UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-13927

In the Matter of

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

Respondents.

Administrative Law Judge
Carol Fox Foelak

DIVISION OF ENFORCEMENT'S OPPOSITION TO MOTION FOR SUMMARY DISPOSITION BY RESPONDENT PIERCE

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I. INTRODUCTION

After concealing key documents during the Division's investigation, falsely denying under oath that he was the beneficial owner of foreign accounts held by respondents Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob"), and vigorously and successfully objecting to adjudication of a claim for his unregistered sales of Lexington shares through Newport and Jenirob in the prior proceeding, respondent G. Brent Pierce now makes a stunning about-face. Despite the Hearing Officer's clear ruling in the prior proceeding that these transactions were beyond the scope of the Order Instituting Proceedings (OIP) in that proceeding, Pierce asserts that the present claim involving these transactions was adjudicated there and thus is forever barred by res judicata. To support this assertion, Pierce makes a fatally flawed attempt to recast the record.

This attempt must fail because Pierce cannot escape what the record actually shows -- that res judicata does not apply for at least three reasons. First, the present OIP asserts a claim for Pierce's unregistered sales of Lexington shares through Newport and Jenirob in violation of Section 5 of the Securities Act of 1933 ("Securities Act"), which was previously determined to be a different claim from those alleged in the prior OIP. Second, the claim in the present proceeding for Pierce's unregistered sales through Newport and Jenirob was not adjudicated in the prior proceeding and therefore no final judgment was reached on the merits. Third, this proceeding involves two parties not named in the prior proceeding, Newport and Jenirob.

Notably missing from Pierce's arguments is any recognition that the Hearing Officer previously ruled that the only Section 5 claim made in the first OIP was for Pierce's unregistered sales of Lexington shares in his *personal* account for profits of $2.7 million. There was no legal requirement that the Division either seek leave to amend the prior OIP or appeal the Hearing Officer's ruling to the Commission. Pierce cannot credibly claim that there had been an

adjudication on the merits of a Section 5 claim for his unregistered sales through Newport and Jenirob when the Hearing Officer explicitly ruled that those sales were beyond the scope of the OIP. Pierce's attempt to argue otherwise through repetitive citations of references to Newport in the record of the prior proceeding is unavailing. Such evidence was relevant to prove other claims asserted against Pierce in the prior OIP for violation 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, as well as to counter his defense that he was entitled to an exemption under Section 4(1) of the Securities Act from registration of the sales through his personal account. Moreover, Pierce's present position is a radical shift from his opposition in the prior proceeding to admission of the Newport and Jenirob evidence, which the Division had finally received from a foreign regulator more than a month after the hearing. Pierce had asserted that he was "being denied his due process rights to *notice of the claims*, the reasonable opportunity to respond," including discovery, and a new hearing. (Emphasis added.)

Finally, Pierce deliberately concealed the operative facts of the present Section 5 claim during the Division's investigation. This concealment forecloses him from now invoking a res judicata defense. The plain fact is that, but for this concealment, the Division could have obtained the evidence it needed to include a claim for his unregistered sales through Newport and Jenirob in the prior proceeding. The public policy implications of rewarding Pierce by permanently preventing adjudication of this claim through a res judicata defense would be stark. Such a result would, in effect, grant immunity from liability to a respondent who conceals documents and gives misleading investigative testimony by forcing the Division, before it brings any claims, to engage in lengthy and possibly fruitless efforts to obtain assistance from the

multitude of foreign jurisdictions used by respondents to obfuscate unregistered sales of securities on U.S. markets.

Accordingly, Pierce's motion for summary disposition must be denied.

II. SUMMARY OF PERTINENT FACTS

A. The First OIP

In the prior proceeding, instituted July 31, 2008, the Division alleged that Pierce, Lexington, and Lexington's CEO each violated Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and (c), through unregistered sales of Lexington shares, and that Pierce also violated Sections 13(d) and 16(a) of the Exchange Act, 15 U.S.C. §§ 78m(d) and 78p(a), and Rules 13d-1, 13d-2 and 16a-3 thereunder, 17 C.F.R. §§ 240.13d-1, 240.13d-2 and 240.16a-3, by failing to accurately report his Lexington stock ownership and transactions. *See* Wells Decl. Ex. 2. In that proceeding, the Division alleged Section 5 violations by Pierce for his unregistered sales of 300,000 Lexington shares in his personal account at a Liechtenstein bank in June 2004 and sought disgorgement from Pierce of the approximately $2.7 million in proceeds from Pierce's sale of these 300,000 shares. *Id.* ¶ 16. The OIP also alleged Section 5 violations by the other defendants, Lexington and Lexington's CEO.

At the request of the Hearing Officer, the Division clarified in its December 2008 motion for summary disposition that it was seeking disgorgement only of the proceeds of Pierce's unregistered sales in his personal account. *See* Buchholz Decl. Ex. E at 9. Throughout the brief, the Division made clear that its allegation that Pierce violated Section 5 only concerned Pierce's unregistered sales of 300,000 Lexington shares through his personal account at the Liechtenstein bank in June 2004. *See, e.g., id.* at 1, 2.

The Division's December 5, 2008 prehearing brief contained the same limitation on the scope of its Section 5 claim against Pierce that it had made in its Motion for Summary

Disposition. *See* Wells Decl. Ex. 3 at, *e.g.*, 10, 12-13; Buchholz Decl. Ex. E at 2. The prehearing brief's references to Newport (as well as the handful of references to "associates" and an "off-shore company" in the OIP) were relevant to whether Pierce's participation in the distribution of Lexington shares foreclosed him from claiming an exemption from registration under Section 4(1) of the Securities Act, 15 U.S.C. § 77d(1), for the sales of Lexington shares from his personal account. The references were also relevant to the Exchange Act claims against Pierce and to the Section 5 claims against the other two respondents, Lexington and its CEO. *See* Wells Decl. Ex. 3 at 10-12, 14.

During the February 2-4, 2009 hearing in the first proceeding, the Division sought to establish its *prima facie* case against Pierce for violation of Section 5 only for his unregistered sales of Lexington stock from his personal account and to counter Pierce's defense that he was entitled to an exemption from registration under Section 4(1) of the Securities Act. The Division also sought to prove that Pierce violated Sections 13(d) and 16(a) of the Exchange Act. As in its prehearing brief, the Division's hearing evidence concerning Newport was intended to show that Pierce was not entitled to a Section 4(1) exemption, as well as to support its Exchange Act claims. The record of evidence was initially closed on March 6, 2009. *See* Buchholz Decl. Ex. F.

B. The Division's Receipt After the Hearing Of New Evidence Concerning Pierce's Additional Securities Violations

On March 10, 2009, the Division finally received evidence that it had requested from a foreign regulator during its investigation prior to institution of the first proceeding, which proved that Pierce had sold 1.6 million Lexington shares through two Liechtenstein accounts that he secretly controlled in the names of Newport and Jenirob. *See* Buchholz Decl. Ex. G. The

Division had attempted to obtain this evidence from Pierce during its investigation, but he had concealed it, as explained below.

1. The Division's Efforts During Its Investigation To Obtain Documents Pertaining To Pierce's Sales of Lexington Shares

In the investigation that led up to the prior proceeding, the Division made several attempts to gather information from Pierce about his ownership and sales of Lexington stock. On October 19, 2005, Division staff sent a letter to Pierce requesting his voluntary production of documents related to the Commission's inquiry. Buchholz Decl. Ex. A. Of particular relevance were document requests numbers 4, 9 and 20, which requested that Pierce voluntarily produce securities brokerage statements and documents regarding his communications about Lexington and transactions in Lexington securities. Pierce produced some personal brokerage records for a U.S. account that he did not use for any Lexington sales but no documents relating to his sale of Lexington stock through Newport, Jenirob or his personal account at the Liechtenstein bank. *Id.* ¶ 2.

On May 17, 2006, Division staff served Pierce with a subpoena for the identical documents. Buchholz Decl. Ex. B. Pierce then produced documents relating to his personal sales of Lexington stock through his personal account at the Liechtenstein bank, but again produced no documents relating to Newport, Jenirob or other companies through which he sold Lexington stock. *Id.* ¶ 3. As a result, beginning in 2006, the Division sought the documents through a regulator in Liechtenstein, although the regulator was not able to obtain the evidence for the Division at that time. *See* Buchholz Decl. ¶ 8 & Ex. G. Later, during the prior proceeding, Pierce personally intervened to oppose production of the documents through the foreign regulator. *See id.* ¶ 13 & Ex. K.

On March 10, 2009, the Division finally received evidence that it had requested from the foreign regulator proving that Pierce had sold 1.6 million Lexington shares through two Liechtenstein accounts that he secretly controlled in the names of Newport and Jenirob for millions of dollars in proceeds. *See* Buchholz Decl. ¶ 9 & Exs. H-I. The records also confirmed that one of Pierce's primary contacts at the bank was Philippe Mast, an officer of the Liechtenstein bank and signatory on the omnibus trading account in the United States at vFinance Investments, Inc. ("vFinance"), a brokerage firm that the bank used to sell Lexington shares for Pierce, Newport, Jenirob and others. Buchholz Decl. ¶ 9.

2. Pierce's Misleading Testimony Under Oath Denying That He Had An Interest In Newport or Jenirob Or That He Directed Trades Through Their Accounts at the Liechtenstein Bank

On July 27-28, 2006, Division staff took Pierce's investigative testimony under oath. During that testimony, Pierce denied that he held any beneficial ownership interest in Newport, testifying as follows:

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

Buchholz Decl. Ex. C at 197:8-13.

In addition, Pierce denied that he held any beneficial ownership interest in Jenirob and further denied that he directed any trading for Newport and Jenirob through the Liechtenstein bank.[1] Specifically, when Pierce was questioned about a document (Testimony Ex. 98, *see* Wells Decl. Ex. 8) containing an email string that had been produced by vFinance involving Pierce, Mast and a broker at vFinance, he acknowledged receiving the emails. He then testified

[1] After denying that he had a beneficial ownership interest in Newport, Pierce later ambiguously indicated that, although he had no interest in Jenirob, he had an unspecified interest in Newport or a Newport account at the Liechtenstein bank. *See* Buchholz Decl. Ex. D at 396:1-5.

that he had no interest in the U.S. trading account through which he, Newport and Jenirob sold Lexington stock. Pierce characterized it as an account connected to Mast that conducted trades in Lexington stock, but Pierce denied giving trading instructions for any securities transactions in that account. Pierce also did not disclose that he was the beneficial owner of the Newport and Jenirob accounts that were selling Lexington stock through the U.S. trading account. Buchholz Decl. ¶ 5 & Ex. D (Pierce Investigative Testimony Tr., 7/28/06) at 394:19-397:20.

As a result of Pierce's concealment and misleading testimony, the Division did not have evidence demonstrating Pierce's unregistered sales of Lexington shares through the Newport and Jenirob accounts in Liechtenstein by the time the first OIP was issued or by the time the hearing was concluded.[2] Apparently based on his Schedule 13D, Pierce now maintains that the Division should somehow have deduced that he was the beneficial owner of a Newport account at the Liechtenstein bank, despite his unequivocal denial of his beneficial ownership of Newport and his refusal to produce documents relating to Newport. This misstates both the contents and legal import of that filing, as explained in Section III.A.2.b below.

C. The Hearing Officer Ruled On The Division's Motion to Admit New Evidence That A Claim for Pierce's Unregistered Sales Through Newport and Jenirob Were Beyond the Scope of the OIP

On March 18, 2009, the Division moved to admit the new evidence it had obtained a little over a week earlier from the foreign regulator. *See* Wells Decl. Ex. 10. This evidence consisted of the very documents that Pierce had refused to produce during the Division's investigation and showed that, in addition to Pierce's sales of 300,000 Lexington shares through his personal account, he had sold 1.6 million Lexington shares through the Newport and Jenirob accounts at the Liechtenstein bank for millions of dollars in proceeds. *Id.* at 2-3; *see* Buchholz Decl. Ex. G.

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[2] The investigative files produced in that proceeding did not contain these documents. *See* Buchholz Decl. ¶ 9.

Pierce's conclusion that the Division "cannot (or should not) have been surprised by the receipt of the Liechtenstein bank records" distorts the facts. While Pierce had suggested in his testimony that Newport and Jenirob had accounts at the bank, he denied beneficial ownership of the accounts and denied directing stock sales in the accounts. Therefore, although Pierce had known (and concealed) these key facts all along, the Division did not know them until it received the bank records in March 2009. Nor, until it received those records, did the Division have evidence showing which Liechtenstein accounts sold Lexington shares and the corresponding quantities, dates and proceeds of those sales. *See* Buchholz Decl. ¶ 9.

Pierce opposed admission of the new evidence and opposed the adjudication of claims relating to his Lexington stock sales through Newport and Jenirob in the prior proceeding. *See* Buchholz Decl. Ex. J. He argued that re-opening the evidence would deny his "due process rights to notice of the claims" and "the reasonable opportunity to respond," including the right to discovery and to a hearing on the new evidence. *Id.* at 2-9. In essence, Pierce contended in his opposition that the prior OIP did not include a claim for his sales of Lexington shares through Newport and Jenirob or disgorgement of the sale proceeds -- the diametric opposite of his current position. Moreover, Pierce never argued that the Division could have obtained the evidence earlier. Rather, he acknowledged that he had attempted to prevent the foreign regulator from disclosing the evidence to the Division. Buchholz Decl. ¶ 13 and Ex. K.

