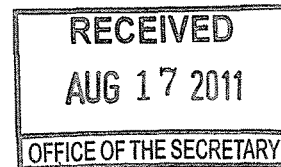


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UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13927

In the Matter of

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

Respondents.

PETITION FOR REVIEW OF
INITIAL DECISION

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Pursuant to Rules of Practice 410 and 411, 17 CFR §§ 201.410 and 201.411, Respondent G. Brent Pierce (“Pierce”) hereby submits this Petition for Review of the Initial Decision issued on July 27, 2011 by the Hearing Officer in this case (“Initial Decision”). Pierce seeks review of the Initial Decision by the Commission because it embodies findings and conclusions of material fact that are clearly erroneous, and conclusions of law that are erroneous. *See* Rule 411 (b)(2). The Initial Decision’s summary disposition improperly ordered Pierce to disgorge money there was no evidence he ever received, improperly rejected his primary defense by ruling Pierce somehow concealed evidence that was in fact admitted, and improperly rejected his further defenses largely by ignoring the Commission’s own rules. Pierce requests the Commission to grant review, reverse the Initial Decision and dismiss the instant administrative proceeding.

This case was the second administrative proceeding to adjudicate Pierce’s liability and the remedy for registration violations in the trading of Lexington Resources, Inc. (“Lexington”) common stock. The July 2009 final order in the first case found reporting and registration violations and disgorged nearly \$2.1 million of trading profits from Pierce. Prior to entry of that order, the Division of Enforcement (“Division”) had sought disgorgement of \$9.6 million from Pierce, out of \$13 million allegedly obtained illegally by “Pierce and his associates,” according to the Order Instituting Proceedings (“OIP”) in the first case. Of the \$9.6 million, \$2.1 million represented profits Pierce had disclosed in his personal records at a foreign bank. The remaining \$7.5 million represented trading profits of two of “Pierce’s associates” held to be under his control, who were discussed extensively in the initial decision in the first case. These “associates” were Newport Capital Corp. (“Newport”) and Jenirob

Company Ltd. (“Jenirob”). The final decision in the first case declined to order disgorgement of \$7.5 million of the \$9.6 million the Division had sought to disgorge.

The Division reprised its request to disgorge another \$7.5 million from Pierce by bringing this second case in June 2010 (later reducing that amount to roughly \$7.25 million). It also named the two Pierce “associates” who had actually received that \$7.25 million. The Division contended in this second case that collateral estoppel barred Pierce from contesting the facts and liability established in the first proceeding, including liability predicated on the same foreign bank records of Newport and Jenirob that support the same \$7.25 million disgorgement claim against Pierce in this second case. Pierce reciprocally asserted affirmative defenses of res judicata, equitable and judicial estoppel, and waiver, based on the final order in the first case.

After obtaining judgments against the two Pierce associates (Newport and Jenirob), the Division moved for summary disposition against Pierce himself. Pierce moved for summary disposition on his affirmative defenses, requesting dismissal of all relief sought against him in this second proceeding. There was no hearing on the merits. The Initial Decision was a ruling on the summary disposition motions.

This Initial Decision should be reviewed by the Commission because it embodies:

- (A) a finding or conclusion of material fact that is clearly erroneous; or
- (B) a conclusion of law that is erroneous; or
- (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.

Rule 411 (b)(2)(ii).

Except for correctly concluding that the affirmative defense of *res judicata* applied to this case, the Initial Decision misapplied the law and misconstrued or ignored undisputed facts material to rulings on all of the affirmative defenses asserted by Pierce: *res judicata*, equitable and judicial estoppel, and waiver. The Initial Decision also erred by ordering disgorgement from Pierce of money it never showed Pierce had received, notwithstanding that the Hearing Officer had already ordered disgorgement of that same money from the two entities that had actually received it.

I. The Initial Decision Erroneously Found Fraudulent Concealment.

The Initial Decision ruled at p. 16 that, “In the absence of any additional considerations, *res judicata* would bar the present proceeding.” (Emphasis added.) Pierce agrees with the ruling that *res judicata* would bar “the present proceeding” but denies that any additional considerations apply. The “additional consideration” applied by the Initial Decision – that Pierce had “fraudulently concealed” information to which he had objected without any challenge from the Division, and that the Division obtained and introduced in any event – created an unprecedented end run around the result plainly required by the *res judicata* doctrine.

