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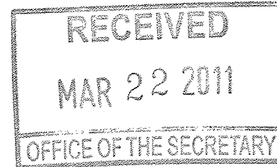


UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13927

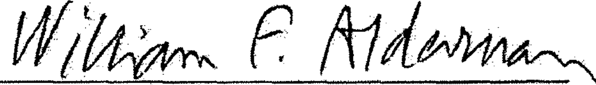
In the Matter of	)	
	)	
GORDON BRENT PIERCE, NEWPORT CAPITAL CORP., AND JENIROB COMPANY LTD.,	)	**RESPONDENT G. BRENT PIERCE'S MOTION FOR SUMMARY DISPOSITION**
	)	
Respondents.	)	

Respondent G. Brent Pierce hereby moves for summary disposition in this proceeding dismissing the claims against respondent on the ground that there is no genuine issue with regard to any material fact and respondent is entitled to a summary disposition as a matter of law. This proceeding is barred by res judicata, inasmuch as the issues involved in this proceeding were previously raised and adjudicated in a prior proceeding against respondent that has become final. The Division of Enforcement is also estopped from bringing these claims by judicial and equitable estoppel based on the positions it took in the prior proceeding that are inconsistent with these claims. The motion is based on the accompanying respondent's opening brief and declaration of Christopher B. Wells, and on all the other pleadings and papers on file herein.

Dated: March 21 , 2011

Respectfully Submitted

ORRICK, HERRINGTON & SUTCLIFFE LLP



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GORDON BRENT PIERCE, NEWPORT CAPITAL CORP., AND JENIROB COMPANY LTD.,	)	**RESPONDENT G. BRENT PIERCE'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION**
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I. INTRODUCTION

This is a classic res judicata case. The Division of Enforcement has already litigated these claims through final judgment. The same evidence and arguments on which the Division would now rely have already been presented to this tribunal. A decision was rendered, and the opportunity to appeal has expired. The Division now seeks to sidestep that final decision by attempting to re-litigate the same claims it brought before. As a matter of law, it cannot do so.

In the prior proceeding, the Division attempted to recover the exact same disgorgement it now seeks. Its request for that disgorgement was denied by the Hearing Officer, but it was the Division that declined to take any of the numerous procedural avenues through which it could have continued to litigate its disgorgement claim. While the Division may now regret its strategic decisions, it cannot ignore them. Its attempt to re-litigate its disgorgement claim must be dismissed as barred by res judicata.

II. STATEMENT OF FACTS

From the very outset of its investigation into trading in the stock of Lexington Resources, Inc. ("Lexington"), all the way through the finality of its first administrative proceeding against Lexington, Grant Atkins ("Atkins") and respondent Brent Pierce ("Pierce"), the Division consistently stuck to its position that it was seeking to hold Pierce responsible for ***all*** trading in which he engaged, whether through his own account or those of the "associates" and "offshore companies" he allegedly controlled. But after failing in its attempt to obtain disgorgement from Pierce for sales through two of those companies – Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") – the Division now seeks to unring that bell and pretend that its failed attempt never happened. As we show below, the Division rang the bell so frequently in the first proceeding that it cannot make the echo fade away and ring the same bell all over again.

A. This Proceeding And the First One Sprang From A Single Investigation

On May 4, 2006, the Commission issued its order directing private investigation into trading in Lexington stock, *In re Matter of Lexington Resources, Inc.*, File No. SF-02989 (Declaration of Christopher B. Wells, Ex. 1).[1] The order recited, among other things, the possibility of registration and reporting violations by unnamed "persons or entities" who were consultants, partners and/or affiliates of Lexington or directly or indirectly the beneficial owners of more than five percent or ten percent of Lexington common stock who failed to file with the Commission all information required by the Exchange Act and rules thereunder (*Id.*)

Those are the very charges brought against Pierce, Lexington and Atkins in the First Proceeding. The Division now repeats these same charges of registration violations regarding the sale of Lexington stock against Pierce, Newport and Jenirob in this Second Proceeding. Nor has the Division produced to Pierce pursuant to Rule 230(d) any investigative files relating to the Second OIP beyond those already produced in connection with the first one (Wells ¶ 28, Ex. 26-27). 17 C.F.R. § 201.230(d). The absence of any new order directing investigation or of new investigative files confirms the unity of the two proceedings, but that is just the beginning.

B. The First OIP Alleged Wrongdoing By Pierce's "Associates" and "Offshore Companies"

More than two years after the Commission issued its order directing investigation into trading in Lexington stock, it issued on July 31, 2008 an order instituting proceedings (the "First OIP", Wells Ex. 2), *In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (the "First Proceeding").

Among other things, the First OIP alleged:

- Lexington and Atkins "issued nearly five million shares of Lexington

[1] We refer to paragraphs in the Wells Declaration as "Wells ¶ __" and exhibits to the Wells Declaration as "Wells Ex. __."

common stock to promoter Gordon Brent Pierce and his associates" (*id.* ¶ 1);

- "Pierce and his associates resold their stock to public investors through an offshore bank, netting millions of dollars in profits" (*id.*);
- after receiving Lexington stock registered on Form S-8, Pierce sold "most of his S-8 shares through an offshore company that he operated" (*id.* ¶ 11);
- "almost immediately after receiving the shares, Pierce transferred or sold them through his offshore company" (*id.* ¶ 14);
- "Pierce and his associates deposited about 3 million Lexington shares in accounts at an offshore bank" and "between February and July 2004, about 2.5 million Lexington shares were sold through an omnibus brokerage account in the United States in the name of the offshore bank, generating sales proceeds of over $13 million" (*id.* ¶ 15), of which at least $2.7 million was for sales by Pierce personally through the offshore bank (*Id.* ¶ 16).

The First OIP recited that the Commission deemed it necessary to determine whether, among other things, Pierce should be ordered to pay disgorgement pursuant to the Securities Act and the Exchange Act for the alleged conduct (*Id.* ¶ 21).

C. The Division Argued Throughout the First Proceeding That Newport and Jenirob Were Pierce's "Associates" and "Offshore Companies"

The Division consistently maintained throughout the First Proceeding that Newport and Jenirob were among the "associates" and "offshore companies" through which the OIP alleged Pierce had committed violations of the securities laws.[2] For example, the Division argued in its pre-hearing brief, among other things:

- "Pierce and his companies and cronies reaped millions of dollars in stock sale proceeds" (Wells Ex. 3 at 1-2);
- "Pierce used Newport Capital to distribute about 2.5 million post-split

[2] Earlier, when he answered the OIP, Pierce had moved for a more definite statement identifying the "associates" and "offshore companies" alleged by the OIP, specifically citing a concern that without such specification the "Division is bound to 'ambush' Mr. Pierce" (Wells Ex. 27 at 4). The Division declined to name those persons or entities in its response to the motion, saying it had made its investigative files available to Pierce and he was "aware of the entities he controlled that owned Lexington stock" (Wells Ex. 28 at 3), and the Hearing Officer did not order it to name them.

Lexington shares without registering that distribution" (*id.* at 3);

- "Pierce transferred [2.52 million] shares to Newport Capital. Newport Capital then sold half of those shares directly to others and placed the other half of those shares in brokerage accounts before selling them to investors. Pierce therefore used Newport Capital, as described now, to distribute 2.52 million post-split Lexington shares" (*id.* at 6);

- Newport held nearly one million Lexington shares in its Hypo Bank account, and after third parties to whom Newport had sold other shares also transferred them to Hypo Bank accounts, vFinance sold 1.2 million shares for Hypo Bank for total net proceeds of $8.1 million (*id.* at 7).

Indeed, the Division's focus on Newport as the "conduit" through which it claimed Pierce sold 2.52 million Lexington shares in violation of Section 5 was so complete that it referenced Newport some 38 times in the 9-page factual statement of its pre-hearing brief.

The Division's spotlight on Newport continued throughout the three-day hearing itself. The transcript reveals some 200 references to Newport (averaging nearly one every three pages), including its sales of Lexington stock received from Pierce. The Division argued in its opening statement that Pierce transferred over 900,000 shares to Newport that it sold from Hypo Bank in 2004 and through a brokerage account in 2006 (Wells Ex. 4 at 24), and that the movement of shares from Pierce to Newport and other entities, and then to brokerage accounts and individual purchasers, constituted a distribution of S-8 shares by Pierce (*Id.* at 26). It elicited testimony that Lexington listed Newport as a selling shareholder in a Form SB 2 registration statement, with Pierce having dispositive powers over those shares (*Id.* at 65). It established that Newport had an account at Hypo Bank (*id.* at 97, 145) and argued that Newport's trading in the United States was established by Pierce's moving Lexington shares to Newport at Hypo Bank and by Hypo Bank having U.S. accounts at vFinance (*Id.* at 221). It repeatedly argued that Pierce made transfers of Lexington shares to Newport, which went to third parties or brokerage accounts (*Id.* at 586, 589).

The Division's hearing exhibits also revealed its continuous attempts to establish Pierce's

sales of Lexington stock through his associates, Newport and Jenirob. It repeatedly referred to the Schedule 13D filed jointly by Pierce and Newport (Wells Ex. 5), in which Pierce acknowledged that he was the beneficial owner of Lexington shares held by Newport and detailed Newport's purchases and sales. It offered Exhibit 51, a chart detailing the movement of Lexington shares to and from Newport (Wells Ex. 6). Indeed, the majority of the Division's exhibits dealt substantially, if not exclusively, with Newport.

The Division also included in Exhibit 43 documentation of the transfer of 435,000 Lexington shares to Jenirob in January 2004 (Wells Ex. 7). It offered Exhibit 33, showing Pierce's instructions to Hypo Bank to book sales of Lexington stock to Jenirob's account (Wells Ex. 8). And it offered Exhibit 70, account statements for a Newport bank account showing deposits of some $1.75 million coming from Jenirob, as well as nearly $900,000 coming from unspecified Hypo Bank accounts (Wells Ex. 9).

D. The Division's Motion to Admit New Evidence Further Litigated Its Claim That Newport and Jenirob Were Pierce's "Associates" and "Offshore Companies"

After the close of the three-day hearing, the Division on March 18, 2009 filed a motion for the admission of new evidence (Wells Ex. 10), arguing that account records and trading summaries from Hypo Bank established that Pierce should be required to disgorge profits from sales of Lexington stock by Newport and Jenirob. The Division reminded the Hearing Officer that the OIP had alleged an illegal distribution of Lexington stock orchestrated by Pierce that generated some $13 million in proceeds from stock sales through Hypo Bank (*id.* at 6) and cited the Hypo Bank records as establishing that "the vast majority" of those sales were of stock Pierce had "transferred to Newport or the other offshore companies; and then sold by Pierce into the open market through Hypo Bank" (*Id.* at 7). The Division claimed that it was still analyzing the Hypo Bank records and would include with its post-hearing brief a chart offered as Exhibit 89,

calculating the exact amount of disgorgement it sought from Pierce as a result of the sales detailed in the Hypo Bank records (*Id.* at 7 n. 2). The Division cannot (or should not) have been surprised by the receipt of these records, inasmuch as it already knew about the Newport and Jenirob accounts at Hypo Bank and had already dealt at length with sales of Lexington stock through the Hypo Bank account at vFinance.

E. The Division's Post-Hearing Brief and Proposed Findings and Conclusions Sought Disgorgement From Pierce for Trading By Newport and Jenirob

Two weeks later, the Division made extensive use of the Hypo Bank records, as well as its references to Newport and other "associates" (such as Jenirob) at the hearing, arguing in its proposed findings and conclusions (Wells Ex. 11) and post-hearing brief (Wells Ex. 12) that Pierce should be required to disgorge not only $2.078 million in trading profits from his personal Hypo Bank account (Wells Ex. 11 ¶ 52), but also $5.454 million and $2 .069 million in trading profits from the respective Newport and Jenirob accounts at Hypo Bank, for a total of some $9.601 million (*Id.* ¶¶ 56-57).

The Division referenced Newport 56 times and Jenirob 12 times in its proposed findings and conclusions, seeking findings that Newport and Jenirob were offshore companies whose Hypo Bank accounts Pierce controlled (Wells Ex. 11 ¶ 32) and that Hypo Bank traded for those accounts through its omnibus vFinance account (*id.* ¶ 34); and seeking conclusions that Pierce should be required to disgorge the $9.601 million in net proceeds the Division claimed he received from sales of S-8 shares through Hypo Bank and vFinance, using Newport and Jenirob as well as his personal account, plus prejudgment interest (*Id.* ¶¶ 51, 53).

The Division's post-hearing brief similarly trumpeted its claim that Pierce should be required to disgorge the $9.601 million he allegedly obtained from trading in his own account and those of his "offshore companies" Newport and Jenirob. On the first page, it argued that

Pierce not only sold Lexington shares for net proceeds of $2.1 million in his personal account at Hypo Bank, but also received additional net proceeds of $7.5 million using Newport and "another offshore company" (*i.e.*, Jenirob) (Wells Decl. Ex. 12 at 1); it repeated the same claim three pages later (*id.* at 4) and in its conclusion (this time specifying Jenirob by name) (*Id.* at 28). Throughout its brief, the Division referenced Newport 64 times and Jenirob 13 times, as well as frequently calling them the offshore companies Pierce controlled (*e.g.*, *Id.* at 10). The Division also argued that the bank records summarized in its proposed new Exhibit 89 established the same conclusions it drew from other exhibits it had already offered at the hearing (*e.g.*, *id.* at 14, citing Exhibit 89 together with hearing Exhibits 23, 24, 49, 50 and 66).

The Division concluded its disgorgement analysis by reiterating its argument that Pierce should disgorge the net proceeds of $2.078 million he realized using his personal account, $5.454 million using Newport, and $2.069 million using Jenirob, for a total disgorgement of $9.601 million plus prejudgment interest (*Id.* at 25).

F. The Initial Decision Found That Pierce Had Traded Lexington Stock Through Accounts at Newport and Jenirob, But Declined to Order Disgorgement by Pierce of His Profits From Those Accounts

On April 7, 2009, the Hearing Officer issued an order on the Division's motion to admit new evidence, concluding that it would reopen the record of evidence "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" (Wells Ex. 13 at 2). The stated rationale for the order was that "these entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP" (*id.*), noting that "the Commission has not delegated its authority to administrative law judges to expand the scope of matters set forth for hearing beyond the

framework of the original OIP" (*Id.* at 2 n. 3).[3]

Two months later, on June 5, 2009, the Hearing Officer issued her Initial Decision (Wells Ex. 14). Echoing the Division's oft-repeated reliance on Pierce's alleged use of Newport and Jenirob to distribute Lexington stock to the public, the Initial Decision made some 70 references to Newport and six to Jenirob. It repeatedly cited the Division's post-hearing exhibits, highlighting the fact that on multiple occasions Pierce sold Lexington shares "through Hypo Bank's omnibus account at vFinance from different accounts that Pierce controlled" (*id.* at 13-14, citing Pierce's sales from both his personal account and the Newport and Jenirob accounts on June 24, 2004 and again from all three accounts on the following day). Nonetheless, the Hearing Officer concluded, as she had done in the April 7, 2009 order, that appropriate disgorgement would not include the net proceeds Pierce realized through Newport and Jenirob because they had not been mentioned in the OIP and the Commission has not delegated to ALJs its authority to expand the scope of matters set down for hearing beyond the framework of the original OIP (*Id.* at 20-21). Accordingly, the Initial Decision ordered that Pierce disgorge only $2.043 million, the ultimately-calculated "actual profits Pierce obtained from his wrongdoing charged in the OIP" (*Id.*).

G. The Division Failed to Exercise Its Opportunities to Appeal the Initial Decision to the Commission

Following the Initial Decision's rejection of its attempt to obtain disgorgement from Pierce of the $7.5 million in net proceeds he allegedly obtained through Newport and Jenirob, the Division had four options if it wanted to keep that claim alive. It could have asked the Commission for interlocutory review of the Hearing Officer's evidentiary decision under Rule of Practice 400(a). It could have asked the Commission to admit the new evidence under Rule of

[3] As we discuss below, this was an express invitation to the Division to ask the Commission to expand the scope of the OIP, an invitation the Division declined to accept.

Practice 452. It could have asked the Commission to expand the scope of the OIP under Rule of Practice 200(d)(1) as the Hearing Officer had suggested. Or, if it believed the Initial Decision had wrongly concluded that the OIP's references to Pierce's associates and offshore companies was insufficiently broad to permit disgorgement from Pierce of his net profits through Newport and Jenirob– notwithstanding the evidence that they were among the associates and offshore companies referenced in the OIP – it could have appealed the Initial Decision to the Commission pursuant to Rule of Practice 410.

By choosing to pass up all four opportunities, and allowing the Initial Decision to become final, the Division irrevocably waived the right to seek the same disgorgement from Pierce by a backdoor route. The Commission issued its notice that the Initial Decision had become final on July 8, 2009 (Wells Ex. 15).

H. Pierce Relied on the Division's Failure to Appeal

Had the Division appealed the Initial Decision, Pierce would have cross-appealed to the Commission from the Initial Decision's findings and conclusions that he had violated the securities laws and would have retained the ultimate right to further appeal to the Court of Appeals. But the absence of an appeal by either party would allow the Initial Decision to become final, resulting in Pierce's fixed liability for the $2.043 million disgorgement ordered by the Initial Decision but exoneration from the additional disgorgement of $7.5 million the Division had sought but the Initial Decision had rejected.

As documented in the declaration Pierce filed with his motion for a TRO and preliminary injunction against prosecution of the Second Proceeding, and consistent with any sensible weighing of the risks and rewards commonly faced by partially-successful litigants, Pierce elected to forego his right to appeal the Initial Decision so as to achieve finality of the Hearing Officer's rejection of the Division's claim for an additional $7.5 million in disgorgement from

him for the net proceeds of sales by Newport and Jenirob (Wells. Ex. 16).

I. The Second OIP Seeks From Pierce Exactly the Same Disgorgement of Newport and Jenirob's Trading Profits That Was Rejected in the First Proceeding

In the absence of an appeal by either party or any attempt by the Division to amend the OIP, Pierce believed when the Initial Decision became final on July 8, 2009, that this matter was behind him. To his surprise six months later, the Division on January 12, 2010 advised Pierce that it intended to institute a Second Proceeding against him, Newport and Jenirob seeking the disgorgement in connection with trading in Newport and Jenirob accounts that the Hearing Officer had denied it in the First Proceeding (Wells Ex. 17). Pierce responded the following month with a Wells Submission in which he raised many of the same factual and legal points that continue to establish the res judicata bar that dooms this duplicative Second Proceeding (Wells Ex. 18).

Undeterred, the Division obtained from the Commission a Second OIP on June 8, 2010, instituting proceedings entitled *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 (Securities Act Release No. 9125) (Wells Ex. 19, the "Second OIP").

The Second OIP repeated many of the allegations in the First OIP (*cf.* Wells Ex. 2 *with* Wells Ex. 19). Indeed, the Commission acknowledged that the now-final Initial Decision in the First Proceeding had ordered Pierce to disgorge $2.043 million in proceeds from sale of Lexington shares in his personal account but had declined to order disgorgement of the proceeds from sale of Lexington shares – allegedly by Pierce – through the Newport and Jenirob accounts (Wells Ex. 19 at ¶¶ 29-30).

The Second OIP continues to refer to Newport and Jenirob as "offshore companies" controlled by Pierce (*Id.* at ¶ 1). It continues to reference Lexington's issuance of stock to

"Pierce and his associates" (*id.* at ¶ 13) and describes 300,000 shares transferred to Newport in January 2004 as issued to "one of Pierce's associates" (*id.* at ¶ 14) and shares transferred to Jenirob in May 2004 as issued to "Pierce's associate" (*Id.* 15 ¶ 15). The Second OIP ends up by requesting the same cease and desist order and disgorgement against Pierce, Newport and Jenirob as it had sought against Lexington, Atkins and Pierce in the First OIP (*Id.* ¶ 31).

J. The Division Further Confirmed the Finality of the Initial Decision's Limited Relief Against Pierce By Seeking and Obtaining From Pierce Full Payment of the Ordered Disgorgement

At the same time it filed the Second OIP, the Commission also filed an application in federal district court in San Francisco seeking an order requiring Pierce to pay the $2.043 million plus interest found to be due in the Initial Decision. *SEC v. Pierce*, No. CV-10-80129 MISC (N.D. Cal.) (Wells Ex. 20). Pierce responded by filing a complaint for declaratory and injunctive relief in the same court, *Pierce v. SEC*, No. CV-10-3025 (N.D. Cal.) (Wells Ex. 21), accompanied by an ex parte application for a TRO, an order to show cause why a preliminary injunction against the prosecution of the duplicative Second Proceeding should not issue, and an order staying the administrative enforcement action pending resolution of the injunction proceedings.[4] These papers explained in detail why this attempted Second Proceeding is barred by principles of res judicata, judicial estoppel and due process.

After the court combined the two proceedings as related, it heard argument on August 13, 2010. The Commission argued that injunctive relief was unnecessary because Pierce could raise his res judicata and estoppel defenses under Rule 220(c) and in a motion for summary disposition (Wells Ex. 22). The Court on September 2, 2010 issued a decision dismissing Pierce's action for lack of federal jurisdiction and ordering enforcement of the disgorgement

[4] Pierce attached his federal court complaint and motion papers with his July 9, 2010 Answer in this Second Proceeding. Those papers were consistent with his February 2010 Wells Submission in which he had also urged that a second proceeding would be barred by res judicata and due process principles (Wells Ex. 18).

order in the First Proceeding, without reaching the merits of Pierce's res judicata allegations (Wells Ex. 23). Pierce's appeal from the dismissal is currently pending before the Ninth Circuit Court of Appeals, No. 10-17218. His opening brief on appeal is due on May 11, 2011.

Pierce has completed payment to the Commission as ordered by the court, thereby confirming his performance of the disgorgement obligation imposed by the now-final Initial Decision (Wells Ex. 24).

III. ARGUMENT

A. Legal Standard For Summary Disposition

Under Rule 250(a) of the Commission's Rules of Practice, a respondent may "make a motion for summary disposition of any or all allegations of the order instituting proceedings." 17 C.F.R. § 201.250(a). The motion should be granted when "there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b). This Second OIP is barred as a matter of law under the doctrine of res judicata because it involves the same parties and the same nucleus of operative facts as the First OIP and because that OIP resulted in a final judgment on the merits. Accordingly, Pierce's motion for summary disposition must be granted.

B. This Action Is Barred By Res Judicata

"Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.5 (1978). Such a final judgment "on the merits of an action precludes the parties or their privies from relitigating issues that ***were or could have been raised in that action***.'" *Dynaquest Corp. v. U.S. Postal Service*, 242 F.3d 1070, 1075 (D.C. Cir. 2001) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)) (emphasis added). The Commission's administrative proceedings are bound by this doctrine. *See Astoria Fed. Savings & Loan Ass'n v.*

Solimino, 501 U.S. 104, 107 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality"); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421 (1966) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose").

Res judicata bars a claim when "the earlier suit . . . (1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005). *See also Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006) (articulating standard). Because each of these elements is satisfied in this Second Proceeding as a matter of law, the Hearing Officer must grant Pierce's summary disposition motion.

1. The Two Matters Concern The Same Nucleus of Operative Facts

"'Whether two cases implicate the same cause of action turns on whether they share the same 'nucleus of facts.' In pursuing this inquiry, the court will consider 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Apotex, Inc. v. FDA*, 393 F.2d 210, 217 (D.C. Cir. 2004); *see also Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) ("The central criterion in determining whether there is an identity of claims between the first and second adjudications is 'whether the two suits arise out of the same transactional nucleus of facts'"). "The causes of action need not be 'identical' in the sense that they raise the same claims based on the same facts. All that is required is that they arise 'out of the same 'transaction, or series of connected

transactions' as [the] previous suit.'" *Harch v. Boulder Town Council*, 471 F.3d 1142, 1150 (10th Cir. 2006).

Factors considered "in determining whether successive suits involve the same cause of action include: (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts," which is the "most important factor of all." *In re Int'l Nutronics, Inc.*, 28 F.3d 965, 971 (9th Cir. 1994). *See also Mpoyo*, 430 F.3d at 988 ("We have often held the common nucleus criterion to be outcome determinative"). Each of these factors supports the conclusion that the Division is asserting the same claims here that it asserted in the First Proceeding. Indeed, a comparison of the "nucleus of operative facts" at the core of this proceeding and those at the core of the First Proceeding makes clear that they are not only "common," but virtually identical.

a. The Two OIPs Describe The Same Conduct and Allegations

An examination of the two OIPs, in connection with the Division's own arguments and filings from the First Proceeding, provides clear evidence that these two proceedings targeted the same alleged conduct.[5] The Second OIP's "Nature of the Proceeding" section describes the same "matter," the unregistered distribution of Lexington stock that is described in the First OIP. *Compare* Wells Ex. 2 at ¶ 1 *with* Wells Ex.19 at ¶ 1. Both OIPs also describe conduct that occurred during nearly identical time frames. *Compare* Wells Ex. 2 at ¶¶ 6-16 (describing

[5] The Division has now admitted that the two proceedings originate from the same "larger scheme" (Motion for Sanctions & Entry of Default at 1). *See Adams v. Southern Farm Bureau Life Ins. Co.*, 493 F.3d 1276, 1290 (11th Cir. 2007) (finding nucleus of facts "broad" and applying res judicata where first action "alleged an overarching scheme of fraud and deception"); *JNC Cos. v. Ollason*, Nos. 92-15678, 92-15766, 1993 WL 239306, at *4 (9th Cir. June 30, 1993) (applying res judicata where first complaint "allege[d] the same . . . [s]cheme" as the second action).

alleged conduct from November 2003 – July 2004) *with* Wells Ex.19 at ¶¶ 13-24) (describing alleged conduct from November 2003 – June 2004).

The fact that the First OIP sought disgorgement from Pierce for an allegedly "illegal distribution" of S-8 shares of Lexington stock because he "acted as an underwriter" of those shares when he "transferred or sold them through an offshore company" (Wells Ex. 2 ¶ 14) would bar the Division's attempt to re-litigate disgorgement in this Second Proceeding even if Newport and Jenirob had never been mentioned by name at all in the First Proceeding. But the unity of the two proceedings runs far deeper. The First OIP brought claims against "Pierce and his associates" and "offshore companies" (Wells Ex. 2 at ¶¶ 1, 15), and the Division's statements and evidence made clear that both Newport and Jenirob,[6] the two co-respondents in this action, were among those entities. The Division's own arguments and exhibits from the First Proceeding establish that its allegations in the Second OIP regarding Pierce's alleged sales through accounts for Newport and Jenirob were part and parcel of the claims it brought in the First OIP.

The two proceedings derive from the same May 4, 2006 order directing investigation (Wells Ex. 1). In its pre-hearing brief from the First Proceeding, the Division focused heavily on Newport and argued that "Pierce used Newport Capital to distribute about 2.5 million post-split Lexington shares without registering that distribution" and that "Pierce and Newport Capital . . . deliberately sold shares in violation of Section 5" (Wells Ex. 3 at 3, 16). The Division's hearing exhibits also contained numerous documents detailing the movement of Lexington stock to and/or from Newport and Jenirob, and it elicited extensive testimony relating to Newport at the hearing (*see* Section II.C above).

[6]*See, e.g.*, Wells Ex. 12 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' by engaging in a distribution of Lexington stock").

Subsequently, the Division confirmed that its claims are the same as those it brought in the First OIP when it represented to Pierce that the evidence supporting the Second OIP was the exact same evidence it had used in the First Proceeding (Wells ¶ 28, Ex. 25, 26);[7] *Adams v. Cal. Dept. of Health Servs.*, 487 F.3d 684, 691 (9th Cir. 2007) (res judicata barred second action where "substantially the same evidence was and would be presented in both actions"). And just last week, the Division further reiterated its contention in the First Proceeding that Pierce used Newport and Jenirob as conduits for his own personal sales by arguing in its March 14, 2011 motion for sanctions and entry of default judgment against Newport and Jenirob in this Second Proceeding that:

- "At Pierce's direction, Newport and Jenirob sold the 1.6 million Lexington shares through their accounts at the Liechtenstein Bank" (page 5);
- "Pierce sold the additional 1.6 million shares through the Newport and Jenirob accounts" (page 6);
- "[Newport and Jenirob] participated in the sales of Pierce's Lexington shares by serving as nominees through which Pierce distributed the securities to the investing public without the benefit of registration" (page 9); and
- "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" (page 11).

These are the same charges the Division leveled against Pierce in the First Proceeding, and reflect the same sales of 1.6 million Lexington shares for which the Division sought but failed to obtain disgorgement from Pierce the first time around.

[7] The only additions after the First OIP were the exhibits the Division introduced or sought to introduce in its Evidence Motion.

b. The Division's Motion For The Admission of New Evidence Confirms That The Two Proceedings Share The Same Nucleus of Facts

The most obvious and direct evidence establishing that the Division's claims in the two OIPs share the same "nucleus of facts" is the motion to admit new evidence ("Evidence Motion") it filed in the First Proceeding on March 18, 2009 (Wells Ex. 10). The Division asserted that the evidence it sought to admit—which now serves as the basis of its Second OIP—was "highly relevant" to the claims it brought in the First OIP and was "material to [those] proceedings" (*Id.* at 2, 7). According to the Division, this evidence showed "that Pierce received millions of dollars in additional illegal proceeds from his sales of Lexington stock through accounts at Hypo Bank in the names 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" (*Id.* at 7-8). Nor did the Division simply move to admit these documents into evidence; it also sought disgorgement from Pierce of the very amounts it again seeks from him here (*Id.* at 8) (arguing that the evidence showed "that disgorgement far in excess of $2.1 million is warranted against Pierce ***in these proceedings***") (emphasis added).

By seeking disgorgement of the exact same proceeds it described in its Evidence Motion the Division has not only confirmed that the two proceedings originate from the same nucleus of facts, but has also violated the doctrine of judicial estoppel by implicitly arguing that its claims regarding these profits were not part of the First Proceeding. Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597,

600-01 (9th Cir. 1996). Under that doctrine (and the related doctrine of equitable estoppel),[8] the Division cannot now argue the same position that it once vehemently opposed "simply because [its] interests have changed." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Accordingly, the Division's prior arguments regarding the same profits that it now seeks to collect not only confirm that this proceeding arises from the same nucleus of facts as the prior proceeding, but estop it from asserting a contrary position here.

2. The Division Had the Opportunity to Fully Litigate These Claims Two Years Ago but Waived Its Right

The Division cannot plausibly argue that it was denied the opportunity to bring these claims in the First Proceeding. After the Hearing Officer admitted the Division's evidence of profits Pierce derived through Newport and Jenirob for the purpose of deciding Pierce's liability but declined to order additional disgorgement of those profits, the Division elected not to take any of the multiple avenues it had available to continue litigating the issue whether it could obtain disgorgement of those profits. Nor did the Division appeal to the Commission the Initial Decision (which concluded that Pierce is the beneficial owner of Newport and Jenirob[9] after referring to his sale of Lexington shares in the accounts of those entities,[10] but denied the Division's request for additional disgorgement of the profits Pierce realized from those

[8] Under equitable estoppel, a party is prevented from arguing inconsistent positions when "(1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe 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." *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007). The government will be estopped when it has "engaged in affirmative misconduct going beyond mere negligence" and its actions "will cause a serious injustice and the imposition of estoppel will not unduly harm the public interest." *Id.*

[9] "Pierce is the beneficial owner of, and works as president and director for Newport Capital Corporation (Newport), an entity based in Switzerland . . . He is also the beneficial owner of Jenirob Company Ltd. (Jenirob)" (Wells Ex. 14 at 5).

[10] "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 . . . 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" (Wells Ex. 14 at 13).

accounts). Rather than continue litigating its claim for disgorgement of the Newport and Jenirob profits, the Division "chose to pursue a one-track strategy"[11] and allowed the Hearing Officer's rulings to become final. In so doing, the Division made the conscious decision to forego the following options:

- The Division could have moved the Commission to amend the first OIP pursuant to Rule of Practice 200(d)(1) "to include new matters of fact or law," but did not.
- The Division could have moved to admit "additional evidence" before the Commission pursuant to Rule of Practice 452, but did not.
- The Division could have moved for an interlocutory appeal from the Hearing Officer's evidentiary decision pursuant to Rule 400(a), but did not.
- The Division could have petitioned the Commission to review the Initial Decision pursuant to Rule of Practice 410, but did not.[12]

Indeed, the Hearing Officer implicitly invited the Division to file a motion with the Commission to amend the First OIP under Rule 200(d)(1). In declining to consider the new evidence for the purpose of disgorgement, the Hearing Officer wrote: "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 (1966)" (Wells Ex. 14 at 2 n. 3). The rule the Hearing Officer cited, Rule 200(d)(1), states that: "Upon motion by a party, the Commission may at any time, amend

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[11] *Aboudaram v. De Groote*, No. 05-988(RMC), 2006 WL 1194276, at *5 (D.D.C. May 4, 2006) ("The District Court's order refused to allow [plaintiff] to amend after [it] had rested its case at trial. [Plaintiff] chose to pursue a one-track strategy and did not assert its Alternative Theories in a timely manner. As a result, [plaintiff] is barred by *res judicata* from now using the Alternative Theories to recover the same debt").

[12] The Commission also could have acted on its own authority to review the disgorgement amount:

- The Commission could have initiated its own interlocutory review pursuant to Rule of Practice 400(a), but did not.
- The Commission could have initiated a review of the Initial Decision under Rule of Practice 360(b)(1), but did not.

an order instituting proceedings to include new matters of fact or law." In *Stout,* the Commission granted a motion to amend an OIP to add a claim for civil monetary penalties and stated: "[W]hen considering a motion to amend an order instituting proceedings, we are guided by the principle that amendment of orders should be freely granted...." *Id.* at 1163. Nevertheless, the Division ignored this clear signal from the Hearing Officer.

Of course, well before it made any of these choices, the Division made the decision to bring the first OIP in July 2008, effectively declining to wait until the issues regarding its request for foreign discovery had been resolved. Despite the Division's apparent belief otherwise, these decisions have consequences, and it cannot now be permitted to "get a second bite at [the] same apple." *Natural Res. Def. Council v. EPA*, 513 F.3d 257, 261 (D.C. Cir. 2008); *Owens*, 244 F.3d at 715 (no exception to res judicata where plaintiffs "fail[ed] to exercise" available options....").[13]

The timing of the SEC's acquisition of the supposedly "new" evidence in the First Proceeding and the Hearing Officer's decision not to order disgorgement of Pierce's profits through Newport and Jenirob have no bearing on the question whether the claims share a common nucleus of operative fact. *See Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 8 (1st Cir. 1991) ("The record reflects that [plaintiff] knew enough about the facts of this case to have been able to assert its horizontal conspiracy claim at the outset before the ITC. It is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late .... [t]hus, we hold that Count 8 is barred, as a matter of law, by res judicata"); s*ee also Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871-72 (9th Cir. 1992)

[13] *Hussein v. Ersek*, 2009 WL 633791 at *4 (D. Nev. 2009) (plaintiff's failure to amend complaint after finding new evidence during discovery barred a later-filed complaint).

(party's previous "ignorance" of facts underlying second claim "insufficient to avoid the bar" of res judicata where claims were "part of the same 'transaction' that was litigated in" an earlier action). The Division may have made the decision to initiate the First Proceeding before it was ready to fully litigate this matter. But the res judicata doctrine requires that it now be bound by the consequences of that decision.

3. The Two Matters Involve the Same Parties Or Their Privies

The requirement that the claims involve the "same parties or their privies" is unquestionably established. Pierce and the SEC have been and are parties in both proceedings. While the Division has claimed that Newport and Jenirob are the "associates" and "offshore companies" alleged in the First OIP, it would not matter in any case because the "naming of additional parties does not eliminate the res judicata effect of a prior judgment." *United States ex rel. Robinson, Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 249 (9th Cir. 1992); *see also Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 966 (3d Cir. 1991) ("[R]es judicata may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants"). In both proceedings, the Division has sought disgorgement from Pierce of the proceeds of sales of Lexington stock by him and his associates. The doctrine of res judicata prohibits this second attempt to obtain the same relief the Hearing Officer denied the Division in the First Proceeding.

4. The First Proceeding Resulted in a Final Judgment

It is similarly indisputable that the Hearing Officer's initial decision in the First Proceeding became final when neither party appealed it, and the Commission issued an order of finality. *See* Commission's Rule of Practice 360(d)(2) ("If a party or aggrieved person entitled to review fails to file timely a petition for review or a motion to correct a manifest error . . . and if

the Commission does not order review of a decision on its own initiative, the Commission will issue an order that the decision has become final . . . [t]he decision becomes final upon issuance of the order"). The Commission announced the completion of the matter in a release entitled "In the Matter of Gordon Brent Pierce NOTICE THAT INITIAL DECISION HAS BECOME FINAL." SEC Release No. 60263, July 8, 2009 ("The time for filing a petition for review . . . has expired...The Commission has not chosen to review the decision as to him on its own initiative . . . [Thus] the initial decision of the administrative law judge has become the final decision of the Commission with respect to Gordon Brent Pierce") (Wells Ex. 15); *see also Dynaquest Corp. v. U.S. Postal Service*, 242 F.3d 1070, 1076 n.5 (D.C. Cir. 2001) (holding that because a party failed to appeal a ruling of an Administrative Judicial Officer of the Postal Service, the issue was "now res judicata between the parties"); *Aunyx Corp. v. Canon U.S.A., Inc.*, *supra*, 978 F.2d at 7 (1st Cir. 1991) ("In this case, all three requirements for res judicata have been satisfied. First, [plaintiff's] failure to appeal from the ITC's order, which decided [its] claim on the merits, rendered it final"). Additionally, any doubt as to whether the decision in the First Proceeding was "final" was firmly resolved when (1) the Division took legal action to enforce it (Wells Ex. 20), and (2) Pierce satisfied the judgment by paying nearly $3 million (Wells Ex. 24).

5. No Exception to Res Judicata Applies

The Division's attempt at a second bite at the apple is not supported by any exception to the rule of res judicata. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties." *Federated Dep't Stores v. Motrie*, 452 U.S. 394, 401 (1981) (citation omitted). Accordingly, "[t]here is no general public policy exception to the operation of res judicata." *Apotex, Inc. v. FDA*, 393 F.2d 210, 217 (D.C. Cir.

2004); *see also Owens*, 244 F.3d at 714 ("The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case").

Equally unavailing as an exception to application of res judicata is the argument the Division made in its motion to admit new evidence that Pierce's efforts to protect the privacy of foreign bank records frustrated its efforts to obtain them earlier (Wells Ex. 10 at 1-4). The Division cannot plausibly argue that it was denied the opportunity to litigate its claims in the First Proceeding due to any of Pierce's conduct. Even if the Division could tenably argue that Pierce frustrated its efforts to obtain documents from Hypo Bank in Liechtenstein, the Division had numerous opportunities to litigate that contention in the First Proceeding but declined to do so. *See Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985) (no exception to res judicata where party "could have litigated the significance of his alleged newly discovered evidence" in prior action because he "was aware of this alleged new evidence prior to the final dismissal of his appeal . . . [y]et, he never sought a rehearing or a reopening of the record in that action").

Nor can the Division show Pierce engaged in any fraud or misconduct regarding the production of the evidence on which its claims are based. The simple fact that Pierce enforced his rights during a good-faith dispute over the privacy of foreign records cannot be held against him. A respondent's action "[r]equiring [the Division] to meet its burden of proof does not constitute fraud or misconduct." *Aboudaram v. De Groote*, No. 05-988(RMC), 2006 WL 1194276, at *6 (D.D.C. May 4, 2006). If the Division believed it had a viable argument regarding its belated claim that Pierce frustrated its efforts to obtain foreign bank records, it could have moved to enforce its subpoena or moved for sanctions against Pierce. It did neither.

Moreover, the Division's belated receipt of foreign bank records did not prevent it from using them in any event. It ultimately obtained them, admitted them into evidence, and argued

them extensively in its post-hearing brief (Wells Ex. 12) and its proposed findings and conclusions (Wells Ex. 11). It fully exploited them for purposes of establishing Pierce's liability based on his sales of Lexington stock through Newport and Jenirob. Accordingly, the Hearing Officer should reject any claim by the Division that Pierce's conduct caused its failure to receive all the relief it sought in the First Proceeding.

IV. CONCLUSION

For the reasons given above, respondent Pierce's motion for summary disposition should be granted.

Dated: March 21 , 2011

Respectfully Submitted

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MAR 22 2011
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UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13927

In the Matter of	)	
	)	
	)	**DECLARATION OF**
GORDON BRENT PIERCE, NEWPORT	)	**CHRISTOPHER B. WELLS IN**
CAPITAL CORP., AND JENIROB	)	**SUPPORT OF RESPONDENT G.**
COMPANY LTD.,	)	**BRENT PIERCE'S MOTION FOR**
	)	**SUMMARY DISPOSITION**
	)	
Respondents.	)	

I, Christopher B. Wells, declare as follows:

1. I am one of the attorneys for respondent G. Brent Pierce ("Pierce") in the above-entitled administrative proceeding. I previously represented Mr. Pierce in an earlier administrative proceeding entitled *In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (the "First Proceeding"). I have personal knowledge of the facts stated in this declaration, and I could and would testify competently to those facts if called as a witness.

2. Attached as Exhibit 1 hereto is a true and correct copy of the Commission's order dated May 4, 2006, directing private investigation into trading in the stock of Lexington Resources, Inc. ("Lexington"), *In re Matter of Lexington Resources, Inc.*, File No. SF-02989.

3. Attached as Exhibit 2 hereto is a true and correct copy of the Commission's order dated July 31, 2008, instituting proceedings in the First Proceeding.

4. Attached as Exhibit 3 hereto is a true and correct copy of the Division's Pre-Hearing Brief dated December 5, 2008 in the First Proceeding.

5. Attached as Exhibit 4 hereto is a true and correct copy of excerpts from the transcript of proceedings in the hearing held on February 2-4, 2009 in the First Proceeding.

6. Attached as Exhibit 5 hereto is a true and correct copy of the Division's Exhibit 15 received in evidence at the hearing in the First Proceeding.

7. Attached as Exhibit 6 hereto is a true and correct copy of the Division's Exhibit 51 received in evidence at the hearing in the First Proceeding.

8. Attached as Exhibit 7 hereto is a true and correct copy of the Division's Exhibit 43 received in evidence at the hearing in the First Proceeding.

9. Attached as Exhibit 8 hereto is a true and correct copy of the Division's Exhibit

33 received in evidence at the hearing in the First Proceeding.

10. Attached as Exhibit 9 hereto is a true and correct copy of excerpts from the Division's Exhibit 70 received in evidence at the hearing in the First Proceeding.

11. Attached as Exhibit 10 hereto is a true and correct copy of the Division's motion for admission of new evidence dated March 18, 2009 in the First Proceeding.

12. Attached as Exhibit 11 hereto is a true and correct copy of the Division's proposed findings of fact and conclusions of law dated March 20, 2009 in the First Proceeding.

13. Attached as Exhibit 12 hereto is a true and correct copy of the Division's post-hearing brief dated March 20, 2009 in the First Proceeding.

14. Attached as Exhibit 13 hereto is a true and correct copy of an order dated April 7, 2009 issued by the Hearing Officer in the First Proceeding.

15. Attached as Exhibit 14 hereto is a true and correct copy of the Initial Decision dated June 5, 2009 issued by the Hearing Officer in the First Proceeding.

16. Attached as Exhibit 15 is a true and correct copy of the Commission's notice that the Initial Decision had become final, dated July 8, 2009 in the First Proceeding.

17. Attached as Exhibit 16 hereto is a true and correct copy of the declaration of Brent Pierce in support of his motion for TRO, preliminary injunction and stay filed on July 9, 2010 in the matter entitled *Pierce v. SEC*, No. CV-10-3026 in the United States District Court for the Northern District of California (the "Injunction Action").

18. Attached as Exhibit 17 hereto is a true and correct copy of a letter to me from Division attorney Tracy Davis dated January 12, 2010 and advising me that the Division intended to recommend that the Commission institute new administrative proceedings against Pierce, Newport Capital Corp. and Jenirob Company, Ltd.

19. Attached as Exhibit 18 hereto is a true and correct copy of the Wells Submission (without exhibits) submitted to the Commission by Pierce on February 11, 2010.

20. Attached as Exhibit 19 hereto is a true and correct copy of the Commission's order dated June 8, 2010, instituting proceedings in this matter, *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company, Ltd.*, Admin. Proc. File No. 3-13927.

21. Attached as Exhibit 20 hereto is a true and correct copy of the Commission's application for an order enforcing administrative disgorgement order against Pierce, filed on June 8, 2010 in *SEC v. Pierce*, No. CV-10-80129-MISC in the United States District Court for the Northern District of California (the "Enforcement Action").

22. Attached as Exhibit 21 hereto is a true and correct copy of the Complaint filed on July 9, 2010 in the Injunction Action.

23. Attached as Exhibit 22 hereto is a true and correct copy of an excerpt from the transcript of the hearing held on August 13, 2010 in the Injunction Action.

24. Attached as Exhibit 23 hereto is a true and correct copy of the order filed on September 2, 2010 in the Injunction Action, denying Pierce's motion for preliminary injunction, dismissing the Injunction Action, and granting the Commission's application for enforcement of disgorgement order.

25. Attached as Exhibit 24 hereto is a true and correct copy of email correspondence between counsel for Pierce and the Division, confirming that Pierce on January 31, 2011 completed the payments required by the disgorgement order in the Enforcement Action.

26. Attached as Exhibit 25 hereto is a true and correct copy of a notice that the Division has made its investigative files available for inspection and copying, dated August 11, 2008 in connection with the First Proceeding.

27. Attached as Exhibit 26 hereto is a true and correct copy of a notice that the Division has made its investigative files available for inspection and copying, dated June 24, 2010, in connection with the Second Proceeding.

28. I have reviewed Exhibit 25 and Exhibit 26. To the best of my knowledge, the Division has not made available for inspection and copying in the Second Proceeding any investigative files that were not made available for review in the First Proceeding (including files that were first made available between the conclusion of the February 2009 hearing and the issuance of the Hearing Officer's Initial Decision (Exhibit 14).

29. Attached as Exhibit 27 hereto is a true and correct copy of Pierce's motion for a more definite statement, dated August 20, 2008 in the First Proceeding.

30. Attached as Exhibit 28 hereto is a true and correct copy of the Division's response to Pierce's motion for a more definite statement, dated September 17, 2008 in the First Proceeding.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Seattle, Washington on March 17th, 2011.

Christopher B. Wells

Exhibit 1

NON-PUBLIC

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 4, 2006

In the Matter of **Lexington Resources, Inc.** **File No. SF-02989**	**ORDER DIRECTING PRIVATE INVESTIGATION AND DESIGNATING OFFICERS TO TAKE TESTIMONY**

I.

The Commission's public official files disclose that:

Lexington Resources, Inc. ("Lexington") is a Nevada corporation headquartered in Las Vegas. Lexington's common stock is registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and is quoted on the over-the-counter bulletin board under the symbol LXRS. Lexington files periodic reports, including Forms 10-KSB and 10-QSB, with the Commission pursuant to Section 13(a) of the Exchange Act and related rules thereunder.

II.

Members of the staff have reported information to the Commission that tends to show that from at least November 2003 until the present:

A. vFinance Investments, Inc. ("vFinance") is a broker-dealer registered with the Commission and is headquartered in Boca Raton, Florida.

B. In possible violation of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), Lexington, vFinance, and each of their officers, directors, employees, partners, subsidiaries, and/or affiliates, and other persons or entities, directly or indirectly, may have been or may be offering to sell, selling, and delivering after sale to the public, or may have been or may be offering to sell or to buy through the medium of any prospectus or otherwise, certain securities, including, but not limited to Lexington common stock, as to which no registration statement was or is in effect or on file with the Commission, and for which no exemption was or is available.

C. In possible violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Lexington, vFinance, and each of their officers, directors, employees, partners, subsidiaries, and/or affiliates, and other persons or entities, directly or

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indirectly, in connection with the purchase or sale of securities, may have been or may be employing devices, schemes, or artifices to defraud, by means of untrue statements of material fact or omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were or are made, not misleading, or engaging in acts, practices or courses of business which operated, operate, or would operate as a fraud or deceit upon any person. In connection with these activities, such persons or entities, directly or indirectly, may have been or may be, among other things, making false statements of material fact or failing to disclose material facts concerning, among other things, Lexington's operations and the market for Lexington common stock.

D. In possible violation of Section 17(b) of the Securities Act, consultants, partners, and/or affiliates of Lexington, and/or others, may have published, given publicity to, or circulated, or may be publishing, giving publicity to, or circulating, any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer Lexington's securities for sale, describes such security for a consideration received or to be received, directly or indirectly, from Lexington, without fully disclosing the receipt of such consideration and the amount thereof.

E. In possible violation of Section 17(a) of the Exchange Act and Rule 17a-4 thereunder, vFinance, its officers, directors, employees, partners, subsidiaries, and/or affiliates, and/or other associated persons or entities may have been or may be failing to make, keep, and preserve books and records as prescribed by the Commission.

F. vFinance, its officers, directors, employees, partners, subsidiaries, and/or affiliates, and/or other persons or entities may have been or may be failing reasonably to supervise, with a view to preventing violations of the above-referenced provisions of the federal securities statutes, rules, and regulations, another person who committed such a violation and who was subject to their supervision, within the meaning of Section 15(b)(4)(E) of the Exchange Act.

G. In possible violation of Section 15(c)(1)(A) of the Exchange Act, vFinance, its officers, directors, employees, partners, subsidiaries, and/or affiliates, and/or other persons or entities, while acting as brokers or dealers, may have been or may be effecting any transaction in, or inducing or attempting to induce, the purchase or sale of any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which such broker or dealer is a member by means of manipulative, deceptive, or other fraudulent devices or contrivances, including: acts, practices, or courses of business which operated, operate, or would operate, or may be operating as a fraud or deceit upon any person; or any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading. As a part of these activities, such persons or

entities, directly or indirectly, may have been or may be, among other things, making false statements of material fact or failing to disclose material facts concerning, among other things, the market for Lexington common stock and the risk of investment in Lexington stock.

H. In possible violation of Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder, certain persons and/or entities who were or are directly or indirectly the beneficial owner of more than five percent of Lexington common stock may have failed to file with the Commission all information required by Schedules 13D and 13G and any amendment thereto.

I. In possible violation of Section 16(a) of the Exchange Act and Rule 16a-3 thereunder, certain persons and/or entities who were or are directly or indirectly the beneficial owner of more than 10 percent of Lexington common stock, or who were or are directors or officers of Lexington, may have failed to file with the Commission initial statements of beneficial ownership of equity securities on Form 3, statements of changes in beneficial ownership on Form 4, and/or annual statements on Form 5.

J. While engaged in the above-described activities, such persons and/or entities, directly or indirectly, may have been making use of any means or instrumentality of interstate commerce, or of any means or instruments of transportation or communication in interstate commerce, or of the mails, or of any facility of any national securities exchange.

III.

The Commission, having considered the staff's report and deeming such acts and practices, if true, to be possible violations of Sections 5(a), 5(c), and 17(b) of the Securities Act; Sections 10(b), 13(d), 15(c), 16(a), and 17(a) of the Exchange Act; and Rules 10b-5, 13d-1, 13d-2, 16a-3, and 17a-4 thereunder; and to be a possible failure to supervise pursuant to Section 15(b)(4)(E) of the Exchange Act; finds it necessary and appropriate and hereby:

ORDERS, pursuant to the provisions of Section 20(a) of the Securities Act and Section 21(a) of the Exchange Act, that a private investigation be made to determine whether any persons or entities have engaged in, or are about to engage in, any of the reported acts or practices or any acts or practices of similar purport or object; and

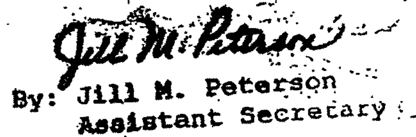
FURTHER ORDERS, pursuant to the provisions of Section 19(c) of the Securities Act and Section 21(b) of the Exchange Act, that for purposes of such investigation, Helane L. Morrison, Marc J. Fagel, Judith L. Anderson, James A. Howell, Susan F. LaMarca, Robert L. Mitchell, John S. Yun, Michael S. Dicke, Jina Choi, Tracy L. Davis, Robert S. Leach, Patrick T. Murphy, Sheila E. O'Callaghan, Cary S. Robnett, Ronald C. Baer, Steven D. Buchholz, Sahil W. Desai, Robert J. Durham, Thomas J. Eme, Lloyd A. Farnham, Mark P. Fickes, Susan Fleischmann, Michael Fortunato, Cal G. Gonzales, Kevin M. Gross, Victor W. Hong, Brian A. Huchro, Adrienne F. Miller, Jeremy Pendrey, Elena Ro, William Salzmann, Carolyn A. Samiere,

SEC 24659

Jennifer L. Scafe, Erin Schneider, Kashya K. Shei, Kristin A. Snyder, Robert L. Tashjian, X. Carlos Vasquez, and each of them, are hereby designated as officers of the Commission and are empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith as prescribed by law.

By the Commission.