Two days after filing its motion to admit new evidence, the Division filed its Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law. Wells Decl. Exs. 11 & 12. The Division sought, among other things, to obtain additional disgorgement for Pierce's unregistered sales of Lexington stock through the Newport and Jenirob accounts in Liechtenstein based upon the new evidence it had acquired about a week earlier. Because the Division had

explicitly stated in its prehearing brief and at the hearing that its Section 5 claim was limited to Pierce's unregistered sales in his personal account, this would have expanded the scope of the Section 5 claim stated in the OIP against Pierce. *See* Wells Decl. Ex. 3 at 10.

In an April 7, 2009 Order, the Hearing Officer admitted the new evidence for use on the issue of liability, but found that a claim for disgorgement of the proceeds from Pierce's different sales of shares through the Newport and Jenirob accounts was outside the scope of the proceeding because Newport and Jenirob were not named in the OIP. *See* Wells Decl. Ex. 13.

D. The Initial Decision Found Pierce Liable For Securities Violations But Ruled That A Claim for Pierce's Unregistered Sales Through Newport and Jenirob Was Beyond the Scope of the OIP

In the June 5, 2009 Initial Decision in the prior proceeding, the Hearing Officer found that Pierce had committed all of the securities violations alleged in the first OIP, but reiterated her April 7th ruling on Newport and Jenirob, stating that "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." Wells Decl. Ex. 14 at 20; *see id.* Ex. 13.

Specifically, the Initial Decision ruled that Pierce had violated Sections 5(a) and 5(c) of the Securities Act in that the Division had established a *prima facie* case against Pierce "for the sales from his personal account of Lexington stock that he acquired from the First S-8" and that he could not claim a Section 4(1) exemption. *See* Wells Decl. Ex. 14 at 15. In making this finding, the Hearing Officer explained that "Section 5 of the Securities Act is *transaction specific*." *Id.* (emphasis added). The Initial Decision also found that Pierce had violated Sections 13(d) and 16(a) of the Exchange Act. *Id.* at 17-18. The Hearing Officer issued a cease and desist order against Pierce and ordered him to disgorge $2,077,969, representing the "actual profits Pierce obtained from his wrongdoing charged in the OIP," plus prejudgment interest. *Id.*

at 14-21. Therefore, a critical component of the Initial Decision was the Hearing Officer's construction of the claims contained in the OIP, which determined that the only Section 5 claim stated against Pierce related to his sales in his personal account. *Id.* at 15, 20.

The Hearing Officer cited evidence relating to Newport to support her finding that Pierce was an "issuer" under Section 2(a)(11) of the Securities Act and therefore was not entitled to a Section 4(1) exemption from registration of the sales of Lexington shares from his personal account. *Id.* at 14-17. In addition, she cited the new evidence that Pierce was the beneficial owner of Newport as further support for her finding that Pierce was liable for the Section 16(a) violation. *Id.* at 18.[3]

E. The Division Made No Representation Upon Which Pierce Could Have Relied In Electing Not To Appeal the Initial Decision

Neither party appealed the Initial Decision and it became the final decision of the Commission on July 8, 2009. *See* Wells Decl. Ex. 15. Pursuant to Rule of Practice 410, any party is entitled to petition the Commission for review of an initial decision within the time prescribed by the Hearing Officer, here within 21 days after service of the initial decision. *See* Wells Decl. Ex. 14 at 21. Under this rule, Pierce could have filed a petition for review at any time before the expiration of the prescribed period, as the deadlines were the same for both parties. Pierce was represented by able counsel and apparently decided to forego appealing the Initial Decision within the 21-day period in favor of possibly filing a cross-appeal if the Division appealed. *See* Pierce Br. at 9, Wells Decl. Ex. 16 at ¶¶ 3-4.

The Division disputes Pierce's characterization of the rulings in the Initial Decision that purportedly informed his decision. Because a claim for Pierce's unregistered sales through

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[3] The Initial Decision stated: "Because [Pierce] is the beneficial owner of Newport, the attempt to evade reporting his beneficial ownership of Lexington by transferring Lexington stock to Newport was ineffectual." *See* Wells Decl. Ex. 14 at 18.

Newport and Jenirob was never adjudicated in the first proceeding, the Initial Decision also did not adjudicate on the merits his liability for the additional disgorgement of the proceeds of those sales. Thus, there was no "exoneration" upon which Pierce could have relied and no "finality" as to any future claim alleging that these separate transactions violated Section 5 of the Securities Act. Moreover, the fact that Pierce was found liable for all three of the claims alleged against him in the first OIP belies his description of his status as "partially successful."

Further, the Division made no factual representation concerning its appellate intentions in the prior proceeding upon which Pierce could have relied. Buchholz Decl. ¶ 14. Until Division staff informed Pierce on January 12, 2010, that the Division planned to recommend that the Commission institute a new administrative proceeding against Pierce alleging that his sales through Newport and Jenirob violated Section 5 of the Securities Act, the staff never discussed with Pierce's counsel whether the Division would recommend a new proceeding against Pierce in connection with the Newport and Jenirob sales. Wells Decl. Ex. 17; Buchholz Decl. ¶ 15.

F. The Second OIP Asserts Claims For Pierce's Unregistered Sales of Lexington Stock Through Newport And Jenirob

On June 8, 2010, the present proceeding was instituted alleging that Pierce, Newport and Jenirob each violated Sections 5(a) and 5(c) of the Securities Act through the illegal sales of Lexington shares through the accounts of Newport and Jenirob at the Liechtenstein bank. Paragraph 25 of the OIP states that the additional documents the Division received in March 2009 showed that:

> [I]n 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.

The Division seeks a cease and desist order and disgorgement of the proceeds of these sales. *See* Wells Decl. Ex. 19 at 1-2, 4-5. The foregoing facts about these transactions were not alleged in the first OIP. *Compare id. with* Wells Decl. Ex. 2. Facts to foreclose Pierce's anticipated defense that he was exempt from registration of his personal sales under Section 4(1) were alleged in the prior OIP. They are alleged in the present OIP to show that Pierce cannot claim that exemption for the Newport and Jenirob sales and would be collaterally estopped from attempting to do so, as the Division argued in its March 21, 2011 motion for summary adjudication. *See Montana v. United States*, 440 U.S. 147, 155 (1979). (an issue of law or fact actually litigated and decided . . . in a prior action may not be relitigated in a subsequent suit between the same parties or their privies"). As the Hearing Officer ruled, the facts the Division offered to establish a *prima facie* case against Pierce for these sales in violation of Section 5 were not included in the prior OIP. *See* Wells Decl. Ex. 13 & Ex. 14 at 20.

G. Pierce's Payment Of Disgorgement Satisfied In Full Only The Disgorgement Ordered For His Unregistered Sales of Lexington Stock Through His Personal Account

The Initial Decision ordered Pierce to pay disgorgement in the amount of $2,077,969, representing the "actual profits Pierce obtained from his wrongdoing charged in the OIP," plus prejudgment interest. Wells Decl. Ex. 14 at 20-21. As the Hearing Officer found, this wrongdoing consisted only of Pierce's unregistered sales of Lexington shares from his personal account. *Id.* at 15-17, 20. Pierce has now paid in full the disgorgement and prejudgment interest as ordered.[4] Wells Decl. Ex. 24. The Hearing Officer did not "reject" on the merits (as Pierce apparently contends) ordering Pierce to disgorge the additional profits he made through Newport

[4] On June 8, 2010, because Pierce had not paid any of the disgorgement and prejudgment interest, the Division filed an application in federal district court on behalf of the Commission to enforce the disgorgement order against Pierce. *See* Wells Decl. Ex. 20.

and Jenirob, but ruled only that this additional disgorgement was beyond the scope of the prior OIP. Neither a Section 5 claim for Pierce's sales through Newport and Jenirob, nor disgorgement or other sanctions related to those sales were adjudicated in that proceeding. *See* Wells Decl. Ex. 14.

III. PIERCE'S MOTION FOR SUMMARY DISPOSITION SHOULD BE DENIED

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

1. Legal Standard

The doctrine of res judicata "provides that a final judgment on the merits in one action bars subsequent relitigation of the same claim by the same parties and by those in privity with the parties." *Greenberg v. Board of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 168 (2d Cir. 1992). Preclusion is limited "to the transaction at issue in the first action. Litigation over other transactions, though involving the same parties and similar facts and legal issues, is not precluded." *Id.* Importantly, the scope of litigation is framed by the complaint at the time it is filed. *Id.*; *see Computer Associates Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997) (same, stating that res judicata doctrine does not apply to new rights acquired during the action which might have been, but were not, litigated).[5] Res judicata does not apply, however, when concealment "caused the plaintiff to fail to include a claim in a former action." *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986).

As Pierce points out, three elements must be satisfied for res judicata to apply. The earlier suit must have "(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.*

[5] Notably, although a plaintiff may seek leave to file a supplemental pleading to assert a new claim based upon actionable conduct the defendant engaged in after the lawsuit was commenced, there is no requirement that the plaintiff do so. *See SEC v. First Jersey Secs.*, 101 F.3d at 1464; *Computer Associates*, 126 F.3d at 370.

Litton Electro-Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005). As none of these elements are satisfied here, Pierce's res judicata argument must fail.

2. Res Judicata Does Not Bar The Division's Present Claim Against Pierce for His Unregistered Sales Through Newport And Jenirob Because There Is No Identity Of Claims

a. The Division's Claim Against Pierce for Violation of Section 5 In The Present Proceeding Arises From Different Facts And Evidence That Pierce Had Concealed

For res judicata to bar a claim in a subsequent action, the fact that both suits "involved essentially the same course of wrongful conduct is not decisive; nor is it dispositive that the two proceedings involved the same parties, similar or overlapping facts and similar legal issues." *SEC v. First Jersey Secs.*, 101 F.3d 1450, 1463-64 (2d Cir. 1996). Rather, a first judgment will have preclusive effect "where the same evidence is needed to support both claims and where the facts essential to the second were present in the first." *Id.* The *First Jersey Securities* court cautioned, however, that "[i]f the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion." *Id.* at 1464. Indeed, res judicata does not apply even when the second action involves different transactions that occurred during the same time period as transactions addressed in a previous action. *See Greenberg v. Board of Governors of the Fed. Reserve Sys.*, 968 F.2d at 168.

Most fundamentally, Pierce's res judicata defense fails because there is no identity of claims between the present proceeding and the prior one. "Identity of claims exists when two suits arise from the same transactional nucleus of operative facts." *Stratosphere Litig., L.L.C. v. Grand Casinos*, 298 F.3d 1137, 1143 (9th Cir. 2002) (internal quotation marks omitted). The present OIP alleges that Pierce, as the beneficial owner of the Newport and Jenirob accounts at a Liechtenstein bank, violated Section 5 of the Securities Act after he deposited 1.6 million Lexington shares into the Newport and Jenirob accounts and then sold the shares through these

accounts between February and December 2004 for millions of dollars in net proceeds. Wells Decl. Ex. 19. Not one of the facts concerning these transactions was present – or could have been present -- in the first OIP because Pierce had concealed the evidence containing these facts from the Division.[6] *See id.* ¶¶ 23, 25-26 & *see generally id.* Ex. 2. Rather, in the first OIP, the Division alleged that Pierce had violated Section 5 of the Securities Act through his unregistered sales of 300,000 shares Lexington stock from his personal account at the Liechtenstein bank for proceeds of $2.7 million. *Id.* Ex. 2 ¶ 16. This was the claim that was adjudicated in the prior proceeding in which Pierce was held liable for that violation and ordered to pay disgorgement of the actual profits he obtained from that specific wrongdoing. *Id.* Ex. 14 at 15-17, 20.

As Pierce well knows, not until the Division received documents from the foreign regulator did the Division possess evidence that Pierce had testified falsely and that he was, in fact, the beneficial owner of the Newport and Jenirob accounts and had directed the unregistered sales of Lexington shares from those accounts.[7] Buchholz Decl. ¶ 9. Accordingly, as a direct result of Pierce's concealment, the first OIP did not allege that Pierce was liable for violating Section 5 for the unregistered Newport and Jenirob sales.

Section 5 requires that each particular sale of Lexington shares must be registered or subject to an exemption. *See, e.g., SEC v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998). As the Initial Decision in the prior proceeding pointed out: "Section 5 of the Securities Act is

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[6] Although Pierce attempts to make much of the unremarkable fact that both the present and prior proceedings stem from the same Formal Order of Investigation, this lends no support to his res judicata defense. *See* Wells Decl. Ex. 1. Because of the open-ended nature of an investigation, it is not unusual for more than one distinct action or proceeding to arise from a single formal order. Buchholz Decl. ¶ 16 & Ex. L (*Enforcement Manual* at 21, § 2.3.4).

[7] As Pierce also knows, the evidence the Division initially disclosed to Pierce and used in the hearing in the first proceeding did not include the evidence obtained from the foreign regulator in March 2009 showing his beneficial ownership of Newport and Jenirob and his involvement in the unregistered sales through their accounts because Pierce himself had concealed it.

transaction specific . . . ." Wells Decl. Ex. 14 at 15 (citing *SEC v. Cavanagh*, 155 F.3d at 133, and *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, 648 (7th Cir. 1990)). Thus, if no valid exemption applies, each separate unregistered sale constitutes a separate violation of Section 5.

