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UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13927

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

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I. INTRODUCTION

The Division's motion for summary disposition rests entirely on its claim that respondent Brent Pierce should be precluded from re-litigating an issue that was decided against him in the First Proceeding when the Hearing Officer concluded that he controlled sales of Lexington stock by his associates Newport and Jenirob. But the Division trespasses on the truism that what is sauce for the goose is sauce for the gander by ignoring the fact that it too is precluded from re-litigating an issue decided against it in the First Proceeding when the Hearing Officer concluded that the proper amount of disgorgement by Pierce did not include the profits he allegedly realized from those same sales by Newport and Jenirob.

The Division cannot have it both ways. Each argument it makes in support of its plea for collateral estoppel establishes even more powerfully that its attempt to re-litigate a remedy it sought but failed to obtain in the First Proceeding is barred by res judicata. If the Division truly believed it was entitled to seek disgorgement of profits Pierce realized through Newport and Jenirob, it was obligated to litigate that claim to conclusion in the First Proceeding.

Having put the claim in play, the Division cannot abandon it mid-stream in the First Proceeding and ask for a "do-over" by bringing a second one. Its motion for summary disposition should be denied and Pierce's motion granted because this duplicative Second Proceeding is barred by res judicata.

II. THE DIVISION LITIGATED THE ISSUE OF PIERCE'S SALE OF LEXINGTON STOCK THROUGH HIS ASSOCIATES NEWPORT CAPITAL AND JENIROB

From the outset of these two proceedings, the Division has asserted that "Pierce and ***his associates*** resold their stock to public investors through an account at an offshore bank . . . ."

(Wells Ex. 2 at 1, emphasis added).[1] Additionally, it alleged (and continues to allege) that Pierce's personal sale of Lexington stock "was part of a larger, on-going scheme" (Wells Ex. 3 at 1); Division's Motion for Sanctions and Entry of Default at 1. The evidence in the first hearing showed that two of Pierce's alleged associates were Newport Capital and Jenirob and that the offshore bank was Hypo Bank. The Division presented evidence about this allegation throughout the first hearing and through the introduction of new evidence after the hearing. *See, e.g.*, Buchholz Exs. V, W.

This overlap—indeed, identity—of evidence clearly demonstrates that these two cases "arise from the same transactional nucleus of operative facts," *Stratosphere Litig. LLC v. Grand Casinos*, 298 F.3d 1137, 1143 (9th Cir. 2002), which the Division acknowledges is the key issue for determining claim preclusion. Division of Enforcement's Motion for Summary Disposition ("Division's Br.") at 15. The Division attempts to avoid the obvious connection between Pierce's sale of Lexington stock through his personal account and his sale of the same stock through his nominees' accounts by stating: "In contrast, the present proceeding concerns ***different transactions***, involving ***different accounts*** and securities sold to ***different investors***" (Division's Br. at 16, emphasis added). But this merely states a distinction without a legal difference. Here, the required application of res judicata focuses on whether such supposedly different events arise out of the same alleged scheme, and the Division itself has consistently described Pierce's activities as a single scheme from the outset.

Apparently, the Division sees no irony when it now argues that Pierce's responsibility for registration violations due to his Lexington S-8 share resales through Newport and Jeniroob turns on "different transactions involving different accounts and securities sold to different investors."

[1] "Wells Ex. __" refers to the exhibits to the Declaration of Christopher B. Wells filed in support of Pierce's Motion for Summary Disposition; "Buchholz Ex. __" refers to exhibits to the Declaration of Steven D. Buchholz filed in support of the Division's Motion for Summary Disposition.

Yet, the Division reprises at page 24 of its motion the very argument it made in pleadings throughout the First Proceeding. From the First OIP on through its post-hearing brief, the Division asserted that Pierce was a statutory underwriter of an illegal distribution of several million Lexington S-8 shares through Newport, producing over $13 million in resale proceeds that yielded profits to Pierce, Newport, and Jenirob. Never did the Division contend that each separate resale by Newport, Jenirob, or any other "associate" of Pierce had to be analyzed separately to determine Pierce's responsibility for registration violations. Instead, the Division has consistently claimed from the very outset, beginning with the First OIP, that Pierce's allegedly "illegal distribution of Lexington stock" consisted of "deposit[ing] about 3 million Lexington shares in accounts at an offshore bank" and that "[b]etween 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 proceeds of over $13 million" (Wells Ex. 2 ¶ 15).