Nancy M. Morris
Secretary



By: Jill M. Peterson
Assistant Secretary

<u>Exhibit 2</u>

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

Exhibit 3

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 PRE-HEARING BRIEF AGAINST RESPONDENT GORDON BRENT PIERCE

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INTRODUCTION

This proceeding involves the acquisition and sale by respondent Gordon Brent Pierce ("Pierce" or "Respondent") of millions of shares of Lexington Resources, Inc. ("Lexington") common stock without registering his sale of those shares, as required by Section 5 of the Securities Act of 1933 ("Securities Act"), and without disclosing his beneficial ownership of those shares, as required by Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 ("Exchange Act"). In the Motion for Summary Disposition being filed today, the Division of Enforcement ("Division") demonstrates that Pierce's liability for violating Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act is undisputed. The Division's Motion requests an administrative order that Pierce (i) pay $2.1 million in disgorgement (plus prejudgment interest) based upon his illegal sale of Lexington common stock during June 2004 and (ii) cease and desist from violating Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act. If the Division's Motion is granted in full, then the February 2009 administrative hearing will become moot.

However, if some portion of the Motion is denied, the Division will use the administrative hearing to prove whatever liability or remedies issues remain. As part of that proof, the Division will establish that the misconduct described in the Motion for Summary Disposition – *i.e.*, Pierce's illegal sales in June 2004 of 300,000 post-split Lexington shares – was part of a larger, on-going scheme to acquire and sell Lexington shares without the necessary registration and disclosure. Because Pierce failed to register his stock sales and disclose his ownership interests, the investors who paid millions of dollars to purchase Lexington shares were denied important information. Those investors did not get a prospectus disclosing information about Pierce and Lexington. They also did not get timely information about his Lexington transactions so that they could evaluate whether his Lexington stock sales reflected an insider's negative assessment about Lexington's prospects.

During the time period when they were not receiving such disclosures from Pierce, many investors bought Lexington shares in June 2004 while the stock price was at its all-time high of more than $7.00 per share. And then investors saw Lexington's share price collapse. Now Lexington's stock is essentially worthless. Meanwhile, Pierce and his companies and his cronies reaped millions

of dollars in stock sale proceeds.

Pierce received Lexington common stock under Form S-8 Registration Statements dated November 21, 2003, June 8, 2004, February 27, 2006 and March 13, 2006 (the "Form S-8s") that only purported to cover Lexington's offer and sale of its shares to its employees or consultants under a stock option plan. Each of those Form S-8s did not register any Lexington shares for resale by anyone else – such as Pierce – and required the stock recipients to represent that the shares they received would not be sold or distributed by them in violation of the securities laws. *E.g.*, November 2003 Form S-8 at 2, 19. Additionally, each of the option exercise agreements that Pierce signed to obtain shares from Lexington contained Pierce's representation that he was obtaining the Lexington shares for "investment purposes" only. *E.g.*, Option Exercise Agreement dated November 24, 2003 at 1. The Form S-8s and option exercise agreements therefore put Pierce on clear notice that he was receiving the Lexington shares to hold as investments, and not for selling or transferring to others. Despite being on notice that he must hold the Lexington shares as investments, Pierce promptly sold the shares to investors.

As described in the Motion for Summary Disposition, Pierce retained for himself 100,000 pre-split shares (300,000 post-split shares) of Lexington common stock that he received under the November 2003 Form S-8. Only seven months later in June 2004, Pierce sold those 300,000 post-split shares (along with 100,000 other post-split shares) through an account at Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank") for $2.7 million. Hypo Bank sold Lexington shares through the Over The Counter Bulletin Board ("OTCBB") using vFinance Investments, Inc. ("vFinance"). Pierce's sale of those 300,000 post-split shares through Hypo Bank violated Section 5 of the Securities Act, and he should therefore disgorge the $2.1 million that he received for those June 2004 sales, along with prejudgment interest. Division's Motion at 4-8, 9-10.

Except for the 300,000 post-split shares covered by the Motion for Summary Disposition, Pierce transferred 2.5 million of his other 2.6 million post-split Lexington shares to Newport Capital Corp. ("Newport Capital") within days of acquiring them. Newport Capital is a Belize company of which Pierce was president, treasurer, and a director, and for which Pierce had investment authority.

Newport Capital then sold 1.2 million of the Lexington shares to other investors and transferred the remaining 1.3 million post-split Lexington shares to its account at Hypo Bank or its other brokerage accounts.

Given the millions of Lexington shares that Pierce transferred to Newport Capital and that Newport Capital then transferred or sold, Pierce's role in distributing Lexington shares goes beyond the 300,000 Lexington shares that he sold for himself in June 2004 (as described in the Motion for Summary Disposition). Between February and October 2004, Hypo Bank sold 2,556,024 post-split Lexington shares through its vFinance account. Additionally, during March 2006, Newport Capital sold 664,000 post-split Lexington shares through its brokerage account at Peacock Hislop Staley & Given ("Peacock Hislop"). Pierce's role in distributing unregistered Lexington shares therefore occurred over a extended period and in conscious disregard of his obligation to register those sales.

In determining whether to issue a cease and desist order, the Hearing Officer may consider, among other factors, the recurrent nature of Pierce's violations, the degree of scienter involved and the danger that Pierce will be in a position to commit future violations. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (describing factors for imposing remedial sanctions). Here, all of the relevant *Steadman* factors support ordering Pierce to cease and desist from violating Section 5 of the Securities Act. A cease and desist order is appropriate because Pierce violated Section 5 through his June 2004 Lexington stock sales. *E.g., 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). It is also appropriate because Pierce used Newport Capital to distribute about 2.5 million post-split Lexington shares without registering that distribution. Pierce's misconduct was therefore recurring because it involved millions of unregistered Lexington shares that were distributed over a thirty-month period from November 2003 to March 2006.

Pierce falsely claims that he believed, in good faith, that he could sell Lexington shares without registration; Lexington's Form S-8s and the option exercise agreements that Pierce signed put him on notice that he needed to register his own sales and Newport Capital's sales. A cease and desist order is moreover appropriate given Pierce's dubious background in securities transactions

and refusal to answer – on purported financial secrecy grounds – many questions regarding his transactions in Lexington shares during the Division's investigation into illegal trading in Lexington shares. In summary, Pierce's unregistered stock sales, use of Newport Capital to distribute millions of Lexington shares without registration, lack of good faith and refusal to be candid about his activities demonstrates that he will engage in future violations of Section 5 of the Securities Act unless a cease and desist order is entered.

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 seeking summary disposition of Pierce's liability under Sections 13(d) and 16(a) of the Exchange Act. Division's Motion at 8-9. Although Pierce filed a belated Schedule 13D in July 2006, that should not obscure the fact that he was acquiring and distributing millions of Lexington shares from November 2003 until March 2006 without disclosing his ownership interest and transactions to investors. Additionally, in his tardy Schedule 13D, Pierce failed to disclose his beneficial ownership in IMT's holdings of vested Lexington stock options. Pierce's violations of Section 13D and 16(a) are therefore on-going and justify imposing a cease and desist order against Pierce.

FACTUAL BACKGROUND

Pierce's Background:

Pierce attended the University of British Columbia for six to eight months, but never continued his education and never obtained any professional licenses. Pierce describes himself as being a self-employed businessman. He has been an officer and director of Newport Capital for over five years and helped form IMT five or six years ago. He has started companies and taken them public in a variety of industries.

In June 1993, Canadian securities regulators in British Columbia imposed a fifteen-year bar and $15,000 fine upon Pierce relating to his activities as a director of Bu-Max Gold Corp. ("Bu-

Max"). According to stipulated findings, investor proceeds were diverted to unauthorized and undisclosed uses, including for Pierce's benefit. Additionally, during the investigation by Canadian securities regulators into Bu-Max, "Pierce tendered documents to the staff of the Commission which were not genuine." *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce*, Order Under Section 144 at 2 (June 8, 1993).

The Lexington Stock Sales Covered By The Motion For Summary Disposition:

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"), whom Pierce met in the early 1990s, 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." From Lexington's formation in November 2003 until the bankruptcy filing of its primary operating subsidiary in March 2008, the company had virtually no revenues and never made a profit.

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. 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. The November 2003 Form S-8 only purported to register Lexington's stock issuances and required the stock recipients to represent that the shares would not be sold or distributed in violation of the securities laws. November 2003 Form S-8 at 2, 19. Pierce obtained shares after representing that he was obtaining the Lexington shares for "investment purposes" only. *E.g.*, Option Exercise Agreement dated November 24, 2003 at 1.

Included in those November 2003 stock issuances were 100,000 shares that Lexington issued to Pierce on November 25, 2003 and that Pierce initially retained for his own account. Pierce

transferred these 100,000 Lexington shares to his personal account at Hypo Bank. Hypo Bank had a trading account at vFinance, a registered brokerage firm based in Florida. 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. Pierce also had 121,683 post-split Lexington shares in the Hypo Bank account that he had previously acquired in November 2003 as part of the reverse merger with the shell corporation.

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. 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.[1] Under the Division's first-in, first-out analysis (whereby the 121,683 post-split shares that Pierce had from the merger are treated as being sold first), Pierce received $2,077,969 in proceeds from selling the 300,000 post-split shares that he retained from the November 2003 Form S-8 stock issuances.

The Other Lexington Stock Transactions Conducted Through Newport Capital:

In addition to the 300,000 post-split Lexington shares that Pierce kept for himself until he sold them through Hypo Bank in June 2004, Pierce received another 2.52 million post-split Lexington shares under Lexington's Form S-8 in November 2003, June 2004, February 2006 and March 2006. As described below, Pierce transferred all of those shares to Newport Capital. Newport Capital then sold half of those shares directly to others and placed the other half of those shares in brokerage accounts before selling them to investors. Pierce therefore used Newport Capital, as described now, to distribute 2.52 million post-split Lexington shares.

1
Earlier in February 2004, Pierce sold some of the 121,683 post-split Lexington shares that he had acquired as part of the reverse merger and deposited into his Hypo Bank account.

In November 2003, Lexington issued Form S-8 shares to Pierce and Pierce promptly transferred most of the shares to Newport Capital rather than retaining them in his own account. Lexington issued 350,000 pre-split shares on November 24, 2003 to Pierce, which Pierce transferred that same day to Newport Capital. Between November 25 and December 9, 2003, Newport sold 328,300 of those 350,000 pre-split Lexington shares to third persons. Lexington also issued 150,000 pre-split shares on November 25, 2003 to Pierce, who transferred 50,000 of those shares on December 2, 2003 to Newport.[2] That same day, Newport sold all of those 50,000 pre-split shares to third parties.

These transactions left Newport with 21,700 pre-split Lexington shares. Newport transferred those 21,700 pre-split shares to an account at Hypo Bank. Newport also acquired 300,000 pre-split Lexington shares from another individual to whom Lexington issued shares under the November 2003 Form S-8. Following the January 2004 stock split, Newport held at least 965,100 post-split Lexington shares in its Hypo Bank account from the November 2003 Form S-8 stock issuances. Additionally, between December 2003 and June 2004, some of the third parties who purchased Lexington shares from Newport Capital also transferred some of their post-split Lexington shares to accounts at Hypo Bank. During June 2004, vFinance net sold a total of 1.2 million post-split Lexington shares for Hypo Bank for total net proceeds of $8.1 million.

Lexington filed another Form S-8 on June 8, 2004 (the "June 2004 Form S-8"). Like the earlier November 2003 Form S-8, the June 2004 Form S-8 stated that the recipients of the Lexington shares were responsible for selling those shares in compliance with any legal requirements. June 2004 Form S-8 at 2, 19. Additionally, Pierce executed stock option exercise agreements on June 15 and June 25, 2004 that contained his representation that he was acquiring the Lexington shares for his own investment. Stock Option Exercise Agreement dated June 15, 2004, at 1, and Stock Option Exercise Agreement dated June 25, 2004, at 1.

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The other 100,000 shares were retained by Pierce and then sold by him in June 2004 as described in the Motion for Summary Disposition.

Pursuant to the June 2004 Form S-8, Pierce received 150,000 post-split Lexington shares on June 15, 2004, another 90,000 post-split Lexington shares on June 16, 2004 and an additional 80,000 post-split Lexington shares on June 25, 2004. Lexington therefore issued a total of 320,000 post-split shares to Pierce under the June 2004 Form S-8. Pierce transferred all 320,000 post-split shares to Newport Capital on the same day that he received them. On June 25, 2004, Newport Capital sold 80,000 of those 320,000 Lexington post-split shares to a third party.

Newport Capital transferred the remaining 240,000 post-split shares to its account at Hypo Bank. Between July and October 2004, vFinance sold a total of 448,216 post-split Lexington shares for the Hypo Bank account.

Subsequently, on February 27, 2006, Lexington filed yet another Form S-8 (the "February 2006 Form S-8"). The February 2006 Form S-8 provided that the purchasers of those shares had to comply with pertinent laws and regulations before selling those shares. February 2006 Form S-8 at 19. Lexington issued 295,000 post-split shares to Pierce on March 3, 2006. Lexington also issued 205,000 more post-split shares to Pierce on March 8, 2006. On March 8 and March 10, 2006, Pierce had Lexington transfer to Newport Capital the 295,000 and 205,000 shares that he received on March 3 and 8, 2006, respectively. Newport Capital sold all of those Lexington shares in March 2006 through its Peacock Hislop brokerage account. Because it sold those Lexington shares for just slightly more than Pierce had paid to purchase those shares from Lexington a few days earlier, Newport Capital was essentially serving as a disguised conduit for Lexington's sale of those shares to public investors.

Finally, on March 14, 2006, Lexington filed one more Form S-8 (the "March 2006 Form S-8"). That Form S-8 also advised purchasers to comply with legal requirements before selling the shares. March 2006 Form S-8 at 19. Lexington issued 132,000 post-split shares to Pierce on March 14, 2006 and 368,000 more post-split shares to Pierce on March 16, 2006. On March 16 and 20, 2006, Pierce had Lexington transfer to Newport Capital the 132,000 and 368,000 post-split shares that he received on March 14 and 16, 2006, respectively. Newport sold 164,000 of these Lexington shares in March 2006 through its Peacock Hislop brokerage account. Once again, Newport Capital

was serving as a conduit for Lexington to sell those shares to public investors by purchasing the shares for only a few cents less than the selling price of the Lexington shares on the OTCBB.

By virtue of these issuances, Pierce received a total of 2.82 million post-split Lexington shares under the November 2003, June 2004, February 2006 and March 2006 Form S-8 registration statements. Of those 2.82 million shares, Pierce had Lexington transfer 2.52 million shares to Pierce's company, Newport Capital, within a few business days after the shares were issued by Lexington. Newport Capital then sold 1,214,900 of those shares to third persons and transferred the balance of the shares to its brokerage accounts. No registration statement was in effect for these Newport Capital transactions. The remaining 300,000 post-split Lexington shares that Pierce kept for himself were sold by Hypo Bank in June 2004, as covered by the Motion for Summary Disposition.

Pierce's Ongoing Failure To Disclose His Ownership Interests In Lexington Shares:

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 was required to disclose his beneficial ownership of Lexington stock, but did not do so until he filed a Schedule 13D on July 25, 2006, after the staff sent him a subpoena for documents and testimony in this matter.

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 and also held at least 5 percent of Lexington's stock during early 2006. Although Pierce regularly traded Lexington stock in the open market for Newport during 2004 when he controlled more than 10 percent of Lexington's stock, Pierce never reported his ownership or changes in his ownership on Forms 3, 4 or 5.

Pierce's Refusal To Answer Questions About Lexington Stock Transactions:

On July 27 and 28, 2006, the staff took Pierce's investigative testimony as part of an investigation into the possible manipulation of the market price of Lexington's common stock. During that testimony, Pierce was asked a number of questions that he refused to answer on

purported financial secrecy grounds. Among those unanswered questions were some seeking information from Pierce regarding who was engaged with Pierce and Newport in selling Lexington shares through the Hypo Bank account at vFinance.

LEGAL ARGUMENT

I. PIERCE VIOLATED SECTION 5 OF THE SECURITIES ACT.

Pierce violated Section 5(a) of the Securities Act which imposed a registration requirement for his sales of Lexington securities in interstate commerce:

> *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
>
> (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 delivery after sale.

15 U.S.C. § 77e(a) (emphasis added). The purpose of Section 5's registration provisions is to ensure that purchasers of the shares have the necessary material information – in the form of a registration statement and prospectus – about their contemplated investment.

As demonstrated in the Motion for Summary Disposition, Pierce committed a *prima facie* violation of Section 5(a) with respect to his June 2004 sales because the undisputed facts establish that (1) no registration statement 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. Division's Motion at 5 (citing *e.g.*, *SEC v. Corporate Relations Group, Inc.*, 2003 U.S. Dist. LEXIS 24925 at *46 (M.D. Fla. March 28, 2003); *SEC v. Lybrand*, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002); *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 361 (S.D.N.Y. 1998), *aff'd* 155 F.3d 129 (2d Cir. 1998)).[3] Given Pierce's *prima facie* violation of

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Because his Lexington stock sales in June 2004 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
(continued...)

Section 5(a), he had the legal burden of proving that his June 2004 sales of Lexington shares were exempt from registration. *See SEC v. Ralston Purina Co.*, 346 U.S.119,126 (1953); *SEC v. M&A West Inc.*, 538 F.3d 1043, 1050-51 (9th Cir. 2008) (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).

Although 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), Pierce could not qualify for this exemption because he fell within the Securities Act's definition of an underwriter when he received and then sold the 300,000 Lexington shares. 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.*, Initial Decision Release No. 250 at 9-12 (Admin. Proc. File No. 3-11310 May 11, 2004) (finding Section 5 violations and absence of exemption).

One compelling indication of Pierce's "underwriter" status is the short time period between his acquisition of the Lexington shares in November 2003 and his sale of those shares through Hypo Bank in June 2004. *SEC v. M&A West, supra*, 538 F.3d at 1050-51. According to the Securities Act

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3(...continued)
to sell Lexington shares without filing a registration statement for those proposed sales. 15 U.S.C. § 77e(c).

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). Because Pierce's June 2004 sales of Lexington shares took place just seven months after he received those shares from Lexington in November 2003, he cannot rely 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.

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. But 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. *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). Additionally, given his clear notice from the Form S-8s and option exercise agreements that he must either hold the shares as investments or comply with the securities laws in any attempt to sell them, Pierce lacked any reasonable or good faith basis to believe that he did not have to register his Lexington stock sales.

Pierce's contention that he instructed Lexington to provide him with unrestricted shares demonstrates that he acquired shares under the Form S-8s 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.

II. PIERCE SHOULD DISGORGE HIS STOCK SALE PROCEEDS.

Because Pierce violated 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 from sale of unregistered securities); *Geiger v. SEC*, 363 F.3d 481, 488-89 (D.C. Cir. 2004) (upholding disgorgement order against family partnership and owner for selling unregistered securities); *In the Matter of Lorsin, Inc.*, *supra*, Initial Decision Release No. 250 at 15 (ordering, on summary disposition, that stock promoters and principals jointly and severally disgorge proceeds of unregistered stock sales). 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 *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 his initial sales were of the 121,683 post-split Lexington shares (using a first-in, first-out method of calculating the sales proceeds) that he received during the reverse merger. His subsequent sales were of the 300,000 post-split shares provided to him under the November 2003 Form S-8. Those sales generated net 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) (describing court's equitable discretion to award prejudgment interest). The Hearing Officer should therefore order Pierce to disgorge $2,077,969 plus pre-judgment interest for his undisputed violation of Section 5.

III. 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). The purpose of these Exchange Act Sections is to ensure that investors have timely knowledge of the identity of corporate insiders and their transactions in the company's stock. Investors can use that knowledge to assess how a company's insiders might perceive the future prospects of the company – *i.e.*, negatively if large insider shareholders are selling their positions.

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) (internal citation omitted).

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 the undisputed facts demonstrate that Pierce had a control relationship with IMT, see Pierce's Answer, ¶ 9, his failure to disclose the IMT holdings also constitutes a violation of Sections 13(d)(1) and 16(a).

IV. A CEASE AND DESIST ORDER IS NECESSARY TO PROTECT INVESTORS FROM FURTHER VIOLATIONS BY PIERCE.

Section 8A of the Securities Act authorizes the Commission to issue a cease and desist order against any person who has been found to be "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 this case, the Hearing Officer is authorized to issue a cease and desist order under Section 8A because – as demonstrated in the Motion for Summary Disposition and above – Pierce violated the registration provisions in Section 5 of the Securities Act. *In the Matter of Lorsin, Inc., et al., supra*, Initial Decision Release No. 250 at 12-14 (issuing cease and desist order after finding that respondent sold unregistered shares).

Similarly, Section 21C(a) of the Exchange Act authorizes the Commission to issue a cease and desist order against any person who has been found to have violated any Exchange Act provision or rule. 15 U.S.C. § 78u-3(a). Here, a cease and desist order is authorized because Pierce violated Sections 13(d) and 16(a) of the Exchange Act by failing to disclose his interests and transactions in Lexington shares within the times allowed by those Sections.

In determining whether to impose a cease and desist order, the Hearing Officer may consider the egregiousness of Pierce's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of any assurances against future violations, Pierce's recognition of the wrongful nature of his conduct, and the likelihood that Pierce's activities will present opportunities for future violations. *Steadman, supra*, 603 F.2d at 1140 (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n. 29 (5th Cir. 1978), *affirmed on other grounds*, 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981)). No one of these particular factors is controlling. *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 based upon violation of record keeping provisions) (citing *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996)). Because remedial sanctions should promote the "public interest," the Court "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." *Arthur Lipper Corp.*, 46 S.E.C. 78, 100 (1975); *In the Matter of Richard C. Spangler, Inc.*, 46 S.E.C. 238, 254 n.67 (1976).

All of the *Steadman* factors support issuing a cease and desist order against Pierce. Pierce obtained and then distributed 2.82 million Lexington shares during a thirty-month period from November 2003 until March 2006 without the registration required by Section 5 of the Securities Act. With respect to 300,000 of those shares, Pierce sold them for his own benefit through Hypo Bank in June 2004 and received $2.1 million in ill-gotten proceeds. Beginning in November 2003 and continuing to March 2006, Pierce transferred the other 2.52 million Lexington shares to Newport Capital, a company he controlled, which then sold half of its holdings to other investors and transferred the remaining half of its holdings to Hypo Bank and another brokerage account. Many of those Newport Capital shares were then sold, directly or indirectly, by Hypo Bank through the OTCBB through its vFinance account or through another brokerage account at Peacock Hislop. Pierce therefore engaged in a wide-ranging, long-lasting and highly lucrative distribution of Lexington shares that violated Section 5 of the Securities Act in an egregious and recurring fashion.

Pierce also acted in conscious disregard of Section 5's registration provisions. On their face, the Lexington Form S-8s made it clear that the company was only purporting to register its own stock sales and that the stock recipients must distribute their shares in compliance with the federal securities laws. Additionally, Pierce's option exercise agreements for acquiring the Lexington shares contained his representation that they were being obtained by him for investment purposes. Contrary to his representations, Pierce sold 300,000 Lexington shares through Hypo Bank within seven months and transferred almost immediately his other 2.52 million Lexington shares to Newport Capital. Newport Capital then sold the shares to others – through individual transactions or through brokerage accounts at Hypo Bank and Peacock Hislop. Pierce and Newport Capital therefore deliberately sold shares in violation of Section 5.

Similarly, Pierce did not file the necessary Schedule 13D form until June 2006, when his Lexington transactions were already under investigation. Even in the belated filing, Pierce failed to disclose all of his transactions through IMT, a company he controlled.

Pierce has made no effort to acknowledge or show remorse for his misconduct or to demonstrate that it will not happen again. Quite to the contrary, Pierce falsely claims that he acted in good faith and does not disclose the full extent of his role in distributing Lexington shares by refusing to answer questions in purported reliance upon financial privacy laws. That is a smoke screen, and the Hearing Officer should disregard it.

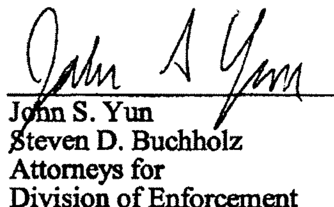
Finally, Pierce does not come to this proceeding with a clean record as a securities professional. On June 8, 1993, Canadian securities regulators in Vancouver, British Columbia made findings that Pierce received proceeds from an offering by Bu-Max Gold Corp. ("Bu-Max") for an unauthorized purpose. During the Canadian authorities' investigation, Pierce also submitted "documents to the staff of the Commission which were not genuine." Canadian regulators therefore imposed a fifteen-year bar upon Pierce and a $15,000 fine. *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce*, Order Under Section 144 (June 8, 1993). Because Pierce appears to make his living by acquiring and selling securities without complying with the securities laws and without having any professional licenses, the Hearing Officer should impose a cease and desist order to protect investors.

CONCLUSION

For the foregoing reasons, the Division asks that the Hearing Officer issue an order (i) finding that Pierce violated Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act, (ii) ordering Pierce to pay $2.1 million in disgorgement plus prejudgment interest on that amount and (iii) ordering Pierce to cease and desist from violations of Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act.

Dated: December 5, 2008

Respectfully submitted,



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

Exhibit 4

1 UNITED STATES OF AMERICA
2 BEFORE THE
3 SECURITIES AND EXCHANGE COMMISSION
4 ADMINISTRATIVE PROCEEDING
5 File No. 3-13109
6 ---
7 In the Matter of)
8 LEXINGTON RESOURCES, INC.,)
9 GRANT ATKINS, and)
10 GORDON BRENT PIERCE)
11 Respondents.) Administrative Law Judge
12) Carol Fox Foelak
13 ---
14 TRANSCRIPT OF PROCEEDINGS
15 ---
16
17 February 2, 2009
18 700 Stewart Street, Room 18206
19 Seattle, Washington
20
21
22
23
24 JULIE C. OSWALD, CSR #299-06
25 COURT REPORTER

1 things that the Court can take into consideration is past
2 regulatory history of the respondent to assess the
3 possible need for some sort of future protection of
4 investors, and we believe that this is something that the
5 Court is entitled to take into consideration for that
6 purpose, whether or not technically under the rules of
7 evidence it might or might not come in before a jury.
8 That's point number one.
9 Point number two, in terms of whether or not it
10 should be disclosed, one of the things we were going to
11 discuss with Mr. Pierce if he was here, but we can point
12 it out anyway, in the Schedule 13-D that Mr. Pierce filed
13 in July of 2007 -- 2006, I'm sorry -- unless I'm missing
14 something, this particular order is already alluded to.
15 So that has already been put at issue, at least in general
16 terms in the 13-D, which is coming into this case, so we
17 think that the rest of the order that underlies that is
18 perfectly fair game to come into the record to show what
19 the 13-D is alluding to, plus what your Honor should be
20 entitled to consider if you determine that some sort of
21 remedies might be appropriate.
22 MR. WELLS: Your Honor, regarding the Schedule
23 13-D, presumably Mr. Pierce was trying to respond
24 thoroughly and efficiently and correctly to the
25 requirements for information to be provided under 13-D,

1 but as we point out in the motion, even considering this
2 BC Securities order for the purposes of remedial leave,
3 and whether that is appropriate, this order is
4 irrelevant.
5 By its own terms this order expired back in June
6 of last year. This case was not commenced until July 31st
7 of last year. Therefore the BC Securities Commission's
8 order expired by its own terms before this case was even
9 commenced.
10 Secondly, under the Securities and Exchange
11 Commission's disclosure rules, this order would not have
12 to be disclosed for public filings if Mr. Pierce were an
13 officer or director five years after its issuance, or more
14 than five years after its issuance. And finally, under
15 federal rules of evidence this order would not be relevant
16 for any purpose in this case after ten years. So we have
17 five, ten and 15 year thresholds, none of which has been
18 crossed by the Division of Enforcement in this case,
19 therefore the order is irrelevant for all purposes in this
20 case. That's why we have moved to exclude it.
21 THE COURT: Thank you. To save time, I might as
22 well rule on this now, which is that I will take it in, as
23 you point out it was a long time ago, and -- well, let's
24 put it this way: It's less weight than if it was 16 days
25 ago. Of course as you know the rules of evidence,

1 especially when it comes to hearsay, are extremely lax in
2 these administrative proceedings, especially before the
3 SEC, and the idea being that the judge is supposed to be
4 able to weigh the weight of things of perhaps lessor
5 weight better than a jury.
6 That being said, I will deny your motion to
7 exclude the 1993 disciplinary order for whatever -- for
8 whatever that evidence is worth.
9 Does anyone have anything else?
10 MR. YUN: Not at this time. I think we can go to
11 the lunch break for other issues. I have witnesses
12 waiting.
13 THE COURT: Okay. Are you going to make an
14 opening statement?
15 MR. YUN: Yes. With the Court's permission I
16 would approach and hand to you some documentation. We
17 have already provided it to respondent's counsel, and I
18 will also display it on the screen before you. Let me
19 hand this to you so that you have it in case you want to
20 see it for any other reason.
21 THE COURT: Thank you.
22 MR. YUN: May I again, your Honor?
23 THE COURT: Yes, please.
24 MR. YUN: Good morning. Your Honor, for the
25 record, once again, I am John Yun and I will be

1 representing the Division of Enforcement in this hearing,
2 along with attorney Steve Buchholz and legal assistant
3 Janet Johnston. This proceeding involves respondent
4 Gordon Brent Pierce's resale of millions of dollars in
5 stock issued by a newly formed oil and gas company,
6 Lexington Resources.
7 When the company was formed in November 2003
8 Pierce and entities he controlled received vested options
9 that initially represented 60 percent of the outstanding
10 stock and was almost always above 10 percent. Lexington,
11 in that time period, had no revenue and was heavily
12 dependent upon Pierce and his entities for financing.
13 Notwithstanding Lexington's financial condition,
14 the company's stock price soared during the beginning of
15 2004. Using brokerage accounts at Hypo Bank, Pierce sold
16 nearly 400,000 Lexington shares in June 2004 for $2.7
17 million. The Division's evidence will show that Pierce
18 sold the vast majority of those 400,000 shares just as
19 Lexington's stock price was surging to it's historic
20 high.
21 If you look at the first document before you,
22 your Honor, you will see a chart. This will also come in
23 during later testimony. This is a chart of the stock
24 price of Lexington. The red dots indicate where
25 Mr. Pierce sold his stock.

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1 Shortly after Pierce sold his shares in June 2004
2 Lexington's stock price collapsed, once again as indicated
3 by this chart. Eventually Lexington's operating
4 subsidiary went bankrupt.
5 In selling shares of Lexington Resources Pierce
6 illegally failed to register his stock sales or provide
7 any disclosure about himself or those sales to investors.
8 Pierce did not disclose to investors his close
9 relationship with Lexington Resources, and its president,
10 Grant Atkins. He made no disclosures about the conditions
11 he controlled and the combined ownership of a large
12 percentage of Lexington stock. He made no disclosure
13 about his sales of Lexington stock while the price was
14 rising.
15 Only two years later, in July 2006, when Pierce
16 belatedly filed a Schedule 13-D did he describe some of
17 his holdings in Lexington stock and allude to his problems
18 with Canadian securities regulators. But that limited
19 disclosure was too late. Pierce had already sold
20 Lexington shares for millions of dollars while never
21 warning outside investors that someone who once controlled
22 over 60 percent of the company's stock was selling
23 Lexington shares.
24 That knowledge would have been a red flag to
25 investors, precisely why the registration of Pierce's

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1 sales and disclosures about his transactions were so
2 necessary.
3 Pierce's lack of disclosure was illegal. It
4 involved violations of the registration provisions of the
5 Securities Act and the stock ownership disclosure
6 provisions of the Exchange Act. Those violations are what
7 the Division will prove during this hearing through
8 evidence that is essentially undisputed.
9 With respect to the Securities Act, Section 5
10 requires that every transaction -- and we stress the word
11 "transaction" -- involving the offer or sale of a security
12 using interstate commerce must have a registration
13 statement or a valid exemption from registration, and it's
14 well established by the cases Pierce did not have to act
15 with any wrongful intent such as even negligence to be
16 liable for a Section 5 violation.
17 In this case there are three groups of Lexington
18 sales transactions that will be involved in a Section 5
19 violation. These are the summaries. There were
20 transactions November 2003, June 2004, and March 2006. We
21 have here the number of shares he received in those.
22 First, in November 2003 Lexington Resources
23 issued 500,000 shares to Pierce, retained 100,000 shares
24 for himself, and transferred 400,000 shares to a company
25 he controlled called Newport Capital.

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1 In January 2004 Lexington performed a three-for-
2 four stock split and issued additional shares to Pierce
3 and Newport Capital. This meant that his personally owned
4 100,000 Lexington shares became 300,000 shares.
5 Pierce also sold some of Newport's shares in
6 private transactions as we have here on the left-hand
7 column, and transferred other shares to an account at Hypo
8 Bank. Hypo Bank sold millions of Lexington shares from
9 its accounts between February and June 2004.
10 Second, in mid June 2004 Lexington issued another
11 split shares to Pierce. Pierce transferred those shares
12 to Newport Capital, which sold 80,000 shares to another
13 company he controlled and transferred the remaining
14 240,000 shares to Hypo Bank from which they were sold
15 during the second half of 2004.
16 The final set of transactions, the 2006
17 transactions, in March 2006, 1 million shares are issued
18 to Pierce. Newport sells 664,000 of those shares to a
19 brokerage account and retains the rest.
20 Pierce received these shares under a vested
21 option grant for 950,000 shares made to another company
22 that Pierce controlled called International Market Trend,
23 or IMT. When Pierce exercised these, the option to
24 receive the shares, Lexington issued them under a Form S-8
25 registration statement that by law only allowed shares to

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1 be issued to employees or consultants who do not provide
2 services for raising money from investors or promoting the
3 issue of stock.
4 A Form S-8 registration statement can be used to
5 cover the resale of shares by employees and consultants,
6 but as we will show through the Division's testimony, that
7 did not happen here, because Pierce's sales were not
8 registered. The Division will establish during its case
9 in chief that Pierce committed a prima facie violation of
10 Section 5.
11 We will satisfy all three elements of showing
12 that, one, Pierce resold his shares, two, there were no
13 registration statements covering his resales, and three,
14 he used interstate commerce for those resales by
15 telephonic, electronic and mail instructions, as well as
16 resales on exchanges or quotation boards. That is all
17 that the Division must prove for its case in chief, and
18 the Division will provide that proof.
19 It is not the Division's burden to allege or
20 prove that Pierce lacked an exemption from Section 5. We
21 anticipate that Pierce will claim that such an exemption
22 existed under Section 4.1 of the Securities Act which
23 exempts transactions by a person who is not acting as an
24 issuer or an underwriter.
25 The Division's evidence regarding the movement of

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1 the S-8 shares -- once again, we will really focus on the
2 November 2003 time period here -- will show that the
3 movement of shares from Pierce to Newport and other
4 entities, and then to brokerage accounts and individual
5 purchasers, constituted a distribution by Pierce of his
6 S-8 shares so as to constitute Pierce as being the
7 definition of a statutory underwriter in this case.
8 Pierce also sold the majority of shares within
9 the one-year period that was required by selling hundreds
10 of thousands of shares just as Lexington's share price was
11 peaking in June 2004. As a result we believe that the
12 total evidence will show there was no Section 4.1
13 exemption for Pierce's resales of his Lexington shares.
14 The Division will also establish Pierce's
15 violations of Section 15-D and Section 16-A of the
16 Exchange Act by his failure to file the necessary
17 disclosure forms.
18 Section 13-D required Pierce's filing of a
19 Schedule 13-D within ten days of acquiring a 5 percent
20 beneficial ownership. Pierce admits in his answer that he
21 did not file his Schedule 13-D until July 2006, even
22 though he had transactions going back all the way to
23 November and December of 2003. Pierce therefore concedes
24 his violation of Section 13-D.
25 Section 16-A of the Exchange Act required Pierce

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1 to file forms 3, 4, and 5 to disclose his transactions in
2 Lexington shares while he was a 10 percent owner of the
3 company stock.
4 Pierce does not challenge his failure to file
5 those forms, but contends that he was never a 10 percent
6 beneficial owner. The Division will prove that his
7 beneficial ownership interest nearly always exceeded 10
8 percent for the entire time period, and was once at 60
9 percent.
10 To see this we need to look at some of the
11 relationships that Pierce has with various companies.
12 First, what the Division's evidence will show is that
13 Pierce managed and controlled two entities about which you
14 will hear quite a bit in this case. You will hear about
15 Newport Capital -- I have already mentioned that -- and
16 you will hear about IMT, which was the company that
17 received the 950,000 vested option shares.
18 With respect to Newport, Pierce was the president
19 and a director of Newport. He decided who should serve as
20 consultants for Newport, which did not have employees, it
21 had only consultants.
22 He hired and selected all of those consultants.
23 He also directed the brokerage tradings for Newport
24 Capital. Pierce therefore controlled Newport Capital
25 directly, and its consultants indirectly. Notably one of

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1 the consultants for Newport Capital is Grant Atkins who
2 you will hear about. He is the president of Lexington
3 Resources.
4 Newport Capital paid large consulting fees to
5 Mr. Atkins, and lent him a substantial amount of money
6 during the time period that Lexington was issuing shares
7 to Pierce, and that Pierce was reselling those shares.
8 Additionally, Pierce ran IMT which was the
9 recipient of the 950,000 option shares. IMT provided
10 consulting services to Lexington, and Pierce, once again,
11 decided who should be IMT's consultants. As a result,
12 Pierce controlled IMT directly, and its various
13 consultants indirectly. He is therefore legally the
14 beneficial owner of the option grant shares that went to
15 or through IMT.
16 Second, Pierce controlled other entities that you
17 will hear he was an officer and director of. This is
18 again a chart that provides you with the names of those
19 entities, Newport and IMT that I have already discussed.
20 You will hear at least three other names, Pacific
21 Rim, Park Place, and Spartan. All of these entities
22 became shareholders of Lexington, and Pierce is deemed to
23 be the beneficial owner through his control of those
24 shares.
25 By virtue of his control over IMT, Newport, and

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1 these other entities, Pierce's stock holdings and
2 influence over Lexington went far beyond that which you
3 would normally expect of any employee or consultant.
4 Thirdly, Mr. Jeffrey Lyttle, staff examiner with
5 the San Francisco office, will present a summary from
6 brokerage statements and transfer records of the amount of
7 Lexington shares held by Pierce and these various entities
8 at any particular time.
9 Using that information, Mr. Lyttle will provide a
10 calculation of the combined percentage of outstanding
11 Lexington shares that Pierce and these entities held at
12 any given time. His calculations will reflect that Pierce
13 and these entities combined had an ownership interest that
14 exceeded 10 percent for nearly all of the relevant
15 period. This chart will show some examples of the
16 ownership that we will indicate.
17 The high point is November 18, 2003. You see the
18 10 percent line. There was a period in December 2004
19 where it fell beneath the 10 percent, and again in May of
20 2006, but throughout most of the period you will see a
21 beneficial ownership that is over 10 percent. On occasion
22 even, as we quoted, it was 20 percent.
23 The Division -- as a result of these percentages
24 Pierce was required to file forms 3, 4 and 5 under Section
25 16-A of the Exchange Act but never did so, and therefore

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1 provisions were all predicated upon Mr. Pierce having
2 provided ineligible services. Presumably that is because
3 the Division hadn't figured out at that point in time that
4 the little bit of capital raising that Mr. Pierce did on
5 behalf of Park Place was compensated separately and apart,
6 and not through S-8 issuances, but rather then by a cash
7 payment of $25,000, as you have seen from that chart.
8 Once they figured that out, when we had our
9 September 29 telephone conference, they realized that
10 their eligibility case was not going to go anywhere and
11 that explains why the Division refused to provide a more
12 definite statement about which particular services
13 Mr. Pierce provided that were compensated by S-8 options
14 that actually had to do with capital raising, so there was
15 a statement back then that that information would not be
16 provided. There is no such allegation at this point of
17 the case. Just as there was no such allegation in the
18 December summary disposition and prehearing briefing by
19 the Division.
20 So the Division is now proceeding under the novel
21 theory that Mr. Pierce violated the registration
22 provisions because he took shares that were registered
23 under an S-8 stock option plan, exercised and purchased
24 those shares, and then resold them, just as you or I might
25 in an S1 registration by Cisco Systems, and if we got cold

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1 feet and a few months later resold our Cisco shares, under
2 the proceeding that we are about to undertake, analogizing
3 the case the Division is going to bring against Mr. Pierce
4 to your situation and mine upon selling our Cisco stock,
5 we would then be put to the burden of -- once the Division
6 of Enforcement challenged us as violating the registration
7 provisions -- of having to show that there was nothing
8 wrong with the registration by Cisco. Otherwise you and I
9 don't have access to Section 4.1, the exemption for those
10 who are involved in transactions that do not involve
11 issuer, dealer, or underwriter.
12 You and I would have to comb through SK, and we
13 are securities lawyers and we might have a difficult time
14 meeting a burden of proof that Cisco properly registered
15 its shares so that when we resold the shares we purchased
16 in a public offering we were not violating the
17 registration provisions. That's the case the Division is
18 going to bring to you today. That case does not exist.
19 In addition we are going to call an expert
20 witness who will put to rest one other aspect of that case
21 that arose in their December briefing. The Division has
22 since fallen back and said, well, in their briefing in
23 December, that Mr. Pierce must have received securities
24 that were not registered under the S-8 plan, but rather
25 were issued in a private offering, and therefore they were

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1 restricted securities from the date he received them.
2 Why is that? Their contention is that because
3 the transaction documents, some of which I just showed you
4 on the screen, like the notice and agreement of exercise
5 of sale, the S-8 registration, the stock option plan,
6 contain language like "investment purpose," or an explicit
7 reference in the event, et cetera, et cetera, the issuer
8 will use section 4.2, private placement.
9 The Division is contending because this alternate
10 theory, that the issuer chose -- that the issuer might
11 choose to avail itself of in issuing stock to Mr. Pierce
12 existed in the transaction documents. They theorize that
13 necessarily the issuer must have used that private
14 placement in issuing shares to Mr. Pierce.
15 You will see correspondence by Mr. Atkins, the
16 president of Lexington, to the transfer agent, Mr. Stevens
17 on a number of occasions whenever a stock, an S-8 stock
18 option was exercised in this case, or by a recipient or
19 grantee of Lexington, that the shares were always to be
20 marked free trading, and in fact clear stream eligible,
21 because they were traded overseas on the Frankfurt
22 exchange, and according to the testimony you are going to
23 hear, clear stream eligible enabled the shares to be
24 traded in overseas markets.
25 So clearly the evidence will show you that

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1 Lexington used the S-8 registrations that have never been
2 challenged by the Division to issue every share of S-8
3 stock to Mr. Pierce that they claim was involved in an
4 illegal distribution because they say Mr. Pierce was an
5 underwriter.
6 There is a legal argument there that I won't make
7 right now, but I want to make it clear in the opening
8 statement, that the evidence will not show that Mr. Pierce
9 was an underwriter for the reasons we have just described.
10 THE COURT: Thank you.
11 MR. YUN: Thank you, your Honor. We will go
12 ahead and call our first witness then.
13 THE COURT: Good.
14 ***
15 TED YU: Being first duly sworn by
16 the Judge on oath testified as follows:
17
18 DIRECT EXAMINATION
19 BY MR. YUN:
20 Q. Good morning, sir.
21 A. Good morning.
22 Q. I am glad to see the microphone is on.
23 Could you state your full name for the record,
24 spelling your last name?
25 A. Sure, Ted Yu. The last name spelled Y-U.

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1 Newport Capital?
2 A. Yes, I did.
3 Q. Did you find those names appearing?
4 A. Newport Capital is mentioned in item 4, the
5 submission of matters to shareholders vote, and Newport
6 Capital was a 2.6 percent holder at the time of
7 acquisition of Lexington Oil.
8 Q. Anything else that you found in there about
9 either Newport Capital or Brent Pierce?
10 A. No.
11 Q. Turn back then to the previous binders. Look at
12 the items behind tabs 7, 8, and 9.
13 A. Yes.
14 Q. Tell us if you recognize these exhibits.
15 A. Yes, I do.
16 Q. What are they?
17 A. These are Form S-8s that were filed by Lexington
18 Resources to register common stock that was going to be
19 issued to the planned participants.
20 Q. Is the first one for June of 2004?
21 A. Yes.
22 Q. That's Exhibit 7?
23 A. Yes.
24 Q. And Exhibit 8 would be February 2006, is that
25 right?

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1 A. Yes.
2 Q. And Exhibit 9 is March 2006?
3 A. Yes.
4 Q. Looking at these together, which sales
5 transactions did these three Form S-8s register?
6 A. They registered the issuance from the company to
7 the planned participants.
8 Q. Did you find any supplemental prospectus
9 registering sales by shareholders --
10 A. No.
11 Q. -- for these documents?
12 A. No, I did not.
13 Q. If I could ask you to turn to the other binder,
14 Exhibit 56.
15 A. Yes.
16 Q. Do you recognize what this document is?
17 A. It is the form 10 KSB for Lexington Resources for
18 2004.
19 Q. That's the period ending December 31st, 2004?
20 A. Yes.
21 Q. Did you do a word search through this document
22 for the names Brent Pierce and Newport Capital?
23 A. Yes, I did.
24 Q. Did you find any disclosure of those names in
25 this document?

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1 A. No, I did not.
2 Q. If you could then turn to Exhibit 57 and tell us
3 if you recognize what this document is.
4 A. This is the form 10 KSB for fiscal year ending
5 December 31st, 2005.
6 Q. Did you do a word search through this document?
7 A. Yes.
8 Q. Did you find the name Brent Pierce in this
9 document?
10 A. No.
11 Q. Did you find the name Newport Capital in this
12 document?
13 A. No.
14 Q. Let me ask you to turn to Exhibit 58. Can you
15 tell us what this document is?
16 A. This is the form 10 KSB for Lexington Resources
17 for the fiscal year ended December 31st, 2006.
18 Q. Did you do a word search through this document?
19 A. Yes.
20 Q. Did you find either the name Brent Pierce or
21 Newport Capital in this document?
22 A. Yes, I did.
23 Q. What did you find?
24 A. In the beneficial ownership table under item 11,
25 Newport Capital was listed as owning 5.6 percent of

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1 Lexington Resources' shares, and in a footnote Brent
2 Pierce was noted as having disposition power over those
3 shares.
4 Q. Since you are in that general area, let me ask
5 you to take a look at Exhibit 59, please.
6 A. Yes.
7 Q. What is Exhibit 59?
8 A. It is a Form SB 2 filed by Lexington Resources.
9 Q. Can you tell us what the filing date was?
10 A. December of 2004.
11 Q. Is that December 15, 2004?
12 A. Yes.
13 Q. In general, what is a Form SB 2?
14 A. A Form SB 2 is a registration statement under the
15 '33 Act, and registered offers and sales of securities by
16 the company.
17 Q. With respect to this document did you do a word
18 search for the names Brent Pierce or Newport Capital?
19 A. Yes, I did.
20 Q. Did either one of those names appear?
21 A. Yes, Newport Capital was listed as a selling
22 shareholder of some common shares, and Brent Pierce was
23 noted in a footnote as having dispositive powers over
24 those shares.
25 Q. Let me ask you to turn to Exhibit 60.

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1 opinion -- you know, if you have an opinion.
2 THE WITNESS: If you buy shares in Cisco?
3 Q. In a registered public offering, and resell them
4 a few weeks later.
5 A. Right. When you resell them you will have to ask
6 yourself if there is an exemption that you can rely on or
7 else you should file a registration statement. That's a
8 decision that requires you to look at all available
9 exemptions under the '33 Act.
10 MR. WELLS: I have nothing further of this
11 witness, your Honor.
12 THE COURT: Thank you.
13 MR. YUN: No follow-up.
14 THE COURT: Thank you for your testimony,
15 Mr. Yu. You may depart.
16 MR. YUN: Is he free to go back to Washington?
17 THE COURT: You are free to go back to
18 Washington.
19 THE WITNESS: Thank you.
20 MR. WELLS: I object, he is already in
21 Washington.
22 MR. BUCHHOLZ: The Division calls Robert Stevens.
23 THE COURT: Do counsel find this room sort of on
24 the warm side?
25 MR. YUN: I don't have a problem with it.

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1 MR. WELLS: We are fine, your Honor.
2 MR. BUCHHOLZ: It seems okay.
3 MR. YUN: We have quite a number of vents over
4 here.
5 MR. WELLS: If we do get warm in here, may we ask
6 you if we can remove our coats?
7 THE COURT: Yes, I was even thinking of seeing if
8 the temperature could be lowered. Go ahead and bring it
9 up.
10 MR. WELLS: Thank you, your Honor.
11 MR. YUN: Can we take five minutes?
12 THE COURT: Let's take to quarter to.
13 MR. YUN: Thank you very much, your Honor.
14 Sorry.
15 (Recess.)
16 **
17 ROBERT STEVENS: Being first duly sworn by
18 the Judge on oath testified as follows:
19
20 DIRECT EXAMINATION
21 BY MR. BUCHHOLZ:
22 Q. Mr. Stevens, could you please state your name for
23 the record
24 A. Robert, R-O-B-E-R-T, Stevens, S-T-E-V-E-N-S,
25 middle name Louis, L-O-U-I-S.

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1 Q. Mr. Stevens, did you start a transfer agent
2 business in 2001?
3 A. Yes, sir, I did.
4 Q. What was the name of the transfer agent business?
5 A. Global Stock Transfer, Incorporated.
6 Q. Has it also been known by other names?
7 A. Yes, we changed the name to X-Clearing
8 Corporation, the letter X, dash, Clearing,
9 C-L-E-A-R-I-N-G, Corp.
10 Q. Was it known as X-Clearing during 2003 and 2004?
11 A. Yes, it was.
12 Q. Was it registered with the SEC?
13 A. Yes, it is, and was.
14 Q. Were you employed at X-Clearing 2003 and 2004?
15 A. Yes, I was.
16 Q. What was your role?
17 A. President, and later chairman.
18 Q. About how many employees did X-Clearing have at
19 that time?
20 A. As few as three, and as many as four.
21 Q. As president and chairman were you familiar with
22 X-Clearing's business records?
23 A. Intimately, yes.
24 Q. Mr. Stevens, did X-Clearing have a client named
25 Lexington Resources during 2003 and 2004?

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1 A. Yes, it did.
2 Q. Was it also a client when it was known as
3 Intergold?
4 A. Yes, it was.
5 Q. Did X-Clearing maintain records related to
6 Lexington or Intergold shares and transfers of shares
7 during 2003 and 2004?
8 A. Yes, we did.
9 Q. When did you first obtain Lexington or Intergold
10 as a client?
11 A. I remember it well. It was right after the
12 terrorist attacks of '01, in 2001. That's when I
13 approached Mr. Pierce and Mr. Atkins about their business
14 and we obtained the account.
15 Q. Who actually agreed with you that Intergold at
16 the time, and later Lexington, would be a client of
17 X-Clearing?
18 A. Originally Mr. Pierce, and then later Mr. Atkins.
19 Q. Was Lexington part of a group of companies that
20 became clients of X-Clearing at the same time?
21 A. Yes, it was. I believe there were three that we
22 brought over at one time.
23 MR. WELLS: Objection, your Honor, irrelevant.
24 MR. BUCHHOLZ: I'm not going to go much further
25 on that route, I just wanted to establish the relationship

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1 compensation in lieu of cash?
2 A. Yes, sir.
3 Q. Are you familiar with a company called ICI?
4 A. I am.
5 Q. What is your understanding of what that company
6 is or was?
7 A. It was my understanding Investor Communications,
8 also known as ICI, those are the initials, was a company
9 that provided investor relation and exposure issues for
10 public companies.
11 Q. Did you have any conversations with Mr. Pierce
12 about that company?
13 A. Yes, sir, on an ongoing basis.
14 Q. Was that happening in 2003 and 2004?
15 A. Yes, it was.
16 Q. Did you have an understanding, based on those
17 discussions, what his role was with ICI?
18 A. Mr. Pierce was the funds behind it, and the
19 brains behind the operation.
20 Q. Are you familiar with a person named Marcus
21 Johnson?
22 A. I am.
23 Q. Did you have an understanding of what his role
24 was, based on your discussions with Mr. Pierce?
25 A. It was my understanding that his roles were

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1 similar to Mr. Atkins. Mr. Johnson did the administrative
2 paperwork, the filings as necessary, the administrative
3 side of the business.
4 Q. Did you ever work for ICI?
5 A. No. I did not directly, no.
6 Q. You didn't have any sort of consulting agreement
7 with ICI?
8 A. No, sir.
9 Q. Did you ever enter into any sort of debt
10 assignment agreement with ICI?
11 A. No, sir.
12 Q. Are you familiar with a company called
13 International Market Trend?
14 A. I am.
15 Q. What is your understanding of that company?
16 A. My understanding of International Market Trend is
17 it's a European version of ICI.
18 Q. Did you ever provide services for IMT?
19 A. No, I did not.
20 Q. Did you have discussions with Mr. Pierce about
21 IMT?
22 A. In a limited capacity, yes.
23 Q. Based on those discussions did you have an
24 understanding of his role at IMT?
25 A. My understanding of his role with IMT was the

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1 same as his role with ICI.
2 Q. Did you have that understanding back in 2004?
3 A. Yes, sir, I did.
4 Q. In association with the 25,000 shares that were
5 issued to you following this letter, page 1 of Exhibit 40,
6 did you receive 50,000 additional Lexington shares as a
7 result of the three-for-four split?
8 A. Yes, I did.
9 Q. What did you do with those shares?
10 A. Those shares I gave back to Mr. Pierce.
11 Q. Did Mr. Pierce ask you to deliver those or
12 journal them to a particular place?
13 A. Yes, sir, the share certificates were sent to a
14 bank in Liechtenstein called Hypo Alpe-Adria Bank. I'm
15 slaughtering the pronunciation.
16 Q. You can refer to it as "Hypo."
17 A. We sent to Hypo where the share certificates were
18 then broken down via some sort of a journal entry on their
19 end, 50,000 to I believe him or Newport Capital, and
20 25,000 shares were DTC'd back to our account at V Finance
21 Investments -- V as in Victor and the word "Finance."
22 Q. When you say "we," you mean you personally?
23 A. Yes.
24 Q. So you received 25,000 back, but the 50,000
25 remained at Hypo Bank for either Mr. Pierce or Newport?