Because Pierce's sales alleged in the present proceeding are different transactions from those alleged (and adjudicated) in the prior proceeding, they constitute distinct violations of Section 5 and give rise to a separate disgorgement remedy. Different facts and different evidence are needed to establish a *prima facie* case against Pierce for the unregistered Newport and Jenirob sales. These facts were not asserted in the first OIP. Accordingly, the nucleus of operative facts in the first OIP is different from the nucleus of operative facts in the second OIP and there is no identity of claims between the prior and present proceedings. As in *Greenberg*, res judicata therefore does not bar the Division from pursuing its claim against Pierce in this proceeding. *See Greenberg v. Board of Governors of the Fed. Reserve Sys.*, 968 F.2d at 168; *see also SEC v. First Jersey Secs.*, 101 F.3d at 1463-64.

b. The References To Newport And To Pierce's Associates In the Prior Proceeding Pertained To Pierce's Ineligibility For An Exemption From Registration And To His Exchange Act Violations

Pierce apparently stakes his res judicata argument on the allegation in paragraph 15 of the first OIP that Pierce and his associates deposited shares of Lexington stock in accounts at an offshore bank and that those shares were sold through an omnibus brokerage account in the United States for profits of $13 million. *See* Wells Decl. Ex.. 2 at 4, ¶ 15. This, he argues, shows that the facts necessary to assert the Section 5 claim in this proceeding were present in the prior proceeding. This argument must fail.

Pierce's contention that the first OIP "brought claims against Pierce, his associates and offshore companies" is wrong both procedurally and factually. Contrary to Pierce's interpretation and as explained above, the first OIP's use of the term "associates" and reference

to an off-shore company does not indicate that specific claims were brought against these entities or that such claims were adjudicated in that proceeding. Moreover, although after it belatedly received the necessary evidence, the Division sought additional disgorgement for Pierce's sales through Newport and Jenirob, the Initial Decision ruled that these sales were beyond the scope of the OIP and definitively held that the only Section 5 claim charged in the first OIP was for Pierce's sales through his personal account and disgorgement was sought and awarded only for the proceeds of those sales. Wells Decl. Ex. 14 at 15, 20. As a result of this ruling, Pierce cannot assert that the first OIP asserted a Section 5 claim against Pierce for sales by his "associates" or that it sought disgorgement of the proceeds of Pierce's sales through his "associates."[8]

Despite the clear ruling in the prior action, Pierce attempts to bolster his argument via a simplistic tallying of the number of references to Newport in the prehearing brief and at the hearing.[9] When viewed in context, however, the references support the Division's argument that Pierce was foreclosed from claiming an exemption from registration of the sales of his personal shares under Section 4(1). Nothing in the prehearing brief indicates that the Division sought to hold Pierce liable under Section 5 for his unregistered sales of Lexington stock through Newport, nor did the Division allege (or even know) that Pierce controlled a Newport account at the Liechtenstein bank or that he personally benefitted from the sales. Rather, based upon transfer agent records showing Pierce's initial transfers of Lexington shares, the prehearing brief

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[8] Pierce, Lexington and the former CEO of Lexington were the only parties named in the OIP and the only parties against whom violations of the specified securities laws were asserted. Only these three named parties were given notice of the prior proceeding under Rule 200(a)(1) and appeared in that proceeding as respondents. Wells Decl. Ex. 2.

[9] Notably, in view of his blanket assertion about Jenirob's presence "throughout the First Proceeding," *see* Pierce Br. at 3, Pierce avoids mentioning that the prehearing brief makes no mention whatsoever of Jenirob. Nor, as the Initial Decision found, is there a single reference to Jenirob – or Newport, for that matter -- anywhere in the first OIP.

described Lexington's distribution of stock in part through Newport. *See* Wells Decl. Ex. 3 at 6, 8; Buchholz Decl. ¶ 9. Based upon Pierce's Schedule 13D (discussed below), which showed that Pierce traded Lexington stock in the open market for Newport during 2004 (when he controlled more than 10 percent of Lexington's stock), the brief also argued that Pierce nonetheless failed to report his ownership or changes in his ownership of Lexington on Forms 3, 4 or 5" in violation of Section 16(a) of the Exchange Act. *Id.* at 9. Far from asserting a Section 5 claim against Pierce for his sales through Newport, the Division stated that it lacked such evidence entirely. *Id.* at 9-10.

The February 2009 hearing followed this general outline. The Division put forward evidence to prove all of Pierce's securities law violations. The Division also submitted exhibits that included information about Newport in order to counter Pierce's defense that his unregistered sales of Lexington stock through his personal account were entitled to an exemption under Section 4(1) of the Securities Act, which excludes transactions by issuers and underwriters, as defined by Sections 2(a)(4) and (11), respectively, of the Securities Act, 15 U.S.C. §§ 77b(a)(4), (11). Indeed, the Initial Decision stated that 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." Wells Decl. Ex. 14 at 16 (citing *Owen v. Kane*, 48 S.E.C. 617, 619 (1986), *aff'd*, 842 F.2d 194 (8th Cir. 1988)).

None of the Division hearing exhibits Pierce cites varied from these purposes or can assist his argument. In the Schedule 13D, for example, Pierce acknowledged that he was an officer and director of Newport and had voting power as to the common shares held by Newport, but he did not acknowledge the critical information that he was the beneficial owner of Newport

itself (which he had denied under oath) or that he had the right to any proceeds from Newport's sales of Lexington shares through an account at the Liechtenstein bank. Wells Decl. Ex. 5 at, *e.g.*, 8. To the contrary, the Schedule 13D filing (which Pierce belatedly made just two days before his testimony) explicitly disclaimed Pierce's beneficial ownership of Newport's Lexington shares. *See* Wells Decl. Ex. 5 (Schedule 13D) at 5, 14. Moreover, the Schedule 13D disclosed only a fraction of the sales of Lexington stock by Newport that were later revealed in the records produced by the Liechtenstein regulator. Nor did Pierce acknowledge his beneficial ownership of Newport or its Lexington shares in Lexington's public filings in 2004 or 2005 relating to private placement investments in Lexington by Newport and others. *See, e.g.,* Buchholz Decl. Exs. M-N (Hearing Exs. 59-60). Hearing Exhibits 51, 43, 33 and 70 (Wells Decl. Exs. 6, 7, 8 & 9, respectively) all supported the Division's argument that Pierce was foreclosed from claiming a Section 4(1) exemption by showing Lexington's distributions of Form S-8 shares, in part through Pierce, who, in turn promptly transferred most of the shares to Newport rather than retaining them in his own account. Newport thereafter sold most of the shares to third parties. *See*, *e.g.*, Wells Decl. Ex. 3 at 5-9, 11-12.

Pierce's characterization of Exhibit 33 (Wells Decl. Ex. 8) in his moving papers misstates the record. He asserts that this exhibit showed his "instructions to Hypo Bank to book sales of Lexington stock to Jenirob's account." *See* Pierce Br. at 5. As discussed above, when confronted with this exhibit during his investigative testimony (marked as Testimony Exhibit 98), Pierce evasively (and falsely) denied that he had an interest in Jenirob and explicitly stated that he did not "get involved in the trading" in the Newport or Jenirob accounts at the

Liechtenstein Bank.[10] Buchholz Decl. Ex. D (Pierce Investigative Testimony Tr., 7/28/06) at 394:19-397:20.

Exhibit 43 (Wells Decl. Ex. 7) consists of records obtained from a transfer agent related to a new issuance of stock by Lexington, which was relevant for the purpose of calculating the number of outstanding Lexington shares and Pierce's corresponding percentage of beneficial ownership for reporting purposes under Sections 13(d) and 16(a) of the Exchange Act. This issuance was reflected on line 48 of Exhibit 51 (Wells Decl. Ex. 6), the Division's chart calculating Pierce's percentage of beneficial ownership to support the Division's claims under Sections 13(d) and 16(a). Pierce fails to mention that this issuance, which involved shares that Pierce ultimately sold through Jenirob (as the Division later learned), was reflected as a *reduction* of Pierce's percentage of ownership for the purposes of Sections 13(d) and 16(a) because the chart was prepared before the hearing, when the evidence of Pierce's beneficial ownership of shares held by Jenirob was still concealed from the Division.

Exhibit 51 (Wells Decl. Ex. 6) attributed holdings to Pierce based on the entities he had included in his Schedule 13D filing, which did not include Jenirob, and the evidence of Lexington stock transfers and sales available to the Division at the time of the hearing, which did not include the records for the Newport and Jenirob accounts at the Liechtenstein bank. While the transfer agent records showed Pierce's initial transfers of shares through Newport, the only potential evidentiary sources of Pierce's ultimate sales into the market through the Liechtenstein bank were Pierce himself and the Liechtenstein regulator, neither of which had provided the documents in response to the Division's requests by the time of the hearing.

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[10] Although this document (which document control numbers indicate was produced by vFinance) was suggestive of the control that Pierce now admits, he consistently (and falsely) denied that control during the first proceeding and concealed relevant evidence that would have refuted his testimony.

Moreover, the fact that certain Newport holdings were attributed to Pierce to demonstrate his violations of Sections 13(d) and 16(a) – based on Pierce's statement in the Schedule 13D that he had dispositive power over the shares – does not mean the Division should have been able to surmise that Pierce was making specific sales of Lexington stock through a Newport account in Liechtenstein and that Pierce was the beneficial owner of that account for the purposes of a Section 5 claim, given his prior false testimony and concealment of documents, as well as his Schedule 13D, which specifically stated that it should not be considered as evidence of Pierce's beneficial ownership of shares held by Newport. *See* Wells Decl. Ex. 5 at 5, 14. Pierce also points to references in Exhibit 70 (Wells Decl. Ex. 9) showing transfers of money among Newport, Jenirob and the Liechtenstein bank. While these records relate to Pierce's role as an underwriter and ineligibility for a Section 4(1) exemption, they contain no information about Lexington stock sales or any other particular sources of the funds being transferred or the beneficial ownership of the parties making the transfers and therefore could not have provided a basis for Section 5 claims in connection with Pierce's unregistered Lexington stock sales through the Newport and Jenirob accounts in Liechtenstein.

As a fall back, Pierce also contends that the Division's post-hearing submission of the belatedly received evidence of his sales through Newport and Jenirob is sufficient to invoke res judicata. This, too, is of no assistance to Pierce. As explained above, the Hearing Officer admitted the new evidence as supplemental support of the Division's allegations against Pierce for the claims within the scope of the OIP, but ruled that a claim for the unregistered Newport and Jenirob sales was beyond the scope of the OIP.

Accordingly, because the claim in the present OIP for Pierce's unregistered sales of Lexington shares through Newport and Jenirob in violation of Section 5 of the Securities Act is

not the same as the claim in the prior OIP for Pierce's unregistered sales of Lexington shares through his personal account in violation of Section 5, that element of res judicata is not met.

c. Res Judicata Is Inapplicable Because Pierce's Concealment Of Evidence Prevented Inclusion Of The Division's Present Claims In The Prior Proceeding

Courts have recognized an exception to the application of res judicata when "fraud, concealment, or misrepresentation have caused the plaintiff to fail to include a claim in a former action." *Harnett v. Billman*, 800 F.2d at 1313; *see also Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d at 988 ("ignorance of a party does not . . . avoid the bar of res judicata unless the ignorance was caused by the misrepresentation or concealment of the opposing party"); *Western Sys., Inc. v. Ulloa*, 958 F.2d at 871-72 (same); *In re Genesis Health Ventures, Inc.*, 355 B.R. 438, 454 (Bkrtcy. D. Del. 2006) (same, finding no res judicata bar because concealment prevented plaintiffs from bringing additional claims during prior proceeding).

This exception is directly applicable here. Pierce conducted the sales in the Newport and Jenirob accounts through a bank in Liechtenstein, a country that had no applicable mechanism for assisting the Commission when the prior action was instituted. He misled the Division in testimony under oath about his ownership interest in Newport, concealed the Newport and Jenirob sales by refusing to produce the relevant subpoenaed records and tried to block the foreign regulator from producing the documents requested by the Division. As explained above, Pierce's deliberate concealment prevented the Division from including claims pertaining to those sales when the OIP was instituted in the prior proceeding. Buchholz Decl. ¶ 8. In view of this record, Pierce's attempt to dismiss his concealment as merely a "good faith dispute over privacy records" should be promptly and soundly rejected.

Under the above case law and for this additional reason, Pierce's concealment of evidence of the Newport and Jenirob sales, which prevented the Division from included those

claims in the prior OIP, is sufficient to bar him from invoking a res judicata defense to avoid the Division's present claims against him.

3. Because The Present Claim For Pierce's Sales Through Newport And Jenirob Was Not Adjudicated In The Prior Proceeding, No Final Judgment Was Reached On The Merits As To That Claim

Res judicata applies *only* if the prior action was "resolved on the merits." *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003). Pierce cannot establish this element here, as the operative transactions at issue in this proceeding have never been adjudicated on the merits. In an attempt to avoid the legal effect of his concealment and misrepresentation of key facts about his unregistered sales through Newport and Jenirob, Pierce again mischaracterizes the record by arguing, in effect, that the Initial Decision "rejected" on the merits the Division's attempt to obtain the additional disgorgement. Based upon this false premise, Pierce then posits that the Division had only four options to "keep alive" its claim for his unregistered sales of Lexington stock through Newport and Jenirob. There is no legal basis for Pierce's contention. Because the Hearing Officer explicitly ruled that the claim was beyond the scope of the first OIP, it was never adjudicated in the prior proceeding and Hearing Officer did not rule on the merits of the Division's request. Therefore, there was no claim that needed to be "kept alive" procedurally through any of Pierce's so-called "options." Accordingly, nothing in the Initial Decision foreclosed the Division from pursuing its new claim against Pierce in this separate proceeding.

Specifically, two of Pierce's proposed options -- under Rules of Practice 400(a) and 452 – concern interlocutory review of the Hearing Officer's evidentiary rulings. Such review was unnecessary, of course, inasmuch as the Hearing Officer admitted the evidence the Division requested. By its terms, Rule 400(a) review is disfavored, applies only in extraordinary circumstances and requires certification by the Hearing Officer of conditions not at issue here.

