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UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13927

In the Matter of	**ORAL ARGUMENT REQUESTED**
GORDON BRENT PIERCE, NEWPORT CAPITAL CORP., AND JENIROB COMPANY LTD.,	**RESPONDENT G. BRENT PIERCE'S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY DISPOSITION**
Respondents.	

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I. INTRODUCTION

Respondent Brent Pierce's opposition to the Division's motion for summary disposition established that the Division's arguments confirm that the its current claims in this attempted "do-over" were actually litigated in the First Proceeding. Now, in its opposition to Pierce's motion for summary disposition, the Division further confirms that it is unable to prevent the doctrine of res judicata from barring its maneuvering to get a second bite at the apple.

The Division contends that it did not raise in the First Proceeding any question of Pierce's Section 5 liability for sales of Lexington stock through accounts Pierce controlled at Newport and Jenirob. But it cannot now walk away from the "single scheme" to violate Section 5 it alleged in the First OIP, from the arguments it made in its pre-hearing brief, from the evidence it presented at the hearing, or from the post-hearing evidence and arguments it advanced in seeking the very disgorgement it was denied in the First Proceeding, and now seeks anew in this duplicative Second Proceeding.

Moreover, the Division ignores altogether the alternate basis on which res judicata bars its attempt to re-litigate, inasmuch as it cannot escape the fact that its claim for disgorgement by Pierce of Newport and Jenirob profits "could have been brought" in the First Proceeding, even if it had not been both brought and litigated the first time around.

For the reasons shown below, in addition to those described in Pierce's opening brief and in his opposition to the Division's motion, Pierce's motion for summary disposition should be granted and this redundant proceeding dismissed.

II. THE DIVISION'S OPPOSITION CONSISTENTLY DISTORTS THE FACTS

The Division's opposition repeatedly misstates facts that in reality establish Pierce's res judicata defense.

A. The Division Did Not Limit Its Section 5 Claim in the First Proceeding to Sales From Pierce's Personal Account

First, the Division argues that the Section 5 claim it asserted in the First OIP related only to Pierce's sales of Lexington stock through his personal account and not his sales through the Newport and Jenirob accounts he allegedly controlled. The Division routinely cites paragraph 16 of the First OIP (Wells Ex. 2)[1] as alleging Pierce's personal stock sales, but ignores that paragraph 15 alleges the broader sale of 2.5 million shares for proceeds of over $13 million (of which the sales from Pierce's personal account were a part) and ignores that paragraph 20's allegation of a Section 5 violation "as a result of the conduct discussed above" makes no distinction between the conduct alleged in paragraphs 15 and 16.

More importantly, the Division's own pre-hearing brief in the First Proceeding establishes that its Section 5 claim was not limited to the sales from Pierce's personal account. As more fully discussed at pages 4-5 of Pierce's April 8 opposition to the Division's motion for summary disposition, the Division argued that "[g]iven the millions of Lexington shares that Pierce transferred to Newport Capital and that Newport Capital then transferred or sold," the distribution of Lexington shares it claimed was illegal under Section 5 "goes beyond the 300,000 Lexington shares that he sold for himself" (Wells Ex. 3 at 3).

Indeed, the very first sentence of the Division's pre-hearing brief described the First Proceeding as involving the sale by Pierce of "millions of shares" of Lexington stock "without registering his sale of those shares, as required by Section 5" (*id.* at 1), notwithstanding that the sales from Pierce's personal account constituted only 400,000 of those "millions" of shares (*Id.* at 2). And the Division further argued that the sales from Pierce's personal account were "part of a larger, on-going scheme to acquire and sell Lexington shares ***without the necessary***

[1] "Wells Ex.__" refers to exhibits to the declaration of Christopher Wells submitted with Pierce's motion for summary disposition.

registration and disclosure" (*Id.* at 1, emphasis added). Thus both the First OIP and the Division's attempt to "clarify" it in the First Proceeding belie its belated attempt to now characterize its Section 5 claim in the First Proceeding as relating only to Pierce's sales from his personal account.

Equally telling, the Division explicitly argued in its post-hearing brief and its proposed findings and conclusions that its Section 5 claim included Pierce's sales through Newport and Jenirob. *See, e.g.*, Wells Ex. 11 at 13 ¶ 7 (proposed conclusion of law that Pierce's sale of 1.6 million Lexington shares through Newport and Jenirob violated Section 5); Wells Ex. 12 at 4 (arguing that Pierce should be ordered to disgorge $9.601 million in sales proceeds from his personal, Newport and Jenirob accounts "in light of his violation of Section 5 of the Securities Act").

