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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.,	**RESPONDENT G. BRENT PIERCE'S OPENING BRIEF TO THE COMMISSION FOR REVISION OF INITIAL DECISION**
Respondents.	

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I. RELIEF REQUESTED

Pursuant to Rules of Practice 410 and 411, 17 CFR §§ 201.410 and 201.411, Respondent G. Brent Pierce ("Pierce") submitted a Petition for Review of the Initial Decision issued on July 27, 2011 by the Hearing Officer ("the Decision"). The Commission issued orders granting Pierce's Petition for Review and the cross-petition for review submitted by the Division of Enforcement ("Division").[1]

Pierce requests that the Commission revise the Decision. The findings and conclusions of material fact are clearly erroneous and the conclusions of law are erroneous. *See* Rule of Practice 411 (17 C.F.R. § 201.411) and 5 U.S.C. § 557(b). The Decision improperly rejected the central defense of res judicata. It ruled Pierce somehow concealed evidence that was actually admitted into the record and overlooked that the $7.5 million claim related to that evidence was actually made in the first case. The Decision also improperly rejected Pierce's other related defenses – equitable and judicial estoppel and waiver. It ignored the Commission's own rules and violated Pierce's due process rights. The Decision further ordered Pierce to disgorge money when there was no evidence he actually received those funds. Accordingly, Pierce requests the reversal of the disgorgement order and the dismissal of this proceeding.

II. STATEMENT OF THE CASE

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. *See* Decision at pp. 1-9.[2]

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[1] By separate motion under Rule 451(b), Pierce requests oral argument with additional time. Pierce also asks that November 24, 2011 be set as the deadline for reply briefs, pursuant to Rule 450(a). Opposition briefs are due November 10, 2011, but the deadline for reply briefs was not included in the September 8, 2011 Extension Order.

[2] Declaration of Christopher B. Wells dated March 17, 2011 ("Wells Decl."), Exs. 1-28. Attached for convenience of the Commission in Appendix A are record items cited in this Brief (other than the Decision and Pierce's Answer attaching a voluminous exhibit). Appendix A's pages are numbered. Appendix A's first page is a table of contents

In the first case, the final order found reporting and registration violations and ordered the disgorgement of nearly $2.1 million of trading profits from Pierce.[3] Prior to entry of that order, the Division of Enforcement sought the disgorgement of $9.6 million out of the $13 million allegedly obtained by "Pierce and his associates" according to the Order Instituting Proceedings ("OIP").[4] Of the $9.6 million, nearly $2.1 million were profits Pierce had received, according to Lexington trading records at a foreign bank.[5] The remaining $7.5 million were trading profits of two of "Pierce's associates" held to be under his control.[6] These "associates" were Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") and were discussed extensively in the initial decision.[7] The Commission declined to disgorge $7.5 million of the $9.6 million the Division had sought, and the $2.1 million amount became the final and complete disgorgement remedy.[8]

By bringing this second case, the Division reprised its prior request for Pierce to disgorge the same $7.5 million, although the Division later reduced this request to roughly $7.25 million.[9] The second case named as parties Newport and Jenirob (the same two Pierce "associates" addressed in the first case). Newport and Jenirob actually received the $7.25 million.[10] The Division contended Pierce is barred from contesting the additional disgorgement that is

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of the Appendix along with starting page numbers. (Pierce's recap of the procedural and fact background supported by the exhibits was essentially the same as the Decision's recap. It was presented in Respondent G. Brent Pierce's Opening Brief in support of Motion for Summary Disposition filed on March 21, 2011 ("Pierce Motion") at pp. 1-12, Statement of Facts Section.

[3] Wells Decl., Exs. 14 and 15 (final order).

[4] Wells Decl. Exs. 10-12; *e.g.*, Ex. 11 Proposed Finding of Fact No. 57 and Proposed Conclusion of Law No. 53, and Ex. 12 at p. 25; Wells Decl. Ex. 2 (OIP).

[5] Wells Decl. Ex. 14 (initial decision in the first case), at pp. 13-14.

[6] Wells Decl. Exs. 2 and 14.

[7] *Id.*

[8] Wells Decl. Ex. 15.

[9] Wells Decl. Ex. 19, Decision at p. 22.

[10] *Id.* and Wells Decl. Ex. 14.

predicated on the very same foreign bank records of Newport and Jenirob admitted into the record as evidence in the first case.[11]

After obtaining default judgments against Newport and Jenirob, the Division moved for summary disposition against Pierce himself.[12] No new evidence was submitted by the Division.[13] Pierce moved for summary disposition on his affirmative defenses and for the dismissal of all relief sought against him.[14] His affirmative defenses of res judicata, equitable and judicial estoppel, and waiver are based on the final order in the first case.[15] The Decision was a ruling on the summary disposition motions.[16]

III. SUMMARY OF ARGUMENT

Except for correctly concluding that the affirmative defense of *res judicata* applied to this case, the Decision misapplied the law. The Decision also misconstrued or ignored undisputed facts material to rulings on all of the affirmative defenses. The Decision further 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. Unless the Decision is revised into a final order denying all relief requested against Pierce, the Commission will have exceeded its powers and violated Pierce's rights.

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[11] *Id.*; Ex. 19 at ¶¶ 20-30.
[12] Decision at p. 2.
[13] *Id.*
[14] *Id.*
[15] Decision at p. 10; Answer of Gordon Brent Pierce dated July 9, 2010.
[16] *Id.*

ARUGMENT

IV. THE DECISION ERRONEOUSLY USED THE FRAUDULENT CONCEALMENT EXCEPTION TO CANCEL THE RES JUDICATA BAR

The Decision ruled at page 16: "In the absence of any additional considerations, ***res judicata would bar the present proceeding***." (Emphasis added.) Pierce agrees that "res judicata would bar the present proceeding" but denies that "any additional considerations" apply. *Id.* The "additional consideration" – that Pierce had "fraudulently concealed" information – is an unsupportable end run around the result plainly required by res judicata. A rare exception was misapplied to swallow res judicata, a rule of finality and fundamental justice.

A. The Decision Erred By Applying the "Fraudulent Concealment" Exception to a Claim Submitted Before the Final Decision in the First Case.

The "fraudulent concealment" exception to res judicata applies ***only*** when the party subject to preclusion obtains "newly discovered evidence" ***after final judgment*** in the first action. Restatement (Second) of Judgments, § 26, cmt. j (1981).[17] When the "concealed" evidence is available before final judgment, the party's recourse lies in the first action itself, or in an appeal from the first action, and res judicata prevents the party from using that evidence as a basis for a second action. Here, the evidence at issue not only was discovered, ***it was actually submitted, asserted as a claim for disgorgement*** and ***was even used*** by the hearing officer in the decision in the first case. Wells Decl. Ex. 14.[18]

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[17] 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***. Restatement (Second) of Judgments, § 26, cmt. j (1981). The Decision applied a test for the use of evidence and claims discovered after final judgment to evidence and claims that were undeniably discovered before final judgment.

[18] That order made around seventy references to Newport and six to Jenirob, repeatedly citing the post-hearing exhibits submitted with the Division's motion to admit them. Wells Decl. Ex. 10.

1. The Decision Erred in Applying the Fraudulent Concealment Exception To A Disgorgement Claim Asserted *Before* the Initial Decision in the First Case.

The Decision at page 16 articulated the test for fraudulent concealment as:

> 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[19] . . .

(Emphasis added.) The ensuing analysis at pages 19-20 misconstrued and misapplied the test. The result is the failure to recognize that undisputed facts clearly preclude any finding of fraudulent concealment. "During the pendency of the first proceeding" or "at the time of the first suit," the Division submitted the very same evidence for the same claims that the Decision has erroneously concluded were fraudulently concealed in the first case. Decision at 16. The Division admitted all of this on the face of the Second OIP:

> ... On July 31, 2008, the Commission instituted cease-and-desist proceedings against Pierce ...[.] In that action, the Division sought disgorgement from Pierce of the $2 million in net proceeds from the sale of 300,000 Lexington shares in his personal account ... in 2004 ....
>
> .... ***Before issuance of the Initial Decision in the prior action, the Division moved to admit the new evidence ... and also sought the additional $7.7 million in disgorgement.*** The new evidence was admitted in the prior action, but the Administrative Law Judge ruled that disgorgement of the $7.7 million in Pierce's sales in the Newport and Jenirob accounts was outside the scope of the [OIP] in the prior action because Newport and Jenirob were not named in the OIP.
>
> .... The Initial Decision in the prior action, issued June 5, 2009, found that Pierce committed the alleged violations of the Securities Act and Exchange Act and

[19] To support its fraudulent concealment ruling, the Decision cites authority compelling exactly the opposite result, leaving no room for doubt that res judicata bars this proceeding. *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988-89 (9th Cir. 2005) held that res judicata barred subsequent filing of claims previously denied in a motion for leave to amend in the first action, and stated the holding was consistent with the law in five other circuits.

> ordered Pierce to disgorge $2,043,362.33 in proceeds from his sale of the 300,000 Lexington shares in his personal account. ***Neither party appealed the Initial Decision and it became the final decision of the Commission on July 8, 2009.***

Wells Decl. Ex. 19 (Second OIP ¶¶ 27, 29 & 30 (emphasis added)).

The disgorgement claim against Pierce in this second case and the claim for an additional $7.5 million against Pierce in the first case are the same remedy and the same claim. The Commission's rules laid out the procedure for the Division to seek additional disgorgement if it disagreed with the hearing officer's denial of such relief in the first case. Although these adjudicatory events are immutable and the rules clear, the Decision applies the fraudulent concealment test *as if* those events never happened. This is plain error.

The application of res judicata in this case is more clear cut than that in *Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985), where the D.C. Circuit affirmed summary judgment dismissal on the basis of a res judicata defense, even though "there was the discovery of two pieces of relevant evidence *after* judgment was entered." (Italics added.) The circuit court concluded:

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

Id. (emphasis added.) While in *Guerrero*, the evidence was discovered "*after judgment*" and during the pendency of the appeal in the first case, the evidence in this case was discovered and the claim asserted *before* the hearing officer made what was only a *preliminary* decision in the first case. *Id.*

The fraudulent concealment exception is a red-herring given the record in this case. That is consistent with the Seventh Circuit's decision in *Magnus Elec., Inc. v. La Republica*

Argentina, 830 F.2d 1396, 1401-03 (7th Cir. 1987), where the plaintiff asserted the same exception to the res judicata bar and where the plaintiff, similar to the Division's actions in this case, failed follow available procedures after the denial of its motion to amend and after the initial dismissal of its case. In *Magnus*, the Seventh Circuit concluded:

> After the district court dismissed the complaint in *Magnus I*, the plaintiff had two courses of action open to it. Either it could have appealed the decision or it could have sought leave to amend under Rule 15(a) after having the judgment reopened under Rule 59 or 60 .... Magnus pursued the latter route and lost. It could then have appealed the district court's decision to this court. Magnus could not, however, simply file a new suit in district court as it has done and allege new bases of subject matter jurisdiction that were available to it at the time of *Magnus I.*

Id. at 1402 (citation omitted). Here, pursuant to the Commission's rules, the Division could have sought review of the initial decision in the first case, but failed to do so.[20] Pierce had a protected expectation that the Commission would abide by its rules and the binding result of an adjudication.

2. The Decision Denied the Administratively and Constitutionally Protected Expectation in the Finality of the First Case.[21]

Res judicata is a precept of adjudication. In this agency adjudication, there also applies the administrative law principle that an agency must follow its own regulations and rules.

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[20] Here, the possible application of the exception is attenuated by two additional steps. The first step is, unlike the district court in *Magnus*, the hearing officer did not express the opinion that the decision would not operate as res judicata to a second case. 830 F.2d at 1402-03 (ruling plaintiff not entrapped by informal remarks by district court that res judicata would not apply). Even if there had been such an expression, there was constructive notice of the preclusionary effect, which is discoverable by engaging in minimal research. *Id.* The second step of attenuation results from the different structure in which the decision was made. Any ruling by a hearing officer – *e.g.*, deferring to the Commission on a $7.5 million claim submitted by a party – is subject to independent review by the Commission. Therefore, it is more akin to a subordinate ruling by a special master appointed by the district court deferring to that court. *E.g.,* Fed. Rule of Civ. Proc. 53. Any ruling by a special master must be challenged before the district court, under the prescribed procedures, *id.*, just as the amount of disgorgement granted by a hearing officer must be challenged under the Commission's procedures before it becomes a final order of the Commission.

[21] All of Pierce's affirmative defenses would be affected by the potential denial of due process if the Commission were to adopt the Decision as its final order in this case. In that event, the Commission necessarily would have flouted its own rules. The Division, like a hearing officer, is another component of the Commission. If the Division or a hearing officer violated Pierce's rights, so would the Commission.

Webster v. Doe, 486 U.S. 592, 602 n.7 (1988). "[T]he 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 abide by its own regulations and rules may constitute a violation of due process, as it "tends to cause unjust discrimination and deny adequate notice."[22] Where a prescribed procedure is intended to protect the interests of a party before the agency, the procedure must be scrupulously observed.[23]

Here, there was an adjudicatory proceeding where well-established rules provided a full and fair opportunity to litigate and to seek review of the initial decision. Those rules created protected interests in the finality of the proceeding. If the Division or Commission were dissatisfied with the hearing officer's decision on the amount of disgorgement, they had a recourse in the first case. The Division could have asked the Commission to review and reverse or modify the initial decision; and, indeed, the Commission had plenary authority to do so on its own initiative. *E.g.,* SEC Rules of Practice 200(d), 360(b)(1), 400(a), 410, 411(c) and 452.[24] Alternatively, rather than seek review of 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. *See* Rule 200(d);[25] *Guerrero v. Katzen*, 774 F.2d at 508.

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[22] *Sameena, Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153-54 (9th Cir. 1998) ("we conclude that the Air Force violated the appellant's constitutional right to due process in failing to comply with binding regulations ...."); *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); *see also Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 640 (6th Cir. 2005) (noting that a due process violation may occur "when the agency's disregard of its rules or assurances results in a procedure which itself impinges upon due process rights").

[23] *Sameena, Inc.*, 147 F.3d at 1153 (citation omitted).

[24] 17 C.F.R. §§ 201.200, 201.360, 201.400, 201.410, 201.411, 201.452.

[25] The Division did effectively move to amend under Rule 200(d)(2), without labeling the motion precisely as such, when it moved to allow evidence supporting the additional $7.5 million in disgorgement. The hearing officer allowed the evidence and her ruling suggests that the Division comply with Rule 200(d)(1) by asking the Commission to include the $7.5 claim for which she had already admitted the proof. Wells Decl. Ex. 14, at pp. 20-21. "Upon motion by a party, the Commission may, at any time, amend an order instituting proceedings to include new matters of fact or law." Rule 200(d)(1). The Division never followed this suggestion.

And the Commission retained the ultimate authority "[u]pon its own motion," to accept and consider the Newport/Jenirob evidence for any purpose, or order further consideration of the $7.5 million claim. Rule 452.

When the Division and Commission failed to take any of these permitted actions to add $7.5 million to the disgorgement award, the initial decision -- specifically including the $2.1 million disgorgement order -- became final. Res judicata (claim preclusion) dictates that the final order bars a second action on those disgorgement claims. Stretching the clearly inapplicable fraudulent concealment exception to cancel the first case's res judicata effect denied Pierce's protected expectation that the Commission would abide by its own rules as required by administrative and constitutional law.

B. Alternatively, even if the Claim Had Not Been Submitted in the First Case, the Decision Erred in Ruling that the Foreign Records Were Fraudulently Concealed. The Existence of the Records Was Disclosed.

The foregoing analysis shows why the fraudulent concealment exception should not have been considered at all. But to provide context through a discussion of how onerous the standard of proof for this exception really is, we apply the standard hypothetically through the analysis below. Assuming an alternate reality, that the Division had not discovered the foreign records and related $7.5 million claim until some time ***after*** the July 8, 2009 final order, the Division still could not have established sufficient deception on Pierce's part or due diligence on its own part to invoke the fraudulent concealment exception.

The fraudulent concealment exception to *res judicata* applies only when evidence is fraudulently concealed or could not have been discovered with due diligence. *Guerrero v. Katzen*, 774 F.2d 506, 508 (D.D.C. 1985); *see also Browning v. Levy*, 283 F.3d 761, 770 (6th Cir. 2002) ("The two elements that must be shown [] are: (1) wrongful concealment of material

facts that (2) prevented plaintiffs from asserting their claims in the first action."). Fraudulent concealment is the exception, not the rule. *See Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988-89 (9th Cir. 2005) ("Permitting these later-filed claims to proceed would create incentive for [parties] to hold back claims and have a second adjudication"). A party asserting fraudulent concealment must "plead[] with particularity facts establishing that [it] diligently attempted to uncover the information that [it] says was concealed." *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1202-03 (9th Cir. 1982); *see, e.g., Saud v. Bank of New York*, 929 F.2d 916, 921 (2d Cir. 1991) ("even if Saud did not know the full extent of the Bank's alleged fraud at the time the [first] action was commenced, his pleading in that suit demonstrated that he had sufficient information to create a duty of further investigation."); *L-Tec Elect. Corp. v. Cougar Elect. Org., Inc.*, 198 F.3d 85, 88 (2d Cir. 1999) (lack of due diligence precludes fraudulent concealment exception). And the existence of "a deliberate misrepresentation," by itself, is insufficient. *Constantini*, 681 F.2d at 1202-03; *see also Harnett v. Billman*, 800 F.2d 1308, 1313-14 (4th Cir. 1986) ("it is impossible to say that any concealment or fraud . . . even if they existed, acted to prevent the assertion of [] claims during the pendency of *Harnett I.*").[26]

Lastly, fraudulent concealment requires active concealment or misconduct, not simply the potential for misunderstanding. *See Browning*, 283 F.3d at 770 ("[a]ffirmative concealment must be shown; mere silence or unwillingness to divulge wrongful activities is not sufficient. (Citation omitted)." In *Browning*, alleged "obstructionist discovery" and failures to disclose information concerning prior representation were insufficient where the plaintiff "knew enough

[26] In *Harnett*, the court found that a party had "sought and obtained discovery" during a prior action that would have "enable[ed] him" to make the conclusions regarding the defendants' conduct that served as the basis for his claims in the subsequent action. 800 F.2d at 1313. The court therefore held, in terms equally applicable here, that it was "impossible to say that any concealment or fraud by [defendants], even if [it] existed, acted to prevent the assertion of [plaintiff's] . . . fraud claim during the pendency of" the prior action. *Id.* at 1314. Here, nothing prevented the claims from being made in the earlier action. They ***were*** made.

to bring suit [] before the conclusion of the [prior] proceeding." *Id.* at 771. Similarly, in *In re Genesis Health Ventures, Inc.*, ten EBITDA manipulations were alleged but, ultimately, fraudulent concealment carved out only the four that were concealed until after plan confirmation. 355 B.R. 438, 449-50 (D. Del. 2006) (the other six were "so close to the factual underpinnings, theory of the case, and relief sought . . . so as to be barred by claim preclusion.").

Here, the Commission had ample information even at the time of the first OIP to include disgorgement claims against Pierce for Lexington stock trading profits comprising the $13 million allegedly obtained by "Pierce and his associates." Wells Decl. Ex. 2 (first OIP ¶¶ 1, 11 and 14-16). 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 that it had sufficient information to allege elements of joint and several liability for $13 million against Pierce at the outset. Consistent with the first OIP's references to $13 million in trading profits of "Pierce and his associates," the Division relied on joint and several liability in the first case to assert that Pierce was liable for the trading profits of Newport and Jenirob, among others. Wells Decl. Ex. 13 at pp. 24-25.

During the investigation, two years before the OIP, Pierce provided the Division records of his personal account at Hypo Bank. These reflected profits he received from Lexington trading. Wells Decl. Exs. 6-9, and Ex. 14 at pp. 6 and 13-14; Supplemental Declaration of Christopher B. Wells In Support of Pierce's Post-Oral Argument Brief, "Suppl. Wells Decl." Exs. A and B. The Division had obtained Lexington trading records of Hypo Bank produced by a U.S. broker-dealer before the OIP as well. *Id.* 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.[27]

The Decision twisted investigative testimony by Pierce into an observation that Pierce made false statements about ownership of Newport and Jenirob. Decision at pp. 17-18. But the Decision erred to the extent its ruling depended on that observation. A fair reading of the record establishes that Pierce's investigative testimony was not false. Suppl. Wells Decl. Ex. C. But whether Pierce supplied misleading testimony or not on some aspect of his association with Newport or Jenirob did not affect the Division's knowledge of the existence and location of the foreign financial records that supported the $7.5 million claim.

Pierce never concealed or misled the Division about the existence of the Newport, Jenirob and other "associate" records in question. To the contrary, he openly acknowledged their existence and objected to producing such records – in written objections, Suppl. Wells Decl. Exs. A and B (*see* objection to RFP No. 4), and during his investigative testimony in 2006. Suppl. Wells Decl. Ex. C. The Division knew enough about the records to ask the Liechtenstein financial markets administrator (the "FMA") for them in 2006, and again in February 2008, before filing the first OIP.[28]

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[27] Earlier, when he answered the OIP, Pierce had moved for a more definite statement identifying the "associates" and "offshore companies" alleged by the OIP, expressing a concern that without such specificity the "Division is bound to 'ambush' Mr. Pierce." Wells Decl. Ex. 27 at 4. The Division declined to name those persons or entities in its response to the motion, saying it had made its investigative files available to Pierce and he was "aware of the entities he controlled that owned Lexington stock" and the Hearing Officer did not order the Division to supplement. Wells Decl. Ex. 28 at 3.

[28] Decl. of Steven D. Buchholz in Support of Div. of Enforcement's Opp'n to Mot. of Summ. Disposition by Resp't Pierce dated April 8, 2011 ("April 8, 2011 Buchholz Decl."), ¶ 8 and Ex. G thereto (Decl. of Steven D. Buchholz in Support of Div. of Enforcement's Mot. for the Admission of New Evidence dated March 18, 2009 ("March 18, 2009 Buchholz Decl.") at ¶¶ 5-8; Decl. of Steven D. Buchholz in Further Support of Div. of Enforcement's Mot. for Summ. Disposition Against Resp't Pierce dated March 21, 2011 (March 21, 2011 Buchholz Decl.) ¶ 9 and Ex. H thereto (Nesensohn letter dated March 25, 2009 re challenge by Pierce and others of FMA production of Hypo Bank records to SEC under Market Manipulation Act).

The reason the Division failed to procure the records before March 2009 was not because of any misdirection in testimony by Pierce, but because the records were located in Liechtenstein, where privacy laws prevented even the FMA from procuring them in 2006 and producing them before 2007. *Id.*

Despite knowing precisely where the foreign records were in 2006, when it was rebuffed by the FMA, the Division was content to rely on the FMA alone. 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 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 would have sooner 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."