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1 A. Yes, sir, that was my understanding.
2 Q. Was that based on discussions with Mr. Pierce?
3 A. It was.
4 Q. Did he tell you a particular account at Hypo to
5 specify when you sent the shares over to Hypo Bank?
6 A. It's my recollection that it was Newport Capital's
7 account.
8 Q. In the discussions you had with him do you know
9 whether he also had an account at Hypo Bank?
10 A. Yes, I knew that Newport did have an account
11 there.
12 Q. Right, Newport.
13 I'm wondering whether you had knowledge of him
14 also having an account, or just the Newport account?
15 A. It was my understanding that he had an account
16 there as well.
17 Q. Please refer to Exhibit 41, the next exhibit in
18 the binder.
19 A. I'm there.
20 Q. Do you recognize Exhibit 41?
21 A. I do.
22 Q. Can you also refer to -- let's do them one at a
23 time -- 42 next?
24 A. Yes.
25 Q. And 43?

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1 terms of any other Privacy Act, we would have complied
2 with those when we subpoenaed the documents, and I don't
3 think they applied.
4 MR. WELLS: If I may respond, using them is one
5 thing. Using them without protecting confidentiality is
6 quite another.
7 THE COURT: Apparently Hypo Bank didn't ask for
8 any confidentiality, and the Privacy Act doesn't apply to
9 anything but a person, a human.
10 Anyway, Exhibit 21 is admitted.
11 MR. YUN: Exhibits 23 and 24 are account
12 statements that we would offer subject to our prior
13 agreement regarding redaction.
14 MR. WELLS: Same objection, your Honor.
15 THE COURT: Okay, 23 and 24 will be admitted as
16 redacted.
17 MR. YUN: Exhibit 25, which are documents re
18 Newport Capital and V Finance.
19 MR. WELLS: Same objection as to a non-party,
20 your Honor. I would repeat there has been no offer by the
21 Division to demonstrate that there is any notice to
22 Newport Capital, and an opportunity for Newport Capital
23 prior to production to redact portions of the documents it
24 thought should be redacted or to designate the information
25 confidential and seek to have it protected in its

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1 entirety, even if it is used in the proceeding.
2 THE COURT: 25 is admitted, and 26.
3 MR. YUN: I'm offering 26, 27, and 28.
4 THE COURT: I gather the same objection would
5 apply to 26, 27 and 28?
6 MR. WELLS: Correct, your Honor.
7 THE COURT: Okay, 26, 27 and 28 are admitted.
8 MR. YUN: The Division Exhibit 29 and 30 are
9 account records from Newport at a different brokerage
10 firm, the Peacock firm, and again subject to the
11 Division's same agreement to redact personal identifying
12 information, we would move those in.
13 MR. WELLS: Same objection, your Honor.
14 THE COURT: Thank you. 29 and 30 are admitted,
15 as redacted.
16 MR. YUN: And finally, Exhibit 46, which are some
17 transfer agent records relating to Lexington. This was
18 held by a different transfer agent firm. He mentioned a
19 Transfer On Line this morning, Mr. Stevens, so this is a
20 Transfer On Line record.
21 MR. WELLS: I will object on the basis of
22 relevance, your Honor.
23 MR. YUN: What these transfer records show are
24 similar to the ones we had this morning, they would show
25 the movement of Lexington shares for the March 2006 S-8

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1 offering.
2 THE COURT: That sounds at least vaguely
3 relevant. Those are admitted, Division Exhibit 46.
4 MR. YUN: Thank you, your Honor.
5 THE COURT: Very good.
6 MR. BUCHHOLZ: The Division calls Jeffrey
7 Lyttle.
8 **
9 JEFFREY LYTTLE: Being first duly sworn by
10 the Judge on oath testified as follows:
11
12 DIRECT EXAMINATION
13 BY MR. BUCHHOLZ:
14 Q. Good afternoon, Mr. Lyttle. Can you please state
15 your name for the record?
16 A. Jeffrey Lyttle, first name J-E-F-F-R-E-Y, last
17 name little, L-Y-T-T-L-E.
18 Q. Where do you work, Mr. Lyttle?
19 A. I am employed at the Securities and Exchange
20 Commission in the San Francisco regional office.
21 Q. What is your job title?
22 A. I am a securities compliance examiner.
23 Q. What are your responsibilities generally as a
24 securities compliance examiner?
25 A. I conduct examinations of broker dealers and

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1 transfer agents that are registered with the commission to
2 insure compliance with federal securities laws.
3 Q. Mr. Lyttle, did you prepare several charts
4 summarizing brokerage and transfer agent records in this
5 matter?
6 A. Yes, I did.
7 Q. Where did you obtain the documents and
8 information that you have summarized in your charts?
9 A. Documentation was provided by Division staff, and
10 it's my understanding that those documents were obtained
11 through the Lexington Resources investigation.
12 In addition I obtained historical price and
13 volume trade data from publicly available sources in
14 regard to Lexington Resources.
15 Q. We will talk more about the charts in more
16 detail.
17 First let's briefly talk about your background.
18 Did you attend college?
19 A. Yes, I did. I obtained a bachelor's degree in
20 1982 from Bates College, a degree in English.
21 Q. Have you taken any course work since that time,
22 any accounting or finance?
23 A. Yes, I have taken course work in accounting, and
24 I've obtained training through internally at the SEC in
25 regard to accounting and financial records.

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1 Q. Very briefly, can you summarize your work history
2 before you started at the SEC?
3 A. After college I was a claims adjuster with a law
4 firm in New York City from 1983 to 1989 that focused on
5 insurance, maritime insurance, specifically. It was not
6 securities related.
7 In 1989 I moved to San Francisco and was employed
8 again as a paralegal in a law firm, and that firm focused
9 -- the work they did focused on defense of litigation and
10 arbitrations brought by investors. One of my central
11 duties was preparing profit and loss analyses on the
12 accounts at issue in those cases.
13 Q. How long have you been with the SEC?
14 A. Ten years. Since April 1999.
15 Q. Have you been a securities compliance examiner
16 the whole time that you've been with the SEC?
17 A. Yes, I have.
18 Q. As part of your responsibilities with the SEC do
19 you review and analyze brokerage and transfer agent
20 records?
21 A. Yes, I do.
22 Q. Do you sometimes also assist Division staff
23 during investigations?
24 A. Yes.
25 Q. What types of activities does that involve?

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1 A. Oftentimes it's assisting in preparing requests
2 of broker dealer transfer agents related records, and at
3 other times reviewing databases of information, filings
4 and financial records in databases that I have access to.
5 Q. When did Division staff first ask for your
6 assistance in summarizing records in this matter?
7 A. November 2008.
8 Q. Had you previously conducted any examinations
9 related to the Lexington investigation?
10 A. No, I did not.
11 Q. Had you provided assistance of any kind to the
12 Division staff during the investigation?
13 A. Earlier in 2008 I conducted a database search at
14 Division staff's request, and provided them with search
15 results. That was in early 2008, as I recall.
16 Q. Did you analyze information, or just provide them
17 search results?
18 A. It was providing search results. There was no
19 analysis involved.
20 Q. Mr. Lyttle, can you please turn to Division
21 Exhibit 48 in the first binder of Division exhibits?
22 A. Okay.
23 Q. Do you have Exhibit 48 in front of you?
24 A. Yes, I do.
25 Q. Do you recognize Exhibit 48?

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1 A. Yes, this is a chart that I prepared.
2 Q. Is it complete in the form that you prepared it?
3 A. Yes, it is. It is a one-page chart and attached
4 to it are two spreadsheets, the first one is 14 pages long
5 and the second one is two pages long.
6 Q. What is summarized in Exhibit 48?
7 A. The chart reflects the closing price of Lexington
8 Resources during two time periods, the daily closing price
9 of the stock from November 29, 2003 through the end of
10 2004, and for a second period, January 1st, 2006 through
11 June 30th, 2006.
12 On top of that are markers reflecting trades that
13 occurred in accounts in the name of Mr. Pierce and Newport
14 Capital. Purchases are reflected as blue triangles.
15 Sales are shown as red circles.
16 Q. What's in the box? There appears to be
17 summaries. It says, "summaries of trades by month."
18 A. Yes, the summaries of trades by month aggregate
19 the total number of shares bought and/or sold during
20 relevant months, and for shares sold lists the proceeds
21 from those sales, and for the shares bought the cost of
22 those purchases.
23 Q. Is that based on the same underlying information
24 that you have used for the chart?
25 A. Yes, yes, it's taken from the supporting

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1 spreadsheets which are in turn supported by brokerage
2 statements.
3 Q. Just to be clear again, which brokerage
4 accounts -- only refer to the last four digits of the
5 account numbers, if you want to refer to them by name.
6 Which accounts did you summarize in this chart?
7 A. Okay. I can refer to the brokerage firm?
8 Q. Sure.
9 A. The first account was Hypo Bank account ending in
10 84 -- 0840, and an account at V Finance ending in numbers
11 4207. The third account was a brokerage account with an
12 account number ending with numbers 9715.
13 Q. Why did you include -- I think you said there
14 were two in the name of Newport and one in the name of
15 Pierce, is that right?
16 A. That's correct.
17 Q. Why did you include Newport accounts?
18 A. Newport accounts, opening account documents,
19 reflect that Mr. Pierce was an officer of Newport
20 Capital. There were corporate resolutions attached to the
21 opening account documentation, and they were both
22 corporate accounts which require someone authorized to act
23 on the corporation's behalf in that account, and he was
24 designated as that person.
25 Q. What kind of trades are included in this chart?

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1 MR. WELLS: If I can respond briefly to that, I
2 don't think I heard any of that in the evidence except a
3 couple times Mr. Stevens said with respect to some other
4 company, that Mr. Pierce seemed to be calling the shots.
5 When questioned about it, Mr. Pierce did not
6 control the transfer agents at all. When we got to ANP it
7 turned out that Mr. Pierce's affiliate, Newport Capital,
8 had loaned ANP money but Mr. Stevens was, in fact, the
9 owner.
10 We also elicited testimony from Mr. Stevens that
11 Mr. Pierce was one of ICI's consultants, so it would make
12 perfect sense that Mr. Pierce would be helping to select a
13 transfer agent for Lexington, and otherwise consulting
14 with Grant Atkins and Mr. Stevens in order to help get
15 business done for Lexington.
16 Mr. Stevens further testified that all of the
17 formal documents were actually signed by Grant Atkins.
18 It was consistent that Grant Atkins was the president and
19 director of Lexington.
20 The evidence of Mr. Stevens does not rise
21 anywhere near the level to suggest -- to get past the
22 initial burden of proof, to show that Mr. Pierce was an
23 affiliate or controlling person.
24 Let's not forget a very elemental fact, and that
25 is that there has been no allegation in the OIP that

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1 Mr. Pierce was an affiliate or controlling of Lexington.
2 I would also like to move to dismiss the
3 reporting violations based on the evidence submitted by
4 the Division that all of the dates selected for
5 determining beneficial ownership are based on transfer
6 agent records, which is patently inconsistent with the
7 purpose of the beneficial ownership reporting
8 requirements, both under Section 13 and Section 16, and we
9 believe that the evidence they have submitted to sustain
10 their burden of proof on the reporting provisions is also
11 inadequate, so I would add that motion orally to the
12 motion to dismiss the registration violations.
13 Having understood that as to the Section 13-D
14 violation Mr. Pierce acknowledges that for some period of
15 time he should have reported 5 percent ownership but he
16 did not, and then the record shows he made a curative
17 filing, that's on the EDGAR system and part of the
18 commission's records.
19 THE COURT: Thank you, Mr. Wells. I will take
20 your motion -- I will defer action on your motion. As you
21 know, the commission frowns on dispositive rulings from
22 the bench as set forth in the Rita Villa, V-I-L-L-A case
23 of some years ago.
24 MR. WELLS: I have one other motion, a somewhat
25 narrower one.

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1 Your Honor, the Division has provided ample
2 correspondence showing the means of jurisdiction that have
3 been used, to innocent purposes we would contend,
4 perfectly lawful purposes, but nonetheless the means and
5 instrumentalities of United States Commerce have been used
6 in Mr. Pierce's purchases of Lexington securities, and in
7 his resale of Lexington stock to Newport Capital.
8 However, with respect to the sales of securities
9 from the Hypo Bank account in Liechtenstein, there has
10 been absolutely no evidence that jurisdictional means have
11 been used. The evidence before the Court is that
12 Mr. Pierce, a Canadian citizen obviously outside the
13 United States, had an account at the Hypo Bank, obviously
14 outside the United States in Liechtenstein, in which there
15 were securities that were sold, not until June of 2004,
16 and there own witness, Mr. Stevens, said that by the
17 spring of 2004 Lexington securities were registered for
18 trading on the Frankfurt exchange.
19 There is absolutely no evidence that the sales
20 from the Hypo Bank account were placed within the United
21 States or that the United States telephone lines, mails,
22 faxes or even computer servers within the United States
23 were used to consummate those sales.
24 MR. YUN: I think the Division's evidence has
25 made it pretty clear, the mails and the telephone were

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1 used, and the faxes were also used throughout this entire
2 process to move shares from Lexington to Pierce and
3 Newport Capital to other entities and to Hypo Bank and
4 that there is a Hypo Bank account at V Finance. As this
5 says, and I haven't had a chance to look at these cases,
6 it's all in the facts and circumstances of this case.
7 There was trading of Lexington shares in the United
8 States. There was a brokerage in Florida handling trading
9 in the United States. The excerpts of the testimony that
10 you will have from Mr. Pierce says he knew Mr. Thompson
11 and knew that Mr. Thompson was a market maker in the
12 United States, and that he communicated with him,
13 including for trading.
14 We think the evidence clearly shows a nexus to
15 interstate commerce in this country. Even if some of the
16 sales may or may not have arguably happened in Germany,
17 the fact is there were also sales happening in this
18 country, and we believe that's enough to satisfy the
19 standard for participation in interstate commerce, which I
20 think all the cases indicate is very broad indeed in this
21 area of securities laws.
22 MR. WELLS: It's interesting, your Honor, when
23 the Division was talking about the registration violation,
24 they were taking a very digital approach versus an
25 analogue or holistic approach. Every transaction,

1 UNITED STATES OF AMERICA
2 BEFORE THE
3 SECURITIES AND EXCHANGE COMMISSION
4 ADMINISTRATIVE PROCEEDING
5 File No. 3-13109
6 ---
7 In the Matter of)
8 LEXINGTON RESOURCES, INC.,)
9 GRANT ATKINS, and)
10 GORDON BRENT PIERCE)
11 Respondents.) Administrative Law Judge
12 Carol Fox Foelak
13 ---
14 TRANSCRIPT OF PROCEEDINGS
15 VOLUME III
16 ---
17 February 4, 2009
18 700 Stewart Street, Room 18206
19 Seattle, Washington
20
21
22
23
24 JULIE C. OSWALD, CSR #299-06
25 COURT REPORTER

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1 statements --
2 THE COURT: As long as I am on the housekeeping
3 matters, you have provided exhibits and I am going to give
4 them back to you.
5 You can send them in to me at my office, and I
6 have not written on them except to write exhibit numbers,
7 and in the case of Pierce Exhibit 58 I put on a sticky
8 that said "offered not admitted," but otherwise I haven't
9 written on them. I will leave the binders here when I
10 depart.
11 Do you want to have closing arguments, or take a
12 break and have closing arguments?
13 MR. YUN: Ours is not long, maybe 15, 20
14 minutes. We would be ready to go after a ten-minute
15 break, if they want closing statements.
16 MR. WELLS: Very well, your Honor. We might as
17 well get it done.
18 THE COURT: Let's take a ten-minute break.
19 (Recess.)
20 THE COURT: Please proceed.
21 MR. YUN: Thank you, your Honor.
22 This case has already generated a substantial
23 amount of briefing, motions and cross motions, and more
24 briefing is yet to come following this hearing.
25 With all this hearing the Court has certainly

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1 realized that this is not a common garden variety failure
2 to register case, and it is not.
3 Respondent Pierce would like you to believe that
4 the Division is looking to force every administrative
5 assistant who buys 100 shares of his or her employer stock
6 during an IPO or through an employee stock option plan,
7 must fear an enforcement action if he or she sells their
8 shares within a certain holding period. Rest assured,
9 that is not the case here because the evidence establishes
10 beyond any dispute that respondent Brent Pierce bears no
11 resemblance to the Cicso employee who merely buys and
12 sells some of that company's shares.
13 Instead, the evidence establishes that Pierce
14 engaged, with the assistance of others, including Grant
15 Atkins, in a deliberate effort to acquire and sell large
16 holdings of Lexington shares while avoiding any disclosure
17 to investors about themselves and their stock
18 transactions. By concealing his activities Pierce could
19 sell hundreds of thousands of Lexington shares in June
20 2004 for millions of dollars without investors knowing
21 that a large and influential Lexington insider was selling
22 off his holdings.
23 Although there is no claim in the order
24 instituting proceedings that has required the Division to
25 prove negligence, deceit, or any other wrongful state of

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1 mind on Pierce's part to prevail on any of its alleged
2 claims, the evidence during the hearing nonetheless
3 creates a compelling picture of a man who consciously
4 acted to circumvent the disclosure obligations of the
5 federal securities laws.
6 As the evidence in this hearing has shown, Pierce
7 consciously refused to comply with the registration
8 obligations of Section 5 of the Securities Act, and
9 deliberately failed to report his Lexington transactions
10 under Sections 13 and 16 of the Exchange Act.
11 The Division was not, and still is not, obligated
12 to prove any wrongful intent on Pierce's part, but in his
13 own case in chief with his own witnesses Pierce himself
14 proved his own efforts at deception under the federal
15 securities laws.
16 Turning first to the Division's Section 5
17 registration, the law is clear the elements of a prima
18 facie violation are merely one, Pierce's resale of his
19 Lexington shares, two, the absence of a registration
20 statement for those resales, and three, the use of
21 interstate commerce for those resales. There is no basis
22 for disputing the existence of all three elements of the
23 prima facie case.
24 I would like the Court -- we previously discussed
25 during the very last prehearing conference the Dudnick

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1 case, an initial decision that Administrative Law Judge
2 Mahoney issued. In that decision on page 14 Judge Mahoney
3 cites a case called Robert G. Weeks. It's a commission
4 opinion at 56 SEC 1297, a 2003 case. Administrative Law
5 Judge Kelly wrote the initial decision in that case.
6 During our briefing we will refer you to that
7 case and discuss it further. We think that reinforces our
8 position of the limited elements of a Section 5 violation,
9 even if there are allegations that some of the
10 transactions involved overseas accounts.
11 Going back, however, to the elements of the case,
12 Pierce does not deny his resales of Lexington shares.
13 Like the Division, he relies upon the transfer agent
14 records showing the rapid transfer of shares to Newport
15 Capital, and then to third persons or to brokerage
16 accounts.
17 Indeed, Mr. Atkins, who is Pierce's friend,
18 debtor, and witness, testified that on November 24, 2003
19 Pierce had to transfer and sell his initial exercise of
20 350,000 shares to try to circumvent the 10 percent
21 ownership reporting limit.
22 Additionally, Pierce admits in his answer that
23 Hypo Bank sold 400,000 shares for him in June 2004 for
24 $2.7 million. So the resale element is satisfied.
25 The lack of registration element is also

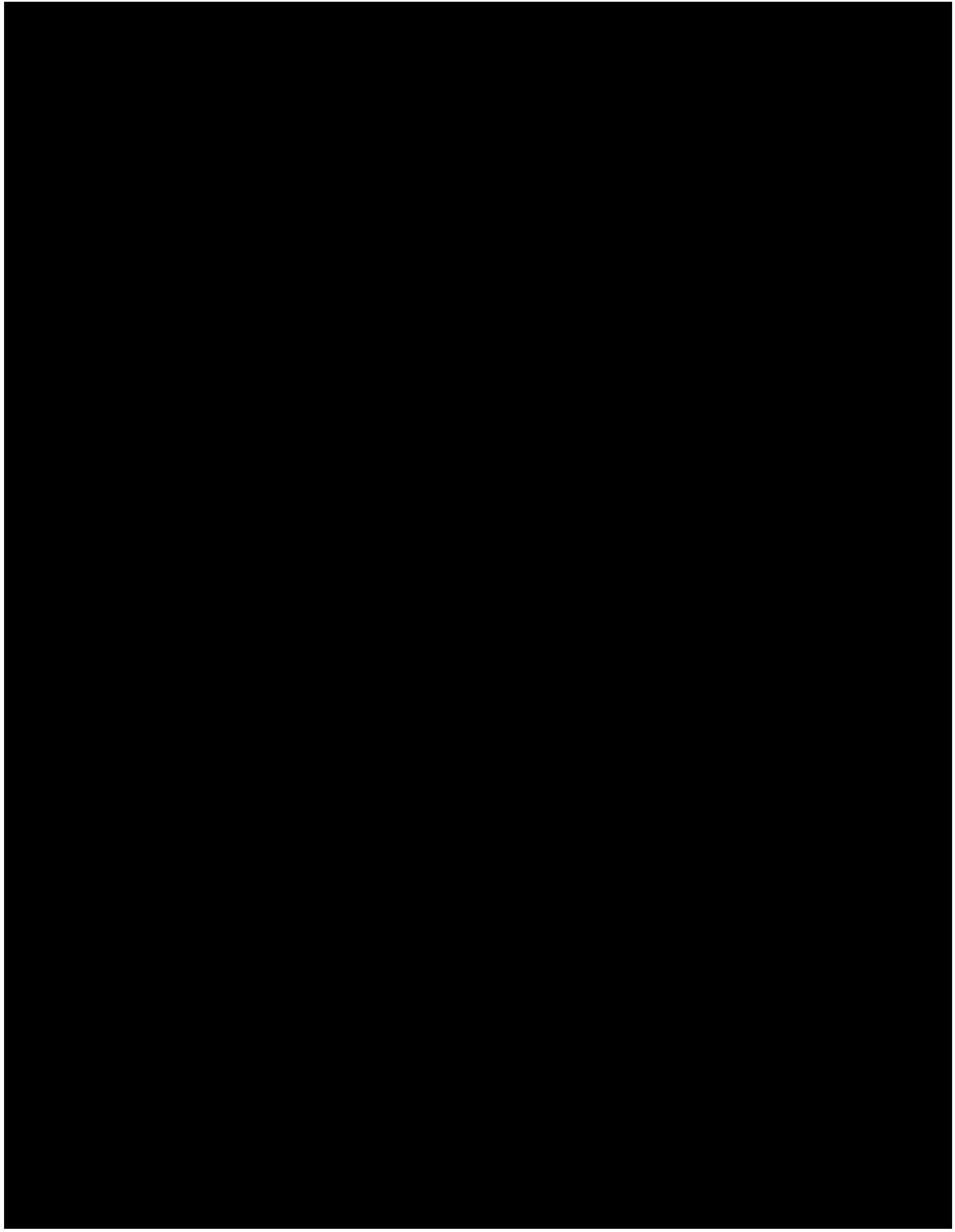
1 satisfied. Mr. Yu provided unchallenged testimony that
2 the Form S-8 registration statements could have contained,
3 but did not contain, a supplemental prospectus covering
4 his resales.
5 Their expert witness today does not dispute that
6 there was a supplemental prospectus opportunity in the
7 Form S-8 registration statements, if they had elected to
8 take advantage of it.
9 You have heard the testimony describing who had
10 to take advantage of that or risk violating the securities
11 laws, but there is no dispute that a supplemental
12 registration component was always available under S-8 to
13 register these shares.
14 Now, because Section 5 explicitly requires that
15 every transaction must be registered or exempt, Pierce's
16 resale had to be registered exempt, even if Lexington
17 shares were supposedly registered under Form S-8. As a
18 result, the second element is satisfied without looking at
19 Pierce's state of mind.
20 But here Mr. Atkins' evasive testimony on cross-
21 examination demonstrates Pierce's efforts to use Form S-8
22 in an abusive fashion. During his direct examination
23 Atkins testified extensively about the need to consummate
24 a transaction where ICI consultants exchanged their unpaid
25 claims for S-8 shares to relieve Lexington of $1.2 million

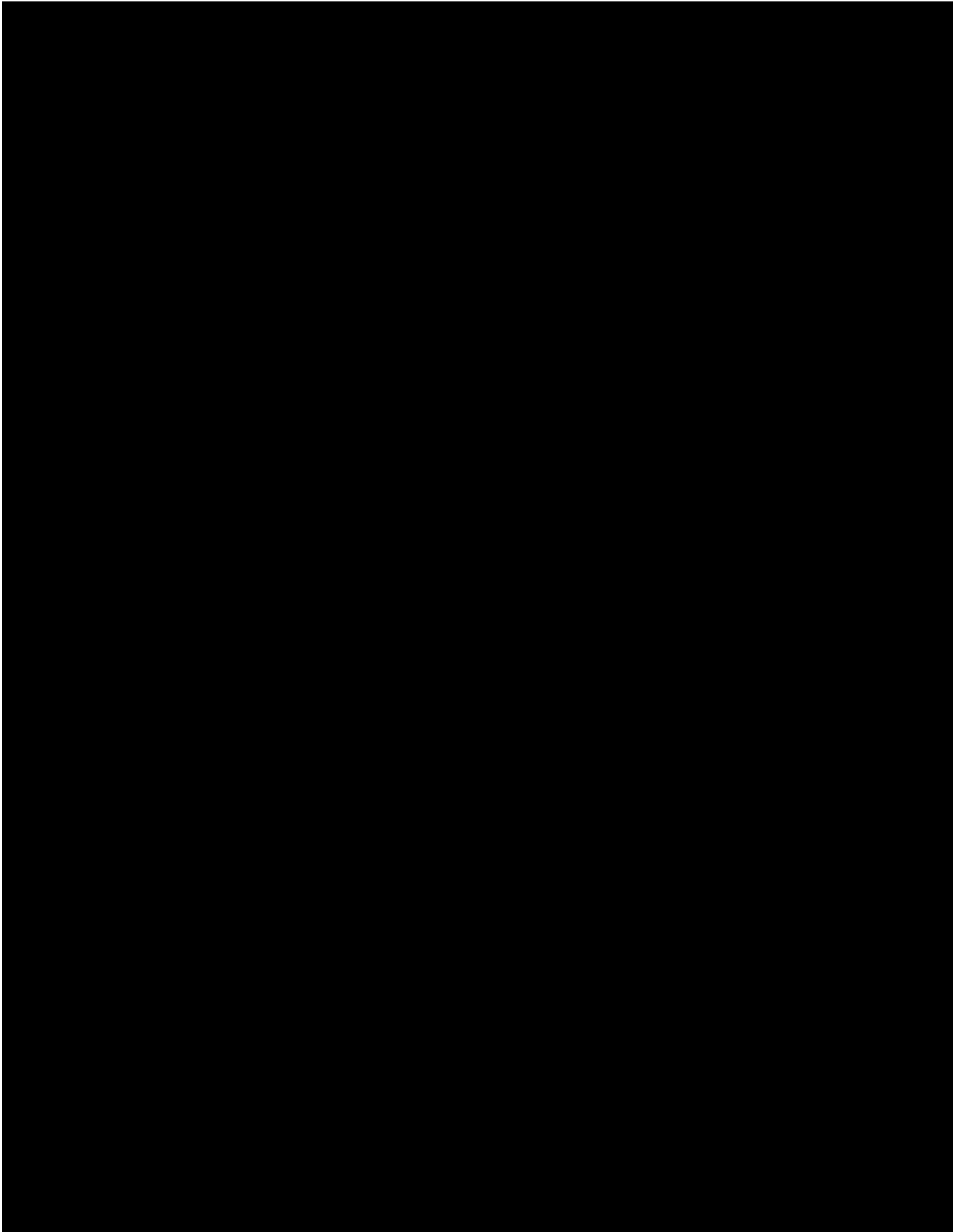
1 of debt during the reorganization that took place on
2 November 19, 2003.
3 We made it very clear all throughout that unless
4 those debts could be reassigned and satisfied by some
5 other method he did not think he was going to get future
6 financing for the company. It was an inherent part of the
7 deal for it to go forward.
8 During cross-examination the Division asked
9 Mr. Atkins very simple questions about whether the amount
10 of the consultant's exchange claims for a number of certed
11 S-8 shares had been determined before November 19, given
12 how Mr. Atkins described the transaction. The simple
13 answer to those questions should have been yes, of
14 course. But Mr. Atkins chose to be evasive in response to
15 those questions. He is not credible.
16 Atkins and Pierce obviously knew who would be
17 getting the S-8 shares, and the number of shares they
18 would be getting when this deal closed on November 19,
19 2003. Because of that fact Mr. Atkins and Mr. Pierce
20 could have easily arranged to have a reoffer prospectus
21 included in the Form S-8 registration statement, but
22 deliberately chose not to.
23 Why? Simple. They did not want to disclose
24 their background and resale plans, and chose instead to
25 try to use Form S-8 for registering employee stock

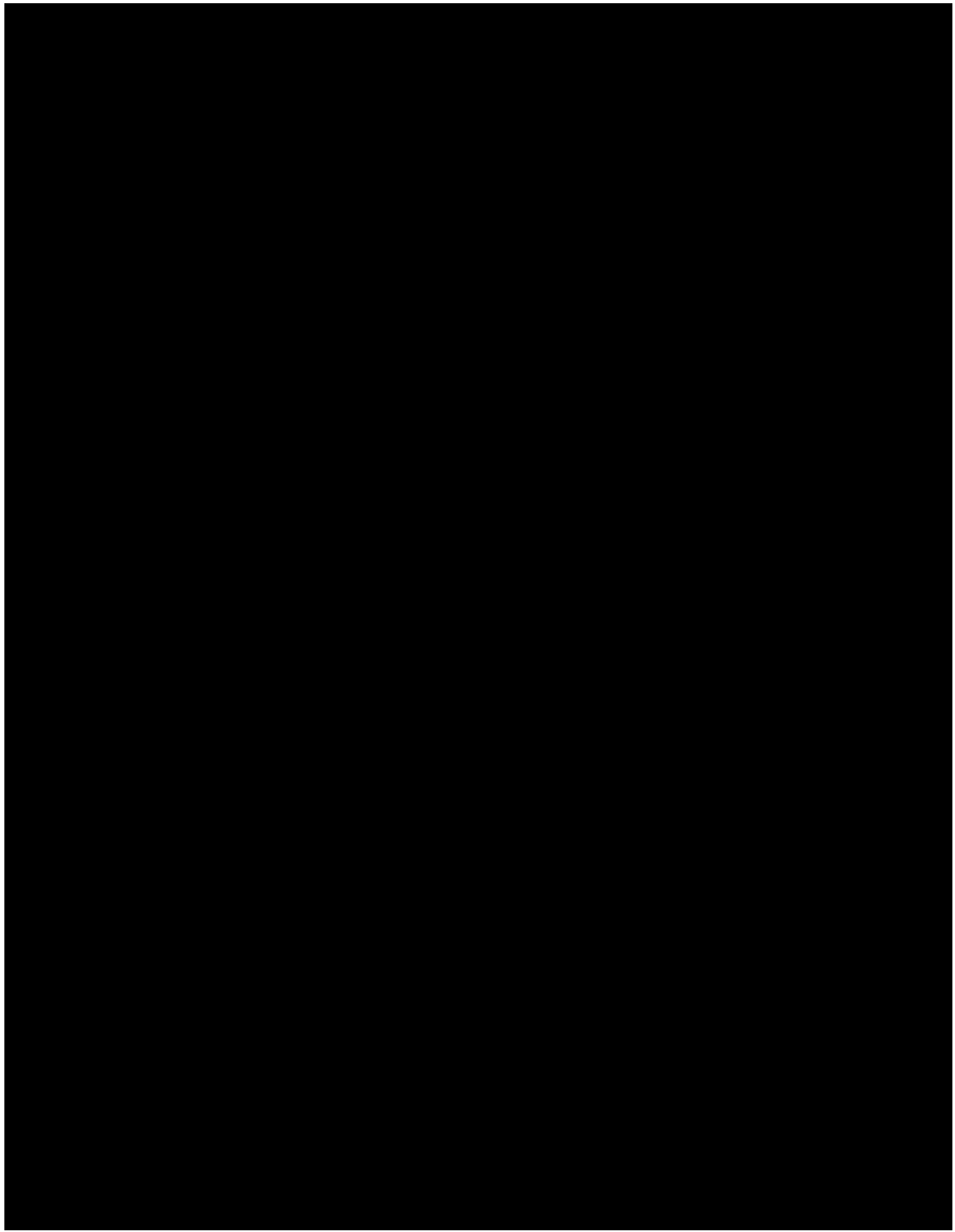
1 offerings.
2 Having abused Form S-8 he cannot rely upon it now
3 for any purpose, and that is something we will discuss in
4 the context of the Weeks case during our follow up
5 briefing.
6 And again, their own expert, during cross-
7 examination, acknowledges that even where the commission
8 issues guidance and issues opportunities to use certain
9 forms and registration, when it's abused, the commission
10 steps in with enforcement actions to try to put a stop to
11 that abuse.
12 You cannot try to circumvent the securities laws
13 and expect to rely upon the registration provisions that
14 are in the securities regulations.
15 Looking at the issue of whether or not interstate
16 commerce was used, obviously it was. There is no dispute
17 that Pierce's shares involve using interstate commerce to
18 transfer the shares from Lexington to Mr. Pierce and then
19 from Mr. Pierce to other holders, including Newport
20 Capital, and from there it went to other parties and
21 various brokerage accounts.
22 Mr. Atkins testified yesterday that some of the
23 instructions he gave for the movement of the 350,000
24 shares came from his room in Zurich because he needed to
25 get those shares moving to avoid the 10 percent reporting

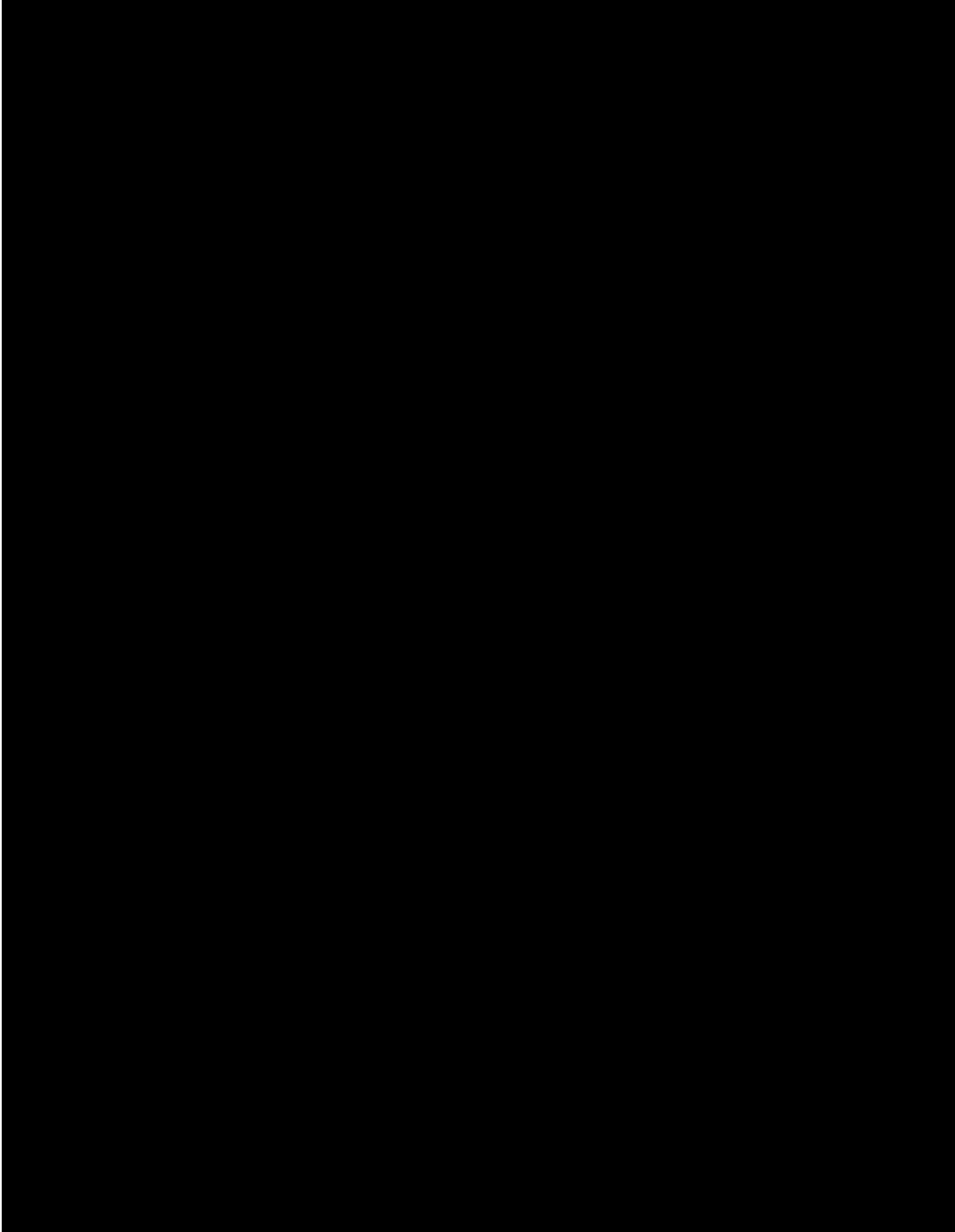
1 requirement. Obviously interstate commerce is used
2 throughout this process. That is all the Division needs
3 to show.
4 Since Mr. Pierce has argued that proof of his
5 sales in the U.S. market is missing, let me address that
6 argument. As Mr. Elliot-Square testified, he did not know
7 how he would sell 300,000 Lexington shares because the
8 market for them was, in his own words, thinly traded.
9 We have had the Court admit earlier the
10 announcement of the company for listing in Germany on the
11 Frankfurt stock exchange that takes place May 5, 2004. We
12 have also provided you with some of the volume information
13 for the Berlin and Frankfurt stock exchanges. I will just
14 show that to you now just by way of example.
15 It's at the bottom of this sheet. This is the --
16 the last column from the end is the volume on the Berlin
17 exchange during the first three weeks of June 2004. The
18 volume is zero.
19 Turning now to the Frankfurt exchange for some of
20 that same period, once again during these three weeks in
21 June, other than 100 shares on June 17, the volume is
22 zero.
23 The question is: With respect to the 400,000
24 shares that Mr. Pierce admits were sold during his -- in
25 his answer during June of 2004, where were those 400,000