The Division is equally off-base at page 1 in characterizing the Initial Decision in the First Proceeding as ruling that "the only Section 5 claim made in the [F]irst OIP was for Pierce's unregistered sales of Lexington shares in his *personal* account for profits of $2.7 million." One searches the Initial Decision (Wells Ex. 14) in vain for any such ruling. Indeed, the Initial Decision found that Pierce had traded Lexington stock on behalf of Newport through Hypo Bank and vFinance accounts (*Id.* at 6). The Initial Decision declined to order disgorgement of Pierce's trading profits through Newport and Jenirob, not because the OIP had limited the Section 5 claim to sales from Pierce's personal account as the Division now argues, but because the OIP had not mentioned Newport and Jenirob by name and only the Commission may expand the scope of an OIP (*Id.* at 20-21).

B. Pierce Did Not Conceal Evidence As Repeatedly Claimed By the Division

In its desperation to avoid the mandatory application of res judicata to its attempted "do-over" of claims it abandoned in the First Proceeding, the Division repeatedly claims that it was

prevented from pursuing disgorgement of Pierce's profits from trading through Newport and Jenirob by Pierce's alleged "concealment" of those profits.

The most obvious refutation of that claim is the fact that the Division ***did*** pursue disgorgement of the Newport and Jenirob profits. After it obtained account records from the Liechtenstein FMA, the Division offered them into evidence, they were admitted by the Hearing Officer, and the Division argued that they supported disgorgement of $7.5 million in Pierce's profits through Newport and Jenirob in addition to the profits through his personal account. That the Division elected not to pursue that disgorgement after the Initial Decision rejected it, through either the route suggested by the Hearing Officer or any other route, cannot be blamed on any alleged "concealment" or other conduct by Pierce.

Just as importantly, the record makes clear that there was no "concealment" in any event. When the Division sought Newport and Jenirob account records from Pierce during its investigation, his counsel objected on the basis of foreign privacy laws that at the time protected the records from disclosure (Buchholz Declaration in opposition to Pierce's motion for summary disposition, Ex. D) ("Buchholz").[2] The Division took no action to challenge those objections, either during its investigation or at any subsequent time. Unchallenged objections, based on privacy concerns that the Division itself acknowledges, cannot fairly be characterized as "concealment."

Nor has the Division ever presented any evidence that Pierce even had the power to unilaterally disclose account records for Newport and Jenirob—even assuming he had access to them, another matter on which the Division has never presented any evidence. Pierce has

[2] The Liechtenstein FMA was not given authority to obtain and disclose such records until February 2007, long after the Division had sought them from Pierce (Buchholz Ex. K ¶ 5). Indeed, the Division acknowledges at page 6 that it was unable to obtain the records from the FMA in 2006 when it initially sought them. That the FMA itself was precluded from disclosing the records makes clear that Pierce was not engaged in "concealment" when he likewise honored the Liechtenstein privacy laws.

acknowledged from the outset that he was one of the directors of Newport, but the Division has never offered evidence that the laws of any applicable jurisdiction would permit a single director to unilaterally disclose records that are protected from disclosure by applicable privacy laws. As to Jenirob, there is no evidence that Pierce was even a director, let alone a director clothed with unilateral authority.

Equally baseless is the Division's assertion that Pierce "concealed" the alleged fact that he "secretly" controlled the accounts of Newport and Jenirob at Hypo Bank in Liechtenstein. For starters, the Division itself introduced evidence at the hearing of Pierce's connection to those accounts, well before it sought post-hearing to admit the "new" evidence it had received from the Liechtenstein FMA. It elicited testimony that Lexington itself disclosed Pierce's dispositive power over shares held by Newport (Wells Ex. 4 at 65), that Newport had an account at Hypo Bank that traded in the U.S. via an omnibus account at vFinance (*id.* at 221) and that Pierce transferred Lexington shares to Newport that then went to third parties or brokerage accounts (*Id.* at 586, 589). The Division also introduced exhibits that included Pierce's Schedule 13D filing showing his beneficial ownership of Lexington shares held by Newport (Wells Ex. 5), a chart detailing the movement of Lexington shares to and from Newport (Wells Ex. 6), documentation of the transfer of Lexington shares to Jenirob and Pierce's instructions to Hypo Bank to book sales of Lexington shares to Jenirob's account (Wells Exs. 7, 8), and Newport bank statements showing deposits of some $1.75 million coming from Jenirob (Wells Ex. 9). The Division can hardly contend that Pierce "concealed" the very evidence it introduced at the hearing.[3]

Nor does the Division play fair when it argues at page 6 that Pierce falsely denied ownership of Newport. There is in fact no evidence that Pierce ever had an ownership interest in

[3] The Division's groundless factual contentions are further undermined by its refusal to deal with this evidence the Division itself had introduced in the First Proceeding, despite Pierce's discussion of that evidence in his opening brief.