Both the case law and the Commission's own procedures required the Division to seek a court order enforcing its subpoena if it wished to contest Pierce's objections to providing either documents or testimony. Its failure to do so is fatal to its argument that Pierce "concealed" the information to which his counsel objected.[29]

The Division's delays further undercut any claim of due diligence. After the Division unsuccessfully sought records in October 2006, it directed no further request to the FMA until February 2008. Nor did the Division explain the year of delay that elapsed between the February

[29] *Cf., Fleet/Northstar Fin. Group, Inc. v. SEC*, 769 F. Supp. 19, 20 (D. Me. 1991) (holding respondent in SEC enforcement action cannot file an action to quash SEC subpoena demanding production of documents to which respondent objects, since the exclusive forum for adjudicating those objections is an action brought by the SEC in federal court to enforce the subpoena); *accord, Reisman v. Caplin*, 375 U.S. 440, 445-46 (1964) (same in context of IRS subpoena); *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 648-50 (5th Cir. 1977) (same in context of FTC subpoena). While Rule 232 of the Rules of Practice provides that a hearing officer may quash a subpoena issued in connection with a hearing ordered by the Commission, there is no comparable administrative remedy provided in the case of an investigatory subpoena.

2007 change in Liechtenstein law permitting the FMA to obtain records from Hypo Bank and the Division's belated February 2008 request. The Division's leisurely approach belies any contention that it could not have awaited the results of its February 2008 request to the FMA before instigating the first OIP. In the exercise of due diligence, the Division could have procured the evidence supporting the $7.5 million claim well before the first OIP was issued, and even earlier than "during the pendency of the first proceeding." In summary, the Decision erroneously concludes that the fraudulent concealment exception to the res judicata bar applies.[30]

V. THE DECISION ERRONEOUSLY FAILED TO APPLY EQUITABLE ESTOPPEL

Equitable estoppel is available against the Commission. *SEC v. Sands*, 902 F. Supp. 1149, 1166 (C.D. Cal. 1995). The four elements of estoppel are: "(1) the party to be estopped knows the facts, (2) he or she intends his or her 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 must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conduct." *U.S. v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007) (citation omitted). The Decision cited the right authority, but incorrectly applied it.

A. The Decision Misconstrued the Test, Speculating on the Division's Latent Intent Rather Than its Overt Actions.

The Decision at page 10 recited the *Gamboa-Cardenas* test for equitable estoppel, but then proceeded to apply the test erroneously:

> 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.[31]

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[30] It is also telling that during the pendency of the first case, the Division took no action to give Pierce notice of its intention to assert the cancellation of the res judicata effect of the first case. The Division's actions and inactions support additional, independent grounds for the reversal of the Decision.

[31] When a party seeks to estop the government, it must also show: "(1) the government has engaged in affirmative misconduct going beyond mere negligence, and (2) the government's act will cause a serious injustice and the

There are several mistakes. First, the Decision misconstrued the operative 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 within the time allowed under Rules 360 and 410. Therefore, there was no need to cross-appeal. At page 11, the Decision identified material facts purportedly resolving the issue regarding action/reliance elements. These facts amounted to what the Division might have had in mind to justify its inaction,

> 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***.
>
> ***
>
> A party's failure to appeal may result from any number of considerations, including cost, likelihood of prevailing, and the availability of other remedies . . .

Id. at p. 11 (emphasis added).

This strange focus on the Division's tactical considerations is completely divorced from the reality of the Division's ***actions***. Whatever its internal designs, the Division did not appeal. That is the ultimate adjudicatory fact satisfying the second prong of the second element of the *Gamboa-Cardenas* test, which the Decision recited but ignored, "the party to be estopped . . . ***must so act*** that the party invoking estoppel has a right to believe it is so intended." (Emphasis added.) The 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 case, thereby outwardly manifesting its acceptance of the finality of the disgorgement order of $2.1 million.

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imposition of estoppel will not unduly harm the public interest." 507 F.2d at 502 (citation and internal quotation marks omitted).

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

At page 11, the 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 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.[32]

This speculation patently misses the point. It was the Division's "act" – no appeal – and the Commission's rules in an adjudicatory proceeding that Pierce clearly relied on.

The Commission entered a final order in the first case on July 8, 2009. The Commission later obtained satisfaction of its ensuing federal court judgment against Pierce (Wells Decl. Ex. 24) by relying on Pierce's decision not to file a petition for review in the first case. And yet, the Division has never offered proof of Pierce's latent intent underlying his decision not to appeal. It had no reason to, and was entitled to rely on Pierce's decision not to appeal liability for $2.1 million. Just as surely as the Commission had a right to rely on Pierce's inaction when it adopted the initial decision in the first case and later collected on the disgorgement award, so

[32] Of course, "it is not reasonable to assume that the Division had entirely given up on its claim for an additional $7 million in disgorgement" – ***against Newport and Jenirob***. But conversely, it is perfectly reasonable to assume otherwise as to Pierce, who, in contrast to Newport and Jenirob, was indeed a party in the first proceeding, and against whom a claim to disgorge profits reaped by Newport and Jenirob had been made and spent, by imposing a barrier to any appeal by Pierce as to liability.

too Pierce had a right to "detrimentally rely" on the Division's inaction and the Commission's entering a final order that excluded the additional $7.5 million disgorgement previously proposed by the Division. Accordingly, satisfying the fourth element of the *Gamboa-Cardenas* test, Pierce refrained from further action. Specifically, he refrained from a cross appeal that was mooted by the Division's inaction and the Commission's final order.[33]

Here, the obvious reasons for the Division to have filed a petition to review the $2.1 million disgorgement order would have been to preserve the $7.5 million claim through the application of the Commission's own rules for the amendment, review, and modification of the disgorgement order for $2.1 million. SEC Rules of Practice 200(d), 360(b)(1), 400(a), 410, 411(c) and 452. In essence, the Decision in this second case 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. This makes no sense. Pierce's reliance on the Division and the Commission complying with the rules was reasonable.

The Decision tacitly finds Pierce's reliance on the longstanding doctrine of res judicata to be unreasonable. Yet, the Decision rules that *but for* its application of the fraudulent concealment exception, res judicata would have barred this second case against Pierce. This res judicata ruling by itself confirms the reasonableness of Pierce's reliance on the Division's and the Commission's overt actions.

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[33] Each side represented to the other that it would not appeal -- by its very act of not appealing. Conversely, neither side made any overt representation about any intent to ***cross appeal***, since that opportunity never arose. Just as Pierce intended to cross appeal if the Division appealed, Wells Decl. Ex. 16 (Pierce Decl. dated June 30, 2010), the Division may have intended to cross appeal if Pierce appealed. But an intent to cross appeal is irrelevant even to the Decision's strained analysis. There could be no reliance on the other side's intent to cross appeal, because a cross appeal is conditioned upon an appeal by the other side to begin with. On the other hand, upon deciding only to cross appeal, detrimental reliance on the other side's action to forego an appeal is inherent, commonplace and reasonable.

C. The Decision Erroneously Ruled that There Is No "Serious Injustice" to Pierce.

The Decision at page 11 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.

This ruling posits that there was no serious injustice because Pierce could have appealed the liability on the registration claim for disgorgement of $2.1 million, but chose not to. Again, the Decision relies on speculation in place of obvious, undisputed facts. Pierce had prevailed on the Division's $7.5 million disgorgement claim. Through the application of the Commission's rules, Pierce would only have had to resume a defense of the claim if 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 risked a "protective appeal," he could 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.

At the time the Division submitted the foreign bank records, the FMA's release of that evidence was being challenged as illegal under the applicable foreign law.[34] As a result, the

[34] April 8, 2011 Buchholz Decl. ¶ 8 and Ex. G thereto (March 18, 2009 Buchholz Decl. at ¶¶ 5-8); March 21, 2011 Buchholz Decl. ¶ 9 and Ex. H thereto (Nesensohn letter dated March 25, 2009). And Pierce could have complained further that the Commission had procured the evidence illegally by representing to the FMA in February 2008 that

Division risked a cross-appeal by Pierce not only on the merits of registration liability but also on due process and other grounds, if the Division tried to increase the disgorgement amount by $7.5 million. The result, had Pierce prevailed, could have been an ultimate ruling that Pierce was not liable for registration violations, and the Division would not even have held on to the $2.1 million disgorgement order. In effect, the Division used and abandoned (spent) its $7.5 million claim to preclude an appeal by Pierce challenging the $2.1 million award. To Pierce or any other litigant, surrendering appeal rights is a significant "detriment," one which the Decision fails to recognize.

By reciprocally surrendering its $7.5 million claim in the first case to finalize registration and disgorgement liability, the Division would indeed commit a "serious injustice" against Pierce if the Commission allowed it to revive that claim. The Division's 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. The "serious injustice" is compounded by the Commission's using the "final" disgorgement order to extract payment by Pierce, who has satisfied his "final" disgorgement obligation. In the process, the Division and the Decision have erroneously represented to the public and Pierce's business community that this second case was permissible and that Pierce had "fraudulently concealed" evidence. This has forced upon Pierce substantial and unwarranted defense costs after the final order in July 2009. Pierce has shown more than enough "serious injustice" to warrant dismissal of this case under his equitable estoppel defense.

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it was investigating violations by Pierce implicating the FMA's oversight of "market manipulation" -- despite limiting its case against Pierce to registration and reporting claims. *Id.*

VI. THE DECISION ERRONEOUSLY FAILED TO APPLY JUDICIAL ESTOPPEL

Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers & Steamfitters Local 343,* 94 F.3d 597, 600-01 (9th Cir. 1996). That doctrine prevents (estops) the Division from arguing that the FMA records and $7.5 million claim were not submitted in the first case, when the record is replete with the Division's admissions and other evidence that they were.

The Decision improperly refused to apply judicial estoppel. This error resulted from the failure to acknowledge the consequences of the Division's inconsistent positions, even though the Decision at page 12 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.

(Emphasis added.) The emphasized language – ***"In [during the pendency of] the First Proceeding, the Division argued that disgorgement of profits from Pierce's trades through Newport and Jenirob was part of the First Proceeding"*** – succinctly confirms that fraudulent concealment does not apply and that res judicata bars this second case. In light of this admission, it is hard to imagine greater prejudice and a more unfair outcome than to permit recovery against Pierce in this second case. Not only would further disgorgement unfairly and illegally penalize Pierce, it would mock due process and the Commission's application of its own

rules in the Commission's adjudicatory channel. Due process in this administrative proceeding is supposed to equate to that in the courts.

In the first case, the Division contended that the Commission should order Pierce to disgorge an additional $7.5 million in profits of Newport and Jenirob. The Division submitted briefing and proposed findings to that effect. Wells Decl. Exs. 11 and 12. Then, under the Commission's rules, by later declining to ask the Commission to add $7.5 million to the disgorgement order before it became final, the Division took the further position that a $2.1 million ***final order*** of disgorgement would satisfy the remedial interest of the public. The Division has contended inconsistently with ***its actions*** in the first case, as well as the final action of the Commission, that a disgorgement amount greater than $2.1 million is necessary to protect the public.

The Decision observed at page 12 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).

But this quote from *New Hampshire v. Maine,* 532 U.S. 742 (2001) extracts a general observation out of context. It ignored the basis for the Supreme Court's ruling, which directly applies here,

> In short, considerations of equity persuade us that application of judicial estoppel is appropriate in this case. Having convinced this Court to accept one interpretation of "Middle of the River," and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense. Were we to accept New Hampshire's latest view, the "risk of inconsistent court determinations," *C.I.T. Constr. Inc.,* 944 F. 2d, at 259, would become a reality. We cannot interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process.

New Hampshire v. Maine, 532 U.S. at 755.[35] The reason the *New Hampshire* court applied judicial estoppel was to prevent a party from exploiting an inconsistent position. That is the problem here. The Division's inconsistent positions strike at the very heart of judicial integrity, by asserting and cancelling the res judicata effect of the first case.

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 Decision has ignored precisely what Pierce sacrificed for finality in the first case – contesting the first hearing officer's finding of registration liability at the Commission and court of appeals levels.

The Decision at page 12 further erred 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,[36] 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

[35] The *New Hampshire v. Maine* opinion bypassed res judicata, because it found the doctrine of judicial estoppel even more apt under the circumstances, "We pretermit the States' competing historical claims along with their arguments on the application *vel non* of the res judicata doctrines commonly called claim and issue preclusion . . . . In the unusual circumstances this case presents, we conclude that a discrete doctrine, judicial estoppel, best fits the controversy. Under that doctrine, we hold, New Hampshire is equitably barred from asserting—contrary to its position in the 1970's litigation—that the inland Piscataqua River boundary runs along the Maine shore. 532 U.S. at 749.

[36] "Courts have observed that '[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle' .... Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. ... Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'.... 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 .... A third consideration is 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 estopped." *New Hampshire v. Maine*, 532 U.S. at 750-51 (citations omitted).

> 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.) Pierce did not prevail "on the issue of whether disgorgement of Newport and Jenirob profits was ***part of the case***." As to Pierce, it clearly was.[37] Rather, he prevailed on the hearing officer not to disgorge the additional $7.5 million – and her order was not final. That was not the end of "the case." Indeed, the hearing officer recognized this herself, signaling the Division to ask ***the Commission*** to award the additional $7.5 million.[38] She surely presumed that the Division would follow the rules under which it might persuade the Commission to increase her preliminary disgorgement order, before "the case" was over and res judicata barred further relief. But the Division did not do so.

The Decision creates a "risk of inconsistent determinations." That risk would be fully realized if it were to become the final order of the Commission. Fortunately, like the initial decision in the first case, the Decision is only preliminary. The proper application of the law compels the reversal of the preliminary ruling and dismissal this case under the doctrines of res judicata and judicial estoppel.

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[37] Inexplicably, both the Division and the Decision imply that the hearing officer in the first case was a "gatekeeper," who did not allow the $7.5 million claim into the Commission's forum. But the hearing officer was a part of the Commission's forum. She was a subordinate component of the proceeding in which the $7.5 million claim ***was made against Pierce*** – as the Decision has acknowledged. The Decision's res judicata ruling accepts the obvious. The $7.5 million claim was made in the first case. That ruling precludes any analysis built upon the artifice that the claim was not part of the first case.

[38] "The Division requests disgorgement of $9,601,347.

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[B]ased on newly discovered evidence . . . the Division argued that over seven million dollars in additional ill-gotten gains should be disgorged, representing profits from the sale of unregistered stock by Jenirob and Newport. . . . 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 pp. 20-21.

VII. THE DECISION ERRONEOUSLY FAILED TO APPLY WAIVER

Waiver is the voluntary relinquishment or abandonment of some legal right or advantage. *See* Black's Law Dictionary at 1717 (9th ed. 2009). Implied waiver is "[a] waiver evidenced by a party's unequivocal conduct inferring the intent to waive." *Id.* The Division's decision to forego the review of the denial of additional disgorgement in the first case constitutes the implied waiver of that review process by operation of the Commission's rules. The Division acceded both to the effect of its own decision and to the effect of a final decision in an adjudicative proceeding, namely res judicata.

The affirmative defense of waiver bars a claim when "a party fails to raise an issue, despite a full and fair opportunity to do so." *Matter of Armstrong*, 201 B.R. 526, 532 (Bankr. D. Neb. 1996) (summary judgment dismissal based on *res judicata* and waiver where trustee could have raised objection in prior proceeding, but chose to not do so, thereby waiving his right to object); *Mathiason v. Halverson*, 16 F.3d 234, 238 (8th Cir. 1994) ("we hold that the bankruptcy court correctly concluded that [the] failure in the initial litigation to raise the joint tenancy issue, or to timely appeal the order implicitly resolving that issue, constituted a waiver").[39]

Waiver applies here. The Decision at page 13 erred in ruling,

> 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

[39] *See also Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423, 1428, (2009) ("No procedural principle is more familiar to this Court than that a ... right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it") (citation omitted)).

> from the Newport and Jenirob sales is supported only by speculation, not evidence or legal authority.

This analysis misses the obvious -- that the Division necessarily is charged with knowledge of the Commission's rules, under which its actions manifested an objective intent to waive the claim for another $7.5 million.

The Division well knew that it had submitted the claim for $7.5 million in the case and that the hearing officer had used the evidence supporting it in her decision. The Division further knew that the hearing officer awarded only $2.1 million in disgorgement. And the Division knew that if it took no further action the Commission's final order would fix the disgorgement amount at $2.1 million, absent spontaneous action by the Commission. The rules permitted the Division to seek the additional $7.5 million disgorgement before the $2.1 million order became final. All of this is undeniable. It therefore follows that the Division "consciously decided to forego all options whatsoever." Otherwise, the Division would be free to flout the rules and the Commission would be free to endorse it – and thereby deny Pierce due process.

It was error to rule further 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 ample legal authority. In addition to res judicata, Pierce identified a number of Commission rules, the use of which the Division must have "made the conscious decision to forego." None of the cited rules were even addressed in the Decision, other than Rule 200(d). And at page 13, the 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.

To justify the Division's election not to follow Rule 200 and move to amend in the first case, the Decision simply speculated why following that rule would have been futile, as if to excuse flouting the rules and violating due process. It fantasized that the Division avoided "the surprise and prejudice [to Pierce] that would have resulted from a new, much larger, disgorgement request presented for the first time only after the hearing." Yet, by launching this second case the Division has accomplished exactly that -- and more. It has gained the additional advantages of inducing Pierce to surrender his rights of appeal on liability and exploited the "final" decision to obtain payment.

Rules of Practice cited by Pierce were not the only notice informing the Division it had to act further before the disgorgement amount became final. The hearing officer's order admitting the new evidence and her decision also put the Division on notice that the Commission needed to act on the pending $7.5 million claim before the disgorgement order became final. Wells Decl. Exs. 13 and 14. The Division "chose to pursue a one-track strategy"[40] and allowed the $2.1

[40] *Aboudaram v. De Groote, 2006 U.S. Dist Lexis 2616* (D.D.C. May 4, 2006) ("The District Court's order refused to allow [plaintiff] to amend after [it] had rested its case at trial. [Plaintiff] chose to pursue a one-track strategy and

million disgorgement award to become final. The Division's election not to proceed with the claim before final judgment was a knowing waiver abandoning the claim.

VIII. THE DECISION ERRONEOUSLY ORDERED DISGORGEMENT FROM PIERCE

The Decision erred by ordering disgorgement of Lexington trading profits of Newport and Jenirob from Pierce without any evidence in the record that Pierce actually received those profits. Neither the appearance of Pierce's name on foreign bank records of Newport or Jenirob nor his managerial position at Newport establishes his personal receipt of the trading proceeds.

The Division's evidence showed that Newport and Jenirob actually received the $7.25 million in Lexington profits, not Pierce. Wells Decl. Ex. 14, at p. 20 ("The Division requests disgorgement of $9,601,347. The ***actual profits Pierce obtained*** ... amount to $2,043,362.33) (emphasis added); Decision at pp. 6-7. None of the Hypo Bank foreign trading records relied upon by the Division show that either of these companies paid any portion of their sale proceeds to Pierce. *Id.* Moreover, Pierce produced his own Hypo Bank records reflecting Lexington trading profits, and these revealed no proceeds of Lexington trading by Newport or Jenirob. Wells Decl. Ex. 14, at pp. 13, 20; Decision at p. 6. These were the very records used to support the final disgorgement award of $2.1 million. *Id.*

Disgorgement is a remedial remedy, ***limited to actual profits obtained by wrongdoing.*** *SEC v. Blatt*, 583 F.2d 1325, 1335-36 (5th Cir. 1978) (finding error where disgorgement costs were taxed in excess of actual fees realized by each individual defendant); *Hately v. SEC*, 8 F.3d 653, 655-56 (9th Cir. 1993) (disgorgement of all commissions was "unreasonable and excessive" because petitioners retained only ten percent of the commissions). "[Disgorgement] may not be

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did not assert its Alternative Theories in a timely manner. As a result, [plaintiff] is barred by *res judicata* from now using the Alternative Theories to recover the same debt").

used punitively." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989), *citing to Blatt*, 583 F.2d at 1335; *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2nd Cir. 1972). *See also SEC v. M&A West, Inc.*, 538 F.3d 1043, 1054 (9th Cir. 2008) (upholding disgorgement against individual in the amount of "cash payments ***he*** obtained and ***his*** profits from ***his*** stock sales" only) (emphasis added).[41]

An exception to this rule has been applied in cases involving insider trading and other ***antifraud*** violations, particularly when in the absence of vicarious (joint and several) liability for disgorgement, wrongdoers would escape liability altogether. *See, e.g., SEC v. Clark III*, 915 F.2d 439, 454 (9th Cir. 1990) ("It is well settled that a tipper can be required to disgorge his tippees' profits . . . whether or not the tippees themselves have been found liable . . . [which] is a necessary deterrent to evasion of Rule 10b-5 liability . . ."); *SEC v. Ward*, 151 F.3d 42, 49 (2nd Cir. 1998) (same); *SEC v. First City Fin. Corp.*, 688 F. Supp. 705, (D.D.C. 1988) ("defendants were effectively trading on insider information.").

Even when addressing antifraud violations, courts have been reluctant to impose as harsh a remedy as disgorgement in the absence of personal profit. *See, e.g., VanCook v. SEC*, 2011 U.S. App. LEXIS *16355 (2nd Cir., Aug. 8, 2011) (amount of disgorgement tied to individual's yearly compensation increases, not total profits to other parties); *SEC v. First Pacific Bankcorp.*, 142 F.3d 1186, 1192 (9th Cir. 1998) (further justifying disgorgement because defendant received "substantial personal benefit," including but not limited to "excessive compensation, which

[41] *M&A West* is particularly instructive because, as with Pierce, the "claims against Medley [were] limited to selling securities when no registration statement had been filed and [the defendant Medley] was acting as an unregistered broker," as expressly distinguished from "other defendants . . . [who were] charged in the complaint[] with stock manipulation and accounting fraud." *SEC. v. M & A West, Inc.*, 2005 WL 1514101, *2 (N.D. Cal. June 20, 2005). Because Medley had only committed registration violations, as opposed to antifraud violations, the district court awarded disgorgement of Medley's personal profits only, and did not hold him jointly and severally liable for the illegal profits of others charged along with him. This award was upheld by the Ninth Circuit as "properly calculated." *M&A West*, 538 F.3d at 1054.

amounted to two or three times what a CEO of a comparable, well-managed institution would receive."); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2nd Cir. 1971) (recognized the additional "hardship" inherent in the imposition of vicarious liability on tippers for tippee profits). Here, none of the factors are present that would support holding Pierce jointly and severally liable for the profits of Newport and Jenirob.