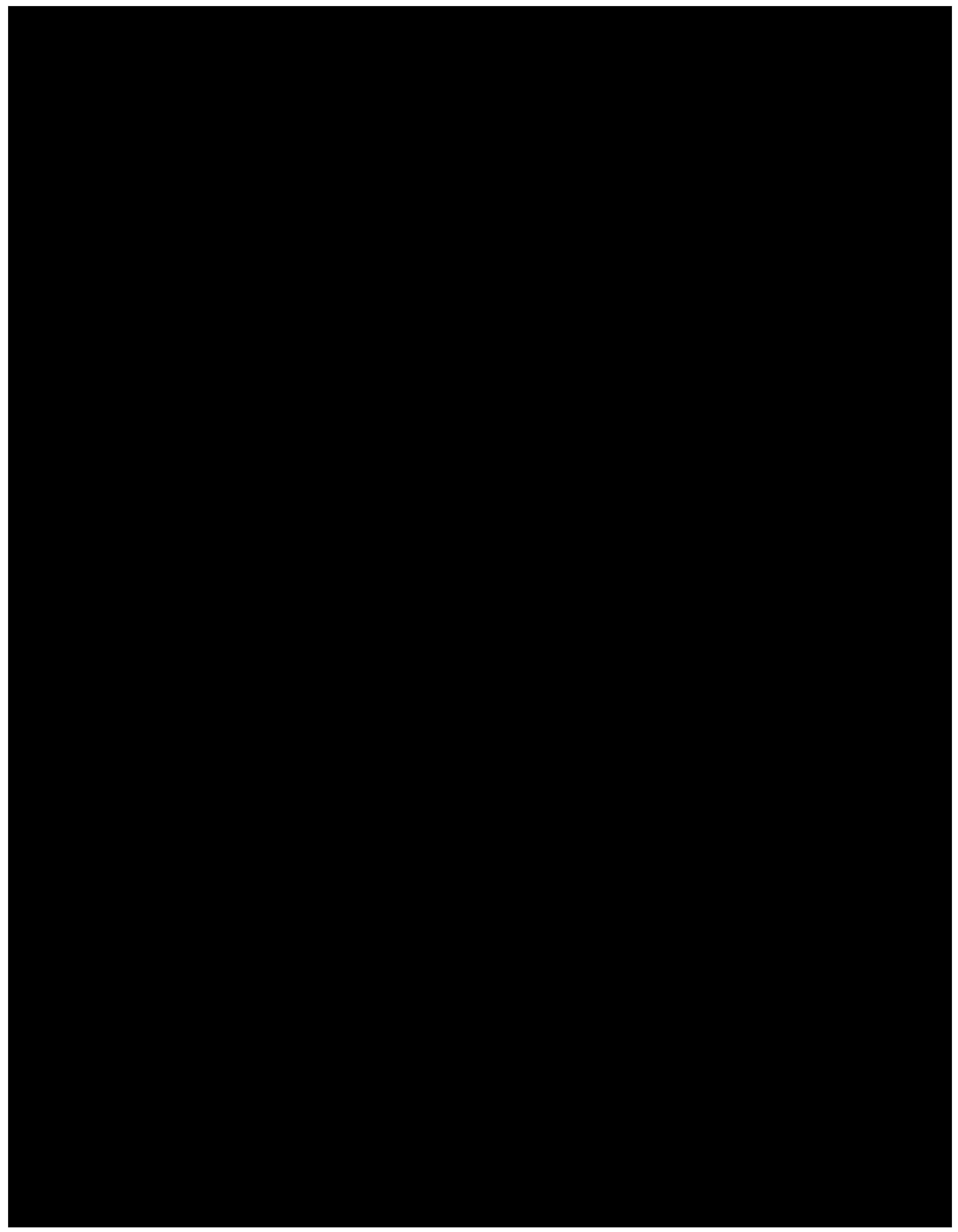
Exhibit 5

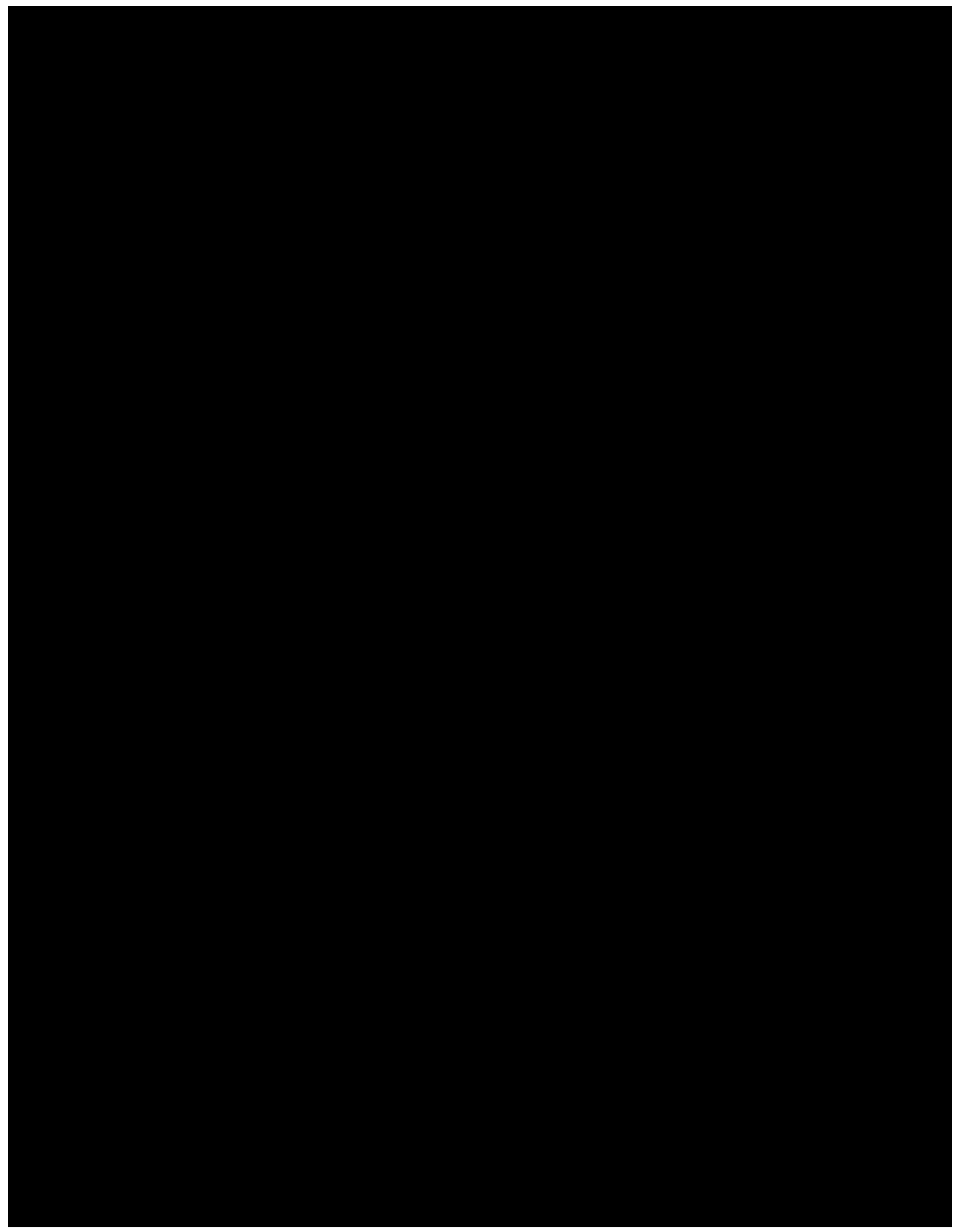


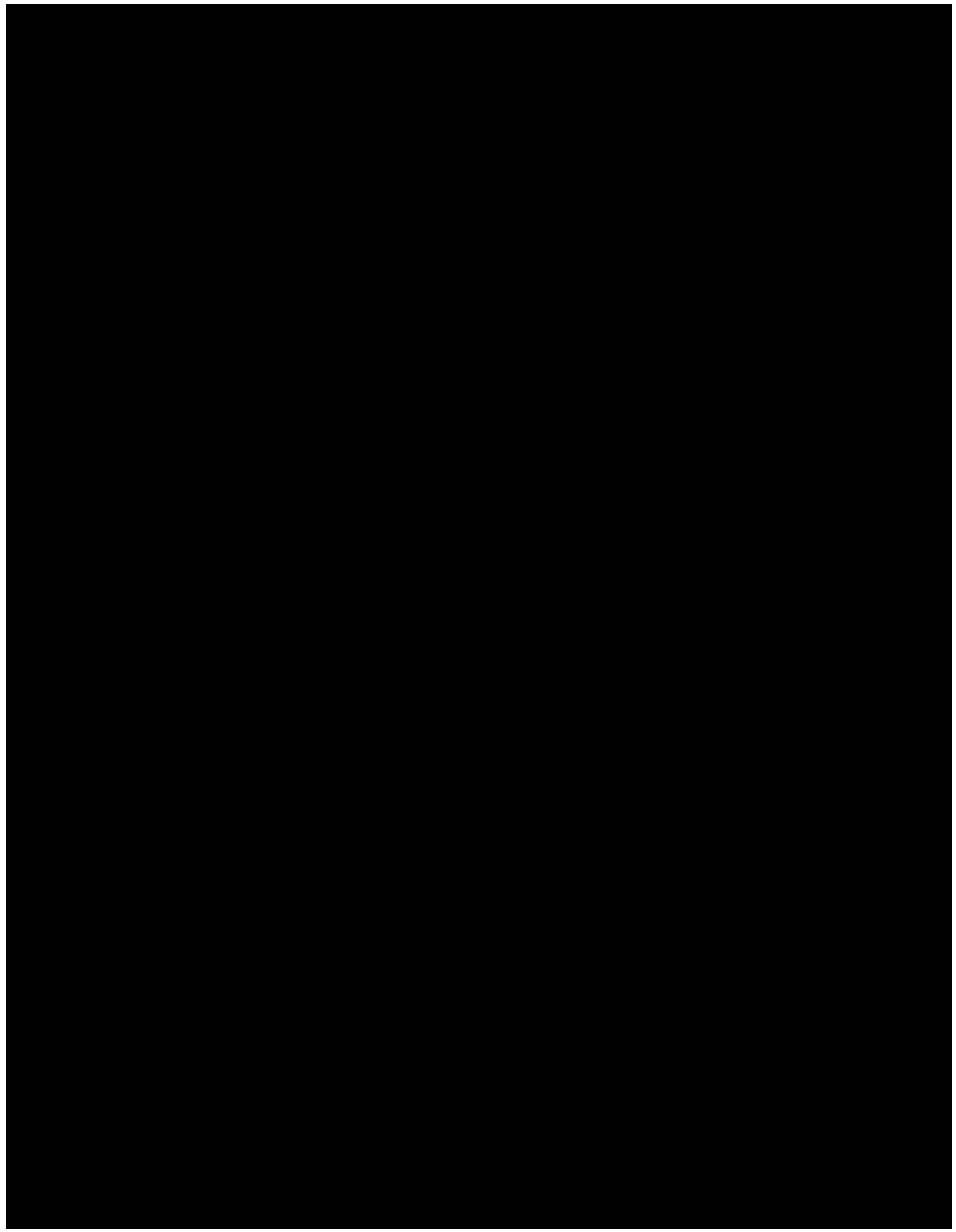


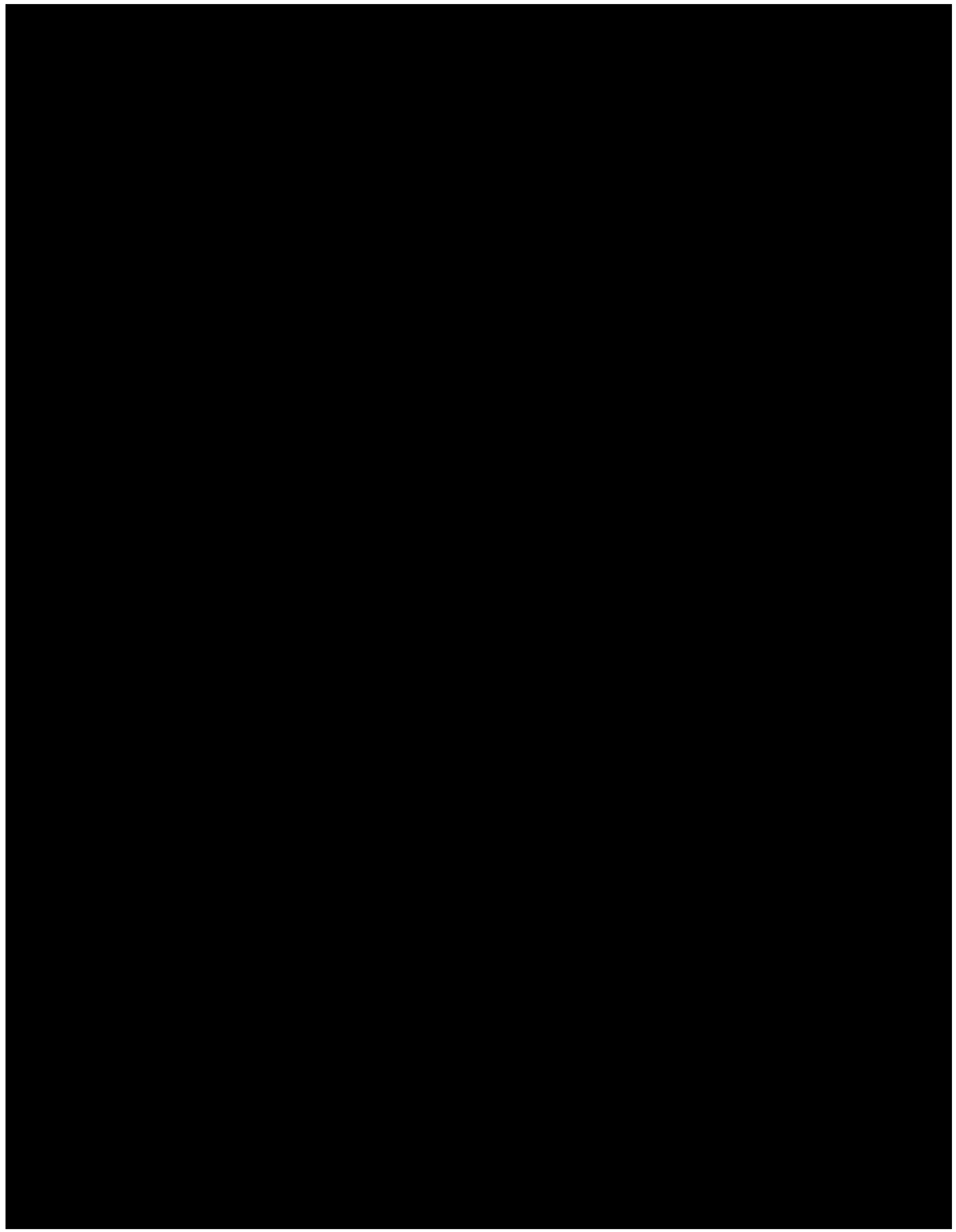


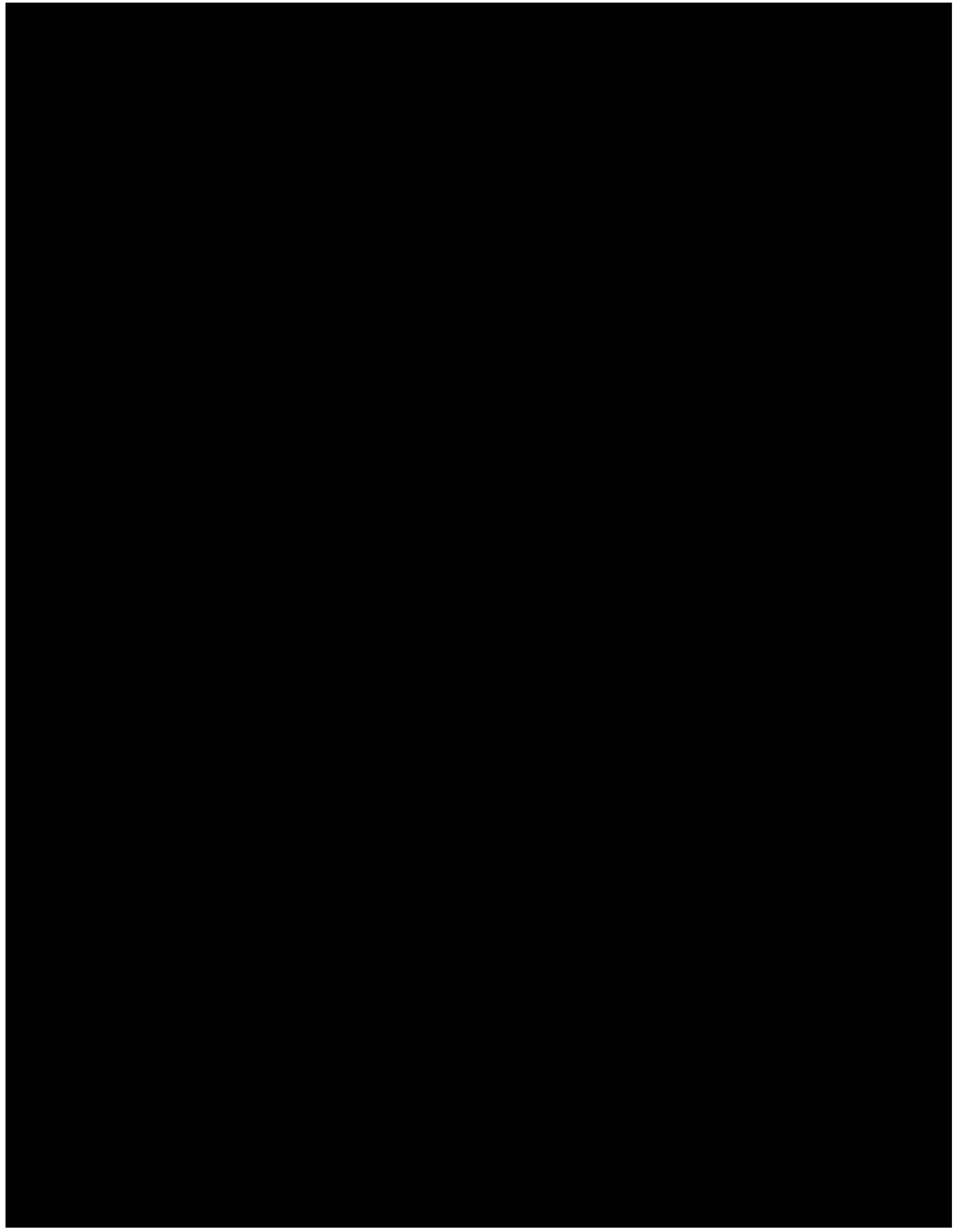


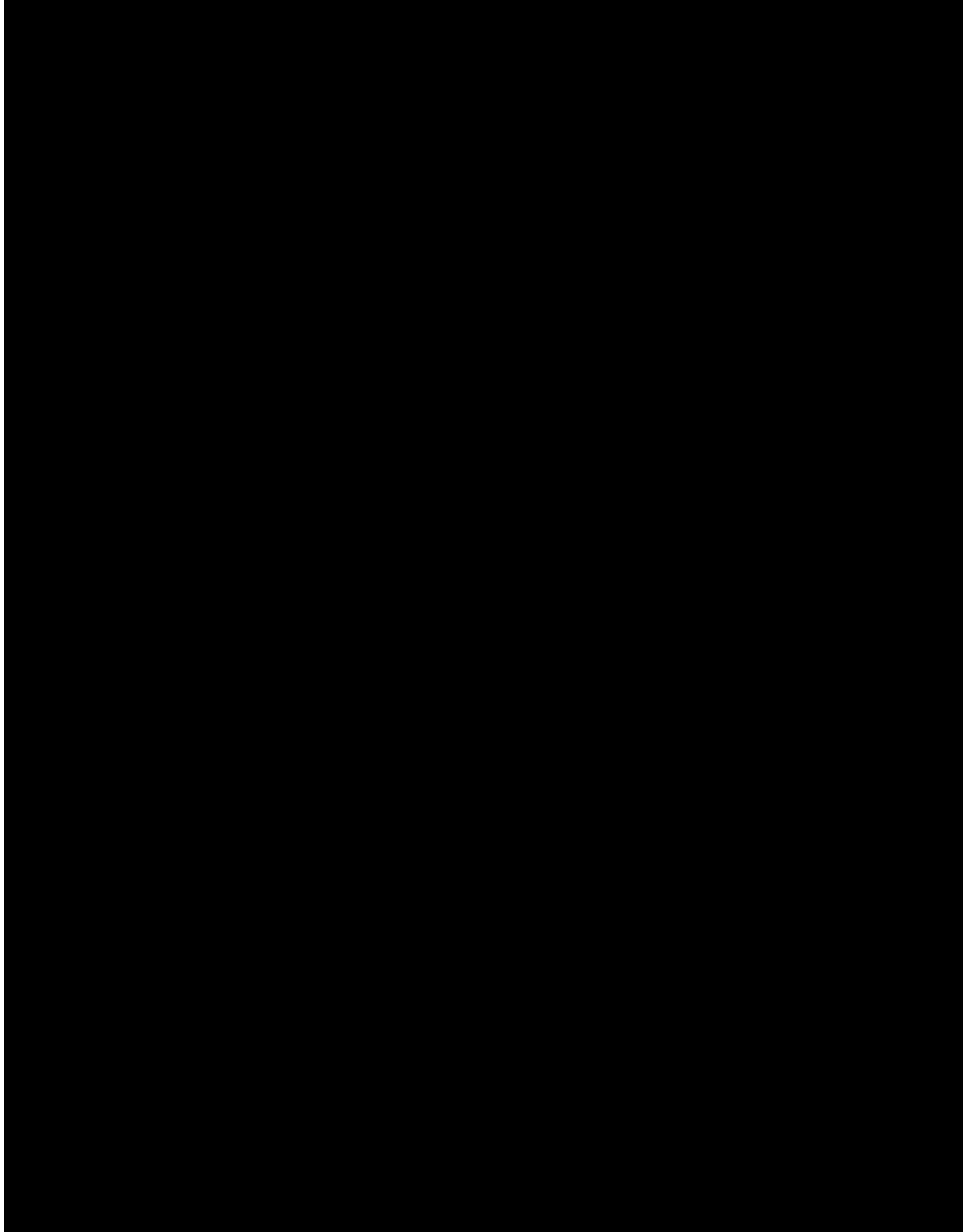


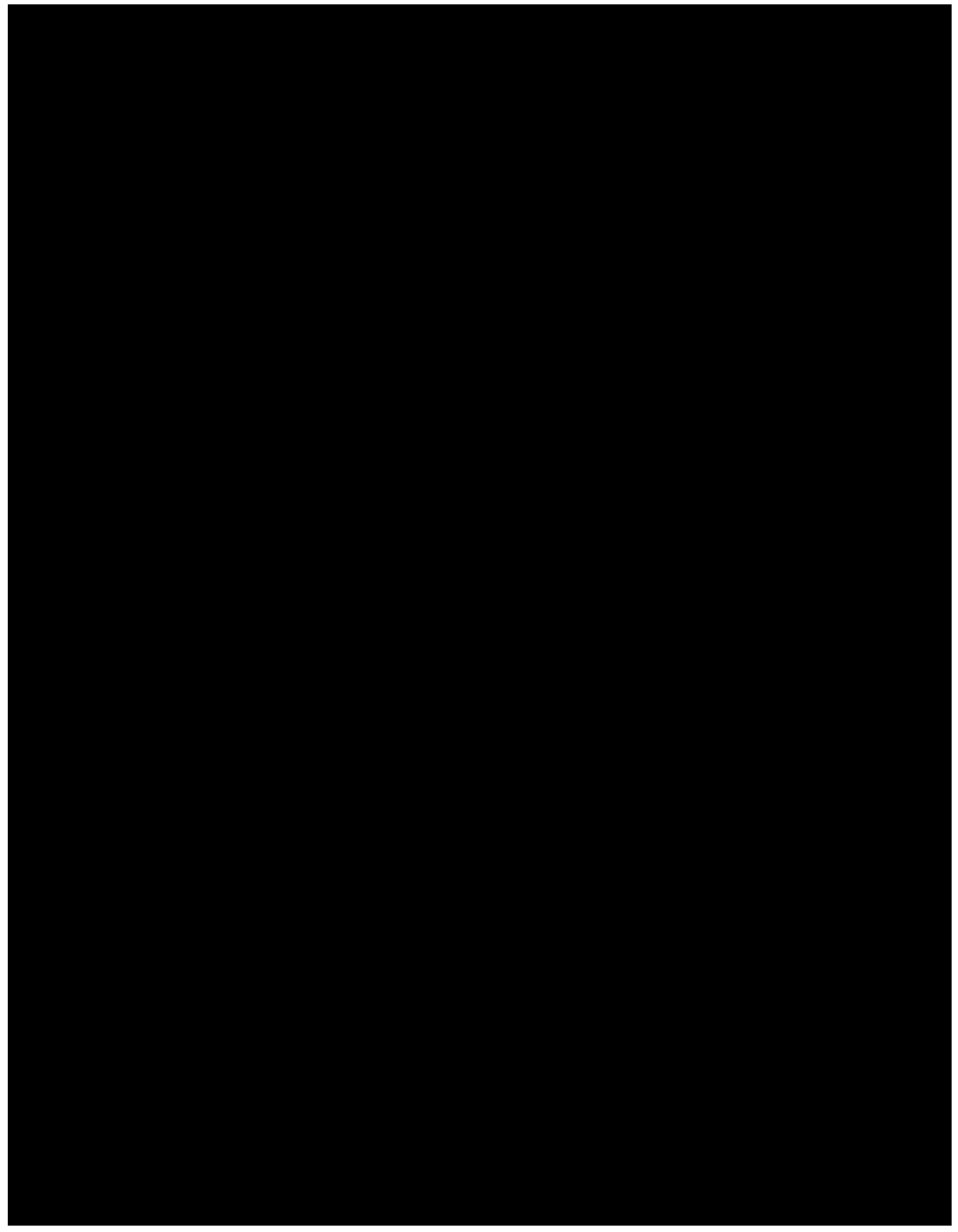


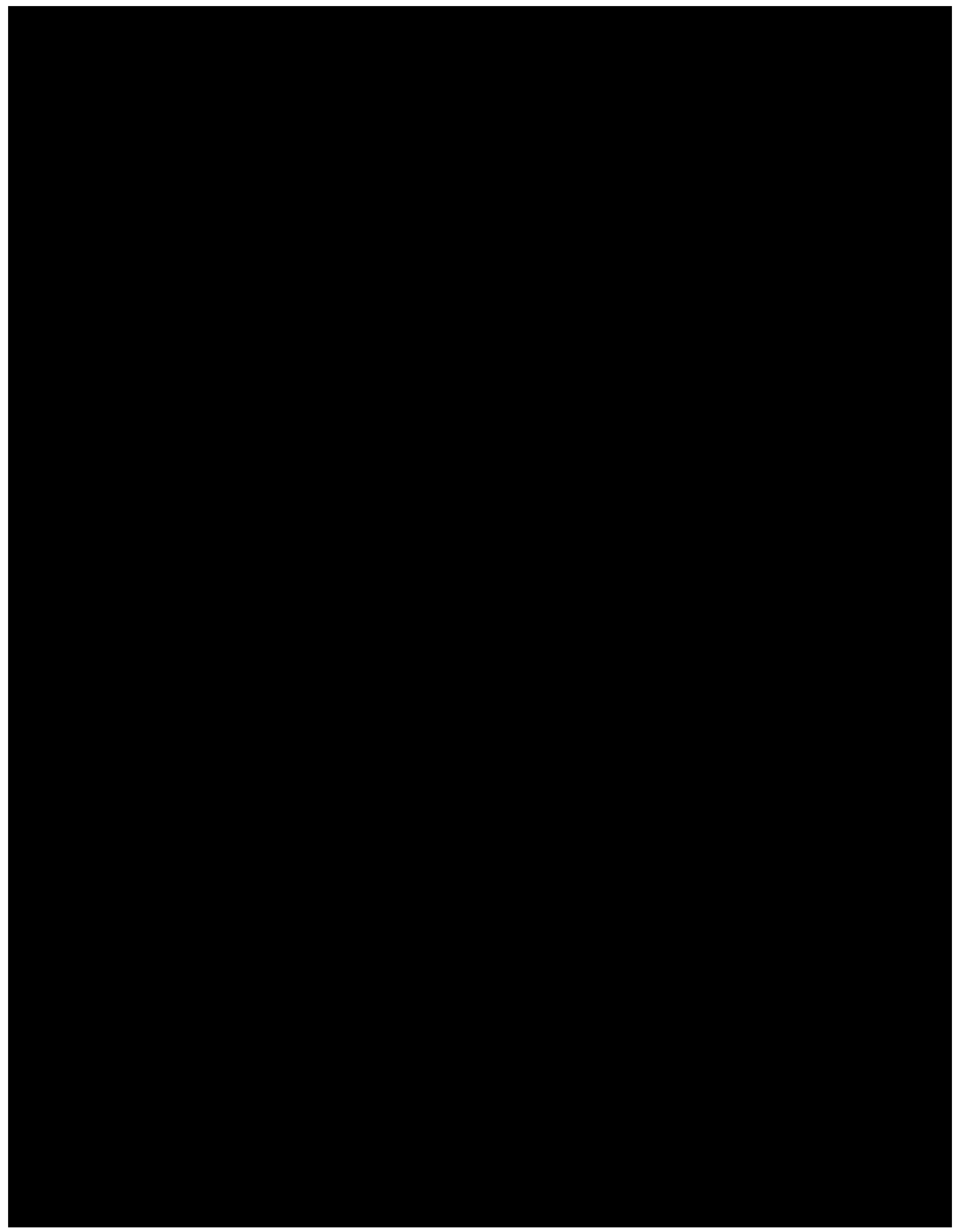












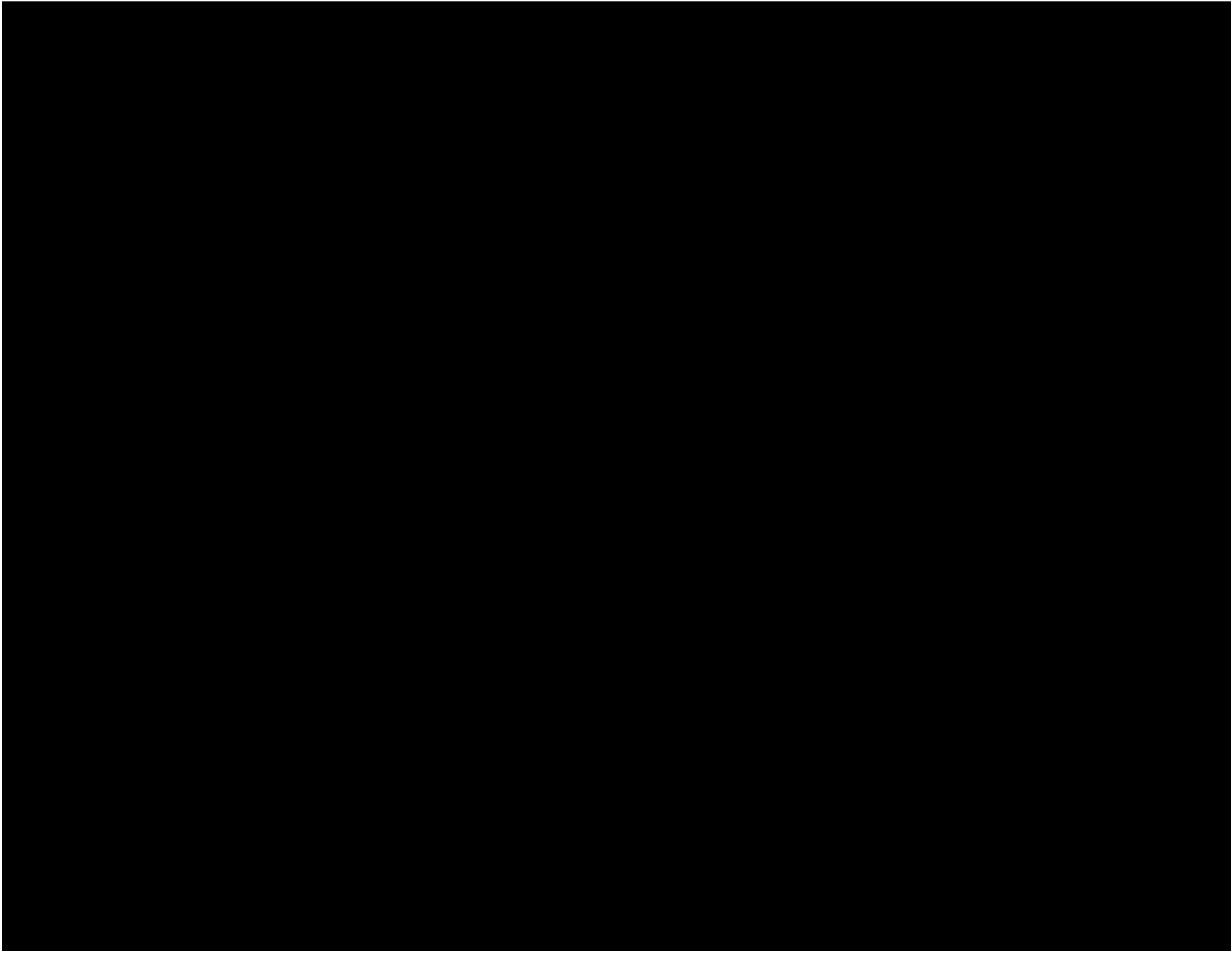
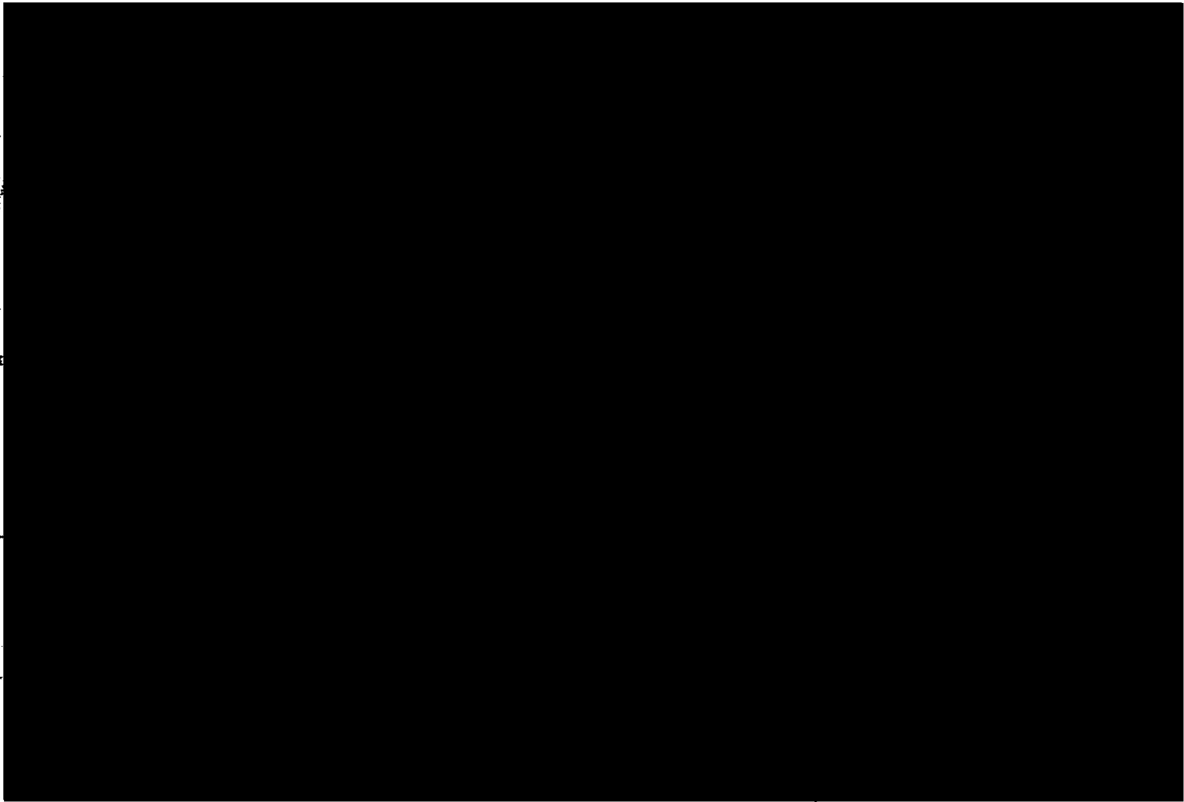
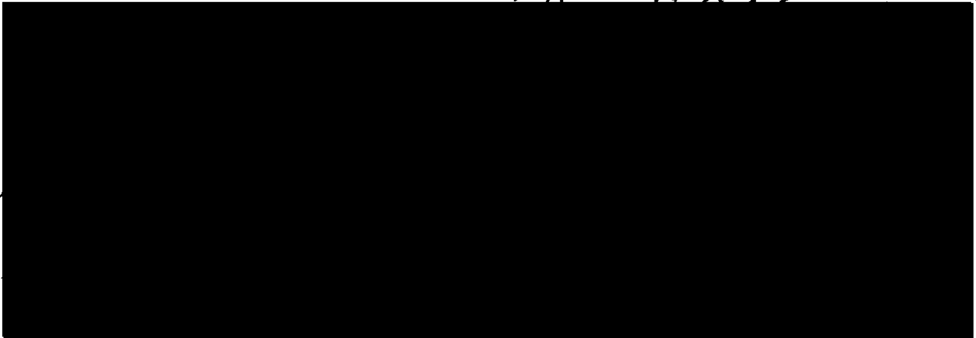


Exhibit 7

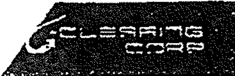




Report Run On 5/19/2004 At 11:52am

SEC- 02692

TRON 04777



X-Clearing Corporation

535 16th Street Mall
Suite 810
Denver, CO 80202

P: 303-573-1000 F: 303-573-1088

Invoice

Date	Invoice #
5/19/2004	4896

Bill To
Lexington Resources, Inc [redacted] Blaine, WA 98230

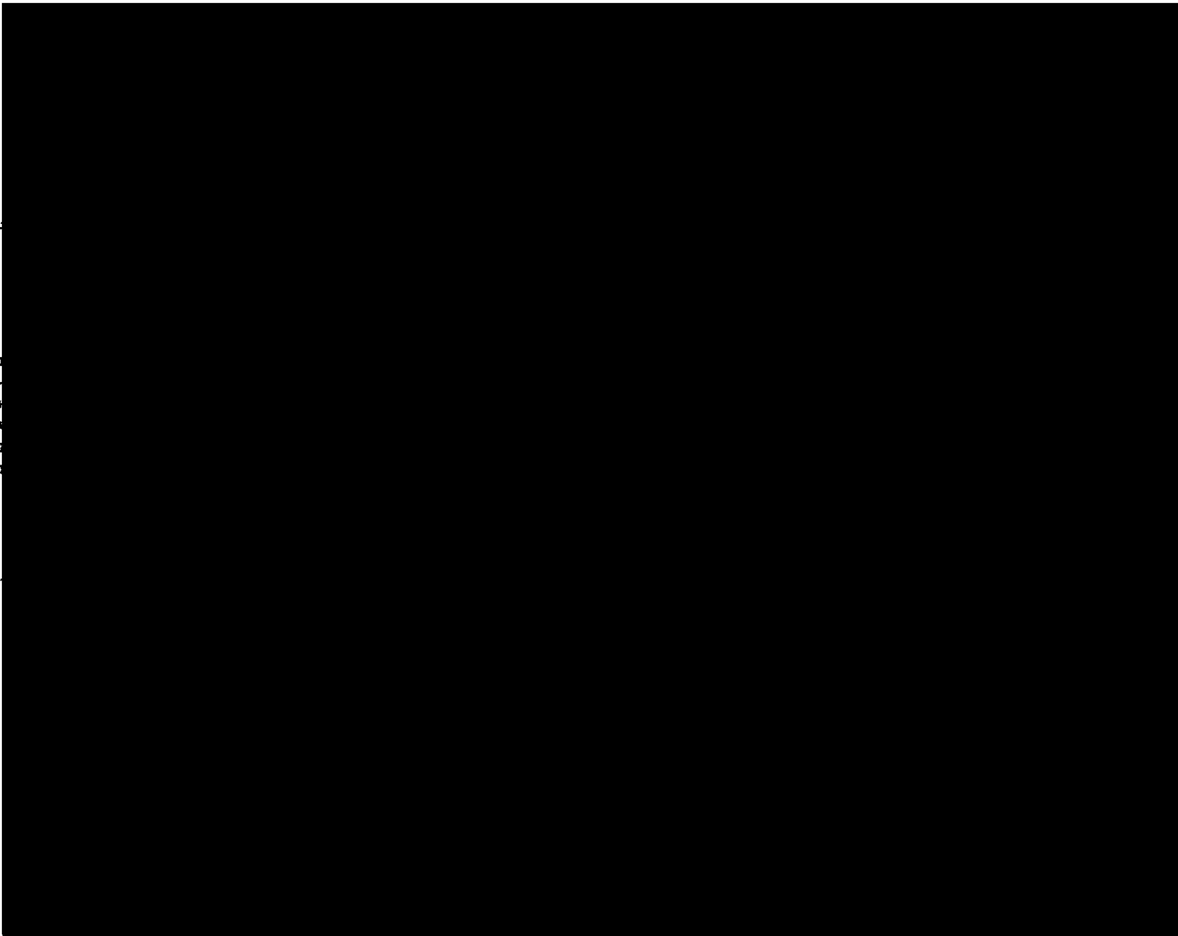
P.O. Number	Terms	Due Date	Project
	Net 15	6/3/2004	

COPY

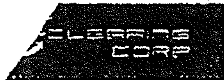
Item	Quantity	Description	Rate	Amount
Issuance	1	Certificate issuance: Richard Elliot-Square, 1 x 495,000 shares (Batch# 12047, effective 5/19/04)	25.00	25.00
Transfers	3	Transferred 1 certificate (#3652) for 16,600 common shares into 3 certificates: Kane Enterprises, Ltd., 2 x 5,000 shares ea. and 1 x 6,600 shares (Batch# 11971, effective 5/14/04)	25.00	75.00

Total $100.00

SEC- 02693



Report Run On 5/19/2004 At 12:05pm



X-Clearing Corporation

535 16th Street Mall
Suite 810
Denver, CO 80202

P: 303-573-1000   F: 303-573-1088

Invoice

Date	Invoice #
5/26/2004	4900

Bill To
Lexington Resources, Inc c/o Grant Atkins [redacted] Blaine, WA 98230

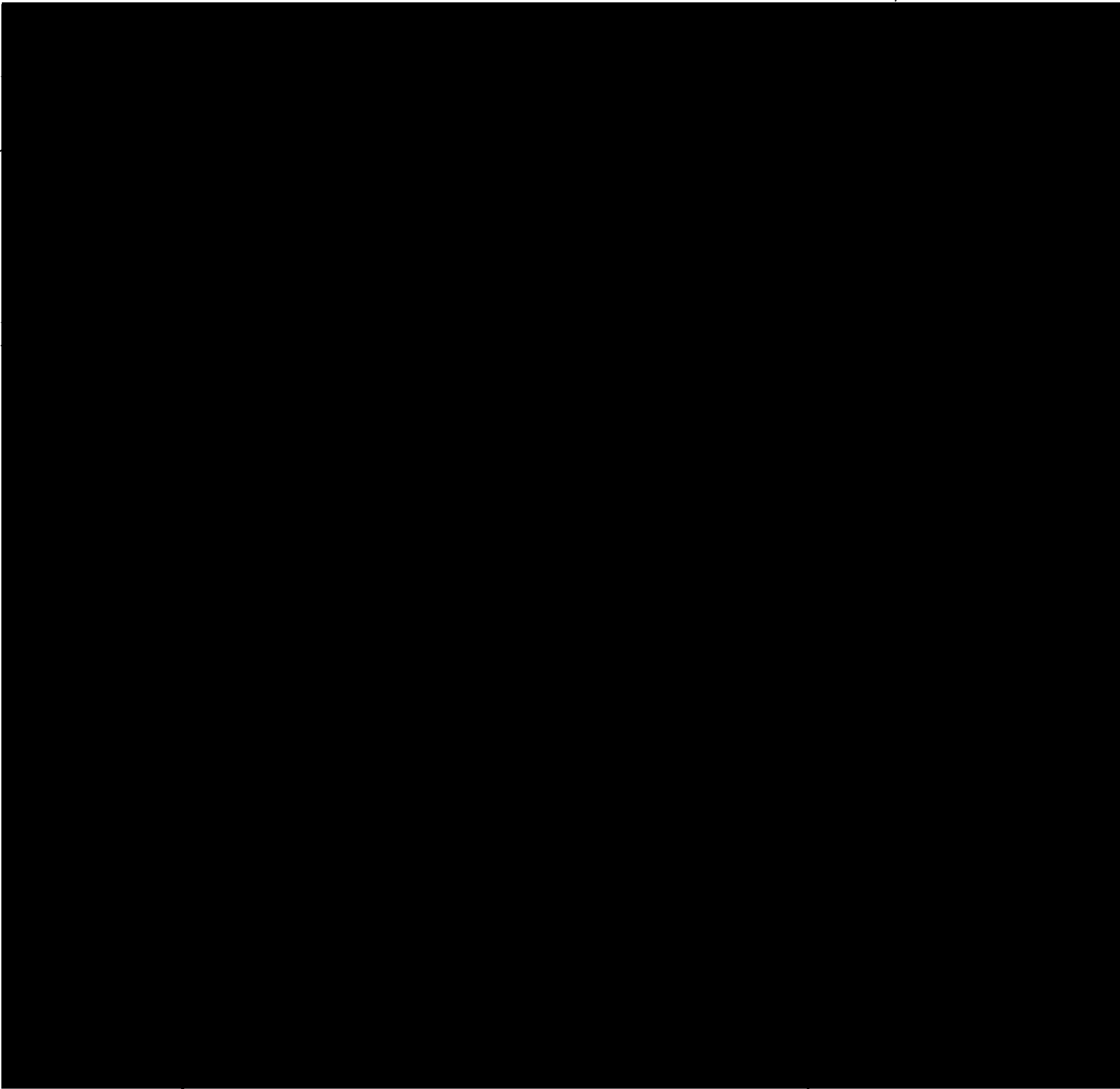
COPY

P.O. Number	Terms	Due Date	Project
	Net 15	6/10/2004	

Item	Quantity	Description	Rate	Amount
Transfers	2 ✓	Transfer of 1 stock certificate into 2 stock certificates as follows: Kingsbridge SA, 1 x 485,000 shares and 1 x 10,000 shares (Batch# 12048, effective 5/19/04)	25.00	50.00
Transfers	3	Transfer 1 stock certificate into 3 stock certificates as follows: Eiger East Finance Ltd., 1 x 50,000 shares; Jenirob Co. Ltd., 1 x 400,000 shares and 1 x 35,000 shares (Batch# 12049, effective 5/19/04)	25.00	75.00
			Total	$125.00

SEC- 02695

TRON 04780



Report Run On 5/19/2004 At 12:12pm

X-Clearing Corporation

535 16th Street Mall
Suite 810
Denver, CO 80202

P: 303-573-1000 F: 303-573-1088

Invoice

Date	Invoice #
5/26/2004	4900

Bill To
Lexington Resources, Inc c/o Grant Atkins 435 Martin St., Ste. 2000 Blaine, WA 98230

P.O. Number	Terms	Due Date	Project
	Net 15	6/10/2004	

Item	Quantity	Description	Rate	Amount
Transfers	2	Transfer of 1 stock certificate into 2 stock certificates as follows: Kingsbridge SA, 1 x 485,000 shares and 1 x 10,000 shares (Batch# 12048, effective 5/19/04)	25.00	50.00
Transfers	3	Transfer 1 stock certificate into 3 stock certificates as follows: Eiger East Finance Ltd., 1 x 50,000 shares; Jenirob Co. Ltd., 1 x 400,000 shares and 1 x 35,000 shares (Batch# 12049, effective 5/19/04)	25.00	75.00

Total $125.00

SEC- 02697

TRON 04782

Scott Prather

From: Grant Atkins [grant@grantatkins.com]
Sent: Wednesday, May 19, 2004 12:45 PM
To: scott@xclr.com
Subject: Delivery instructions

FEDX [redacted]
International Market Trend AG

Please send back tracking numbers

For all certificates Eiger, Genirob:

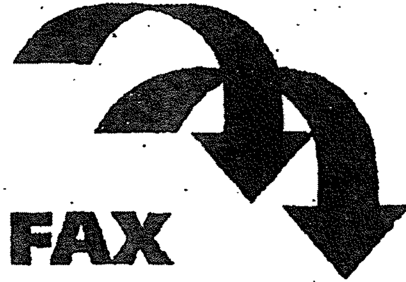
Attention: Phil Mast
Hypo Alpe Adria Bank
Landstrasse 126 A
Schaan 9494
Liechtenstein
Tel: 004 232350140

For Kingsbridge:

Attention: Stephanie Ebert
Investor Communications International, Inc.
435 Martin Street, Suite 2000
Blaine WA, 98230

May 19 2004 8:31AM HP LASERJET 3330 P.1

Grant Atkins



Date: May 19/04

Time: 9:30 Am

To: Scott

Company: X-CLR

Fax Number:

From: Grnt @ LXRS

Total Pages Including This Cover: 26

Note:

Scott: Can you call me regarding this fax before you create the certificates

[signature] ~~120117~~

Certs will get sent to Blaine after Cer. Distribution

Tel: (604) 602-1125 Fax: (604) 608-3399 E-Mail: grant@grantatkins.com

SEC- 02699

LEXINGTON RESOURCES, INC.

May 19, 2004

Mr. Rob Stevens
Global Securities Transfer Inc.
191 University Boulevard, Suite 401
Cherry Creek Office
Denver, CO 80206

RE: LEXINGTON RESOURCES, INC. (the "Company")

Dear Rob:

Please find attached Notice and Agreement of Exercise of Options. Please issue FREE TRADING SHARES that are in process of being registered under Form S-8 that were granted to International Market Trend AG, that have been assigned to the individual listed below for bonifide work conducted on the Company's behalf. A complete package of information including Stock Option Plan, Exercise Forms, Stock Option Plan Agreement, S-8 Registration, execution pages of agreements, assignment agreements outlining full and complete payment, BOD Minutes, and other necessary documentation will be forwarded to your offices by next week. Please issue the following shares in the following denomination:

Richard Elliot-Square [redacted]	495,000 Free Trading Common Shares in Lexington Resources, Inc.

Yours sincerely,
LEXINGTON RESOURCES, LTD.

Grant Atkins, *Director*

3808
495,000
12047

US Offices: 435 Martin Street, Suite 2000, Blaine, WA U.S.A. 98230
Toll Free: (888) 848-7377 Tel: (714) 476-3411 Fax: (888) 706-7027
Internet: Lexingtonoilandgas.com E-Mail: investor@intergoldcorp.com

LEXINGTON RESOURCES, INC.

May 19, 2004

Mr. Rob Stevens
Global Securities Transfer Inc.
191 University Boulevard, Suite 401
Cherry Creek Office
Denver, CO 80206

RE: LEXINGTON RESOURCES, INC. (the "Company")

Dear Rob:

Please find attached FREE TRADING SHARES in the capital of Lexington Resources, Inc. that have been issued under Form S-8 that were granted to Richard Elliot-Square per the paperwork you already have on file, such shares were issued on the date of this letter. Pursuant to a private share sale agreement between Richard Elliot-Square and Kingsbridge SA dated May 19, 2004, please cancel the certificate listed as:

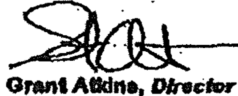
3809 - 3810
495,000
12048

Richard Elliot-Square 51 Gloucester Road London SW7 4QN England	485,000 Free Trading Common Shares in Lexington Resources, Inc.

Please issue the following shares in the following denomination:

Kingsbridge SA Upper Carriage House Northbrook Farm Bentley Nr Farnham Surrey GU10 5EU	485,000 Free Trading Common Shares in Lexington Resources, Inc.
Kingsbridge SA Upper Carriage House Northbrook Farm Bentley Nr Farnham Surrey GU10 5EU	10,000 Free Trading Common Shares in Lexington Resources, Inc.

Yours sincerely,
LEXINGTON RESOURCES, LTD.



Grant Atkins, *Director*

US Office: 435 Martin Street, Suite 2000, Blaine, WA U.S.A. 98230
Toll Free: (888) 848-7377 Tel: (714) 474-3811 Fax: (800) 706-7827
Internet: Lexingtonoilandgas.com E-Mail: investor@intergoldcorp.com

LEXINGTON RESOURCES, INC.

May 19, 2004

Mr. Rob Stevens
Global Securities Transfer Inc.
191 University Boulevard, Suite 401
Cherry Creek Office
Denver, CO 80206

RE: LEXINGTON RESOURCES, INC. (the "Company")

Dear Rob:

Please find attached FREE TRADING SHARES in the capital of Lexington Resources, Inc. Pursuant to a private share sale agreement between Kingsbridge SA and the entities listed below dated May 19, 2004, please cancel the certificate listed as:

Kingsbridge SA Upper Carriage House Northbrook Farm Bentley Nr Farnham Surrey GU10 5EU	485,000 Free Trading Common Shares in Lexington Resources, Inc.

12049

Please issue the following shares in the following denomination:

Elger East Finance Ltd. Pasea Estate Road Town, Tortola British Virgin Islands	50,000 Free Trading Common Shares in Lexington Resources, Inc.
Jenirob Company Ltd. Landstrausse 126 Schaan 9494 Lichtenstein	400,000 Free Trading Common Shares in Lexington Resources, Inc.
Jenirob Company Ltd. Landstrausse 126 Schaan 9494 Lichtenstein	35,000 Free Trading Common Shares in Lexington Resources, Inc.

Yours sincerely,
LEXINGTON RESOURCES, LTD.

Grant Atkins, *Director*

US Offices: 435 Martin Street, Suite 2000, Blaine, WA U.S.A. 98230
Toll Free: (888) 849-7377 · Tel: (714) 476-3411 . Fax: (800) 786-7827
Internet: Lexingtonoilandgas.com E-Mail: investor@intergoldcorp.com

SEC- 02702

TRON 04787

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT is dated to be effective this 18th day of May, 2004 by and between Investor Communications International, Inc., a Washington corporation ("Assignor") and Richard Elliot Square, an individual ("Assignee").

WHEREAS, Assignor and Lexington Resources, Inc., (formerly Intergold Corporation) a Nevada corporation ("Lexington") entered into prior consulting arrangements and as a direct result Lexington owes a significant amount of funds to the Assignor.

WHEREAS, pursuant to services rendered by Assignor by its employees and/or consultants under the terms of current and prior consulting agreements, and as of March 31, 2004, and prior services and advances made by the Assignor to Lexington, Lexington is indebted to Assignor in the approximate amount of at least $600,000.00 (the "Debt");

WHEREAS, Assignee has provided bona fide services to Lexington in connection with the terms and provisions of the prior and current consulting agreements and prior arrangements, which services did not include directly or indirectly promotion or maintenance of a market for Lexington's securities nor were rendered in connection with the offer or sale of securities in a capital-raising transaction;

WHEREAS, Assignor desires to assign to Assignee a portion of its right, title and interest in the Debt in the amount of $500,000.00, and Assignee is willing to accept the assignment by Assignor of its right, title and interest in the Debt in the amount of $500,000.00.

THEREFORE, the parties to this Assignment Agreement agree as follows:

1. Assignor assigns to Assignee its right, title and interest in the Debt in the amount of $500,000.00 in exchange for the settlement and release of the Receivable in the amount of $500,000.00.

2. Assignee agrees to accept such assignment in full settlement and satisfaction of the Receivable.

3. Assignee further agrees to release and forever discharge Assignor from any and all causes of action, debts, sums of money, claims and demands whatsoever, in law or in equity, related to the Receivable, which Assignee now or hereafter can, shall or may have.

4. This Assignment Agreement shall be effective as of May 18, 2004 and shall be binding upon and inure to the benefit of the parties hereto and their respective assigns and successors.

SEC- 02703

The foregoing may be signed in counter parts, each of which so executed shall be deemed to be an original including each such copy sent by facsimile transmission, and such counterparts together shall constitute but one and the same instrument.

INVESTOR COMMUNICATIONS INTERNATIONAL, INC.

By: ______________________
Director, President

Richard Elliot-Square

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT is dated to be effective this 18th day of May, 2004 by and between Richard Elliot Square, an individual ("Assignor") and Lexington Resources, Inc., a Nevada corporation ("Assignee").

WHEREAS, Assignee and Investor Communications International, Inc. ("ICI") has provided services to ICI for the sole and direct benefit of the Assignee;

WHEREAS, pursuant to services rendered by ICI by its employees and/or consultants under the terms of the prior and current consulting arrangements, and as of May 18, 2004, Assignee is indebted to ICI in at least the approximate amount of $600,000 (the "Debt");

WHEREAS, ICI and Assignor entered into an assignment agreement dated May 18, 2004 (the "ICI Assignment Agreement"), pursuant to which ICI assigned a portion of its right, title and interest in the Debt to Assignor in satisfaction and release of a debt in the amount of $495,000.00 due and owing to Assignor relating to bona fide services performed by Assignor under the terms of prior and current consulting arrangements (the "Receivable");

WHEREAS, Assignee adopted and approved a stock option plan dated June 23, 2003 and as amended and approved by the Board of Directors of the Assignee on November 19, 2003 and December 31, 2003 (the "Stock Option Plan");

WHEREAS, Assignee prepared a Form S-8 registration statement under the Securities Act of 1933, as amended, which was filed on April 23, 2004 and effective with the Securities and Exchange Commission on April 23, 2004 (the "Registration Statement"), pursuant to which 500,000 shares of common stock under the Stock Option Plan were registered;

WHEREAS, Assignee and International Market Trend AG ("IMT") entered into a stock option plan agreement dated February 22, 2004 pursuant to which Assignee granted IMT and/or its employees or consultants 495,000 stock options exercisable into 495,000 shares of common stock at $1.00 per option;

WHEREAS, Assignor executed a notice and agreement of exercise of option dated May 18, 2004 pursuant to which Assignor exercised 495,000 stock options at the exercise price of $1.00 per option to acquire 495,000 shares of the common stock of Assignee (the "Notice and Agreement of Exercise of Option");

WHEREAS, Assignor desires to assign to Assignee the Receivable as consideration for cash payment of the options pursuant to the terms of the Notice and Agreement of Exercise of Option; and

WHEREAS, the board of directors of Assignee pursuant to resolutions dated May 18, 2004 has acknowledged the ICI Assignment Agreement to be effective and has authorized the issuance

of 495,000 shares of common stock to Assignor in accordance with the terms of the Notice and Agreement of Exercise of Option.

THEREFORE, the parties to this Assignment Agreement agree as follows:

1. Assignor assigns to Assignee its right, title and interest in the Receivable as consideration for cash payment of the 495,000 stock options exercised at $1.00 per option to acquire 495,000 shares of the common stock of Assignee pursuant to the terms of the Notice and Agreement of Exercise of Option.

2. Assignee agrees to accept such assignment as cash payment for the 495,000 stock options exercised by Assignor at $1.00 per option to acquire 495,000 shares of the common stock of Assignee pursuant to the terms of the Notice and Agreement of Exercise of Option.

3. Assignee further agrees to issue 495,000 shares of its common stock in the name of Assignee in accordance with the provisions of the Stock Option Plan and Notice and Agreement of Exercise of Option.

4. This Assignment Agreement shall be effective as of May 18, 2004.

The foregoing may be signed in counter parts, each of which so executed shall be deemed to be an original including each such copy sent by facsimile transmission, and such counterparts together shall constitute but one and the same instrument.

Richard Elliot-Square

Lexington Resources, Inc.

By:
Grant Atkins, Director

Exhibit 8

Message ID # 1362635 - Archived on Nov 1, 2004 6:02:16 AM

Subject: Fw: trades 10/29/04
From: Brent Pierce <brent@brentpierce.com>
To: Nicholas Thompson <nthompson@vfinance.com>
Sent Date: Nov 1, 2004 6:00:18 AM

Message Body Text:

----- Original Message -----
From: "Brent Pierce" <brent@brentpierce.com>
To: "Philippe Mast" <philippe.mast@hypo-alpe-adria.li>
Cc: <phil.mast@bluewin.ch>
Sent: Saturday, October 30, 2004 9:27 AM
Subject: Fw: trades 10/29/04

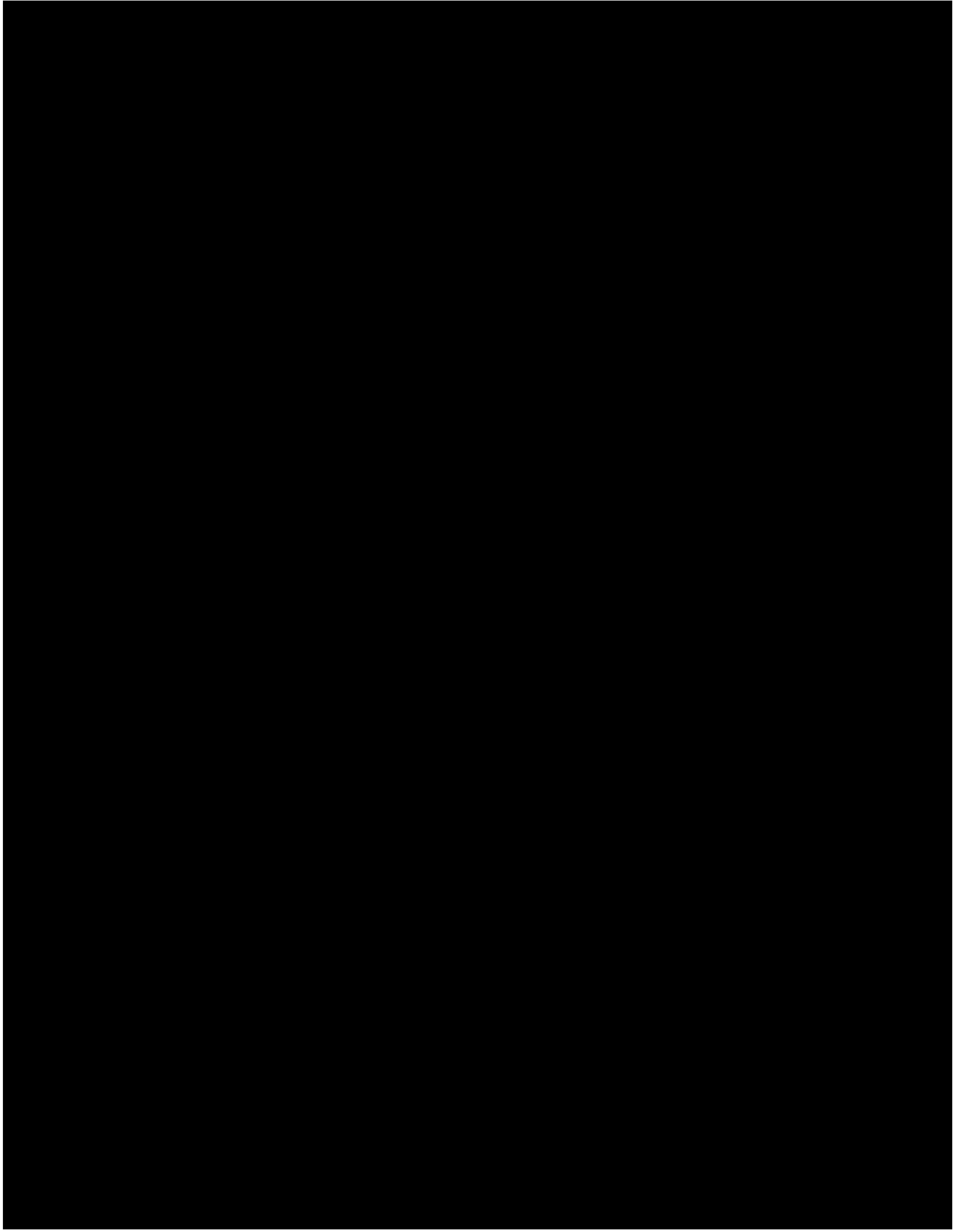
> Please book the following trades to accounts as follows:
> -LXRS purchase 15,000 CANACCORD to Newport
>
> -LXRS sale 15,000 Vfinance to Jenirob
> -LXRS Purchase 10,000Vfinance to Eurotrade
> -RVTIF purchase 3500 Vfinance to Newport
> -MIVT sales 5000 Vfinance to Eastern
> 8000 Vfinance to Jenirob
> 2000 Vfinance to Newport
> 5000 Vfinance to Eurotrade
> Please fax updates forthe following:
> Newport
> Jenirob
> Eastern
> Eurotrade
> Thanks BP
> ----- Original Message -----
> From: "Nicholas Thompson" <fininfo@blast.net>
> To: "Brent Pierce" <brent@brentpierce.com>
> Sent: Friday, October 29, 2004 1:27 PM
> Subject: trades 10/29/04
>
>
> My home number [redacted]
>
>
> b 3500 rvtif 1.1486
> s 15000 lxrs 2.508
> b 10000 lxrs 2.418
> s 20000 mivt .22
>
>
> I didn't send it to Phil yet.
>