A. The Initial Decision Erred In Applying “Fraudulent Concealment” At All.

Fraudulent Concealment applies only to evidence and resulting claims discovered after a final judgment. Here the evidence not only was discovered, *it was actually submitted*, and *was even used* by the hearing officer in the initial decision issued *prior to final judgment* in the first case.

The Initial Decision in this second case articulated the test for fraudulent concealment as follows at p. 16,

This exception avoids the res judicata bar when “the plaintiff does not know the full extent of [its] injuries” *during the pendency of the first proceeding*, it omits to claim relief for the full extent of its injuries, and its ignorance of its injuries results from fraud, concealment, or misrepresentation by the defendant. *Restatement (Second) of Judgments*, § 26, comment j (1981). This principle has been adopted by the Ninth Circuit. *Costantini*, 681 F.2d at 1203 n.12 (the fraudulent concealment exception applies “where defendant’s misconduct prevented plaintiff from knowing, *at the time of the first suit*,... the extent of his injury”); *Mpoyo*, 430 F.3d at 988 ...

(Emphasis added.) The ensuing analysis at pp. 19-20 misconstrues the test, resulting in the failure to address undisputed facts that plainly preclude any finding of fraudulent concealment.

“During the pendency of the first proceeding” or “at the time of the first suit” in this matter, the Division submitted the very documents and resulting claims that the Initial Decision concludes were fraudulently concealed. The Division further submitted detailed spreadsheets quantifying and supporting its request that the Commission – acting through the hearing officer in the subordinate phase – disgorge an additional \$7.5 million from Pierce. The Initial Decision analyzes fraudulent concealment as if this never happened.

B. The Initial Decision Erred by Distorting Language In the Test It Applied.

The Initial Decision addressed only the information the Division had at the time of the first OIP, not what it had during the pendency of the first proceeding – that is, before the final order. This is plain error.

C. The Initial Decision Erred By Failing to Rule that the Division Had Sufficient Information About the Foreign Records At the Time of the First OIP to Preclude Fraudulent Concealment.

Pierce further contended that the Commission had sufficient information even at the time of the first OIP to include disgorgement claims against Pierce for Lexington stock trading profits comprising the \$13 million in profits Pierce “and his associates” allegedly

obtained, according to the first OIP. Having alleged that Pierce and “his associates” earned \$13 million, which included Pierce’s individual \$2.1 million and Newport and Jenirob’s \$7.25 million, the Division represented to the public in effect that it had sufficient information to allege elements of joint and several liability for \$13 million against Pierce at the outset. In fact, the Division has relied on joint and several liability to hold Pierce liable for trading profits of Newport and Jenirob, and the Initial Decision did not require proof that Pierce actually received any of the \$7.25 million profits of Newport and Jenirob -- another error, discussed below. Thus, the Commission/Division had enough information even at the time of the initial OIP to prevent it from ever asserting fraudulent concealment thereafter, or at minimum to raise the level of due diligence it should have exercised to obtain additional information before commencing the first action. Pierce had even filed a corrective 13(d) report of beneficial ownership (or discretionary trading authority) jointly with Newport in July 2006, which revealed changes in ownership percentages. The report did not include detailed disclosure of each transaction that did not move the Lexington holdings past a 5% or 10% threshold, because that was not required, but the 13(d) disclosures added to the information available to the Division even before it commenced the first action.

The Division knew precisely where the foreign records were in 2006, when it requested them from the Liechtenstein financial markets administrator (the “FMA”).

D. The Initial Decision Erred in Ruling that the Foreign Records Were Fraudulently Concealed When There Is No Dispute that the Existence of the Foreign Records was Disclosed by Pierce in 2006 in Written Objections, Further Objections by Counsel During Examination, and Testimony by Pierce.