The Division submitted no evidence that Pierce shared in any of Newport's or Jenirob's trading profits. Nor have any antifraud violations even been alleged, much less established. All of Pierce's personal profits from the unregistered sales of Lexington stock have already been disgorged. To disgorge more would impose an unjustified penalty against Pierce and exceed the power of the Commission. *See Blatt*, 583 F.2d at 1335-36; *Hately*, 8 F.3d at 655-56.

IX. CONCLUSION

The Decision ignored or misconstrued undisputed facts that require the rulings on each of Pierce's affirmative defenses be reversed. The Decision's summary disposition improperly ordered Pierce to disgorge money there was no evidence he ever received, improperly rejected his primary defense of res judicata by ruling that he somehow concealed evidence that was in fact admitted, and improperly rejected his defenses further by ignoring the Commission's own rules and violating Pierce's due process rights.

The Commission should rule that res judicata bars this second case against Pierce altogether, along with all other potential proceedings against him 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 to res judicata for fraudulent concealment does not apply and all further relief against Pierce is also barred by his other defenses -- equitable and judicial estoppel, and waiver.

The Commission should also rule that there has been insufficient evidence of Pierce's receipt of personal Lexington trading profits beyond those already disgorged to support disgorging the additional $7.25 million from Pierce sought by the Division.

The Commission should rule that Pierce is entitled to his attorney fees and other expenses incurred in the defense of the instant 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).

DATED this 10th day of October, 2011.

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APPENDIX A

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Attorneys for G. Brent Pierce

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13927

In the Matter of	)	
	)	
	)	**DECLARATION OF**
GORDON BRENT PIERCE, NEWPORT CAPITAL CORP., AND JENIROB COMPANY LTD.,	)	**CHRISTOPHER B. WELLS IN SUPPORT OF RESPONDENT G. BRENT PIERCE'S MOTION FOR SUMMARY DISPOSITION**
	)	
	)	
Respondents.	)	

I, Christopher B. Wells, declare as follows:

1. I am one of the attorneys for respondent G. Brent Pierce ("Pierce") in the above-entitled administrative proceeding. I previously represented Mr. Pierce in an earlier administrative proceeding entitled *In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (the "First Proceeding"). I have personal knowledge of the facts stated in this declaration, and I could and would testify competently to those facts if called as a witness.

2. Attached as Exhibit 1 hereto is a true and correct copy of the Commission's order dated May 4, 2006, directing private investigation into trading in the stock of Lexington Resources, Inc. ("Lexington"), *In re Matter of Lexington Resources, Inc.*, File No. SF-02989.

3. Attached as Exhibit 2 hereto is a true and correct copy of the Commission's order dated July 31, 2008, instituting proceedings in the First Proceeding.

4. Attached as Exhibit 3 hereto is a true and correct copy of the Division's Pre-Hearing Brief dated December 5, 2008 in the First Proceeding.

5. Attached as Exhibit 4 hereto is a true and correct copy of excerpts from the transcript of proceedings in the hearing held on February 2-4, 2009 in the First Proceeding.

6. Attached as Exhibit 5 hereto is a true and correct copy of the Division's Exhibit 15 received in evidence at the hearing in the First Proceeding.

7. Attached as Exhibit 6 hereto is a true and correct copy of the Division's Exhibit 51 received in evidence at the hearing in the First Proceeding.

8. Attached as Exhibit 7 hereto is a true and correct copy of the Division's Exhibit 43 received in evidence at the hearing in the First Proceeding.

9. Attached as Exhibit 8 hereto is a true and correct copy of the Division's Exhibit

33 received in evidence at the hearing in the First Proceeding.

10. Attached as Exhibit 9 hereto is a true and correct copy of excerpts from the Division's Exhibit 70 received in evidence at the hearing in the First Proceeding.

11. Attached as Exhibit 10 hereto is a true and correct copy of the Division's motion for admission of new evidence dated March 18, 2009 in the First Proceeding.

12. Attached as Exhibit 11 hereto is a true and correct copy of the Division's proposed findings of fact and conclusions of law dated March 20, 2009 in the First Proceeding.

13. Attached as Exhibit 12 hereto is a true and correct copy of the Division's post-hearing brief dated March 20, 2009 in the First Proceeding.

14. Attached as Exhibit 13 hereto is a true and correct copy of an order dated April 7, 2009 issued by the Hearing Officer in the First Proceeding.

15. Attached as Exhibit 14 hereto is a true and correct copy of the Initial Decision dated June 5, 2009 issued by the Hearing Officer in the First Proceeding.

16. Attached as Exhibit 15 is a true and correct copy of the Commission's notice that the Initial Decision had become final, dated July 8, 2009 in the First Proceeding.

17. Attached as Exhibit 16 hereto is a true and correct copy of the declaration of Brent Pierce in support of his motion for TRO, preliminary injunction and stay filed on July 9, 2010 in the matter entitled *Pierce v. SEC*, No. CV-10-3026 in the United States District Court for the Northern District of California (the "Injunction Action").

18. Attached as Exhibit 17 hereto is a true and correct copy of a letter to me from Division attorney Tracy Davis dated January 12, 2010 and advising me that the Division intended to recommend that the Commission institute new administrative proceedings against Pierce, Newport Capital Corp. and Jenirob Company, Ltd.

19. Attached as Exhibit 18 hereto is a true and correct copy of the Wells Submission (without exhibits) submitted to the Commission by Pierce on February 11, 2010.

20. Attached as Exhibit 19 hereto is a true and correct copy of the Commission's order dated June 8, 2010, instituting proceedings in this matter, *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company, Ltd.*, Admin. Proc. File No. 3-13927.

21. Attached as Exhibit 20 hereto is a true and correct copy of the Commission's application for an order enforcing administrative disgorgement order against Pierce, filed on June 8, 2010 in *SEC v. Pierce*, No. CV-10-80129-MISC in the United States District Court for the Northern District of California (the "Enforcement Action").

22. Attached as Exhibit 21 hereto is a true and correct copy of the Complaint filed on July 9, 2010 in the Injunction Action.

23. Attached as Exhibit 22 hereto is a true and correct copy of an excerpt from the transcript of the hearing held on August 13, 2010 in the Injunction Action.

24. Attached as Exhibit 23 hereto is a true and correct copy of the order filed on September 2, 2010 in the Injunction Action, denying Pierce's motion for preliminary injunction, dismissing the Injunction Action, and granting the Commission's application for enforcement of disgorgement order.

25. Attached as Exhibit 24 hereto is a true and correct copy of email correspondence between counsel for Pierce and the Division, confirming that Pierce on January 31, 2011 completed the payments required by the disgorgement order in the Enforcement Action.

26. Attached as Exhibit 25 hereto is a true and correct copy of a notice that the Division has made its investigative files available for inspection and copying, dated August 11, 2008 in connection with the First Proceeding.

27. Attached as Exhibit 26 hereto is a true and correct copy of a notice that the Division has made its investigative files available for inspection and copying, dated June 24, 2010, in connection with the Second Proceeding.

28. I have reviewed Exhibit 25 and Exhibit 26. To the best of my knowledge, the Division has not made available for inspection and copying in the Second Proceeding any investigative files that were not made available for review in the First Proceeding (including files that were first made available between the conclusion of the February 2009 hearing and the issuance of the Hearing Officer's Initial Decision (Exhibit 14).

29. Attached as Exhibit 27 hereto is a true and correct copy of Pierce's motion for a more definite statement, dated August 20, 2008 in the First Proceeding.

30. Attached as Exhibit 28 hereto is a true and correct copy of the Division's response to Pierce's motion for a more definite statement, dated September 17, 2008 in the First Proceeding.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Seattle, Washington on March 17th, 2011.

Christopher B. Wells

Exhibit 1

NON-PUBLIC

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 4, 2006

In the Matter of **Lexington Resources, Inc.** **File No. SF-02989**	**ORDER DIRECTING PRIVATE INVESTIGATION AND DESIGNATING OFFICERS TO TAKE TESTIMONY**

I.

The Commission's public official files disclose that:

Lexington Resources, Inc. ("Lexington") is a Nevada corporation headquartered in Las Vegas. Lexington's common stock is registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and is quoted on the over-the-counter bulletin board under the symbol LXRS. Lexington files periodic reports, including Forms 10-KSB and 10-QSB, with the Commission pursuant to Section 13(a) of the Exchange Act and related rules thereunder.

II.

Members of the staff have reported information to the Commission that tends to show that from at least November 2003 until the present:

A. vFinance Investments, Inc. ("vFinance") is a broker-dealer registered with the Commission and is headquartered in Boca Raton, Florida.

B. In possible violation of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), Lexington, vFinance, and each of their officers, directors, employees, partners, subsidiaries, and/or affiliates, and other persons or entities, directly or indirectly, may have been or may be offering to sell, selling, and delivering after sale to the public, or may have been or may be offering to sell or to buy through the medium of any prospectus or otherwise, certain securities, including, but not limited to Lexington common stock, as to which no registration statement was or is in effect or on file with the Commission, and for which no exemption was or is available.

C. In possible violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Lexington, vFinance, and each of their officers, directors, employees, partners, subsidiaries, and/or affiliates, and other persons or entities, directly or

D Ex 54

indirectly, in connection with the purchase or sale of securities, may have been or may be employing devices, schemes, or artifices to defraud, by means of untrue statements of material fact or omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were or are made, not misleading, or engaging in acts, practices or courses of business which operated, operate, or would operate as a fraud or deceit upon any person. In connection with these activities, such persons or entities, directly or indirectly, may have been or may be, among other things, making false statements of material fact or failing to disclose material facts concerning, among other things, Lexington's operations and the market for Lexington common stock.

D. In possible violation of Section 17(b) of the Securities Act, consultants, partners, and/or affiliates of Lexington, and/or others, may have published, given publicity to, or circulated, or may be publishing, giving publicity to, or circulating, any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer Lexington's securities for sale, describes such security for a consideration received or to be received, directly or indirectly, from Lexington, without fully disclosing the receipt of such consideration and the amount thereof.

E. In possible violation of Section 17(a) of the Exchange Act and Rule 17a-4 thereunder, vFinance, its officers, directors, employees, partners, subsidiaries, and/or affiliates, and/or other associated persons or entities may have been or may be failing to make, keep, and preserve books and records as prescribed by the Commission.

F. vFinance, its officers, directors, employees, partners, subsidiaries, and/or affiliates, and/or other persons or entities may have been or may be failing reasonably to supervise, with a view to preventing violations of the above-referenced provisions of the federal securities statutes, rules, and regulations, another person who committed such a violation and who was subject to their supervision, within the meaning of Section 15(b)(4)(E) of the Exchange Act.

G. In possible violation of Section 15(c)(1)(A) of the Exchange Act, vFinance, its officers, directors, employees, partners, subsidiaries, and/or affiliates, and/or other persons or entities, while acting as brokers or dealers, may have been or may be effecting any transaction in, or inducing or attempting to induce, the purchase or sale of any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which such broker or dealer is a member by means of manipulative, deceptive, or other fraudulent devices or contrivances, including: acts, practices, or courses of business which operated, operate, or would operate, or may be operating as a fraud or deceit upon any person; or any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading. As a part of these activities, such persons or

entities, directly or indirectly, may have been or may be, among other things, making false statements of material fact or failing to disclose material facts concerning, among other things, the market for Lexington common stock and the risk of investment in Lexington stock.

H. In possible violation of Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder, certain persons and/or entities who were or are directly or indirectly the beneficial owner of more than five percent of Lexington common stock may have failed to file with the Commission all information required by Schedules 13D and 13G and any amendment thereto.

I. In possible violation of Section 16(a) of the Exchange Act and Rule 16a-3 thereunder, certain persons and/or entities who were or are directly or indirectly the beneficial owner of more than 10 percent of Lexington common stock, or who were or are directors or officers of Lexington, may have failed to file with the Commission initial statements of beneficial ownership of equity securities on Form 3, statements of changes in beneficial ownership on Form 4, and/or annual statements on Form 5.

J. While engaged in the above-described activities, such persons and/or entities, directly or indirectly, may have been making use of any means or instrumentality of interstate commerce, or of any means or instruments of transportation or communication in interstate commerce, or of the mails, or of any facility of any national securities exchange.

III.

The Commission, having considered the staff's report and deeming such acts and practices, if true, to be possible violations of Sections 5(a), 5(c), and 17(b) of the Securities Act; Sections 10(b), 13(d), 15(c), 16(a), and 17(a) of the Exchange Act; and Rules 10b-5, 13d-1, 13d-2, 16a-3, and 17a-4 thereunder; and to be a possible failure to supervise pursuant to Section 15(b)(4)(E) of the Exchange Act; finds it necessary and appropriate and hereby:

ORDERS, pursuant to the provisions of Section 20(a) of the Securities Act and Section 21(a) of the Exchange Act, that a private investigation be made to determine whether any persons or entities have engaged in, or are about to engage in, any of the reported acts or practices or any acts or practices of similar purport or object; and

FURTHER ORDERS, pursuant to the provisions of Section 19(c) of the Securities Act and Section 21(b) of the Exchange Act, that for purposes of such investigation, Helane L. Morrison, Marc J. Fagel, Judith L. Anderson, James A. Howell, Susan F. LaMarca, Robert L. Mitchell, John S. Yun, Michael S. Dicke, Jina Choi, Tracy L. Davis, Robert S. Leach, Patrick T. Murphy, Sheila E. O'Callaghan, Cary S. Robnett, Ronald C. Baer, Steven D. Buchholz, Sahil W. Desai, Robert J. Durham, Thomas J. Eme, Lloyd A. Farnham, Mark P. Fickes, Susan Fleischmann, Michael Fortunato, Cal G. Gonzales, Kevin M. Gross, Victor W. Hong, Brian A. Huchro, Adrienne F. Miller, Jeremy Pendrey, Elena Ro, William Salzmann, Carolyn A. Samiere,

Jennifer L. Scafe, Erin Schneider, Kashya K. Shei, Kristin A. Snyder, Robert L. Tashjian, X. Carlos Vasquez, and each of them, are hereby designated as officers of the Commission and are empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith as prescribed by law.

By the Commission.

Nancy M. Morris
Secretary

By: Jill M. Peterson
Assistant Secretary

Exhibit 2

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 31, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13109

In the Matter of

Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce,

Respondents.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Lexington Resources, Inc. ("Lexington"), Grant Atkins ("Atkins") and Gordon Brent Pierce ("Pierce") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

Nature of the Proceeding

1. This matter involves the unregistered distribution of stock in a Las Vegas microcap company, allowing a Canadian stock promoter to reap millions of dollars in unlawful profits without disclosing to investors information mandated by the federal securities laws. Between 2003 and 2006, Lexington Resources, Inc., a purported oil and gas company, and its CEO and Chairman Grant Atkins, issued nearly five million shares of Lexington common stock to promoter Gordon Brent Pierce and his associates. Pierce and his associates then spearheaded a massive promotional campaign, including email spam and mass mailings. As Lexington's stock price skyrocketed to $7.50 per share, Pierce and his associates resold their stock to public investors through an account at an offshore bank, netting millions of dollars in profits; Lexington's operating subsidiary subsequently filed for bankruptcy and its stock now trades below $0.02 per share.

2. Lexington's issuance of stock to Pierce was supposedly covered by Form S-8 registration statements, a short form registration statement that allows companies to register offerings made to employees, including consultants, using an abbreviated disclosure format. Form S-8 is to be used by issuers to register the issuance of shares to consultants who perform bona fide services for the issuer and are issued by the company for compensatory or incentive purposes. However, Form S-8 expressly prohibits the registration of the issuance of stock as compensation for stock promotion or capital raising services. Pierce provided both of these services to Lexington, and thus the registration of these issuances of shares purportedly pursuant to Form S-8 was invalid. As a result, both Lexington's sales to Pierce, and Pierce's sales to the public, were in violation of the registration provisions of the federal securities laws.

Respondents

3. Lexington is a Nevada corporation formed in November 2003 pursuant to a reverse merger between Intergold Corp. ("Intergold"), a public shell company, and Lexington Oil and Gas LLC, a private company owned by an offshore entity. In connection with the reverse merger, Intergold changed its name to Lexington Resources, Inc. and Lexington Oil and Gas became a wholly-owned subsidiary of Lexington Resources, Inc. Lexington's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and quoted on the pink sheets under the symbol "LXRS." On March 4, 2008, Lexington's primary operating subsidiary, Lexington Oil and Gas, filed for Chapter 11 bankruptcy. The petition was converted to a Chapter 7 liquidation on April 22, 2008. Lexington's only other operating subsidiary filed for Chapter 7 liquidation on June 11, 2008.

4. Grant Atkins has been CEO and Chairman of Lexington since its inception in November 2003 and was CEO and Chairman of Lexington's predecessor, Intergold. Atkins, 48, is a Canadian citizen residing in Vancouver, British Columbia.

5. Gordon Brent Pierce has acted as a "consultant" to Lexington and other issuers in the U.S. and Europe through various consulting companies that he controls. Pierce, 51, is a Canadian citizen residing in Vancouver, British Columbia and the Cayman Islands.

Facts

Lexington and Atkins Issued Millions of Shares to Pierce Using Form S-8

6. On November 19, 2003, Atkins and Pierce formed Lexington through a reverse merger between Intergold (at that point a non-operational shell company) and Lexington Oil and Gas, a new private company owned by an offshore entity set up by Pierce. Atkins became the sole officer and director of Lexington, a purported natural gas and oil exploration company.

7. Within days of the reverse merger, Atkins caused Lexington to file a registration statement on Form S-8 and immediately began issuing stock to Pierce and several of Pierce's longtime business associates. Between November 2003 and March 2006, Atkins caused Lexington to issue more than 5 million shares to Pierce and his associates purportedly registered on Form S-8. Pierce told Atkins who should receive the shares and how many.

8. Form S-8 is an abbreviated form of registration statement that may be used to register an issuance of shares to employees and certain types of consultants; Form S-8 does not provide the extensive disclosures or Commission review required for a registration statement used for a public offering of securities. A company can issue S-8 shares to consultants only if they provide bona fide services to the registrant and such services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

9. Contrary to the express requirements of Form S-8, Pierce served as both a stock promoter and capital-raiser for Lexington. During the entire period from late 2003 to 2006, Pierce personally met with individual and institutional investors to solicit investments in Lexington and directed an investor relations effort that included speaking with and distributing promotional kits to thousands of potential investors. Pierce used some of his S-8 stock to compensate others who helped with this effort. Pierce also coordinated an extensive promotional campaign for Lexington through spam emails, newsletters, and advertisements on investing websites. All of these services promoted or maintained a market for Lexington stock and therefore could not be compensated with securities registered pursuant to Form S-8.

10. Pierce's stock promotion campaign was successful. From February to June 2004, Lexington's stock price increased from $3.00 to $7.50 per share, with average trading volume increasing from 1,000 to about 100,000 shares per day. (The price subsequently collapsed, and the stock currently trades at under $0.02 per share.)

11. Pierce also engaged in extensive capital-raising activities on behalf of Lexington, contrary to the plain terms of Form S-8. Pierce raised all of the capital for Lexington's first year of drilling operations by finding investors to provide loans to Lexington. He transferred some of his S-8 shares to these investors. Pierce also raised capital for Lexington by selling most of his S-8 shares through an offshore company that he operated, and funneling money back to Lexington and Atkins.

12. Lexington and Atkins also issued shares under Form S-8 to indirectly raise capital and exhibited control over the resale of shares by arranging to have individuals who received S-8 shares pay off Lexington's pre-existing debts.

13. Lexington's purported registration of stock issuances to Pierce on Form S-8 was invalid because Pierce was performing services expressly disallowed for Form S-8 registrations. By failing to register the issuance of shares to Pierce and his associates, Lexington failed to make all of the disclosures to the public for the registration of the issuances of shares for capital-raising transactions as required by law.

Pierce Engaged in a Further Illegal Distribution of Lexington Stock

14. After receiving the shares from Lexington, Pierce engaged in a further illegal distribution of his own. Pierce acted as an underwriter because he acquired the shares with a view to distribution. Almost immediately after receiving the shares, Pierce transferred or sold them through his offshore company.

15. Pierce and his associates deposited about 3 million Lexington shares in accounts at an offshore bank. Between February and July 2004, about 2.5 million Lexington shares were sold to the public through an omnibus brokerage account in the United States in the name of the offshore bank, generating sales proceeds of over $13 million.

16. Pierce personally sold at least $2.7 million in Lexington stock through the offshore bank in June 2004 alone. Pierce's sales were not registered with the Commission.

Pierce Failed to File Reports Disclosing His Stock Ownership

17. During most of the period from November 2003 to May 2004, Pierce owned or controlled between 10 and 60 percent of Lexington's outstanding stock. Pierce did not file the required Schedule 13D until July 25, 2006, however.

18. In the belatedly-filed Schedule 13D, Pierce inaccurately stated that he owned or controlled between 5 and 10 percent of Lexington's outstanding stock during late 2003, early 2004, and early 2006. In reality, Pierce owned or controlled more than 10 percent of Lexington's stock during most of the period from November 2003 to May 2004.

19. Although Pierce regularly traded Lexington stock in the open market for entities he controlled during 2004, Pierce never reported his ownership or changes in ownership on Forms 3, 4 or 5.

Violations

20. As a result of the conduct described above, Respondents Lexington, Atkins, and Pierce violated Sections 5(a) and 5(c) of the Securities Act, which, among other things, unless a registration statement is on file or in effect as to a security, prohibit any person, directly or indirectly, from: (i) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; (ii) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or (iii) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

21. Also as a result of the conduct described above, Respondent Pierce violated Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder, which require: (i) any beneficial owner of more than five percent of any class of equity security registered under Section 12 to file a statement with the Commission within 10 days containing the information required in Schedule 13D and promptly to file an amendment to Schedule 13D if any material change in beneficial ownership occurs, and (ii) any beneficial owner of more than ten percent of a class of equity security registered under Section 12 to file an initial statement of ownership on Form 3 within 10 days, statements of changes in ownership on Form 4 within two business days, and annual statements of ownership on Form 5 within 45 days of year-end.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate that cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. Whether, pursuant to Section 8A of the Securities Act, all Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a) and 5(c) of the Securities Act;

C. Whether, pursuant to Section 21C of the Exchange Act, Respondent Pierce should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder; and

D. Whether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answer, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within

the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Florence E. Harmon
Acting Secretary

Exhibit 3

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 PRE-HEARING BRIEF AGAINST RESPONDENT GORDON BRENT PIERCE

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INTRODUCTION

This proceeding involves the acquisition and sale by respondent Gordon Brent Pierce ("Pierce" or "Respondent") of millions of shares of Lexington Resources, Inc. ("Lexington") common stock without registering his sale of those shares, as required by Section 5 of the Securities Act of 1933 ("Securities Act"), and without disclosing his beneficial ownership of those shares, as required by Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 ("Exchange Act"). In the Motion for Summary Disposition being filed today, the Division of Enforcement ("Division") demonstrates that Pierce's liability for violating Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act is undisputed. The Division's Motion requests an administrative order that Pierce (i) pay $2.1 million in disgorgement (plus prejudgment interest) based upon his illegal sale of Lexington common stock during June 2004 and (ii) cease and desist from violating Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act. If the Division's Motion is granted in full, then the February 2009 administrative hearing will become moot.