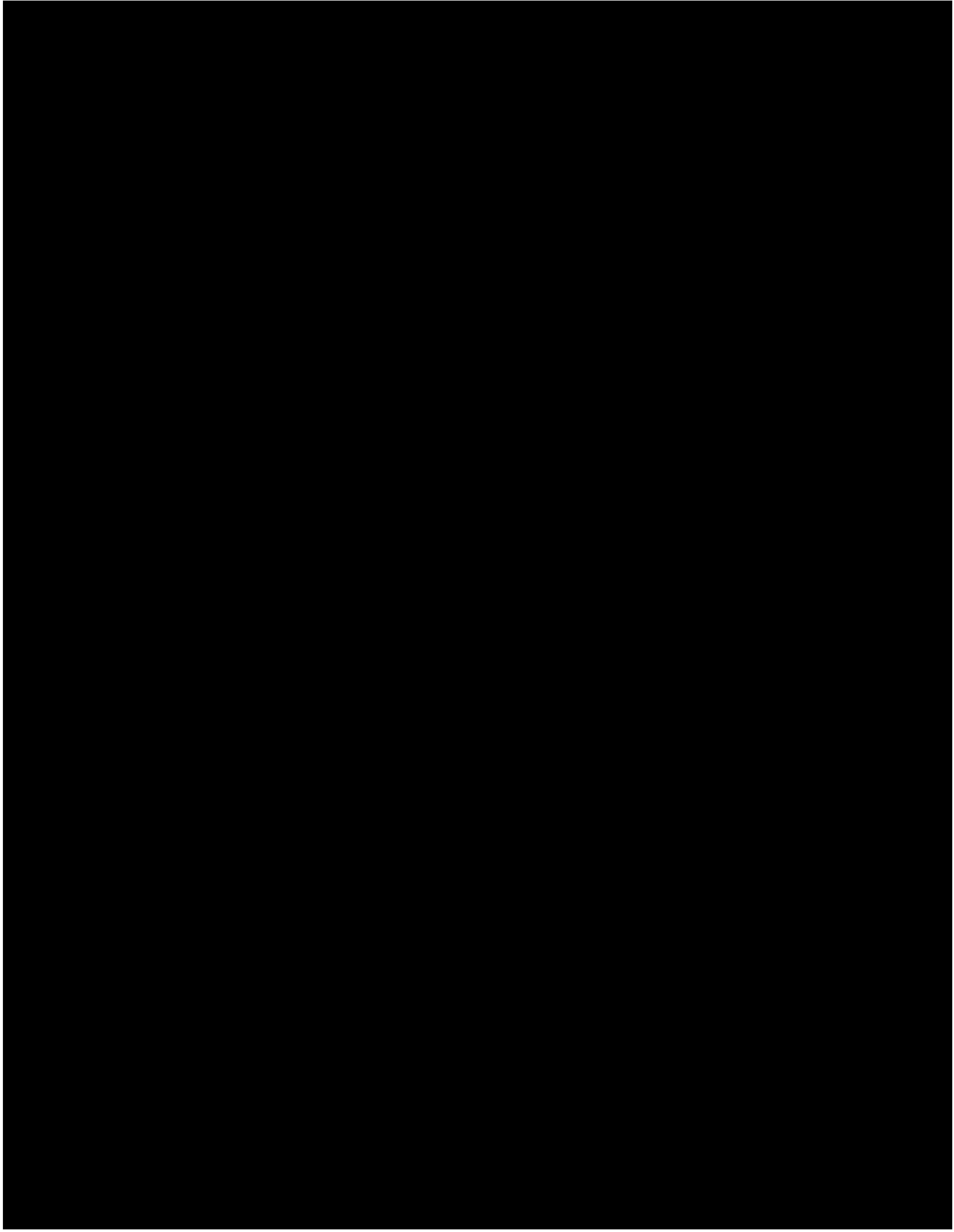
VFIN 1085 SEC 03002

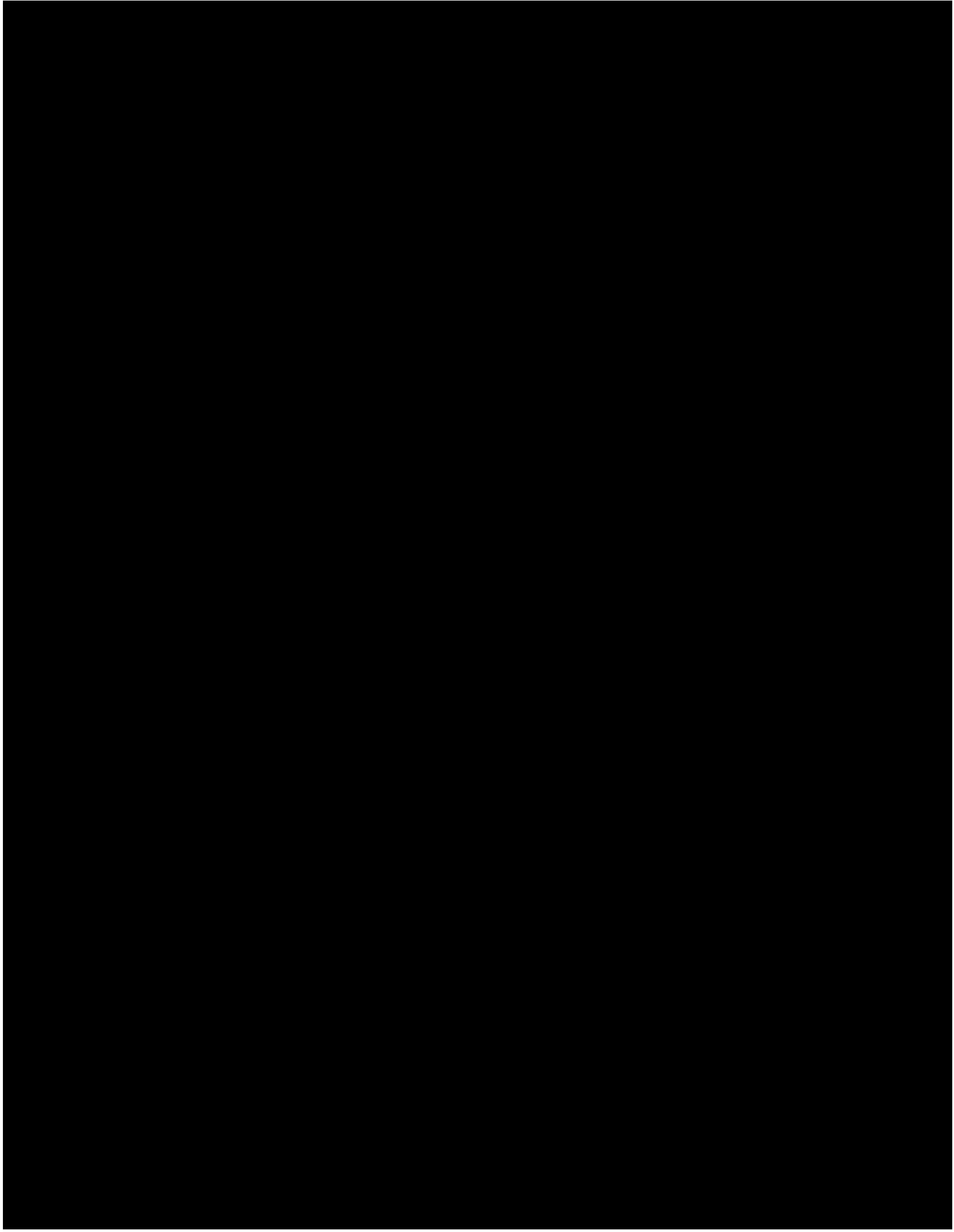
> Talk to you over the weekend.
>
> nick
>
>
>

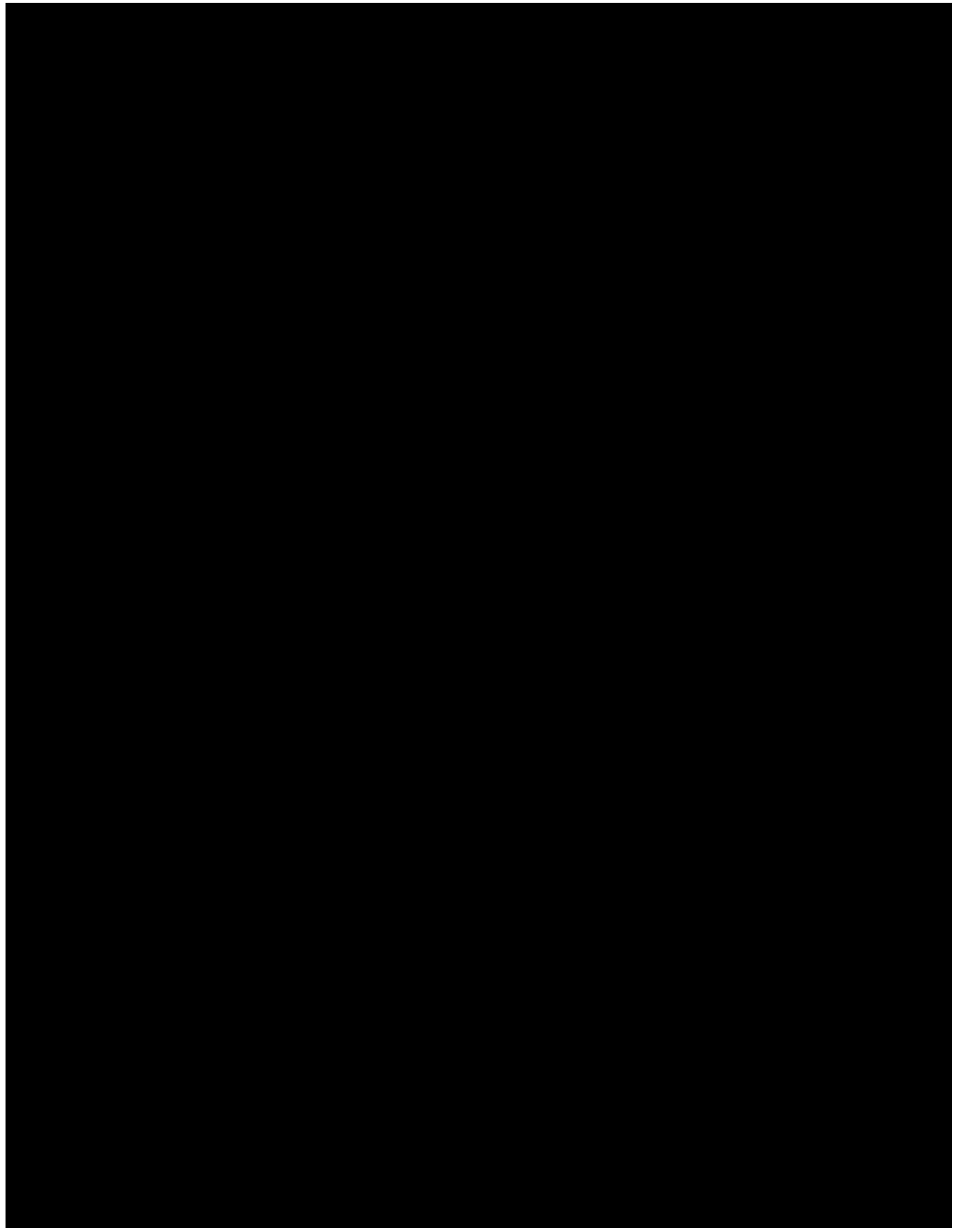
VFIN 1086
SEC 05003

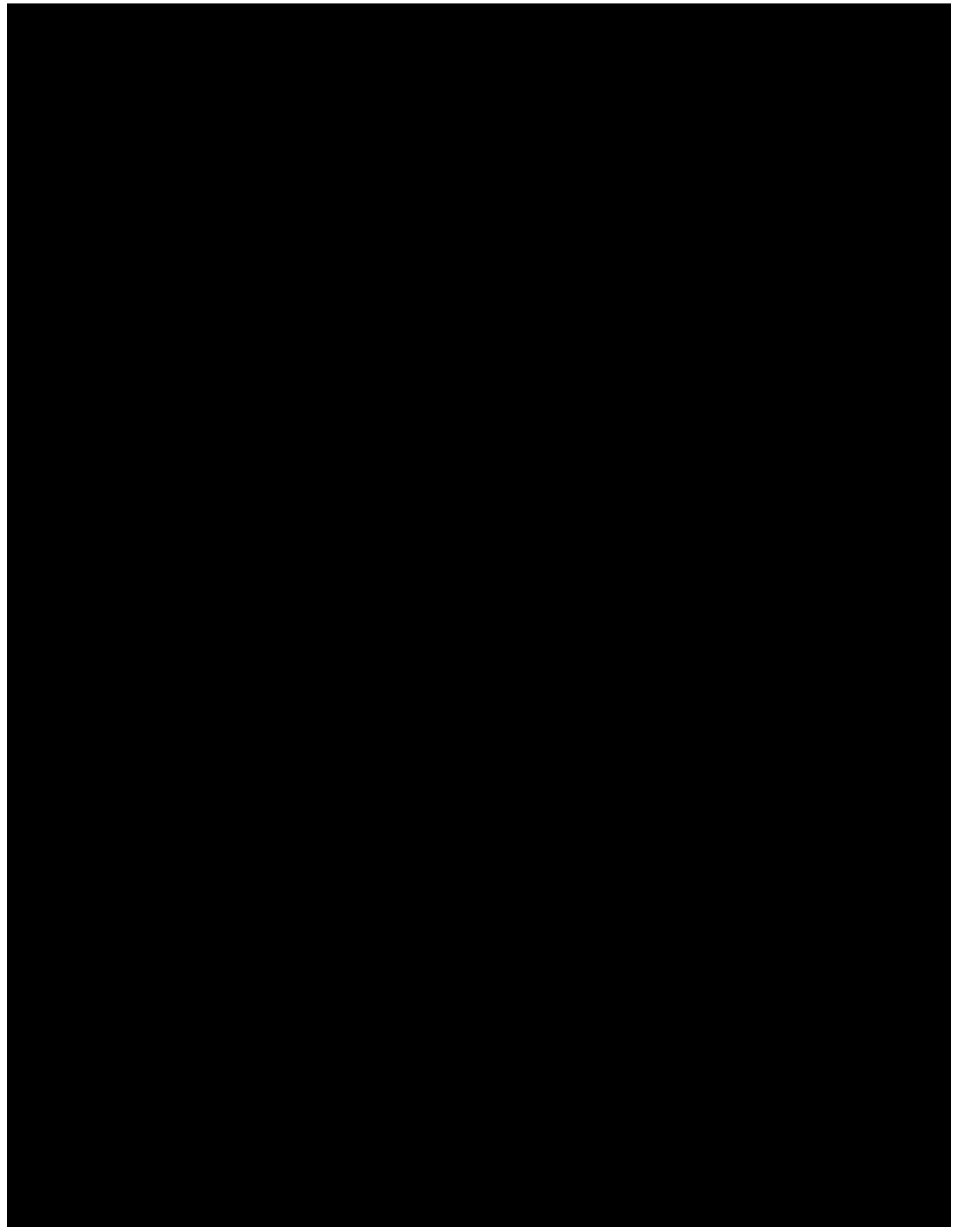
Exhibit 9

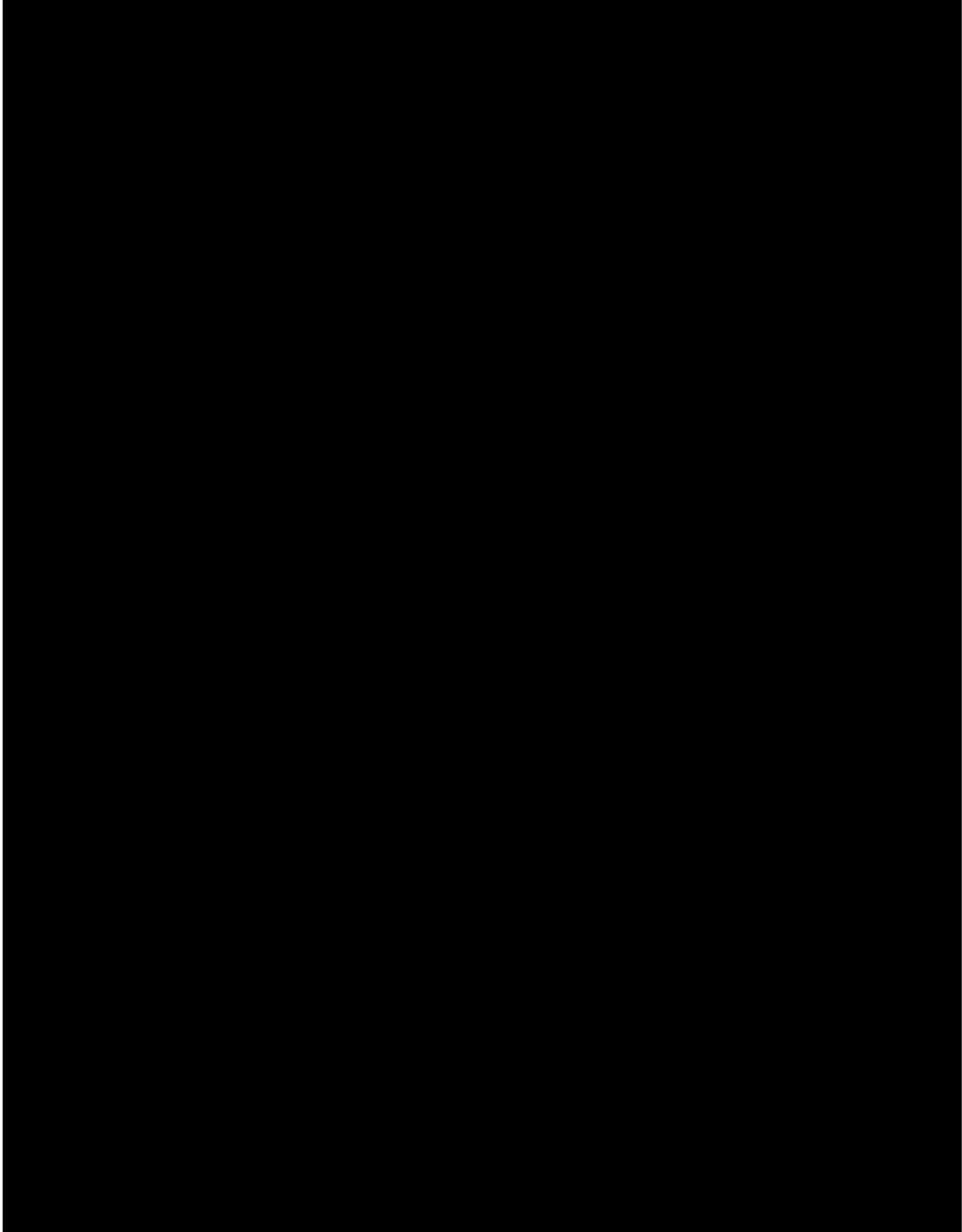












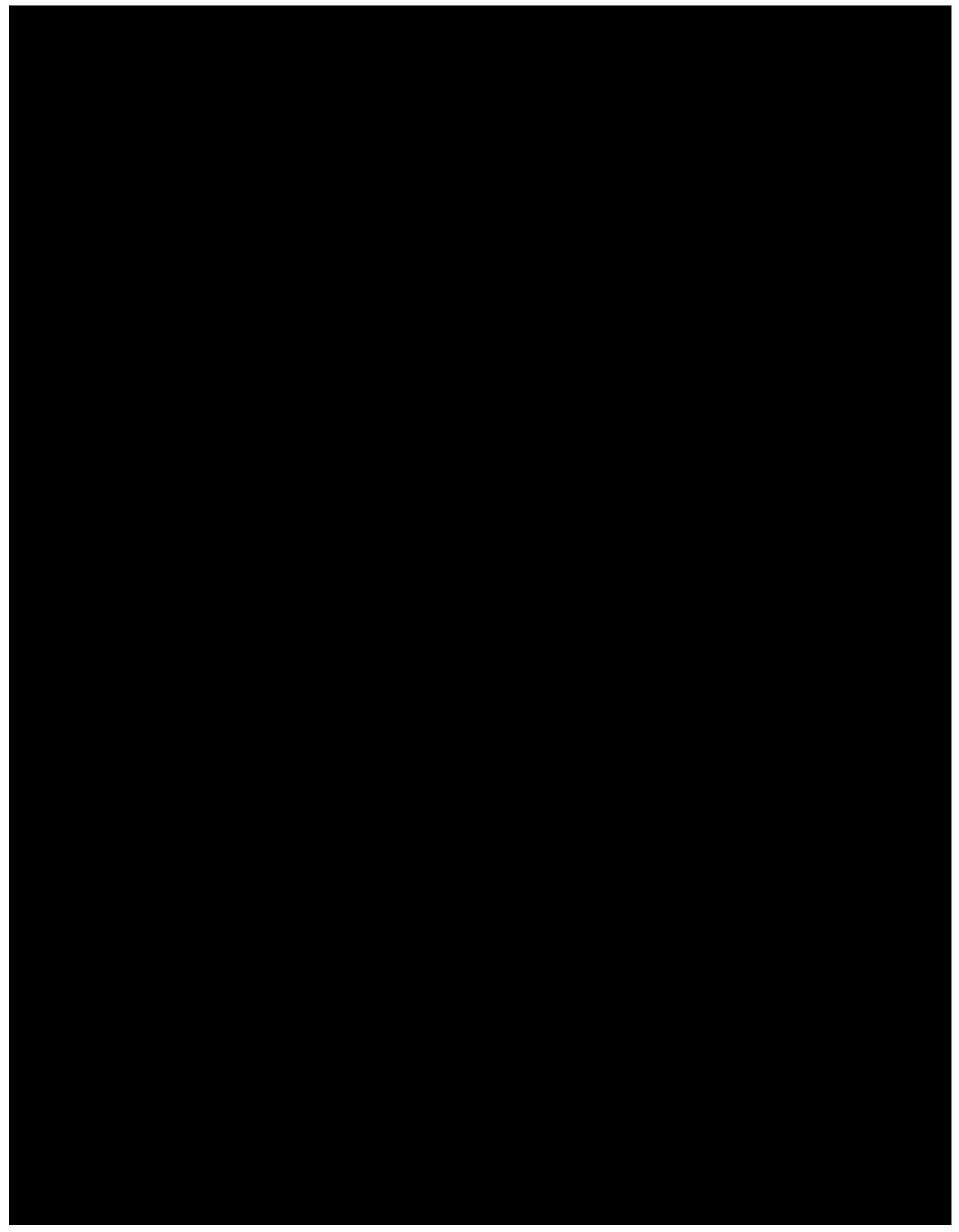


Exhibit 10

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,

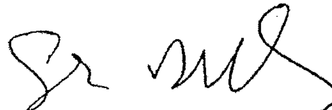


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Exhibit 11

Administrative Proceeding
File No. 3-13109

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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 PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW AGAINST RESPONDENT GORDON BRENT PIERCE

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In accordance with Rule 340 o f the Commission's Rules of Practice, the Division of Enforcement submits these Proposed Findings of Facts and Conclusions of Law against Respondent Gordon Brent Pierce ("Pierce"):

PROPOSED FINDINGS OF FACT

Pierce's Used His Consulting Firms To Exercise Control Of Intergold And Lexington:

1. Pierce is the president of Newport Capital ("Newport"), and became an officer and director of Newport prior to July 2001. Investigative Testimony Transcript of Gordon Brent Pierce dated July 27 and 28, 2006 ("Pierce Testimony") at 23 (Division's designations contained in Division's Exhibit 62). Newport provides financing and locates investment opportunities for companies. *Id.* at 20-21. Newport also provides investor relations and promotional services to public companies, either directly or through Pierce's other companies. *Id.* at 20, 53.

2. Newport does not have any employees, just consultants. Pierce provides consulting services to other companies through Newport. *Id.* at 27, 37. Pierce receives annual compensation from Newport of $800,000 to $900,000 for his consulting services. *Id.* at 66.

3. Pierce borrows money from Newport (which he approves on behalf of Newport) and sometimes paid down his loans from Newport by transferring his Lexington shares to Newport. *Id.* at 107, 109. Pierce also caused Newport to invest directly in Lexington on numerous occasions between late 2003 and 2006 in the form of loans and private placements. *See* Division's Exhibits 59, 60, 70; Hearing Transcript at 410, 414.

4. After identifying himself as a witness on behalf of himself, Pierce failed to appear at the hearing.

Pierce's Used His Control To Obtain 950,000 Vested Option Shares For Resale:

5. Intergold Corporation ("Intergold") was a shell corporation with essentially no business operations, income, or property by 2002. Respondent's Exhibits 1 at 3. In November 2003, Intergold merged with Lexington Oil & Gas Ltd. ("Lexington Oil") to form Lexington by issuing three million shares with restrictive legends to the shareholders of Lexington Oil and by changing Intergold's name to "Lexington Resources."

6. Atkins was the president of Intergold and became the president of Lexington. Respondent's Exhibit 5.

7. Pierce was an officer and director of Investor Communications International, Inc. ("ICI"). Pierce Testimony at 54. Pierce provided consulting services to ICI through Newport. *Id.* at 72. ICI in turn provided consulting services to Intergold and then Lexington until the first quarter of 2004. Transcript of Proceedings on February 2, 3 and 4, 2009 ("Hearing Transcript" or "Transcript") at 312-13.

8. Pierce was the "funds" and the "brains" behind ICI, while ICI's nominal president, Marcus Johnson ("Johnson"), only did administrative paperwork and filings. *Id.* at 94-95.

9. Atkins provided his services as president of Intergold in his capacity as a consultant for ICI. Pierce's Testimony at 64 (Division's Exhibit 62). While serving as the president of Intergold and then Lexington, Atkins received consulting fees from ICI for his services as president of Intergold and Lexington during 2002, 2003 and 2004. Those fees were $17,325 in 2002, $19,625 in 2003 and $60,000 in 2004. Transcript at 452-53; Respondent's Exhibit 5 at 5; Division's Exhibit 56 at 96.

10. ICI lent money to Intergold to allow that company to stay in business. By October 2003, Intergold owed a total of $1.2 million to ICI. Hearing Transcript at 301; Respondent's Exhibit 2.

11. Atkins worked to arrange a restructuring of Intergold. One of the key issues for Atkins to resolve was Intergold's debt to ICI. According to Atkins, "I couldn't go forward with a new company and try to raise money in it if there was this [ICI] debt that was outstanding ...." Transcript at 303.

12. Atkins restructured Intergold by giving Pierce's group a major stake in Intergold. First, Atkins gave Pierce's group 100,000 shares of stock with restrictive legends in lieu of $250,000 owed to Pierce. *Id.* at 303-04; Respondents' Exhibit 2.

13. Second, Atkins gave Pierce's group, through his consulting firm, International Market Trend AG ("IMT"), "the right and option ... to purchase all or any part of an aggregate 950,000

shares of the ... Company" for five years from November 18, 2003 in lieu of $475,000 owed to Pierce's group (the "Option Agreement"). Division's Exhibit 2 at 2.

14. When Atkins agreed to give Pierce's group the vested options for 950,000 shares, there were 521,184 Intergold common shares outstanding. Respondent's Exhibit 5 at 2. This meant that under the Option Agreement, Pierce's group received vested options — without paying cash — for 64% of Intergold's shares on a post-exercise basis. Division's Exhibit 51.

15. Atkins therefore gave Pierce's group a 64% block of the equity that Intergold's shareholders would retain as part of the forthcoming merger with Lexington Oil. It also gave Pierce's group the shares that they would sell to cash out after the merger.

Pierce's Control Over Lexington:

16. Following Intergold's merger with Lexington Oil on November 19, 2003, the 950,000 vested option shares granted to IMT represented 21.25% of Lexington's outstanding shares. Respondent's Exhibit 5 and 5-6. The largest block of shares, 63.9%, was purportedly owned by Orient. *Id.* at 6.

17. The sole shareholder of Orient is an off-shore trust whose only beneficiaries are Pierce's wife and daughter. Proposed Divisions' Exhibits 78, 79. Pierce's total influence over Lexington must therefore be measured by combining IMT's 21.25% stake with Orient's 63.90% stake.

18. Although Orient was supposedly the majority shareholder, it exercised no influence directly over Lexington's management. Atkins did not speak with Orient's representatives or even know who Orient's representatives were. While never talking to Orient's representatives, Atkins would speak with Pierce three or four times per week. Transcript at 455-56.

19. Lexington's shareholders and directors also exerted no control over the company. Lexington did not have any shareholder meetings during 2003 or 2004. After Atkins appointed additional directors to Lexington's board, the board still did not have meetings, except for quarterly meetings of the audit committee. Other board actions were handled through written consents. *Id,* at 457-58.

20. Lexington had only nominal business operations. Lexington had no revenues during 2003 and only $472,000 in revenues during 2004 (versus more than $6.5 million in expenses). Division's Exhibit 56 at 35. Most operational activities were performed by LMT, which provided consulting services to Lexington for financing, investor relations and locating oil and gas properties. Pierce Testimony at 67 (Division's Exhibit 62).

21. Pierce was an officer and director of IMT. *Id.* at 36. Pierce provided consulting services to IMT through Newport. *Id.* at 64-65. Pierce had Newport lend money to IMT. *Id.* at 95; Division's Exhibit 70. Pierce was the "funds" and the "brains" behind the business. Hearing Transcript at 96.

22. IMT also helped raise financing for Lexington in Europe and the United States. Pierce Testimony at 70. Lexington did not have any offices of its own, except for a corporate identification office in Las Vegas, Nevada.

23. Rather than having its own offices, Lexington used IMT's office in Blaine, Washington. IMT's administrative staff answered the phones for Lexington, forwarded telephone calls, directed emails, obtained shareholder inquiries and handled banking responsibilities. Hearing Transcript at 457-58.

24. Lexington also did not pay its officers, who therefore relied upon Pierce for income and loans. Both Lexington's president, Atkins, and chief financial officer, Vaughn Barbon ("Barbon"), did not receive salary payments from Lexington during 2003 and 2004. Instead, all of their reported compensation relating to Lexington came from ICI, the consulting group Pierce controlled. Division's Exhibit 56 at 96 (showing ICI payments of $60,000 to Atkins and $64,000 to Barbon during 2004).

25. While not receiving payments from Lexington, Atkins received large payments from Newport. Atkins was a paid consultant for Newport for five years, including the time when he was Lexington's president. Pierce gave Atkins his consulting assignments for Newport. Transcript at 451, 453-54.

26. Atkins also borrowed money from Pierce from 2004 to 2006 to remodel his home.

Although Atkins borrowed the money from Pierce, the funds came from Newport. Atkins repaid the loan by transferring stock to Newport. *Id.* at 453-54, 459. Although Atkins might have borrowed' up to $400,000 from Pierce, he could not say what the total was.

27. During the hearing, Atkins would not provide the total amount of compensation that he received from Newport, and also refused to disclose even a general description of his income sources in 2003 and 2004. *Id.* at 454-55. Bank records indicate that from December 2003 to November 2004, Newport paid a total of $ 268,000 to Atkins. Division's Exhibit 70.

28. Pierce decided who should provide services to Intergold and Lexington. Intergold retained X-Clearing Corp. ("X-Clearing"), which was formerly known as Global Securities Transfer Inc., as its transfer agent in 2001.

29. Pierce made the decision to have Intergold retain X-Clearing, while Atkins merely memorialized the retention of X-Clearing. Hearing Transcript at 81-82. After Intergold's merger with Lexington Oil, X-Clearing continued to serve as the transfer agent for Lexington until 2004. Transcript at 83-84.

30. Intergold and Lexington were "slow pay" accounts. When X-Clearing's president, Robert L. Stevens ("Stevens") had trouble getting paid by Intergold or Lexington, he went to Pierce to get the bills paid because Pierce was the money behind the venture. *See Id.* at 104.

Pierce's Control Over Accounts At Hypo Bank And vFinance:

31. Pierce had an account in his own name at Hypo Bank. He was the only person authorized to conduct trading in his Hypo Bank account. Pierce Testimony at 42; Division's Exhibits 16-19; Proposed Division's Exhibit 87. Pierce owned Intergold shares prior to the merger with Lexington. Through the merger, Pierce's Intergold shares were converted into 42,561 Lexington shares, which Pierce deposited into his personal Hypo Bank account. Division's Exhibit 50.

32. As revealed in the new records produced to the Division on March 10, 2009, Pierce also controlled accounts at Hypo Bank in the names of Newport and another offshore company, Jenirob Company Ltd. ("Jenirob"). See Proposed Division's Exhibits 80 and 84.

33. In 2003 and at about the same time that Lexington began trading on the OTCBB, Pierce opened a brokerage account for Newport at vFinance. Pierce Testimony at 218; Division's Exhibit 25. Hypo Bank also held an omnibus account in its name at vFinance.

34. Hypo Bank traded for its customers, including Pierce and the offshore companies he controlled, through its omnibus vFinance account. *See* Division's Exhibits 17-19, 23-24 and Proposed Division's Exhibits 82-83, and 86 (brokerage records reflecting trades in Lexington shares). By trading in his Hypo Bank accounts through the omnibus vFinance account in Hypo Bank's name, Pierce ensured that neither his name nor the names of his companies appeared on the vFinance brokerage statements or on trading records kept by U.S. exchanges.

35. Pierce's primary broker at Hypo Bank was Philippe Mast ("Mast"). *See* Proposed Division's Exhibits 80-88. Mast also was a signatory on the account opening documents for Hypo Bank's omnibus account at vFinance. Division's Exhibit 21.

36. Mast and Pierce communicated if a Hypo Bank account was executing trades in Lexington shares. Division's Exhibit 67. According to Pierce, it was "regular protocol" for Mast to tell Pierce about Hypo Bank accounts that were trading in Lexington. Pierce Testimony at 391 (Division's Exhibit 62). Mast was also the contact person at Hypo Bank when X-Clearing arranged to transfer Lexington shares to a Hypo Bank account.

37. Stevens spoke with Mast to have Lexington shares transferred to Brown Brothers Harriman, which was Hypo Bank's clearing broker in the United States. Stevens helped Hypo Bank get shares that were in "street name" and therefore sellable on the open market. Hearing Transcript at 101-03.

38. Pierce also communicated with vFinance about its trading in Lexington shares for Hypo Bank. Nicholas Thompson ("Thompson") was the market maker for Lexington shares at the vFinance brokerage firm. Pierce had known Thompson for five years. *Id.* at 114, 228. Thompson sent Pierce emails discussing trading in Lexington shares that Thompson was executing for Hypo Bank's account at vFinance. Division's Exhibit 33.

39. Thompson would tell Pierce about a Lexington stock trade in Hypo Bank's account

before Thompson even told Mast about the trade. *Id.* Pierce testified that he communicated regularly with Thompson about Lexington trading in Hypo Bank's account. Pierce Testimony at 391-92.

Pierce's Receipt And Distribution Of Lexington Form S-8 Shares:

40. On November 21, 2003, Lexington filed a short-form registration statement, the November 2003 Foto' S-8, which purported to register Lexington's stock issuances to employees and consultants. The Form S-8 stated that the stock recipients must represent that the shares would not be sold or distributed in violation of the securities laws. November 2003 Form S-8 at 2, 19 (Division's Exhibit 6).

41. The November 2003 Form S-8 did not even contain so much as a supplemental prospectus to register resales by any Lexington shareholder, and therefore no disclosure whatsoever about the selling shareholders, their holdings, or their plan of distribution was provided. Subsequent Form S-8 filings also failed to contain even a supplemental prospectus. Transcript at 60, 62-63.

42. Lexington issued 350,000 pre-split shares on November 24, 2003 to Pierce, which Pierce transferred that same day to Newport. Division's Exhibit 40. Pierce obtained those 350,000 shares after representing that he was obtaining the Lexington shares for "investment purposes" only. Option Exercise Agreement dated November 24, 2003 at 1 (Division's Exhibit 10).

43. Contrary to the representations, Pierce caused Newport to sell 328,300 of those 350,000 pre-split Lexington shares to third persons. Division's Exhibit 40. These transactions left Newport with 21,700 pre-split Lexington shares.

44. Lexington also issued 150,000 pre-split shares on November 25, 2003 to Pierce, who represented that the shares were for investment purposes only. Division's Exhibit 11. Pierce transferred 50,000 of those shares on December 2, 2003 to Newport and retained the other 100,000 pre-split shares for his own account. Division's Exhibit 41. Pierce transferred these 100,000 Lexington shares to his personal account at Hypo Bank. Division's Exhibit 16; Proposed Division's Exhibit 88.

45. Pierce had originally asked to have these 150,000 shares issued with the 350,000

shares that he received on November 24, 2003. However, Atkins spoke with Pierce by telephone and advised Pierce that the 500,000 share issuance would cause Pierce to cross the 10% ownership threshold for reporting his stake in Lexington. Atkins recommended to Pierce that they structure the transaction to split the 500,000 shares into two blocks of 350,000 and 150,000 shares that would be issued on consecutive days. Hearing Transcript at 359-60, 473-75.

46. On January 22, 2004, Lexington issued 300,000 pre-split Lexington shares to Pierce's long-time associate, Richard Elliot-Square, pursuant to the November 2003 Form S-8. Respondent's Exhibit 27. On January 26, 2004, Elliot-Square transferred all 300,000 of those shares to Newport. Respondent's Exhibit 28. Elliot-Square has offered conflicting reasons for his receipt and transfer of those 300,000 shares. During the Division's investigation, Elliot-Square stated that the 300,000 shares might have been a mistaken payment of too many options for the work he performed. Transcript at 279-80 (quoting ttom Transcript of Richard Elliot-Square Interview dated February 28, 2007). Pierce later deposited these 300,000 shares into Newport's Hypo Bank account. Proposed Division's Exhibit 82.

47. 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 personal Hypo Bank account a total of 300,000 post-split Lexington shares that were issued under the November 2003 Form S-8.

48. Pierce's Hypo Bank account also contained 121,683 post-split Lexington shares that he received in exchange for his original Intergold shares. Division's Exhibit 17. As a result of the split, Newport received and deposited into its Hypo Bank account an additional 643,400 shares it received for the 300,000 shares it had acquired from Elliot-Square and the 21,700 shares it had acquired from Pierce. Proposed Division's Exhibit 82.

49. In February 2004, Pierce caused Newport to acquire for its account at Hypo Bank 25,000 post-split shares that Lexington had issued to Stevens pursuant to the November 2003 Foini S-8. *Id.* On May 19, 2004, Lexington issued 495,000 shares to Elliot-Square purportedly pursuant to a Form S-8 filed by Lexington in February 2004. Respondent's Exhibits 32-33.

50. Pierce caused Jenirob to acquire 435,000 of these shares the same day after they were issued to Elliot-Square and then Pierce deposited them in Jenirob's Hypo Bank account. Proposed Division's Exhibit 86. Pierce moved 100,000 of these shares from the Jenirob account to Newport's account at Hypo Bank on June 11,.2004. *Id.*

51. 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 in his personal Hypo Bank account for proceeds of $2.7 million. Division's Exhibits 18, 48. 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.

52. Under a first-in, first-out analysis (whereby the 121,683 post-split shares that Pierce received through the merger are treated as sold first), Pierce received $2,077,969 in proceeds from selling the 300,000 post-split shares that he retained from the November 2003 Form S-8 stock issuances. Division's Exhibits 48, 50.

53. Lexington filed another Form S-8 on June 8, 2004 (the "June 2004 Form S-8"). Division's Exhibit 7. Pursuant to the June 2004 Form S-8, Pierce received a total of 320,000 Lexington shares after stating in writing that the shares were for investment purposes only. Division's Exhibits 12-14. Pierce transferred all 320,000 shares to Newport on the same day that he received them. Division's Exhibits 44-45.

54. On June 25, 2004, Pierce caused Newport Capital to sell 80,000 of those 320,000 Lexington shares to another company Pierce controlled. Division's Exhibit 45. Pierce transferred the remaining 240,000 shares to Newport's account at Hypo Bank. Proposed Division's Exhibit 82.

55. Based upon documents that it received from Liechtenstein authorities within the past few days, the Division has determined that by June 2004, Pierce had moved to the Newport and Jenirob accounts at Hypo Bank a total of 1,634,400 Lexington shares that had been issued purportedly pursuant to Form S-8 registration statements. Proposed Division's Exhibit 89. Pierce sold these shares into the open market through the Newport and Jenirob accounts at Hypo Bank between February and December 2004. *Id.*

56. Under a similar first-in, first-out analysis, Pierce received a total of $5.454 million and $2.069 million in proceeds in the Newport and Jenirob accounts, respectively, from selling the additional 1.6 million Lexington shares that were originally issued under Forms S-8. *Id.*

57. Including his personal account and the Newport and Jenirob accounts at Hypo Bank, Pierce sold a total of two million S-8 shares for net proceeds on a first-in, first-out basis of $9.601 million. Division's Exhibit 50 and Proposed Division's Exhibit 89. Pierce sold more than one million of these shares during June 2004, when Lexington's stock price hit an all-time high of $7.46. *Id.*

58. Pierce's sales through the three accounts at Hypo Bank were part of Hypo Bank's sale of Lexington shares through its omnibus account at vFinance between February and December 2004, which included sales of 1.2 million shares in June 2004 alone. Division's Exhibits 26-28, 49. While Pierce's sales made up the vast majority of the sales in the vFinance Hypo Bank account, some of the third parties who purchased Lexington shares from Newport also transferred and sold their Lexington shares through accounts at Hypo Bank. Division's Exhibit 66.

59. On February 27, 2006, Lexington filed yet another Foim S-8 (the "February 2006 Form S-8"). Division's Exhibit 8. Lexington issued a total of 500,000 shares to Pierce in early March 2006.

60. Within days of receipt, Pierce had Lexington transfer those 500,000 shares to Newport. Pierce sold all of those Lexington shares in March 2006 through a brokerage account that Pierce opened for Newport at the Peacock Hislop Staley & Given Inc. brokerage firm ("Peacock Hislop") in Phoenix, Arizona. Pierce Testimony at 194; Division's Exhibit 29. Pierce made those sales at prices just slightly higher than he had paid to purchase those shares from Lexington a few days earlier. Division's Exhibit 46.

61. Finally, on March 14, 2006, Lexington filed one more Fonn S-8 (the "March 2006 Form S-8"). Division's Exhibit 9. Lexington issued a total of 500,000 shares to Pierce in mid-March 2006. Within days, Pierce had Lexington transfer those 500,000 shares to Newport.

62. Pierce sold 164,000 of these Lexington shares in March 2006 through the Newport

account at Peacock His op. Pierce acquired those shares for only a few cents less than the eventual selling price of those Lexington shares on the OTCBB. Division's Exhibit 30.

Pierce's Prior Bar By Canadian Securities Regulators:

63. Pierce attended the University of British Columbia for six to eight months, but never continued his education and never obtained any professional licenses. After leaving college, Pierce was a self-employed businessman. Pierce Testimony at 158-59.

64. Pierce has known Atkins since the early 1990s. Pierce and Atkins have worked together on ten different companies. *Id.* at 159-60.

65. In June 1993, Canadian securities regulators in British Columbia imposed a fifteen-year bar and $15,000 fine upon Pierce relating to his activities as a director of Bu-Max Gold Corp. ("Bu-Max"). According to stipulated findings, investor proceeds were diverted to unauthorized and undisclosed uses, including for Pierce's benefit.

66. During the investigation by Canadian securities regulators into Bu-Max, "Pierce tendered documents to the staff of the Commission which were not genuine." *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce,* Order Under Section 144 at 2 (June 8, 1993) (DiviSion's Exhibit 47).

67. The Staff subpoenaed documents from Pierce in May 2006. *See* Division's Exhibit 31. Pierce did not produce any emails relating to Lexington or his trading in response to the subpoena. According to Pierce, he deletes all of his emails on a daily basis. Pierce Testimony at 175-76.

PROPOSED CONCLUSIONS OF LAW

Pierce Violated Section 5 Of The Securities Act:

1. Pierce violated Section 5(a) of the Securities Act which imposed a registration requirement for his sales of Lexington securities in interstate commerce:

> *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

15 U.S.C. § 77e(a) (emphasis added). Similarly, because his Lexington stock resales 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).

2. The purpose of Section 5's registration provisions is to ensure that the investing public is provided with the necessary material information about their contemplated investment. It is well-established that improper intent is not an element of a Section 5 violation. *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).

3. Section 5's registration requirements apply to each and every sale of securities, including those issued under a Form S-8 registration statement. *SEC v. Cavanagh,* 155 F.3d 123, 133 (2d Cir. 1998). Interpretive Release No. 33-6188 (the "1980 Release"), which discusses the availability of the Foon S-8 registration statement for stock issuances to employees of the issuer, states that "Section 5 provides that *every offer or sale ofa 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).

4. The 1980 Release also provides that affiliates of the issuer must separately register their sales of S-8 shares. *Id.* at 8976-77. Form S-8's 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 and n.2.

5. Pierce violated Section 5 with respect to his resales of Lexington S-8 shares. The Division established a *prima facie* case with evidence that (1) Pierce directly or indirectly sold Lexington shares, (2) no registration statement was in effect as to Pierce's sale of Lexington shares

d (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. March 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)).

6. Pierce admits that he sold Lexington shares through his Hypo Bank account in June 2004. Answer, ¶ 16. *See also* Division's Exhibit 18 (account statements for trading in Pierce's Hypo Bank account during June 2004). Brokerage records also establish that Pierce sold Lexington shares throughout all of 2004 and during March 2006. Division's Exhibits 16-19 (brokerage records reflecting sales of Lexington shares in Pierce's Hypo Bank account), 30 (brokerage records reflecting sales of Lexington shares in Newport's Peacock Hislop account) and 48 (Division's summary of Pierce's Lexington open market sales).

7. As a result, there is no genuine dispute that Pierce sold shares received through Lexington's S-8 offerings. Additionally, the evidence received from the Liechtenstein regulators proves that Pierce sold another 1.6 million Lexington shares through Newport and Jenirob accounts at Hypo Bank between February and December 2004. Proposed Division's Exhibits 82, 86, 89.

8. Pierce received his shares from Lexington under the purported November 2003, June 2004, February 2006 and March 2006 Form S-8 Registration Statements. Division's Exhibits 5-8. Those Form S-8s supposedly registered Lexington's issuance of shares to purported employees and consultants, but did not register the resale of those shares by the recipients. Transcript at 59-60, 62-63. The shares Pierce sold in the Newport and Jenirob accounts either came from Pierce of from other consultants who received the shares under purported S-8 registration statements that did not register any resales. It is therefore beyond dispute that Pierce resold his Lexington shares without filing a registration statement for those resales. Answer, § 16 (admitting that Pierce sold shares in June 2004 with registering those sales).

9. It is also beyond genuine dispute that instruments of interstate commerce were used in connection with Pierce's sales of Lexington shares. X-Clearing received instructions by mail, telephone and fax related to the transfer of Lexington S-8 shares to Pierce and then to other persons

and communicated with Mast at Hypo Bank to get the shares into "street name." Transcript at 102-03, 109; Respondent's Exhibits 16, 17, 22, 23, 37b-c, 38, 39b-d. Pierce communicated by telephone and email with Mast at Hypo Bank and Thompson at vFinance about trading in Lexington shares. Pierce Testimony at 391-92 (Division's Exhibit 62); Division's Exhibits 33, 34, 67.

Pierce Did Not Carry His Burden Of Proving An Exemption From Registration:

10. As demonstrated above, the Division established Pierce's *prima facie* violation of Section 5's registration requirements. Pierce therefore has the burden of proving that his resales of Lexington shares were exempt from registration whether or not Lexington supposedly used valid S-8 registration statements for its sales of shares to Pierce. *SEC v. Cavanagh, supra,* 155 F.3d at 133-34 (finding Section 5 violation for resales of S-8 shares without registering the resales). *See SEC v. Ralston Purina Co.,* 346 U.S. 119, 126 (1953).

11. Pierce's reliance upon a registration exemption must be strictly construed. *SEC v. M&A West Inc.,* 538 F.3d 1043, 1050-51 (9' Cir. 2008); *Sorrel v. SEC,* 679 F.2d 1323, 1326 (9`" Cir. 1982) (holding that exemptions are strictly construed and must be proven by party asserting exemption). Exemptions from registration are strictly construed to protect investors' access to material information. *In the Matter of Thomas .1 Dudchik and Rodney R. Schoemann,* Initial Decision at 14-15 (Admin. Proc. File No. 3-12943 Dec. 5, 2008) (All Mahony).

12. Although 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), Pierce cannot qualify for this exemption. As demonstrated below, the evidence establishes that Pierce falls within the Securities Act's definitions of an "issuer" and an 'underwriter," and is therefore precluded from relying upon Section 4(1).

Pierce Was An "Issuer"

13. Section 2(a)(11) of the Securities Act defines an "issuer" to include "any person directly or indirectly controlling or controlled by the issuer." 15 U.S.C. § 77b(a)(11). A person who constitutes an "affiliate" of the issuer is deemed to be an "issuer" with respect to the distribution of securities. *SEC v. Cavanagh, supra,* 155 F.3d at 134, *cited by In the Matter of Thomas J. Dudchik*

and Rodney R. Schoemann, supra, Initial Decision at 14.

14. Determining whether a person is affiliate involves looking at the totality of the circumstances, including a consideration of the person's influence upon the management and policies of the corporation. *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann, supra,* Initial Decision at 14 (citing and quoting *SEC v. Freiberg,* 2007 WL 2692041 at * 15 (D. Utah Sept. 12 2007)). An affiliate need not be an officer, director, manager, or shareholder of the issuer and does not have to exercise control in a continuous or active manner. *SEC v. International Chemical Development Corporation,* 469 F.2d 20, 30 (10thCri. 1972) (citing *Pennaluna & Co. v. SEC,* 410 F.2d 861, 866 (9thCir. 1969), *cert. denied* 396 U.S. 1007, 90 S. Ct. 562, 24 L. Ed. 2d 499 (1970)). The provision of financing and participation in the violative scheme can be enough to render a person an affiliate of the issuer. *Id.*

15. The hearing evidence establishes Pierce's status as an affiliate of Lexington. Pierce was the money and brains behind Lexington. Transcript at 82-83, 94-96. IMT's block of shares exceeded 20% and Pierce's initial exercise of 500,000 option shares represented a 10% block. Additionally, the owner of Lexington's majority shareholder, Orient, has just been revealed to be an off-shore trust whose beneficiaries are Pierce's wife and daughter. Proposed Division's Exhibits 78 and 79.

16. Although Orient was the nominal majority shareholder, Atkins did not communicate with, or even know the identity of its representatives. Instead, Atkins talked three or four times per week with Pierce. Although Lexington's nominal president, Atkins derived absolutely no income from Lexington itself. Instead, Atkins was dependent upon Pierce for financial support through consulting fees from ICI, consulting fees from Newport and personal loans from Pierce.

17. The totality of Pierce's ability to exercise influence over Atkins makes Pierce an affiliate of Lexington. *SEC v. International Chemical Development Corporation, supra,* 469 F.2d at 30; *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann, supra,* Initial Decision at 14 (describing and applying totality of circumstances test for affiliate status).

18. Pierce's affiliate status is also demonstrated by his ability to dictate the terms of the

merger between Intergold and Lexington. Because Intergold owed $1.2 million to ICI, Atkins knew that he could not alti act new investors to Lexington unless Pierce agreed to reduce that debt. Atkins therefore negotiated a deal whereby Pierce's consultants released $475,000 in debt for 950,000 vested option shares that represented 64% of Intergold's outstanding shares (calculated on a post-exercise basis). Division's Exhibit 51. As a result, Pierce was able to extract the majority of Intergold's benefit from the merger, and that ability demonstrates his corporate control.

19. Because he was in a position to kill Intergold's merger with Lexington unless he got what he wanted, Pierce also had enough control to insist that a registration statement be filed for his resales. Pierce's decision not to require registration of his resales was based on his obvious desire to conceal his acquisition and resale of those shares.

20. Filing a prospectus for his resales would have forced Pierce to disclose his large stock position and his prior bar by British Columbia securities regulators. That disclosu e would have warned investors that a large shareholder with a bar for deceptive conduct was selling his shares in Lexington, and thereby raised questions about Lexington's business prospects. Instead of making disclosures through a registration statement, Pierce decided to make undisclosed sales of his shares while Lexington's share price was rising and peaking.

Pierce Was An Underwriter

21. Pierce is also unable to rely upon the Section 4(1) exemption given the evidence establishing his underwriter status. 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).

22. 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 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.,* Initial Decision Release No. 250 at 9-12 (Admin. Proc. File No. 3-11310 May 11, 2004) (finding Section 5 violations and absence of exemption).

23. One compelling indication of Pierce's "underwriter" status is the short time period between his acquisition of the Lexington shares in November 2003 and his sale of those shares through Newport's account at Hypo Bank beginning in February 2004 and through Pierce's own account at Hypo Bank beginning in June 2004 (under the first-in, first-out methodology). *SEC v. M&A West, supra,* 538 F.3d at 1050-51. 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). Because Pierce's sales of the November 2003 Lexington S-8 shares took place in just three months for his Newport account and in just seven months for his personal account (with all sales completed within one year), Pierce cannot rely 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.

24. Pierce also held the 320,000 shares received under the June 2004 Form S-8 for a very short period. Within a few days, Newport sold 80,000 of those shares to a third party. Division's Exhibit 45. Pierce transferred the other 240,000 post-split shares to Newport's account at Hypo Bank. Pierce sold those Lexington shares between February and December 2004. Division's Exhibits 19, 24.

25. In early March 2006, Lexington issued 500,000 shares to Pierce under the February 2006 Form S-8. Within days, Pierce transferred those shares to Newport which deposited all of the shares into its Peacock Hislop account. Those shares were then sold in a few days for nearly the same price as the exercise price that Pierce paid to Lexington.

26. Similarly, Lexington issued another 500,000 shares to Pierce under the March 2006 Form S-8. Pierce quickly transferred those shares to Newport, which sold 164,000 of those shares through Peacock Hislop for prices that roughly equaled the exercise price paid by Pierce.

27. Because there was no profit for Pierce in selling the Lexington shares quickly for nearly the same price at which he acquired the shares, it is clear that Pierce's intention was to

distribute shares for Lexington by paying Lexington an exercise price roughly equal to the price for which the shares sold on the open market.

28. 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" by engaging in a distribution of Lexington stock.

Pierce Violated Section 13(d) and Section 16(a) Of The Exchange Act:

29. 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).

30. The purpose of these Exchange Act Sections is to ensure that investors have timely knowledge of the identity of corporate insiders and their transactions in the company's stock. Investors can use that knowledge to assess how a company's insiders assess the company's future prospects — *i.e.,* negatively if large inside shareholders are selling their positions.

31. 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) (internal citation omitted).

38. Pierce did not file a Form 3, 4, or 5 regarding his Lexington transactions. Furthermore, Pierce admits that he did not disclose his ownership interest by filing a Schedule 13D until July 2006. Pierce's Answer, ¶ 17. Pierce's belated Schedule 13D reflects 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).

39. Additionally, a summary of documents establishes that Pierce actually had at least a 10% interest for all but a few days between November 2003 and May 2004. Division's Exhibit 51.

40. Atkins' testimony during the hearing established that Pierce deliberately attempted to evade his ownership disclosure requirements. Atkins learned that Pierce intended to exercise an option on 500,000 pre-split shares in November 2003.

41. Given the number of outstanding. Lexington shares, that exercise would have put Pierce over the 10% ownership threshold. Atkins therefore advised Pierce to split his 500,000 shares into two blocks of 350,000 and 150,000 shares that would be exercised on consecutive days in late November 2003. This scheme required, however, that Pierce quickly sell of some of his 350,000 shares to avoid having more than 10% of the outstanding shares when he acquired the second block of 150,000 on the next day. Transcript at 473-75.

42. The fact that Pierce was entitled to exercise an option on 500,000 shares is enough, however, to establish his beneficial ownership for purposes of Sections 13(d) and 16(a); such ownership exists as to any option (in this case for the total 500,000 shares) that Pierce could exercise in the next sixty days. 17 C.F.R. § 240.13d-3(d)(1). Atkins testimony regarding Pierce's planned exercise of options for 500,000 shares therefore establishes that Pierce crossed the reporting threshold in November 2003, but failed to file the required Schedule 13D and Forms 3, 4 and 5.