Pierce's citation of Rule of Practice 452 is particularly puzzling, as that rule pertains to proceedings already pending before the Commission and it was therefore inapplicable.

Pierce's third alleged option was for the Division to file a motion to the Commission, pursuant to Rule of Practice 200(d), to amend the OIP in the prior proceeding to include a Section 5 claim for Pierce's sales through Newport and Jenirob. Amendment of orders instituting proceedings is subject to the consideration that "other parties not be surprised or their rights prejudiced." *See In re Barlow*, Exchange Act Release No. 42109, 199 SEC LEXIS 2357 (Nov. 5, 1999) at *2-3 (allowing amendment within scope of original order to conform the relief requested to the charges alleged by the Commission where hearing was not scheduled to begin for several months). Moreover, Comment (d) to Rule of Practice 200 explains that the Commission has authority to amend the OIP "where an amendment is intended to correct an error and is within the scope of the original order" -- neither of which would have been true here. *See In re Wise*, Exchange Act Release No. 48850, 2003 SEC LEXIS 2807 (Nov. 26, 2003) at *3 (allowing amendment to correct error in respondent's first name where no hearing had been set because proceeding had been stayed pending resolution of parallel criminal action). In light of these decisions plus the fact that the hearing had been concluded before the new evidence was even received and that the 300-day deadline for issuance of an initial decision was near , amendment was neither a necessary nor a viable option. Amendment also would not have conserved resources because, as Pierce argued, additional discovery and a new hearing might have been needed to adjudicate the new claim.[11] *See* Buchholz Decl. Ex. J at 2-9. *Cf. Lockheed*

[11] By contending that the Division needed to amend the first OIP to bring a claim against him for his Newport and Jenirob sales, Pierce implicitly acknowledges that the claim was not included in the first proceeding. In contrast to his present position that the claim was brought in the prior proceeding, Pierce previously contended that the claim was not included in the prior proceeding

Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999) (need to re-open discovery and delay proceedings supports district court's finding of prejudice from a delayed motion to amend).

Finally, the Division did not need to appeal the rulings of the Initial Decision on the allegations in the OIP, which found Pierce liable for all of the violations alleged and granted all of the relief the Division had requested in the OIP. Appealing the Hearing Officer's ruling that a claim for Pierce's unregistered sales of Lexington stock through Newport and Jenirob was beyond the scope of the OIP therefore would have amounted to a request that the Commission grant leave to amend the OIP and re-open the prior proceeding to adjudicate an entirely new claim through discovery and a new hearing. There was no need to adjudicate this new and separate claim within the confines of a proceeding that had already concluded, particularly when the requisite evidence for the claim was not available until after the hearing due to Pierce's concealment and adjudication there would not have conserved resources. The Division rightly chose to request that the Commission institute a new proceeding to adjudicate Pierce's liability for these separate transactions under Section 5.

Incredibly, Pierce also argues that the Division should have waited indefinitely to bring the first OIP until it resolved "issues regarding its request for foreign discovery." While such a course of action may reward a respondent whose goal is to obstruct that discovery through concealment and misrepresentation, it does not serve the needs of justice. Similarly incredible is Pierce's contention that the Division knew enough facts to bring the present Section 5 claim when the prior OIP was issued. Quite obviously, given the record, if the Division had had the

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and that permitting the Division to adjudicate it would violate his due process rights. *See* Buchholz Decl. Ex. J.

evidence it needed to assert a claim for Pierce's Newport and Jenirob sales in the first OIP, it would have done so.

None of the cases Pierce cites change this result. Unlike here, all involve plaintiffs who had sufficient information to have included their claims at the outset in their complaints in the earlier actions. In *Aunyx v. Canon U.S.A.*, 978 F.2d 3, 5, 8 (1st Cir. 1992), the court held that res judicata barred the plaintiff from asserting the same claim in her later district court action because she knew enough about the facts to have asserted her claim *at the outset* in her prior administrative proceeding. Here, in contrast, the Division did not know the operative facts and therefore could not have asserted them in the earlier proceeding. In *Western Sys, Inc. v. Ulloa*, 958 F.2d 864, 871-72 (9th Cir. 1992), the court found that the plaintiff was barred by res judicata because he had been on notice of his potential claim earlier. In *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001), the plaintiffs' later action was predicated on the same allegations of discrimination as had been alleged in their dismissed earlier actions. Finally, in *Dynaquest Corp. v. U.S. Postal Serv.*, 242 F.3d 1070, 1074-76 (D.C. Cir. 2001), the later action was barred because the underlying facts were the same as those adjudicated in an earlier proceeding. Unlike *Owens* and *Dynaquest*, however, the Division's claims for Pierce's unregistered sales of Newport and Jenirob were not alleged in the prior proceeding and were never adjudicated there. The Division's decision not to appeal the Hearing Officer's ruling, which was not a decision on the merits of the present Section 5 claim against Pierce, therefore has no res judicata significance. Moreover, unlike *Natural Res. Def. Council v. EPA*, 513 F.3d 257, 261 (D.C. Cir. 2008), where the court found that the earlier and later proceedings "simply offer different legal theories to support the same claim," here different facts and evidence were

required to bring the present claim against Pierce under Section 5, which is transaction specific. *See SEC v. Cavanaugh*, 155 F. 3d at 133.

Accordingly, because the Division's claims for Pierce's unregistered sales of Lexington stock through Newport and Jenirob were never adjudicated, there was no judgment on the merits and that element of res judicata is not met.

4. Two Parties In This Proceeding, Newport And Jenirob, Were Not Named In The Prior Proceeding

Pierce faces the additional hurdle that the present OIP brings claims against not only Pierce, but also against Jenirob and Newport, which the Hearing Officer found were not parties to the first proceeding. *See* Wells Decl. Ex. 14 at 20. *Cf. Facchiano Construction Co. v. U.S. Dept. of Labor*, 987 F.2d 206, 212 (3d Cir. 1993) (declining to apply res judicata in part because not all parties were the same in both actions). The fact that Newport and Jenirob were in privity with Pierce as their beneficial owner is not significant for res judicata purposes, as Pierce's concealment of this relationship prevented the Division from including claims against them in the prior proceeding, as explained above. Accordingly, this element of res judicata, too, is not met and Pierce's res judicata defense must fail in its entirety.

B. This Proceeding Is Not Barred By Estoppel Principles Or Waiver

1. Pierce's Equitable Estoppel Defense Is Inapplicable

Pierce's claimed equitable estoppel defense does not bar this proceeding. The "traditional" elements of equitable estoppel include: (1) the party to be estopped must have known the facts; (2) that party must have intended that its conduct would be acted on or must have acted such that the party asserting estoppel had a right to believe it was so intended; (3) the asserting party must have been ignorant of the true facts; and (4) the asserting party must have relied on the other party's conduct to his injury. *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir.

1994) (stating that courts generally disfavor application of estoppel doctrine against the government). A party seeking to estop another must show that he or she relied reasonably and detrimentally on another party's clear representation of fact. *Heckler v. Community Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984) (declining to find reasonable reliance by party seeking estoppel on ground party was presumed to know the law and declining to find detrimental reliance even where party might be adversely affected by Government's recoupment of funds party had already spent and even though party might have to curtail operations or seek bankruptcy relief).

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

None of the elements of an equitable estoppel can be established here. Nor can Pierce show any affirmative misconduct by the Division. Pierce apparently argues that the "fact" the Division was aware of was that it would not appeal the Hearing Officer's Initial Decision, but would proceed with its Section 5 claim for the unregistered Newport and Jenirob sales and seek the additional disgorgement in a new proceeding. In fact, the Division never made a factual representation of any kind to Pierce or his counsel concerning its appellate intentions upon which Pierce could have relied, much less relied reasonably and detrimentally. Buchholz Decl. ¶ 14. Pierce does not contend otherwise. Further, until Division staff informed Pierce on January 12,

2010, that the Division planned to recommend that the Commission institute a new administrative proceeding against Pierce alleging that his sales through Newport and Jenirob violated Section 5 of the Securities Act, the staff did not discuss this subject with Pierce's counsel. Wells Decl. Ex. 17; Buchholz Decl. ¶ 15. Undeterred, Pierce claims he somehow had a right to rely on the Division's conduct (or inaction), rather than on any affirmative representation by the Division regarding its intentions. Inasmuch as the appellate deadline for both parties expired simultaneously, Pierce could not have relied on any conduct by the Division. Pierce may now regret his tactical decision to waive his right to appeal, but regret is not reliance.

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

Pierce cannot establish an estoppel defense for the additional reason that the equities in this enforcement proceeding run strongly against him. *See Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (stating rule that "he who comes into equity must come with clean hands"). Pierce misled the Commission about his ownership interest in Newport; concealed documents about his sales in the Newport and Jenirob accounts that the Division was able to obtain from the foreign regulator (over Pierce's opposition) only

after the close of evidence in the prior proceeding; and then vigorously and successfully objected to inclusion of claims for disgorgement of those sales proceeds in that proceeding. Now, after managing to avoid disgorgement of the Newport and Jenirob sales proceeds in the first proceeding and after admitting the facts concerning these illegal sales in the present proceeding, Pierce seeks to avoid disgorgement of the proceeds of these illegal sales altogether. This result is wholly contrary to the public interest in enforcing the securities laws. Accordingly, the defense must fail.

2. Pierce's Judicial Estoppel Defense Is Inapplicable

Pierce's judicial estoppel defense is equally meritless. The doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Factors typically considered in deciding whether to apply the doctrine include: (1) "a party's later position must be clearly inconsistent with its earlier position;" (2) "whether the party has succeeded in persuading a court to accept that party's earlier position," in that "[a]bsent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations;" and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not stopped." *Id.* at 750-51.

Pierce's judicial estoppel defense fails to meet these elements. There is no inconsistency between the Division's positions in the prior proceeding and the present proceeding. The Division sought, and continues to seek, a finding that Pierce is liable for his unregistered sales of Lexington stock through Newport's and Jenirob. The Hearing Officer in the prior proceeding

simply ruled that the proposed claim was beyond the scope of the OIP in the prior proceeding.[12] Neither party "prevailed," as the claim was never adjudicated. Litigating this claim in a new proceeding therefore presents no risk of inconsistent judicial determinations because the claim was never adjudicated and is certainly within the scope of the present proceeding.

3. Pierce Cannot Show That the Division Waived Its Right To Proceed With The Claims In the Present Proceeding

Pierce's argument that the Division waived its right to seek disgorgement from him for the separate violations of Rule 5 alleged in the present proceeding must fail. Waiver is the "intentional relinquishment of a known right." *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999). As discussed above, the Division did not relinquish its right to pursue this claim. The Hearing Officer did *not* make any determination in the Initial Decision or anywhere else preventing the Division from seeking disgorgement of the sales through Newport and Jenirob in a subsequent proceeding. Nor was there any legal requirement that the Division appeal because no final judgment had been reached on the merits, as discussed in Section III.A.3 above.

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

IV. CONCLUSION

For all the foregoing reasons, the Division requests that the Hearing Officer deny Respondent Pierce's Motion for Summary Disposition.

Dated: April 8, 2011

Respectfully submitted,

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-13927

In the Matter of

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

Respondents.

Administrative Law Judge
Carol Fox Foelak

DECLARATION OF STEVEN D. BUCHHOLZ IN SUPPORT OF DIVISION OF ENFORCEMENT'S OPPOSITION TO MOTION FOR SUMMARY DISPOSITION BY RESPONDENT PIERCE

I, Steven D. Buchholz, declare:

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

2. Attached hereto as Exhibit A is a true and correct copy of the Division's document request letter to Pierce during the Lexington investigation, dated October 19, 2005. In response to the letter request, Pierce voluntarily produced some personal brokerage records for a U.S. account that he did not use for any Lexington sales. He did not produce any documents relating to his sale of Lexington stock through Newport Capital Corp. ("Newport"), Jenirob Company Ltd. ("Jenirob") or his personal account at Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank"). Exhibit A was made available to Pierce for inspection at pages SEC 04248-53 in the Division's investigative file.

3. Attached hereto as Exhibit B is a true and correct copy of the Division's May 17, 2006 subpoena to Pierce requesting the identical categories of documents covered by the October 19, 2005 voluntary document request. In response to the investigative subpoena, Pierce produced documents relating to his personal sales of Lexington stock through his personal account at Hypo Bank, but Pierce produced no documents relating to Newport, Jenirob or other companies through which he sold Lexington stock. Exhibit B was made available to Pierce for inspection at pages SEC 03847-51 in the Division's investigative file.

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

5. Attached hereto as Exhibit D is a true and correct copy of an excerpt from the transcript of Pierce's sworn investigative testimony in the Lexington matter on July 28, 2006, which was made available to Respondents for inspection at pages SEC 02927-40 in the Division's investigative file.

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

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

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

9. The new evidence produced by the Liechtenstein regulator to the Division for the first time on March 10, 2009 showed that Pierce had sold 1.6 million Lexington shares through

two Liechtenstein accounts that he secretly controlled in the names of Newport and Jenirob for more than $7 million in proceeds. The new records also confirmed that one of Pierce's primary contacts at Hypo Bank was Philippe Mast, an officer of Hypo Bank and signatory on Hypo Bank's omnibus trading account in the United States at vFinance Investments, Inc. ("vFinance"), a brokerage firm that Hypo Bank used to sell Lexington shares for Pierce, Newport, Jenirob and others. These records first received from the Liechtenstein regulator on March 10, 2009 had not been part of the investigative files produced by the Division in the prior proceeding. Before this new evidence was received, the Division did not have evidence showing which Liechtenstein accounts sold Lexington shares, the identity of the beneficial owners of those accounts, or the corresponding quantities, dates and proceeds of those sales. The Division only had transfer agent records showing Pierce's initial transfers of Lexington shares, many of which involved Newport.