Newport, and Pierce's denial of such ownership stands undisputed. The Division cites evidence that Pierce had a beneficial interest in the Lexington shares held in Newport's account, but that is an entirely different question and Pierce never denied that interest. Not only did he acknowledge it in his Schedule 13D filing (Wells Ex. 5); he also straightforwardly admitted it in his investigative testimony, as the Division itself acknowledges at page 6 note 1.[4]

Inexplicably, the Division then contends at page 7 that Pierce denied he had a beneficial interest in the Newport account, despite having just cited Pierce's contrary admission. Later, at page 19, the Division appears to rest its contention on what it calls Pierce's "express disclaimer" of beneficial ownership of Newport's Lexington shares in his Schedule 13D. But all the 13D said in that regard was the standard language that "[t]he filing of this statement by Mr. Pierce shall not be construed as an admission" that he is a beneficial owner of the Newport shares (Wells Ex. 5 at 5).

Indeed, the 13D acknowledged (as had Lexington itself in its own registration statement) that Pierce had "on Newport Capital's behalf, the sole power to vote or to direct the voting of, or to dispose or to direct the disposition of" the Lexington shares held by Newport (*Id.* at 9). Pierce in truth consistently acknowledged his beneficial interest in Newport's Lexington shares. The Division cannot honestly characterize that acknowledgment as an admission that Pierce owned Newport itself, and there remains no evidence that would render the absence of such ownership a matter of dispute.

Finally, the Division castigates Pierce for seeking to prevent the FMA from releasing Hypo Bank records. But its complaining proves too much, inasmuch as it has to acknowledge at

[4] The Division snidely characterizes Pierce's testimony as an "ambiguous" acknowledgment of an "unspecified" interest in Newport or a Newport account at Hypo Bank, citing Buchholz Ex. D at 396:1-5. But there is nothing "ambiguous" about Pierce's testimony, as he directly answered the question "Do you have an interest in those accounts" by saying "I have an interest in Newport Capital." He was not asked to specify that interest and cannot be blamed for any ambiguity the Division may have left in the record by failing to follow up.

page 5 that the FMA would not release those confidential records to the Division itself (much less to Pierce) in 2006 (*See* Buchholz Decl. ¶ 8). It was not until Liechtenstein changed its laws in February 2007 (Buchholz Ex. K at ¶ 5) that the FMA first obtained authority to acquire previously-secret bank records. Again, Pierce cannot be accused of "concealing" anything, inasmuch as it was he who introduced, as hearing Exhibit A, the letter on which the Division now relies as Buchholz Ex. K. That letter, from the Liechtenstein lawyer representing Pierce and others who likewise sought to preserve bank secrecy under the new Liechtenstein law, outlines multiple reasons why the FMA should be precluded from obtaining private bank records. It shows, not the "concealment" argued by the Division, but rather a resort to proper processes under Liechtenstein law that confirm the legitimacy of the concerns that led Pierce's lawyers to respectfully object to production of those records during the Division's investigation. And the Division itself appears to have acknowledged the legitimacy of those objections by declining ever to challenge them.

III. THE DIVISION'S ARGUMENTS AGAINST THE APPLICATION OF RES JUDICATA IGNORE THE LAW AND THE FACTS

A. The Division's Opposition Brief Confirms That the Two Proceedings Arise From the Same Nucleus of Operative Facts

As the Supreme Court has emphasized, the res judicata doctrine prohibits the subsequent litigation of both (1) claims that were brought and (2) claims that could have been brought: "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *San Remo Hotel v. City and Cnty. of S.F., Cal.*, 545 U.S. 323, 336 n.16 (2005). *See also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) ("Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit"). The Division's Opposition

focuses exclusively on the first prohibition and completely ignores the second prohibition. The reason for its truncated response is clear: the Division has no credible explanation for why it chose in March 2009 not to move to amend the First OIP or later to appeal the Hearing Officer's Initial Decision so that it could litigate to completion what it described in the first OIP as the "scheme" by Mr. Pierce and his associates to distribute unregistered Lexington stock.