43. Pierce's Schedule 13D also failed to reflect [MT's acquisition of 950,000 vested Lexington options on November 18, 2003. Because Pierce has admitted his control over LMT, *see* Pierce's Answer, ¶9, his failure to disclose the IMT holdings as part of his beneficial holdings constitutes a violation of Sections 13(d)(1) and 16(a).

44. Atkins' testimony that Lexington would not have issued S-8 shares to IMT because such shares may only be issued to natural persons is inapt. As both Atkins and Pierce's expert witness testified, the. Option Agreement did not limit IMT to receiving S-8 shares. IMT had the right under the Option Agreement to acquire 950,000 restricted shares at any time. Transcript at 480-81,

548-49 That right triggered Pierce's and IMT' s beneficial ownership of 950,000 shares for reporting purposes under Sections 13(d) and 16(a) of the Exchange Act.

45. Finally, Pierce hid his majority ownership of Lexington by using Orient as the nominal shareholder, while never revealing that his wife and daughter were the beneficiaries of the trust that owned Orient. Pierce's deliberate concealment of his beneficial interest in Orient demonstrates that he consciously acted to attempt to evade his disclosure obligations under Sections 13(d) and 16(a) of the Exchange Act.

Pierce Should Disgorge His Lexington Stock Sale Proceeds:

46. Because Pierce violated Section 5 of the Securities Act through his unregistered sale of Lexington shares, Pierce should 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 from sale of unregistered securities); *Geiger v. SEC, supra* 363 F.3d at 488-89 (upholding disgorgement order against family partnership and owner for selling unregistered securities); *In the Matter of Lorsin, Inc., supra,* Initial Decision Release No. 250 at 15 (ordering, on summary disposition, that stock promoters and principals jointly and severally disgorge proceeds of unregistered stock sales).

47. The "purpose of disgorgement is to force 'a defendant to give up the amount by which he was unjustly enriched' rather than to compensate the victims of fraud." *S.E. C. v. Blavin,* 760 F.2d 706, 713 (6th Cir. 1985)(quoting *S.E.C. v. Commonwealth Chemical Securities, Inc.,* 574 F.2d 90, 102 (2d Cir. 1978)).

48. 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 *First City Fin. Corp.,* 890 F.2d at 1232).

49. Pierce does not dispute the Division's allegations that he received $2.7 million from his sales of Lexington shares in June 2004. *Compare* OIP, ¶ 111.16 *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.

50. At best, Pierce could try to show that his initial sales were of the 121,683 post-split Lexington shares (using a first-in, first-out method of calculating the sales proceeds) that he received during the reverse merger. His subsequent sales were of the 300,000 post-split shares provided to him under the November 2003 Form S-8. Those sales generated net proceeds of $2,077,969.

51. Based upon the Hypo Bank documents it just received, the Division has determined that Pierce sold 1,634,400 Lexington S-8 shares through Hypo Bank and vFinance using Newport for net proceeds of $5,454,197 and using Jenirob for net proceeds of $2,069,181. Proposed Division's Exhibit 89. Because those sales were in violation of Section 5's registration requirements, Pierce should disgorge total net proceeds of $9,601,347 ($2,077,969 + $5,454,197 +$2,069,181). *Id.*

52. 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. Sem, 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 (9thCir. 1996) (describing court's equitable discretion to award prejudgment interest).

53. The Initial Decision will therefore order Pierce to disgorge $9,601,347, plus pre-judgment interest on that amount, for his violation of Section 5.

A *Cease-And-Desist Order Against Pierce Is Appropriate:*

54. Section 8A of the Securities Act authorizes the Securities and Exchange Commission ("Commission") to issue a cease and desist order against any person who has been found to be "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).

55. Similarly, Section 21C(a) of the Exchange Act authorizes the Commission to issue a cease and desist order against any person who has been found to have violated any Exchange Act provision or rule. 15 U.S.C. § 78u-3(a).

56. In this case, a cease and desist order should be issued in light of Pierce's repeated and deliberate violations of Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act. *See, e.g., In the Matter of Lorsin, Inc., et al., supra,* Initial Decision Release No. 250 at 12-14 (issuing cease and desist order after finding that respondent sold unregistered shares). In determining whether to impose a cease and desist order, the Hearing Officer considered the egregiousness of Pierce's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of any assurances against future violations, Pierce's recognition of the wrongful nature of his conduct, and the likelihood that Pierce's activities will present opportunities for future violations. *Steadman, supra,* 603 F.2d at 1140 (quoting *SEC v. Blatt,* 583 F.2d 1325, 1334 n. 29 (5th Cir. 1978), *affirmed on other grounds,* 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981)).

57. No one of these particular factors is controlling. *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) (All Mahony) (imposing cease and desist orders based upon violation of record keeping provisions) (citing *SEC v. Fehn,* 97 F.3d 1276, 1295-96 (9thCir. 1996)). Because remedial sanctions should promote the "public interest," a 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." *Arthur Lipper Corp.,* 46 S.E.C. 78, 100 (1975); *In the Matter of Richard C. Spangler, Inc.,* 46 S.E.C. 238, 254 n.67 (1976).

58. All of the *Steadman* factors strongly favor a cease and desist order against Pierce. Pierce distributed over three million Lexington shares during a thirty-month period from November 2003 until March 2006 without the registration required by Section 5 of the Securities Act. In June 2004 alone, Pierce sold 300,000 of those shares through his own Hypo Bank account for $2.1 million in net proceeds.

59. Additionally, from November 2003 through March 2006, Pierce transferred Lexington

shares to Newport, a company he controlled, which then sold shares through Hypo Bank and another brokerage account. Pierce therefore engaged in a wide-ranging, long-lasting and highly lucrative distribution of Lexington shares that violated Section 5 of the Securities Act in an egregious and recurring fashion.

60. Similarly, Pierce did not file the necessary Schedule 13D form until June 2006, when his Lexington transactions were already under investigation, and never filed any Forms 3, 4, or 5 to disclose his transactions in Lexington shares. Pierce deliberately violated Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act to conceal his acquisition and sale of large blocks Lexington shares.

61. For example, Pierce and Atkins decided in late November 2003 to split a block of 500,000 shares to attempt to avoid disclosing his ownership interest. Similarly, Pierce and Atkins also made DAT the nominal recipient of the 950,000 shares to conceal the identities — particularly Pierce's — of the persons who would receive the shares.

62. Documents just released by Liechtenstein over Pierce's objections also establish that Pierce used Orient to conceal his family's majority stake in Lexington. As a result, Lexington's Form 10-KSB filings for 2003, 2004 and 2005 do not contain any mention of Pierce, including the section describing the company's 5% shareholders. Division's Exhibits 55-57; Hearing Transcript at 61, 63-64. That was no oversight. That was deliberate concealment.

63. In fact, only after Lexington's stock price had crashed and the staff sent a subpoena to Pierce in June 2006 did Pierce file a Schedule 13D in July 2006 and did Lexington disclose Pierce's ownership interest in the Form 10-KSB for 2006. Division's Exhibits 15 (Pierce's Schedule 13D filing) and 58 (Lexington's 2006 Form 10-KSB). Pierce's Schedule I3D filing also alludes to the enforcement action by British Columbia securities regulators. Division's Exhibit 15 at 6.

64. Pierce has made no effort to acknowledge or show remorse for his misconduct or to demonstrate that it will not happen again. Quite to the contrary, Pierce failed to attend the administrative hearing despite being listed as a witness for himself.

65. Finally, Pierce does not come to this proceeding with a clean record as a securities

professional. On June 8, 1993, Canadian securities regulators imposed a fifteen-year bar upon Pierce and a $15,000 fine for deceptive conduct that included misuse of funds and submitting false documents. *In the Matter Securities Act, S13.(7, 1985, chapter 83 And In the Matter of Gordon Brent Pierce,* Order Under Section 144 (June 8, 1993) (Division's Exhibit 47).

66. Far from recognizing the seriousness of that misconduct, Pierce sent a letter to the Peacock Hislop brokerage firm asserting that Canadian securities regulators were engaged in a "witch hunt" and that the Order was a product of a "kangaroo court proceeding." Division's Exhibit 29 at 2.

67. Accordingly, the Initial Decision contains a cease-and-desist order against Pierce's further violations of Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act because Pierce cannot be trusted to obey the securities laws in the future.

Dated: March 20, 2009

Res ctfully submitted,

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

Exhibit 12

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 POST-HEARING BRIEF AGAINST RESPONDENT GORDON BRENT PIERCE

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Gordon Brent Pierce ("Pierce"), a Canadian stock promoter with a previous record of securities law violations in British Columbia, made millions of dollars by selling Lexington Resources, Inc. ("Lexington") stock in violation of Section 5 of the Securities Act of 1933 ("Securities Act"). Pierce also concealed his ownership interest and transactions in Lexington stock in violation of Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 ("Exchange Act"). Although scienter is not an element of those violations, the evidence is nonetheless compelling that Pierce deliberately violated the federal securities laws to conceal his Lexington scheme from investors.

Pierce used two of his consulting firms, Investor Communications International, Inc. ("ICI") and International Market Trend AG ("IMT"), to control Lexington and its predecessor, Intergold Corporation ("Intergold"). Using his control, Pierce had Intergold grant 950,000 vested options to himself and his associates through IMT. Pierce exercised 500,000 of those options in November 2003 and transferred many of the shares to another company he controlled, Newport Capital ("Newport"). Pierce sold 100,000 of his shares (which became 300,000 shares on a post-split basis) through a brokerage account in his own name at Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank") for net proceeds of $2.1 million during June 2004, while Lexington's stock price peaked at over $7.00 per share. Pierce also used Newport and another off-shore company to sell other Lexington shares granted to him, or to associates like Richard Elliot-Square ("Elliot-Square"), for additional net proceeds of $7.5 million dollars during 2004.

Pierce's ability to sell so many Lexington shares and pocket millions of dollars was possible only because Pierce concealed from investors that he, as a major Lexington shareholder, was dumping his shares while the stock price was rising. Pierce did not, therefore, register his resales of Lexington shares in order to avoid revealing his intention to sell those shares. Pierce did not file a Schedule 13D reporting his Lexington stock ownership and did not file Forms 3, 4 and 5 reporting his Lexington stock holdings and transactions in order to avoid revealing his insider selling.

Pierce employed various schemes to hide his control of Lexington and dumping of shares.

He had Intergold grant the 950,000 vested options to IMT, even though that consulting firm was not currently providing any services and even though Pierce undoubtedly knew how many options he would receive. Pierce used used Hypo Bank to conduct the trades to impede access by regulators to trading records. Pierce failed to produce a single email to the Staff because he destroys all of his messages. Furthermore, as just revealed in documents produced by Liechtenstein regulators, Pierce concealed his ownership of Lexington by using a company secretly controlled by his family, Orient Explorations, Inc. ("Orient"), to hold the majority block shares.

When Pierce belatedly filed a Schedule 13D in July 2006 (which was after the Staff sent him a subpoena regarding his Lexington transactions), Pierce had liquidated nearly all of his Lexington shares and Lexington's stock price was just a dollar per share. By 2008, Lexington's only operating subsidiaries were in bankruptcy. Pierce's violations in this case are therefore apparent.

As demonstrated in the Motion for Summary Disposition filed by the Division of Enforcement ("Division"), Pierce's *prima facie* violation of Section 5 of the Securities Act has never been a matter of genuine dispute. His sales of Lexington shares from November 2003 through March 2006 constitute a *prima facie* violation of Section 5 because (i) Pierce sold the Lexington shares, (ii) there was no registration statement for Pierce's sales of the Lexington shares and (iii) Pierce used interstate commerce in selling those shares. *E.g.*, *SEC v. Lybrand*, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002). Pierce has even admitted making unregistered sales of Lexington shares for $2.7 million in June 2004 through his personal Hypo Bank account. Answer, ¶ 16. The hearing evidence only reinforced the existence of a *prima facie* violation involving Pierce's sales of Lexington shares (Division's Exhibit 48), his failure to register his sales (Transcript of Proceedings on February 2, 3 and 4, 2009 ("Hearing Transcript" or "Transcript") at 59-60, 62-63), and use of interstate commerce to carry out the sales (Transcript at 109).

After the Division established his *prima facie* violation of Section 5, Pierce had the burden to allege and prove that his Lexington stock sales were exempt from registration, even if Pierce received his stock under a purportedly valid S-8 registration statement filed by Lexington. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *SEC v. Cavanagh*, 155 F.3d 123, 133-34 (2d Cir.

1998) (finding Section 5 violation for resales of S-8 shares without registering the resales). Pierce's apparent reliance upon the registration exemption found in Section 4(1) of the Securities Act is unavailing. The hearing evidence proves that Pierce acted as an issuer and underwriter of Lexington shares, and is therefore precluded from relying upon the Section 4(1) exemption.

Pierce's status as an "issuer" is reflected by the direct and indirect control that he exercised over Intergold and then Lexington using his consulting firms, ICI and IMT, as well as by his influence over Grant Atkins ("Atkins"), the nominal president of Intergold and then Lexington. One month before the merger with Lexington, Intergold agreed to give Pierce's consulting group a 64% stake in that company by granting 950,000 vested options to IMT. That 950,000 share option grant ensured that Pierce received the lion's share of Intergold's benefit from the impending merger, as well as providing a way for Pierce to cash out – by exercising the options and selling the shares – when the merger was completed.

Pierce continued to exercise control after the merger through his large equity stake in Lexington and through large payments to Atkins by Pierce's companies. In addition, evidence just received by the Division establishes that Lexington's majority shareholder, Orient, was actually owned by a trust whose only beneficiaries were Pierce's wife and daughter. Proposed Division's Exhibits 78, 79 at SEC158416 (covered by Division's Motion for the Admission of New Evidence ("Division's Motion")). Thus, Pierce was a Lexington affiliate who could not use the Section 4(1) exemption. *E.g.*, *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann*, Initial Decision at 14-15 (Admin. Proc. File No. 3-12943 Dec. 5, 2008) (ALJ Mahony).

Pierce also engaged in a distribution of the Lexington shares, and therefore became a statutory "underwriter" as defined in Section 2(11) of the Securities Act. 15 U.S.C. § 77b(11). 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. Pierce sold all of his shares within one year, so as to engage in a distribution and become a statutory underwriter. *See SEC v. M&A West Inc.*, 538 F.3d 1043, 1050-51 (9th Cir. 2008).

As the Division's Motion for Summary Disposition demonstrated, Pierce violated the

disclosure requirements of Sections 13(d) and 16(a) of the Exchange Act because he did not file a Schedule 13D until July 2006, even though his reporting obligation began in November 2003. Pierce's Answer, ¶ 17. The Hearing Evidence only reinforces that Motion. Atkins testified that he warned Pierce in November 2003 that Pierce would go over a 10% reporting threshold. Furthermore, the additional evidence offered in the Division's Motion demonstrates that Pierce controlled Lexington's majority shareholder, Orient, because his wife and daughter owned Orient through an off-shore trust. Proposed Division's Exhibits 78, 79.

Pierce should be ordered to disgorge the proceeds from his illegal sale of unregistered Lexington shares. *Geiger v. SEC*, 363 F.3d 481, 488-89 (D.C. Cir. 2004). Pierce received about $2.1 million in net proceeds during June 2004 that flowed from his unregistered sale of Lexington shares through his personal account at Hypo Bank. Additionally, as discussed below and in the Division's motion, newly obtained evidence shows that Pierce sold 1.6 million more shares through Newport and another off-shore company – using brokerage accounts at Hypo Bank and vFinance. The proceeds from Pierce's sales of Lexington shares (that were originally issued using a Form S-8 registration statement) through these accounts total approximately $7.501 million for the period from February 2004 to December 2004. Proposed Division's Exhibit 89. The Hearing Officer should order Pierce to disgorge all $9.601 million in these sales proceeds – plus pre-judgment interest – in light of his violation of Section 5 of the Securities Act.

In addition to disgorging his gains, Pierce should be ordered to cease and desist from further violations. The repeated nature of Pierce's violations, the degree of scienter exhibited and the danger that Pierce is in a position to commit future violations all dictate in favor of a cease-and-desist order. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (describing factors for imposing remedial sanctions). Pierce violated Section 5's registration provisions over an extended period from 2003 to 2006. He is also continuing to violate the disclosure provisions of Sections 13(d) and 16(a) because he has failed to disclose his control over IMT's shares and has never disclosed his Lexington stock purchases and sales in the necessary Forms 3, 4 and 5. In addition to his repeated violations in this matter, Pierce has an adverse history with British Columbia securities regulators for deceptive

conduct and purposefully evaded his obligations under the federal securities laws. Indeed, Pierce thinks so little of securities regulators and the securities laws that he failed to appear for the hearing in this case.[1]

FACTUAL BACKGROUND

Overview Of Pierce's Stock Dumping Scheme:

To put Pierce's violations into perspective, the Division presents this overview of Pierce's illegal and concealed sales of millions of Lexington shares. In the fall of 2003, Lexington merged with the deeply indebted and basically defunct Intergold. To restructure Intergold and consummate a merger with Lexington, Atkins agreed to give Pierce and his associates a nearly two thirds stake in Intergold through a 950,000 share vested option grant. When Lexington began trading under the symbol "LXRS" in November 2003, investors were told that the shares were owned by a few shareholders including IMT and Orient. Investors were not told, however, that Pierce controlled IMT and, as new evidence now shows, Orient. They were also not told that Pierce was receiving 500,000 option shares through IMT and was in the process of selling those shares through Newport.

As a new oil and gas firm, Lexington had no revenues in 2003. Despite that lack of revenues, Lexington's share price began to rise dramatically during the first half of 2004. Division's Exhibit 48. This price rise was undoubtedly the result of ICI's and IMT's promotional activities with investors on behalf of Lexington. When Pierce began selling his shares on the open market in February 2004, the price was $3.00 per share on a 1,000 share daily volume. Lexington's shares price hit $7.46, on daily volume as high as one million shares, in June 2004. *Id.* Concealed from investors during this price run-up was Pierce's ownership stake in Lexington and sales of Lexington

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After identifying himself as a witness on his own behalf, Pierce failed to appear at the hearing. Pierce's asserted reasons for not testifying are not believable. In reality, he was afraid of cross-examination and/or wanted to avoid asserting his Fifth Amendment privilege on the stand. The Hearing Officer should draw the negative inference that if Pierce had testified truthfully, his testimony would have been harmful to his case. *See In the Matter of Sky Scientific, Inc., et al.* Initial Decision at 3 (Admin. Proc. File No. 3-9201 March 5, 1999)(ALJ Mahony) (ruling that an administrative law judge "may draw adverse inferences from a witness' refusal to testify or explain facts that may be particularly within the witness' knowledge").

shares. Also concealed from investors during this period was Pierce's control over Lexington through his stock ownership and payments to Atkins.

Pierce's Used His Consulting Firms To Exercise Control Of Intergold And Lexington:

Pierce is the president of Newport, and became an officer and director of Newport prior to July 2001. Investigative Testimony Transcript of Gordon Brent Pierce dated July 27 and 28, 2006 ("Pierce Testimony") at 23 (Division's designations contained in Division's Exhibit 62). Newport provides financing and locates investment opportunities for companies. *Id.* at 20-21. Newport also provides investor relations and promotional services to public companies, either directly or through Pierce's other companies. *Id.* At 20, 53

Newport does not have any employees, just consultants. Pierce provides consulting services to other companies through Newport. *Id.* at 27, 37. Pierce receives annual compensation from Newport of $800,000 to $900,000 for his consulting services. *Id.* at 66. Pierce borrows money from Newport (which he approves on behalf of Newport) and sometimes paid down his loans from Newport by transferring his Lexington shares to Newport. *Id.* at 107, 109. Pierce also caused Newport to invest directly in Lexington on numerous occasions between late 2003 and 2006 in the form of loans and private placements. *See* Division's Exhibits 59, 60, 70; Hearing Transcript at 410, 414.

Pierce's Uses His Control To Obtain 950,000 Vested Option Shares For Resale:

Intergold was a shell corporation with essentially no business operations, income, or property by 2002. Respondent's Exhibits 1 at 3. In November 2003, Intergold merged with Lexington Oil & Gas Ltd. ("Lexington Oil") to form Lexington by issuing three million shares with restrictive legends to the shareholders of Lexington Oil and by changing Intergold's name to "Lexington Resources." Atkins was the president of Intergold, and became the president of Lexington. Respondent's Exhibit 5.

Pierce was an officer and director of ICI. Pierce Testimony at 54. Pierce provided consulting services to ICI through Newport. *Id.* at 72. ICI in turn provided consulting services to Intergold and then Lexington until the first quarter of 2004. Hearing Transcript at 312-13. Pierce was the "funds"

and the "brains" behind ICI, while ICI's nominal president, Marcus Johnson ("Johnson"), only did administrative paperwork and filings. *Id.* at 94-95.

Atkins provided his services as president of Intergold in his capacity as a consultant for ICI. Pierce's Testimony at 64 (Division's Exhibit 62). While serving as the president of Intergold and then Lexington, Atkins received consulting fees from ICI for his services as president of Intergold and Lexington during 2002, 2003 and 2004. Those fees were $17,325 in 2002, $19,625 in 2003 and $60,000 in 2004. Transcript at 452-53; Respondent's Exhibit 5 at 5; Division's Exhibit 56 at 93.

ICI lent money to Intergold to allow that company to stay in business. By October 2003, Intergold owed a total of $1.2 million to ICI. Hearing Transcript at 301; Respondent's Exhibit 2. Atkins worked to arrange a restructuring of Intergold. One of the key issues for Atkins to resolve was Intergold's debt to ICI. According to Atkins, "I couldn't go forward with a new company and try to raise money in it if there was this [ICI] debt that was outstanding ...." Transcript at 303.

Atkins restructured Intergold by giving Pierce's group a major stake in Intergold. First, Atkins gave Pierce's group 100,000 shares of stock with restrictive legends in lieu of $250,000 owed to Pierce. *Id.* at 303-04; Respondents' Exhibit 2. Second, Atkins gave Pierce's group, through IMT, "the right and option ... to purchase all or any part of an aggregate 950,000 shares of the ... Company" for five years from November 18, 2003 in lieu of $475,000 owed to Pierce's group (the "Option Agreement"). Division's Exhibit 2 at 2.

When Atkins agreed to give Pierce's group the vested options for 950,000 shares, there were 521,184 Intergold common shares outstanding. Respondent's Exhibit 5 at 2. This meant that under the Option Agreement, Pierce's group received vested options -- without paying a dollar in cash -- for 64% of Intergold's shares on a post-exercise basis. Division's Exhibit 51. Atkins therefore gave Pierce's group a 64% block of the equity that Intergold's shareholders would retain as part of the forthcoming merger with Lexington Oil. It also gave Pierce's group the shares that they would sell to cash out following the merger.

Pierce's Control Over Lexington:

Following Intergold's merger with Lexington Oil on November 19, 2003, the 950,000 vested

option shares granted to IMT represented 21.25% of Lexington's outstanding shares. Respondent's Exhibit 5 and 5-6. The largest block of shares, 63.9%, was purportedly owned by Orient. *Id.* at 6. According to a document just received by the Division, the sole shareholder of Orient is an off-shore trust whose only beneficiaries are Pierce's wife and daughter. Proposed Division's Exhibits 78, 79. Pierce's total influence over Lexington must therefore be measured by combining IMT's 21.25% stake with Orient's 63.90% stake.

Although Orient was supposedly the majority shareholder, it exercised no influence directly over Lexington's management. Atkins did not speak with Orient's representatives or even know who Orient's representatives were. While never talking to Orient's representatives, Atkins would speak with Pierce three or four times per week. Transcript at 455-56.

Lexington's shareholders and directors also exerted no control over the company. Lexington did not have any shareholder meetings during 2003 or 2004. After Atkins appointed additional directors to Lexington's board, the board still did not have meetings, except for quarterly meetings of the audit committee. Other board actions were handled through written consents. *Id.* at 457-58.

Lexington had only nominal business operations. Lexington had no revenues during 2003 and only $472,000 in revenues during 2004 (versus more than $6.5 million in expenses). Division's Exhibit 56 at 35. Most operational activities were performed by IMT, which provided consulting services to Lexington for financing, investor relations and locating oil and gas properties. Pierce Testimony at 67 (Division's Exhibit 62). Pierce was an officer and director of IMT. *Id.* at 36. Pierce provided consulting services to IMT through Newport. *Id.* at 64-65. Pierce had Newport lend money to IMT. *Id.* at 95; Division's Exhibit 70. Pierce was the "funds" and the "brains" behind the business. Hearing Transcript at 96.

IMT also helped raise financing for Lexington in Europe and the United States. Pierce Testimony at 70. Lexington did not have any offices of its own, except for a corporate identification office in Las Vegas, Nevada. Rather than having its own offices, Lexington used IMT's office in Blaine, Washington. IMT's administrative staff answered the phones for Lexington, forwarded telephone calls, directed emails, obtained shareholder inquiries and handled banking responsibilities.

Hearing Transcript at 457-58.

Lexington also did not pay its officers, who therefore relied upon Pierce for income and loans. Both Lexington's president, Atkins, and chief financial officer, Vaughn Barbon ("Barbon"), did not receive salary payments from Lexington during 2003 and 2004. Instead, all of their reported compensation relating to Lexington came from ICI, the consulting group Pierce controlled. Division's Exhibit 56 at 96 (showing ICI payments of $60,000 to Atkins and $64,000 to Barbon during 2004).

While not receiving payments from Lexington, Atkins received large payments from Newport. Atkins was a paid consultant for Newport for five years, including the time when he was Lexington's president. Pierce gave Atkins his consulting assignments for Newport. Transcript at 451, 453-54. Atkins also borrowed money from Pierce from 2004 to 2006 to remodel his home. Although Atkins borrowed the money from Pierce, the funds came from Newport. Atkins repaid the loan by transferring stock to Newport. *Id.* at 453-54, 459. Although Atkins might have borrowed up to $400,000 from Pierce, he could not say what the total was.

During the hearing, Atkins would not provide the total amount of compensation that he received from Newport, and also refused to disclose even a general description of his income sources in 2003 and 2004. *Id.* at 454-55. Bank records indicate that from December 2003 to November 2004, Newport paid a total of $ 268,000 to Atkins. Division's Exhibit 70.

Pierce decided who should provide services to Intergold and Lexington. Intergold retained X-Clearing Corp. ("X-Clearing"), which was formerly known as Global Securities Transfer Inc., as its transfer agent in 2001. Pierce made the decision to have Intergold retain X-Clearing, while Atkins merely memorialized the retention of X-Clearing. Hearing Transcript at 81-82. After Intergold's merger with Lexington Oil, X-Clearing continued to serve as the transfer agent for Lexington until 2004. Transcript at 83-84. Intergold and Lexington were "slow pay" accounts. When X-Clearing's president, Robert L. Stevens ("Stevens") had trouble getting paid by Intergold or Lexington, he went to Pierce to get the bills paid because Pierce was the money behind the venture. *See Id.* at 104.

Pierce's Control Over Accounts At Hypo Bank And vFinance:

Pierce had an account in his own name at Hypo Bank. He was the only person authorized to conduct trading in his Hypo Bank account. Pierce Testimony at 42; Division's Exhibits 16-19; Proposed Division's Exhibit 87.[2] As revealed in the new records produced to the Division on March 10, 2009, Pierce also controlled accounts at Hypo Bank in the names of Newport and another offshore company, Jenirob Company Ltd. ("Jenirob"). *See* Proposed Division's Exhibits 80 and 84.

In 2003 and at about the same time that Lexington began trading on the OTCBB, Pierce opened a brokerage account for Newport at vFinance. Pierce Testimony at 218; Division's Exhibit 25. Hypo Bank also held an omnibus account in its name at vFinance. Hypo Bank traded for its customers, including Pierce and the offshore companies he controlled, through its omnibus vFinance account. *See* Division's Exhibits 17-19, 23-24 and Proposed Division's Exhibits 82-83, and 86 (brokerage records reflecting trades in Lexington shares). By trading in his Hypo Bank accounts through the omnibus vFinance account in Hypo Bank's name, Pierce ensured that neither his name nor the names of his companies appeared on the vFinance brokerage statements or on trading records kept by U.S. exchanges.

Pierce's primary broker at Hypo Bank was Philippe Mast ("Mast"). *See* ProposedDivision's Exhibits 80-88. Mast also was a signatory on the account opening documents for Hypo Bank's omnibus account at vFinance. Division's Exhibit 21. Mast and Pierce communicated if a Hypo Bank account was executing trades in Lexington shares. Division's Exhibit 67. According to Pierce, it was "regular protocol" for Mast to tell Pierce about Hypo Bank accounts that were trading in Lexington. Pierce Testimony at 391 (Division's Exhibit 62). Mast was also the contact person at Hypo Bank when X-Clearing arranged to transfer Lexington shares to a Hypo Bank account.[3]

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Pierce owned Intergold shares prior to the merger with Lexington. Through the merger, Pierce's Intergold shares were converted into 42,561 Lexington shares, which Pierce deposited into his personal Hypo Bank account. Division's Exhibit 50.

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Stevens spoke with Mast to have Lexington shares transferred to Brown Brothers Harriman, which
(continued...)

Pierce also communicated with vFinance about its trading in Lexington shares for Hypo Bank. Nicholas Thompson ("Thompson") was the market maker for Lexington shares at the vFinance brokerage firm. Pierce had known Thompson for five years. *Id.* at 114, 228. Thompson sent Pierce emails discussing trading in Lexington shares that Thompson was executing for Hypo Bank's account at vFinance. Division's Exhibit 33. In fact, Thompson would tell Pierce about a Lexington stock trade in Hypo Bank's account before Thompson even told Mast about the trade. *Id.* Pierce testified that he communicated regularly with Thompson about Lexington trading in Hypo Bank's account. Pierce Testimony at 391-92.

Pierce's Receipt And Distribution Of Lexington Form S-8 Shares:

On November 21, 2003, Lexington filed a short-form registration statement, the November 2003 Form S-8, which purported to register Lexington's stock issuances to employees and consultants. The Form S-8 stated that the stock recipients must represent that the shares would not be sold or distributed in violation of the securities laws. November 2003 Form S-8 at 2, 19 (Division's Exhibit 6). The November 2003 Form S-8 did not even contain so much as a supplemental prospectus to register resales by any Lexington shareholder, and therefore no disclosure whatsoever about the selling shareholders, their holdings, or their plan of distribution was provided. Subsequent Form S-8 filings also failed to contain even a supplemental prospectus. Transcript at 60, 62-63.

Lexington issued 350,000 pre-split shares on November 24, 2003 to Pierce, which Pierce transferred that same day to Newport. Division's Exhibit 40. Pierce obtained those 350,000 shares after representing that he was obtaining the Lexington shares for "investment purposes" only. Option Exercise Agreement dated November 24, 2003 at 1 (Division's Exhibit 10). Contrary to the representations, Pierce caused Newport to sell 328,300 of those 350,000 pre-split Lexington shares to third persons. Division's Exhibit 40. These transactions left Newport with 21,700 pre-split

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3(...continued)
was Hypo Bank's clearing broker in the United States. Stevens helped Hypo Bank get shares that were in "street name" and therefore sellable on the open market. Hearing Transcript at 101-03.

Lexington shares.

Lexington also issued 150,000 pre-split shares on November 25, 2003 to Pierce, who represented that the shares were for investment purposes only. Division's Exhibit 11. Pierce transferred 50,000 of those shares on December 2, 2003 to Newport and retained the other 100,000 pre-split shares for his own account. Division's Exhibit 41. Pierce transferred these 100,000 Lexington shares to his personal account at Hypo Bank. Division's Exhibit 16; Proposed Division's Exhibit 88.

Pierce had originally asked to have these 150,000 shares issued with the 350,000 shares that he received on November 24, 2003. However, Atkins spoke with Pierce by telephone and advised Pierce that the 500,000 share issuance would cause Pierce to cross the 10% ownership threshold for reporting his stake in Lexington. Atkins recommended to Pierce that they structure the transaction to split the 500,000 shares into two blocks of 350,000 and 150,000 shares that would be issued on consecutive days. Hearing Transcript at 359-60, 473-75.

On January 22, 2004, Lexington issued 300,000 pre-split Lexington shares to Pierce's long-time associate, Elliot-Square, pursuant to the November 2003 Form S-8. Respondent's Exhibit 27. On January 26, 2004, Elliot-Square transferred all 300,000 of those shares to Newport. Respondent's Exhibit 28.[4] Pierce later deposited these 300,000 shares into Newport's Hypo Bank account. Proposed Division's Exhibit 82.

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 personal Hypo Bank account a total of 300,000 post-split Lexington shares that were issued under the November 2003 Form S-8. Pierce's Hypo Bank account also contained 121,683 post-split Lexington shares that he received in exchange for his original Intergold shares. Division's

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Elliot-Square has offered conflicting reasons for his receipt and transfer of those 300,000 shares. During the Division's investigation, Elliot-Square stated that the 300,000 shares might have been a mistaken payment of too many options for the work he performed. Transcript at 279-80 (quoting from Transcript of Richard Elliot-Square Interview dated February 28, 2007).

Exhibit 17. As a result of the split, Newport received and deposited into its Hypo Bank account an additional 643,400 shares it received for the 300,000 shares it had acquired from Elliot-Square and the 21,700 shares it had acquired from Pierce. Proposed Division's Exhibit 82.

In February 2004, Pierce caused Newport to acquire for its account at Hypo Bank 25,000 post-split shares that Lexington had issued to Stevens pursuant to the November 2003 Form S-8. *Id.* On May 19, 2004, Lexington issued 495,000 shares to Elliot-Square purportedly pursuant to a Form S-8 filed by Lexington in February 2004. Respondent's Exhibits 32-33. Pierce caused Jenirob to acquire 435,000 of these shares the same day after they were issued to Elliot-Square and then Pierce deposited them in Jenirob's Hypo Bank account. Proposed Division's Exhibit 86. Pierce moved 100,000 of these shares from the Jenirob account to Newport's account at Hypo Bank on June 11, 2004. *Id.*

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 in his personal Hypo Bank account for proceeds of $2.7 million. Division's Exhibits 18, 48. 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.[5] Under a first-in, first-out analysis (whereby the 121,683 post-split shares that Pierce received through the merger are treated as sold first), Pierce received $2,077,969 in proceeds from selling the 300,000 post-split shares that he retained from the November 2003 Form S-8 stock issuances. Division's Exhibits 48, 50.

Lexington filed another Form S-8 on June 8, 2004 (the "June 2004 Form S-8"). Division's Exhibit 7. Pursuant to the June 2004 Form S-8, Pierce received a total of 320,000 Lexington shares after stating in writing that the shares were for investment purposes only. Division's Exhibits 12-14. Pierce transferred all 320,000 shares to Newport on the same day that he received them. Division's Exhibits 44-45. On June 25, 2004, Pierce caused Newport Capital to sell 80,000 of those 320,000

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Earlier in 2004, Pierce sold some of the 121,683 post-split Lexington shares that he had acquired as part of the reverse merger and deposited into his Hypo Bank account.

Lexington shares to another company Pierce controlled. Division's Exhibit 45. Pierce transferred the remaining 240,000 shares to Newport's account at Hypo Bank. Proposed Division's Exhibit 82.

Based upon documents that it received from Liechtenstein authorities within the past few days, the Division has determined that by June 2004, Pierce had moved to the Newport and Jenirob accounts at Hypo Bank a total of 1,634,400 Lexington shares that had been issued purportedly pursuant to Form S-8 registration statements. Proposed Division's Exhibit 89. Pierce sold these shares into the open market through the Newport and Jenirob accounts at Hypo Bank between February 2004 and December 2004. *Id.* Under a similar first-in, first-out analysis, Pierce received a total of \$5.454 million and \$2.069 million in proceeds in the Newport and Jenirob accounts, respectively, from selling the additional 1.6 million Lexington shares that were originally issued under Forms S-8. *Id.*

Therefore, including his personal account and the Newport and Jenirob accounts at Hypo Bank, Pierce sold a total of two million S-8 shares for net proceeds on a first-in, first-out basis of \$9.601 million. Division's Exhibit 50 and Proposed Exhibit 89. Pierce sold more than one million of these shares during June 2004, when Lexington's stock price hit an all-time high of \$7.43. Division's Exhibit 50 and Proposed Exhibit 89. Pierce's sales through the three accounts at Hypo Bank were part of Hypo Bank's sale of Lexington shares through its omnibus account at vFinance. Division's Exhibits 23-24, 49.[6]

On February 27, 2006, Lexington filed yet another Form S-8 (the "February 2006 Form S-8"). Division's Exhibit 8. Lexington issued a total of 500,000 shares to Pierce in early March 2006. Within days of receipt, Pierce had Lexington transfer those 500,000 shares to Newport. Pierce sold all of those Lexington shares in March 2006 through a brokerage account that Pierce opened for Newport at the Peacock Hislop Staley & Given Inc. brokerage firm ("Peacock Hislop") in Phoenix, Arizona. Pierce Testimony at 194; Division's Exhibit 29. Pierce made those sales at prices just

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While Pierce's sales made up the vast majority of the sales in the vFinance Hypo Bank account, some of the third parties who purchased Lexington shares from Newport also transferred and sold their Lexington shares through accounts at Hypo Bank. Division's Exhibit 66.

slightly higher than he had paid to purchase those shares from Lexington a few days earlier. Division's Exhibit 46.

Finally, on March 14, 2006, Lexington filed one more Form S-8 (the "March 2006 Form S-8"). Division's Exhibit 9. Lexington issued a total of 500,000 shares to Pierce in mid-March 2006. Within days, Pierce had Lexington transfer those 500,000 shares to Newport. Pierce sold 164,000 of these Lexington shares in March 2006 through the Newport account at Peacock Hislop. Pierce acquired those shares for only a few cents less than the eventual selling price of those Lexington shares on the OTCBB. Division's Exhibit 30.

Pierce's Prior Bar By Canadian Securities Regulators:

Pierce attended the University of British Columbia for six to eight months, but never continued his education and never obtained any professional licenses. After leaving college, Pierce was a self-employed businessman. Pierce Testimony at 158-59. Pierce has known Atkins since the early 1990s. Pierce and Atkins have worked together on ten different companies. *Id.* at 159-60.

In June 1993, Canadian securities regulators in British Columbia imposed a fifteen-year bar and $15,000 fine upon Pierce relating to his activities as a director of Bu-Max Gold Corp. ("Bu-Max"). According to stipulated findings, investor proceeds were diverted to unauthorized and undisclosed uses, including for Pierce's benefit. Additionally, during the investigation by Canadian securities regulators into Bu-Max, "Pierce tendered documents to the staff of the Commission which were not genuine." *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce*, Order Under Section 144 at 2 (June 8, 1993) (Division's Exhibit 47).

The Staff subpoenaed documents from Pierce in May 2006. *See* Division's Exhibit 31. Pierce did not produce any emails relating to Lexington or his trading in response to the subpoena. According to Pierce, he deletes all of his emails on a daily basis. Pierce Testimony at 175-76.

LEGAL ARGUMENT

I. PIERCE VIOLATED SECTION 5 OF THE SECURITIES ACT.

Pierce violated Section 5(a) of the Securities Act which imposed a registration requirement for his sales of Lexington securities in interstate commerce:

> *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

15 U.S.C. § 77e(a) (emphasis added). Similarly, because his Lexington stock resales 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).

The purpose of Section 5's registration provisions is to ensure that the investing public is provided with the necessary material information about their contemplated investment. It is well-established that improper intent is not an element of a Section 5 violation. *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).

Section 5's registration requirements apply to each and every sale of securities, including those issued under a Form S-8 registration statement. *SEC v. Cavanagh, supra*, 155 F.3d at 133. 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 that "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. Form S-8's 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 and n.2.

Pierce violated Section 5 with respect to his resales of Lexington S-8 shares. The Division established a *prima facie* case with evidence that (1) Pierce directly or indirectly sold Lexington

shares, (2) no registration statement was in effect as to Pierce's sale of 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. March 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)).

Pierce admits that he sold Lexington shares through his Hypo Bank account in June 2004. Answer, ¶ 16. *See also* Division's Exhibit 18 (account statements for trading in Pierce's Hypo Bank account during June 2004). Brokerage records also establish that Pierce sold Lexington shares throughout all of 2004 and during March 2006. Division's Exhibits 16-19 (brokerage records reflecting sales of Lexington shares in Pierce's Hypo Bank account), 30 (brokerage records reflecting sales of Lexington shares in Newport's Peacock Hislop account) and 48 (Division's summary of Pierce's Lexington open market sales). As a result, there is no genuine dispute that Pierce sold shares received through Lexington's S-8 offerings. Additionally, the evidence received from the Liechtenstein regulators proves that Pierce sold another 1.6 million Lexington shares through Newport and Jenirob accounts at Hypo Bank between February 2004 and December 2004. Proposed Division's Exhibits 82, 86, 89

Pierce received his shares from Lexington under the purported November 2003, June 2004, February 2006 and March 2006 Form S-8 Registration Statements. Division's Exhibits 5-8. Those Form S-8s supposedly registered Lexington's issuance of shares to purported employees and consultants, but did not register the resale of those shares by the recipients. Transcript at 59-60, 62-63. The shares Pierce sold in the Newport and Jenirob accounts either came from Pierce or from other consultants who received the shares under purported S-8 registration statements that did not register any resales. It is therefore beyond dispute that Pierce resold his Lexington shares without filing a registration statement for those resales. Answer, § 16 (admitting that Pierce sold shares in June 2004 with registering those sales).

It is also beyond genuine dispute that instruments of interstate commerce were used in connection with Pierce's sales of Lexington shares. X-Clearing received instructions by mail,

telephone and fax related to the transfer of Lexington S-8 shares to Pierce and then to other persons and communicated with Mast at Hypo Bank to get the shares into "street name." Transcript at 102-03, 109; Respondent's Exhibits 16, 17, 22, 23, 37b-c, 38, 39b-d. Pierce communicated by telephone and email with Mast at Hypo Bank and Thompson at vFinance about trading in Lexington shares. Pierce Testimony at 391-92 (Division's Exhibit 62); Division's Exhibits 33, 34, 67.

II. PIERCE CANNOT PROVE AN EXEMPTION FROM REGISTRATION.

A. Pierce Has The Burden Of Proving An Exemption.

As demonstrated above, the Division established Pierce's *prima facie* violation of Section 5's registration requirements. Pierce therefore has the burden of proving that his resales of Lexington shares were exempt from registration whether or not Lexington supposedly used valid S-8 registration statements for its sales of shares to Pierce. *SEC v. Cavanagh, supra*, 155 F.3d at 133-34 (finding Section 5 violation for resales of S-8 shares without registering the resales). *See SEC v. Ralston Purina Co., supra*, 346 U.S. at 126 (1953). Pierce's reliance upon a registration exemption must be strictly construed. *SEC v. M&A West Inc., supra*, 538 F.3d at 1050-51; *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). Exemptions from registration are strictly construed to protect investors' access to material information. *In the Matter of J. Dudchik and Rodney R. Schoemann, supra*, Initial Decision at 14.

B. Pierce Cannot Establish The Section 4(1) Exemption.

Although 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), Pierce cannot qualify for this exemption. As demonstrated below, the evidence establishes that Pierce falls within the Securities Act's definitions of an "issuer" and an "underwriter," and is therefore precluded from relying upon Section 4(1).

1. Pierce's Control Over Lexington Made Him An "Issuer."

Section 2(a)(11) of the Securities Act defines an "issuer" to include "any person directly or indirectly controlling or controlled by the issuer." 15 U.S.C. § 77b(a)(11). A person who constitutes

an "affiliate" of the issuer is deemed to be an "issuer" with respect to the distribution of securities. *SEC v. Cavanagh*, *supra*, 155 F.3d at 134, *cited by In the Matter of Thomas J. Dudchik and Rodney R. Schoemann*, *supra*, Initial Decision at 14.

Determining whether a person is an affiliate involves looking at the totality of the circumstances, including a consideration of the person's influence upon the management and policies of the corporation. *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann*, *supra*, Initial Decision at 14 (citing and quoting *SEC v. Freiberg*, 2007 WL 2692041 at * 15 (D. Utah Sept. 12, 2007)). An affiliate need not be an officer, director, manager, or shareholder of the issuer and does not have to exercise control in a continuous or active manner. *SEC v. International Chemical Development Corporation*, 469 F.2d 20, 30 (10th Cir. 1972) (citing *Pennaluna & Co. v. SEC*, 410 F.2d 861, 866 (9th Cir. 1969), *cert. denied* 396 U.S. 1007, 90 S. Ct. 562, 24 L. Ed. 2d 499 (1970)). The provision of financing and participation in the violative scheme can be enough to render a person an affiliate of the issuer. *Id.*

The hearing evidence establishes Pierce's status as an affiliate of Lexington. Pierce was the money and brains behind Lexington. Transcript at 82-83, 94-96. IMT's block of shares exceeded 20% and Pierce's initial exercise of 500,000 option shares represented a 10% block. Additionally, the owner of Lexington's majority shareholder, Orient, has just been revealed to be an off-shore trust whose beneficiaries are Pierce's wife and daughter. Proposed Division's Exhibits 78 and 79.

Although Orient was the nominal majority shareholder, Atkins did not communicate with, or even know the identity of its representatives. Instead, Atkins talked three or four times per week with Pierce. Lexington's nominal president, Atkins, derived absolutely no income from Lexington itself. Instead, Atkins was dependent upon Pierce for financial support through consulting fees from ICI, consulting fees from Newport and personal loans from Pierce. The totality of Pierce's ability to exercise influence over Atkins makes Pierce an affiliate of Lexington. *SEC v. International Chemical Development Corporation*, *supra*, 469 F.2d at 30; *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann*, *supra*, Initial Decision at 14 (describing and applying totality of circumstances test for affiliate status).

Pierce's affiliate status is also demonstrated by his ability to dictate the terms of the merger between Intergold and Lexington. Because Intergold owed $1.2 million to ICI, Atkins knew that he could not attract new investors to Lexington unless Pierce agreed to reduce that debt. Atkins therefore negotiated a deal whereby Pierce's consultants released $475,000 in debt for 950,000 vested option shares that represented 64% of Intergold's outstanding shares (calculated on a post-exercise basis). Division's Exhibit 51. As a result, Pierce was able to extract the majority of Intergold's benefit from the merger, and that ability demonstrates his corporate control.

Because he was in a position to kill Intergold's merger with Lexington unless he got what he wanted, Pierce also had enough control to insist that a registration statement be filed for his resales. Pierce's decision not to register his resales was based on his obvious desire to conceal his acquisition and resale of those shares. Filing a prospectus for his resales would have forced Pierce to disclose his large stock position and his prior bar by British Columbia securities regulators. That disclosure would have warned investors that a large shareholder with a bar for deceptive conduct was selling his shares in Lexington, and thereby raised questions about Lexington's business prospects. Instead of making disclosures through a registration statement, Pierce decided to make undisclosed and unregistered sales of his shares while Lexington's share price was rising and peaking.

2. <u>Pierce's Distribution Of Shares Made Him An "Underwriter."</u>

Pierce is also unable to rely upon the Section 4(1) exemption given the evidence establishing his underwriter status. 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 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.*, Initial Decision Release No. 250 at 9-12 (Admin. Proc. File No. 3-11310 May 11, 2004) (finding Section 5 violations and absence of exemption).

One compelling indication of Pierce's "underwriter" status is the short time period between his acquisition of the Lexington shares in November 2003 and his sale of those shares through Newport's account at Hypo Bank beginning in February 2004 and through Pierce's own account at Hypo Bank beginning in June 2004 (under the first-in, first-out methodology). *SEC v. M&A West, supra*, 538 F.3d at 1050-51. According to the Securities Act Rule 144(k) that was in effect in 2004, the minimum holding period for the safe harbor from registration was twelve months. 17 C.F.R. § 230.144(a)(1) (2004). Because Pierce's sales of the November 2003 Lexington S-8 shares took place in just three months for his Newport account and in just seven months for his personal account (with all sales were completed within one year), Pierce cannot rely 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.

Pierce also held the 320,000 shares received under the June 2004 Form S-8 for a very short period. Within a few days, Newport sold 80,000 of those shares to a third party. Division's Exhibit 45. Pierce transferred the other 240,000 post-split shares to Newport's account at Hypo Bank. Pierce sold those Lexington shares between February and December 2004. Division's Exhibits 19, 24.

In early March 2006, Lexington issued 500,000 shares to Pierce under the February 2006 Form S-8. Within days, Pierce transferred those shares to Newport which deposited all of the shares into its Peacock Hislop account. Those shares were then sold in a few days for nearly the same price as the exercise price that Pierce paid to Lexington. Similarly, Lexington issued another 500,000 shares to Pierce under the March 2006 Form S-8. Pierce quickly transferred those shares to Newport and then sold 164,000 of those shares through Peacock Hislop for prices that roughly equaled the exercise price paid by Pierce. Because there was no profit for Pierce in selling these Lexington shares quickly for nearly the same price at which he acquired the shares, it is clear that Pierce's intention was to distribute shares for Lexington by paying Lexington an exercise price roughly equal to the price for which the shares sold on the open market.

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" by engaging in a distribution of Lexington stock.

III. 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). The purpose of these Exchange Act Sections is to ensure that investors have timely knowledge of the identity of corporate insiders and their transactions in the company's stock. Investors can use that knowledge to assess how a company's insiders assess the company's future prospects – *i.e.*, negatively if large inside shareholders are selling their positions.

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) (internal citation omitted).

Pierce did not file a Form 3, 4, or 5 regarding his Lexington transactions. Furthermore, Pierce admits that he did not disclose his ownership interest by filing a Schedule 13D until July 2006. Pierce's Answer, ¶ 17. Pierce's belated Schedule 13D reflects 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). Additionally, the Divisions' evidence established that Pierce actually had at least a 10% interest for all but a few days between November 2003 and May 2004. Division's Exhibit 51.

Atkins' testimony during the hearing established that Pierce deliberately attempted to evade his ownership disclosure requirements. Atkins learned that Pierce intended to exercise an option on 500,000 pre-split shares in November 2003. Given the number of outstanding Lexington shares, Atkins recognized that this exercise would have put Pierce over the 10% ownership threshold. Atkins therefore advised Pierce to split his 500,000 shares into two blocks of 350,000 and 150,000 shares that would be exercised on consecutive days in late November 2003. This scheme required, however, that Pierce quickly sell off some of his 350,000 shares to avoid having more than 10% of the outstanding shares when he acquired the second block of 150,000 on the next day. Transcript at 473-75.

The fact that Pierce was entitled to exercise an option on 500,000 shares is enough, however, to establish his beneficial ownership for purposes of Sections 13(d) and 16(a); such ownership exists as to any option (in this case for the total 500,000 shares) that Pierce could exercise in the next sixty days. 17 C.F.R. § 240.13d-3(d)(1). Atkins' testimony regarding Pierce's planned exercise of options for 500,000 shares therefore establishes that Pierce crossed the reporting threshold in November 2003, but failed to file the required Schedule 13D and Forms 3, 4 and 5.

Pierce's Schedule 13D also failed to reflect IMT's acquisition of 950,000 vested Lexington options on November 18, 2003. Because Pierce has admitted his control over IMT, *see* Pierce's Answer, ¶ 9, his failure to disclose the IMT holdings as part of his beneficial holdings constitutes a violation of Sections 13(d)(1) and 16(a).[7]

Finally, Pierce hid his majority ownership of Lexington by using Orient as the nominal shareholder, while never revealing that his wife and daughter were the beneficiaries of the trust that owned Orient. Pierce's deliberate concealment of his beneficial interest in Orient demonstrates that

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Atkins' testimony that Lexington would not have issued S-8 shares to IMT because such shares may only be issued to natural persons is inapt. As both Atkins and Pierce's expert witness testified, the Option Agreement did not limit IMT to receiving S-8 shares. IMT had the right under the Option Agreement to acquire 950,000 restricted shares at any time. Transcript at 480-81, 548-49. That right triggered Pierce's and IMT's beneficial ownership of 950,000 shares for reporting purposes under Sections 13(d) and 16(a) of the Exchange Act.

he consciously acted to attempt to evade his disclosure obligations under Sections 13(d) and 16(a) of the Exchange Act.

IV. PIERCE SHOULD DISGORGE HIS STOCK SALE PROCEEDS.

Because Pierce violated Section 5 of the Securities Act through his unregistered sale of Lexington shares, 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 from sale of unregistered securities); *Geiger v. SEC*, *supra* 363 F.3d at 488-89 (upholding disgorgement order against family partnership and owner for selling unregistered securities); *In the Matter of Lorsin, Inc.*, *supra*, Initial Decision Release No. 250 at 15 (ordering, on summary disposition, that stock promoters and principals jointly and severally disgorge proceeds of unregistered stock sales). The "purpose of disgorgement is to force 'a defendant to give up the amount by which he was unjustly enriched' rather than to compensate the victims of fraud." *S.E.C. v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985)(quoting *S.E.C. v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978)).

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 *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 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 his initial sales were of the 121,683 post-split Lexington shares (using a first-in, first-out method of calculating the sales proceeds) that he received during the reverse merger. His subsequent sales were of the 300,000 post-split shares provided to

him under the November 2003 Form S-8. Those sales generated net proceeds of $2,077,969.

Based upon the Hypo Bank documents it just received, the Division has determined that Pierce sold 1,634,400 Lexington S-8 shares through Hypo Bank and vFinance using Newport for net proceeds of $5,454,197 and using Jenirob for net proceeds of $2,069,181. Proposed Division's Exhibit 89. Because those sales were in violation of Section 5's registration requirements, Pierce should disgorge total net proceeds of $9,601,347 ($2,077,969 + $5,454,197 + $2,069,181). *Id.*

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) (describing court's equitable discretion to award prejudgment interest). The Hearing Officer should therefore order Pierce to disgorge $9,601,347, plus pre-judgment interest on that amount, for his violation of Section 5.

