

**UNITED STATES OF AMERICA**  
**before the**  
**SECURITIES AND EXCHANGE COMMISSION**

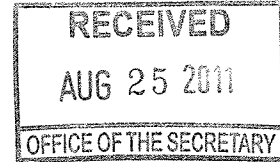
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**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13927**

**In the Matter of**

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

**Respondents.**



**DIVISION OF ENFORCEMENT'S CROSS-PETITION**  
**FOR REVIEW OF INITIAL DECISION AS TO GORDON BRENT PIERCE**

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## **I. The Division's Cross-Petition For Review of Initial Decision As to Gordon Brent Pierce**

Pursuant to the Commission's Rules of Practice 410(b) and 411(b)(2)(ii)(B), (C), the Division of Enforcement ("Division") hereby cross-petitions the Commission for review of certain conclusions contained in the Initial Decision as to Gordon Brent Pierce ("Initial Decision") rendered by Administrative Law Judge Cameron Elliot on July 27, 2011. This cross-petition follows the Petition for Review by Respondent Gordon Brent Pierce ("Pierce") served via facsimile and email on August 16, 2011.

The Initial Decision properly held that Pierce's unregistered sales of the stock of Lexington Resources, Inc. ("Lexington") through the accounts of Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") at a Liechtenstein bank violated Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") and properly ordered Pierce to cease and desist from further Section 5 violations and disgorge approximately \$7.2 million in net profits. Initial Decision at 9-10, 20-22. The Initial Decision also properly held that Pierce's res judicata defense did not bar the Division's Section 5 claim against Pierce in this proceeding because Pierce concealed crucial evidence pertaining to his sales transactions through the Newport and Jenirob accounts, thereby preventing the Division from including a Section 5 claim for those transactions when an earlier administrative proceeding was instituted against Pierce in 2008. *Id.* at 16-20.

While concurring with the result, the Division is filing this cross-petition solely to address the legal arguments for rejection of Pierce's res judicata defense in its entirety, as the Initial Decision made conclusions of law regarding application of res judicata that were clearly erroneous. By granting the Division's cross-petition, the Commission may, for the reasons identified below and to be fully demonstrated in the Division's Opening Brief on Appeal, provide guidance on issues relating to claims brought under Section 5 of the Securities Act and

the application of res judicata to cease-and-desist administrative proceedings brought under the provisions of the “Securities Enforcement Remedies and Penny Stock Reform Act of 1990,” Public Law 101-429 (101<sup>st</sup> Congress Oct. 15, 1990) (“Remedies Act”).

## **II. Issues On Which the Division Seeks Review**

The Division asks the Commission to review the following issues:

First, the Initial Decision erroneously determined that there was an identity of claims for Pierce’s violation of Section 5 between the prior and present proceedings by applying a “same right” analysis to the Section 5 claims that were at issue, rather than correctly using a “transaction specific” analysis of the Section 5 claims at issue. Under the applicable legal precedent, an analysis of a Section 5 violation is transaction specific because Section 5 of the Securities Act requires that each particular offer or sale of shares must be registered or subject to an exemption. *See, e.g., SEC v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998). Failing to apply this precedent, the Initial Decision erroneously concluded: “That the specific amount of disgorgement, the specific sales transactions, and the specific ‘alter-ego’ corporations involved are different is not a sufficient distinction.” Initial Decision at 15. For similar reasons, the Initial Decision’s failure to analyze as separate Section 5 violations Pierce’s unregistered sales of Lexington stock through the Newport and Jenirob accounts, of which Pierce was the beneficial owner, also led to the erroneous conclusion that the transactional nucleus of operative facts in both proceedings was the same. *Id.* at 15-16.

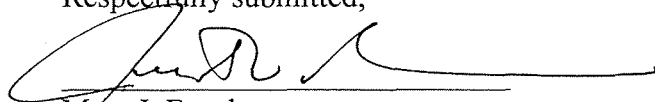
Second, the Initial Decision erroneously held that a final judgment was reached in the prior proceeding on the controversy at issue here: whether Pierce’s unregistered sales of Lexington stock through the Newport and Jenirob accounts violated Section 5. Initial Decision at 14. The Supreme Court has held that “[i]n order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and

*the point of controversy must be the same in both cases, and must be determined on its merits.” Costello v. United States, 365 U.S. 265, 286 (1961) (emphasis added).* As Administrative Law Judge Carol Fox Foelak’s Initial Decision in the prior administrative proceeding makes clear, the judgment in the prior proceeding only covered Pierce’s Section 5 liability for his unregistered sales of Lexington stock ***through his personal account*** at the Liechtenstein bank. Pierce’s Section 5 liability for his unregistered sales of Lexington stock through the Newport and Jenirob accounts was ***not*** adjudicated on the merits in the prior proceeding.

Third, the Initial Decision erroneously used the res judicata analysis applicable to federal district courts of general jurisdiction in determining what claims were “at issue” and “resolved” in the prior administrative proceeding. Initial Decision at 14. For res judicata purposes, the nature and scope of the claims that are brought and resolved in an administrative proceeding instituted under the Remedies Act may be narrower than those that would be brought and resolved in a district court proceeding. By their nature, administrative proceedings under the Remedies Act may be brought more quickly to resolve in an expeditious fashion the potential violations that the Division has already identified.

Dated: August 24, 2011

Respectfully submitted,



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