Pierce provided his own personal records identifying the foreign bank he used, and the Division had already obtained Lexington trading records of that bank produced by a U.S.

broker-dealer. The Division also had documents that identified the “associates,” as it argued when opposing Pierce’s motion for a more definite statement against the first OIP. The Initial Decision erroneously twisted undisputed investigative testimony by Pierce that was cited in the record into an observation that Pierce lied about ownership of Newport and Jenirob. But the Initial Decision also erred to the extent its ruling depended on that observation. Not only does a fair reading of the record establish that Pierce did not lie at all; whether Pierce lied or not was immaterial to the Division’s knowledge of the existence and location of the foreign financial records that supported the \$7.5 million claim in any event. Because of that knowledge, the Division asked the FMA for those records in 2006 and again in February 2008, before filing the first OIP. The reason the Division did not procure the records before March 2009 was not because of any testimony by Pierce, whether true or false, but because the records were located in Liechtenstein, where privacy laws prevented even the FMA from procuring those records in 2006 and producing them before 2009.

E. The Initial Decision Erred by Failing to Rule that the Division’s Own Inaction Barred Application of Fraudulent Concealment.

The Division was content to seek assistance from the FMA to obtain the foreign records. It elected not to subpoena the foreign bank from which the FMA ultimately obtained the records (the Hypo Bank of Liechtenstein); nor did the Division even attempt to subpoena the “associates” of Pierce, including Newport and Jenirob. Still further, the Division never filed a motion to compel Pierce to produce documents of any kind. Had it done so, the Division either would have obtained the records it now claims were concealed, or would have obtained a ruling that Pierce’s objections were proper, thereby precluding any claim of “fraudulent concealment.”

F. The Initial Decision Erred by Ruling that the Foreign Records Had Been Concealed Notwithstanding the Undisputed Fact that the Division Had Requested Those Very Records from the FMA as Early as 2006, Demonstrating Ineluctably that the Division Knew The Records Existed and Where to Find Them.

In reality, the Division would not have known to ask the FMA for the records in 2006, or again in 2008, if the records had been fraudulently concealed.

The "fraudulent concealment" exception to res judicata applies only where the party subject to the preclusion obtains "newly discovered evidence" *after* final judgment in the first action. Where the evidence was discovered and actually known to the party during the pendency of the first action, the exception has no relevance and cannot apply as a matter of law. This is particularly true where, as here, the party – the Division -- not only knows of the evidence in question during the pendency of the first action, but actually uses it, attempts to use it and/or had the opportunity to do so during the first action, but elects not to. In any of these events, the party's recourse lies in the first action itself, or appeal thereof, and res judicata prevents the party from using the same evidence in a second action.

If the Division and/or Commission were dissatisfied with the ALJ's ruling on the disgorgement issue, they were required to seek recourse in the first action itself. The Division could have asked the Commission to reverse or modify the first hearing officer's initial decision; and, indeed, the Commission had plenary authority to do so on its own initiative. SEC Rules of Practice 400, 410 and 411(c). Alternatively, rather than challenge the hearing officer's ruling, the Division could have moved the first hearing officer or the Commission to amend the first OIP to explicitly include the Newport/Jenirob disgorgement claim against Pierce. SEC Rule of Practice 200(d). Similarly, the Commission also retained the authority

“[u]pon its own motion,” to accept and consider the Newport/Jenirob evidence for any purpose, or order further proceedings on the \$7.5 million claim. SEC Rule of Practice 452.

When the Division and/or Commission failed to do any of these things, the initial decision in the first case, including the amount of the disgorgement order, became final. The Initial Decision misapplied the exceptions to the general rule concerning claim splitting. Restatement (Second) Judgments Section 26. There was no express reservation of the claim by the parties or in the earlier decision, and the claim was either included or could have been included in the first proceeding. Since this second case is premised entirely on the same evidence and seeks the same remedy the Division proffered in the first, this second case is nothing more than claim splitting barred by res judicata.

It was plain error even to consider a fraudulent concealment exception because the Division and Commission had ample opportunity to, and did in fact, use the Newport/Jenirob evidence “during the pendency of the first proceeding.” In short, there was no “newly discovered evidence” and, thus, there can be no fraudulent concealment exception to res judicata as a matter of law.

Even where there actually is “newly discovered evidence” -- that is, evidence discovered *after* final judgment in the first action -- *res judicata ordinarily still applies* to preclude a second action based on the newly discovered evidence. That rule is subject to an exception for the rare instances where (1) the evidence was fraudulently concealed or (2) the evidence could not have been discovered in the exercise of due diligence throughout the pendency of the first action. Even had the Division first obtained the FMA records *after* the Commission's July 2009 final order in the first case, the exception would not have applied here because the Division could not have satisfied its burden of proving either factor.

