administrative Law Judge ruled that disgorgement of the $7.7 million in Pierce's sales in the Newport and Jenirob accounts was outside the scope of the [OIP] in the prior action because Newport and Jenirob were not named in the OIP.
>
> ... The Initial Decision in the prior action, issued June 5, 2009, found that Pierce committed the alleged violations of the Securities Act and Exchange Act and ordered Pierce to disgorge $2,043,362.33 in proceeds from his sale of the 300,000 Lexington shares in his personal account. ***Neither party appealed the Initial Decision and it became the final decision of the Commission on July 8, 2009.***

(Second OIP, ¶¶ 27, 29 & 30, emphasis added). In short, it is clear that the Commission hopes to directly or indirectly benefit from the preclusive effect of the Final Decision to establish Pierce's liability in the Second Action, while, at the same time, escaping the preclusive effect of the Final Decision on the Commission's ability to re-litigate the amount to be disgorged from Pierce, which the Division elected not to challenge and the Commission elected not to revise. Indeed, the Second OIP admits its purpose is "to determine: ... Whether Respondents [Pierce, Newport and Jenirob] should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act,"

which is precisely what was decided in the Final Decision, at least as to Pierce.

39. Equally troublesome, in the Second OIP, the Commission again uses the term "associates." Through this pleading device, the Commission threatens to repeat another round of repetitive litigation if it doesn't achieve all it wants in the Second Action. This threat of future administrative actions is never ending if, as the Commission apparently hopes, reference to unnamed "associates" in the body of the OIP allows it to escape ordinary principles of res judicata.

F. The Collection Action

40. The Commission's desire to have it both ways is further reflected by its efforts to enforce the Final Decision in the First Action. On June 8, 2010, the same day it filed the Second Action, the Commission filed an action in the United States District Court for the Northern District of California at San Francisco, Case No. 3:10-mc-80129, to enforce the disgorgement remedy imposed by the Final Decision (the "Collection Action"). In the Collection Action, the Commission expressly recognizes that the Final Decision represents a final judgment of the claims litigated in the First Action. The Commission seeks an equitable remedy, entry of a court order enforcing its Final Decision, while inequitably abusing its power to act in a quasi-judicial capacity by prosecuting the Second Action and threatening more such actions.

V. FIRST CAUSE OF ACTION

(Declaratory/Injunctive Relief – Res Judicata)

41. Pierce adopts and incorporates by reference the allegations contained in paragraphs 1 through 40 above as if fully set out herein.

42. An actual controversy of a justifiable nature presently exists between Pierce and the Commission as to whether the Commission acted illegally, without authority and in violation of the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Administrative Procedure Act when it filed a Second Action against Pierce in an effort to re-litigate the precise claims previously litigated and finally decided in the First Action, and thus absolutely barred by the doctrine of res judicata, including collateral estoppel, issue preclusion and claim preclusion.

43. The issuance of declaratory and/or injunctive relief on res judicata grounds by this Court will terminate the existing controversy between the parties because such relief will require the Commission to cease prosecution of the Second Action, and preclude any other or future agency action involving claims and conduct previously litigated, finally decided and not appealed from in the First Action.

VI. SECOND CAUSE OF ACTION

(Declaratory/Injunctive Relief – Equitable Estoppel)

44. Pierce adopts and incorporates by reference the allegations contained in paragraphs 1 through 40 above as if fully set out herein.

45. An actual controversy of a justifiable nature presently exists between Pierce and the Commission as to whether the Commission should be equitably estopped from prosecuting the Second Action against Pierce where:

(a) the Division knew when it did not appeal the Initial Decision to the Commission, and the Commission knew when it did not review the Initial Decision, that the Commission intended to subsequently initiate the Second Action;

(b) the Commission intended Pierce to rely on its purported acquiescence in the finality of the Initial Decision and Final Decision in the First Action, including the order to pay disgorgement pursuant to Section 8A(e) of the Securities Act;

(c) Pierce did not know until long after the period for appeal of the Initial Decision and/or Final Decision lapsed that the Commission intended to subsequently initiate the Second Action;

(d) Pierce detrimentally relied on the Commission's conduct by waiving his right to appeal the Initial Decision and/or Final Decision in the First Action;

(e) the Commission's conduct in this regard was affirmative, and not mere negligence; and

(f) unless estopped from proceeding on the Second Action, the Commission's conduct will cause a serious injustice to Pierce and will unduly harm the public interest.