10. Attached hereto as Exhibit H is a true and correct copy of documents relating to Newport's Hypo Bank account. Exhibit H was among the documents produced by the Liechtenstein regulator to the Division for the first time on March 10, 2009 and was admitted into evidence as Division's Exhibit 80 in the prior proceeding.

11. Attached hereto as Exhibit I is a true and correct copy of documents relating to Jenirob's Hypo Bank account. Exhibit I was among the documents produced by the Liechtenstein regulator to the Division for the first time on March 10, 2009 and was admitted into evidence as Division's Exhibit 84 in the prior proceeding.

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

13. Attached hereto as Exhibit K is a true and correct copy of a March 25, 2009 letter from Pierce's Liechtenstein counsel, filed March 26, 2009 in the prior proceeding as Exhibit A to the Declaration of Christopher B. Wells in support of Pierce's Opposition to the Division's Motion for the Admission of New Evidence. According to Exhibit K, Pierce filed appeals in

Liechtenstein on November 4, 2008 and again on February 23, 2009 relating to the Division's request for assistance from the Liechtenstein regulator.

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

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

16. Attached hereto as Exhibit L is a true and correct copy of an excerpt of Section 2.3.4 of the Division's *Enforcement Manual*, which is publicly available through the Commission's website at http://www.sec.gov/divisions/enforce/enforcementmanual.pdf. Because of the open-ended nature of an investigation, it is not unusual for more than one distinct action or proceeding to arise from a single formal order of investigation.

17. Attached hereto as Exhibit M is a true and correct copy of an excerpt from a public filing on Form SB-2 made by Lexington on December 15, 2004 relating to a private placement by Lexington in which Newport and others participated, which did not identify Pierce as the beneficial owner of Newport. This Form SB-2 filing was previously marked as investigation exhibit 49 and admitted into evidence as Division's Exhibit 59 in the prior proceeding. The full text also is publicly available through the Commission's website at http://www.sec.gov/Archives/edgar/data/1060791/000109230604000937/formsb2.txt.

18. Attached hereto as Exhibit N is a true and correct copy of an excerpt from a public filing on Form SB-2 made by Lexington on October 17, 2005 relating to a private placement by Lexington in which Newport and others participated, which did not identify Pierce as the beneficial owner of Newport. This Form SB-2 filing was previously marked as

investigation exhibit 50 and admitted into evidence as Division's Exhibit 60 in the prior proceeding. The full text also is publicly available through the Commission's website at http://www.sec.gov/Archives/edgar/data/1060791/000118374005000111/sb2.htm.

19. Consistent with the agreement reached during the hearing in the prior proceeding, account numbers and personal identification numbers (including social security numbers) have been redacted wherever they appear in exhibits attached to this declaration to show only the last four digits.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed April 8, 2011, in San Francisco, California.

Steven D. Buchholz

A

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
SAN FRANCISCO DISTRICT OFFICE
44 Montgomery Street
SUITE 2600
SAN FRANCISCO, CALIFORNIA 94104

DIRECT DIAL: 415-293-0312
FAX NUMBER: 415-705-2501
BUCHHOLZS@SEC.GOV

October 19, 2005

VIA FACSIMILE TO 360-676-7565
AND FIRST-CLASS MAIL

Brent Pierce
2211 Rimland Drive, Suite 100
Bellingham, WA 98225

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

Dear Mr. Pierce:

The enforcement staff of the U.S. Securities and Exchange Commission ("Commission") is conducting an inquiry in the above-referenced matter to determine whether there have been violations of the federal securities laws. In connection with our inquiry, we request that you voluntarily produce the materials and information described in the attachment to this letter that are in your custody, possession, or control.

Instructions for Production and Preservation Request

We request that you produce the materials and information no later than **November 2, 2005**. Although you may produce copies of the requested materials at your expense, **effective immediately you should take all reasonable steps to preserve and maintain the originals of the requested materials until we inform you that we no longer need them.** We will notify you if and when such originals are required. The materials should be sent to:

Steven D. Buchholz
U.S. Securities and Exchange Commission
44 Montgomery Street, Suite 2600
San Francisco, CA 94104

Materials produced to the Commission should be accompanied by a list briefly describing each item produced and the specific numbered category or categories to which it relates. We also ask that all pages or other materials produced be serially numbered (with a unique prefix, such as "PIEB"). You should include a cover letter stating whether you have conducted a diligent search for all requested materials, and whether all materials located have been produced.

If any requested material is not produced, for whatever reason, we ask that you provide a list identifying such materials, their location, and the reason they were not produced. In addition,

if any requested material is withheld because of a claim of attorney-client privilege, you should identify: (a) the attorney and client involved; (b) all persons or entities identified by the material to have received or been sent the material; (c) all persons or entities known to have been furnished the material or informed of its substance; (d) the date of the material; and (e) the subject matter of the material.

Other Important Information

You have the right to consult with and be represented by your own lawyer in this matter. We cannot give you legal advice.

Enclosed is a copy of Commission Form 1662, which contains important supplemental information, including a list of routine uses of information provided to the Commission. Please read it carefully.

This inquiry is confidential and should not be construed as an indication by the Commission or its staff that any violations of law have occurred, nor should it be considered a reflection upon any person, entity, or security.

Please note that, in any matter in which enforcement action is ultimately deemed to be warranted, the Division of Enforcement will not recommend any settlement to the Commission unless the party wishing to settle certifies, under penalty of perjury, that all materials responsive to the staff's subpoenas and formal and informal production requests in the matter have been produced.

If you have any questions, please call me at 415-293-0312. If you obtain counsel, please have your counsel contact me.

Sincerely,

Steven D. Buchholz
Staff Attorney, Office of Enforcement

Encls: Attachment
Form 1662

ATTACHMENT TO REQUEST FOR PRODUCTION OF DOCUMENTS TO BRENT PIERCE

In the Matter of Lexington Resources, Inc. (SF-2989)
October 19, 2005

DEFINITIONS

The following definitions apply to this attachment:

A. "YOU" and "YOUR" mean Brent Pierce and any person or entity acting on YOUR behalf, including but not limited to agents, employees, consultants, accountants, and attorneys.

B. "LEXINGTON RESOURCES" means Lexington Resources, Inc. and all of its current and former officers (including but not limited to Grant Atkins and Vaughn Barbon), directors (including but not limited to Douglas Humphreys, Norman MacKinnon, and Steve Jewett), employees, agents, independent contractors, partners, limited partners, attorneys, accountants, affiliates, subsidiaries (including Lexington Oil & Gas Ltd. Co. LLC), divisions, predecessors, and successors; and any person acting on behalf of LEXINGTON RESOURCES with express, implied, or apparent authority to do so.

C. "DOCUMENTS" means all records, materials, and other tangible forms of expression in YOUR possession, custody, or control, whether originals, copies, annotated copies, drafts, or final versions, and however created, produced, stored, or maintained, including but not limited to charts, lists, logs, spreadsheets, financial information and analyses, summaries, books, papers, files, notes, minutes, memoranda, reports, schedules, account statements, ledgers, checks, receipts, money orders, wire transfers, confirmations, records of payment and billings, transcriptions, correspondence, contracts, agreements, telegrams, telexes, wire messages, telephone messages, journals, calendars, datebooks, diaries, budgets, invoices, audio and video recordings, electronic mail, electronic data compilations, computer tapes and disks (and hard copy of the data contained on such tapes and disks), microfilm, microfiche, and all other electronic media and storage devices.

D. "COMMUNICATIONS" includes any transmittal or receipt of information, whether by chance or prearranged, formal or informal, oral, written, or electronic, including but not limited to conversations, meetings, and discussions in person or by telephone or video conference; and written correspondence through the use of the mails, telephone lines and wires, courier services, and electronic media such as electronic mail and instant messenger.

ATTACHMENT TO REQUEST FOR PRODUCTION OF DOCUMENTS TO BRENT PIERCE

TIME PERIOD

Unless otherwise stated, this request calls for the production of documents dated, created, or reviewed from October 1, 2003 through the date of production.

CATEGORIES OF DOCUMENTS TO BE PRODUCED

1) DOCUMENTS sufficient to identify by name, address, and telephone number every company or other entity for which YOU have provided services or with which YOU have been affiliated in any capacity since 1995.

2) DOCUMENTS reflecting all residential addresses, telephone numbers, drivers license numbers, passport numbers, and aliases used by YOU since 1995.

3) All statements from checking, savings, credit card, and other bank accounts in YOUR name or in which YOU have a beneficial interest.

4) All statements from securities brokerage accounts in YOUR name, in which YOU have a beneficial interest or exercise discretionary control, or in whose profits and/or losses YOU share.

5) All DOCUMENTS constituting, reflecting, or relating to any agreement, whether written or oral, between YOU and LEXINGTON RESOURCES.

6) DOCUMENTS sufficient to identify by name, address, telephone number, and e-mail address all persons and entities retained, directly or indirectly, by YOU to provide promotional, marketing, advertising, financial, managerial, accounting, investment, scientific, geologic, geophysical, drilling, operational, legal, business relations, public relations, media relations, investor relations, or investor communications services relating to LEXINGTON RESOURCES.

7) All DOCUMENTS constituting, reflecting, or relating to any agreement, whether written or oral, between YOU and any other person or entity concerning LEXINGTON RESOURCES.

8) All DOCUMENTS constituting or reflecting COMMUNICATIONS between YOU and LEXINGTON RESOURCES.

9) All DOCUMENTS constituting or reflecting COMMUNICATIONS between YOU and any other person or entity concerning LEXINGTON RESOURCES.

10) All DOCUMENTS constituting or relating to invoices, statements of work, or any other DOCUMENTS describing services actually performed by YOU or any other person or entity relating to LEXINGTON RESOURCES.

11) All DOCUMENTS relating to payments or other consideration of any kind (including but not limited to stock, stock options, notes, and warrants) exchanged,

directly or indirectly, between YOU and LEXINGTON RESOURCES. This request includes but is not limited to receipts, invoices, requisitions, cancelled checks (front and back), stock transfer records, accounts payable records, and accounts receivable records.

12) All DOCUMENTS relating to payments or other consideration of any kind (including but not limited to stock, stock options, notes, and warrants) exchanged, directly or indirectly, between YOU and any other person or entity in connection with services relating to LEXINGTON RESOURCES. This request includes but is not limited to receipts, invoices, requisitions, cancelled checks (front and back), stock transfer records, accounts payable records, and accounts receivable records.

13) All drafts and final versions of promotional materials, newsletters, reports, tout sheets, marketing, advertising, press releases, public statements, investor kits, investor relations packages, or similar DOCUMENTS, including but not limited to e-mails, facsimiles, and internet postings, relating to LEXINGTON RESOURCES.

14) All DOCUMENTS that support each statement made in any materials distributed by YOU relating to LEXINGTON RESOURCES.

15) DOCUMENTS sufficient to identify all internet service provider accounts and e-mail addresses maintained by YOU.

16) DOCUMENTS sufficient to identify all screen names and user accounts maintained by YOU for Raging Bull, Yahoo, or any other internet stock message board or chat room.

17) All messages relating to LEXINGTON RESOURCES posted by YOU on Raging Bull, Yahoo, or any other internet stock message board or chat room.

18) Telephone records for all telephone numbers maintained by YOU.

19) All DOCUMENTS reflecting or relating to any loans or lines of credit received or given, directly or indirectly, between YOU and LEXINGTON RESOURCES.

20) All DOCUMENTS reflecting or relating to issuances, purchases, grants, sales, transfers, or any other transactions by YOU in the securities of LEXINGTON RESOURCES, including but not limited to stock, stock options, notes, and warrants.

21) All DOCUMENTS relating to the lease, rental, or ownership of premises located at 2211 Rimland Drive, Suite 100, Bellingham, WA 98225; including but not limited to agreements and records of payments.

ATTACHMENT TO REQUEST FOR PRODUCTION OF DOCUMENTS TO BRENT PIERCE

22) All DOCUMENTS relating to the lease, rental, or ownership of premises located at [redacted] Zürich, Switzerland; including but not limited to agreements and records of payments.

23) All DOCUMENTS relating to the lease, rental, or ownership of premises located at [redacted] 5EH, United Kingdom; including but not limited to agreements and records of payments.

24) All DOCUMENTS relating to the lease, rental, or ownership of premises located at [redacted]t, Surrey, British Columbia B3S 0J8, Canada; including but not limited to agreements and records of payments.

B

SUBPOENA
UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

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

To: **Brent Pierce**
c/o Christopher B. Wells, Esq.
Lane Powell P.C.
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

☑ **YOU MUST PRODUCE** everything specified in the Attachment to this subpoena to officers of the Securities and Exchange Commission at the place, and no later than the date and time, specified below.

U.S. Securities and Exchange Commission
44 Montgomery Street, 26th Floor
San Francisco, California 94104
Date/Time: May 31, 2006 at 5:00 p.m. PDT

☑ **YOU MUST TESTIFY** before officers of the Securities and Exchange Commission, at the place, date and time specified below.

United States Attorney's Office
700 Stewart Street, Fifth Floor
Seattle, Washington 98101
Date/Time: June 7, 2006 at 9:00 a.m. PDT

SEC 03847

FEDERAL LAW REQUIRES YOU TO COMPLY WITH THIS SUBPOENA.
Failure to comply may subject you to a fine and/or imprisonment.