II. The Initial Decision Erroneously Failed to Apply Equitable Estoppel.

A. The Initial Decision Misconstrued the Test It Cited.

At p. 9, the Initial Decision cited the following test for equitable estoppel:

Equitable estoppel prevents a party from arguing a particular position or making a particular claim when (1) the party to be estopped knows the facts, (2) he intends that his conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended, (3) the party invoking estoppel is ignorant of the true facts, and (4) he detrimentally relies on the former's conduct. *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007).

The Initial Decision applied this test erroneously at p. 9,

This defense fails because Pierce has not proven the second and fourth elements required for equitable estoppel, and has not shown that the government's act will cause a serious injustice.

This error derives from several mistakes. First, the Initial Decision mischaracterized undisputed facts by stating the premise, "But it is undisputed that the Division made no representations regarding its intention to appeal." Yet, it is undisputed that the Division did not appeal the initial decision in the first case within the time allowed under Rules 360 and 410. The Initial Decision adopted a characterization of fact on this issue supplied by Division counsel that is completely divorced from the reality of the Division's *actions*. The Division's actions communicated immutably that it did not intend to appeal. It did not appeal.

The next step in the Initial Decision's analysis of the test in *United States v. Gamboa-Cardenas* is likewise erroneous, "There is no persuasive evidence that the Division's failure to appeal was intended to lull Pierce into similarly failing to appeal ... *Pierce also points to no legal authority* stating that he had the "*right*" to believe that the Division's inaction was *intended to lull him*, or that the Division had a duty to *inform him of its intentions*." *Id.* at p. 9 (emphasis added). These requirements are fabricated by distorting the second alternative in

the second element of the *Gamboa-Cardenas* test. Consequently, the Initial Decision deviated from basic principles of estoppel.

The second element of the test quoted at p. 9 of the Initial Decision is, “(2) he intends that his conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended.” (Emphasis added.) That is the legal authority to which Pierce pointed. By distorting the emphasized language in the second element, the Initial Decision failed to observe that whatever the Division’s latent intent might have been, it is an undisputed fact that the Division declined to appeal the amount of disgorgement ordered in the first initial decision, thereby outwardly manifesting its acceptance of a final disgorgement order of \$2.1 million rather than the \$9.6 million it had requested.

The Commission entered a final order in the first case in July 2009, and has obtained satisfaction of a judgment against Pierce approaching \$3 million (\$2.1 million plus interest) by relying on Pierce’s decision not to file a petition for review in the first case -- without ever proving Pierce’s latent intent underlying his decision not to appeal. Just as surely as the Division/Commission asserted a right to rely on Pierce’s inaction when it made the initial decision in the first case final, and collected on the resulting judgment, Pierce had a right to rely on the Division’s inaction and the Commission’s entering a final order that excluded the additional \$7.5 million disgorgement proposed by the Division. In that reliance, and pursuing his preference for finality of the \$2.1 million disgorgement amount, Pierce refrained from further action – specifically a cross appeal that was mooted by the Division’s inaction and the Commission’s final order.

B. The Initial Decision Erred by Ruling that Pierce's Reliance on the Division's Inaction Was Not Reasonable.

At p. 9, the Initial Decision ruled,

Moreover, although Pierce explains at length how he relied on the Division's inaction and silence (Wells Decl., Ex. 16), his reliance was not reasonable. Detrimental reliance in the equitable estoppel context must be reasonable. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984).

The Initial Decision goes on to test the reasonableness of Pierce's decision not to appeal by speculating on what latent reasons the Division might have had for not appealing,

A party's failure to appeal may result from any number of considerations, including cost, likelihood of prevailing, and the availability of other remedies. One reasonable explanation, among others, for the Division's failure to appeal is that it interpreted the First Proceeding ID as holding that the Newport and Jenirob sales should be the subject of a separate OIP. First Proceeding ID, p. 20. That is apparently exactly how the Division interpreted the First Proceeding ID. It is not reasonable to assume from mere silence that the Division had entirely given up on its claim for an additional \$7 million in disgorgement.

This presents an erroneous assumption that the Commission had to launch a new proceeding, after Pierce's rights of appeal expired, when, in reality, the Commission had the power to expand the existing OIP or issue a separate OIP before entering a final order in the first case.