The Division's myopic focus on what it knew before it received documents from the Liechtenstein FMA in March 2009 is doubly troubling. It not only ignores what the Division in fact knew from the outset of the First Proceeding, as discussed in part II above; it also ignores that all of the evidence it submitted in the First Proceeding, including the FMA production, binds it under both the "were brought" and "could have been brought" prongs of the res judicata doctrine.

It is undisputed that as of March 2009 the Division had obtained what it described as "material" evidence that Pierce had sold Lexington stock through both his personal account and those of his associates, Newport and Jenirob (Wells Ex. 10 at 1). The Division attempts to avoid what is factually and legally obvious—that both OIPs arise from a common nucleus of operative facts—by seizing on the "transaction specific" nature of a potential Section 5 violation (Opposition at 16 and 27).[5]

This reliance on the unremarkable truism that each sale of unregistered stock may be a violation of Section 5 ignores the undisputable fact that the two OIPs are based on the exact same alleged scheme to sell unregistered shares of Lexington stock. Even the Division has

[5] The Division's citation of the Initial Decision's reference to the "transaction specific" nature of Section 5 does not permit it to now disclaim its allegations in the First OIP that Pierce's distribution of Lexington stock through both his personal account and those of his associates constituted a single scheme in violation of Section 5. The Initial Decision used "transaction specific" to distinguish between the initial registration by Lexington on Form S-8 and the subsequent unregistered resales by Pierce. That distinction in no way supports the Division's attempt to now split its "single scheme" claim into two unrelated violations of Section 5.

admitted that it attempted to bring this claim in the prior proceeding. The Division stated in its Opposition at page 1 that it had sought the "adjudication of a claim for [Pierce's] unregistered sales of Lexington shares through Newport and Jenirob in the prior proceeding," and at page 30 that it "sought, and continues to seek, a finding that Pierce is liable for his unregistered sales of Lexington stock through Newport[] and Jenirob." The contention that each unregistered sale constitutes a distinct Section 5 violation is immaterial to the question whether the two proceedings concern the same "cause of action" for res judicata purposes.

The "most important factor of all" in that determination is "whether the two suits arise out of the same transactional nucleus of facts." *In re Int'l Nutronics, Inc.*, 28 F.3d 965, 971 (9th Cir. 1994).[6] Where claims relate " to the same set of facts" and "could have conveniently been tried together," an identity of claims exists for purposes of res judicata. *Owens v. Kaiser Foundation Health Plan*, 244 F.3d 708, 714 (9th Cir. 2001). *See also id.* ("[R]es judicata bars subsequent action when the plaintiff 'had to produce substantially the same evidence in both suits to sustain its case'") (citing *Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863, 868 (9th Cir. 1995). Under the Restatement of Judgments,[7] res judicata extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the [prior] action arose." Restatement, Second, Judgments § 24(1) (1982). According to Comment d to that rule:

> [w]hen a defendant is accused of successive but nearly simultaneous acts, or acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action. The events constitute but one transaction or a connected series.

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[6] *See also Cameron v. Church*, 253 F. Supp. 2d 611, 620 (S.D.N.Y. 2003) ("[T]he bar will apply when the subsequent facts are merely additional examples of the earlier-complained of conduct, such that the action remains based principally upon the shared common nucleus of operative facts").

[7] *See Nevada v. United States*, 463 U.S. 110, 131 n.12 (1983) (adopting § 24 of the Restatement (Second) of Judgments).

Here, the Division's claims clearly "could have been conveniently tried together" and revolve around alleged acts that were "nearly simultaneous" and "substantially of the same sort and similarly motivated." In prior pleadings, Pierce has outlined the similarities between the allegations of the two OIPs, but in truth a detailed comparison is unnecessary. In the First Proceeding, the Division introduced the same basic evidence it would now introduce, made the same general allegations it now makes, and sought the same remedy it now seeks.

The Division argues that "[t]here was no need to adjudicate" its claims "within the confines" of the First Proceeding because doing so "would not have conserved resources" (Opposition at 25). But no matter how hard it tries, the Division cannot ignore that there was a need—indeed, a fundamental legal requirement—that it litigate the entirety of its Section 5 "single scheme" claim against Pierce in the First Proceeding. "To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution." *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08 (1991).