By: _____ Date: May 17, 2006

Steven D. Buchholz, Staff Attorney
U.S. Securities and Exchange Commission, San Francisco District Office
44 Montgomery Street, 26th Floor; San Francisco, CA 94104; Telephone: 415-293-0312

I am an officer of the United States Securities and Exchange Commission authorized to issue subpoenas in this matter. The Securities and Exchange Commission has issued a formal order authorizing this investigation under Section 21(b) of the Securities Exchange Act of 1934.

NOTICE TO WITNESS: If you claim a witness fee or mileage, submit this subpoena with the claim voucher.

Subpoena Attachment to Brent Pierce

In the Matter of Lexington Resources, Inc. (SF-2989)
May 17, 2006

DEFINITIONS

A. "YOU" and "YOUR" mean Brent Pierce and any person or entity acting on YOUR behalf, including but not limited to agents, employees, consultants, accountants, and attorneys.

B. "LEXINGTON RESOURCES" means Lexington Resources, Inc. and all of its current and former officers (including but not limited to Grant Atkins and Vaughn Barbon), directors (including but not limited to Douglas Humphreys, Norman MacKinnon, and Steve Jewett), employees, agents, independent contractors, partners, limited partners, attorneys, accountants, affiliates, subsidiaries (including Lexington Oil & Gas Ltd. Co. LLC), divisions, predecessors, and successors; and any person acting on behalf of LEXINGTON RESOURCES with express, implied, or apparent authority to do so.

C. "DOCUMENTS" means any and all records in YOUR possession, custody, or control, whether drafts or in finished versions, whether stored in written, magnetic, or electronic form, including but not limited to files, notes, summaries, analyses, memoranda, correspondence, electronic mail, facsimile transmissions, audio or video tape recordings, computer tapes or disks, and all records encompassed by Rule 34(a) of the Federal Rules of Civil Procedure.

D. "COMMUNICATIONS" includes any transmittal or receipt of information, whether by chance or prearranged, formal or informal, oral, written, or electronic, including but not limited to conversations, meetings, and discussions in person or by telephone or video conference; and written correspondence through the use of the mails, telephone lines and wires, courier services, and electronic media such as electronic mail and instant messenger.

TIME PERIOD

Unless otherwise stated below, this Attachment calls for DOCUMENTS dated, created, or reviewed between October 1, 2003 and May 17, 2006.

DOCUMENTS TO BE PRODUCED

1) DOCUMENTS sufficient to identify by name, address, and telephone number every company or other entity for which YOU have provided services or with which YOU have been affiliated in any capacity since 1995.

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10) All DOCUMENTS constituting or relating to invoices, statements of work, or any other DOCUMENTS describing services actually performed by YOU or any other person or entity relating to LEXINGTON RESOURCES.

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checks (front and back), stock transfer records, accounts payable records, and accounts receivable records.

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22) All DOCUMENTS relating to the lease, rental, or ownership of premises located at [redacted] Zürich, Switzerland; including but not limited to agreements and records of payments.

23) All DOCUMENTS relating to the lease, rental, or ownership of premises located at [redacted] London W1K 5EH, United Kingdom; including but not limited to agreements and records of payments.

24) All DOCUMENTS relating to the lease, rental, or ownership of premises located at [redacted] Surrey, British Columbia B3S 0J8, Canada; including but not limited to agreements and records of payments.

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

Q Do you know someone named Philippe Mast, P-H-I-L-I-P-P-E, Mast, M-A-S-T?

A Yes.

Q Who is he?

A He's a Swiss citizen.

Q Is he a business associate of yours?

A Yes.

Q Does he work for a bank that you do business through?

MR. WELLS: You can disclose anything that's disclosed in public documents. Other than that, we may have to advise Mr. Pierce, if the bank is going to be one of these foreign domicile banks, to use caution and perhaps consult legal counsel before answering. But if Mr. Mast is mentioned in some public document that comes to mind, then by all means

answer it. By "public document" I mean public filing of Lexington.

THE WITNESS: I believe that his name is in some public filings, yes.

BY MR. BUCHHOLZ:

Q In what context?

A I'm not sure, but I've seen his name in the filings before.

Q In connection with having an ownership interest in Lexington securities or something else?

A Being involved with some companies that have ownership interest. I believe that's where I have seen it.

Q Which companies?

A I don't remember. I mean it would be in there. I think where I would have seen it is either in a registration statement or somewhere.

Q So like an SB2?

A Yes.

Q And were you aware of Mr. Mast having control over some entities that invested in Lexington Resources whose shares were later registered on a form SB2?

MR. WELLS: Well, be careful about having control because that implies ownership in addition to some officer or director type position.

THE WITNESS: I don't know his position.

BY MR. BUCHHOLZ:

Q Okay, but is your understanding that he was identified as a person who was authorized to direct trading of Lexington Securities?

A I don't know whether he is authorized to do that or not. I have just seen his name in association with the companies, so.

Q Okay. Are you aware of Mr. Mast conducting trading activities in Lexington Securities with any brokerages in the US?

A Yes.

Q Which brokerages?

A The only one that I know about was with vFinance.

Q Did Mr. Mast conduct those activities at vFinance in an account in his own name?

A I don't know. I don't know whether he had an account in his own name.

Q But he had some account that he conducted trading activities in Lexington Securities at vFinance?

A I believe so, yes.

Q What's the basis of your understanding?

A Just a comment from Mr. Thompson that he dealt with him regarding an account at the firm.

Q In connection with that account, what did Mr. Thompson say?

A I don't know whether he said anything. I mean --
Q Why did it come up?
A Hmm?
Q Why did it come up?
A I think it came up at the point when -- certainly came up at the point when we -- basically when he wasn't allowed to trade stock anymore in, as you say Lexington, but I don't know whether it was Lexington or all securities.
Q What's your recollection of what Mr. Thompson said about what he was not allowed to do?
A He basically said that he wasn't allowed to trade Lexington securities. That's what I believe.
Q And I didn't want to give any other information to the contrary. I was just unclear on what your testimony was.
A And I think that's what he said. I mean I know there was a discussion. It was a long time ago. That's what I remember. So there was some -- like I said, it was in reference to the other account, as well. It wasn't just the Newport account.
Q Did Mr. Thompson mention any other individuals other than Mr. Mast in connection with that other account at vFinance?
A I don't remember any other individuals, that he mentioned to me anyway.
Q Were you aware of any other individuals connected

to that account at vFinance that traded in Lexington securities?

A I'm aware of other individuals, but I don't know whether they had anything to do with that account.

Q Or any other account at vFinance?

A No, that account because we're talking about the account that Mr. Mast operated.

Q Okay. What do you mean by you know of other individuals; are there other individuals that are relevant how?

A That work for the same company, but I don't know whether they had anything to do with that account.

Q Has Mr. Mast?

A Yes.

Q Okay. Are any of them US citizens?

A I don't know. I have no idea.

Q Do you have any reason to think they're not US citizens?

A Yes.

Q Where are they located?

A Liechtenstein.

Q Did you have any involvement with that other account at vFinance?

A What do you mean "involvement"?

Q Did you direct any trading in that account?

A I don't think I'm authorized to trade for that account.

Q Did you direct trading in that account?

A I don't think I directed trading on that account, no.

Q So it's your testimony, no, you did not direct trading in that account?

A I don't believe I directed trading in that account.

Q Did you give instructions to anyone else to conduct trading in that account at vFinance?

A I don't think I have any authority to trade in other people's accounts, so.

Q I understand your testimony has been you don't believe you have authority, but I'm asking whether you instructed anyone else to conduct trades in that account, not the Newport account, the other account connected to Mr. Mast at vFinance?

A I don't remember doing that.

Q Did you ever direct Mr. Kellner to conduct trading in that account?

A I didn't direct Mr. Kellner at all.

Q With respect to any Lexington trading, you never directed Mr. Kellner --

A To do with Lexington trading, we went through that yesterday, so.

Q Right. What did you mean by you never directed Mr. Kellner at all?

A To do with that particular account. We're talking about that particular account.

Q Do you know whether Mr. Kellner traded or directed trading in the Mast account at vFinance?

A It is possible.

Q What's the basis for your understanding?

A I just think it's possible.

Q Why? Did you have discussions with Mr. Kellner?

A That's where I would have gotten the information, yeah.

Q Do you know anyone else who was authorized to trade -- or who directed trading in the Mast account at vFinance?

A I don't know anybody else, other than possibly Mr. Kellner.

(SEC Exhibit No. 98 marked for identification.)

Q I'm handing you an exhibit that's been marked Exhibit No. 98, and it's a two-page document, and it's labeled VFIN 1085 and 1086. It appears to be an email string involving you, Mr. Thompson, and Mr. Mast on October 29, October 30 -- or sorry -- October 29 -- yeah, October 30 and November 1st, 2004. The subject is "Trades 10/29/04."

Do you recognize the emails in Exhibit 98?

A I don't recognize them, but I can read them.
Q Do you believe you received and sent the emails on the dates indicated?
A My name is on here.
Q The lowest email where Mr. Thompson emails you and shows what looked to be information related to buys and sells, the lines that have B or S at the left column and quantities --
A Uh-huh.
Q -- what do you understand that to refer to?
A Buys and sells in those securities.
Q In which account?
A I assume it to be the Phil Mast account.
Q Why would Mr. Thompson send you information about trades in the Phil Mast account?
A He did it on a regular basis.
Q Why?
A Because it was in reference to securities that I was involved in.
Q By "securities you were involved in," do you mean the companies you were involved in, or do you mean the actual security transactions?
A The security transactions.
Q How were you involved in them?
A Well, with these particular companies, Lexington,

MIVT -- I'm sorry. I don't understand your question.

Q So that's what I meant when I asked you do you mean the companies generally, or do you mean these particular securities transactions?

So with regard --

A Well, he sent me -- these are obviously securities transactions.

Q Right. Why would he send you that information?

A Because I corresponded with Mr. Mast on a regular basis about transactions.

Q Why?

A Just a regular protocol.

Q But why?

A Pardon?

Q Why would you communicate with Mr. Mast about securities transactions?

A Because that particular account traded in the securities.

Q Did you have any interest in that account?

A No.

Q And I thought you said you never gave any instructions for trading in that account?

A I didn't give trading instructions.

Q So why would you get information about trades that had been conducted in that account?

A Mr. Thompson would provide information on what -- how many shares of that particular stock had been traded.

Q Did you ask him to do that?

A Pardon me?

Q Did he send you the information about the transactions?

A I possibly could have.

Q Why?

A Because I worked with Mr. Mast on that side of things.

Q What do you do; what work do you do with Mr. Mast?

A If client accounts were either purchasing or selling securities, for instance, in Lexington, he would ask, and they'd put in an order to sell securities. There was certain splits as to where the stock would be sold from.

Q What do you mean by that, certain splits?

A Just that. Like here there's -- appears to be 20 -- 15,000 shares sold and 10,000 shares bought.

Q Why would that happen?

From -- is it your understanding that that's from the Mast account, from one account?

A It has to be.

Q So why would they be buying and selling the same day?

A They are not buying and selling the same day. They

represent thousands of accounts.

Q Who represents thousands of accounts?

A Phil Mast.

Q But the account at vFinance bought and sold in the same account the same day?

A We still haven't established what account this is.

Q You said it was the Mast account.

A I did not. I said it was related to Phil Mast. I did not say that. I don't know that it's Phil Mast's personal account. I did not say that.

Q No, no, no. We were referring to that account at vFinance that was connected to Mr. Mast as the Mast account. That's what I meant.

A Yes. Okay, but I don't know that it's Phil Mast's account.

Q Right, but was it your understanding that these were trades that were conducted in that account at vFinance?

A Yes.

Q Okay. What are you saying about what Mr. Mast was doing with the stock, the Lexington stock, that here it indicates was bought and sold on the same day?

A There was customers of his buying and selling stock.

Q Customers of Mr. Mast's?

A Yes.

Q The next email up where you email to Mr. Mast with the various information about Lexington and the other securities, are the accounts Newport, Jenirob, Eurotrade, are those accounts that Mr. Mast was selling to?

A Selling to?

Q Or having transactions in the securities with?

A I believe so, yes.

Q Which Newport account is this referring to?

A This is Newport at the Hypo Bank.

Q And what about Jenirob, is that a Hypo Bank account, to your understanding?

A I assume that they all are Hypo Bank accounts.

Q Which Canacord account is referenced here in the line that says, "Lexington purchased 15,000 Canacord to Newport"?

A I assume it's the same.

Q What do you mean by the same, a Mast account at Canacord?

A A Mast account, yes.

Q Why did you ask Mr. Mast to send you updates for those accounts at Hypo Bank?

(Mr. Woodall exits room.)

THE WITNESS: He sends me updates for my accounts and some of my other client accounts.

BY MR. BUCHHOLZ:

Q Are those your accounts? Do you have an interest in those accounts?
A I have an interest in Newport Capital.
Q What about Jenirob?
A No.
Q What about Eastern?
A No.
Q What about Eurotrade?
A No.
Q Do you know who does have an interest in those accounts?
A Yes.
Q Are you willing to tell us today who has an interest?
A Not today. I'll have to check with the individuals.
Q Okay. Did you tell Mr. Thompson -- obviously you have sent him this email forwarded in the top level email here on November 1, 2004, this information.
So was it your understanding that Mr. Thompson was aware that transactions were happening in the stock at Hypo Bank with other accounts?
A He did the trading.
Q He did the trading in the Mast account of vFinance?
A That's correct.

Q Did he know about the trades or the transactions that were going on at Hypo Bank or other banks or brokerages?