More broadly, the Initial Decision turned the analysis upside down. The Initial Decision presumes that reliance cannot be reasonable when a party to be estopped might have had latent reasons besides the obvious ones relied upon by the party asserting estoppel. Here, the obvious reasons for the Division to have filed a petition to review the \$2.1 million disgorgement order would have included conforming to the Commission's own rules, affording due process and avoiding a final order of disgorgement that did not include the \$7.5 million proposed. (*E.g.*, Pierce's discussion of Rules of Practice 200, 452, 400, 410 and 360 at

p. 19, and generally at pp. 18-22, of Respondent G. Brent Pierce's Opening Brief in Support of Motion for Summary Disposition, "Pierce's Opening Brief.")

In essence, the Initial Decision holds that Pierce could not reasonably rely on the Division and the Commission to follow the Commission's own rules and afford him due process. Thus, through erroneous speculation, the Initial Decision concludes that the Division might have refrained from filing a petition to review in the first case because it believed the \$7.5 million disgorgement claim could still be prosecuted through a separate OIP. But that does not mean the separate OIP could be issued *after* the disgorgement amount in the first case had become final. In other words, any separate OIP still had to be sought in the first case, because the evidence supporting the \$7.5 million disgorgement claim had been used by the hearing officer and the claim had been presented to the Commission. Otherwise, absent further adjudication in the first case, *res judicata*, and not just the Commission's own rules, would bar further disgorgement.

In effect, the Initial Decision finds Pierce's reliance on the longstanding doctrine of *res judicata* – applicable to himself as well as the Division/Commission – to be unreasonable. Yet, the Initial Decision rules that but for its application of an exception, *res judicata* would have barred the second proceeding against Pierce. This *res judicata* ruling by itself confirms the reasonableness of Pierce's reliance on the Division's and the Commission's failure to perfect the \$7.5 million claim before the disgorgement order became final. Given that the Initial Decision found that *res judicata* applied to this second case absent an exception, it must have found the doctrine to have been a reasonable prospect upon entry of the final order in the first proceeding.

C. The Initial Decision Erroneously Ruled that There Is No “Serious Injustice” to Pierce.

The Initial Decision at p. 9 erroneously ruled:

Lastly, the detriment to Pierce falls short of a “serious injustice.” The parties’ notices of appeal were due at the same time, Pierce retained the right to file a cross-appeal if the Division appealed, and Pierce could presumably have filed a “protective” appeal, one that he could dismiss later or simply fail to prosecute if it turned out that the Division did not file its own appeal. See 17 C.F.R. § 201.410. Pierce waived none of his defenses to a second action, and indeed, has asserted them with vigor. His only significant detriment is the requirement that he defend himself in the present proceeding. Wells Decl., Ex. 16. This does not rise to the level of a serious injustice.

The Initial Decision postulates that there was no serious injustice because Pierce could have appealed liability on the registration claim for disgorgement of \$2.1 million, but chose not to do so. Again, the Initial Decision relies on speculation while ignoring obvious undisputed facts. Pierce had prevailed on the Division’s \$7.5 million disgorgement claim – unless the Division appealed before the \$2.1 million disgorgement order became final. The Division did not appeal; nor did the Commission order further adjudication of the \$7.5 million claim the Division had unsuccessfully raised. Had Pierce appealed, he might have prompted a cross-appeal on the \$7.5 disgorgement claim (assuming the Division/Commission would follow the Commission’s own rules and observe the doctrine of res judicata). To avoid further adjudication of the \$7.5 million claim, Pierce declined to appeal the merits of registration liability or the \$2.1 million disgorgement order.

Before the Division submitted the foreign financial records and \$7.5 million claim, it had been pursuing an exotic liability theory, under which it had not alleged Pierce was an affiliate of Lexington when he sold shares already registered under S-8. Moreover, at the time the Division submitted the new evidence, the release of that evidence was being challenged as

illegal under the applicable foreign law; and Pierce could have complained further that the Commission had procured the evidence illegally by falsely representing to the FMA in February 2008 that it was investigating antifraud violations against Pierce despite earlier and later statements on the record respectively to Pierce and the public that it was not. Thus, the Division risked a cross-appeal by Pierce if it appealed to increase the disgorgement amount by \$7.5 million. The result, had Pierce prevailed, could have been an ultimate ruling that Pierce could not be held liable for registration violations, and the Division would not even have held on to the \$2.1 million disgorgement order, much less obtained the \$9.6 million it had proposed.