B. The Division's Argument That There Was No Final Judgment on the Merits Is Baseless

The Division appears to willfully ignore the very law it cites by arguing that res judicata does not apply because no final judgment was reached on the merits of its claims. According to the Division, "[r]es judicata applies only if the prior ***action*** was 'resolved on the merits'" (Opposition at 23). The Division then argues that because all of its ***claims*** were not resolved on their merits, res judicata should not apply. This argument misses the point. Because res judicata bars all claims that "could have been" raised in a prior action, relitigation of claims that were not resolved on their merits will nonetheless be barred. Put simply, a "final judgment by a court of

competent jurisdiction bars a subsequent suit between the same parties and on the same cause of action not only as to all matters that were litigated in the first proceeding but also as to all issues that could have been litigated." *Interstate Pipe Maintenance, Inc. v. FMC Corp.*, 775 F.2d 1495, 1497 (11th Cir. 1985); *see also Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005) (argument that res judicata should not apply because claims were not resolved on their merits "fail[ed] . . . because the remainder of the claims, which [arose] out of the same transaction, were decided on the merits"); *Sherman v. Ludington*, 968 F.2d 1216, 1992 WL 158878, at *8 (6th Cir. 1992) ("Even though plaintiff's claims . . . were never addressed on their respective merits, because plaintiff possessed the facts and evidence and had the opportunity to litigate the claims at an earlier date, the doctrine of federal res judicata will be applied").

If all of the Division's claims were not resolved on their merits, it has only itself to blame. *See Saud v. Bank of New York*, 734 F. Supp. 628, 635-36 (S.D.N.Y. 1990) (Plaintiff "cannot avoid res judicata by reformulating the facts he submitted to the court in the [prior] [a]ction into the mold of a [new] claim . . . [t]he consequences of [his] decisions . . . are his alone to bear"), *aff'd*, 929 F.2d 916 (2d Cir. 1991).[8]

As legal support for its incomplete analysis of the res judicata doctrine, the Division again relies at pages 13-16 on two cases that have no relevance to the legal circumstances here. Pierce's opposition to the Division's motion for summary disposition established that the facts of *Greenberg v. Board of Governors*, 968 F.2d 164 (2d Cir. 1992) have no similarity to the duplicate litigation engaged in by the Division here. Most obviously, *Greenberg* is inapplicable here because it involved settlement agreements that clearly reserved the party's right to bring further claims. As to the second case, *SEC v. First Jersey Secs.*, 101 F.3d 1450 (2d Cir. 1996),

[8] *See also Phillips/May Corp. v. United States*, 524 F.3d 1264, 1271 (Fed. Cir. 2008) (plaintiff "was obligated to prosecute its claims in the same proceeding [and] could not avoid the application of res judicata through strategic delay").

even the Division has conceded its inapplicability. Unlike the facts in *First Jersey*, which involved acts that occurred after the dates of the settlement agreement, the Division here has alleged that all the Lexington stock distribution occurred between February and November 2004, well prior to the filing of the first OIP.[9]

C. The Naming of Newport and Jenirob Does Not Affect Whether Res Judicata Applies to Pierce

The Division again repeats at page 27 its unsupportable argument that res judicata should not apply as to Pierce simply because Newport and Jenirob were not parties to the First Proceeding. As Pierce has already noted, and numerous courts have ruled, that argument is absurd. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 249 (9th Cir. 1992) ("[T]he naming of additional parties does not eliminate the res judicata effect of a prior judgment"); *Bethesda Lutheran Homes v. Born*, 238 F.3d 853, 857 (7th Cir. 2001) ("The defense of res judicata is not avoided by joinder"); *Dreyfus v. First Nat'l Bank of Chicago*, 424 F.2d 1171, 1175 (7th Cir. 1970) ("[I]t is no objection that the former action included parties not joined in the present action, or vice versa").

D. Pierce Did Not Conceal Evidence, and No Exception to Res Judicata Applies

Nor can the Division salvage its irreparably-flawed argument that an exception to res judicata should apply because evidence was "concealed." In fact, nothing was concealed from the Division. It is indisputable that the Division believed that relevant records existed in Liechtenstein—indeed, the Division admits that Pierce produced his personal records from Liechtenstein (Opposition at 5). But the production of confidential bank records from a foreign jurisdiction is a complex legal issue, and the Division has cited no Liechtenstein authority (and

[9] *Computer Associates Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365 (2d Cir. 1997) is also not instructive. That case, much like *First Jersey*, focused on the question whether claims based on underlying conduct that did not occur until after a prior action had been filed should be barred by res judicata. *Id.* at 369. Of course, the alleged conduct on which the Second OIP here is based occurred well before the First OIP was instituted.