However, if some portion of the Motion is denied, the Division will use the administrative hearing to prove whatever liability or remedies issues remain. As part of that proof, the Division will establish that the misconduct described in the Motion for Summary Disposition – *i.e.*, Pierce's illegal sales in June 2004 of 300,000 post-split Lexington shares – was part of a larger, on-going scheme to acquire and sell Lexington shares without the necessary registration and disclosure. Because Pierce failed to register his stock sales and disclose his ownership interests, the investors who paid millions of dollars to purchase Lexington shares were denied important information. Those investors did not get a prospectus disclosing information about Pierce and Lexington. They also did not get timely information about his Lexington transactions so that they could evaluate whether his Lexington stock sales reflected an insider's negative assessment about Lexington's prospects.

During the time period when they were not receiving such disclosures from Pierce, many investors bought Lexington shares in June 2004 while the stock price was at its all-time high of more than $7.00 per share. And then investors saw Lexington's share price collapse. Now Lexington's stock is essentially worthless. Meanwhile, Pierce and his companies and his cronies reaped millions

of dollars in stock sale proceeds.

Pierce received Lexington common stock under Form S-8 Registration Statements dated November 21, 2003, June 8, 2004, February 27, 2006 and March 13, 2006 (the "Form S-8s") that only purported to cover Lexington's offer and sale of its shares to its employees or consultants under a stock option plan. Each of those Form S-8s did not register any Lexington shares for resale by anyone else -- such as Pierce – and required the stock recipients to represent that the shares they received would not be sold or distributed by them in violation of the securities laws. *E.g.*, November 2003 Form S-8 at 2, 19. Additionally, each of the option exercise agreements that Pierce signed to obtain shares from Lexington contained Pierce's representation that he was obtaining the Lexington shares for "investment purposes" only. *E.g.*, Option Exercise Agreement dated November 24, 2003 at 1. The Form S-8s and option exercise agreements therefore put Pierce on clear notice that he was receiving the Lexington shares to hold as investments, and not for selling or transferring to others. Despite being on notice that he must hold the Lexington shares as investments, Pierce promptly sold the shares to investors.

As described in the Motion for Summary Disposition, Pierce retained for himself 100,000 pre-split shares (300,000 post-split shares) of Lexington common stock that he received under the November 2003 Form S-8. Only seven months later in June 2004, Pierce sold those 300,000 post-split shares (along with 100,000 other post-split shares) through an account at Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank") for $2.7 million. Hypo Bank sold Lexington shares through the Over The Counter Bulletin Board ("OTCBB") using vFinance Investments, Inc. ("vFinance"). Pierce's sale of those 300,000 post-split shares through Hypo Bank violated Section 5 of the Securities Act, and he should therefore disgorge the $2.1 million that he received for those June 2004 sales, along with prejudgment interest. Division's Motion at 4-8, 9-10.

Except for the 300,000 post-split shares covered by the Motion for Summary Disposition, Pierce transferred 2.5 million of his other 2.6 million post-split Lexington shares to Newport Capital Corp. ("Newport Capital") within days of acquiring them. Newport Capital is a Belize company of which Pierce was president, treasurer, and a director, and for which Pierce had investment authority.

Newport Capital then sold 1.2 million of the Lexington shares to other investors and transferred the remaining 1.3 million post-split Lexington shares to its account at Hypo Bank or its other brokerage accounts.

Given the millions of Lexington shares that Pierce transferred to Newport Capital and that Newport Capital then transferred or sold, Pierce's role in distributing Lexington shares goes beyond the 300,000 Lexington shares that he sold for himself in June 2004 (as described in the Motion for Summary Disposition). Between February and October 2004, Hypo Bank sold 2,556,024 post-split Lexington shares through its vFinance account. Additionally, during March 2006, Newport Capital sold 664,000 post-split Lexington shares through its brokerage account at Peacock Hislop Staley & Given ("Peacock Hislop"). Pierce's role in distributing unregistered Lexington shares therefore occurred over a extended period and in conscious disregard of his obligation to register those sales.

In determining whether to issue a cease and desist order, the Hearing Officer may consider, among other factors, the recurrent nature of Pierce's violations, the degree of scienter involved and the danger that Pierce will be in a position to commit future violations. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (describing factors for imposing remedial sanctions). Here, all of the relevant *Steadman* factors support ordering Pierce to cease and desist from violating Section 5 of the Securities Act. A cease and desist order is appropriate because Pierce violated Section 5 through his June 2004 Lexington stock sales. *E.g., 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). It is also appropriate because Pierce used Newport Capital to distribute about 2.5 million post-split Lexington shares without registering that distribution. Pierce's misconduct was therefore recurring because it involved millions of unregistered Lexington shares that were distributed over a thirty-month period from November 2003 to March 2006.

Pierce falsely claims that he believed, in good faith, that he could sell Lexington shares without registration; Lexington's Form S-8s and the option exercise agreements that Pierce signed put him on notice that he needed to register his own sales and Newport Capital's sales. A cease and desist order is moreover appropriate given Pierce's dubious background in securities transactions

and refusal to answer – on purported financial secrecy grounds – many questions regarding his transactions in Lexington shares during the Division's investigation into illegal trading in Lexington shares. In summary, Pierce's unregistered stock sales, use of Newport Capital to distribute millions of Lexington shares without registration, lack of good faith and refusal to be candid about his activities demonstrates that he will engage in future violations of Section 5 of the Securities Act unless a cease and desist order is entered.

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 seeking summary disposition of Pierce's liability under Sections 13(d) and 16(a) of the Exchange Act. Division's Motion at 8-9. Although Pierce filed a belated Schedule 13D in July 2006, that should not obscure the fact that he was acquiring and distributing millions of Lexington shares from November 2003 until March 2006 without disclosing his ownership interest and transactions to investors. Additionally, in his tardy Schedule 13D, Pierce failed to disclose his beneficial ownership in IMT's holdings of vested Lexington stock options. Pierce's violations of Section 13D and 16(a) are therefore on-going and justify imposing a cease and desist order against Pierce.

FACTUAL BACKGROUND

Pierce's Background:

Pierce attended the University of British Columbia for six to eight months, but never continued his education and never obtained any professional licenses. Pierce describes himself as being a self-employed businessman. He has been an officer and director of Newport Capital for over five years and helped form IMT five or six years ago. He has started companies and taken them public in a variety of industries.

In June 1993, Canadian securities regulators in British Columbia imposed a fifteen-year bar and $15,000 fine upon Pierce relating to his activities as a director of Bu-Max Gold Corp. ("Bu-

Max"). According to stipulated findings, investor proceeds were diverted to unauthorized and undisclosed uses, including for Pierce's benefit. Additionally, during the investigation by Canadian securities regulators into Bu-Max, "Pierce tendered documents to the staff of the Commission which were not genuine." *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce*, Order Under Section 144 at 2 (June 8, 1993).

The Lexington Stock Sales Covered By The Motion For Summary Disposition:

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"), whom Pierce met in the early 1990s, 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." From Lexington's formation in November 2003 until the bankruptcy filing of its primary operating subsidiary in March 2008, the company had virtually no revenues and never made a profit.

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. 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. The November 2003 Form S-8 only purported to register Lexington's stock issuances and required the stock recipients to represent that the shares would not be sold or distributed in violation of the securities laws. November 2003 Form S-8 at 2, 19. Pierce obtained shares after representing that he was obtaining the Lexington shares for "investment purposes" only. *E.g.*, Option Exercise Agreement dated November 24, 2003 at 1.

Included in those November 2003 stock issuances were 100,000 shares that Lexington issued to Pierce on November 25, 2003 and that Pierce initially retained for his own account. Pierce

transferred these 100,000 Lexington shares to his personal account at Hypo Bank. Hypo Bank had a trading account at vFinance, a registered brokerage firm based in Florida. 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. Pierce also had 121,683 post-split Lexington shares in the Hypo Bank account that he had previously acquired in November 2003 as part of the reverse merger with the shell corporation.

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. 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.[1] Under the Division's first-in, first-out analysis (whereby the 121,683 post-split shares that Pierce had from the merger are treated as being sold first), Pierce received $2,077,969 in proceeds from selling the 300,000 post-split shares that he retained from the November 2003 Form S-8 stock issuances.

The Other Lexington Stock Transactions Conducted Through Newport Capital:

In addition to the 300,000 post-split Lexington shares that Pierce kept for himself until he sold them through Hypo Bank in June 2004, Pierce received another 2.52 million post-split Lexington shares under Lexington's Form S-8 in November 2003, June 2004, February 2006 and March 2006. As described below, Pierce transferred all of those shares to Newport Capital. Newport Capital then sold half of those shares directly to others and placed the other half of those shares in brokerage accounts before selling them to investors. Pierce therefore used Newport Capital, as described now, to distribute 2.52 million post-split Lexington shares.

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[1] Earlier in February 2004, Pierce sold some of the 121,683 post-split Lexington shares that he had acquired as part of the reverse merger and deposited into his Hypo Bank account.

In November 2003, Lexington issued Form S-8 shares to Pierce and Pierce promptly transferred most of the shares to Newport Capital rather than retaining them in his own account. Lexington issued 350,000 pre-split shares on November 24, 2003 to Pierce, which Pierce transferred that same day to Newport Capital. Between November 25 and December 9, 2003, Newport sold 328,300 of those 350,000 pre-split Lexington shares to third persons. Lexington also issued 150,000 pre-split shares on November 25, 2003 to Pierce, who transferred 50,000 of those shares on December 2, 2003 to Newport.[2] That same day, Newport sold all of those 50,000 pre-split shares to third parties.

These transactions left Newport with 21,700 pre-split Lexington shares. Newport transferred those 21,700 pre-split shares to an account at Hypo Bank. Newport also acquired 300,000 pre-split Lexington shares from another individual to whom Lexington issued shares under the November 2003 Form S-8. Following the January 2004 stock split, Newport held at least 965,100 post-split Lexington shares in its Hypo Bank account from the November 2003 Form S-8 stock issuances. Additionally, between December 2003 and June 2004, some of the third parties who purchased Lexington shares from Newport Capital also transferred some of their post-split Lexington shares to accounts at Hypo Bank. During June 2004, vFinance net sold a total of 1.2 million post-split Lexington shares for Hypo Bank for total net proceeds of $8.1 million.

Lexington filed another Form S-8 on June 8, 2004 (the "June 2004 Form S-8"). Like the earlier November 2003 Form S-8, the June 2004 Form S-8 stated that the recipients of the Lexington shares were responsible for selling those shares in compliance with any legal requirements. June 2004 Form S-8 at 2, 19. Additionally, Pierce executed stock option exercise agreements on June 15 and June 25, 2004 that contained his representation that he was acquiring the Lexington shares for his own investment. Stock Option Exercise Agreement dated June 15, 2004, at 1, and Stock Option Exercise Agreement dated June 25, 2004, at 1.

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2 The other 100,000 shares were retained by Pierce and then sold by him in June 2004 as described in the Motion for Summary Disposition.

Pursuant to the June 2004 Form S-8, Pierce received 150,000 post-split Lexington shares on June 15, 2004, another 90,000 post-split Lexington shares on June 16, 2004 and an additional 80,000 post-split Lexington shares on June 25, 2004. Lexington therefore issued a total of 320,000 post-split shares to Pierce under the June 2004 Form S-8. Pierce transferred all 320,000 post-split shares to Newport Capital on the same day that he received them. On June 25, 2004, Newport Capital sold 80,000 of those 320,000 Lexington post-split shares to a third party.

Newport Capital transferred the remaining 240,000 post-split shares to its account at Hypo Bank. Between July and October 2004, vFinance sold a total of 448,216 post-split Lexington shares for the Hypo Bank account.

Subsequently, on February 27, 2006, Lexington filed yet another Form S-8 (the "February 2006 Form S-8"). The February 2006 Form S-8 provided that the purchasers of those shares had to comply with pertinent laws and regulations before selling those shares. February 2006 Form S-8 at 19. Lexington issued 295,000 post-split shares to Pierce on March 3, 2006. Lexington also issued 205,000 more post-split shares to Pierce on March 8, 2006. On March 8 and March 10, 2006, Pierce had Lexington transfer to Newport Capital the 295,000 and 205,000 shares that he received on March 3 and 8, 2006, respectively. Newport Capital sold all of those Lexington shares in March 2006 through its Peacock Hislop brokerage account. Because it sold those Lexington shares for just slightly more than Pierce had paid to purchase those shares from Lexington a few days earlier, Newport Capital was essentially serving as a disguised conduit for Lexington's sale of those shares to public investors.

Finally, on March 14, 2006, Lexington filed one more Form S-8 (the "March 2006 Form S-8"). That Form S-8 also advised purchasers to comply with legal requirements before selling the shares. March 2006 Form S-8 at 19. Lexington issued 132,000 post-split shares to Pierce on March 14, 2006 and 368,000 more post-split shares to Pierce on March 16, 2006. On March 16 and 20, 2006, Pierce had Lexington transfer to Newport Capital the 132,000 and 368,000 post-split shares that he received on March 14 and 16, 2006, respectively. Newport sold 164,000 of these Lexington shares in March 2006 through its Peacock Hislop brokerage account. Once again, Newport Capital

was serving as a conduit for Lexington to sell those shares to public investors by purchasing the shares for only a few cents less than the selling price of the Lexington shares on the OTCBB.

By virtue of these issuances, Pierce received a total of 2.82 million post-split Lexington shares under the November 2003, June 2004, February 2006 and March 2006 Form S-8 registration statements. Of those 2.82 million shares, Pierce had Lexington transfer 2.52 million shares to Pierce's company, Newport Capital, within a few business days after the shares were issued by Lexington. Newport Capital then sold 1,214,900 of those shares to third persons and transferred the balance of the shares to its brokerage accounts. No registration statement was in effect for these Newport Capital transactions. The remaining 300,000 post-split Lexington shares that Pierce kept for himself were sold by Hypo Bank in June 2004, as covered by the Motion for Summary Disposition.

Pierce's Ongoing Failure To Disclose His Ownership Interests In Lexington Shares:

During most of the period from November 2003 to May 2004, Pierce owned or controlled between 10 and 60 percent of Lexington's outstanding stock. Pierce was required to disclose his beneficial ownership of Lexington stock, but did not do so until he filed a Schedule 13D on July 25, 2006, after the staff sent him a subpoena for documents and testimony in this matter.

In the belatedly-filed Schedule 13D, Pierce inaccurately stated that he owned or controlled between 5 and 10 percent of Lexington's outstanding stock during late 2003, early 2004 and early 2006. In reality, Pierce owned or controlled more than 10 percent of Lexington's stock during most of the period from November 2003 to May 2004 and also held at least 5 percent of Lexington's stock during early 2006. Although Pierce regularly traded Lexington stock in the open market for Newport during 2004 when he controlled more than 10 percent of Lexington's stock, Pierce never reported his ownership or changes in his ownership on Forms 3, 4 or 5.

Pierce's Refusal To Answer Questions About Lexington Stock Transactions:

On July 27 and 28, 2006, the staff took Pierce's investigative testimony as part of an investigation into the possible manipulation of the market price of Lexington's common stock. During that testimony, Pierce was asked a number of questions that he refused to answer on

purported financial secrecy grounds. Among those unanswered questions were some seeking information from Pierce regarding who was engaged with Pierce and Newport in selling Lexington shares through the Hypo Bank account at vFinance.

LEGAL ARGUMENT

I. PIERCE VIOLATED SECTION 5 OF THE SECURITIES ACT.

Pierce violated Section 5(a) of the Securities Act which imposed a registration requirement for his sales of Lexington securities in interstate commerce:

> *Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –*
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or delivery after sale.

15 U.S.C. § 77e(a) (emphasis added). The purpose of Section 5's registration provisions is to ensure that purchasers of the shares have the necessary material information – in the form of a registration statement and prospectus – about their contemplated investment.

As demonstrated in the Motion for Summary Disposition, Pierce committed a *prima facie* violation of Section 5(a) with respect to his June 2004 sales because the undisputed facts establish that (1) no registration statement 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. Division's Motion at 5 (citing *e.g.*, *SEC v. Corporate Relations Group, Inc.*, 2003 U.S. Dist. LEXIS 24925 at *46 (M.D. Fla. March 28, 2003); *SEC v. Lybrand*, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002); *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 361 (S.D.N.Y. 1998), *aff'd* 155 F.3d 129 (2d Cir. 1998)).[3] Given Pierce's *prima facie* violation of

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[3] Because his Lexington stock sales in June 2004 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 (continued...)

Section 5(a), he had the legal burden of proving that his June 2004 sales of Lexington shares were exempt from registration. *See SEC v. Ralston Purina Co.*, 346 U.S.119,126 (1953); *SEC v. M&A West Inc.*, 538 F.3d 1043, 1050-51 (9th Cir. 2008) (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).

Although 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), Pierce could not qualify for this exemption because he fell within the Securities Act's definition of an underwriter when he received and then sold the 300,000 Lexington shares. 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.*, Initial Decision Release No. 250 at 9-12 (Admin. Proc. File No. 3-11310 May 11, 2004) (finding Section 5 violations and absence of exemption).

One compelling indication of Pierce's "underwriter" status is the short time period between his acquisition of the Lexington shares in November 2003 and his sale of those shares through Hypo Bank in June 2004. *SEC v. M&A West, supra*, 538 F.3d at 1050-51. According to the Securities Act

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3 (...continued)
to sell Lexington shares without filing a registration statement for those proposed sales. 15 U.S.C. § 77e(c).

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). Because Pierce's June 2004 sales of Lexington shares took place just seven months after he received those shares from Lexington in November 2003, he cannot rely 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.

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. But 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. *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). Additionally, given his clear notice from the Form S-8s and option exercise agreements that he must either hold the shares as investments or comply with the securities laws in any attempt to sell them, Pierce lacked any reasonable or good faith basis to believe that he did not have to register his Lexington stock sales.

Pierce's contention that he instructed Lexington to provide him with unrestricted shares demonstrates that he acquired shares under the Form S-8s 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.

II. PIERCE SHOULD DISGORGE HIS STOCK SALE PROCEEDS.

Because Pierce violated 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 from sale of unregistered securities); *Geiger v. SEC*, 363 F.3d 481, 488-89 (D.C. Cir. 2004) (upholding disgorgement order against family partnership and owner for selling unregistered securities); *In the Matter of Lorsin, Inc., supra*, Initial Decision Release No. 250 at 15 (ordering, on summary disposition, that stock promoters and principals jointly and severally disgorge proceeds of unregistered stock sales). The Division's disgorgement formula only has to be a reasonable approximation of the gains causally connected to the violation. *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995); *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 his initial sales were of the 121,683 post-split Lexington shares (using a first-in, first-out method of calculating the sales proceeds) that he received during the reverse merger. His subsequent sales were of the 300,000 post-split shares provided to him under the November 2003 Form S-8. Those sales generated net 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) (describing court's equitable discretion to award prejudgment interest). The Hearing Officer should therefore order Pierce to disgorge $2,077,969 plus pre-judgment interest for his undisputed violation of Section 5.

III. 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). The purpose of these Exchange Act Sections is to ensure that investors have timely knowledge of the identity of corporate insiders and their transactions in the company's stock. Investors can use that knowledge to assess how a company's insiders might perceive the future prospects of the company – *i.e.*, negatively if large insider shareholders are selling their positions.

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) (internal citation omitted).

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 the undisputed facts demonstrate that Pierce had a control relationship with IMT, see Pierce's Answer, ¶ 9, his failure to disclose the IMT holdings also constitutes a violation of Sections 13(d)(1) and 16(a).

IV. A CEASE AND DESIST ORDER IS NECESSARY TO PROTECT INVESTORS FROM FURTHER VIOLATIONS BY PIERCE.

Section 8A of the Securities Act authorizes the Commission to issue a cease and desist order against any person who has been found to be "violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder." 15 U.S.C. § 77h-1(a). In this case, the Hearing Officer is authorized to issue a cease and desist order under Section 8A because – as demonstrated in the Motion for Summary Disposition and above – Pierce violated the registration provisions in Section 5 of the Securities Act. *In the Matter of Lorsin, Inc., et al., supra*, Initial Decision Release No. 250 at 12-14 (issuing cease and desist order after finding that respondent sold unregistered shares).

Similarly, Section 21C(a) of the Exchange Act authorizes the Commission to issue a cease and desist order against any person who has been found to have violated any Exchange Act provision or rule. 15 U.S.C. § 78u-3(a). Here, a cease and desist order is authorized because Pierce violated Sections 13(d) and 16(a) of the Exchange Act by failing to disclose his interests and transactions in Lexington shares within the times allowed by those Sections.

In determining whether to impose a cease and desist order, the Hearing Officer may consider the egregiousness of Pierce's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of any assurances against future violations, Pierce's recognition of the wrongful nature of his conduct, and the likelihood that Pierce's activities will present opportunities for future violations. *Steadman, supra*, 603 F.2d at 1140 (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n. 29 (5th Cir. 1978), *affirmed on other grounds*, 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981)). No one of these particular factors is controlling. *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 based upon violation of record keeping provisions) (citing *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996)). Because remedial sanctions should promote the "public interest," the Court "weigh[s] the effect of [its] action or inaction on the welfare of investors as a class and on standards of conduct in the securities business

generally." *Arthur Lipper Corp.*, 46 S.E.C. 78, 100 (1975); *In the Matter of Richard C. Spangler, Inc.*, 46 S.E.C. 238, 254 n.67 (1976).

All of the *Steadman* factors support issuing a cease and desist order against Pierce. Pierce obtained and then distributed 2.82 million Lexington shares during a thirty-month period from November 2003 until March 2006 without the registration required by Section 5 of the Securities Act. With respect to 300,000 of those shares, Pierce sold them for his own benefit through Hypo Bank in June 2004 and received $2.1 million in ill-gotten proceeds. Beginning in November 2003 and continuing to March 2006, Pierce transferred the other 2.52 million Lexington shares to Newport Capital, a company he controlled, which then sold half of its holdings to other investors and transferred the remaining half of its holdings to Hypo Bank and another brokerage account. Many of those Newport Capital shares were then sold, directly or indirectly, by Hypo Bank through the OTCBB through its vFinance account or through another brokerage account at Peacock Hislop. Pierce therefore engaged in a wide-ranging, long-lasting and highly lucrative distribution of Lexington shares that violated Section 5 of the Securities Act in an egregious and recurring fashion.