46. The issuance of declaratory and/or injunctive relief by this Court on the equitable

estoppel issue will terminate the existing controversy between the parties because such relief will require the Commission to cease prosecution of the Second Action and prevent future prosecutions by the Commission on the same adjudicated facts and claims.

VII. THIRD CAUSE OF ACTION

(Declaratory/Injunctive Relief – Violation of Due Process)

47. Pierce adopts and incorporates by reference the allegations contained in paragraphs 1 through 40 above as if fully set out herein.

48. An actual controversy of a justifiable nature presently exists between Pierce and the Commission as to whether the Commission violated and continues to violate Pierce's right to due process guaranteed by the United States Constitution by subjecting Pierce to unlawful, harassing and costly duplicative litigation of the Second Action. Moreover, the Commission's use of the term "associates" again in the Second OIP demonstrates its intent to threaten and/or commence future further unlawful, harassing and costly duplicative litigation.

49. The issuance of declaratory and/or injunctive relief by this Court on the due process issue will terminate the existing controversy between the parties because such relief will require the Commission to cease prosecution of the Second Action and refrain from commencing more such actions. This relief will not only mitigate the Commission's violation of Pierce's right to due process, but it will protect the public's interest in deterring any other or future agency action involving unlawful, harassing and costly duplicative litigation previously litigated, finally decided and not appealed from in the First Action in accordance with regulatory requirements.

* * *

WHEREFORE, Pierce respectfully requests the following relief:

A. That the Court declares that the Commission acted illegally and without statutory authority, and violated Pierce's constitutional rights, by filing and prosecuting the administrative cease-and-desist proceedings captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927, as further described herein;

B. That the Court issue a preliminary and permanent injunction enjoining the Commission from continuing the administrative cease-and-desist proceedings against Pierce captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927, or any other or future agency action involving claims and conduct previously litigated, finally decided and not appealed from in the Commission's prior administrative proceedings against Pierce captioned *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109;

C. That the Commission temporarily be barred from continuing to apply for, procure or use for the purpose of disgorging assets, the order proposed in this Court in the Collection Action, Misc. No. CV-10-80129-MISC, and that such action, an application for a court order enforcing the Commission's Final Decision of July 8, 2009 in Administrative Proceeding File No. 3-13109, be stayed until the relief sought by Pierce herein is finally adjudicated.

D. An award of reasonable attorneys fees and costs as may be permitted by law; and;

E. For such other and further relief as the Court deems just and proper.

Dated: July 9, 2010

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General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 10-17218 **Docketed:** 10/04/2010
Nature of Suit: 2850 Securities, Commodities, Exchange
Gordon Pierce v. SEC
Appeal From: U.S. District Court for Northern California, San Francisco
Fee Status: Paid

Case Type Information:
1) civil
2) united states
3) null

Originating Court Information:
District: 0971-3 : 3:10-cv-03026-SI
Court Reporter: Kathy Pope Wyatt, Court Reporter
Trial Judge: Susan Illston, District Judge
Date Filed: 07/09/2010

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
09/02/2010	09/02/2010	10/01/2010	10/04/2010