By accepting the \$2.1 million disgorgement order and using the “final” adjudication of registration liability in the first case to perfect the \$7.25 million claim in this new proceeding, the Division has indeed committed a “serious injustice” against Pierce. Its actions, particularly in light of the Commission’s rules that apply equally to the Division, induced Pierce to surrender his appeal rights on registration liability in the first instance along with the \$2.1 million disgorgement order. By flouting the Commission’s rules and exploiting Pierce’s compliance with those same rules, the Division has now used this second proceeding to revive a \$7.5 (now \$7.25) million disgorgement claim that it had earlier relinquished reciprocally with Pierce’s surrender of his appeal rights on liability issues. This “serious injustice” is compounded by the Commission’s using the disgorgement order in the first case to extract nearly \$3 million from Pierce to liquidate his “final” disgorgement obligation, by misrepresenting to the public and Pierce’s business community that this second case was permissible and that Pierce had “fraudulently concealed” evidence, and by forcing upon

Pierce substantial, unwarranted legal defense costs after the final order of disgorgement in July 2009.

Thus, it was clear error for the Initial Decision to hold that “Pierce waived none of his defenses to a second action.” To the contrary, Pierce waived all of his defenses to liability for registration violations when he observed the Commission’s rules, in the reasonable belief that those rules applied to the Division as well.

III. The Initial Decision Erroneously Failed to Apply Judicial Estoppel.

The Initial Decision improperly rejected the application of judicial estoppel. This error resulted from the failure to acknowledge the consequences to Pierce of the Division’s inconsistent positions, even though at p. 12, the Initial Decision recognizes the inconsistencies,

In the First Proceeding, the Division argued that disgorgement of profits from Pierce’s trades through Newport and Jenirob was part of the First Proceeding, and in the present proceeding the Division argues that such disgorgement is part of the present proceeding. These two positions are “clearly inconsistent.” However, Pierce has failed to show that any advantage the Division has thereby derived is “unfair.” As noted above, Pierce has had a full and fair opportunity to litigate his affirmative defenses, and the only significant prejudice to him is that he has been forced to defend himself in the present proceeding.

In the first case, the Division contended that the “Commission” – acting through its agent designated to handle the first phase of the proceeding, the hearing officer – should order Pierce to disgorge an additional \$7.5 million in profits of Newport and Jenirob in addition to the \$2.1 million in Pierce’s personal profits. Having submitted briefing and proposed findings of fact and conclusions of law advocating a disgorgement award that included the \$7.5 million, predicated on evidence used in the first case to establish liability for registration violations, the Division has contended in this second case that the \$7.5 million claim was not before the Commission in the first case. Yet, by declining to ask the Commission to add \$7.5

million to the first hearing officer's disgorgement order, the Division also took the position, under the Commission's rules, that a \$2.1 million *final order* of disgorgement would fulfill the remedial interest of the public. The Division's contention in this second case that an additional \$7.5 million be disgorged based on the same evidence admittedly adduced at the first hearing is inconsistent.

The Initial Decision at p. 12 observed that,

Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations and thus poses little threat to judicial integrity. *New Hampshire*, 532 U.S. at 750-51 (citation and quotations omitted).

This second case threatens "judicial integrity" for the reasons discussed regarding the equitable estoppel defense. The Division has abused the Commission's rules and Pierce's due process rights to extract Pierce's surrender of his appeal rights in the first proceeding before reviving a litigated claim of \$7.5 million. The Division has used the finality of Pierce's registration liability it thereby obtained -- subject to the limitation of a \$2.1 million disgorgement order -- to preempt Pierce's contesting registration liability, a contest the Division would have faced if the Division had not by its own inaction surrendered the \$7.5 million claim in the first proceeding. The Commission likewise would have faced an appeal to a federal circuit court on Pierce's registration liability if it had determined to increase the disgorgement award to \$9.6 million instead of limiting the amount to \$2.1 million in its final order.

By ruling that "Pierce has had a full and fair opportunity to litigate his affirmative defenses, and the only significant prejudice to him is that he has been forced to defend himself in the present proceeding," the Initial Decision has ignored precisely what Pierce sacrificed

for finality in the first case – contesting the first hearing officer’s finding of registration liability directly to the Commission and thereafter to a federal court of appeals in exchange for limiting disgorgement to \$2.1 instead of \$9.6 million.