Pierce also acted in conscious disregard of Section 5's registration provisions. On their face, the Lexington Form S-8s made it clear that the company was only purporting to register its own stock sales and that the stock recipients must distribute their shares in compliance with the federal securities laws. Additionally, Pierce's option exercise agreements for acquiring the Lexington shares contained his representation that they were being obtained by him for investment purposes. Contrary to his representations, Pierce sold 300,000 Lexington shares through Hypo Bank within seven months and transferred almost immediately his other 2.52 million Lexington shares to Newport Capital. Newport Capital then sold the shares to others – through individual transactions or through brokerage accounts at Hypo Bank and Peacock Hislop. Pierce and Newport Capital therefore deliberately sold shares in violation of Section 5.

Similarly, Pierce did not file the necessary Schedule 13D form until June 2006, when his Lexington transactions were already under investigation. Even in the belated filing, Pierce failed to disclose all of his transactions through IMT, a company he controlled.

Pierce has made no effort to acknowledge or show remorse for his misconduct or to demonstrate that it will not happen again. Quite to the contrary, Pierce falsely claims that he acted in good faith and does not disclose the full extent of his role in distributing Lexington shares by refusing to answer questions in purported reliance upon financial privacy laws. That is a smoke screen, and the Hearing Officer should disregard it.

Finally, Pierce does not come to this proceeding with a clean record as a securities professional. On June 8, 1993, Canadian securities regulators in Vancouver, British Columbia made findings that Pierce received proceeds from an offering by Bu-Max Gold Corp. ("Bu-Max") for an unauthorized purpose. During the Canadian authorities' investigation, Pierce also submitted "documents to the staff of the Commission which were not genuine." Canadian regulators therefore imposed a fifteen-year bar upon Pierce and a $15,000 fine. *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce*, Order Under Section 144 (June 8, 1993). Because Pierce appears to make his living by acquiring and selling securities without complying with the securities laws and without having any professional licenses, the Hearing Officer should impose a cease and desist order to protect investors.

CONCLUSION

For the foregoing reasons, the Division asks that the Hearing Officer issue an order (i) finding that Pierce violated Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act, (ii) ordering Pierce to pay $2.1 million in disgorgement plus prejudgment interest on that amount and (iii) ordering Pierce to cease and desist from violations of Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act.

Dated: December 5, 2008

Respectfully submitted,

John S. Yun
Steven D. Buchholz
Attorneys for
Division of Enforcement

Exhibit 4

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

TRANSCRIPT OF PROCEEDINGS

February 2, 2009
700 Stewart Street, Room 18206
Seattle, Washington

JULIE C. OSWALD, CSR #299-06
COURT REPORTER

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things that the Court can take into consideration is past regulatory history of the respondent to assess the possible need for some sort of future protection of investors, and we believe that this is something that the Court is entitled to take into consideration for that purpose, whether or not technically under the rules of evidence it might or might not come in before a jury. That's point number one.

Point number two, in terms of whether or not it should be disclosed, one of the things we were going to discuss with Mr. Pierce if he was here, but we can point it out anyway, in the Schedule 13-D that Mr. Pierce filed in July of 2007 -- 2006, I'm sorry -- unless I'm missing something, this particular order is already alluded to. So that has already been put at issue, at least in general terms in the 13-D, which is coming into this case, so we think that the rest of the order that underlies that is perfectly fair game to come into the record to show what the 13-D is alluding to, plus what your Honor should be entitled to consider if you determine that some sort of remedies might be appropriate.

MR. WELLS: Your Honor, regarding the Schedule 13-D, presumably Mr. Pierce was trying to respond thoroughly and efficiently and correctly to the requirements for information to be provided under 13-D,

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but as we point out in the motion, even considering this BC Securities order for the purposes of remedial leave, and whether that is appropriate, this order is irrelevant.

By its own terms this order expired back in June of last year. This case was not commenced until July 31st of last year. Therefore the BC Securities Commission's order expired by its own terms before this case was even commenced.

Secondly, under the Securities and Exchange Commission's disclosure rules, this order would not have to be disclosed for public filings if Mr. Pierce were an officer or director five years after its issuance, or more than five years after its issuance. And finally, under federal rules of evidence this order would not be relevant for any purpose in this case after ten years. So we have five, ten and 15 year thresholds, none of which has been crossed by the Division of Enforcement in this case, therefore the order is irrelevant for all purposes in this case. That's why we have moved to exclude it.

THE COURT: Thank you. To save time, I might as well rule on this now, which is that I will take it in, as you point out it was a long time ago, and -- well, let's put it this way: It's less weight than if it was 16 days ago. Of course as you know the rules of evidence,

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especially when it comes to hearsay, are extremely lax in these administrative proceedings, especially before the SEC, and the idea being that the judge is supposed to be able to weigh the weight of things of perhaps lessor weight better than a jury.

That being said, I will deny your motion to exclude the 1993 disciplinary order for whatever -- for whatever that evidence is worth.

Does anyone have anything else?

MR. YUN: Not at this time. I think we can go to the lunch break for other issues. I have witnesses waiting.

THE COURT: Okay. Are you going to make an opening statement?

MR. YUN: Yes. With the Court's permission I would approach and hand to you some documentation. We have already provided it to respondent's counsel, and I will also display it on the screen before you. Let me hand this to you so that you have it in case you want to see it for any other reason.

THE COURT: Thank you.

MR. YUN: May I again, your Honor?

THE COURT: Yes, please.

MR. YUN: Good morning. Your Honor, for the record, once again, I am John Yun and I will be

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representing the Division of Enforcement in this hearing, along with attorney Steve Buchholz and legal assistant Janet Johnston. This proceeding involves respondent Gordon Brent Pierce's resale of millions of dollars in stock issued by a newly formed oil and gas company, Lexington Resources.

When the company was formed in November 2003 Pierce and entities he controlled received vested options that initially represented 60 percent of the outstanding stock and was almost always above 10 percent. Lexington, in that time period, had no revenue and was heavily dependent upon Pierce and his entities for financing.

Notwithstanding Lexington's financial condition, the company's stock price soared during the beginning of 2004. Using brokerage accounts at Hypo Bank, Pierce sold nearly 400,000 Lexington shares in June 2004 for $2.7 million. The Division's evidence will show that Pierce sold the vast majority of those 400,000 shares just as Lexington's stock price was surging to it's historic high.

If you look at the first document before you, your Honor, you will see a chart. This will also come in during later testimony. This is a chart of the stock price of Lexington. The red dots indicate where Mr. Pierce sold his stock.

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Shortly after Pierce sold his shares in June 2004 Lexington's stock price collapsed, once again as indicated by this chart. Eventually Lexington's operating subsidiary went bankrupt.

In selling shares of Lexington Resources Pierce illegally failed to register his stock sales or provide any disclosure about himself or those sales to investors. Pierce did not disclose to investors his close relationship with Lexington Resources, and its president, Grant Atkins. He made no disclosures about the conditions he controlled and the combined ownership of a large percentage of Lexington stock. He made no disclosure about his sales of Lexington stock while the price was rising.

Only two years later, in July 2006, when Pierce belatedly filed a Schedule 13-D did he describe some of his holdings in Lexington stock and allude to his problems with Canadian securities regulators. But that limited disclosure was too late. Pierce had already sold Lexington shares for millions of dollars while never warning outside investors that someone who once controlled over 60 percent of the company's stock was selling Lexington shares.

That knowledge would have been a red flag to investors, precisely why the registration of Pierce's

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sales and disclosures about his transactions were so necessary.

Pierce's lack of disclosure was illegal. It involved violations of the registration provisions of the Securities Act and the stock ownership disclosure provisions of the Exchange Act. Those violations are what the Division will prove during this hearing through evidence that is essentially undisputed.

With respect to the Securities Act, Section 5 requires that every transaction -- and we stress the word "transaction" -- involving the offer or sale of a security using interstate commerce must have a registration statement or a valid exemption from registration, and it's well established by the cases Pierce did not have to act with any wrongful intent such as even negligence to be liable for a Section 5 violation.

In this case there are three groups of Lexington sales transactions that will be involved in a Section 5 violation. These are the summaries. There were transactions November 2003, June 2004, and March 2006. We have here the number of shares he received in those.

First, in November 2003 Lexington Resources issued 500,000 shares to Pierce, retained 100,000 shares for himself, and transferred 400,000 shares to a company he controlled called Newport Capital.

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In January 2004 Lexington performed a three-for-four stock split and issued additional shares to Pierce and Newport Capital. This meant that his personally owned 100,000 Lexington shares became 300,000 shares.

Pierce also sold some of Newport's shares in private transactions as we have here on the left-hand column, and transferred other shares to an account at Hypo Bank. Hypo Bank sold millions of Lexington shares from its accounts between February and June 2004.

Second, in mid June 2004 Lexington issued another split shares to Pierce. Pierce transferred those shares to Newport Capital, which sold 80,000 shares to another company he controlled and transferred the remaining 240,000 shares to Hypo Bank from which they were sold during the second half of 2004.

The final set of transactions, the 2006 transactions, in March 2006, 1 million shares are issued to Pierce. Newport sells 664,000 of those shares to a brokerage account and retains the rest.

Pierce received these shares under a vested option grant for 950,000 shares made to another company that Pierce controlled called International Market Trend, or IMT. When Pierce exercised these, the option to receive the shares, Lexington issued them under a Form S-8 registration statement that by law only allowed shares to

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be issued to employees or consultants who do not provide services for raising money from investors or promoting the issue of stock.

A Form S-8 registration statement can be used to cover the resale of shares by employees and consultants, but as we will show through the Division's testimony, that did not happen here, because Pierce's sales were not registered. The Division will establish during its case in chief that Pierce committed a prima facie violation of Section 5.

We will satisfy all three elements of showing that, one, Pierce resold his shares, two, there were no registration statements covering his resales, and three, he used interstate commerce for those resales by telephonic, electronic and mail instructions, as well as resales on exchanges or quotation boards. That is all that the Division must prove for its case in chief, and the Division will provide that proof.

It is not the Division's burden to allege or prove that Pierce lacked an exemption from Section 5. We anticipate that Pierce will claim that such an exemption existed under Section 4.1 of the Securities Act which exempts transactions by a person who is not acting as an issuer or an underwriter.

The Division's evidence regarding the movement of

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the S-8 shares -- once again, we will really focus on the November 2003 time period here -- will show that the movement of shares from Pierce to Newport and other entities, and then to brokerage accounts and individual purchasers, constituted a distribution by Pierce of his S-8 shares so as to constitute Pierce as being the definition of a statutory underwriter in this case.

Pierce also sold the majority of shares within the one-year period that was required by selling hundreds of thousands of shares just as Lexington's share price was peaking in June 2004. As a result we believe that the total evidence will show there was no Section 4.1 exemption for Pierce's resales of his Lexington shares.

The Division will also establish Pierce's violations of Section 15-D and Section 16-A of the Exchange Act by his failure to file the necessary disclosure forms.

Section 13-D required Pierce's filing of a Schedule 13-D within ten days of acquiring a 5 percent beneficial ownership. Pierce admits in his answer that he did not file his Schedule 13-D until July 2006, even though he had transactions going back all the way to November and December of 2003. Pierce therefore concedes his violation of Section 13-D.

Section 16-A of the Exchange Act required Pierce

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to file forms 3, 4, and 5 to disclose his transactions in Lexington shares while he was a 10 percent owner of the company stock.

Pierce does not challenge his failure to file those forms, but contends that he was never a 10 percent beneficial owner. The Division will prove that his beneficial ownership interest nearly always exceeded 10 percent for the entire time period, and was once at 60 percent.

To see this we need to look at some of the relationships that Pierce has with various companies. First, what the Division's evidence will show is that Pierce managed and controlled two entities about which you will hear quite a bit in this case. You will hear about Newport Capital -- I have already mentioned that -- and you will hear about IMT, which was the company that received the 950,000 vested option shares.

With respect to Newport, Pierce was the president and a director of Newport. He decided who should serve as consultants for Newport, which did not have employees, it had only consultants.

He hired and selected all of those consultants. He also directed the brokerage tradings for Newport Capital. Pierce therefore controlled Newport Capital directly, and its consultants indirectly. Notably one of

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the consultants for Newport Capital is Grant Atkins who you will hear about. He is the president of Lexington Resources.

Newport Capital paid large consulting fees to Mr. Atkins, and lent him a substantial amount of money during the time period that Lexington was issuing shares to Pierce, and that Pierce was reselling those shares.

Additionally, Pierce ran IMT which was the recipient of the 950,000 option shares. IMT provided consulting services to Lexington, and Pierce, once again, decided who should be IMT's consultants. As a result, Pierce controlled IMT directly, and its various consultants indirectly. He is therefore legally the beneficial owner of the option grant shares that went to or through IMT.

Second, Pierce controlled other entities that you will hear he was an officer and director of. This is again a chart that provides you with the names of those entities, Newport and IMT that I have already discussed.

You will hear at least three other names, Pacific Rim, Park Place, and Spartan. All of these entities became shareholders of Lexington, and Pierce is deemed to be the beneficial owner through his control of those shares.

By virtue of his control over IMT, Newport, and

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these other entities, Pierce's stock holdings and influence over Lexington went far beyond that which you would normally expect of any employee or consultant.

Thirdly, Mr. Jeffrey Lyttle, staff examiner with the San Francisco office, will present a summary from brokerage statements and transfer records of the amount of Lexington shares held by Pierce and these various entities at any particular time.

Using that information, Mr. Lyttle will provide a calculation of the combined percentage of outstanding Lexington shares that Pierce and these entities held at any given time. His calculations will reflect that Pierce and these entities combined had an ownership interest that exceeded 10 percent for nearly all of the relevant period. This chart will show some examples of the ownership that we will indicate.

The high point is November 18, 2003. You see the 10 percent line. There was a period in December 2004 where it fell beneath the 10 percent, and again in May of 2006, but throughout most of the period you will see a beneficial ownership that is over 10 percent. On occasion even, as we quoted, it was 20 percent.

The Division -- as a result of these percentages Pierce was required to file forms 3, 4 and 5 under Section 16-A of the Exchange Act but never did so, and therefore

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provisions were all predicated upon Mr. Pierce having provided incligible services. Presumably that is because the Division hadn't figured out at that point in time that the little bit of capital raising that Mr. Pierce did on behalf of Park Place was compensated separately and apart, and not through S-8 issuances, but rather then by a cash payment of $25,000, as you have seen from that chart.

Once they figured that out, when we had our September 29 telephone conference, they realized that their eligibility case was not going to go anywhere and that explains why the Division refused to provide a more definite statement about which particular services Mr. Pierce provided that were compensated by S-8 options that actually had to do with capital raising, so there was a statement back then that that information would not be provided. There is no such allegation at this point of the case. Just as there was no such allegation in the December summary disposition and prehearing briefing by the Division.

So the Division is now proceeding under the novel theory that Mr. Pierce violated the registration provisions because he took shares that were registered under an S-8 stock option plan, exercised and purchased those shares, and then resold them, just as you or I might in an S1 registration by Cisco Systems, and if we got cold

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feet and a few months later resold our Cisco shares, under the proceeding that we are about to undertake, analogizing the case the Division is going to bring against Mr. Pierce to your situation and mine upon selling our Cisco stock, we would then be put to the burden of -- once the Division of Enforcement challenged us as violating the registration provisions -- of having to show that there was nothing wrong with the registration by Cisco. Otherwise you and I don't have access to Section 4.1, the exemption for those who are involved in transactions that do not involve issuer, dealer, or underwriter.

You and I would have to comb through SK, and we are securities lawyers and we might have a difficult time meeting a burden of proof that Cisco properly registered its shares so that when we resold the shares we purchased in a public offering we were not violating the registration provisions. That's the case the Division is going to bring to you today. That case does not exist.

In addition we are going to call an expert witness who will put to rest one other aspect of that case that arose in their December briefing. The Division has since fallen back and said, well, in their briefing in December, that Mr. Pierce must have received securities that were not registered under the S-8 plan, but rather were issued in a private offering, and therefore they were

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restricted securities from the date he received them.

Why is that? Their contention is that because the transaction documents, some of which I just showed you on the screen, like the notice and agreement of exercise of sale, the S-8 registration, the stock option plan, contain language like "investment purpose," or an explicit reference in the event, et cetera, et cetera, the issuer will use section 4.2, private placement.

The Division is contending because this alternate theory, that the issuer chose -- that the issuer might choose to avail itself of in issuing stock to Mr. Pierce existed in the transaction documents. They theorize that necessarily the issuer must have used that private placement in issuing shares to Mr. Pierce.

You will see correspondence by Mr. Atkins, the president of Lexington, to the transfer agent, Mr. Stevens on a number of occasions whenever a stock, an S-8 stock option was exercised in this case, or by a recipient or grantee of Lexington, that the shares were always to be marked free trading, and in fact clear stream eligible, because they were traded overseas on the Frankfurt exchange, and according to the testimony you are going to hear, clear stream eligible enabled the shares to be traded in overseas markets.

So clearly the evidence will show you that

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Lexington used the S-8 registrations that have never been challenged by the Division to issue every share of S-8 stock to Mr. Pierce that they claim was involved in an illegal distribution because they say Mr. Pierce was an underwriter.

There is a legal argument there that I won't make right now, but I want to make it clear in the opening statement, that the evidence will not show that Mr. Pierce was an underwriter for the reasons we have just described.

THE COURT: Thank you.

MR. YUN: Thank you, your Honor. We will go ahead and call our first witness then.

THE COURT: Good.

****

TED YU: Being first duly sworn by the Judge on oath testified as follows:

DIRECT EXAMINATION

BY MR. YUN:

Q. Good morning, sir.

A. Good morning.

Q. I am glad to see the microphone is on. Could you state your full name for the record, spelling your last name?

A. Sure, Ted Yu. The last name spelled Y-U.

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Newport Capital?
A. Yes, I did.
Q. Did you find those names appearing?
A. Newport Capital is mentioned in item 4, the submission of matters to shareholders vote, and Newport Capital was a 2.6 percent holder at the time of acquisition of Lexington Oil.
Q. Anything else that you found in there about either Newport Capital or Brent Pierce?
A. No.
Q. Turn back then to the previous binders. Look at the items behind tabs 7, 8, and 9.
A. Yes.
Q. Tell us if you recognize these exhibits.
A. Yes, I do.
Q. What are they?
A. These are Form S-8s that were filed by Lexington Resources to register common stock that was going to be issued to the planned participants.
Q. Is the first one for June of 2004?
A. Yes.
Q. That's Exhibit 7?
A. Yes.
Q. And Exhibit 8 would be February 2006, is that right?

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A. Yes.
Q. And Exhibit 9 is March 2006?
A. Yes.
Q. Looking at these together, which sales transactions did these three Form S-8s register?
A. They registered the issuance from the company to the planned participants.
Q. Did you find any supplemental prospectus registering sales by shareholders --
A. No.
Q. -- for these documents?
A. No, I did not.
Q. If I could ask you to turn to the other binder, Exhibit 56.
A. Yes.
Q. Do you recognize what this document is?
A. It is the form 10 KSB for Lexington Resources for 2004.
Q. That's the period ending December 31st, 2004?
A. Yes.
Q. Did you do a word search through this document for the names Brent Pierce and Newport Capital?
A. Yes, I did.
Q. Did you find any disclosure of those names in this document?

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A. No, I did not.
Q. If you could then turn to Exhibit 57 and tell us if you recognize what this document is.
A. This is the form 10 KSB for fiscal year ending December 31st, 2005.
Q. Did you do a word search through this document?
A. Yes.
Q. Did you find the name Brent Pierce in this document?
A. No.
Q. Did you find the name Newport Capital in this document?
A. No.
Q. Let me ask you to turn to Exhibit 58. Can you tell us what this document is?
A. This is the form 10 KSB for Lexington Resources for the fiscal year ended December 31st, 2006.
Q. Did you do a word search through this document?
A. Yes.
Q. Did you find either the name Brent Pierce or Newport Capital in this document?
A. Yes, I did.
Q. What did you find?
A. In the beneficial ownership table under item 11, Newport Capital was listed as owning 5.6 percent of

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Lexington Resources' shares, and in a footnote Brent Pierce was noted as having disposition power over those shares.
Q. Since you are in that general area, let me ask you to take a look at Exhibit 59, please.
A. Yes.
Q. What is Exhibit 59?
A. It is a Form SB 2 filed by Lexington Resources.
Q. Can you tell us what the filing date was?
A. December of 2004.
Q. Is that December 15, 2004?
A. Yes.
Q. In general, what is a Form SB 2?
A. A Form SB 2 is a registration statement under the '33 Act, and registered offers and sales of securities by the company.
Q. With respect to this document did you do a word search for the names Brent Pierce or Newport Capital?
A. Yes, I did.
Q. Did either one of those names appear?
A. Yes, Newport Capital was listed as a selling shareholder of some common shares, and Brent Pierce was noted in a footnote as having dispositive powers over those shares.
Q. Let me ask you to turn to Exhibit 60.

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opinion -- you know, if you have an opinion.
THE WITNESS: If you buy shares in Cisco?
Q. In a registered public offering, and resell them a few weeks later.
A. Right. When you resell them you will have to ask yourself if there is an exemption that you can rely on or else you should file a registration statement. That's a decision that requires you to look at all available exemptions under the '33 Act.
MR. WELLS: I have nothing further of this witness, your Honor.
THE COURT: Thank you.
MR. YUN: No follow-up.
THE COURT: Thank you for your testimony, Mr. Yu. You may depart.
MR. YUN: Is he free to go back to Washington?
THE COURT: You are free to go back to Washington.
THE WITNESS: Thank you.
MR. WELLS: I object, he is already in Washington.
MR. BUCHHOLZ: The Division calls Robert Stevens.
THE COURT: Do counsel find this room sort of on the warm side?
MR. YUN: I don't have a problem with it.

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MR. WELLS: We are fine, your Honor.
MR. BUCHHOLZ: It seems okay.
MR. YUN: We have quite a number of vents over here.
MR. WELLS: If we do get warm in here, may we ask you if we can remove our coats?
THE COURT: Yes, I was even thinking of seeing if the temperature could be lowered. Go ahead and bring it up.
MR. WELLS: Thank you, your Honor.
MR. YUN: Can we take five minutes?
THE COURT: Let's take to quarter to.
MR. YUN: Thank you very much, your Honor. Sorry.
(Recess.)
****
ROBERT STEVENS: Being first duly sworn by the Judge on oath testified as follows:

DIRECT EXAMINATION

BY MR. BUCHHOLZ:
Q. Mr. Stevens, could you please state your name for the record
A. Robert, R-O-B-E-R-T, Stevens, S-T-E-V-E-N-S, middle name Louis, L-O-U-I-S.