Pierce is not aware of any) that gave Pierce the authorization, in 2006, to obtain those records and to produce them to a foreign regulator. Indeed, the Division admits that even the regulatory authority in Liechtenstein was then unable to procure those records (Opposition at 5).

The Division was well-aware that the records resided in Liechtenstein and that Pierce did not believe that, under Liechtenstein law, he had the authority to acquire and produce them to the Division. If the Division disagreed, it could have moved to compel Pierce to produce the Liechtenstein records. It did not. Thus, the Division cannot now argue that this evidence was "concealed" when, in fact, the Division was aware of its existence and could have acted to achieve potential resolution of a dispute with Pierce over its production, but chose not to. *See Johnson v. Ashcroft*, 445 F. Supp. 2d 45, 50 (D.D.C. 2006) ("plaintiff should have raised the defendants' alleged failure to provide the documents in the course of his [earlier] lawsuit").

Finally, the Division's argument cannot succeed for the simple reason that it ***in fact received*** all of the supposedly-concealed evidence during the pendency of the First Proceeding. The Division transparently attempts to downplay this critical fact by stating that it did not have this evidence "at the outset," but this is immaterial. *See Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985) (no exception to res judicata because party "was aware of . . . alleged new evidence prior to the final dismissal of his appeal"); *Ahmed v. INS*, No. 94 Civ. 762 (LAP), 1995 WL 489710, at *5 (S.D.N.Y. Aug. 15, 1995) (action barred by res judicata because "all operative facts" asserted in second proceeding "were in place . . . before [the court] reached a decision" in prior proceeding); *Cox v. Tennessee Valley Authority*, 16 F.3d 1218, 1994 WL 43433, at *4 (6th Cir. Feb. 10, 1994) (claim barred by res judicata because "[p]laintiffs clearly became aware of

the [pertinent facts] in the process of discovery in [prior proceeding] and should have moved to amend their complaint").[10]

The Division had the alleged evidence in time to present it and seek all remedies relating to it. It must now accept the legal consequences of its tactical decision not to pursue to conclusion claims it had put into play.

IV. THE DIVISION'S ATTEMPT TO RE-LITIGATE IS ALSO BARRED BY WAIVER AND ESTOPPEL

The Division argues at pages 27-31 that it is not estopped from pursuing Pierce a second time and did not waive its supposed right to re-litigate by failing to pursue any of the four routes available to it after the Initial Decision declined to order disgorgement of Pierce's profits through Newport and Jenirob. Neither argument has merit.

The Division first argues that estoppel does not bar it from taking a second bite at the apple because it never represented to Pierce that it would not come after him a second time. But its failure to pursue to completion the claim for disgorgement of Newport and Jenirob profits it had put into play in the First Proceeding legally constituted a representation that it had abandoned that claim. And the Division gets nowhere by arguing at page 29 that "Inasmuch as the appellate deadline for both parties expired simultaneously, Pierce could not have relied on any conduct by the Division." Pierce legitimately could, and did, wait to see whether the Division appealed, knowing that if it did he could cross-appeal and, if it did not, the matter would be ended once and for all. It is undisputed that Pierce did in fact so rely (Wells Ex. 16 ¶¶ 3-4), and the Division acknowledges as much by admitting at page 10 that "Pierce was

[10] *See also China Tire Holdings Ltd. v. Goodyear Tire and Rubber Co.*, 91 F. Supp. 2d 1106, 1110 (N.D. Ohio 2000) ("the plaintiff has sought to circumvent the proper procedure for presenting its newly-discovered evidence by bringing a second set of . . . claims in this Court. The doctrine of claim preclusion prevents the plaintiff from so doing").

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."

The Division's argument that it did not waive the supposed right to bring a duplicative second claim against Pierce is equally unavailing. At page 31, it bases its argument only on the contentions that its Section 5 claim here alleges "separate violations" from those alleged in the First Proceeding and that it was not obligated to complete its pursuit of claims for disgorgement by Pierce of Newport and Jenirob profits "because no final judgment had been reached on the merits...." But the factual premise of the first contention is debunked in part II(A) above, and the legal premise of the second one is debunked in part III(B) above.

For these additional reasons, the Division's attempted "do over" is barred.

V. CONCLUSION

For the reasons given above, Respondent's Motion for Summary Disposition should be granted, and this action dismissed. Mr. Pierce respectfully requests that the Hearing Officer schedule a hearing at which oral argument on these matters may be heard.

Dated: April 18, 2011

Respectfully Submitted

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