The Initial Decision further erred at p. 12 in its closing analysis of judicial estoppel,

Most significant, though, is the fact that Pierce prevailed in the First Proceeding on the issue of whether disgorgement of Newport and Jenirob profits was part of the case. The Division’s current position, although inconsistent with its previous position, is entirely consistent with the conclusions of the First Proceeding ID. ***There is thus no risk of inconsistent determinations and no threat to administrative or judicial integrity posed by the Division’s present contentions.*** Taking into account all three New Hampshire factors, and placing the greatest weight on the second factor, I conclude that judicial estoppel is inapplicable. [And at footnote 6,] Virtually all of Pierce’s case is based on a central contention -- namely, that disgorgement of Newport and Jenirob’s profits was part of the First Proceeding -- which is the opposite of the contention it successfully argued in the First Proceeding, and which may itself be barred by judicial estoppel. The Division has not specifically asserted judicial estoppel, however, which bolsters the conclusion that Pierce has not been unfairly prejudiced by the Division’s inconsistent arguments. Division’s Motion, p. 31 at n.12.

(Emphasis added.) The Commission issued a final order to the effect that \$2.1 million was sufficient to protect the remedial interest of the public based on the evidence and claims before the Commission in the first case. Now, based on the same evidence and claims, the Division would have the Commission enter an order disgorging another \$7.5 million, for a total of \$9.6 million instead of the \$2.1 million finally ordered. Not only has there been a “risk of inconsistent determinations,” that risk would be fully realized if the Initial Decision were to become final. The inconsistency is clear, the conflicting messages to the public are misleading, and the threat to judicial integrity is exacerbated by the Division and Commission violating the Commission’s own rules to arrive at the “inconsistent determinations.”

IV. The Initial Decision Erroneously Failed to Apply Waiver.

The Initial Decision erred in ruling at p. 13,

Assuming for the sake of argument that the Division did relinquish its right to prosecute the present OIP, the record does not demonstrate that the Division did so intentionally. Even further assuming that the Division had a number of other options, which it allegedly “made the conscious decision to forego” (Pierce’s Motion, p. 19), it does not follow that it consciously decided to forego all options whatsoever. Other than *res judicata* (addressed below), Pierce points to no legal authority requiring the Division to appeal, on pain of losing the right to pursue the present OIP. Pierce’s contention that the Division made a knowing, deliberate decision to abandon all rights to seek disgorgement of profits from the Newport and Jenirob sales is supported only by speculation, not evidence or legal authority.

The Division’s actions manifested an objective intent to waive its claim for another \$7.5 million to be disgorged. The Rules of Practice referred to above obligated the Division to seek the additional disgorgement before the \$2.1 million order became final. Unless it is unreasonable to presume that the Division would comply with the Commission’s rules and observe the doctrine of *res judicata* as well, it indeed does follow that the Division “consciously decided to forego all options whatsoever.” Likewise, it was error to rule that, “Pierce points to no legal authority requiring the Division to appeal, on pain of losing the right to pursue the present OIP.” Pierce pointed to a number of rules, identified above, the use of which the Division must have “made the conscious decision to forego” – unless its conscious decision was to flout the rules and *res judicata*. None of the cited rules were even addressed in the Initial Decision other than Rule 200(d). And the Initial Decision erred in that analysis as well,

Pierce argues that the Division should have filed a motion with the Commission to amend the OIP, and that the First Proceeding ID provided a “clear signal” to follow that course. Pierce’s Motion, pp. 19-20. But the cited language of the First Proceeding ID does not state, either explicitly or implicitly, that the only course of action available to the Division

was to move to amend the OIP. First Proceeding ID, p. 20. A motion to amend the OIP is allowed by the Commission Rules of Practice and such a motion may be made “at any time.” 17 C.F.R. § 201.200(d). Although such motions should be “freely granted,” they are subject to the consideration that other parties “should not be surprised, nor their rights prejudiced.” 60 Fed. Reg. 32738, 32757 (June 23, 1995) (citing *Carl L. Shipley*, 45 SEC 589, 595 (1974)); see also *Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009) (mid-hearing change in requested sanction held not a due process violation because no prejudice was shown). As the Division correctly notes, Pierce argued against admission of the Liechtenstein Documents precisely on the basis that their admission would result in surprise and prejudice, and possibly necessitate a supplemental hearing. Buchholz Decl. in Opposition, Ex. J. Moreover, at the summary disposition stage, the Division put Pierce on notice regarding how much disgorgement it was seeking so that Pierce could adequately present evidence of his ability to pay. Moving to amend the OIP would likely have been futile, given the surprise and prejudice that would have resulted from a new, much larger, disgorgement request presented for the first time only after the hearing.