The Division never wavered from its contention in the First Proceeding that the sales of Lexington shares from Pierce's personal account at the offshore bank were part of the same alleged $13 million scheme in which sales were made by Pierce through the accounts of Newport, Jenirob, and other alleged "associates" of Pierce at the same offshore bank. Indeed, the Division highlighted that contention in two of the pleadings it filed in December 2008. In its motion for summary disposition, it focused on the sales from Pierce's personal account because Pierce had admitted them in his answer to the First OIP (Buchholz Ex. B). The Division now claims that its summary disposition motion "clarified" its allegations in the First OIP as relating only to the sales from Pierce's personal account (Division's Br. at 2-3).

But the Division ignores that, on the same day it filed its motion for summary disposition in the First Proceeding, it also filed its pre-hearing brief in which it continued to portray the sales in Pierce's personal account as "part of a larger, on-going scheme to acquire and sell Lexington shares without the necessary registration and disclosure" (Wells Ex. 3 at 1). It detailed that alleged "larger scheme" as involving the very sales by Newport and Jenirob for which it again seeks disgorgement here:

- "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...within days of acquiring them" (*Id.* at 2, emphasis added).

- "Given the millions of Lexington shares that Pierce transferred to Newport Capital and that Newport Capital 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)" (*Id.* at 3).

Indeed, the Division's pre-hearing brief divided its discussion of Pierce's sales into two sections, a short one headed: "The Lexington Stock Sales Covered By The Motion For Summary Disposition" (*id.* at 5-6) and a longer one headed: "The Other Lexington Stock Transactions Conducted Through Newport Capital" (*Id.* at 6-9). The latter section describes the very sales for which the Division renews its request for disgorgement in this duplicative Second Proceeding, making there the same arguments on which it relies here that Pierce "used Newport...to distribute 2.52 million post-split Lexington shares" (*id.* at 6), that Newport "was essentially serving as a disguised conduit for Lexington's sale of those shares to public investors" (*id.* at 8), and that the 2.52 million shares Pierce transferred to Newport and the 300,000 shares he sold through a personal account comprised the same 2.82 million shares Pierce received under four Lexington Form S-8 registration statements (*Id.* at 9).

Nor can the Division escape the irony that it sought to base Pierce's liability in the First

Proceeding on his own Schedule 13D disclosures that he was the beneficial owner of Lexington shares held by Newport and that his beneficial ownership of Lexington shares rose and fell with the Newport transactions for which the Division takes a second shot at disgorgement here.[2]

Additionally, the transparent disingenuousness of the Division's position is exposed by its argument that Pierce is collaterally estopped from contesting any issues regarding these supposedly "different" transactions in the Second Proceeding because his liability for them was decided in the First Proceeding. The Division asserts "because the Hearing Officer determined in the prior proceeding that Pierce beneficially owned both Newport and Jenirob, and that he directed sales of Lexington shares in the Newport and Jenirob accounts at the Lichtenstein bank, he is also collaterally estopped from litigating those factual issues here" (Division's Br. at 10). This contention that the issues regarding sales from Newport and Jenirob accounts were not only litigated, but decided, clearly demonstrates that the two proceedings arise from the same operative facts. Accordingly, this Second Proceeding is barred by res judicata.

III. THE HEARING OFFICER'S INITIAL DECISION DID NOT PREVENT THE DIVISION FROM LITIGATING THESE CLAIMS IN THE FIRST OIP

Res judicata bars claims that were brought or that could have been brought. *Dynaquest Corp. v. U.S. Postal Service*, 242 F.3d 1070, 1075 (D.C. Cir. 2001) (res judicata "precludes the parties or their privies from relitigating issues that were or could have been raised" in an earlier action); *Owens v. Kaiser Found. Health Plan*, 244 F.3d 708, 713 (9th Cir. 2001) (res judicata "bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action"); *San Remo Hotel v. City and Cnty. of S.F., Cal.*, 545 U.S. 323, 336 n.16 (2005) (same). The Division, perhaps recognizing that it not only actually litigated the claims regarding

[2] The Division repeatedly claims erroneously that Pierce admitted that he was the beneficial owner of Newport (*see, e.g.*, Division's Br. at 8, 12). In truth, Pierce admitted beneficial ownership of the Lexington ***shares*** held by Newport as an "affiliate," but never suggested that he owned the ***company*** itself.

Newport and Jenirob, but also could have done more to seek a favorable resolution of those claims in the First Proceeding, attempts to blame its failure on the evidentiary ruling and Initial Decision of the Hearing Officer who declined to rely on the new evidence in calculating the disgorgement remedy. This proves too little as the Division well knows.