A I have no idea whether he knew that.

Q Well, you forwarded him this email.

A Well, but I have no idea whether he knew what was going on in the other accounts that Phil Mast has. I really don't know that answer. Obviously from this email, he can see that there's a transaction, but I don't know whether he knew there was other business going on elsewhere. No idea.

Q And is it your testimony that you never directed trades in either the Mast account at vFinance or any Mast account at Canacord?

A I don't know what "directed trades" means, so maybe clarify what you mean.

Q As opposed to receiving confirmations afterwards, like this document, giving the instructions before the trade?

A The trades were done. I was involved in the confirmation side of it.

Q And you never were involved before the trading?

A I don't get involved in the trading.

E

Administrative Proceeding
File No. 3-13109

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

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

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INTRODUCTION

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

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

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

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

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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

LEGAL ARGUMENT

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

A. The Grounds For Summary Disposition Against Pierce

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

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

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

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

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

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

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

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

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

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

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

shares through Hypo Bank in June 2004.

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

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

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

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

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

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

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

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

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

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

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

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

II. DISGORGEMENT AND CEASE AND DESIST ORDERS ARE PROPER.

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

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

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

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

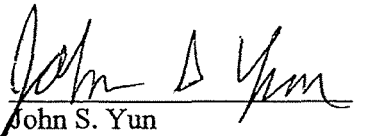
Pierce's violations also support cease and desist orders. His violation of Section 5 deprived Lexington stock purchasers of disclosures in a registration statement and prospectus; his violation of Sections 13(d) and 16(a) deprived investors of disclosures about Pierce's holdings and transactions. Pierce's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

CONCLUSION

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

Dated: December 5, 2008

Respectfully submitted,



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Attorneys for
Division of Enforcement

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ADMINISTRATIVE PROCEEDING
FILE NO. 3-13109

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

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

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

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

IT IS SO ORDERED.

Carol Fox Foelak

Carol Fox Foelak
Administrative Law Judge

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13109

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

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

I, Steven D. Buchholz, declare:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Steven D. Buchholz

Administrative Law Judge Carol Fox Foelak

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UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13109

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

I.

Summary of Opposition

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

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

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

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

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

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

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

II.

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

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

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

Two days later, the Division rested its rebuttal case:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV.

Conclusion.

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

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

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

DATED this 26th day of March , 2009.

LANE POWELL PC

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

LNR LORENZ NESENSOHN KABANSER, RECHTSANWÄLTE
LANDSTRASSE 33 POSTFACH 207 FL 9490 VADUZ

K

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

Vaduz, 25 March 2009
guh

FMA/Brent Pierce and others

Dear Mr. Wells

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I hope this is of assistance to you.

Yours sincerely

Dr. Oliver Nesensohn

2.3.4 Formal Order Process

Introduction:

The staff cannot issue investigative subpoenas to compel testimony or the production of documents unless a formal order of private investigation has been issued. Pursuant to delegated authority, certain senior officers of the Division may, in their discretion, issue a formal order of investigation when a formal investigation is appropriate and necessary in order to determine whether a violation of the federal securities laws may have occurred or may be occurring. The formal order serves two important functions. First, it generally describes the nature of the investigation that has been authorized, and second, it designates specific staff members to act as officers for the purposes of the investigation and empowers them to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of documents and other materials. Formal investigative proceedings are nonpublic unless otherwise ordered by the Commission.

As Filed with the Securities and Exchange Commission on December 15, 2004

Registration No. 333-_____

U.S. SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM SB-2

REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

LEXINGTON RESOURCES, INC.

(NAME OF SMALL BUSINESS ISSUER IN ITS CHARTER)

Nevada	3663	11-3124068
(State or jurisdiction of incorporation or organization)	(Primary Standard Industrial Classification Code Number)	(I.R.S. Employer Identification No.)

7473 WEST LAKE MEAD ROAD LAS VEGAS,
NEVADA 89128
(702) 382-5139
(ADDRESS AND TELEPHONE NUMBER OF PRINCIPAL EXECUTIVE OFFICES)

GRANT ATKINS, CHIEF EXECUTIVE OFFICER
7473 WEST LAKE MEAD ROAD LAS VEGAS,
NEVADA 89128
(702) 382-5139
(NAME, ADDRESS AND TELEPHONE NUMBER OF AGENT FOR SERVICE)

COPIES TO:
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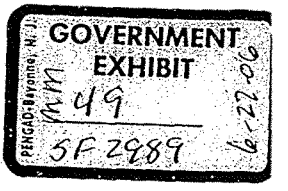
Dave Stefanski, Esq.
Schlueter & Associates, P.C.
1050 17th St., Suite 1700
Denver, Colorado 80265
(303) 292-3883
(303) 296-8880 (fax)

Approximate date of proposed sale to the public: From time to time after the effective date of this Registration Statement.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act, check the following box. {X}

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. { }

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. { } If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and



PLAN OF DISTRIBUTION

The Selling Shareholders of the common stock of Lexington Resources, Inc., and any of their pledgees, assignees and successors-in-interest may, from time to time, sell any or all of their shares of Common Stock on any stock exchange, market or trading facility on which the shares are traded or in private transactions. These sales may be at fixed or negotiated prices. The Selling Shareholders may use any one or more of the following methods when selling shares:

- ordinary brokerage transactions and transactions in which the broker-dealer solicits purchasers;
- block trades in which the broker-dealer will attempt to sell the shares as agent but may position and resell a portion of the block as principal to facilitate the transaction;
- purchases by a broker-dealer as principal and resale by the broker-dealer for its account;
- an exchange distribution in accordance with the rules of the applicable exchange;
- privately negotiated transactions;
- settlement of short sales entered into after the date of this prospectus;
- broker-dealers may agree with the Selling Shareholders to sell a specified number of such shares at a stipulated price per share;
- a combination of any such methods of sale;
- through the writing or settlement of options or other hedging transactions, whether through an options exchange or otherwise; or
- any other method permitted pursuant to applicable law.

The Selling Shareholders may also sell shares under Rule 144 under the Securities Act of 1933, as amended (the "Securities Act"), if available, rather than under this prospectus.

Broker-dealers engaged by the Selling Shareholders may arrange for other brokers-dealers to participate in sales. Broker-dealers may receive commissions or discounts from the Selling Shareholders (or, if any broker-dealer acts as agent for the purchaser of shares, from the purchaser) in amounts to be negotiated. Each Selling Shareholders does not expect these commissions and discounts relating to its sales of shares to exceed what is customary in the types of transactions involved.

In connection with the sale of our common stock or interests therein, the Selling Shareholders may enter into hedging transactions with broker-dealers or other financial institutions, which may in turn engage in short sales of the common stock in the course of hedging the positions they assume. The Selling Shareholders may also sell shares of our common stock short and deliver these securities to close out their short positions, or loan or pledge the common stock to broker-dealers that in turn may sell these securities. The Selling

Shareholders may also enter into option or other transactions with broker-dealers or other financial institutions or the creation of one or more derivative securities which require the delivery to such broker-dealer or other financial institution of shares offered by this prospectus, which shares such broker-dealer or other financial institution may resell pursuant to this prospectus (as supplemented or amended to reflect such transaction).

The Selling Shareholders and any broker-dealers or agents that are involved in selling the shares may be deemed to be "underwriters" within the meaning of the Securities Act in connection with such sales. In such event, any commissions received by such broker-dealers or agents and any profit on the resale of the shares purchased by them may be deemed to be underwriting commissions or discounts under the Securities Act. Each Selling Shareholder has informed us that it does not have any agreement or understanding, directly or indirectly, with any person to distribute the common stock.

We are required to pay certain fees and expenses incurred by us incident to the registration of the shares. We have agreed to indemnify the Selling Shareholders against certain losses, claims, damages and liabilities, including liabilities under the Securities Act.

Because the Selling Shareholders may be deemed to be "underwriters" within the meaning of the Securities Act, they will be subject to the prospectus delivery requirements of the Securities Act. In addition, any securities covered by this prospectus which qualify for sale pursuant to Rule 144 under the Securities Act may be sold under Rule 144 rather than under this prospectus. Each Selling Shareholders has advised us that they have not entered into any agreements, understandings or arrangements with any underwriter or broker-dealer regarding the sale of the resale shares. There is no underwriter or coordinating broker acting in connection with the proposed sale of the resale shares by the Selling Shareholders.

We have agreed to keep this prospectus effective until the earlier of (i) the latest date upon which we are obligated to cause to be effective the registration statement for resale of the shares by the Selling Shareholders, (ii) the date on which the shares may be resold by the Selling Shareholders without registration and without regard to any volume limitations by reason of Rule 144(k) under the Securities Act or any other rule of similar effect or (iii) all of the shares have been sold pursuant to the prospectus or Rule 144 under the Securities Act or any other rule of similar effect. The resale shares will be sold only through registered or licensed brokers or dealers if required under applicable state securities laws. In addition, in certain states, the resale shares may not be sold unless they have been registered or qualified for sale in the applicable state or an exemption from the registration or qualification requirement is available and is complied with.

Under applicable rules and regulations under the Exchange Act, any person engaged in the distribution of the resale shares may not simultaneously engage in market making activities with respect to our common stock for a period of two business days prior to the commencement of the distribution. In addition, the Selling Shareholders will be subject to applicable provisions of the Exchange Act and the rules and regulations thereunder, including Regulation M, which may limit the timing of purchases and sales of shares of our common stock by the Selling Shareholders or any other person. We will make copies of this prospectus available to the Selling Shareholders and have informed them of the need to deliver a copy of this prospectus to each purchaser at or prior to the time of the sale.

SELLING SHAREHOLDERS

The Selling Shareholders may offer and sell, from time to time, any or all of the common stock issued and the common stock issuable to them upon exercise of the common stock purchase warrants. Because the Selling Shareholders may offer all or only some portion of the 4,087,525 shares of common stock and underlying common stock purchase warrants to be registered, no estimate can be given as to the amount or percentage of these shares of common stock that will be held by the selling stockholders upon termination of the offering.

The following table sets forth certain information regarding the beneficial ownership of shares of common stock by the Selling Shareholders as of November 25, 2004, and the number of shares of common stock covered by this prospectus. The number of shares in the table represents an estimate of the number of shares of common stock to be offered by the selling stockholder. None of the Selling Shareholders is a broker-dealer, or an affiliate of a broker-dealer to our knowledge.

Name of Selling Shareholder	Shares Beneficially Owned Prior to Offering	Shares to be Offered	Number of Shares Owned After Offering and Percentage Total of the Issued and Outstanding	
			Shares Owned	Percentage of Issued and Outstanding
Crescent International, Ltd.(1)	400,000	400,000	Nil	Nil
Cranshire Capital LP(2)	340,136	340,136	Nil	Nil
Brennglass Gary(3)	68,028	62,028	Nil	Nil
Platinum Partners Value Arbitrage Fund, L.P. (4)	408,164	408,164	Nil	Nil
B&E Apartments, L.P.(5)	272,000	272,000	Nil	Nil
Enable Growth Partners, LP(6)	340,136	340,136	Nil	Nil
Double U Master Fund LP(7)	340,136	340,136	Nil	Nil
F. Berdon Co. LP (8)	70,000	70,000	Nil	Nil
SRG Capital, LLC (9)	340,136	340,136	Nil	Nil
David Garnett (10)	3,000	3,000	Nil	Nil
Paul Masters IRA(11)	70,000	70,000	Nil	Nil
Everett L. Roley(12)	3,000	3,000	Nil	Nil
Phillipe Mast(13)	15,000	15,000	Nil	Nil
Arnold and Lynne Kellner(14)	36,000	36,000	Nil	Nil
Victor Miera(15)	145,000	45,000	100,000	0.58%

Richard Ialungo(16)	15,000	15,000	Nil	Nil
Newport Capital Corp. (17)	588,431	485,970	102,461	0.59%
Eiger East Finance Ltd. (18)	39,800	39,800	Nil	Nil
Fairmont East Finance Ltd. (19)	25,200	25,200	Nil	Nil
John Cervi(20)	27,000	27,000	Nil	Nil
Vincenzo Aballini(21)	697,466	697,466	Nil	Nil

(1) Represents 400,000 shares of common stock and 400,000 warrants to purchase shares of our common stock. Mel Craw and Maxi Breeze, as Managers of Greenlight SA, the investment advisor to Crescent International Ltd. exercise dispositive and voting power with respect to the shares of common stock owned by Crescent International Ltd.

(2) Represents 170,068 shares of common stock and 170,068 warrants to purchase shares of our common stock. Downsview Capital, the General Manager of Cranshire Capital, LP exercises dispositive and voting power with respect to the shares of common stock that Cranshire Capital own. Mitchell P. Kopin is the President of Downsview Capital.

(3) Represents 34,014 shares of common stock and 34,014 warrants to purchase shares of our common stock owned by Mr. Brennglass.

(4) Represents 208,082 shares of common stock and 208,082 warrants to purchase shares of our common stock. Platinum Partners Value Arbitrage Fund LP is a private investment fund that is owned by all its investors and managed by Mr. Mark Nordlicht. Mr. Nordlicht may be deemed the control person of the shares owned by such entity, with final voting power and investment control over such shares.

(5) Represents 136,000 shares of common stock and 136,000 warrants to purchase shares of our common stock. Howard Einberg exercises dispositive and voting power with respect to the shares of common stock owned by B&E Apartments, LP.

(6) Represents 170,068 shares of common stock and 170,068 warrants to purchase shares of our common stock. Mitch Levine exercises dispositive and voting power with respect to the shares of common stock that Enable Growth Partners L.P. own.