10/04/2010	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 10/11/2010. Transcript ordered by 11/01/2010. Transcript due 11/30/2010. Appellant Gordon Brent Pierce opening brief due 01/10/2011. Appellee Securities And Exchange Commission answering brief due 02/09/2011. Appellant's optional reply brief is due 14 days after service of the answering brief. [7495490] (GR)
10/11/2010	2	Filed (ECF) Appellant Gordon Brent Pierce Mediation Questionnaire. Date of service: 10/11/2010. [7503467] (RPM)
10/26/2010	3	Filed order MEDIATION (VLS): The Mediation Program of the Ninth Circuit Court of Appeals facilitates settlement while appeals are pending. See Fed. R. App. P. 33 and Ninth Cir. R. 33-1. The court has scheduled a telephone settlement assessment conference, with counsel only, on November 17, 2010, at 2:00 p.m. PACIFIC (San Francisco) Time to discuss whether this case is appropriate for participation in the Mediation Program. [7522569] (AF)
11/18/2010	4	Filed order MEDIATION (RGA): The court has determined that this appeal will not be selected for inclusion in the Mediation Program. All further inquiries regarding this appeal, including requests for extensions of time, should be directed to the Clerk's office. The briefing schedule previously set by the court is amended as follows: appellant shall file an opening brief on or before May 11, 2011; appellee shall file an answering brief on or before June 13, 2011; appellant may file an optional reply brief within fourteen (14) days from the service date of the answering brief. [7550017] (AF)
12/08/2010	5	Filed (ECF) notice of appearance of Thomas Jeffrey Karr for Appellee SEC. Date of service: 12/08/2010. [7571182] (TJK)
12/08/2010	6	Added attorney Thomas J. Karr for SEC, in case 10-17218. [7571296] (EB)

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ADMINISTRATIVE PROCEEDING
FILE NO. 3-13927

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 11, 2011

In the Matter of	:	
	:	ORDER
GORDON BRENT PIERCE,	:	
NEWPORT CAPITAL CORP., and	:	
JENIROB COMPANY LTD.	:	

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on June 8, 2010. Under consideration is Respondent Gordon Brent Pierce's (Pierce) Motion for a Postponement or Stay of the Enforcement Proceeding (Motion), filed March 9, 2011.[1] Previously, the parties requested leave to file motions for summary disposition and consented to an initial decision based on the pleadings. Leave was granted, pursuant to 17 C.F.R. § 201.250(a). March 14, 2011, was set as the due date for the motions for summary disposition; April 1, 2011, for oppositions; and April 11, 2011, for replies. Gordon Brent Pierce, Admin. Proc. No. 3-13927 (A.L.J. Nov. 19, 2010).

The Motion seeks a postponement or stay of this proceeding pending a decision in Pierce v. SEC, Case No. 10-17218 (9th Cir.), in which Pierce is asking the Court of Appeals to reverse the U.S. District Court's refusal to enjoin the instant proceeding. Pierce argues, at length, the basis for his position that the District Court's ruling was erroneous. However, this proceeding will not be stayed or postponed. The Commission has long held that the pendency of an appeal is not grounds for stay or postponement of an administrative proceeding. See, e.g., Don Warner Reinhard, Exchange Act Release No. 63720, 2011 WL 121451, at n.29 (Jan. 14, 2011); James E. Franklin, 91 SEC Docket 2708, 2714 n.15. Nonetheless, in view of its imminence, the due date for the parties' motions for summary disposition will be postponed one week, until March 21, 2011.

IT IS SO ORDERED.[2]

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

[1] Pierce's Motion was originally directed to the Commission. It was filed February 28, 2011, and responsive pleadings were filed by the Division of Enforcement and Pierce. On March 9, 2011, Pierce filed a pleading re-directing the matter to the undersigned. Accordingly, the Motion and responsive pleadings will be considered nunc pro tunc as filed before the undersigned as of March 9.

[2] Pierce's November 24, 2010, Motion for Withdrawal of Administrative Law Judge and responsive pleadings remains pending.

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UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13927

In the Matter of **GORDON BRENT PIERCE, NEWPORT CAPITAL CORP., and JENIROB COMPANY LTD.,** **Respondents.**	**ANSWER OF GORDON BRENT PIERCE**

Without prejudice to vindicating his rights in the proper forum, Respondent G. Brent Pierce submits this Answer to the Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 (the "Securities Act") issued on June 8, 2010 as Administrative Proceeding File No. 3-13927 (the "Second OIP") and pertaining to trading in the securities of Lexington Resources, Inc. ("Lexington") (the "Second Action").