The Rules of Practice provided a clear path for the Division to seek a favorable resolution of its request that Pierce disgorge $7.5 million in profits of Newport and Jenirob before the Commission's final decision on the amount of Pierce's disgorgement. Following the Hearing Officer's Initial Decision, the Division had at least four opportunities to further pursue its litigation position. Under Rule 200(d)(1), it could have moved "at any time" for the Commission to amend the OIP "to include new matters of fact or law" relating to its disgorgement claim. Second, under Rule of Practice 410 the Division could have filed a petition for review with the Commission of the Hearing Officer's Initial Decision. Third, it could have pursued an interlocutory appeal to the Commission of the Hearing Officer's evidentiary ruling under Rule 400(a). And fourth, it could have asked the Commission to admit the Division's evidence under Rule 452 for purposes of calculating disgorgement.

Nothing in the Hearing Officer's order or Initial Decision foreclosed any of these avenues for challenging the Hearing Officer's calculation of the disgorgement remedy. The Division does not explain, nor apparently can it, why it did not choose any of these paths rather than now bringing a separate proceeding. That it now also seeks to collaterally estop Pierce from contesting this Second Proceeding only emphasizes the inconsistency of the Division's positions. The doctrine of res judicata is designed to prevent such piecemeal litigation. *Int'l Union of Operating Engineers v. Karr*, 994 F.2d 1426, 1430-31 (9th Cir. 1993) ("Because the . . . claim in

this matter could have been brought in the prior actions, the district court properly avoided piecemeal litigation by invoking the doctrine of res judicata").

Moreover, not only could the full extent of the Division's disgorgement have been easily and efficiently litigated in the First Proceeding—in point of fact it ***was***. The Division submitted evidence regarding Pierce's alleged sales through Newport and Jenirob, asserting that the evidence was both relevant and material, Pierce opposed its use, and the Hearing Officer accepted the evidence for the purpose of deciding Pierce's liability. This further emphasizes that both proceedings spring from the same nucleus of operative facts.

Finally, the Division argues at page 16 that the Hearing Officer's decision rejecting disgorgement of Pierce's profits through Newport and Jenirob was merely "procedural." But that decision reflected only an initial determination that she could not order disgorgement of Pierce's profits through Newport and Jenirob under the existing OIP. In so ruling, the Hearing Officer also referred to her earlier ruling that, pursuant to Rule of Practice 630, the Division had to fix the disgorgement amount so that Pierce could evaluate if he wanted to present evidence at the hearing concerning his ability to pay (Wells Ex. 13 at 1). However, as the Hearing Officer indicated, the Division could have moved the Commission to amend the OIP (*id.* at 2 n.3). That the Division for whatever reason decided not to accept that invitation does not change the fact that this duplicative proceeding must be dismissed by application of res judicata.[3]

IV. THE CASE LAW CITED BY THE DIVISION DOES NOT SUPPORT ITS POSITION

In support of its argument that res judicata should not bar its attempted second bite at the apple, the Division cites a handful of cases. None of these cases is relevant to the circumstances

[3] Surely the Division is not trying to exploit the Rule 630 protection available to Pierce—a protection he never requested—to avoid the Division's obligation to follow Commission Rules or suffer the consequences of its actions, including the application of res judicata.

here. The Division principally relies on *Greenberg v. Board of Governors*, 968 F.2d 164, 168 (2d Cir. 1992) for the proposition that res judicata may not, in some circumstances, apply even where a second action involves the "same parties and similar facts and legal issues" (Division's Br. at 15). However, the *Greenberg* court was not (as the Hearing Officer is here) considering whether to give res judicata effect to a prior, contested adjudication. *See Faggiano v. Eastman Kodak Co.*, 378 F. Supp. 2d 292, 304-05 (W.D.N.Y. 2005) (explaining *Greenberg*'s limited precedential value on multiple grounds including that it focused on a "letter issued by an administrative agency [that] was not adjudicative").

The *Greenberg* court was evaluating the preclusive effect of prior settlements between two individuals and the OCC, each of which had resulted in a categorically different remedy from the one sought in the later proceeding.[4] In so doing, the court based its decision entirely on its interpretation of express, limiting language contained in the settlement agreements and communications. *Faggiano*, 378 F. Supp. 2d at 305 ("the consent order relied on by the defendants in *Greenberg* for the res judicata argument contained language specifically stating that the order would not preclude further action"). One of the settlements came in the form of a letter that expressly stated that it did "not affect further possible administrative action." *Greenberg*, 968 F.2d at 169. A second letter sent by the OCC was interpreted as a statement that it had agreed to settle certain transactions, but not others. *Id.* As to a third prior settlement, the *Greenberg* court acknowledged that "[t]o the extent that the transactions at issue in [those prior proceedings] are also at issue here, the [petitioners] would have a credible preclusion argument" (*id.* at 170), but the court declined to apply res judicata based only on the individuals' "failure to precisely identify which transactions considered [in the later proceeding] were also the subject of

[4] The prior settlements were for a civil monetary penalty and a cease-and-desist order. The later action sought the debarment of the individuals from the affairs of any federally supervised financial institution. 968 F.2d at 168-70.

the [earlier] settlement." *Id.* Here, it is indisputable that the Division now seeks a second opportunity to recover disgorgement based on the same transactions and alleged scheme it litigated in the First Proceeding.