V. A CEASE AND DESIST ORDER IS NECESSARY TO PROTECT INVESTORS FROM FURTHER VIOLATIONS BY PIERCE.

Section 8A of the Securities Act authorizes the Commission to issue a cease and desist order against any person who has been found to be "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). Similarly, Section 21C(a) of the Exchange Act authorizes the Commission to issue a cease and desist order against any person who has been found to have violated any Exchange Act provision or rule. 15 U.S.C. § 78u-3(a).

In this case, a cease and desist order should be issued in light of Pierce's repeated and deliberate violations of Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act. *See, e.g., In the Matter of Lorsin, Inc., et al., supra*, Initial Decision Release No. 250 at 12-14 (issuing cease and desist order after finding that respondent sold unregistered shares). In determining whether to impose a cease and desist order, the Hearing Officer should consider the egregiousness

of Pierce's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of any assurances against future violations, Pierce's recognition of the wrongful nature of his conduct, and the likelihood that Pierce's activities will present opportunities for future violations. *Steadman, supra*, 603 F.2d at 1140 (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n. 29 (5th Cir. 1978), *affirmed on other grounds*, 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981)).

No one of these particular factors is controlling. *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 based upon violation of record keeping provisions) (citing *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996)). 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." *Arthur Lipper Corp.*, 46 S.E.C. 78, 100 (1975); *In the Matter of Richard C. Spangler, Inc.*, 46 S.E.C. 238, 254 n.67 (1976).

All of the *Steadman* factors strongly favor a cease and desist order against Pierce. Pierce distributed over three million Lexington shares during a thirty-month period from November 2003 until March 2006 without the registration required by Section 5 of the Securities Act. In June 2004 alone, Pierce sold 300,000 of those shares through his own Hypo Bank for $2.1 million in net proceeds. Additionally, from November 2003 through March 2006, Pierce transferred Lexington shares to Newport, a company he controlled, which then sold shares through Hypo Bank and another brokerage account. Pierce therefore engaged in a wide-ranging, long-lasting and highly lucrative distribution of Lexington shares that violated Section 5 of the Securities Act in an egregious and recurring fashion.

Similarly, Pierce did not file the necessary Schedule 13D form until June 2006, when his Lexington transactions were already under investigation, and never filed any Forms 3, 4, or 5 to disclose his transactions in Lexington shares. Pierce deliberately violated Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act to conceal his acquisition and sale of large blocks Lexington shares. For example, Pierce and Atkins decided in late November 2003 to split

a block of 500,000 shares to attempt to avoid disclosing his ownership interest. Similary, Pierce and Atkins also made IMT the nominal recipient of the 950,000 vested options to conceal the identities – particularly Pierce's – of the persons who would receive the shares.

Documents just released by Liechtenstein over Pierce's objections also establish that Pierce used Orient to conceal his family's majority stake in Lexington. As a result, Lexington's Form 10-KSB filings for 2003, 2004 and 2005 do not contain any mention of Pierce, including the section describing the company's 5% shareholders. Division's Exhibits 55-57; Hearing Transcript at 61, 63-64. That was no oversight. That was deliberate concealment. In fact, only after Lexington's stock price had crashed and the staff sent a subpoena to Pierce in June 2006 did Pierce file a Schedule 13D in July 2006 and did Lexington disclose Pierce's ownership interest in the Form 10-KSB for 2006. Division's Exhibits 15 (Pierce's Schedule 13D filing) and 58 (Lexington's 2006 Form 10-KSB). Pierce's Schedule 13D filing also alludes to the enforcement action by British Columbia securities regulators. Division's Exhibit 15 at 6. Because Pierce consciously violated the federal securities laws, a cease and desist order is necessary to protect investors from future violations.

Pierce has made no effort to acknowledge or show remorse for his misconduct or to demonstrate that it will not happen again. Quite to the contrary, Pierce failed to attend the administrative hearing despite being listed as a witness for himself.

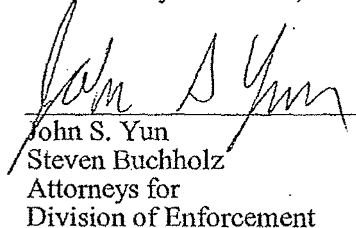
Finally, Pierce does not come to this proceeding with a clean record as a securities professional. On June 8, 1993, Canadian securities regulators imposed a fifteen-year bar upon Pierce and a $15,000 fine for deceptive conduct that included misuse of funds and submitting false documents. *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce*, Order Under Section 144 (June 8, 1993) (Division's Exhibit 47). Far from recognizing the seriousness of that misconduct, Pierce sent a letter to the Peacock Hislop brokerage firm asserting that Canadian securities regulators were engaged in a "witch hunt" and that the Order was a product of a "kangaroo court proceeding." Division's Exhibit 29 at 2. Accordingly, a cease-and-desist order against further violations is necessary because Pierce cannot be trusted to obey the securities laws in the future.

CONCLUSION

For the reasons described above and based upon the entire record, the Hearing Officer should find that Pierce violated the registration provisions in Section 5 of the Securities Act and the disclosure provisions in Sections 13(d) and 16(a) of the Exchange Act. The Hearing Officer should also order Pierce to pay $2.1 million in disgorgement on his personal account S-8 stock sales, another $5.454 million on his Newport account stock sales and another $2.069 million on his Jenirob account stock sales, plus prejudgment interest on those amounts. The Hearing Officer should also impose a cease-and-desist order against further violations by Pierce.

Dated: March 20, 2009

Respectfully submitted,



John S. Yun
Steven Buchholz
Attorneys for
Division of Enforcement

Exhibit 13

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

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[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

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[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).

Exhibit 14

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

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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.

16(a) and Rule 16a-3 thereunder. Pierce denies that he owned or controlled more than ten percent, 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

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

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).

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.

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

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 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

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[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.

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 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; 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.

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

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

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 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.

[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.

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 & 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.

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[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.

[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.

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 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

[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.

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

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.

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[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.

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
>
> (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

---

[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).

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

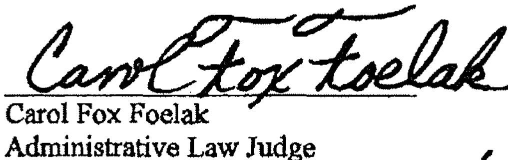
Pursuant to Rule 351(b) of the Commission's Rules of Practice, it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on May 21, 2009.

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

CFF 6/5/2009

Exhibit 15

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

Exhibit 16

ORIGINAL

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9 Attorneys for G. Brent Pierce

FILED
JUL - 9 2010
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10

11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA

13 SAN FRANCISCO DIVISION

14

15 GORDON BRENT PIERCE,	Civil No. 10-3026 MEJ
16 Plaintiff,	**DECLARATION OF G. BRENT PIERCE**
17 v.	
18 SECURITIES AND EXCHANGE	
19 COMMISSION,	
20 Defendant.	

21 Upon penalty of perjury under the laws of the United States and British Columbia,

22 Canada, the undersigned declares that the following is true.

23 1. I am a respondent in a new administrative proceeding (the "Second

24 Proceeding") together with Newport Capital Corp. ("Newport") and Jenirob Company Ltd.

25 ("Jenirob") (together, the "Corporate Respondents") brought by the U.S. Securities and

26

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

4 2. On July 31, 2008, the Commission brought the earlier administrative
5 proceeding by issuing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") *In*
6 *the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc.
7 File No. 3-13109 (the "First Proceeding"). In the First Proceeding, the Commission's
8 Division of Enforcement (the "Division") claimed that the other respondents and I had
9 violated the registration provisions of the Securities Act of 1933 (the "Securities Act"),
10 Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c), and that I had violated the reporting
11 provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), Sections 13(d) and
12 16(a), 15 U.S.C. §§ 78m(d) & 78p(a). The First OIP contended that my "associates" and I had
13 generated resale proceeds of $13 million in Lexington stock distributions in 2004 through an
14 "offshore company" (obviously Newport) resulting from registration violations of the
15 Securities Act caused by my resale of shares registered under Lexington's Form S-8 stock
16 option plan. Documents recording the Lexington S-8 stock transfers upon my resale and
17 through Newport made clear that Jenirob was one of my alleged "associates" that had
18 received a portion of the $13 million in resale proceeds.

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

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1 appealed every aspect of the Initial Decision with which I disagreed, on numerous grounds,
2 had the Division appealed to the Commission to expand the OIP as necessary and otherwise to
3 increase the disgorgement order by $7.5 million before a final decision. The Division did not
4 petition or otherwise appeal, and I relied on the Division's election, and manifest
5 representation that a $2 million rather than $9.5 million disgorgement order was adequate
6 remedial relief, when I declined to prosecute my rights of appeal.
7 4. The ALJ had ruled in her Initial Decision that the Commission had the
8 authority to order me to pay disgorgement of the additional $7.5 million sought by the
9 Division. Had the Commission notified me that it would consider doing so, I would have
10 challenged all aspects of the Initial Decision timely at every stage of an appeal. On July 8,
11 2009, the Commission issued a Notice informing me that "the Commission has not chosen to
12 review the decision as to [my liability for disgorgement] on its own initiative" and, thus,
13 pursuant to 17 C.F.R. § 201.360(d), the Initial Decision "has become the final decision of the
14 Commission with respect to Gordon Brent Pierce. The orders contained in that decision are
15 hereby declared effective." I relied on the Commission's decision not to increase the amount I
16 was ordered to disgorge in the "orders contained in that decision," just as I had relied on the
17 ALJ's observation in the Initial Decision and the Rules of Practice promulgated by the
18 Commission that the Commission had the power to alter the Initial Decision and conduct
19 further hearings before entering a final order of disgorgement. I had likewise relied on the
20 Division's apparent acquiescence in a final order to pay disgorgement of just over $2 million
21 rather than the roughly $9.5 million the Division had previously thought necessary for
22 remedial relief. Consequently the "Final Decision" on "Whether Respondent Pierce should
23 be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act" for
24 registration violations was that I should be ordered to pay $2,043,362.33. Based on that
25 representation, in contrast to the $9.5 million under consideration, I declined to exercise my
26 right of appeal of the Commission's Final Decision to a court of appeals. The Final Decision

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

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

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

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

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

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

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

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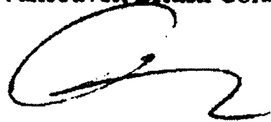
adverse effects of the Final Decision in the First Proceeding, and was about to make further progress by settling the disgorgement order therein, when I was informed that a second proceeding would be recommended by the Division. This surprise came after I had made significant and somewhat successful 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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ENFORCEMENT PROCEEDINGS - In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.

Posted on: Wed, 09 Jun 2010 16:19:06 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

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

by Mike Caswell

The U.S. Securities and Exchange Commission has launched another administrative case against Vancouver promoter Gordon Brent Pierce for the Lexington Resources Inc. promotion, seeking to recover an additional $7.7-million in illicit profits from the scheme. (All figures are in U.S. dollars.) The SEC claims that Mr. Pierce sold 1.6 million Lexington shares through offshore accounts as he co-ordinated a spam-fuelled promotion in 2004.

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.

The first Lexington case

The first Lexington case named Mr. Pierce and another Vancouver promoter, Grant Atkins, as respondents. Mr. Atkins settled without a hearing on Nov. 26, 2008, agreeing to an order barring future violations of the U.S. Securities Act. He did not admit to any wrongdoing.

Mr. Pierce did not settle, so the SEC convened a three-day hearing in Seattle on Feb. 2, 2009, before an administrative law judge. Mr. Pierce did not personally attend, instead sending his lawyer. He said he was concerned that he could be arrested if he entered the United States because prosecutors were investigating his role with another company, CellCyte Genetics Corp.

Judge Carol Foelak issued a decision on June 5, 2009, in which she ordered Mr. Pierce to pay $2.04-million. She said that his failure to appear in person was unexpected, and she was entitled to draw an adverse inference from it. He did not provide any assurances that he would not commit any future violations, nor did he recognize the "wrongful nature" of his conduct.

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] St. 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

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

by Mike Caswell

The U.S. Securities and Exchange Commission has launched another administrative case against Vancouver promoter Gordon Brent Pierce for the Lexington Resources Inc. promotion, seeking to recover an additional $7.7-million in illicit profits from the scheme. (All figures are in U.S. dollars.) The SEC claims that Mr. Pierce sold 1.6 million Lexington shares through offshore accounts as he co-ordinated a spam-fuelled promotion in 2004.

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.

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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.

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Print

Exhibit 17

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
SAN FRANCISCO REGIONAL OFFICE
44 Montgomery Street
SUITE 2800
SAN FRANCISCO, CALIFORNIA 94104

DIRECT DIAL: 415-705-2318
FAX NUMBER: 415-705-2501

January 12, 2010

VIA EMAIL AND U.S. MAIL

Christopher B. Wells, Esq.
Lane Powell P.C.
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

Re: *In the Matter of Lexington Resources, Inc. (SF-2989)*

Dear Mr. Wells:

This letter confirms the telephone conversation today in which the staff of the Securities and Exchange Commission (the "Commission") advised you that it intends to recommend that the Commission institute administrative and cease-and-desist proceedings against Gordon Brent Pierce, Newport Capital Corp. and Jenirob Company Ltd., alleging that they violated Sections 5(a) and 5(c) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. §§ 77e(a) and (c)] in connection with sales of Lexington stock in accounts held in the names of Newport and Jenirob. In the contemplated proceedings, the staff may seek a cease-and-desist order and disgorgement plus prejudgment interest against all respondents, and a penny stock bar against Mr. Pierce.

In accordance with Rule 5(c) of the Commission's Rules on Informal and Other Procedures [17 C.F.R. § 202.5(c)], we are offering Mr. Pierce, Newport and Jenirob the opportunity to make Wells submissions. We enclose for your information a copy of Securities Act of 1933 Release No. 5310 entitled "Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations." If they wish to make a written or videotaped submission setting forth any reasons of law, policy or fact why they believe the proceedings should not be instituted, or bringing any facts to the Commission's attention in connection with its consideration of this matter, please forward the submission to the staff by no later than January 26, 2010. Any written submission should be limited to 40 pages, and any video submission should not exceed 12 minutes. Please inform us by no later than January 19, 2010 whether Mr. Pierce, Newport and Jenirob will be making a Wells submission.

Any Wells submissions should be addressed to Marc J. Fagel, Regional Director, at the San Francisco Regional Office.

In the event the staff makes an enforcement recommendation to the Commission on this matter, we will forward any Wells submissions to the Commission. Please be advised that the Commission may use the information contained in such a submission as an admission, or in any other manner permitted by the Federal Rules of Evidence, in connection with Commission enforcement proceedings, or otherwise. This practice is explicitly provided for in the list of

Routine Uses of Information (Item 4), which is contained in Form 1662, "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena." For your information, a copy of Form 1662 is enclosed. Please also be advised that any Wells submissions may be discoverable by third parties in accordance with applicable law.

If you have any questions, please contact Steven Buchholz at 415-705-8101.

Sincerely,

Tracy L. Davis
Assistant Regional Director

Encls: Securities Act of 1933 Release No. 5310
SEC Form 1662

Exhibit 18

In the Matter of Lexington Resources, Inc. (SF-2989)

BRENT PIERCE'S WELLS COMMITTEE SUBMISSION TO SEC UNDER 17 CFR §202.5(c)

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I. Violations Alleged and Relief Recommended by the Staff

The Enforcement Division Staff in the San Francisco Office (collectively, the "Division") of the U.S. Securities and Exchange Commission ("Commission") is proposing the re-commencement of previously adjudicated administrative cease-and-desist proceedings. See App. H (Jan. 12, 2010 Staff letter). The Division proposes that the Commission prosecute Brent Pierce (Gordon Brent Pierce, "Mr. Pierce"), Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") for alleged violations of Sections 5(a) and 5(c) of the Securities Act of 1933 (the "1933 Act") [15 U.S.C. § § 77e(a) and (c)] in connection with sales of Lexington stock in accounts held in the names of Newport and Jenirob. The relief sought is unclear: "In the contemplated proceedings, the staff ***may*** seek a cease-and-desist order and disgorgement plus prejudgment interest against all respondents and a penny stock bar against Mr. Pierce." App. H.

II. Summary of Brent Pierce's Response

In July 2008, the Commission instituted cease-and-desist proceedings against Pierce and others in connection with the issuance and sale of Lexington Resources, Inc. shares by "Pierce and his associates" during the period "between 2003 and 2006."[1] The Commission could have awaited the outcome of pending requests to a foreign securities regulator rather than commencing the proceedings at the time. But instead of waiting for the outcome in the foreign forum, the Commission elected to prosecute claims in the administrative hearing that closed in February 2009. After the hearing closed, the administrative law judge ("ALJ") re-opened the record, admitted the Division's new evidence of Lexington trading profits by Newport and Jenirob, and considered the Division's arguments to disgorge those profits from Mr. Pierce. Thus, the Division belatedly added to its disgorgement claim, "seven [and

[1] Lexington Res., Inc., File No. 3-13109, Order Instituting Proceedings Pursuant to § 8A of the Securities Act of 1933 and § 21C of the Securities Act of 1934 (Jul. 31, 2008) (App. A); Order Making Findings and Imposing Cease-And-Desist Orders Pursuant to § 8A or the Securities Act of 1933 As To Lexington Resources, Inc. and Grant Atkins (Nov. 26, 2008).

a half] million dollars . . . representing profits from the sale of the unregistered stock by Jenirob and Newport" based on new evidence from the foreign securities regulator.[2] Although the ALJ admitted the evidence against Mr. Pierce, who remained the sole respondent, she ruled that disgorgement of profits from Newport and Jenirob, who were not mentioned in the OIP and had not been added as respondents, would be outside the scope of the order instituting proceedings. Initial Decision at 20, App. F.

The June 5, 2009 initial decision became final after the Division decided not to appeal the resulting relief to the Commission. Even though Mr. Pierce did not agree with parts of the initial decision, he likewise did not appeal to the Commission to adjust the relief. Mr. Pierce had incurred substantial expense in the four-year investigation and proceedings and desired finality of the $9.5 million claim against him. The Commission's rules provide for such reciprocal finality. The finality was equally applied to Mr. Pierce's decision whether to challenge the $2 million disgorgement award against him and the Division's decision not to ask the Commission to evaluate the new evidence for purposes of altering the disgorgement award -- which would have evoked a cross-petition by Mr. Pierce. On July 9, 2009 the Commission adopted the Initial Decision as its final ruling, declining to use the new evidence for purposes of altering the amount to be disgorged from Mr. Pierce or requiring further consideration of that subject, which was clearly before it in the record. App. G. Through counsel, Mr. Pierce subsequently contacted the Division about settling and discharging the monetary relief.

Roughly six months after the Commission's final decision, the Division has recommended that the Commission start new proceedings against Mr. Pierce, and add Jenirob and Newport as respondents "in connection of Lexington stock in accounts held in the names of Newport and Jenirob."[3] The Division is bent upon disgorging another $7.5 million from Mr. Pierce, despite the prior adverse ruling, but it is unwilling to test its "do over" in a federal court proceeding. The Division seeks the shelter of a

---

[2] Lexington Res., Inc., File No. 3-12109, Initial Decision at 20 (Jun. 5, 2009)(App. F); Exs. 17-23 to Decl. of Steven D. Bucholz in Supp. of Div. Of Enforcement's Mot. for Admission of New Evidence (Mar. 18, 2009); Div. Of Enforcement's Mot. for Admission of New Evidence (Mar. 18, 2009); Division's Updated List of Admitted Hearing Exhibits, Nos. 79-89.
[3] Letter from Tracy L. Davis (Jan. 12, 2010), App. H.

second administrative proceeding because its defiance of fundamental principles of fairness and due process and would not be well received in court.

The "final" decision in the concluded proceedings extinguishes and precludes the claims and relief sought against Mr. Pierce in the proposed new proceeding. The revived claims arise from the same series of transactions. They *could have been litigated* and *actually were litigated* with respect to *Mr. Pierce* in the prior proceeding. The Commission was under the compulsion not to split a claim. Having brought the prior proceeding upon part of a claim – actually, all of a claim against Mr. Pierce -- the Commission may not sue to recover upon the rest of the claim. There is administrative preclusion. Using an administrative adjudicative process to circumvent fundamental fairness and longstanding legal precedent should not become part of the Commission's enforcement policy. The doctrines of claim and issue preclusion apply to bar the repeat action against Mr. Pierce.

III. Discussion and Analysis

A. Background Fact Summary.

Mr. Pierce resides in Vancouver, British Columbia, Canada. In October 2005, Mr. Pierce received a request by the Division to supply information voluntarily during the course of an informal investigation of trading in the shares of OTCBB company Lexington Resources, Inc. ("Lexington"). Mr. Pierce cooperated with the Staff, and supplied most of the requested information voluntarily, including his personal U.S. brokerage firm trading records. Mr. Pierce even produced records of his personal trading in Lexington in an account at Hypo Alpe-Adria-Bank of Liechtenstein ("Hypo Bank").

B. The Commission's 2008 Order Initiating Proceedings Was Broad.

On July 31, 2008, the Commission issued its Order Instituting Proceedings against Pierce, Atkins and Lexington Resources. See App. A. The Order stated in part:

> **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.

. . .

Respondents

3. Lexington is a Nevada corporation formed in November 2003. . .

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.

. . .

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. (Underline and italics added.)

Respondents Atkins and Lexington Resources, Inc. settled with the Commission in consent orders.[4] Mr. Pierce contested all of the remedial relief sought.

During his investigative testimony, Mr. Pierce confirmed that he served as an officer or director of Newport and he and Newport had brokerage accounts with Piper Jaffrey in the U.S. and Hypo Bank in Liechtenstein. Initial Decision at 5-6, App. F. Newport is incorporated in Belize and domiciled in Switzerland. Id. at 7. Mr. Pierce admitted that he served as a director of Newport and stated, "I have an interest in Newport Capital" but no interest in Jenirob and declined to identify who did have an interest in Jenirob. Div. Hearing Ex. 78, Tr. at 394-96.

C. There Is a Final Decision in the Proceedings Commenced in 2008.

In February 2009, there was a three-day evidentiary hearing. App. F at 1. Although the hearing closed on February 4, the record was kept open pending the receipt of several exhibits. Lex. Res., Inc., Admin. Proc. No. 3-13109 (Mar. 6, 2009) (unpublished). The record closed on March 6, 2009. Lex. Res., Inc., Admin. Proc. No. 3-13109 (A.L.J. Mar. 6, 2009) (unpublished). On April 7, 2009, the ALJ opened the record to consider the Division's new evidence. App. E. This included Division Hearing Exhibits 79-89, which supported the Division's claim for another $7.5 million to be disgorged from Pierce, based on trading profits of Newport and Jenirob. This is precisely the same claim that the Division now urges the Commission to prosecute by exploiting exactly the same evidence.

ALJ Carol Fox Foelak made a June 5, 2009 initial decision. App. F. The initial decision at page 18 states:

> 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.

[4] Order Making Findings and Imposing Cease-And-Desist Orders Pursuant to § 8A or the Securities Act of 1933 As To Lexington Resources, Inc. and Grant Atkins (Nov. 26, 2008).

App. F. The decision at page 20 states how the Commission's request for disgorgement changed over time:

> 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).

App. F.[5]

When neither party filed a timely petition for review in July 2009, the initial decision became final.[6] App. D. The sole basis for the Division's proposal to retry Mr. Pierce on the $7.5 disgorgement claim – and throw in another injunctive claim (a penny stock bar) that it could have included in the first proceeding – is its pretense that the issue of relief was not before the Commission in 2009. Even if the

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[5] The ALJ nevertheless applied a very expansive view in practice. The OIP did not contain any control person liability allegations against Mr. Pierce, nor did it allege that he was an affiliate of Lexington Resources for purposes of Section 5 liability. App. A. But that did not prevent the ALJ from allowing the Division's tardy claims and incorporating them into the initial decision. App. F. Resp't G. Brent Pierce's Post-Hearing Br. at 21-22, 25-28 (Apr. 3, 2009) (claiming the Division was estopped from seeking equitable relief, had unclean hands, and was denying due process rights, when it made new claims at the hearing and in post-hearing briefing that Pierce was the controlling person of Lexington and asserted a new affiliate theory, *after* the Division had earlier asserted in response to Pierce's motion for more definite statement and in the Division's summary judgment motion and during a pre-hearing conference that the Division did not contend Pierce acted as a controlling person when Lexington violated Section 5), App. D.

[6] See S.E.C. Rule of Practice 410(a)–(b), 17 C.F.R. § 201.410(a)(b); see, e.g., In re Woessner, Rel No. 2164, 80 S.E.C. Docket 2847, 2003 WL 22015406 (Aug. 26, 2003) (granting both the Division of Enforcement's and the respondent's petitions for review of the initial decision).

Division could split out component parts of relief, however, the amount of disgorgement was plainly before the Commission and the penny stock bar could have been litigated as well.

The ALJ allowed the Division's new evidence, but refused the Division's request to increase the amount to be disgorged from Mr. Pierce. Apr. 7, 2009 Order, App. E. The Division declined to follow the Commission's Rule of Practice and submit (or resubmit) its new evidence to the Commission, when this matter was before the Commission. Rule 452, "Additional Evidence," states:

> Upon its own motion or the motion of a party, <u>the Commission may allow the submission of additional evidence</u>. 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. <u>The Commission may accept or hear additional evidence</u>, may remand the proceeding to a self-regulatory organization, <u>or may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate</u>.

Mr. Pierce opposed the ALJ's use of the new evidence on this very ground. Pierce Opp'n to Mot. for Admission of New Evidence at 3-9 (Mar. 26, 2009), App. C. Rather than submit the new evidence to the ALJ before her ruling, the Division also had the opportunity to wait, and submit the new evidence to the Commission itself for purposes of increasing the amount to be disgorged by Mr. Pierce to include the $7.5 million in trading profits of Newport and Jenirob. Or, without regard to the prior impropriety, the Division could have resubmitted the new evidence to the Commission and argued for the higher disgorgement amount based on the new evidence. The evidence was already admitted into the record against Mr. Pierce when the initial decision was issued. The materiality of the new evidence and the question whether "there were reasonable grounds for failure to adduce such evidence previously [for disgorgement purposes]" were likewise before the Commission.

The Division elected not to "file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission." Rule 452. After the initial decision, the

Division declined to submit a petition for review to include a motion to add Newport and Jenirob as respondents or even to consider the new evidence for the sole purpose of expanding the remedial relief against existing respondent Pierce. Such issues were already before the Commission, which had the option to "*accept or hear additional evidence* ... remand the proceeding to a self-regulatory organization, *or ... remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate*." The Commission elected not to do so, even though it had the authority "upon its own motion." Rule 452.

Just as Mr. Pierce could have petitioned to the Commission to overturn the ALJ's liability finding, or to reduce the amount to be disgorged, the Division could have petitioned to have the amount to be disgorged increased, by up to $7.5 million. But it did not. Likewise, the Commission had the authority to conduct further proceedings after the ALJ's decision and alter the amount to be disgorged or other aspects of the relief "*prior to the issuance of a decision by the Commission.*" But it did not.

In reliance on the Commission's notice of its "final" decision on July 9, 2009, Mr. Pierce did not pursue appeal to the federal circuit court of appeals. The decision to disgorge over $2 million from Mr. Pierce was certainly not favorable to him. If he now sought to overturn that award, the Commission would no doubt oppose him, and make the very arguments Mr. Pierce now makes. Conversely, the Commission's *"final" decision not to increase the disgorgement* amount to $9.5 million when the evidence and arguments were before the Commission was favorable to Mr. Pierce, leaving him no reason to appeal that aspect of the decision to the federal circuit court. Consequently, in reliance on the Commission's "final" decision limiting the relief to disgorgement of $2 million and no penny stock bar, Mr. Pierce waived his right to appeal the Commission's "final" decision.

Any new action by the Commission on this relief would not only contradict established law and the Commission's own Rules of Practice, it would be bad policy. The Commission would be exploiting its own inconsistent conduct, contending that there would be no damage to fundamental fairness by creating a "Hobson's Choice" for respondents. The Division appeared to violate the Commission's Rules of Practice by submitting the new evidence to the ALJ after the hearing closed, rather than submitting it to the Commission instead. Pierce Opp'n. at 3-9, App. C. The ALJ adopted the rule breach by admitting the new evidence. By exploiting the new evidence apparently in breach of the Rules of Practice, and fundamental fairness, the Division obtained a favorable decision by the ALJ, in which the evidence and analysis of the Newport and Jenirob trading as it related to respondent Pierce was thoroughly embedded. That consequence cannot now be undone; yet the Division would have the Commission reap the benefits of that action without bearing the burdens.

The Division then failed to follow the same Rules to submit the new evidence and a larger disgorgement demand (or other expansion of the remedial relief, such as a penny stock bar). The Commission then sanctioned all of this conduct, left the relief undisturbed and declined to increase the relief or risk holding further proceedings to do so, in which the relief might have been reduced rather than increased. If the Commission were to institute the new administrative proceeding under these circumstances, it would simply teach the public that the ends justify the means, and rules don't matter – not a message that a regulator should send, and not a message condoned by the courts.

D. The Final Decision Operates to Merger, Extinguish, and Preclude Claims that Were or Could Have Been Raised in the Prior Proceedings.

It is well established that the government may be precluded from relitigating claims. See, e.g., United States v. Stauffer Chem. Co., 464 U.S. 165, 169 (1984) ("we agree that the doctrine of mutual

defensive collateral estoppel is applicable against the Government to preclude the relitigation of the very same issue already litigated against the same party in another case involving the virtually identical facts"). "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 n. 7 (1966). Here, the Division and the Commission have already established that there was an adequate opportunity to litigate the question of remedial relief -- whether such relief should include a cease and desist order, which could have included a penny stock bar, and an additional $7.5 million should be disgorged from Mr. Pierce in connection with Lexington trading by his OIP "associates," Newport and Jenirob. The Division and the Commission both left undisturbed a ruling issued after the injunctive and disgorgement issues were litigated, at least as to Mr. Pierce's liability and the scope of any disgorgement award, "the Commission has not chosen to review the decision as to him [Pierce] on its own initiative." App. F.

"Under the doctrine of claim preclusion, '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" Rivet v. Regions Bank, 522 U.S. 470, 477 (1988) (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981)). "[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 (1998).

Just as the doctrines of issue and claim preclusion apply to respondents in SEC proceedings,[7] so too the same doctrines apply to the Commission. Here, the Commission was acting as a plaintiff and was "required to join [its] legal and equitable claims to avoid the bar of res judicata." Lytle v.

[7] See, e.g., In re Carman, Release No. 343, 92 S.E.C. Docket 1476 (Jan. 25, 2008) (concluding permanent injunction in court action was entitled to collateral estoppel effect against respondent in a SEC proceeding); In re Snell and Lecroy, Release No. 330, 90 SEC Docket 1536 (May 3, 2007) (stating the Commission has frequently applied the doctrine of collateral estoppel to prevent a respondent from relitigating the factual findings or the legal conclusions of an underlying criminal proceeding in the follow-on administrative proceeding and citing decisions).

Household Mfg., Inc., 494 U.S. 545, 552 (1990). In Lytle, the United States Supreme Court cited the Fourth Circuit's Harnett decision. Id. ("See Harnett v. Billman, 800 F.2d 1308, 1315 (4th Cir. 1986) (holding that prior adjudication barred a claim that arose out of the same transactions and that could have been raised in the prior suit)." In Harnett, the circuit court held that claims arising out of corporate spin-offs and freeze-out mergers forming the basis for a prior action were precluded under the doctrine of res judicata. The barred claims included those under the 1993 and 1934 Acts. Id. at 1314-15. The applicable standard for res judicata was:

> Harnett is therefore subject to the general principle that the judgment in *Harnett I* extinguishes any claims that might have been raised in that litigation and that are, for res judicata purposes, the same claims as those advanced in the earlier case. Res judicata precludes the litigation by the plaintiff in a subsequent action of claims "with respect to all or any part of the transaction, or series of connected transactions, out of which the [first] action arose." . . . .
>
> . . . The rule of claim preclusion we apply, however, asks only if a claim made in the second action involves a right arising out of the same transaction or series of connected transactions that gave rise to the claims in the first action. To decide this, we measure the scope of "transaction or series of connected transactions" by considering pragmatic factors such as common origin and relation, as well as whether the acts giving rise to the claim would be considered as part of the same unit by the parties in their business capacities. *See* Restatement (Second) of Judgments § 24(2) (1982). 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. *Id.* comment c.

Id. at 1314 (adding underline).

That pragmatic legal standard (adopted in federal courts throughout the United States) applies to the Division's proposed "new" claims for disgorgement and injunctive relief that arise from the very same series of transactions involving the sale of Lexington shares four or more years ago. The Division/Commission asserted the same claims and sought the same relief in the prior proceedings. It is precluded from prosecuting a second proceeding on "any part" of the prior claim. "[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. at 233 (1998). It is precluded from "relitigating issues that were or could have

been raised in that action.'" Rivet v. Regions Bank, 522 U.S. at 477. The Commission did not express the intention to reserve the rest of the claim for another action. Furthermore, neither the administrative law judge nor the Commission made a determination that the initial decision was "without prejudice" to a second action on the scope of the relief awarded against Mr. Pierce.

The Division submitted evidence, argued in its pleadings and otherwise pursued claims against Mr. Pierce based on his actions on behalf of Newport and Jenirob.[8] The twenty-one page initial decision refers to the proposed new respondent "Newport" over sixty-five times and to the other new respondent "Jenirob" six times.[9] The decision also concludes that Mr. Pierce is the beneficial owner of Newport and Jenirob[10] and refers to sales by Pierce of Lexington shares in the accounts of Newport and Jenirob.[11] But the decision declined to grant disgorgement relief against Mr. Pierce based on the trading profits of Newport and Jenirob. The Division declined to appeal that order, and the Commission declined to overrule it in any manner. As a result, the rejected disgorgement and forgone penny stock bar claims were extinguished and merged into the prior proceeding and the proposed second proceeding is barred. The claims arose from the same nucleus of operative facts -- the facts are so interwoven to constitute a

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[8] In addition to requesting the disgorgement of profits from Mr. Pierce due to Lexington stock sales by Newport and Jenirob, 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. See, e.g., Div. Of Enforcement's Post-Hearing Br. against Gordon Brent Pierce at 1 (Mar. 20, 2009) ("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 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. And see Division's Pre-Hearing Brief at 6-10 (Dec. 5, 2008) (contending that sales through Newport proved that Mr. Pierce acted as an underwriter and violated Section 5), App. C.

[9] App. F.

[10] "Pierce is the beneficial owner of, and works as president and director for Newport Capital Corporation (Newport), an entity based in Switzerland. Div. Exs. 62 at 20, 80. He is also the beneficial owner of Jenirob Company Ltd. (Jenirob)." App. F at 5.

[11] "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. . . . 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." App. F at 13.

single claim and cannot be dressed up to look different and to support a separate new claim. 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.").

E. Additional Injunctive, Disgorgement and Other Ancillary Relief is Unwarranted.

The additional proposed relief is unwarranted against Mr. Pierce. The Commission already has a disgorgement and cease-and-desist order against Mr. Pierce which was effective in July 2009.[12] Mr. Pierce has also contacted the Division about settling the prior disgorgement award.[13] These are but a few of the actions Mr. Pierce as taken in reliance on the Commission's announcement of a "final" decision in July 2008.

IV. Conclusion

The Division's recommended "repeat" action is not well founded. The action would be based on a series of transactions that started in 2003 and have been the subject of proceedings before the SEC and more recently in bankruptcy court and in federal district court in Oklahoma. The new proposed claims are extinguished and merged by the final decision in the prior proceedings before the Commission. The Commission should adhere to established legal precedent and decline to institute the proposed proceeding.

[12] SEC v. China Energy Savings Tech., Inc., 2009 U.S. Dist. Lexis 27187, Cas. No. 06-CV-6402 (E.D.NY. Mar. 27, 2009) (granting SEC an injunction against further violations but denying SEC's request for penney stock bar).

[13] In November 2009, Mr. Pierce settled related claims brought by the trustee in the bankruptcy of Lexington Resources who filed claims both in bankruptcy court and in the federal district court in Oklahoma. See generally Gerald R. Miller v. Gordon Pierce, et al., Case No. CIV-09-096-FHS (E.D. of Okla); see, e.g., Dkt. No. 63 (Administrative Closing Order).

APPENDIXES

A. Order Instituting Cease-and-Desist Proceedings (July 31, 2008).

B. Division of Enforcement's Pre-Hearing Br. Against Resp't Gordon Brent Pierce (Dec. 5, 2008).

C. Resp't Pierce's Opp'n to Division's Mot. for the Admission of New Evidence and Pierce's Mot. to Strike (Mar. 26, 2009)

D. Resp't G. Brent Pierce's Post-Hearing Br. (Apr. 3, 2009).

E. Order (Apr. 7, 2009).

F. Initial Decision (Jun. 5, 2009).

G. Notice that Initial Decision Has Become Final (Jul. 5, 2009).

H. Letter from Tracy L. Davis (Jan. 12, 2010).

Exhibit 19

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

use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

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; 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

Exhibit 20

ORIGINAL

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FILED 2010 JUN -8

JSW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Applicant, vs. GORDON BRENT PIERCE, Respondent.	CV 10 80129MISC 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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

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

27

28

1 **II. FACTUAL BACKGROUND**

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

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

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

21 In her Initial Decision, Administrative Law Judge Carol Fox Foelak determined that the
22 Division of Enforcement had proven Pierce's violation of Sections 5(a) and 5(c) of the Securities Act
23 by offering and selling Lexington shares in interstate commerce without registering his offers and
24 sales, and rejected Pierce's defense. Initial Decision at 15-16. Administrative Law Judge Foelak also
25 determined that Pierce violated the requirement under Section 13(d) of the Exchange Act, 15 U.S.C.
26 § 78m(d), that he report his ownership interest by filing the appropriate disclosure, and that Pierce
27 violated the requirement under Section 16(a) of the Exchange Act, 15 U.S.C. § 78p(a), that he report
28 his transactions in Lexington stock. *Id.* at 17-18.

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

3 Pierce's conduct was egregious and recurrent. . . . As a control person
4 making unregistered [Lexington stock] sales, he deprived the investing public of valuable information. . . . Pierce's failure to make disclosures
5 regarding his beneficial ownership also deprived the investing public of valuable information. Pierce's failure to give assurances against future
6 violations or to recognize the wrongful nature of his conduct is underscored by his failure to appear in person and give testimony on
7 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
8 record is replete with evidence that Pierce acted with a high degree of scienter in attempting to conceal his ownership of Lexington stock.

9 *Id.* at 19.[1]

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

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

26

27 [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
28 Exchange Act and of Exchange Act Rules 13d-1, 13d-2 and 16a-3. *Id.* at 19-21.

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

5 **III. LEGAL ARGUMENT**

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

7 Congress has authorized the Commission to seek judicial assistance in enforcing its orders
8 under the federal securities laws. In particular, Section 20(c) of the Securities Act, 15 U.S.C. §
9 77t(c), provides in pertinent part:

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

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

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

17 After notice and a full evidentiary hearing, Pierce was ordered to pay $2,043,362 in
18 disgorgement, based on the "actual profits Pierce obtained from his wrongdoing charged in the OIP."
19 Initial Decision at 20. The wrongdoing alleged and established against Pierce included his
20 unregistered offer and sale of Lexington securities in violation of Sections 5(a) and 5(c) of the
21 Securities Act. As a result, Section 20(c) of the Securities Act authorizes the Court to enforce the
22 disgorgement award by issuing a writ commanding Pierce's compliance. 15 U.S.C. § 77t(c).
23 Because Pierce also was found to have violated Sections 13(d) and 16(a) of the Exchange Act by
24 deliberately failing to disclose his holdings and transactions, Section 21(e) of the Exchange Act
25
26
27
28

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

3 Enforcing a disgorgement order – such as the Commission's order against Pierce – is an
4 important component of the statutory scheme for protecting investors from securities law violations.
5 Because Pierce was found to have violated the federal securities laws, the Commission had the power
6 to order his disgorgement of his ill-gotten gains. *See, e.g., SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir.
7 1985).

8 The "purpose of disgorgement is to force 'a defendant to give up the amount by which he was
9 unjustly enriched.'" *Id.* (quoting *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102
10 (2d Cir. 1978)). Disgorgement may encompass all benefits derived by a violator. *See SEC v. First*
11 *Pacific Bancorp*, 142 F.3d 1186, 1192 (9th Cir. 1998); *C.F.T.C. v. British American Commodity*
12 *Options Corporation*, 788 F.2d 92, 93-94 (2d Cir. 1986).

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

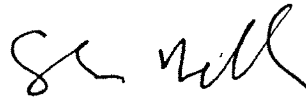
17 **IV. CONCLUSION**

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

21 Dated: June 8, 2010

Respectfully submitted,

22



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

26

27 [1] Venue is proper in any district of the United States under 28 U.S.C. § 1391 because Pierce is a
28 Canadian citizen who resides in Vancouver, British Columbia. *See* Initial Decision at 5.

Exhibit 21

COPY

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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 SAN FRANCISCO DIVISION

17

18 GORDON BRENT PIERCE, 19 Plaintiff, 20 v. 21 SECURITIES AND EXCHANGE COMMISSION, 22 Defendant. 23	Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

24

25 **I. INTRODUCTION**

26 1. Plaintiff Gordon Brent Pierce ("Pierce") brings this Complaint for Declaratory and
27 Injunctive Relief against the Defendant Securities and Exchange Commission ("Commission") to
28 preliminarily and permanently enjoin the Commission from prosecuting or otherwise continuing

1 the pending administrative proceedings against Pierce captioned *In the Matter of Gordon Brent*
2 *Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 (the
3 "Second Action), or any other agency action involving claims and conduct previously litigated,
4 finally decided and not appealed from in the Commission's prior administrative proceedings
5 captioned *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*,
6 Admin. Proc. File No. 3-13109 (the "First Action").

7 2. The Commission lacks jurisdiction and authority to prosecute the Second Action,
8 which is barred by res judicata, collateral estoppel, issue preclusion, equitable estoppel and
9 fundamental principles of due process. In the First Action, the Commission's Division of
10 Enforcement ("Division") claimed that Pierce realized approximately $7.5 million in profits from
11 the improper sale of unregistered stock by two offshore companies which the Division alleged
12 Pierce controlled. The ALJ admitted the Division's evidence and considered its disgorgement
13 claim, but refused to grant the Division the relief it sought. In response to the ALJ's decision, the
14 Division did not move to amend the order instituting proceedings in the First Action or appeal the
15 ALJ's decision denying its disgorgement claim and, although it had authority to do so on its own
16 initiative, the Commission similarly refused to review, reverse or modify the ALJ's decision.
17 Instead, the Commission adopted the ALJ's decision as its own final judgment in the First Action.

18 3. Months later, the Division ignored the preclusive effect of that prior judgment and
19 its own acquiescence therein, when it filed the Second Action against Pierce. The Second Action
20 alleges the very same $7.5 million disgorgement claim the Division asserted, the ALJ rejected
21 and the Commission refused to reconsider in the First Action—all of which Pierce relied upon
22 when he elected not to appeal the First Action in the interests of finality. The Commission does
23 not get a second bite at the apple. Pierce brings this action to immediately forestall further
24 unlawful, costly and vexatious litigation by the Commission.

25 **II. JURISDICTION AND VENUE**

26 4. This action arises under the Securities Act of 1933, 15 U.S.C. § 77 *et seq.*, and the
27 Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.*, the Administrative Procedure Act, 5
28 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.

1 9. Defendant the Securities and Exchange Commission is the federal administrative
2 agency of the United States with authority to enforce the Securities Act of 1933 and the Securities
3 Exchange Act of 1934.

4 **IV. GENERAL ALLEGATIONS**

5 **A. The First Action**

6 10. Beginning sometime in 2005, the Commission initiated an investigation of Pierce
7 in connection with alleged violation of securities registration and reporting requirements in
8 connection with the trading of Lexington Resources, Inc.'s ("Lexington") common stock.
9 Following its investigation, on July 3, 2007, the Commission informed Pierce that it intended to
10 bring an administrative action against Pierce. At the Commission's invitation, Pierce filed a
11 Wells Committee Submission, 17 C.F.R. § 202.5(c), in response to the Commission's threatened
12 action, to no avail.

13 11. On July 31, 2008, the Commission's Division of Enforcement brought the First
14 Action by filing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") against
15 Pierce and others in a proceeding captioned *In the Matter of Lexington Resources, Inc. Grant*
16 *Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109. The Division claimed that
17 Pierce violated the registration provisions of the Securities Act, Sections 5i. and 5(c), 15
18 U.S.C.§ 77e(a) & (c), and the reporting provisions of the Exchange Act, Sections 13(d) and 16(a),
19 15 U.S.C. §§ 78m(d) & 78p(a).[1]

20 12. The First OIP alleged, among other things, that Pierce and "his associates"
21 violated the registration provisions by reselling shares they received from Lexington without a
22 valid registration statement or exemption from registration in 2004. The First OIP further alleged
23 that Pierce violated the reporting provisions by late-filing a Schedule 13D concerning his
24 ownership or control of Lexington stock during the period November 2003 to May 2004, and
25 failing to file Forms 3, 4 or 5 in connection with Pierce's alleged ownership or control of more
26 than ten percent of Lexington stock during that period.

27

28 [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

1 March 10, 2009, Pierce also controlled accounts at Hypo Bank in the names of Newport and another offshore company, Jenirob ...[.]

2

3 * * *

4 ... 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.

7 (Proposed Findings of Fact 32 & 55). The Division likewise proposed a conclusion of law that,

8 because the Newport and Jenirob "sales were in violation of Section 5's registration requirements,

9 Pierce should disgorge total net proceeds of $9,601,347," of which $7,523,378 was derived from

10 Newport and Jenirob sales.

11 21. Pierce opposed the Division's motion to admit the New Evidence. Among other

12 things, Pierce pointed out that the Commission's own Rule of Practice 452, 17 C.F.R. § 201.452,

13 allowed the Division to move the Commission to admit additional evidence, but no rule allowed

14 the Division to seek the introduction of new evidence directly to the ALJ following the close of

15 evidence. Pierce also argued that the New Evidence did not support the Division's theories of

16 liability and disgorgement in any event.

17 22. On April 7, 2009, ALJ Foelak issued an order granting the Division's motion to

18 admit the New Evidence. ALJ Foelak ruled: "Under the circumstances the record of evidence

19 will be reopened to admit [the New Evidence] for use on the issue of liability, but not for the

20 purpose of disgorgement based on sales of stock by Newport and Jenirob. These entities are not

21 mentioned in the OIP, and such disgorgement would be outside the scope of the OIP."

22 23. Having admitted the New Evidence as material to the issue of liability, ALJ

23 Foelak's ruling that she could not consider it for purposes of determining disgorgement was

24 plainly inconsistent with the Division's and the ALJ's prior position that the First OIP included

25 allegations related to Newport and Jenirob as the "offshore compan[ies]" and "associates" who

26 had received portions of the $13 million in stock sale proceeds. As noted above, the First OIP

27 specifically alleged that Pierce had "transferred or sold [Lexington stock] through his offshore

28

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

1 consider the New Evidence for any purpose, or order further proceedings with the ALJ thereon.
2 *See* 17 C.F.R. § 201.452.

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

13 **E. <u>The Second Action</u>**

14 33. Over the next several months, Pierce and Commission staff negotiated terms upon
15 which Pierce could satisfy the $2,043,362.33 disgorgement remedy, plus prejudgment interest,
16 imposed on Pierce by the Commission's Final Decision in the First Action. In doing so, Pierce
17 relied on the Division's manifest agreement that disgorgement had been "determined" with
18 finality when Pierce exchanged compromise and settlement offers with the Division in an effort
19 to resolve his disgorgement obligations.

20 34. Only after Pierce had increased his offer to an amount the Division had
21 represented would be acceptable, did the Commission staff inform Pierce that the Commission
22 intended to initiate a new administrative action against him in an effort to re-litigate its
23 determination that Pierce be ordered to pay disgorgement for registration violations resulting
24 from his resale and distribution of Lexington shares. The Commission intended to revive the
25 question whether Pierce should be ordered to pay disgorgement of the alleged $7.5 million in net
26 proceeds received by Newport and Jenirob from the sale of Lexington stock in 2004. Facing the
27 prospect of another burdensome and costly administrative action sparking a new round of bad
28 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. <u>The Collection Action</u>

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.

1 43. The issuance of declaratory and/or injunctive relief on res judicata grounds by this
2 Court will terminate the existing controversy between the parties because such relief will require
3 the Commission to cease prosecution of the Second Action, and preclude any other or future
4 agency action involving claims and conduct previously litigated, finally decided and not appealed
5 from in the First Action.

6 **VI. SECOND CAUSE OF ACTION**

7 ***(Declaratory/Injunctive Relief – Equitable Estoppel)***

8 44. Pierce adopts and incorporates by reference the allegations contained in
9 paragraphs 1 through 40 above as if fully set out herein.

10 45. An actual controversy of a justifiable nature presently exists between Pierce and
11 the Commission as to whether the Commission should be equitably estopped from prosecuting
12 the Second Action against Pierce where:

13 (a) the Division knew when it did not appeal the Initial Decision to the
14 Commission, and the Commission knew when it did not review the Initial Decision, that
15 the Commission intended to subsequently initiate the Second Action;

16 (b) the Commission intended Pierce to rely on its purported acquiescence in the
17 finality of the Initial Decision and Final Decision in the First Action, including the order
18 to pay disgorgement pursuant to Section 8A(e) of the Securities Act;

19 (c) Pierce did not know until long after the period for appeal of the Initial
20 Decision and/or Final Decision lapsed that the Commission intended to subsequently
21 initiate the Second Action;

22 (d) Pierce detrimentally relied on the Commission's conduct by waiving his
23 right to appeal the Initial Decision and/or Final Decision in the First Action;

24 (e) the Commission's conduct in this regard was affirmative, and not mere
25 negligence; and

26 (f) unless estopped from proceeding on the Second Action, the Commission's
27 conduct will cause a serious injustice to Pierce and will unduly harm the public interest.

28 46. The issuance of declaratory and/or injunctive relief by this Court on the equitable

1 estoppel issue will terminate the existing controversy between the parties because such relief will
2 require the Commission to cease prosecution of the Second Action and prevent future
3 prosecutions by the Commission on the same adjudicated facts and claims.

4 **VII. THIRD CAUSE OF ACTION**

5 ***(Declaratory/Injunctive Relief – Violation of Due Process)***

6 47. Pierce adopts and incorporates by reference the allegations contained in
7 paragraphs 1 through 40 above as if fully set out herein.

8 48. An actual controversy of a justifiable nature presently exists between Pierce and
9 the Commission as to whether the Commission violated and continues to violate Pierce's right to
10 due process guaranteed by the United States Constitution by subjecting Pierce to unlawful,
11 harassing and costly duplicative litigation of the Second Action. Moreover, the Commission's
12 use of the term "associates" again in the Second OIP demonstrates its intent to threaten and/or
13 commence future further unlawful, harassing and costly duplicative litigation.

14 49. The issuance of declaratory and/or injunctive relief by this Court on the due
15 process issue will terminate the existing controversy between the parties because such relief will
16 require the Commission to cease prosecution of the Second Action and refrain from commencing
17 more such actions. This relief will not only mitigate the Commission's violation of Pierce's right
18 to due process, but it will protect the public's interest in deterring any other or future agency
19 action involving unlawful, harassing and costly duplicative litigation previously litigated, finally
20 decided and not appealed from in the First Action in accordance with regulatory requirements.

21 * * *

22 WHEREFORE, Pierce respectfully requests the following relief:

23 A. That the Court declares that the Commission acted illegally and without statutory
24 authority, and violated Pierce's constitutional rights, by filing and prosecuting the administrative
25 cease-and-desist proceedings captioned *In the Matter of Gordon Brent Pierce, Newport Capital*
26 *Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927, as further described herein;
27
28

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

CHRISTOPHER B. WELLS
DAVID C. SPELLMAN
RYAN P. MCBRIDE
LANE POWELL PC

WILLIAM F. ALDERMAN
ORRICK, HERRINGTON & SUTCLIFFE LLP

William F. Alderman

WILLIAM F. ALDERMAN
Attorneys for Plaintiff
GORDON BRENT PIERCE

Exhibit 22

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 BEFORE THE HONORABLE SUSAN ILLSTON, JUDGE

4 GORDON BRENT PIERCE,

5

6 PLAINTIFF,

7 VS. NO. C-10-03026 SI
PAGES 1 - 27

8 SECURITIES AND EXCHANGE COMMISSION,

9

10 DEFENDANT.

11 SECURITIES AND EXCHANGE COMMISSION,

12

13 PLAINTIFF,

14 VS. NO. C-10-80129-MISC (SI)

15 GORDON BRENT PIERCE,

16

17 DEFENDANT.

18

19 SAN FRANCISCO, CALIFORNIA
FRIDAY, AUGUST 13, 2010

20

TRANSCRIPT OF PROCEEDINGS

21

APPEARANCES ON NEXT PAGE.