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Q. Mr. Stevens, did you start a transfer agent business in 2001?
A. Yes, sir, I did.
Q. What was the name of the transfer agent business?
A. Global Stock Transfer, Incorporated.
Q. Has it also been known by other names?
A. Yes, we changed the name to X-Clearing Corporation, the letter X, dash, Clearing, C-L-E-A-R-I-N-G, Corp.
Q. Was it known as X-Clearing during 2003 and 2004?
A. Yes, it was.
Q. Was it registered with the SEC?
A. Yes, it is, and was.
Q. Were you employed at X-Clearing 2003 and 2004?
A. Yes, I was.
Q. What was your role?
A. President, and later chairman.
Q. About how many employees did X-Clearing have at that time?
A. As few as three, and as many as four.
Q. As president and chairman were you familiar with X-Clearing's business records?
A. Intimately, yes.
Q. Mr. Stevens, did X-Clearing have a client named Lexington Resources during 2003 and 2004?

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A. Yes, it did.
Q. Was it also a client when it was known as Intergold?
A. Yes, it was.
Q. Did X-Clearing maintain records related to Lexington or Intergold shares and transfers of shares during 2003 and 2004?
A. Yes, we did.
Q. When did you first obtain Lexington or Intergold as a client?
A. I remember it well. It was right after the terrorist attacks of '01, in 2001. That's when I approached Mr. Pierce and Mr. Atkins about their business and we obtained the account.
Q. Who actually agreed with you that Intergold at the time, and later Lexington, would be a client of X-Clearing?
A. Originally Mr. Pierce, and then later Mr. Atkins.
Q. Was Lexington part of a group of companies that became clients of X-Clearing at the same time?
A. Yes, it was. I believe there were three that we brought over at one time.
MR. WELLS: Objection, your Honor, irrelevant.
MR. BUCHHOLZ: I'm not going to go much further on that route, I just wanted to establish the relationship

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compensation in lieu of cash?
A. Yes, sir.
Q. Are you familiar with a company called ICI?
A. I am.
Q. What is your understanding of what that company is or was?
A. It was my understanding Investor Communications, also known as ICI, those are the initials, was a company that provided investor relation and exposure issues for public companies.
Q. Did you have any conversations with Mr. Pierce about that company?
A. Yes, sir, on an ongoing basis.
Q. Was that happening in 2003 and 2004?
A. Yes, it was.
Q. Did you have an understanding, based on those discussions, what his role was with ICI?
A. Mr. Pierce was the funds behind it, and the brains behind the operation.
Q. Are you familiar with a person named Marcus Johnson?
A. I am.
Q. Did you have an understanding of what his role was, based on your discussions with Mr. Pierce?
A. It was my understanding that his roles were

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similar to Mr. Atkins. Mr. Johnson did the administrative paperwork, the filings as necessary, the administrative side of the business.
Q. Did you ever work for ICI?
A. No. I did not directly, no.
Q. You didn't have any sort of consulting agreement with ICI?
A. No, sir.
Q. Did you ever enter into any sort of debt assignment agreement with ICI?
A. No, sir.
Q. Are you familiar with a company called International Market Trend?
A. I am.
Q. What is your understanding of that company?
A. My understanding of International Market Trend is it's a European version of ICI.
Q. Did you ever provide services for IMT?
A. No, I did not.
Q. Did you have discussions with Mr. Pierce about IMT?
A. In a limited capacity, yes.
Q. Based on those discussions did you have an understanding of his role at IMT?
A. My understanding of his role with IMT was the

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same as his role with ICI.
Q. Did you have that understanding back in 2004?
A. Yes, sir, I did.
Q. In association with the 25,000 shares that were issued to you following this letter, page 1 of Exhibit 40, did you receive 50,000 additional Lexington shares as a result of the three-for-four split?
A. Yes, I did.
Q. What did you do with those shares?
A. Those shares I gave back to Mr. Pierce.
Q. Did Mr. Pierce ask you to deliver those or journal them to a particular place?
A. Yes, sir, the share certificates were sent to a bank in Liechtenstein called Hypo Alpe-Adria Bank. I'm slaughtering the pronunciation.
Q. You can refer to it as "Hypo."
A. We sent to Hypo where the share certificates were then broken down via some sort of a journal entry on their end, 50,000 to I believe him or Newport Capital, and 25,000 shares were DTC'd back to our account at V Finance Investments -- V as in Victor and the word "Finance."
Q. When you say "we," you mean you personally?
A. Yes.
Q. So you received 25,000 back, but the 50,000 remained at Hypo Bank for either Mr. Pierce or Newport?

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A. Yes, sir, that was my understanding.
Q. Was that based on discussions with Mr. Pierce?
A. It was.
Q. Did he tell you a particular account at Hypo to specify when you sent the shares over to Hypo Bank?
A. It's my recollection that it was Newport Capital's account.
Q. In the discussions you had with him do you know whether he also had an account at Hypo Bank?
A. Yes, I knew that Newport did have an account there.
Q. Right, Newport.
I'm wondering whether you had knowledge of him also having an account, or just the Newport account?
A. It was my understanding that he had an account there as well.
Q. Please refer to Exhibit 41, the next exhibit in the binder.
A. I'm there.
Q. Do you recognize Exhibit 41?
A. I do.
Q. Can you also refer to -- let's do them one at a time -- 42 next?
A. Yes.
Q. And 43?

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terms of any other Privacy Act, we would have complied with those when we subpoenaed the documents, and I don't think they applied.
MR. WELLS: If I may respond, using them is one thing. Using them without protecting confidentiality is quite another.
THE COURT: Apparently Hypo Bank didn't ask for any confidentiality, and the Privacy Act doesn't apply to anything but a person, a human.
Anyway, Exhibit 21 is admitted.
MR. YUN: Exhibits 23 and 24 are account statements that we would offer subject to our prior agreement regarding redaction.
MR. WELLS: Same objection, your Honor.
THE COURT: Okay, 23 and 24 will be admitted as redacted.
MR. YUN: Exhibit 25, which are documents re Newport Capital and V Finance.
MR. WELLS: Same objection as to a non-party, your Honor. I would repeat there has been no offer by the Division to demonstrate that there is any notice to Newport Capital, and an opportunity for Newport Capital prior to production to redact portions of the documents it thought should be redacted or to designate the information confidential and seek to have it protected in its

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entirety, even if it is used in the proceeding.
THE COURT: 25 is admitted, and 26.
MR. YUN: I'm offering 26, 27, and 28.
THE COURT: I gather the same objection would apply to 26, 27 and 28?
MR. WELLS: Correct, your Honor.
THE COURT: Okay, 26, 27 and 28 are admitted.
MR. YUN: The Division Exhibit 29 and 30 are account records from Newport at a different brokerage firm, the Peacock firm, and again subject to the Division's same agreement to redact personal identifying information, we would move those in.
MR. WELLS: Same objection, your Honor.
THE COURT: Thank you. 29 and 30 are admitted, as redacted.
MR. YUN: And finally, Exhibit 46, which are some transfer agent records relating to Lexington. This was held by a different transfer agent firm. He mentioned a Transfer On Line this morning, Mr. Stevens, so this is a Transfer On Line record.
MR. WELLS: I will object on the basis of relevance, your Honor.
MR. YUN: What these transfer records show are similar to the ones we had this morning, they would show the movement of Lexington shares for the March 2006 S-8

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offering.
THE COURT: That sounds at least vaguely relevant. Those are admitted, Division Exhibit 46.
MR. YUN: Thank you, your Honor.
THE COURT: Very good.
MR. BUCHHOLZ: The Division calls Jeffrey Lyttle.
****
JEFFREY LYTTLE: Being first duly sworn by the Judge on oath testified as follows:

DIRECT EXAMINATION
BY MR. BUCHHOLZ:
Q. Good afternoon, Mr. Lyttle. Can you please state your name for the record?
A. Jeffrey Lyttle, first name J-E-F-F-R-E-Y, last name little, L-Y-T-T-L-E.
Q. Where do you work, Mr. Lyttle?
A. I am employed at the Securities and Exchange Commission in the San Francisco regional office.
Q. What is your job title?
A. I am a securities compliance examiner.
Q. What are your responsibilities generally as a securities compliance examiner?
A. I conduct examinations of broker dealers and

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transfer agents that are registered with the commission to insure compliance with federal securities laws.
Q. Mr. Lyttle, did you prepare several charts summarizing brokerage and transfer agent records in this matter?
A. Yes, I did.
Q. Where did you obtain the documents and information that you have summarized in your charts?
A. Documentation was provided by Division staff, and it's my understanding that those documents were obtained through the Lexington Resources investigation.
In addition I obtained historical price and volume trade data from publicly available sources in regard to Lexington Resources.
Q. We will talk more about the charts in more detail.
First let's briefly talk about your background. Did you attend college?
A. Yes, I did. I obtained a bachelor's degree in 1982 from Bates College, a degree in English.
Q. Have you taken any course work since that time, any accounting or finance?
A. Yes, I have taken course work in accounting, and I've obtained training through internally at the SEC in regard to accounting and financial records.

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Q. Very briefly, can you summarize your work history before you started at the SEC?
A. After college I was a claims adjuster with a law firm in New York City from 1983 to 1989 that focused on insurance, maritime insurance, specifically. It was not securities related.
In 1989 I moved to San Francisco and was employed again as a paralegal in a law firm, and that firm focused -- the work they did focused on defense of litigation and arbitrations brought by investors. One of my central duties was preparing profit and loss analyses on the accounts at issue in those cases.
Q. How long have you been with the SEC?
A. Ten years. Since April 1999.
Q. Have you been a securities compliance examiner the whole time that you've been with the SEC?
A. Yes, I have.
Q. As part of your responsibilities with the SEC do you review and analyze brokerage and transfer agent records?
A. Yes, I do.
Q. Do you sometimes also assist Division staff during investigations?
A. Yes.
Q. What types of activities does that involve?

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A. Oftentimes it's assisting in preparing requests of broker dealer transfer agents related records, and at other times reviewing databases of information, filings and financial records in databases that I have access to.
Q. When did Division staff first ask for your assistance in summarizing records in this matter?
A. November 2008.
Q. Had you previously conducted any examinations related to the Lexington investigation?
A. No, I did not.
Q. Had you provided assistance of any kind to the Division staff during the investigation?
A. Earlier in 2008 I conducted a database search at Division staff's request, and provided them with search results. That was in early 2008, as I recall.
Q. Did you analyze information, or just provide them search results?
A. It was providing search results. There was no analysis involved.
Q. Mr. Lyttle, can you please turn to Division Exhibit 48 in the first binder of Division exhibits?
A. Okay.
Q. Do you have Exhibit 48 in front of you?
A. Yes, I do.
Q. Do you recognize Exhibit 48?

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A. Yes, this is a chart that I prepared.
Q. Is it complete in the form that you prepared it?
A. Yes, it is. It is a one-page chart and attached to it are two spreadsheets, the first one is 14 pages long and the second one is two pages long.
Q. What is summarized in Exhibit 48?
A. The chart reflects the closing price of Lexington Resources during two time periods, the daily closing price of the stock from November 29, 2003 through the end of 2004, and for a second period, January 1st, 2006 through June 30th, 2006.
On top of that are markers reflecting trades that occurred in accounts in the name of Mr. Pierce and Newport Capital. Purchases are reflected as blue triangles. Sales are shown as red circles.
Q. What's in the box? There appears to be summaries. It says, "summaries of trades by month."
A. Yes, the summaries of trades by month aggregate the total number of shares bought and/or sold during relevant months, and for shares sold lists the proceeds from those sales, and for the shares bought the cost of those purchases.
Q. Is that based on the same underlying information that you have used for the chart?
A. Yes, yes, it's taken from the supporting

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spreadsheets which are in turn supported by brokerage statements.
Q. Just to be clear again, which brokerage accounts -- only refer to the last four digits of the account numbers, if you want to refer to them by name. Which accounts did you summarize in this chart?
A. Okay. I can refer to the brokerage firm?
Q. Sure.
A. The first account was Hypo Bank account ending in 84 -- 0840, and an account at V Finance ending in numbers 4207. The third account was a brokerage account with an account number ending with numbers 9715.
Q. Why did you include -- I think you said there were two in the name of Newport and one in the name of Pierce, is that right?
A. That's correct.
Q. Why did you include Newport accounts?
A. Newport accounts, opening account documents, reflect that Mr. Pierce was an officer of Newport Capital. There were corporate resolutions attached to the opening account documentation, and they were both corporate accounts which require someone authorized to act on the corporation's behalf in that account, and he was designated as that person.
Q. What kind of trades are included in this chart?

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MR. WELLS: If I can respond briefly to that, I don't think I heard any of that in the evidence except a couple times Mr. Stevens said with respect to some other company, that Mr. Pierce seemed to be calling the shots.

When questioned about it, Mr. Pierce did not control the transfer agents at all. When we got to ANP it turned out that Mr. Pierce's affiliate, Newport Capital, had loaned ANP money but Mr. Stevens was, in fact, the owner.

We also elicited testimony from Mr. Stevens that Mr. Pierce was one of ICI's consultants, so it would make perfect sense that Mr. Pierce would be helping to select a transfer agent for Lexington, and otherwise consulting with Grant Atkins and Mr. Stevens in order to help get business done for Lexington.

Mr. Stevens further testified that all of the formal documents were actually signed by Grant Atkins. It was consistent that Grant Atkins was the president and director of Lexington.

The evidence of Mr. Stevens does not rise anywhere near the level to suggest -- to get past the initial burden of proof, to show that Mr. Pierce was an affiliate or controlling person.

Let's not forget a very elemental fact, and that is that there has been no allegation in the OIP that

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Mr. Pierce was an affiliate or controlling of Lexington.

I would also like to move to dismiss the reporting violations based on the evidence submitted by the Division that all of the dates selected for determining beneficial ownership are based on transfer agent records, which is patently inconsistent with the purpose of the beneficial ownership reporting requirements, both under Section 13 and Section 16, and we believe that the evidence they have submitted to sustain their burden of proof on the reporting provisions is also inadequate, so I would add that motion orally to the motion to dismiss the registration violations.

Having understood that as to the Section 13-D violation Mr. Pierce acknowledges that for some period of time he should have reported 5 percent ownership but he did not, and then the record shows he made a curative filing, that's on the EDGAR system and part of the commission's records.

THE COURT: Thank you, Mr. Wells. I will take your motion -- I will defer action on your motion. As you know, the commission frowns on dispositive rulings from the bench as set forth in the Rita Villa, V-I-L-L-A case of some years ago.

MR. WELLS: I have one other motion, a somewhat narrower one.

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Your Honor, the Division has provided ample correspondence showing the means of jurisdiction that have been used, to innocent purposes we would contend, perfectly lawful purposes, but nonetheless the means and instrumentalities of United States Commerce have been used in Mr. Pierce's purchases of Lexington securities, and in his resale of Lexington stock to Newport Capital.

However, with respect to the sales of securities from the Hypo Bank account in Liechtenstein, there has been absolutely no evidence that jurisdictional means have been used. The evidence before the Court is that Mr. Pierce, a Canadian citizen obviously outside the United States, had an account at the Hypo Bank, obviously outside the United States in Liechtenstein, in which there were securities that were sold, not until June of 2004, and there own witness, Mr. Stevens, said that by the spring of 2004 Lexington securities were registered for trading on the Frankfurt exchange.

There is absolutely no evidence that the sales from the Hypo Bank account were placed within the United States or that the United States telephone lines, mails, faxes or even computer servers within the United States were used to consummate those sales.

MR. YUN: I think the Division's evidence has made it pretty clear, the mails and the telephone were

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used, and the faxes were also used throughout this entire process to move shares from Lexington to Pierce and Newport Capital to other entities and to Hypo Bank and that there is a Hypo Bank account at V Finance. As this says, and I haven't had a chance to look at these cases, it's all in the facts and circumstances of this case. There was trading of Lexington shares in the United States. There was a brokerage in Florida handling trading in the United States. The excerpts of the testimony that you will have from Mr. Pierce says he knew Mr. Thompson and knew that Mr. Thompson was a market maker in the United States, and that he communicated with him, including for trading.

We think the evidence clearly shows a nexus to interstate commerce in this country. Even if some of the sales may or may not have arguably happened in Germany, the fact is there were also sales happening in this country, and we believe that's enough to satisfy the standard for participation in interstate commerce, which I think all the cases indicate is very broad indeed in this area of securities laws.

MR. WELLS: It's interesting, your Honor, when the Division was talking about the registration violation, they were taking a very digital approach versus an analogue or holistic approach. Every transaction,

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

TRANSCRIPT OF PROCEEDINGS
VOLUME III

February 4, 2009
700 Stewart Street, Room 18206
Seattle, Washington

JULIE C. OSWALD, CSR #299-06
COURT REPORTER

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statements --
THE COURT: As long as I am on the housekeeping matters, you have provided exhibits and I am going to give them back to you.
You can send them in to me at my office, and I have not written on them except to write exhibit numbers, and in the case of Pierce Exhibit 58 I put on a sticky that said "offered not admitted," but otherwise I haven't written on them. I will leave the binders here when I depart.
Do you want to have closing arguments, or take a break and have closing arguments?
MR. YUN: Ours is not long, maybe 15, 20 minutes. We would be ready to go after a ten-minute break, if they want closing statements.
MR. WELLS: Very well, your Honor. We might as well get it done.
THE COURT: Let's take a ten-minute break.
(Recess.)
THE COURT: Please proceed.
MR. YUN: Thank you, your Honor.
This case has already generated a substantial amount of briefing, motions and cross motions, and more briefing is yet to come following this hearing.
With all this hearing the Court has certainly

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realized that this is not a common garden variety failure to register case, and it is not.
Respondent Pierce would like you to believe that the Division is looking to force every administrative assistant who buys 100 shares of his or her employer stock during an IPO or through an employee stock option plan, must fear an enforcement action if he or she sells their shares within a certain holding period. Rest assured, that is not the case here because the evidence establishes beyond any dispute that respondent Brent Pierce bears no resemblance to the Cisco employee who merely buys and sells some of that company's shares.
Instead, the evidence establishes that Pierce engaged, with the assistance of others, including Grant Atkins, in a deliberate effort to acquire and sell large holdings of Lexington shares while avoiding any disclosure to investors about themselves and their stock transactions. By concealing his activities Pierce could sell hundreds of thousands of Lexington shares in June 2004 for millions of dollars without investors knowing that a large and influential Lexington insider was selling off his holdings.
Although there is no claim in the order instituting proceedings that has required the Division to prove negligence, deceit, or any other wrongful state of

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mind on Pierce's part to prevail on any of its alleged claims, the evidence during the hearing nonetheless creates a compelling picture of a man who consciously acted to circumvent the disclosure obligations of the federal securities laws.
As the evidence in this hearing has shown, Pierce consciously refused to comply with the registration obligations of Section 5 of the Securities Act, and deliberately failed to report his Lexington transactions under Sections 13 and 16 of the Exchange Act.
The Division was not, and still is not, obligated to prove any wrongful intent on Pierce's part, but in his own case in chief with his own witnesses Pierce himself proved his own efforts at deception under the federal securities laws.
Turning first to the Division's Section 5 registration, the law is clear the elements of a prima facie violation are merely one, Pierce's resale of his Lexington shares, two, the absence of a registration statement for those resales, and three, the use of interstate commerce for those resales. There is no basis for disputing the existence of all three elements of the prima facie case.
I would like the Court -- we previously discussed during the very last prehearing conference the Dudnick

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case, an initial decision that Administrative Law Judge Mahoney issued. In that decision on page 14 Judge Mahoney cites a case called Robert G. Weeks. It's a commission opinion at 56 SEC 1297, a 2003 case. Administrative Law Judge Kelly wrote the initial decision in that case.
During our briefing we will refer you to that case and discuss it further. We think that reinforces our position of the limited elements of a Section 5 violation, even if there are allegations that some of the transactions involved overseas accounts.
Going back, however, to the elements of the case, Pierce does not deny his resales of Lexington shares. Like the Division, he relies upon the transfer agent records showing the rapid transfer of shares to Newport Capital, and then to third persons or to brokerage accounts.
Indeed, Mr. Atkins, who is Pierce's friend, debtor, and witness, testified that on November 24, 2003 Pierce had to transfer and sell his initial exercise of 350,000 shares to try to circumvent the 10 percent ownership reporting limit.
Additionally, Pierce admits in his answer that Hypo Bank sold 400,000 shares for him in June 2004 for $2.7 million. So the resale element is satisfied.
The lack of registration element is also

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satisfied. Mr. Yu provided unchallenged testimony that the Form S-8 registration statements could have contained, but did not contain, a supplemental prospectus covering his resales.

Their expert witness today does not dispute that there was a supplemental prospectus opportunity in the Form S-8 registration statements, if they had elected to take advantage of it.

You have heard the testimony describing who had to take advantage of that or risk violating the securities laws, but there is no dispute that a supplemental registration component was always available under S-8 to register these shares.

Now, because Section 5 explicitly requires that every transaction must be registered or exempt, Pierce's resale had to be registered exempt, even if Lexington shares were supposedly registered under Form S-8. As a result, the second element is satisfied without looking at Pierce's state of mind.

But here Mr. Atkins' evasive testimony on cross-examination demonstrates Pierce's efforts to use Form S-8 in an abusive fashion. During his direct examination Atkins testified extensively about the need to consummate a transaction where ICI consultants exchanged their unpaid claims for S-8 shares to relieve Lexington of $1.2 million

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of debt during the reorganization that took place on November 19, 2003.

We made it very clear all throughout that unless those debts could be reassigned and satisfied by some other method he did not think he was going to get future financing for the company. It was an inherent part of the deal for it to go forward.

During cross-examination the Division asked Mr. Atkins very simple questions about whether the amount of the consultant's exchange claims for a number of certed S-8 shares had been determined before November 19, given how Mr. Atkins described the transaction. The simple answer to those questions should have been yes, of course. But Mr. Atkins chose to be evasive in response to those questions. He is not credible.

Atkins and Pierce obviously knew who would be getting the S-8 shares, and the number of shares they would be getting when this deal closed on November 19, 2003. Because of that fact Mr. Atkins and Mr. Pierce could have easily arranged to have a reoffer prospectus included in the Form S-8 registration statement, but deliberately chose not to.

Why? Simple. They did not want to disclose their background and resale plans, and chose instead to try to use Form S-8 for registering employee stock

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offerings.

Having abused Form S-8 he cannot rely upon it now for any purpose, and that is something we will discuss in the context of the Weeks case during our follow up briefing.

And again, their own expert, during cross-examination, acknowledges that even where the commission issues guidance and issues opportunities to use certain forms and registration, when it's abused, the commission steps in with enforcement actions to try to put a stop to that abuse.

You cannot try to circumvent the securities laws and expect to rely upon the registration provisions that are in the securities regulations.

Looking at the issue of whether or not interstate commerce was used, obviously it was. There is no dispute that Pierce's shares involve using interstate commerce to transfer the shares from Lexington to Mr. Pierce and then from Mr. Pierce to other holders, including Newport Capital, and from there it went to other parties and various brokerage accounts.