The Division also cites *SEC v. First Jersey Secs.*, 101 F.3d 1450 (2d Cir. 1996), though it admits that the case "involved subsequent transactions" (Division's Br. at 17). That admitted distinction is critical. In *First Jersey*, the court was asked to determine whether claims brought by the SEC with respect to conduct that occurred from 1982 – 1985 should be barred by res judicata based on a prior proceeding that began in 1979 and was adjourned in 1980. Not surprisingly, the court declined to apply res judicata in large part because "[a]t the time the SEC filed its charges [in the first proceeding] and throughout the period of the hearing, the transactions at issue here had not yet occurred." *Id.* at 1464. Of course, those concerns are not present in a case where, as here, the conduct on which the Division's claims are based occurred years before the commencement of the First Proceeding and was actually litigated in that proceeding.

The Division's reliance on *Facchiano Construction Co. v. U.S. Dept. of Labor*, 987 F.2d 206 (3d Cir. 1993) is equally unavailing. The Division contends that *Facchiano* supports its argument that res judicata should not apply because Newport and Jenirob were "not parties to the first action" (Division's Br. at 18). But the *Facchiano* court analyzed whether two departments of the United States Cabinet (DOL and HUD) that had brought proceedings based on entirely different statutes and evidence were in privity for res judicata purposes. *Id.* at 212-13. After reviewing the pertinent regulations and legislation, the court held that because HUD did not have the "authority to represent the United States," the DOL was not precluded from bringing its own action against the defendant. *Id.* at 212. Here, the Division has sued Pierce twice—alleging

violations of the same statutes based on the same conduct and requesting the same remedy. The idea that the Division should be allowed to avoid the bar of res judicata as to its claims against Pierce simply because it has also initiated proceedings against two additional entities simply does not follow from *Facchiano*, or from common sense. *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 249 (9th Cir. 1992) ("the naming of additional parties does not eliminate the res judicata effect of a prior judgment"); *Bethesda Lutheran Homes v. Born*, 238 F.3d 853, 857 (7th Cir. 2001) ("The defense of res judicata is not avoided by joinder").

Moreover, of course, the Division's argument that Newport and Jenirob are "new" to its claims is belied by its contention that Pierce controlled both of them and used them as conduits for his own stock sales. And it is rendered entirely disingenuous by the Division's own claim that the Hearing Officer's finding in the First Proceeding that Pierce controlled both companies collaterally estops him from arguing otherwise here.

One case cited by the Division is instructive, but not in the manner the Division likely intended. The Division cites *Stratosphere Litig. LLC v. Grand Casinos*, 298 F.3d 1137, 1143 (9th Cir. 2002) for the general proposition that claims are identical when "two suits arise from the same transactional nucleus of operative facts" (Division's Br. at 15). In that case, the Ninth Circuit held that the plaintiff's breach of contract claims were barred by res judicata because, in a prior bankruptcy proceeding, it had been adjudicated that the defendant's obligations under the contract had been discharged (a holding that was corroborated by a later reorganization plan). *Id.* at 1141-43. The Ninth Circuit held that the breach of contract claims were precluded by res judicata despite "[t]he bankruptcy court's assertion that it did not decide whether '[the defendant] may have frustrated the [contract].'" *Id.* at 1143 n.4. The Ninth Circuit found that holding to be

of "no consequence" because the plaintiff's representative in the bankruptcy proceeding had "neither appealed the bankruptcy court's decision" that the defendant's obligations had been discharged, "nor objected to the confirmation of [the] second reorganization plan." *Id.* Basing its decision in large part on the plaintiff's earlier failures of action, the court held that the claims were barred by res judicata. *Id.* at 1143. Similarly, the Division here "neither appealed . . . nor objected to" the Hearing Officer's disgorgement order. Having chosen to leave the vigorously contested disgorgement amount of $2.1 million undisturbed, the Division must be barred from re-litigating here.