In order to justify the Division’s election not to follow Rule 200, and move either the hearing officer or the Commission to amend, the Initial Decision simply speculates why following that rule would have been futile. This ignores that the Division accomplished the very effect that the Initial Decision posits as a hypothetical, “the surprise and prejudice that would have resulted from a new, much larger, disgorgement request presented for the first time only after the hearing.” The Division did just that, enjoying the benefit of liability established through the hearing officer’s use of the new evidence supporting the larger disgorgement request to establish registration liability and then ignoring the hearing officer’s admonition that the Commission should entertain the larger disgorgement request rather than the hearing officer. Like Pierce, the hearing officer in the first case presumed that the Division would follow the Commission’s rules to increase the disgorgement amount or waive its pending request. She notified the Division (erroneously or not) that the Commission, rather than the hearing officer, had the authority to increase the disgorgement amount.

Rules identified by Pierce provided the means for the Division to follow the hearing officer’s admonition before the \$2.1 million disgorgement order became final. For the

foregoing reasons, it was also error for the Initial Decision to rule at p. 13 that, “Pierce’s belief that the Division had entirely abandoned its claim for disgorgement of the Newport and Jenirob profits was not reasonable.”

V. The Initial Decision Erroneously Ordered Disgorgement from Pierce.

The Initial Decision erred by ordering disgorgement of Lexington trading profits of Newport and Jenirob from Pierce without the Division having submitted any evidence that Pierce actually received those profits. Nor did the appearance of Pierce’s name on foreign bank records of Newport or Jenirob, or his managerial position at Newport, provide a sufficient inference of his personal receipt of the trading proceeds to support disgorgement.

If anything, the Division’s evidence showed that Newport and Jenirob actually received the \$7.25 million in Lexington profits, not Pierce. None of the trading records submitted by the Division, foreign or domestic, showed that either of these companies paid any portion of the sale proceeds to Pierce.

The Initial Decision further erred by ordering disgorgement when a registration violation not requiring *scienter* for liability – versus an antifraud violation – served as the predicate. This error was compounded because of the indirect liability imposed on Pierce for disgorgement of funds received not by himself, but by others, based on liability not involving *scienter* as an element. This imposed an unlawful penalty on Pierce.

VI. Conclusion.

The Initial Decision contains the foregoing errors in its legal analysis of Pierce’s affirmative defenses. Consequently, it ignored or misconstrued undisputed facts to the extent that its rulings on each of Pierce’s affirmative defenses should be reversed. Because the Initial Decision was decided on summary disposition motions, and there are no proposed findings

and conclusions of law to which he would otherwise refer, Pierce incorporates all arguments in his pleadings in this case, which are recapped above in summary form, as prescribed by Rule 410. If there is any ambiguity, Pierce assigns error to the extent the positions in his pleadings and argument were not adopted in the Initial Decision.

The Commission should rule that *res judicata* bars this case against Pierce altogether, along with all other potential proceedings against Pierce involving trading in Lexington stock and disgorgement of any additional portion of the \$13 million in proceeds allegedly received by Pierce and his “associates.” The Commission should expressly rule that the exception for fraudulent concealment does not apply. Thus, *res judicata* alone is sufficient to extinguish all potential relief against Pierce pertaining to Lexington stock. The Commission should, however, for the foregoing reasons rule that all further relief against Pierce is also barred by application of his other defenses -- equitable and judicial estoppel, and waiver.

The Commission should further rule that Pierce is entitled to his attorney fees and other expenses incurred in the defense of this case, pursuant to 5 U.S.C. § 504(a) (the Equal Access to Justice Act), 17 CFR § 201.31 and *In the matter of Russo Securities, Inc.*, Exchange Act Release No. 42121 (Nov. 10, 1999).


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