Mr. Atkins testified yesterday that some of the instructions he gave for the movement of the 350,000 shares came from his room in Zurich because he needed to get those shares moving to avoid the 10 percent reporting

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requirement. Obviously interstate commerce is used throughout this process. That is all the Division needs to show.

Since Mr. Pierce has argued that proof of his sales in the U.S. market is missing, let me address that argument. As Mr. Elliot-Square testified, he did not know how he would sell 300,000 Lexington shares because the market for them was, in his own words, thinly traded.

We have had the Court admit earlier the announcement of the company for listing in Germany on the Frankfurt stock exchange that takes place May 5, 2004. We have also provided you with some of the volume information for the Berlin and Frankfurt stock exchanges. I will just show that to you now just by way of example.

It's at the bottom of this sheet. This is the -- the last column from the end is the volume on the Berlin exchange during the first three weeks of June 2004. The volume is zero.

Turning now to the Frankfurt exchange for some of that same period, once again during these three weeks in June, other than 100 shares on June 17, the volume is zero.

The question is: With respect to the 400,000 shares that Mr. Pierce admits were sold during his -- in his answer during June of 2004, where were those 400,000

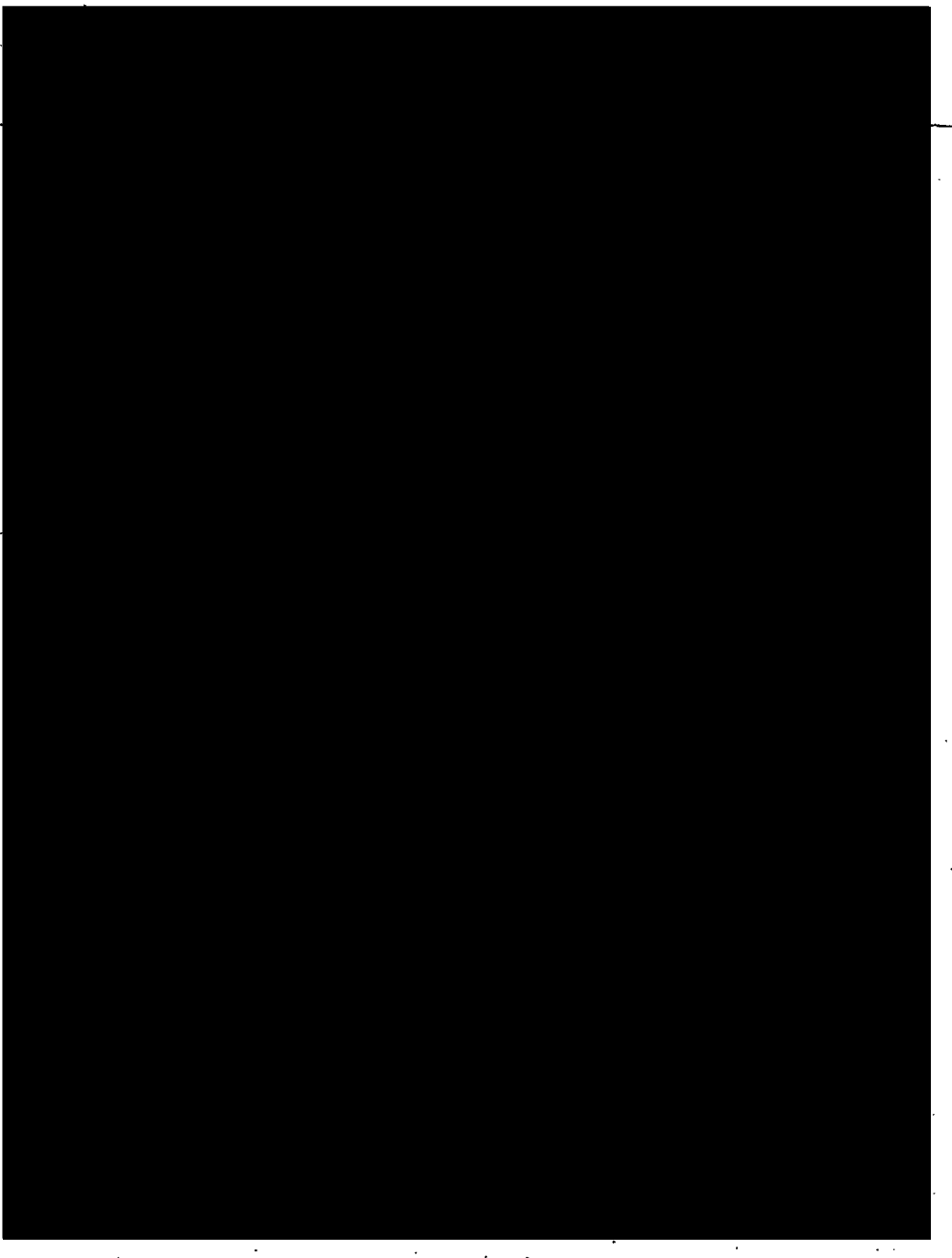
Exhibit 5

[redacted]

BP 00425
CONFIDENTIAL

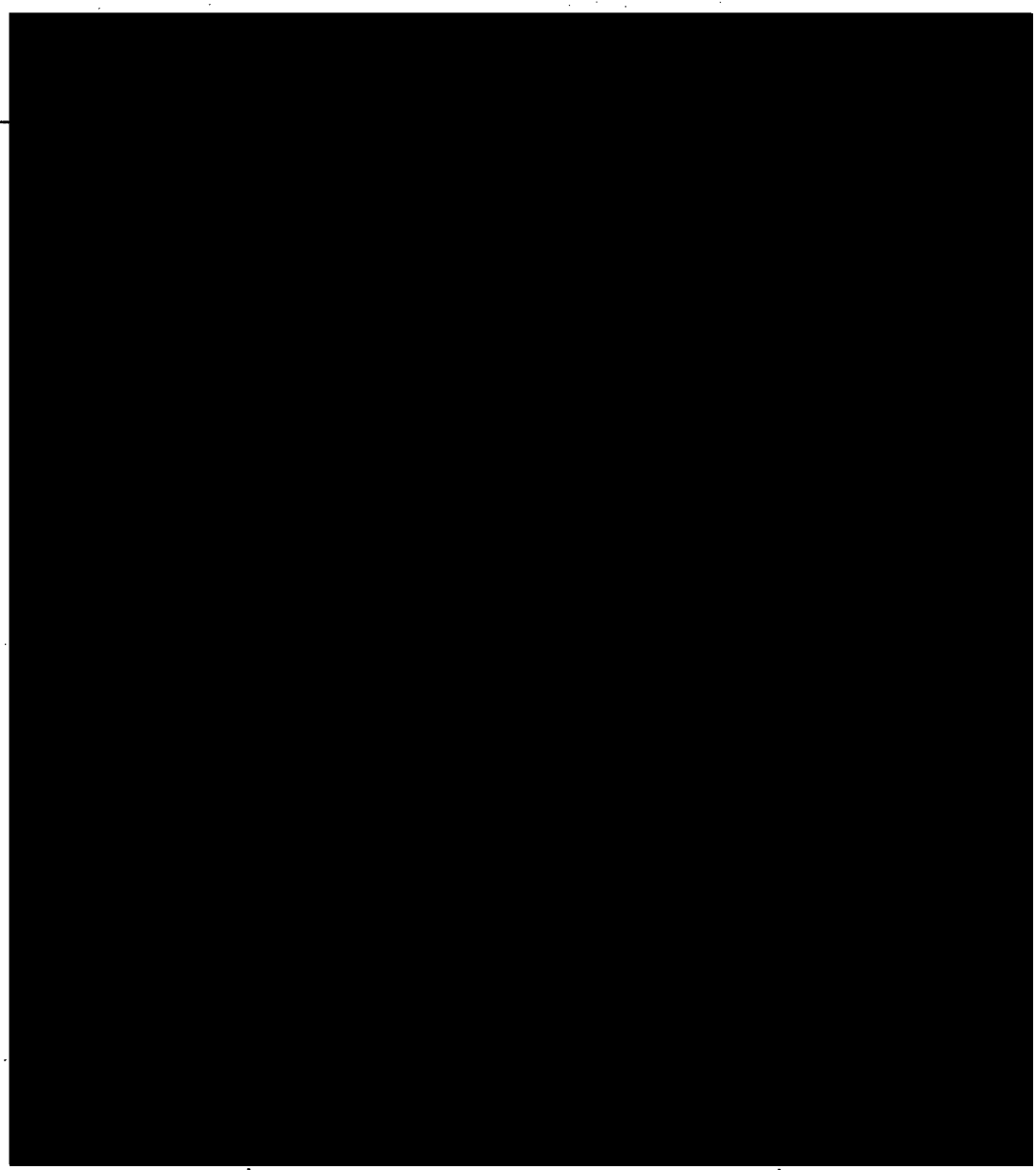
[redacted]