22

23 REPORTED BY: KATHERINE WYATT, CSR, RPR, RMR
OFFICIAL REPORTER, USDC

24 COMPUTERIZED TRANSCRIPTION BY ECLIPSE

25

1 TO SKIP THE EXHAUSTION OF ADMINISTRATIVE REMEDIES, IT
2 IS REQUIRED THERE BE IRREPARABLE INJURY. THE SUPREME COURT IN
3 SO CAL AND SEVERAL OTHER COURTS HAVE SAID THAT:
4 "LITIGATION EXPENSES, HOWEVER SUBSTANTIAL AND
5 IRRECOUPABLE, DO NOT CONSTITUTE IRREPARABLE INJURY."
6 AND WHILE WE'RE ON THE SECOND PRONG FOR A CLAIM OF
7 TRO PRELIMINARY INJUNCTION, FOR THE SAME REASONS THEY CAN'T
8 DEMONSTRATE IRREPARABLE INJURY FOR PURPOSES OF THEIR MOTION.
9 THEY ALSO HAVE TO SHOW THAT THE COMMISSION DID NOT
10 HAVE AUTHORITY TO ADJUDICATE. UNDER THE CASE LAW WHAT THAT MEANS
11 IS AUTHORITY, AUTHORITY TO HOLD THE HEARING, NOT THAT THERE'S
12 SOME AFFIRMATIVE DEFENSE THAT MAY END UP DEFEATING THE CASE.
13 FOR INSTANCE, IF THE SEC HAD BROUGHT AN ACTION TO
14 ENFORCE A PURELY CRIMINAL STATUTE WHICH ONLY JUSTICE CAN
15 ENFORCE, IN THAT CASE IT MIGHT BE BEYOND OUR AUTHORITY TO
16 ADJUDICATE.
17 IF SOMEONE HAS A DEFENSE, AN AFFIRMATIVE DEFENSE SUCH
18 AS RES JUDICATA OR EQUITABLE ESTOPPEL DOES NOT APPLY.
19 NOR CAN PIERCE CLAIM UNDER THE LAW THAT IT WOULD BE
20 FUTILE TO GO THROUGH THE ADMINISTRATIVE PROCESS. THE COMMISSION
21 RULES SPECIFICALLY PERMIT THE DEFENSE OF RES JUDICATA ALONG WITH
22 STATUTE OF LIMITATIONS AND OTHER EQUITABLE DEFENSES TO BE RAISED
23 IN A PROCEEDING.
24 THE CITE FOR THAT, WHICH I APOLOGIZE IS NOT OUR
25 BRIEF, IS 17 CFR 201.220 (C).

1 SO THEY HAD THAT OPPORTUNITY. IN FACT, THEY HAVE
2 FILED AN ANSWER IN WHICH THEY HAVE RAISED RES JUDICATA AND
3 EQUITABLE ESTOPPEL AS DEFENSES.
4 THEY ARE ENTITLED TO BRING THOSE CLAIMS BEFORE AN
5 ALJ. THEY CAN DO IT BY A MOTION BY SUMMARY DISPOSITION, AND
6 THEY CAN RAISE THAT ISSUE. AND THEN, IF THEY DON'T LIKE THE
7 RESULT THERE, THEY CAN APPEAL. THEY CAN TRY AN INTERLOCUTORY
8 APPEAL TO THE FULL COMMISSION.
9 OR IF THEY LOSE ON THAT GROUND, AND THERE IS AN
10 INTERLOCUTORY APPEAL GRANTED, AT THE CONCLUSION OF THE
11 ADMINISTRATIVE PROCEEDING BEFORE THE ALJ THEY CAN MAKE THAT ONE
12 OF THEIR CLAIMS.
13 ASSUMING THAT THE COMMISSION PREVAILS ON ITS PRIMARY
14 CLAIMS, THEY CAN RAISE THAT BEFORE THE COMMISSION. THEY CAN
15 ALSO SEEK TO STAY THE EFFECT OF A COMMISSION ORDER ON THAT AND
16 SEEK AN APPEAL TO THE COURT OF APPEALS.
17 SO THE COMMISSION IS IN NO WAY TRYING TO KEEP THIS
18 FROM THE FEDERAL COURTS. THEY WILL HAVE AMPLE OPPORTUNITY TO DO
19 THAT, AND THERE'S NO REASON TO THINK THAT IT IS FUTILE TO AVAIL
20 THEMSELVES OF THE COMMISSION'S PROCESSES WHICH GIVE THEM FULL
21 RIGHTS, YOU KNOW, TO BRING WITNESSES TO MAKE THEIR ARGUMENTS
22 WHENEVER AND WHEREVER.
23 WITH REGARD TO THEIR CITING TO CONTINENTAL CAN,
24 CONTINENTAL CAN, EVEN THE SEVENTH CIRCUIT HAS RECOGNIZED IS NO
25 LONGER GOOD LAW IN LIGHT OF FTC VERSUS SOUTHERN CALIFORNIA.

Exhibit 23

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GORDON BRENT PIERCE,

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant.
_____________________________/

No. C 10-3026 SI

ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, DISMISSING 10-3026 SI FOR LACK OF JURISDICTION; AND GRANTING APPLICATION FOR ENFORCEMENT OF DISGORGEMENT ORDER IN 10-80129 MISC

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

v.

GORDON BRENT PIERCE,

Respondent.
_____________________________/

No. C 10-80129 MISC

On August 13, 2010, the Court held a hearing on Gordon Brent Pierce's motion for a temporary restraining order, preliminary injunction and a stay, and the SEC's application for an order enforcing an administrative disgorgement order. For the reasons set forth below, the Court DENIES Pierce's motion and GRANTS the SEC's application.

BACKGROUND

These related cases arise out of two separate administrative enforcement proceedings brought by the Securities and Exchange Commission (SEC) against Gordon Brent Pierce, a Canadian citizen.

United States District Court
For the Northern District of California

1 The SEC initiated the first proceeding on July 31, 2008 by filing an Order Instituting Cease-and-Desist
2 Proceedings ("First OIP") against Pierce, Lexington Resources, Inc., and Lexington's CEO Grant
3 Atkins. The SEC claimed that Pierce violated the registration provisions of the Securities Act of 1933,
4 Sections 5(a) and 5(c), 15 U.S.C. § 77e(a) & (c), and the reporting provisions of the Exchange Act of
5 1934, Section 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a). Wells Decl. Ex. A (C 10-3046).
6 The First OIP charged, *inter alia*, that Pierce transferred or sold Lexington Resources stock
7 "through his offshore company," OIP ¶ 14, and that "Pierce and his associates" deposited shares in
8 accounts at an offshore bank. *Id.* ¶ 15. Pierce moved for a more definite statement, and in response the
9 SEC took the position that transaction documents with which Pierce was familiar identified the
10 "associates" and the "offshore company"; those documents indicated that the "offshore company" was
11 Newport Capital Corp. (Newport) , and that Jenirob Company, Ltd. (Jenirob) was one of the
12 "associates." Pierce asserts that "as a result of this informal amendment process, without ever actually
13 moving to amend the First OIP, the Commission itself specifically claimed that, to the extent Newport
14 and Jenirob were involved in the resale of Lexington stock by Pierce, the OIP included both for purposes
15 of 'determining' whether Mr. Pierce committed registration violations, and 'whether Respondent Pierce
16 should be ordered to pay disgorgement.'" Motion at 4:12-16.
17 Administrative Law Judge Foelak held a three day hearing in February 2009. After the close
18 of evidence, the SEC moved for the admission of new evidence obtained from a foreign regulator which
19 purportedly showed that in addition to Pierce's sales through his personal account, Pierce had illegally
20 sold 1.6 million shares of Lexington stock for $7.7 million through two Liechtenstein accounts that
21 Pierce controlled in the names of Newport and Jenirob. Pierce opposed the admission of the new
22 evidence. In an order dated April 7, 2009, the ALJ held that the new evidence would be admitted for
23 purposes of liability, but not for disgorgement:

24 > The Order Instituting Proceedings (OIP) authorizes disgorgement. At the
25 > 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
26 > Commission rules; the Division stated that it was seeking $2.7 million in disgorgement.
27 > 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
28 > from Pierce's sale of allegedly unregistered stock.

1 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 the delay in producing the new material to the Division was entirely Pierce's fault, as he refused to supply it in response to a 2006 subpoena and actively opposed its release to the Division by the FMA.

8 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. 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.

12 Wells Decl. Ex. L (footnotes omitted).

13 On June 5, 2009, ALJ Foelak issued an Initial Decision finding that Pierce violated the Securities Act by offering and selling shares of Lexington Resources stock without the necessary registration for those offers and sales, and that he violated the Exchange Act by failing to file the required forms with the Securities and Exchange Commission to disclose his beneficial ownership of, and transactions in, Lexington shares. The ALJ found that Pierce was unjustly enriched in the amount of $2,043,362.33, and she ordered Pierce to pay that amount in disgorgement, plus interest. The disgorgement amount was based on evidence regarding sales of 300,000 shares made from Pierce's personal account.

20 The Initial Decision stated that the recommended sanctions were to take effect unless a party filed an appeal within 21 days. No party filed an appeal, and on July 8, 2009, the SEC issued notice that the Initial Decision was final. Buchholz Decl. Ex. B. Under the SEC's Rules of Practice, Pierce was required to pay the disgorgement and interest by July 9, 2009, the first day after the Initial Decision became final. 17 C.F.R. § 201.601(a). Pierce has not paid any amount of the disgorgement and interest. On June 8, 2010, the SEC filed an Application for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce, *Securities and Exchange Commission v. Gordon Brent Pierce*, C 10-80129 MISC.

28 Also on June 8, 2010, the SEC initiated an administrative enforcement proceeding against Pierce,

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Jenirob and Newport. This proceeding alleges that Pierce reaped $7.7 million in unlawful profits by selling 1.6 million shares of stock through Jenirob and Newport. In the second proceeding, the SEC alleges that Pierce controlled Lexington by holding a majority of its stock and by providing Lexington a consultant CEO who was employed by Pierce, and that Pierce made the stock sales through Newport and Jenirob while he directed a widespread scam and newsletter campaign touting Lexington's stock. To date, no rulings have been made on these allegations.

On July 9, 2010, Pierce filed a lawsuit in this Court, *Gordon Brent Pierce v. Securities and Exchange Commission*, C 10-3026 SI. Pierce seeks to enjoin the SEC from prosecuting the second administrative enforcement proceeding on the ground that it is barred by res judicata, collateral estoppel, issue preclusion, equitable estoppel and due process. The complaint seeks declaratory and injunctive relief, and alleges three claims: (1) declaratory/injunctive relief – res judicata; (2) declaratory/injunctive relief – equitable estoppel; and (3) declaratory/injunctive relief – violation of Due Process.

Now before the Court are the SEC's application for an order enforcing the administrative disgorgement order, and Pierce's motion for a temporary restraining order, preliminary injunction, and stay. Pierce seeks (1) a temporary restraining order and an order to show cause why a preliminary injunction should not be issued against the SEC enjoining it from proceeding with the second administrative proceeding; and (2) a temporary stay of the SEC's application for an order enforcing the disgorgement order pending a determination of the merits of the issues raised in the civil case filed by Pierce (10-3026 SI).

DISCUSSION

I. *Pierce v. SEC*, C 10-3026 SI

A threshold question is whether the Court has jurisdiction over Pierce's complaint. The complaint alleges that this case arises under the Securities and Exchange Acts, the Administrative Procedure Act, and the Due Process Clause of the United States Constitution, and that the 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). Compl. ¶¶ 4-5. The complaint also alleges that the Court has the authority to grant the declaratory and injunctive relief sought pursuant to 28 U.S.C. §§ 2201 and

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2202 (the Declaratory Judgment Act) and 28 U.S.C. § 1651 (the All Writs Act). *Id.* ¶ 5.

The SEC asserts that the Securities and Exchange Acts do not confer jurisdiction because Pierce does not bring any claims under the Securities and Exchange Acts, and rather he brings this case to halt the SEC's enforcement of the federal securities laws against him. The three claims for declaratory and injunctive relief alleged in the complaint do not arise under the Securities or Exchange Acts. Pierce does not cite any authority for the proposition that an action seeking to enjoin an SEC administrative proceeding arises under the federal securities laws, and in his briefing, Pierce appears to have abandoned the assertion that this Court has jurisdiction based upon the federal securities laws. The Court agrees with the SEC that the federal securities laws do not provide a basis for jurisdiction over Pierce's complaint.

The SEC also contends that the Administrative Procedure Act does not provide a basis for jurisdiction. Pierce asserts that Section 705 of the APA provides a basis for jurisdiction. *See* Pl's Motion at 13 n.4. That section provides,

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. However, as the SEC notes, Section 703 of the APA provides that "the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . . ." 5 U.S.C. § 703. The federal securities laws provide that judicial review of SEC orders is vested in the Court of Appeals. Section 25(a) of the Exchange Act states,

> A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or be set aside in whole or in part.

15 U.S.C. § 78y(a)(1); *see also* 15 U.S.C. § 77i(a) (similar language in Securities Act); *see also Public Utility Comm'r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) ("[W]here a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review.").

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For the Northern District of California

Pierce simply asserts that the APA confers jurisdiction, *see* Pl's Motion at 13:n. 4, and does not address the authority cited by the SEC. Pierce's reply does not mention the APA as a basis for jurisdiction, and thus it appears that Pierce has abandoned this contention. The Court concludes that because Congress has established a specific statutory system for judicial review of SEC actions by the Court of Appeals, Pierce cannot rely on the APA's general review provisions as a source of jurisdiction.

Pierce suggests that the Court has jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and 2202. However, "[t]he use of the declaratory judgment statute does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint brought without the use of 28 U.S.C. § 2201." *Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 15-16 (1983)). Similarly, the All Writs Act is not an independent source of federal question jurisdiction. *See Stafford v. Superior Ct.*, 272 F.2d 407, 409 (9th Cir. 1959) ("The All Writs Act . . . does not operate to confer jurisdiction . . . since it may be invoked by a . . . court only in aid of jurisdiction which it already has."). As such, Pierce's reliance on *SEC v. G.C. George Sec. Inc.*, 637 F.2d 685 (9th Cir. 1981), is unavailing. There, the Ninth Circuit held that a district court had jurisdiction to enjoin an administrative proceeding which allegedly violated a settlement agreement that the district court had approved, where the settlement agreement expressly conferred jurisdiction on the court to enforce the terms of the settlement agreement. *Id.* at 687-88. The Ninth Circuit held that the district court's jurisdiction was based on the court's retained continuing jurisdiction, as well as the All Writs Act. *Id.* The Ninth Circuit remanded to the district court to consider whether administrative exhaustion was required. *Id.* at 688-89.

Finally, Pierce asserts that the Court has jurisdiction based on his due process claim, and under 28 U.S.C. § 1337, which confers original jurisdiction in actions arising under acts regulating commerce.[1] Pierce relies on *Martin v. Hodel*, 692 F. Supp. 637 (W.D. Va. 1998). In *Martin*, a coal mine operator brought suit to enjoin the government from prosecuting the operator in an administrative proceeding for

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[1] The complaint does not allege 28 U.S.C. § 1337 as a basis for jurisdiction, and Pierce did not assert this argument until his reply papers. *See* Reply at 2:13-14. Nevertheless, the Court will consider this ground because the analysis of whether 28 U.S.C. § 1337 provides a basis for jurisdiction is essentially the same as whether the due process claim provides a basis for jurisdiction, namely whether the administrative agency is acting unlawfully, and thus falls in a narrow exception where the court has jurisdiction and a party is excused from exhausting administrative remedies.

United States District Court
For the Northern District of California

1 a violation of the Surface Mining Control and Reclamation Act. The coal mine operator had previously
2 been charged with a violation of the Act, and had prevailed when an administrative law judge found that
3 the operator's mine was exempt from the Act. *Id.* at 638. Seven years later, the government charged
4 the operator with the same violation of the Act based upon the same site. The operator filed suit in
5 federal court to enjoin the administrative prosecution, arguing "since the ALJ found Martin's Dickenson
6 County mining operation within the Act's two acre exemption in 1981, OSM is barred from further
7 action for the same violation at the identical site when Martin has engaged in no further mining at the
8 site." *Id.* The government argued that the court lacked jurisdiction because the operator was required
9 to exhaust his administrative remedies before seeking judicial review. The district court held that while
10 administrative exhaustion is generally required, "Individuals are not required to exhaust administrative
11 remedies when the administrative agency is acting unlawfully." *Id.* at 639. The court held that
12 "although the Act affords no specific review procedure for the illegal action by the Secretary, the court
13 may rely on its general federal jurisdiction pursuant to 28 U.S.C.A. § 1337 (original jurisdiction for civil
14 actions arising under any Act of Congress regulating commerce) to adjudicate this dispute." *Id.* The
15 court relied on *Leedom v. Kyne*, 358 U.S. 184 (1958), in which the Supreme Court held that a district
16 court had jurisdiction under 28 U.S.C. § 1337 to enjoin a federal agency when the agency was acting
17 in excess of its delegated powers and contrary to a specific provision in its authorizing Act.

18 The exception recognized in *Leedom* is a narrow one. The Ninth Circuit recently addressed
19 *Leedom* in *AMERCO v. N.L.R.B.*, 458 F.3d 883 (9th Cir. 2006). Although *AMERCO* arose in the labor
20 context, as did *Leedom*, the Court finds *AMERCO* and its discussion of *Leedom* instructive. In
21 *AMERCO*, the NLRB brought an administrative complaint against AMERCO for alleged unfair labor
22 practices. After the administrative trial was underway, AMERCO filed suit in district court seeking an
23 injunction to stop the administrative proceeding on due process grounds. AMERCO alleged that the
24 NLRB "had tried them in absentia for the first three weeks of the hearing, in an effort to gain an unfair
25 advantage from their absence and lack of representation, and with full knowledge that a complaint
26 ultimately would be filed against them." *Id.* at 886. The district court dismissed AMERCO's lawsuit
27 for lack of jurisdiction, holding that AMERCO was required to exhaust its administrative remedies, and
28 ultimately seek judicial review in the Court of Appeals. *Id.*

1 The Ninth Circuit affirmed. The court held that "[r]egardless of the viability of AMERCO's
2 constitutional claims, the district court lacked jurisdiction to remedy them" because Section 10 of the
3 National Labor Relations Act vests exclusive jurisdiction in the Court of Appeals to review errors
4 arising from unfair labor practice proceedings. *Id.* at 887. Section 10 of the NLRA provides,

5 Any person aggrieved by a final order of the Board granting or denying in whole or in
6 part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have
7 been engaged in . . . by filing in such a court a written petition praying that the order of the Board be modified or set aside.

8 29 U.S.C. § 160(f). The Ninth Circuit noted that "Section 10 provides no separate process for obtaining
9 injunctive relief prior to the issuance of a final order." *Id.* at 887. In addition, the court emphasized that
10 "the exception advanced by AMERCO is inconsistent with the doctrine of administrative exhaustion.
11 Exhaustion serves two vital purposes: first, to give the agency an initial opportunity to correct its
12 mistakes before courts intervene; and second, to enable the creation of a complete administrative record
13 should judicial review become necessary." *Id.* at 888. The Ninth Circuit also rejected AMERCO's
14 argument that the district court had jurisdiction under *Leedom*. The court noted that *Leedom* arose in
15 the context of a Section 9 representation proceeding, for which Congress has not provided any judicial
16 review. *Id.* at 888-89. "The exception[] of *Leedom* derive[s] from the inequity that would result if no
17 court could review claims that the NLRB acted unconstitutionally or contrary to statutory authority in
18 a Section 9 determination." *Id.* at 889. "[W]e hold that the *Leedom* . . . exception[] does not apply
19 outside the context of Section 9 actions or other situations in which meaningful judicial review is
20 unavailable." *Id.* at 889-90.

21 As in *AMERCO*, the federal securities laws provide for exclusive judicial review of SEC orders
22 in the Court of Appeals, and indeed the language of Section 10 of the NLRA is very similar to the
23 language of Section 25(a) of the Exchange Act and Section 9(a) of the Securities Act. Similarly, the
24 federal securities laws do not provide for a separate process for obtaining injunctive relief prior to the
25 issuance of a final order. *AMERCO* emphasized the importance of administrative exhaustion, and the
26 narrowness of the *Leedom* exception. Pierce contends that exhaustion should be excused because
27 pursuit of administrative remedies would be futile. Pierce states that when he first learned that the SEC
28 was contemplating a second enforcement action, he submitted a "Wells submission" to the SEC

1 asserting that a second administrative proceeding would be barred by res judicata, and that the SEC
2 nevertheless initiated the second proceeding. However, as the SEC notes, under Section 554(d)(2) of
3 the APA, the members of a body of an agency, such as the SEC, are expressly permitted to participate
4 both in the "investigative or prosecuting functions for an agency" and the agency's review of any
5 recommended decision from that proceeding. *See* 5 U.S.C. § 554(d)(2)(c); *see also San Francisco*
6 *Mining Exch. v. SEC*, 378 F.2d 162, 167-68 (9th Cir. 1967) (holding that fact that Commission "had
7 considered the staff report in determining whether to authorize the proceeding" "does not tend to show
8 that any Commissioner had prejudged the case, or was biased and prejudiced concerning it"). The
9 pending administrative proceeding affords a full range of quasi-judicial review and protections to Pierce,
10 and Pierce has the opportunity to submit any relevant evidence and assert his defenses, including the
11 arguments that the proceeding is barred by res judicata and equitable estoppel. *See* 17 C.F.R. §
12 201.220(c) (providing that "[a] defense of res judicata, statute of limitations or any other matter
13 constituting an affirmative defense shall be asserted in the answer" to an Order Instituting Proceedings).
14 Numerous courts have rejected similar efforts to enjoin SEC administrative proceedings, and
15 held that parties must exhaust administrative remedies prior to seeking judicial review, including when
16 the party seeking the injunction claims that the administrative proceedings violate due process. *See SEC*
17 *v. R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir. 1963) (reversing district court order enjoining SEC
18 administrative proceeding because administrative remedies not exhausted; plaintiff claimed due process
19 violation and that SEC Commissioner should be disqualified); *Wolf Corporation v. SEC*, 317 F.2d 139,
20 142 (D.C. Cir. 1963) (upholding refusal to enjoin SEC's stop order proceeding against issuer's proposed
21 securities registration, and holding that claims relating to evidence allegedly seized in violation of the
22 Fourth Amendment and challenges to the Commission's authority must first be made to the
23 Commission); *First Jersey Sec. Inc. v. SEC*, 553 F. Supp. 205, 208-09 (S.D.N.J. 1982) (refusing to
24 enjoin SEC administrative proceedings, where plaintiff alleged various constitutional and statutory
25 violations because Second Circuit precedent mandates that "the procedures established for review of
26 SEC actions deprive this court of jurisdiction over suits that seek to interrupt the agency proceedings").
27 Pierce is correct that in exceptional circumstances courts have enjoined administrative
28 proceedings, such as *Martin v. Hodel*, 692 F. Supp. 637 (W.D. Va. 1998), where the court found the

1 administrative agency was acting ultra vires. Pierce also relies on *Continental Can Company, U.S.A.*
2 *v. Marshall*, 603 F.2d 590 (7th Cir. 1979), and *Safir v. Gibson*, 432 F.2d 137 (2d Cir. 1970). However,
3 *Martin*, *Continental Can*, and *Safir* are distinguishable because in those cases, the plaintiffs filed suit
4 in federal court after they had prevailed on the merits in administrative proceedings, and then were
5 subject to new administrative proceedings charging them with liability based on the precise conduct
6 adjudicated in the earlier proceedings. The courts enjoined the new administrative proceedings on the
7 ground that those proceedings were vexatious, harassing, and barred by res judicata. Here, in contrast,
8 in the first administrative proceeding Pierce was found liable and ordered to pay disgorgement based
9 on sales of stock from his personal account, while the second administrative proceeding names Pierce,
10 Newport and Jenirob, and seeks disgorgement based on sales of stock through Newport and Jenirob.
11 On the face of it, Pierce's two administrative proceedings are not analogous to the circumstances
12 presented in *Martin*, *Continental Can*, and *Safir*.

13 Moreover, in *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 433 (7th Cir. 1991), the Seventh
14 Circuit questioned the continuing vitality of *Continental Can* in light of the Supreme Court's decision
15 in *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980. In *R.R. Donnelley*, the court held that
16 even when the second administrative proceeding relitigates the issues raised in a prior action, federal
17 courts lack jurisdiction to intervene in the administrative process because there is no final administrative
18 order subject to judicial review. In *R.R. Donnelley*, a commercial printer filed a petition in the Court
19 of Appeals seeking review of the FTC's denial of the printer's motion to dismiss an administrative
20 complaint. The printer argued that the administrative complaint was barred by issue preclusion because
21 a district judge had previously found, in a separate proceeding and after a trial, in the printer's favor.
22 The printer argued, as Pierce does here, that the injury it was suffering was being required to undergo
23 the costly and time-consuming administrative process. *Id.* at 430.

24
25
26
27
> We may assume that the ALJ is mistaken, that the FTC will eventually hand Donnelley the laurel. We may even assume that if the FTC does not do this, a court will set aside its order. Still, this case is far from over. The long road ahead is precisely Donnelley's beef. [*FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980) (*Socal*),] held that the filing of a complaint is not a final decision even though it finally determines that there is reasonable cause to proceed. Resolution of an issue is one thing, resolution of the case another.

28 *Id.* at 431. The court held that there is no civil "right not to be tried": "An inadequate opportunity

(sometimes even an inadequate incentive) to present one's case the first time may permit another shot in civil litigation. Legal errors by the judge may be overturned and the case re-done. Preclusion in a civil case creates a 'right not to be tried' only in the sense that it creates a right to win; but many legal doctrines do that without also creating a right to interlocutory appellate review." *Id.* at 432-33. With regard to *Continental Can*, the Seventh Circuit noted that *Continental Can* did not discuss jurisdiction or the final order rule, and "whether there is *any* life to *Continental Can* after *Socal* remains to be seen." *Id.* at 433 (emphasis in original).

This Court emphasizes that it is not ruling on the merits of Pierce's res judicata defense, or any other defense; those defenses should be made to the SEC, and ultimately the Court of Appeals if Pierce does not prevail before the agency. However, the Court does find that on this record, Pierce has not shown that shown that this case falls within the narrow class of cases where administrative exhaustion is excused and federal court intervention in ongoing administrative proceedings is warranted.

II. *SEC v. Pierce*, 10-80129 MISC

The SEC has filed this application to enforce the disgorgement order pursuant to Section 20(c) of the Securities Act and Section 21(e) of the Exchange Act. Those sections provide that "Upon application of the Commission, the district courts of the United States . . . 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." 15 U.S.C. § 77r(c) (Securities Act); *see also* 15 U.S.C. § 78u(e) (similar provision regarding Exchange Act). Because they are initiated by an "application," a Section 20(c) proceeding and a Section 21(e) proceeding may be decided in a summary proceeding rather than in a formal civil action under the Federal Rules of Civil Procedure. *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). The Ninth Circuit has explained,

> Summary proceedings are particularly appropriate where the merits of the dispute have already been litigated extensively before the NASD, the Commission, and on appeal to a circuit court, where the only remedy sought is enforcement of the previously upheld order. . . .
>
> Section 21(e) is an enforcement mechanism; its purpose is to ensure that NASD members comply with the Commission. There is no evidence in the statute or its legislative history from which to infer that § 21(e) was enacted to create another layer of adjudication. Rather, § 21(e) authorizes district courts to issue writs of mandamus,

United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

> injunctions, and orders commanding NASD members, who violate Commission orders, to comply with the Commission or face federal contempt charges. The forcefulness of § 21(e)'s language is further evidence that Congress intended to authorize a more summary procedure. By the time a § 21(e) application is filed by the Commission, the time and opportunity for adjudicating the merits of the claim have been exhausted; all that is left to do is enforce the order. Appellants should not be permitted to exploit this statutory provision to delay and prolong the enforcement of a duly issued order of the Commission.

Id. at 657-58. In a summary proceeding, the respondent must be provided an opportunity to respond to the application. *Id.* at 658-59. However, the respondent cannot relitigate the merits. *Id.* at 658.

Here, Pierce does not dispute that the administrative disgorgement order is final. Instead, Pierce seeks a temporary stay of the enforcement proceeding until the propriety of the new administrative action is litigated. As discussed *supra*, the Court concludes that Pierce must exhaust his administrative remedies in the new action, and thus this Court lacks jurisdiction over his federal action. Further, the new administrative action has no impact whatsoever on Pierce's obligation to pay the disgorgement order. Pierce cannot and does not challenge the validity of the disgorgement order before this Court; instead, he challenges the validity of the new administrative action. As the SEC argues, if Pierce is found liable in the new administrative proceeding, Pierce must pay the current $2 million disgorgement amount plus any additional disgorgement ordered based on the second action. If, on the other hand, Pierce is found not liable in the new administrative proceeding, Pierce must still pay the $2 million disgorgement order.

Accordingly, the Court GRANTS the SEC's application enforcing the administrative disgorgement order. The Court orders that within 21 days from the date of this Order, respondent Gordon Brent Pierce shall comply with the Commission's administrative disgorgement order by paying the full amount of $2,043,362 in disgorgement, plus pre-judgment and post-judgment interest at the rate established by 26 U.S.C. § 6621(a)(2), beginning July 1, 2004 through the last day of the month preceding the month in which payment is made, compounded quarterly. Through May 31, 2010, total pre-judgment and post-judgment interest was $867,495. Payment of disgorgement and interest shall be made to the Commission, in accordance with Rule 601 of the Commission's Rules of Practice, 17 C.F.R. § 201.601, by United States postal money order, wire transfer, certified check, bank cashier's check, or bank money order made payable to the Securities and Exchange Commission. Payment shall be

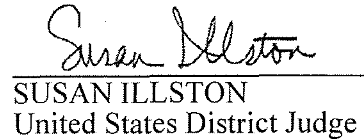
accompanied by a letter that identifies the name and number of the administrative proceeding against Pierce and that identifies Pierce as the respondent making payment. A copy of the letter and the instrument of payment shall be sent to counsel for the Division of Enforcement.

CONCLUSION

For the foregoing reasons, the Court DENIES Pierce's motion for a TRO, preliminary injunction and stay (Docket No. 6 in C 10-3026 SI) and GRANTS the SEC's application for an order enforcing administrative disgorgement order (Docket No. 1 in C 10-80129 MISC). The Court DISMISSES *Pierce v. SEC*, C 10-3026 for lack of jurisdiction and failure to exhaust administrative remedies. The clerk shall close both files.

IT IS SO ORDERED.

Dated: September 2, 2010



SUSAN ILLSTON
United States District Judge

Exhibit 24

Alderman, William

From: Buchholz, Steven [BuchholzS@sec.gov]
Sent: Tuesday, February 01, 2011 3:04 PM
To: Alderman, William
Cc: Wells, Christopher; Dicke, Michael S.; Yun, John S.
Subject: RE: SEC v. Pierce

Bill,

The payment of $510,459.65 was received.

Steve

From: Alderman, William [mailto:walderman@orrick.com]
Sent: Monday, January 31, 2011 7:16 PM
To: Buchholz, Steven; Dicke, Michael S.; Yun, John S.
Cc: Wells, Christopher
Subject: RE: SEC v. Pierce

Dear Colleagues – The final $510,459.65 due from Brent Pierce under Judge Illston's September 2 and December 17 orders was wired today from our trust account to the SEC Treasury, in accordance with your prior instructions. Please confirm receipt. Thanks, and best regards. Bill

ORRICK

WILLIAM F. ALDERMAN
Partner

ORRICK, HERRINGTON & SUTCLIFFE LLP
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO, CA 94105-2669

tel 415-773-5944
fax 415-773-5759
walderman@orrick.com
bio | vcard

www.orrick.com

From: Buchholz, Steven [mailto:BuchholzS@sec.gov]
Sent: Tuesday, January 04, 2011 5:28 PM
To: Alderman, William
Cc: Dicke, Michael S.; Yun, John S.; Wells, Christopher
Subject: RE: SEC v. Pierce

We have confirmation from DC that the $1 million wire was received on 12/23/10. The current amount remaining is $510,459.65. If payment is made by the end of January, that is the total amount due; on February 1 the amount will increase to $511,735.80 (these are the same amounts that were on the spreadsheet I forwarded).

Steve

From: Alderman, William [mailto:walderman@orrick.com]
Sent: Thursday, December 23, 2010 1:40 PM
To: Dicke, Michael S.
Cc: Yun, John S.; Buchholz, Steven; Wells, Christopher
Subject: SEC v. Pierce

Hi Mike – This confirms that we have sent a wire today in the amount of $1 million from our trust account to the SEC Treasury, in accordance with your prior instructions, to be applied to the amounts due from Brent Pierce under Judge Illston's September 2 and December 17 orders. Please confirm receipt. Thanks.

Here's wishing a good holiday weekend and happy new year to all. Bill

ORRICK

WILLIAM F. ALDERMAN
Partner

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IRS Circular 230 disclosure:
To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication, unless expressly stated otherwise, was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

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For more information about Orrick, please visit http://www.orrick.com/
==

Exhibit 25

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
SAN FRANCISCO REGIONAL OFFICE
44 Montgomery Street
SUITE 2600
SAN FRANCISCO, CALIFORNIA 94104

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

August 11, 2008

VIA U.S. MAIL

Christopher B. Wells, Esq.
Lane Powell P.C.
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

Re: In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce (SF-2989-C); Admin. Proceeding File No. 3-13109

Dear Mr. Wells:

Pursuant to Rule 230 of the Securities and Exchange Commission ("Commission") Rules of Practice, enclosed is a list of documents, CDs, and other media that are being made available to your client for inspection and copying at the Commission's San Francisco Regional Office.

You may inspect these materials in our offices before requesting that any copies be made. Alternatively, you may request that copies be made and sent to you from the list. In either event, pursuant to Rule 230(f), you will be responsible for the cost of photocopying the documents and copying or printing from the other media. If you request that we copy the documents and send them to you, the cost per page will be no more than $0.24, exclusive of any applicable shipment cost and sales taxes. We estimate that the materials include about 60,000 pages and 30 CDs or DVDs, in addition to one hard drive.

Please feel free to call me at 415-705-8101 if you wish to discuss this matter.

Sincerely,

Steven D. Buchholz
Staff Attorney

Encl: Document List

DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce (SF-2989-C)

Administrative Proceeding File No. 3-13109

1) Transcripts and transcript exhibits from investigative testimony;

2) Subpoenas issued by the Division of Enforcement ("Division");

3) Written requests to persons not employed by the Commission to provide documents or to be interviewed and correspondence related to the requests;

4) Hard drive image obtained by the Division from Nicholas Thompson (one external hard drive, 120 GB);

5) Documents and two CDs obtained by the Division from National Financial Services;

6) Documents and one CD obtained by the Division from the NASD;

7) Documents and ten CDs obtained by the Division from vFinance Investments, Inc. ("vFinance");

8) Documents obtained by the Division from Transfer Online;

9) Documents obtained by the Division from X-Clearing Corporation;

10) Documents obtained by the Division from Nicholas Thompson;

11) Documents obtained by the Division from Brown Brothers Harriman;

12) Documents obtained by the Division from Lexington Resources, Inc. ("Lexington");

13) Documents obtained by the Division from Ivan Saldana;

14) Documents obtained by the Division from Knight Equity Markets;

15) Documents obtained by the Division from Grant Atkins;

16) Documents obtained by the Division from International Market Trend;

17) Documents obtained by the Division from Brent Pierce;

18) Documents obtained by the Division from Investor Communications International;

19) Documents and one CD obtained by the Division from American News Publishing;

DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

20) Documents, five CDs, and three DVDs obtained by the Division from Leonard Braumberger;

21) Documents and one CD obtained by the Division from Piper Jaffray;

22) Documents obtained by the Division from Richard Elliot-Square;

23) Documents obtained by the Division from Fletcher Lewis Engineering;

24) Documents obtained by the Division from Stephanie Ebert;

25) Documents obtained by the Division from Vaughn Barbon;

26) Documents obtained by the Division from Bank of America;

27) Documents obtained by the Division from JP Morgan/Chase/Bank One;

28) Documents obtained by the Division from SG Martin Securities;

29) Two CDs obtained by the Division from Raymond James Financial;

30) Documents obtained by the Division from Peacock, Hislop, Staley & Given;

31) Documents obtained by the Division from Pennaluna & Co.;

32) Documents obtained by the Division from Saturna Capital;

33) Documents and one CD obtained by the Division from TD Ameritrade;

34) Documents obtained by the Division from Deutsche Bank Alex Brown;

35) Documents and one CD obtained by the Division from Pinnacle Energy Services;

36) Documents and one CD obtained by the Division from Pershing LLC;

37) Documents obtained by the Division from Legent Clearing;

38) Documents and one CD obtained by the Division from First Southwest;

39) Documents obtained by the Division from Robert L. Stevens;

40) One CD obtained by the Division from Pink Sheets LLC;

41) Documents obtained by the Division from James Dow;

42) Documents obtained by the Division from Whitley Penn;

43) Documents and one CD obtained by the Division from Verizon Wireless;

DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

44) Documents obtained by the Division from James Matthews;

45) Documents obtained by the Division from OptionsXpress;

46) One CD with electronic documents obtained by the Division via email from vFinance, Patrick Hayes, Amy LaRochelle, John Matthews, James Dow, OptionsXpress, and Peacock, Hislop, Staley & Given;

47) Formal Order of Investigation regarding Lexington;

48) Wells submission of Lexington;

49) Wells submission of Grant Atkins; and

50) Wells submission of Gordon Brent Pierce.

With respect to the documents produced by vFinance Investments, there are many pages of documents (such as supervisory manuals) that are not relevant to the current administrative proceeding, but will nonetheless be made available for your inspection because they were produced during the same investigation.

Exhibit 26

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** **James T. Kelly**

NOTICE THAT THE DIVISION OF ENFORCEMENT HAS MADE ITS INVESTIGATIVE FILE AVAILABLE FOR INSPECTION AND COPYING

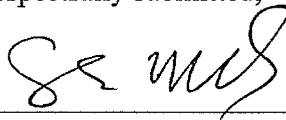
Pursuant to the Order dated June 24, 2010, the Division of Enforcement ("Division") files herewith copies of its June 15, 2010 written notices to Respondents Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. making the Division's investigative file available for inspection and copying pursuant to Securities and Exchange Commission ("Commission") Rule of Practice 230. The written notices informed Respondents as to the size and location of the Division's investigative file and included an attached Document List describing categories of documents included in the investigative file.

The Division has included for inspection and copying all documents received from foreign securities regulators (see category number 49 of the Document List), but intends to withhold from inspection and copying all correspondence between the foreign securities regulators and the Commission's Office of International Affairs pursuant to Sections 24(d) and 24(e) of the Securities Exchange Act of 1934, including cover letters for the productions

received from the foreign securities regulators. The Division does not intend to withhold any other documents from its investigative file from inspection and copying.

Dated: June 24, 2010

Respectfully submitted,



John S. Yun
Steven D. Buchholz
44 Montgomery Street, Suite 2600
San Francisco, CA 94104
Phone: (415) 705-2500
Fax: (415) 705-2501
Attorneys for DIVISION OF ENFORCEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
SAN FRANCISCO REGIONAL OFFICE
44 Montgomery Street
SUITE 2600
SAN FRANCISCO, CALIFORNIA 94104

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Christopher B. Wells, Esq.
Lane Powell P.C.
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Mr. Wells:

Pursuant to Rule 230 of the Securities and Exchange Commission ("Commission") Rules of Practice, enclosed is a list of documents, CDs, and other media that are being made available to your client for inspection and copying at the Commission's San Francisco Regional Office.

You may inspect these materials in our offices before requesting that any copies be made. Alternatively, you may request that copies be made and sent to you from the list. In either event, pursuant to Rule 230(f), you will be responsible for the cost of photocopying the documents and copying or printing from the other media. If you request that we copy the documents and send them to you, the cost will be no more than $0.24 per page, exclusive of any applicable shipment cost and sales taxes. We estimate that the materials include about 70,000 pages and 32 CDs or DVDs, in addition to one hard drive.

Please contact me if you have any questions about inspecting or copying the documents.

Sincerely,

Steven D. Buchholz
Staff Attorney, Division of Enforcement

Encl: Document List

DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. Administrative Proceeding File No. 3-13927

1) Transcripts and transcript exhibits from investigative testimony;
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8) Documents obtained by the Division from Transfer Online;
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10) Documents obtained by the Division from Nicholas Thompson;
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UNITED STATES
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44 Montgomery Street
SUITE 2600
SAN FRANCISCO, CALIFORNIA 94104

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Mr. Gordon Brent Pierce
[redacted] Street
West Vancouver, BC V7V 4P3
CANADA

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Mr. Pierce:

Pursuant to Rule 230 of the Securities and Exchange Commission ("Commission") Rules of Practice, enclosed is a list of documents, CDs, and other media that are being made available to you for inspection and copying at the Commission's San Francisco Regional Office.

You may inspect these materials in our offices before requesting that any copies be made. Alternatively, you may request that copies be made and sent to you from the list. In either event, pursuant to Rule 230(f), you will be responsible for the cost of photocopying the documents and copying or printing from the other media. If you request that we copy the documents and send them to you, the cost will be no more than $0.24 per page, exclusive of any applicable shipment cost and sales taxes. We estimate that the materials include about 70,000 pages and 32 CDs or DVDs, in addition to one hard drive.

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Sincerely,

Steven D. Buchholz
Staff Attorney, Division of Enforcement

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44 Montgomery Street
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SAN FRANCISCO, CALIFORNIA 94104

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Newport Capital Corp.
c/o The Belize Bank Limited (registered agent)
60 Market Square
P.O. Box 364
Belize City
BELIZE

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Newport Capital Corp.:

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Staff Attorney, Division of Enforcement

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June 15, 2010

VIA U.S. MAIL

Newport Capital Corp.
c/o Mr. Gordon Brent Pierce
[redacted]
West Vancouver, BC V7V 4P3
CANADA

Re: *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)*

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Staff Attorney, Division of Enforcement

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SAN FRANCISCO, CALIFORNIA 94104

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Jenirob Company Ltd.
c/o Morgan & Morgan Trust Corporation Ltd. (registered agent)
Pasea Estate
Road Town, Tortola
BRITISH VIRGIN ISLANDS

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Jenirob Company Ltd.:

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Staff Attorney, Division of Enforcement

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Exhibit 27

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-3109

In the Matter of **LEXINGTON RESOURCES, INC., GRANT ATKINS, and GORDON BRENT PIERCE,** **Respondents.**	)	**MOTION FOR MORE DEFINITE STATEMENT**

Pursuant to Rule 220(d) of the Rules of Practice, respondent Gordon Brent Pierce moves for a more definite statement of allegations in the Order Instituting Proceedings ("OIP").

Indefinite Allegations

1. In paragraph 1 of the OIP, the term "associates" of Mr. Pierce is not defined. This term is used elsewhere in the OIP, yet nowhere is it defined. The Enforcement Division should be required to define the term, "associates" of Mr. Pierce.

2. In paragraph 2, the OIP alleges that Mr. Pierce provided ineligible capital raising and stock promotional services in exchange for stock option shares registered on Form S-8.

But Lexington Resources issued a number of S-8 shares in a number of grants over a number of years. The OIP does not specify which grants. For example, the largest capital funding took place in 2005 (*see* Form SB-2 dated October 14, 2005), but the OIP does not restrict the allegations to all S-8 grants in 2005 or to any particular grant in any specific year. The Division should be required to specify by date each S-8 grant in which it alleges Mr. Pierce received shares in exchange for capital raising services, each grant that resulted from promotional services and, as to each, also identify which capital raising effort and which stock promotion comprised Mr. Pierce's ineligible services. (This should be done in tabular form, which would better enable Mr. Pierce, the other respondents and the Hearing Officer to track the Division's allegations and proof on issues common to all parties.)

3. In paragraph 6, the OIP alleges that Mr. Pierce "set up" an "offshore entity" that "owned" Lexington Oil and Gas but does not identify the offshore entity to which it refers. The Division should be required to identify this entity.

4. In paragraph 7, the OIP refers to Mr. Pierce's "longtime business associates" and to "his associates" who received Form S-8 shares but again does not identify any of those "associates" with respect to any Form S-8 shares issued under any specific grant during the November 2003 to March 2006 time frame. The Division should be required to identify each such "associate" for each S-8 grant, by name, date of grant and the amount of shares granted. The Division should further be required to identify each recipient of S-8 shares who provided capital raising or stock promotional services for a specific grant and what funding, by date and amount, such services yielded.

5. In paragraph 9, the OIP alleges that Mr. Pierce "served as both a stock promoter and capital-raiser" during the entire period from late 2003 to 2006. But the OIP does not allege that the activities described in paragraph 9 were the only services provided by Mr.

Pierce, nor does it explain which capital financings, by date and amount, were the product of these activities, nor does it explain why Mr. Pierce's managerial services were not the ones for which he was compensated with Form S-8 shares but the unspecified capital raising and stock promotional activities were. The Division should be required either to make the allegation that capital raising or stock promotional services were the only services supplied by Mr. Pierce with respect to each S-8 grant he received (which cannot be done in good faith) or identify which grants resulted from which of these ineligible services and which did not. The Division has further alleged that Mr. Pierce "used some of his S-8 stock to compensate others who helped" raise capital and promote stock but has not identified which individuals, which S-8 stock grants and which transactions are referred to. The Division should be required to identify these transactions by date of the S-8 share grant involved, date of Mr. Pierce's transfer of these S-8 shares, share amount and recipient.

6. In paragraph 15, the OIP again refers to Mr. Pierce's "associates" without identifying them. Paragraph 15 also refers to an "omnibus brokerage account in the United States in the name of the offshore bank" without identifying the brokerage firm, the offshore bank or the account participants in the "omnibus" account. The Division should be required to identify each person included within the meaning of the term "associates" and to identify the offshore bank, the United States brokerage firm, the "omnibus account" and each of the account participants who was an "associate" of Mr. Pierce.

7. In paragraph 17, the OIP alleges that Mr. Pierce owned between 10 and 60 percent of Lexington's outstanding stock from November 2003 to May 2004 and alleges in paragraph 18 that Mr. Pierce's curative Schedule 13D filed on July 25, 2006 was inaccurate. But the OIP does not identify what persons other than those listed in the

Schedule 13D held Lexington stock beneficially owned or controlled by Mr. Pierce. The Division should be required to identify all such persons.

Further Reasons for More Definite Statement

It is impractical, unreasonably burdensome and expensive for Mr. Pierce to speculate about what conduct the Division alleges was unlawful. This is particularly unfair, given that the Division has been investigating Lexington Resources for three years.

One year ago, the Division issued a letter inviting a Wells Committee submission in response to its recommendation to file a civil injunctive action in federal court. (No reference was made to an administrative proceeding, but here we are.) *See* Exhibit A (July 3, 2007 letter to the undersigned) to Brent Pierce's Wells Committee Submission to SEC under 17 CFR §202.5(c), attached as Exhibit 1 hereto. Mr. Pierce provided as much detail as possible to explain his position, despite a lack of clarity as to the basis for the Division's proposal. But in contrast to Mr. Pierce's precision, the Division has backtracked, and supplied far less detail in its OIP. Indeed, the OIP seems designed not to provide notice and an opportunity for a hearing, but rather to provide titillating intrigue for the press.

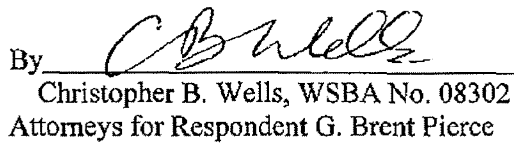
It is hardly fair to Mr. Pierce, or the other respondents, to allow the Division to proceed to a hearing on the fuzzy notice supplied by the OIP. The Division is bound to "ambush" Mr. Pierce. Moreover, the Division's lack of specifics in the OIP subtly and improperly shifts the burden of persuasion upon Mr. Pierce, forcing him to struggle to respond to incomprehensible terms such as "his associates" and a miasma of S-8 grants perhaps but maybe not under attack. Unless the OIP is clarified, the Division will have been allowed to exploit Mr. Pierce's candor in his Wells submission while continuing to hide its own position behind the OIP's elusive allegations. Ultimately, the Division's tactics will not help the Hearing Officer, nor will they benefit the record. But Mr. Pierce will feel the greatest impact.

Conclusion

The Hearing Officer should order the Division to provide the details requested above by amending the OIP and delivering it to counsel no later than October 30, 2008.

DATED this 20th day of August, 2008.

LANE POWELL PC

By 

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

Exhibit 28

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

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT PIERCE'S MOTION FOR MORE DEFINITE STATEMENT

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DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT PIERCE'S MOTION FOR MORE DEFINITE STATEMENT

I. Introduction

The Division of Enforcement ("Division") submits this response to the motion by respondent Gordon Brent Pierce ("Respondent" or "Pierce") for a more definite statement of certain allegations in the Order Instituting Proceedings ("OIP") in this matter. In light of the material already made available to Pierce and his own knowledge of the facts, Respondent has more than enough information to prepare a defense. His motion for a more definite statement is therefore unfounded. Nonetheless, the Division provides Respondent with additional information below, to the extent that such information is relevant to the claims being made against Pierce. Other than the allegations for which the Division provides additional information below, the Division opposes Respondent's motion for more definite statement.

II. Legal Standards For A Motion For More Definite Statement

The Commission's Rules of Practice require that an OIP to which an answer must be filed "shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto." Rule 200(b)(3) (17 C.F.R. § 200.200(b)(3)). Where the OIP provides sufficient information for the respondent to prepare a defense, no more definite statement is necessary. See In re Monetta Financial Services, Inc., Release No. APR-563 (available at 1998 WL 211406) (Apr. 21, 1998) (citing In re Morris J. Reiter, 39 S.E.C. 484, 486 (1959)). Respondents "are not entitled to a disclosure of the evidence upon which the Division intends to rely." Id.

III. The Division's Allegations Against Pierce In the OIP

The Division is bringing a focused case against Pierce, and he possesses all of the necessary information to prepare a defense to the Division's case. The Division alleges that Pierce violated Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") by offering and selling shares of Lexington Resources, Inc. ("Lexington") without filing a registration statement or qualifying for an exemption with regard to his stock offers and sales. The Division

further alleges that because Pierce obtained his shares from Lexington with the goal of selling, rather than holding, them, he engaged in a distribution of the shares as an underwriter. Pierce's status as an underwriter precluded him from relying upon the exemption from registration provided in Section 4(1) of the Securities Act. Pierce therefore sold shares without filing an effective registration statement or qualifying for an exemption from registration.

The OIP therefore alleges in paragraph 14 that Pierce acted as an underwriter in an illegal distribution of stock in Lexington by acquiring shares with a view to distribution and then transferring or selling them almost immediately after he received them. The Division has made its investigative files available to Pierce and he is aware of the issuances of Lexington stock that he received purportedly pursuant to registration statements that Lexington filed on Form S-8. As a result, Pierce does not meet the test for obtaining a more definite statement. Nonetheless, the Division states that Lexington filed registration statements on the following dates and then issued shares to Pierce in the following amounts, which Pierce then transferred or sold as an underwriter in an illegal distribution: November 21, 2003 (1.6 million shares[1]); June 8, 2004 (320,000 shares); February 27, 2006 (500,000 shares); and March 14, 2006 (500,000 shares).

In paragraph 16, the OIP alleges that Pierce sold at least $2.7 million in Lexington stock through an omnibus brokerage account in the U.S. in the name of an offshore bank. The Division has made its investigative files available to Pierce, and he undoubtedly is aware of the identity of the offshore bank and U.S. brokerage firm through which he sold Lexington stock. Nonetheless, the Division states that the U.S. brokerage account was held at vFinance Investments, Inc. and the offshore bank in whose name the omnibus account was held is Hypo Alpe-Adria Bank of Liechtenstein.

The OIP further alleges in paragraphs 17 to 19 that Pierce owned or controlled more than 10 percent of Lexington's stock during specified time periods and failed to file required reports accurately disclosing his beneficial ownership and changes in his ownership. Pierce is aware of the entities he controlled that owned Lexington stock during the periods specified in the OIP. Despite Pierce's knowledge of the underlying facts, the Division states that Pierce's belated

[1] This share amount is adjusted for Lexington's three-for-one stock split on January 29, 2004.

Schedule 13D was inaccurate because it did not include all of the Lexington stock owned by the entities Pierce listed in the 13D and because it failed to include all of the vested stock options that Lexington granted to another entity, International Market Trend. Pierce controlled International Market Trend and its vested stock options, and therefore was required to include those Lexington holdings in reports disclosing his beneficial ownership and changes in his ownership.

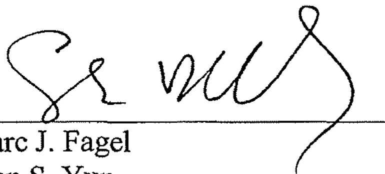
Paragraphs 20 and 21 of the OIP plainly state the specific securities statutes and rules that the Division alleges Pierce violated through his conduct. No more definite statement of the law, or of any facts, is needed to permit Pierce to respond to the allegations against him in the OIP, as he already has responded by admitting or denying the allegations that pertain directly to violations allegedly committed by him. See Answer of G. Brent Pierce at ¶¶ 14, 16, and 17-21.

Pierce requests additional information about other allegations in the OIP that relate to services provided and stock received by associates of Pierce. That information is not necessary to permit Pierce to respond to the allegations against him because it pertains to the violations allegedly committed by Lexington and Respondent Grant Atkins, not by Pierce. Therefore, no more definite statement with regard to that information should be required.

Accordingly, other than the allegations for which the Division has provided additional information above, the Division respectfully requests that the Hearing Officer deny Respondent's motion for more definite statement.

Dated: September 17, 2008

Respectfully submitted,



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