Mr. Pierce denies that any further relief against him is permissible. The relief sought in this proceeding is no different than the relief that was to be determined *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109) (the "First OIP") issued on July 31, 2008 in the "First Action" and considered but rejected by the Commission prior to its Notice of Final Decision in Administrative Proceeding No. 3-13109 on July 8, 2009 (the "Final Decision").

Mr. Pierce denies that the Commission has the authority to issue the Second OIP under Section 8A of the Securities Act and thereby prejudge its own prior actions. Mr. Pierce denies that the Commission has jurisdiction over this proceeding and denies that the Commission any longer has the authority to require him to answer the allegations in the Second OIP, because they were fully adjudicated in the First Action.

Mr. Pierce further objects to the Division's inconsistent legal positions. The Division contended implicitly that an order disgorging from Mr. Pierce $7.5 million in Lexington stock trading profits from resale by Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") was covered by the First OIP, because the Division made no motion to amend under Rule of Practice 200(d) when it submitted that claim along with supporting evidence in the First Action. The Division now contradicts itself by contending that the First OIP did not cover its $7.5 million disgorgement claim against Mr. Pierce.

Mr. Pierce objects to the Commission's inconsistent legal positions as well. This Second Action contradicts the Commission's Application for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce filed on June 8, 2010 – the same day this action was commenced -- in the United States District Court for the Northern District of California in Misc. No. CV-10-80129-Misc (JSW).

Mr. Pierce has instituted stay and injunction proceedings in the same court to bar this Second Action and any others using the term "associates" as a device to relitigate facts, claims and issues adjudicated in the First Action. Mr. Pierce hereby incorporates by reference his court pleadings, attached as Exhibit A hereto, in support of his affirmative defenses barring this Second Action.

Subject to the foregoing, and additional objections below, Mr. Pierce answers allegations in the numbered paragraphs of the OIP:

Nature of the Proceeding

1. Because Mr. Pierce and the Commission are equally barred from relitigating the allegations in the Second OIP, Mr. Pierce is precluded from denying the allegations of paragraph 1, just as the Commission is precluded from bringing them. Mr. Pierce would have denied that he controlled Jenirob, except that it was litigated to conclusion on evidence submitted with the Division's related and rejected request for disgorgement, which was never appealed by the Division or altered by the Commission before all rights of appeal had expired.

2. Regarding the allegations in paragraph 2, Mr. Pierce denies that he ever held the majority of Lexington's stock, and asserts that the Commission has already ruled that he did not. *(See* the Initial Decision of June 5, 2009 in the First Action at 14, ruling that Pierce's control over Lexington stock peaked at 23.9%: "Including the unexercised options granted to IMT, over which Pierce had dispositive power, he had 23.9% interest in Lexington on February 2, 2004.") Consequently, the Commission is barred from taking an inconsistent position in the Second Action through the Division's allegations herein. Consistent with the First Decision, in late 2003 and early 2004 Lexington issued a number of shares registered under Form S-8 to Mr. Pierce and persons described in the First Action as Mr. Pierce's "associates." To the extent the remaining allegations in paragraph 2 conform to the Final

Decision in the First Action, Mr. Pierce is admittedly barred from denying them; and to the extent the allegations are inconsistent, the Commission is barred from bringing them. The Commission is also barred from bringing consistent allegations to commence an action for relief that has already been adjudicated. That includes all of the relief that applies to Mr. Pierce in this Second Action.