V. THE DIVISION'S ARGUMENT FOR AN EXCEPTION TO RES JUDICATA IS A RED HERRING

Finally, the Division argues that res judicata should not bar it from re-litigating its claims because it was "prevented" from bringing them "when the OIP was instituted in the prior proceeding" (Division's Br. at 18). Even were that false claim actually true, it would be irrelevant. By making this argument, the Division requests that the Hearing Officer ignore everything that happened in the First Proceeding after the OIP was issued. Among the facts that the Division asks the Hearing Officer to overlook include that it: (i) obtained the evidence on which these claims are based during the pendency of the First Proceeding; (ii) moved to admit those documents into evidence (which they were); (iii) requested that disgorgement be calculated based on those documents; (iv) utilized them heavily in its post-hearing brief and proposed findings and conclusions; and (v) passed up numerous opportunities to continue its pursuit of the requested disgorgement. Of course, it was also the Division's decision in the first instance to

seek the First OIP from the Commission before it had all of the evidence, knowing full well that the foreign regulators had not yet responded to its requests.[5]

Nor has the Division cited a single case where a court refused to apply res judicata after finding that evidence had been concealed. In fact, the central case cited by the Division declined to apply this exception altogether. *See Harnett v. Billman*, 800 F.2d 1308, 1313-14 (4th Cir. 1986) (refusing to apply res judicata exception). In *Harnett*, the court found that a party had "sought and obtained discovery" during a prior action that would have "enable[ed] him" to make the conclusions regarding the defendants' conduct that served as the basis for his claims in the subsequent action. *Id.* at 1313. The court therefore held, in terms equally applicable here, that it was "impossible to say that any concealment or fraud by [defendants], even if they existed, acted to prevent the assertion of [plaintiff's] . . . fraud claim during the pendency of" the prior action. *Id.* at 1314; *see also Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985):

> [I]t is noteworthy that [plaintiff] concedes that he was aware of this alleged new evidence prior to the final dismissal of his appeal from [an earlier proceeding]. Yet, he never sought a rehearing or a reopening of the record in that action. Clearly, [he] could have litigated the significance of his alleged newly discovered evidence in [the earlier proceeding] and, therefore, he may not raise it here.

As the *Harnett* court noted, "[f]or purposes of res judicata, it is not necessary to ask if the plaintiff knew of his present claim at the time of the former judgment, for it is the existence of the present claim, not party awareness of it, that controls." *Harnett*, 800 F.2d at 1313.

The Division also cites *In re Genesis Health Ventures, Inc.*, a case in which the court held that the majority of the plaintiffs' claims were barred by res judicata because they were "so close to the factual underpinnings, theory of the case, and relief sought in the [prior action] so as to

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[5] *See also Johnson v. Ashcroft*, 445 F. Supp. 2d 45, 50 (D.D.C. 2006) ("[A]lthough plaintiff now complains that the defendants did not provide the documents he requested, the plaintiff should have raised the defendants' alleged failure to provide the documents in the course of his [prior] lawsuit"); *Theodore v. District of Columbia*, ---F. Supp. 2d---, 2011 WL 1113372, at *5 (D.D.C. Mar. 28, 2011) ("newly discovered evidence normally does not prevent the application of res judicata") (internal quotation marks omitted).

make it unreasonable for Plaintiffs not to have brought such claims in that forum." 355 B.R. 438, 454 (Bkrtcy. D. Del. 2006). As to the remaining claims the court held that, because it was ruling on a motion to dismiss, it was required to "accept[] as true" the plaintiffs' allegation (which had been made in the complaint) that relevant information had been concealed. *Id.* The Division's characterization of that opinion as one in which the court "found" that plaintiffs had been prevented from bringing their claims in an earlier action is inaccurate and misleading (Division's Br. at 18 n. 12). *In re Genesis Health* merely stands for the basic proposition that, when ruling on a motion to dismiss, courts assume the complaint's allegations to be true.[6]

VI. CONCLUSION

For the reasons given above, the Division's motion should be denied, and this action dismissed. Pierce respectfully requests that the Hearing Officer schedule a hearing at which oral argument on these matters may be heard.

[6] The court in *In re Genesis Health* was also ruling in the context of a prior bankruptcy action and expressly stated that it was not applying the "standard res judicata analysis" because of the "unique circumstances that arise when the previous litigation took place in the context of a bankruptcy case." *Id.* at 449 (internal quotation marks omitted).

Dated: April 8, 2011

Respectfully Submitted

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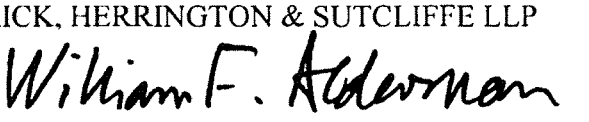

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