(7) Represents 170,068 shares of common stock and 170,068 warrants to purchase shares of our common stock. Itzchak Winehouse exercises dispositive and voting power with respect to the shares of common stock that the Double U Master Fund LP owns.

(8) Represents 70,000 shares of common stock and 70,000 warrants to purchase shares of our common stock. Federick Berdon exercises dispositive and voting power with respect to the shares of common stock that the F. Berdon Co. LP owns.

(9) Represents 170,068 shares of common stock and 170,068 warrants to purchase shares of our common stock. Edwin Macabe and Tai May Lee are employees of SRG Capital, LLC and jointly have dispositive and voting power with respect to these securities.

(10) Represents 2,000 shares of common stock and 1,000 warrants to purchase shares of our common stock.

(11) Represents 70,000 shares of common stock and 70,000 warrants to purchase shares of our common stock.

(12) Represents 2,000 shares of common stock and 1,000 warrants to purchase shares of our common stock.

(13) Represents 10,000 shares of common stock and 5,000 warrants to purchase shares of our common stock.

(14) Represents 24,000 shares of common stock and 12,000 warrants to purchase shares of our common stock.

(15) Represents 130,000 share of common stock, 30,000 of which are being registered on this registration statement and 15,000 warrants to purchase shares of our common stock.

(16) Represents 10,000 shares of common stock and 5,000 warrants to purchase shares of our common stock.

(17) Represents 417,246 shares of common stock, 314,785 of which are being registered on this registration statement and 171,185 warrants to purchase shares of our common stock. Brent Pierce is an officer of Newport Capital Corp. and exercises dispositive and voting power with respect to the shares of common stock owned by Newport Capital Corp.

(18) Represents 39,800 shares of common stock earned by Eiger East Finance Ltd as a finders fee for the April 2004 Offering. Phil Mast exercises dispositive and voting power with respect to the shares of common stock owned by Eiger East Finance Ltd.

(19) Represents 16,800 shares of common stock and 8,400 warrants to purchase shares of our common stock. Phil Mast exercises dispositive and voting power with respect to the shares of common stock owned by Fairmont East Finance Ltd.
(20) Represents 18,000 shares of common stock and 9,000 warrants to purchase shares of our common stock.
(21) Represents 348,733 shares of common stock and 348,733 warrants to purchase shares of our common stock.

.NITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C., 20549

FORM SB-2

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

LEXINGTON RESOURCES, INC.
(Exact name of registrant as specified in charter)

NEVADA	3663	11-3124068
(State or jurisdiction of incorporation or organization)	(Primary Standard Industrial Classification Code Number)	(I.R.S. Employer Identification No.)

7473 West Lake Mead Road Las Vegas,

Nevada, U.S.A. 89128

Telephone: (702) 382-5139
(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)
GRANT ATKINS,
Chief Executive Officer

7473 West Lake Mead Road Las Vegas,

Nevada, U.S.A., 89128

Telephone: (702) 382-5139 and Facsimile: (702) 385-1202
(Name, address, including zip code, and telephone number, including area code, of agent for service)
with a copy to:

Thomas J. Deutsch, Esq.

LANG MICHENER LLP

1500 Royal Centre, 1055 West Georgia Street

Vancouver, British Columbia, Canada, V6E 4N7

Telephone: (604) 689-9111 and Facsimile: (604) 685-7084

Approximate date of commencement of proposed sale to the public: From time to time after this Registration Statement is declared effective.

If any securities being registered on this form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933. {X}

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. { }

SEC 103630

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registrations statement number of the earlier effective registration statement for the same offering. { }

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under

statements. These statements are based on our beliefs and the assurances made using information currently available to us. Because these statements reflect its current views concerning future events, these statements involve risks, uncertainties and assumptions. Actual results could differ materially from the results discussed in the forward-looking statements. Some, but not all, of the factors that may cause these differences include those discussed in the risk factors. A reader should not place undue reliance on these forward-looking statements. A reader should also remember that these statements are made only as of the date of this report and future events may cause them to be less likely to prove to be true.

USE OF PROCEEDS

We will not receive any of the proceeds from the sale of the shares of common stock offered by the Selling Shareholders under this prospectus. There are warrants covered by this prospectus. If these warrants were exercised, the maximum we would receive are gross proceeds of approximately $9,342,500.

If the resale of the shares of common stock acquired under any of the Class A Warrants, Class B Warrants or Finder's Warrants fails to be registered pursuant to an effective registration statement under the Securities Act, each such warrant may effect a cashless exercise, including a calculation of the number of shares of common stock to be issued upon such exercise. In the event of a cashless exercise, in lieu of paying the exercise price in cash, the holder is required to surrender the warrant for that number of shares of common stock determined by multiplying the number of warrant shares to which it would otherwise be entitled by a fraction, the numerator of which shall be the difference between the then current market price per share of the common stock and the exercise price, and the denominator of which shall be the then current market price per share of common stock. For example, if the holder is exercising 100,000 warrants with a per warrant exercise price of $0.75 per share through a cashless exercise when the common stock's current market price per share is $2.00 per share, the holder will receive 62,500 shares of common stock.

The proceeds, if any, that we receive from the exercise of warrants will be used for working capital in support of the growing business.

SELLING SHAREHOLDERS

The Selling Shareholders may offer and sell, from time to time, any or all of the common stock issued and the common stock issuable to them upon exercise of the common stock purchase warrants. We will not receive any proceeds from the resale of our common stock by the Selling Shareholders. Because the Selling Shareholders may offer all or only some portion of the 17,134,000 shares of common stock and underlying common stock purchase warrants to be registered, no estimate can be given as to the amount or percentage of these shares of common stock that will be held by the Selling Shareholders upon termination of the offering.

The following table sets forth certain information regarding the beneficial ownership of shares of common stock by the Selling Shareholders, to the best of the Company's knowledge, as of October 14, 2005, and the number of shares of common stock covered by this prospectus. The number of shares in the table represents an estimate of the number of shares of common stock to be offered by the Selling Shareholder. None of the Selling Shareholders is a broker-dealer, or an affiliate of a broker-dealer to our knowledge.

Name of Selling Shareholder	Shares Beneficially Owned Prior to	Shares to be Offered	Number of Shares Owned After Offering and Percentage Total of the Issued and Outstanding

	Offering		Shares Owned	Percentage of Issued and Outstanding
Various Private Placements - June to August 2005				
Vincenzo Aballini(1)	120,000	120,000	Nil	Nil
Newport Capital Corp.(2)	113,000	113,000	Nil	Nil
C.K. Cooper & Co.(3)	200,000	200,000	Nil	Nil
Convertible Notes - September 2005(4)				
Alpha Capital Aktiengesellschaft	1,000,000	1,375,000	Nil	Nil
Whalehaven Capital Fund Limited	1,000,000	1,375,000	Nil	Nil
Monarch Capital Fund Ltd.	400,000	550,000	Nil	Nil
Harborview Master Fund LP	300,000	412,500	Nil	Nil
Nite Capital LP	400,000	550,000	Nil	Nil
Paul Masters IRA	100,000	137,500	Nil	Nil
BL Cubed LLC	200,000	275,000	Nil	Nil
Enable Opportunity Partners LP	200,000	275,000	Nil	Nil
Enable Growth Partners LP	1,000,000	1,375,000	Nil	Nil
SRG Capital, LLC	600,000	825,000	Nil	Nil
Double U Master Fund LP	500,000	687,500	Nil	Nil
Platinum Long Term Growth I, LLC	1,500,000	2,062,500	Nil	Nil
Truk Opportunity Fund, LLC	552,000	759,000	Nil	Nil
Truk International Fund, LP	48,000	66,000	Nil	Nil
Hasenfeld-Stein, Inc. - Pension Trust	200,000	275,000	Nil	Nil
Nachum Stein	100,000	137,500	Nil	Nil
HSI Partnership	100,000	137,500	Nil	Nil
Ellis International Ltd.	200,000	275,000	Nil	Nil
Midtown Partners Inc.	270,000	371,250	Nil	Nil
RHP Master Fund Ltd.	1,000,000	1,375,000	Nil	Nil
First Mirage, Inc.	200,000	275,000	Nil	Nil
Silver Oak Investments, Inc.	500,000	687,500	Nil	Nil
DKR Soundshore Oasis Holding Fund Ltd.	500,000	687,500	Nil	Nil
Cape May Investors, Inc.	50,000	68,750	Nil	Nil
Generation Capital Associates	300,000	412,500	Nil	Nil
The Hart Organization Corp.	200,000	275,000	Nil	Nil

Name of Selling Shareholder	Shares Beneficially Owned Prior to Offering	Shares to be Offered	Number of Shares Owned After Offering and Percentage Total of the Issued and Outstanding	
Notzer Chesed Corp.	300,000	412,500	Nil	Nil
Finder's Warrant shares - September 2005(5)				
Tuva Financial S.A.	586,000	586,000	Nil	Nil
Totals	12,739,000	17,134,000		

* Represents 120,000 Warrants exercisable into 120,000 shares of our common stock at an exercise price of $3.00 per share until May 31, 2010.

* Represents 113,000 Warrants exercisable into 113,000 shares of our common stock at an exercise price of $3.00 per share until May 31, 2010.

* Represents 200,000 shares regarding a termination agreement between Lexington and C.K. Cooper & Co.

* Represents Convertible Notes; with each $1,000 face value of Convertible Notes being convertible into 1,000 shares of our common stock (approximately 59.85% of the shares to be offered) and shares of our common stock issuable pursuant to the exercise of the Class A Warrants and the Class B Warrants (approximately 34.20% of the shares to be offered). We have agreed to register shares representing 175% of the common shares currently issuable upon conversion of the Convertible Notes in order to account for potential anti-dilution adjustments. The Class A Warrants are exercisable into 2,930,000 shares of our common stock at an exercise price of $1.50 per share for a period of three years from the date that this registration statement is declared effective by the SEC. The Class B Warrants are exercisable into 2,930,000 shares of our common stock at an exercise price of $1.25 per share for a period of one year from the date that this registration statement is declared effective by the SEC.

* Represents 586,000 Finder's Warrants exercisable into 586,000 shares of our common stock at an exercise price of $1.00 per share for a period of three years the date that this registration statement is declared effective by the SEC.

We may require the Selling Shareholders to suspend the sales of the securities offered by this prospectus upon the occurrence of any event that makes any statement in this prospectus or the related registration statement untrue in any material respect or that requires the changing of statements in these documents in order to make statements in those documents not misleading.

PLAN OF DISTRIBUTION

Each Selling Shareholder will most likely sell their shares on the open market. Our stock is quoted on the National Quotation Bureau/Pink Sheets Electronic Quotation Service under the symbol LXRS.

Therefore, the Selling Shareholders may, from time to time, sell any or all of their shares of common stock on any stock exchange, market or trading facility on which the shares are traded or in private transactions. These sales may be at fixed or negotiated prices. This registration statement does not cover sales by any of the Selling Shareholders' respective pledges, donees, transferees and other successors-in-interest. The Selling Shareholders may use any one or more of the following methods when selling shares:

* ordinary brokerage transactions and transactions in which the broker-dealer solicits purchasers;

* block trades in which the broker-dealer will attempt to sell the shares as agent but may position and resell a portion of the block as principal to facilitate the transaction;

* purchases by a broker-dealer as principal and resale by the broker-dealer for its own account;

* an exchange distribution following the rules of the applicable exchange;

* privately negotiated transactions;

* short sales that are not violations of the laws and regulations of any state of the United States;

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* broker-dealers may agree with the Selling Shareholders to sell a specified number of such shares at a stipulated price per share; and

* a combination of any such methods of sale any other lawful method.

The Selling Shareholders may also sell shares under Rule 144 under the Securities Act, if available, rather than under this prospectus. The Selling Shareholders shall have the sole and absolute discretion not to accept any purchase offer or make any sale of shares if they deem the purchase price to be unsatisfactory at any particular time.

The Selling Shareholders may also engage in,

* short selling against the box, which is making a short sale when the seller already owns the shares;

* other transactions in our securities or in derivatives of our securities and the subsequent sale or delivery of shares by the stockholder; and

* pledging shares to their brokers under the margin provisions of customer agreements. If a Selling Shareholder defaults on a margin loan, the broker may, from time to time, offer to sell the pledged shares.

Broker-dealers engaged by the Selling Shareholders may arrange for other brokers-dealers to participate in sales. Broker-dealers may receive commissions or discounts from Selling Shareholders in amounts to be negotiated. If any broker-dealer acts as agent for the purchaser of shares, the broker-dealer may receive commission from the purchaser in amounts to be negotiated. The Selling Shareholders do not expect these commissions and discounts to exceed what is customary in the types of transactions involved.

The Selling Shareholders may pledge their shares to their brokers under the margin provisions of customer agreements. If a Selling Shareholder defaults on a margin loan, the broker may, from time to time, offer and sell the pledged shares. The Selling Shareholders and any other persons participating in the sale or distribution of the shares will be subject to applicable provisions of the Exchange Act and the rules and regulations under the Exchange Act, including, without limitation, Regulation M. These provisions may restrict certain activities of, and limit the timing of purchases and sales of any of the shares by, the Selling Shareholders or any other such person. In the event that the Selling Shareholders are deemed affiliated purchasers or distribution participants within the meaning of Regulation M, then the Selling Shareholders will not be permitted to engage in short sales of common stock. Furthermore, under Regulation M, persons engaged in a distribution of securities are prohibited from simultaneously engaging in market making and certain other activities with respect to such securities for a specified period of time prior to the commencement of such distributions, subject to specified exceptions or exemptions. In regards to short sells, the Selling Shareholder can only cover