Further, Mr. Pierce objects to the Commission's use of the term "associates" in paragraph 2 of the Second OIP, and throughout, because the Commission has already used the terms "associate" and "offshore company" as a pretext to distort the scope of the First Action and relitigate remedial relief derived from transactions covered by the Final Decision. The Commission now contends implicitly and inconsistently with the First Action that the "associate" of Mr. Pierce described in the Second OIP was not "named" in the First OIP, or in the pleadings, evidence and orders in the First Action, and incorporated into the relief as to Mr. Pierce in the Final Decision. This tactic violates res judicata and due process principles by exposing Mr. Pierce to a series of newly minted administrative proceedings based on the same 2004 transactions, violations and remedies covered by the Final Decision. This practice abuses the Commission's statutory powers under Section 8A of the Securities Act by employing a pretense that Mr. Pierce remains exposed to further disgorgement orders based on his liability for Lexington stock trading profits by "associates" not named in a previous OIP.

Respondents

3. Mr. Pierce admits that he lawfully provided capital raising services to Lexington through a private company that was compensated by means other than S-8 registered stock option awards, as the Division conceded in the First Action. Mr. Pierce admits that he was a party to the First Action. Mr. Pierce admits that he is 53 and is a Canadian citizen residing in Vancouver, British Columbia.

4. Mr. Pierce admits that Newport was a privately-held company organized under the laws of Belize, admits that he has served as a president and a director of Newport in the past and that Newport was obviously the company that the First OIP referred to as an "associate" and "his offshore company," which held Lexington securities as described in Schedule 13Ds filed by Mr. Pierce in 2006 and which was integral to Mr. Pierce's registration violations according the pleadings of the Division in the First Action and the Initial Decision therein, and which received part of the $13 million in stock sale proceeds alleged in the First OIP (¶¶ 14-16), and which was covered by the Division's post-hearing evidence and $7.5 million additional disgorgement request in the First Action.

5. Mr. Pierce lacks knowledge sufficient to admit the allegations in paragraph 5 about Jenirob's registered agent. Mr. Pierce admits that Lexington records reflect that Jenirob was a privately held BVI company that was one of the "associates" generating a portion of the over $13 million in proceeds from the sale of Lexington S-8 shares described in the First OIP (¶¶ 14-16) and that Jenirob is the same company that was referenced in the Division's pleadings and the Initial Decision in the First Action.

Fact Allegations and Alleged Violations

Answering paragraphs 6-31 in the Second OIP, Mr. Pierce admits the facts and the violations alleged against him solely because they were already adjudicated in the First Action along with the Division's request that Mr. Pierce "should be ordered to pay disgorgement pursuant to Section 8A of the Securities Act." Mr. Pierce lacks knowledge to address the violations alleged and relief requested against respondents Newport and Jenirob and therefore denies the same.

Relief Sought By Division

The relief to be determined in Section III of the Second OIP is identical to the relief that was to be determined pursuant to Section III of the First OIP, and which ultimately was

determined pursuant to the Final Decision in the First Action. Mr. Pierce therefore denies that he "should be ordered to pay disgorgement" of $7.7 million or any amount beyond the disgorgement ordered in the Final Decision in the First Action. For the foregoing reasons, Mr. Pierce denies that any relief against him in this Second Action is appropriate.

Affirmative Defenses

The claims and relief sought against Mr. Pierce are barred by principles of res judicata -- including issue and claim preclusion, and collateral, equitable and judicial estoppel – and by waiver, ratification, acquiescence, the expiration of applicable limitation periods, laches, and unclean hands.

Relief Requested By Pierce

Mr. Pierce requests that the Commission immediately dismiss this action with prejudice and refrain from bringing any further proceedings concerning transactions in Lexington stock described in any of the pleadings, hearings, evidence, orders or decisions in the First Action, and that all claims for relief sought by the Enforcement Division be denied. Mr. Pierce requests an award of his attorney fees, pursuant to 5 U.S.C. § 504(a) (the Equal Access to Justice Act) and 17 CFR § 201.31. *E.g., In the matter of Russo Securities, Inc.*, Exchange Act Release No. 42121 (Nov. 10, 1999) and other applicable law.

DATED this 9th day of July, 2010.

LANE POWELL PC

By _____
Christopher B. Wells, WSBA No. 08302
Attorneys for Respondent G. Brent Pierce