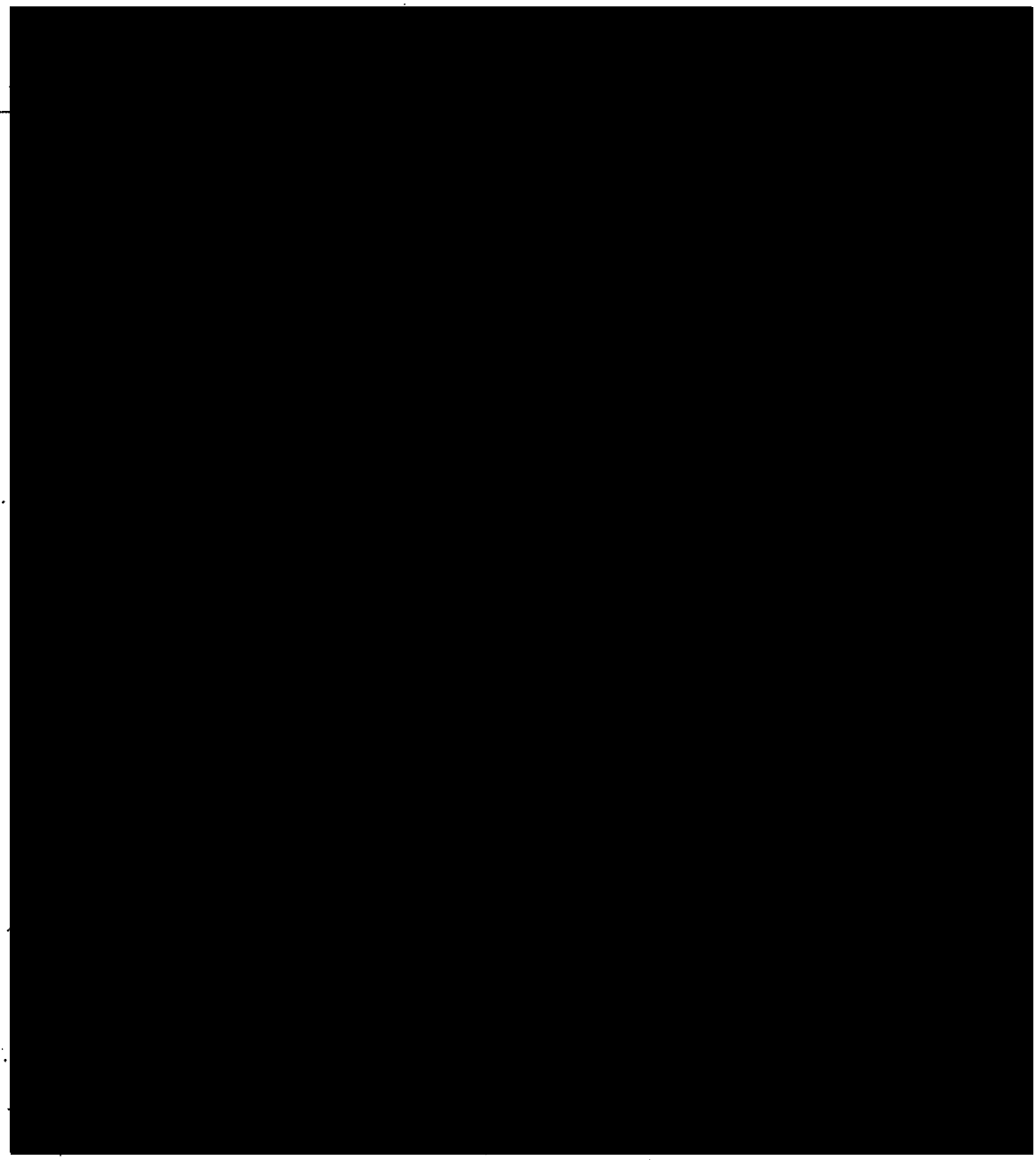
SEC-02567

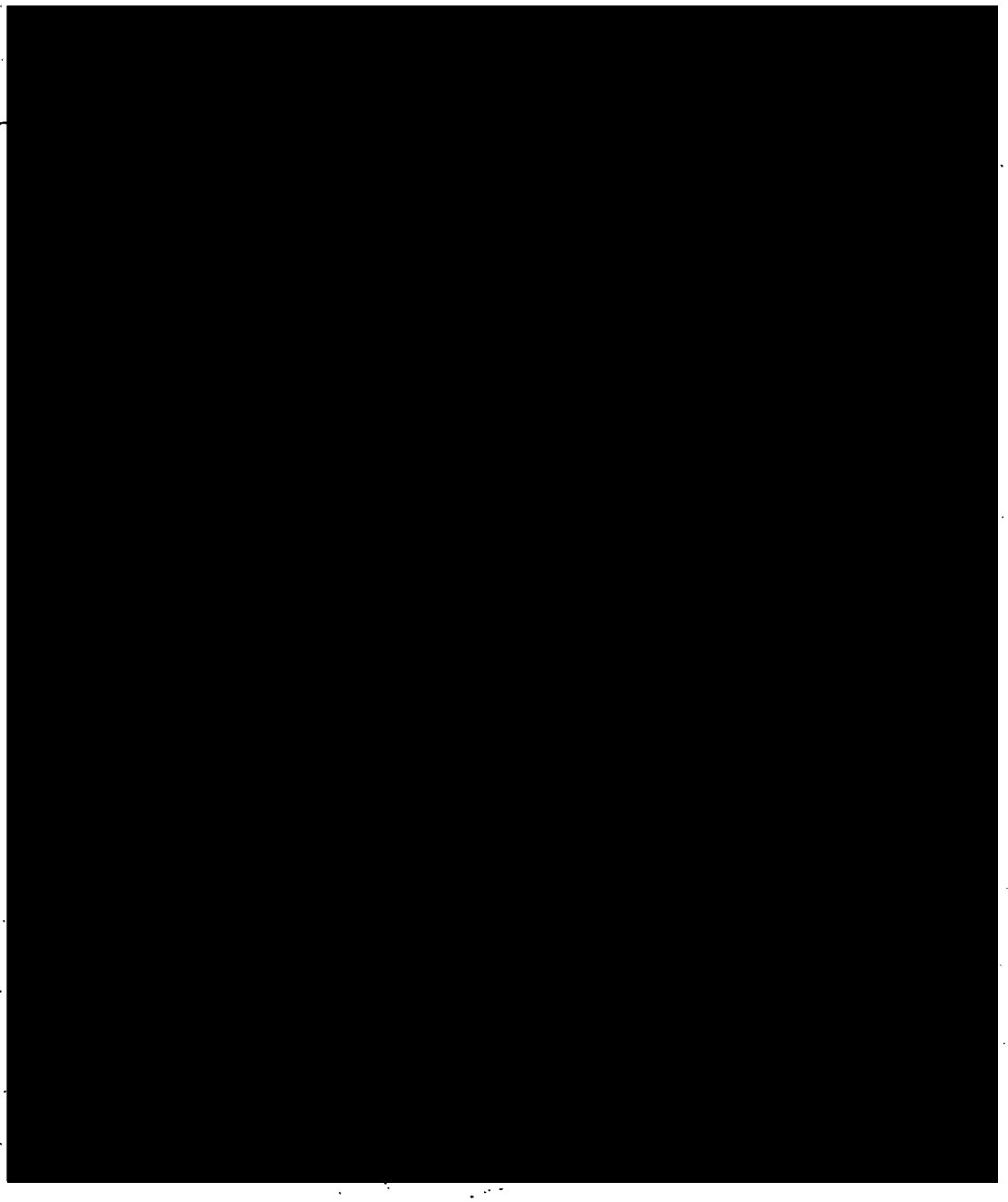


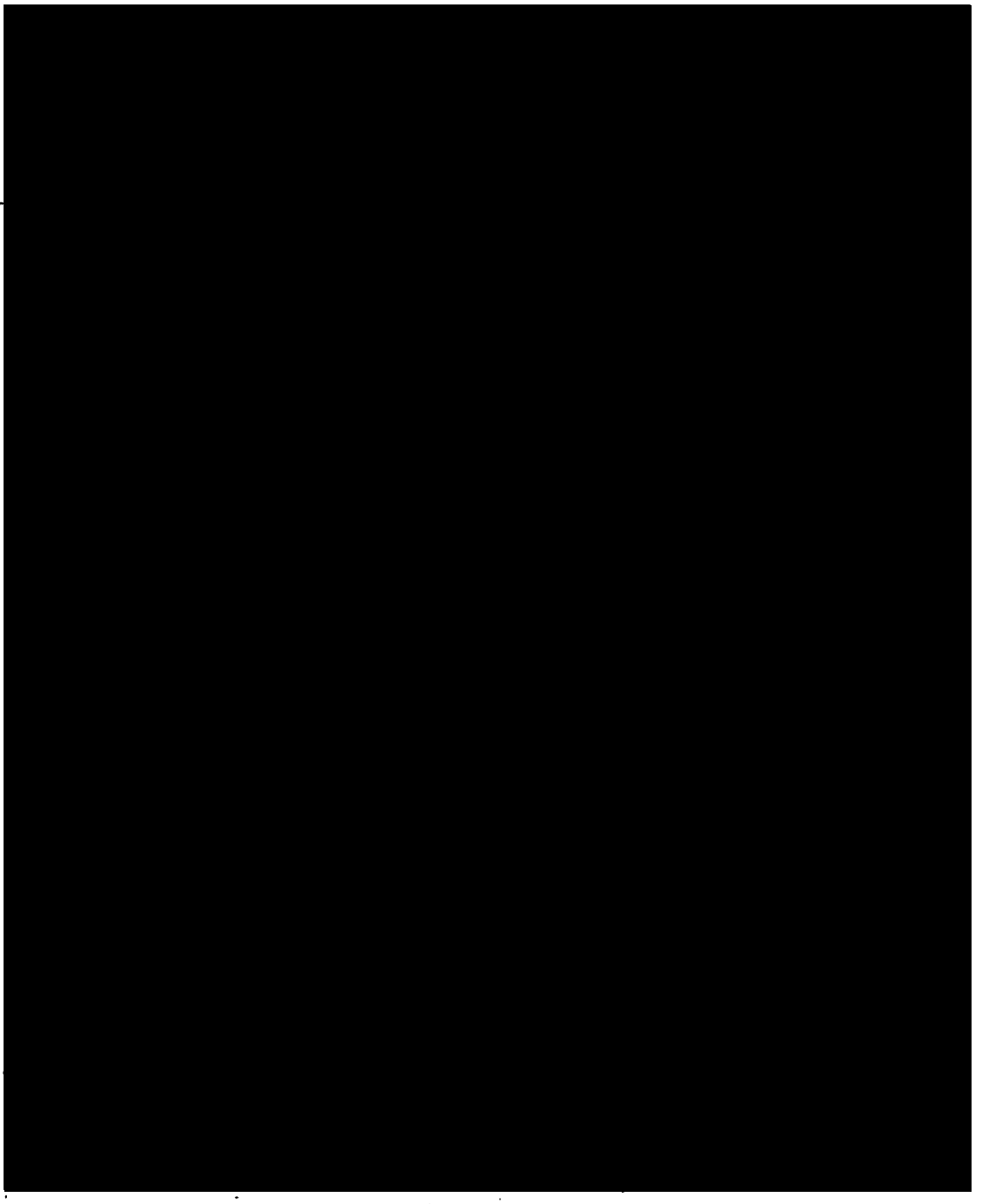
BP 00426
CONFIDENTIAL

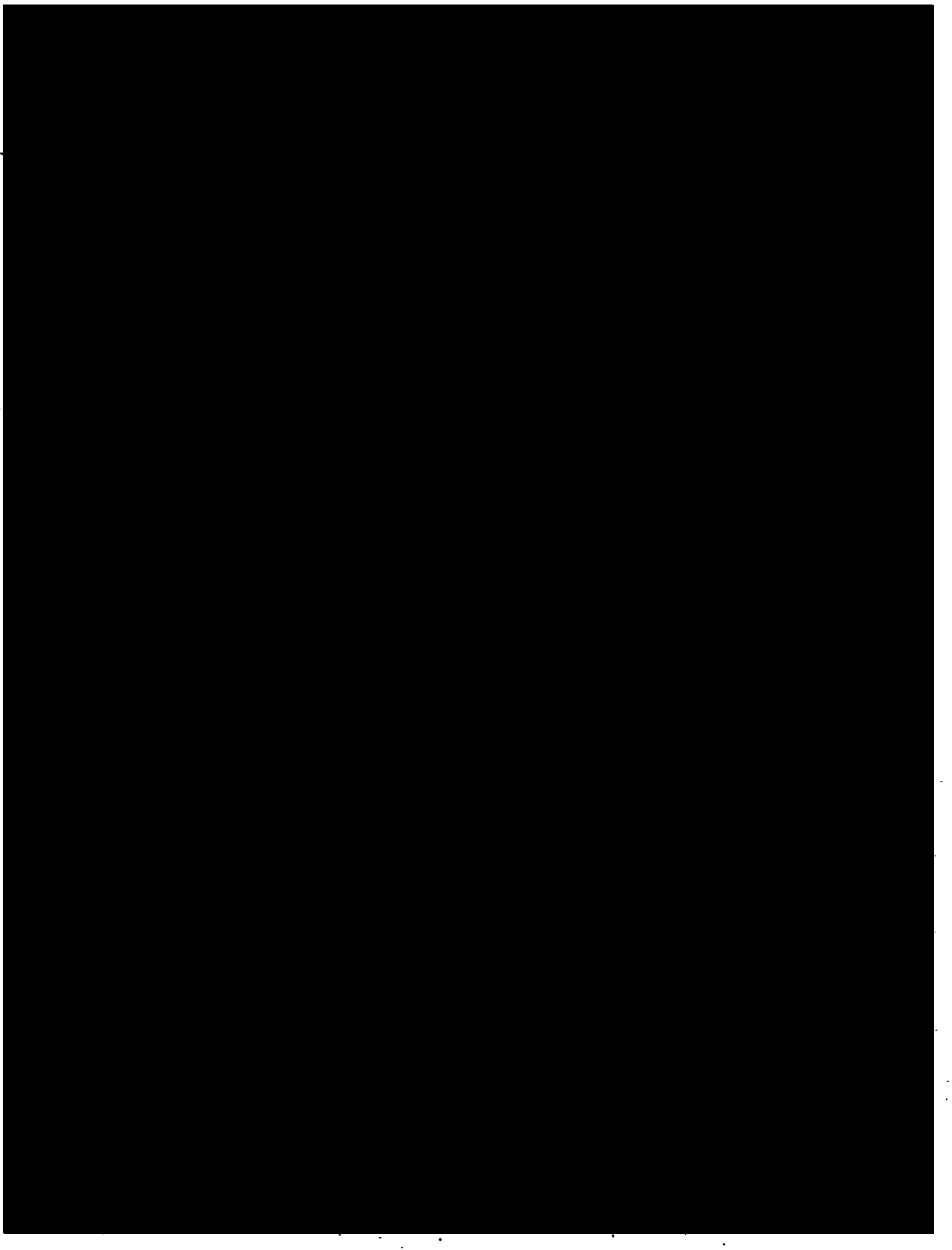
SEC- 02568

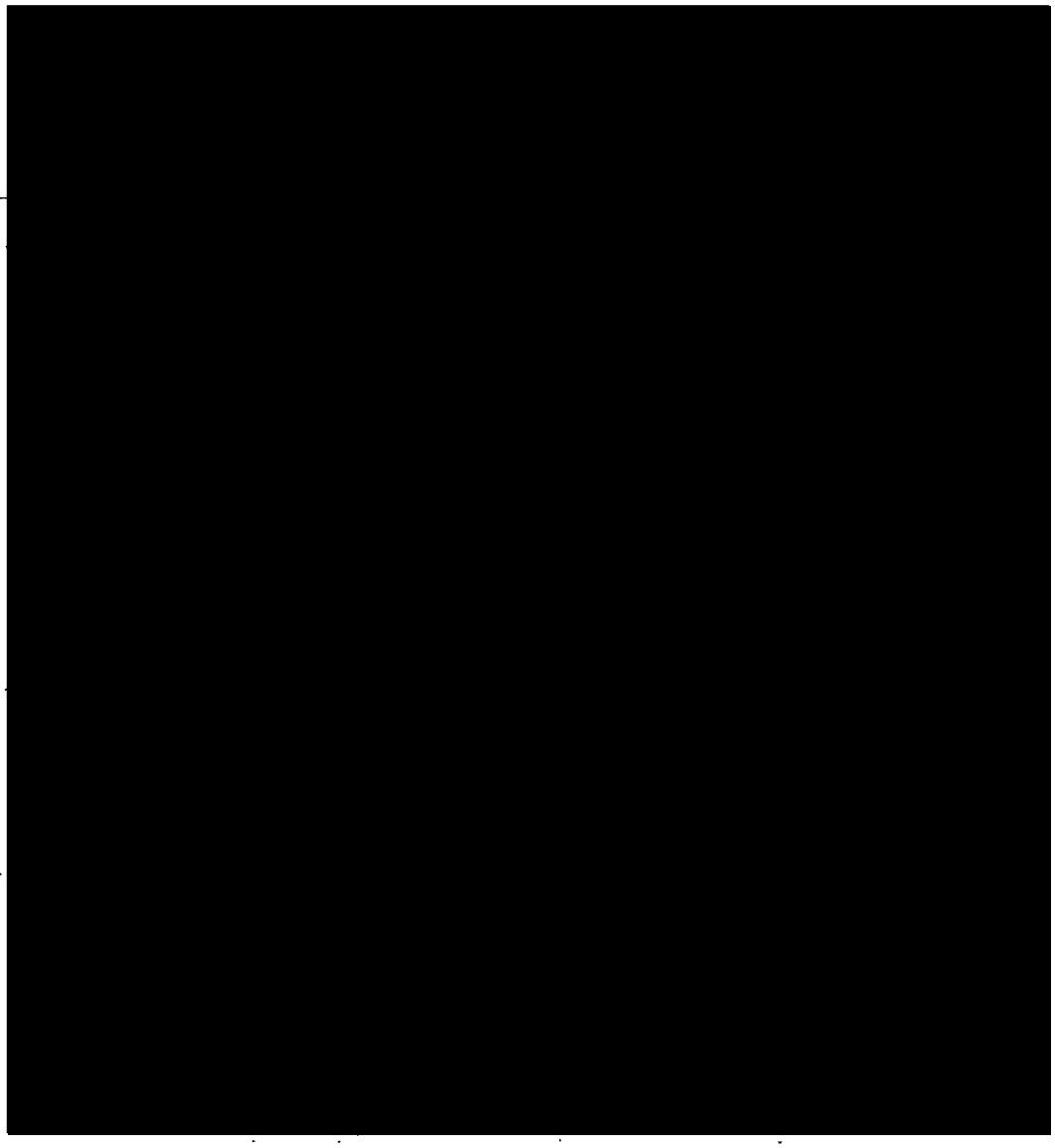










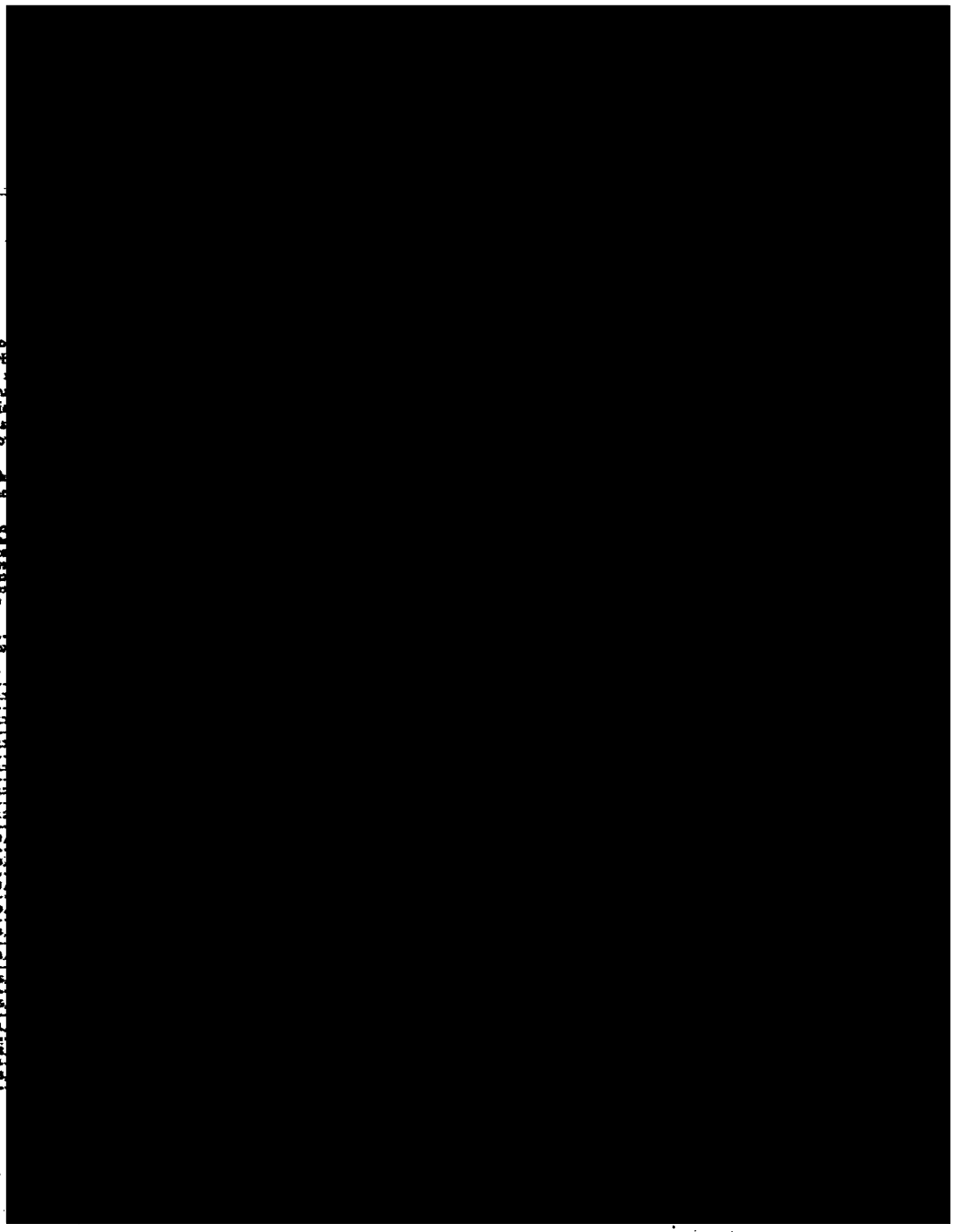


BP 00435
CONFIDENTIAL

SEC- 02577

BP 00436
CONFIDENTIAL

SEC- 02578



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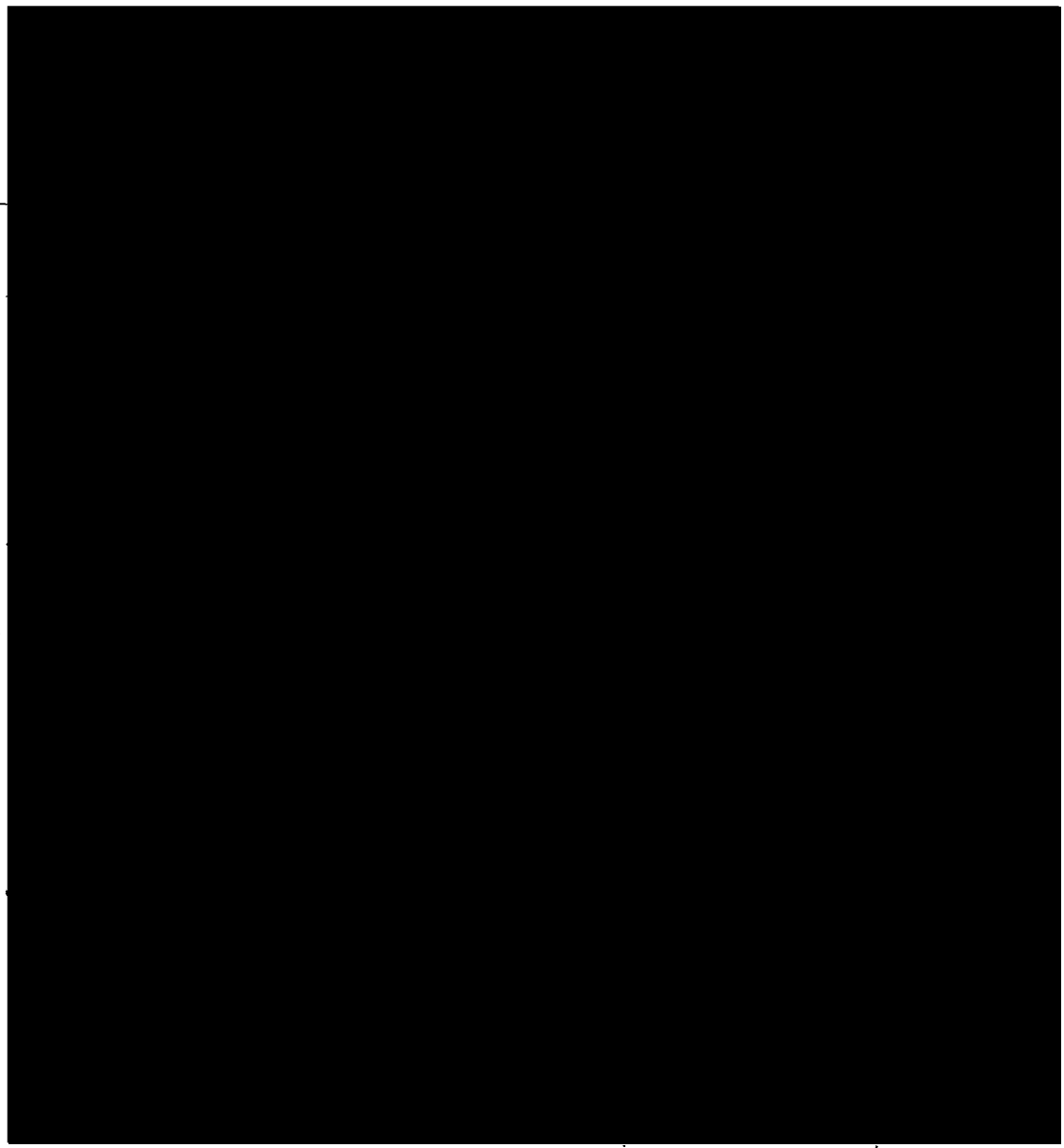
SEC- 02579



BP 00438
CONFIDENTIAL

SEC- 02580

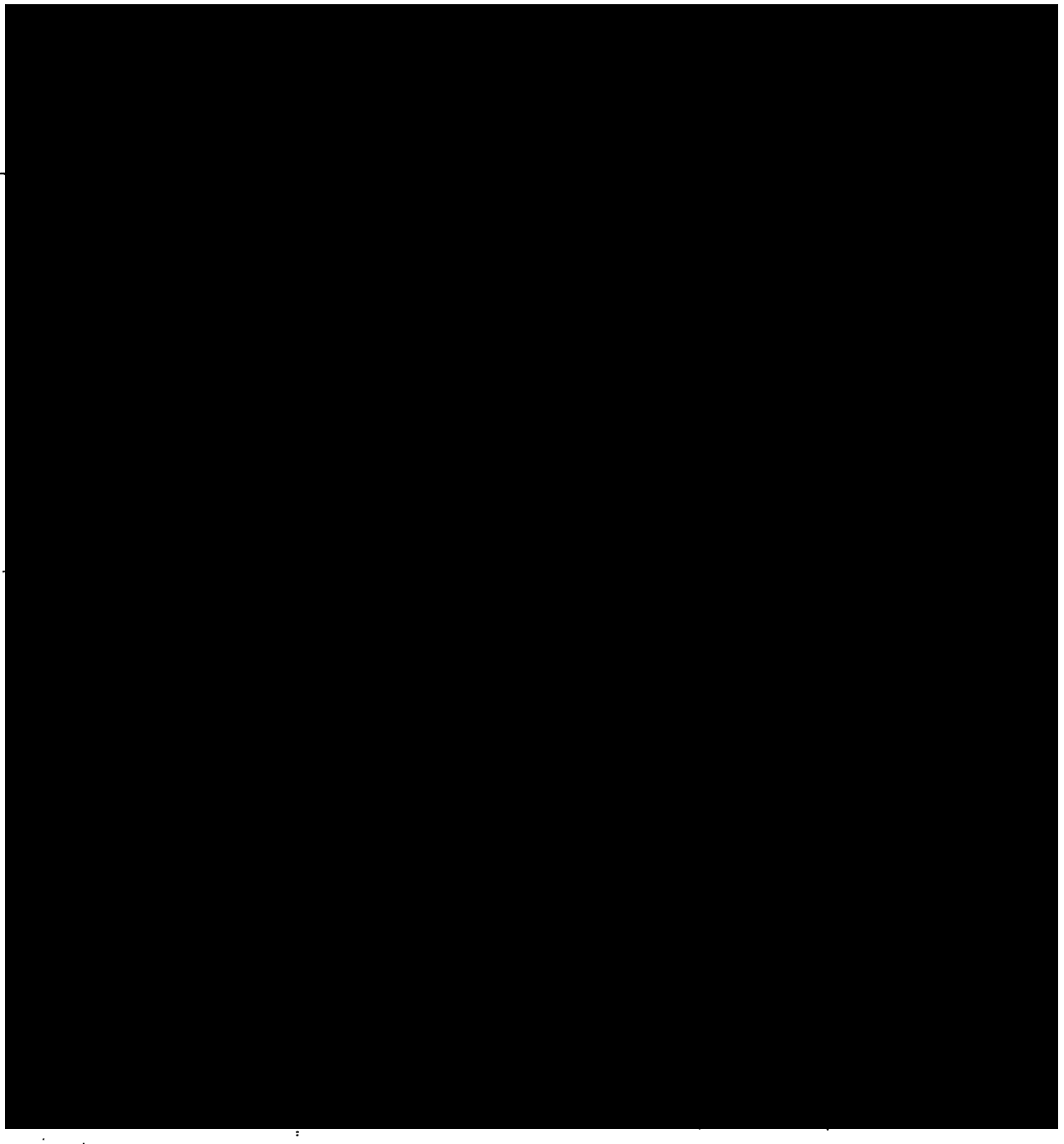


Exhibit 6

Exhibit 7

TRANSFER JOURNAL — PAGE 1
X-CLEARING CORPORATION — SEQUENCES 1

RECEIPT NUMBER: [redacted] 5/19/2004 ISSUE SECURITIES 495,000 SHARES/PAR VALUE

LEXINGTON RESOURCES INC (529561102) (LEXINGTON) RECEIVED: 05/19/2004

ENTITY: CREDITS:

| RICHARD ELLIOT-BOSHAM — TAXID:
| UPPER CAMBRIDGE HOUSE — [MISSING TIN]
| NORTHBROOK FARM — ACCT#: [redacted]
| BENTLEY, FARNHAM UNITED KINGDOM CB10 SE SHRS: 495,000
|
| 1 X 495,000 1000 495,000

Certificates cancelled ... Total: 0 Certificates issued ... Total: 495,000

See Trust 4896 5/19/04 (copy attached)

used this index = A50

[redacted]

Report Run On 5/19/2004 At 11:52am

SEC- 02692
TRON 04777

X-Clearing Corporation
535 16th Street Mall
Suite 810
Denver, CO 80202
P: 303-573-1000 F: 303-573-1088

Invoice

Date	Invoice #
5/19/2004	4896

Bill To
Lexington Resources, Inc c/o Grant Atkins 435 Martin St., Ste. 2000 Blaine, WA 98230

P.O. Number	Terms	Due Date	Project
	Net 15	6/3/2004	

Item	Quantity	Description	Rate	Amount
Issuance	1	Certificate Issuance: Richard Elliot-Square, 1 x 495,000 shares (Batch# 12047, effective 5/19/04)	25.00	25.00
Transfers	3	Transferred 1 certificate (#3652) for 16,600 common shares into 3 certificates: Kane Enterprises, Ltd., 2 x 5,000 shares ea. and 1 x 6,600 shares (Batch# 11971, effective 5/14/04)	25.00	75.00
			Total	$100.00

COPY

SEC- 02693

TRANSFER JOURNAL — PAGE 1
X-CLEARING CORPORATION — SEQUENCES 1

RECEIPT NUMBER: 1204 ✓ EFFECTIVE:05/19/2004 TRANSFER SECURITIES 495,000 SHARES/PAR VALUE

LEXINGTON RESOURCES INC (525961109) [LEXINGTON] RECEIVED: 05/19/2004

DEBITS:		CREDITS:		
RICHARD ELLIOT-SQUARE	TAXID:	KINGSBRIDGE SA	TAXID:	
UPPER CAMBRIDGE HOUSE	[MISSING TIN]	UPPER CARRIAGE HOUSE	[FOREIGN]	
NORTHBROOK FARM	[redacted]	BENTLEY	ACCT#:	[redacted]
BENTLEY, FARNHAM UNITED KINGDOM GU10 5E SHRS:	0	MR FARNHAM	SHRS:	495,000
		SURREY BC CANADA		
1 X 495,000 3500	495,000			
		1 X 485,000 3809		485,000
		1 X 10,000 3810		10,000
Certificates cancelled ... Total:	495,000	Certificates issued ... Total:		495,000

or see 1A 4900) 5/26/04 (pg attached)

Report Run On 5/19/2004 At 12:05pm

SEC- 02694

TDOM 04776

X-Clearing Corporation

535 18th Street Mall
Suite 810
Denver, CO 80202

P: 303-573-1000 F: 303-573-1088

Invoice

Date	Invoice #
5/25/2004	4900

Bill To
Lexington Resources, Inc c/o Grant Atkins 436 Martin St., Ste. 2000 Blaine, WA 98230

COPY

P.O. Number	Terms	Due Date	Project
	Net 15	6/10/2004	

Item	Quantity	Description	Rate	Amount
Transfers	2	Transfer of 1 stock certificate into 2 stock certificates as follows: Kingsbridge SA, 1 x 485,000 shares and 1 x 10,000 shares (Batch# 12048, effective 5/19/04)	25.00	50.00
Transfers	3	Transfer 1 stock certificate into 3 stock certificates as follows: Eigar East Finance Ltd., 1 x 50,000 shares; Jenkob Co. Ltd., 1 x 400,000 shares and 1 x 35,000 shares (Batch# 12048, effective 5/19/04)	25.00	75.00
		Total		$125.00

SEC- 02695

TRON 04780

TRANSFER JOURNAL — PAGE 1
X-CLEARING CORPORATION — SEQUENCE# 1

RECEIPT NUMBER: 12045 ✓ EFFECTIVE:05/19/2004 TRANSFER SECURITIES 485,000 SHARES/PAR VALUE

LEXINGTON RESOURCES INC (529541102) (LEXINGTON) RECEIVED: 05/19/2004

DEBITS:			CREDITS:		
KIMMERIDGE EA UPPER CARRIAGE HOUSE BENTLEY RG FARNHAM SURREY BC CANADA	TAXID: (FOREIGN) ACCT#[redacted] SHRS: 10,000		EIGER EAST FINANCE LTD PASEA ESTATE ROAD TOWN TORTOLA BRITISH VIRGIN ISLANDS	TAXID: (FOREIGN) ACCT#: [redacted] SHRS: 50,000	
1 X 485,000	3869	485,000	1 X 50,000	3813	50,000
			JENIMOR COMPANY LTD LUNDSTRASSE 126 SCHAAN/LIECHTENSTEIN 9494	TAXID: (FOREIGN) ACCT#: 202 SHRS: 435,000	
			1 X 400,000	3812	400,000
			1 X 35,000	3813	35,000
1 Certificates cancelled ... Total:		485,000	2 Certificates issued ... Total:		485,000

OK

See Invst 4900, 5/26/04 (copy attached)

Report Run On 5/19/2004 At 12:32pm

SEC- 02696

A078

X-Clearing Corporation
535 16th Street Mall
Suite 810
Denver, CO 80202
P: 303-573-1000 F: 303-573-1088

Invoice

Date	Invoice #
5/26/2004	4900

Bill To

Lexington Resources, Inc
c/o Grant Atkins
435 Martin St., Ste. 2000
Blaine, WA 98230

COPY

P.O. Number	Terms	Due Date	Project
	Net 15	6/10/2004	

Item	Quantity	Description	Rate	Amount
Transfers	2	Transfer of 1 stock certificate into 2 stock certificates as follows: Kingsbridge SA, 1 x 485,000 shares and 1 x 10,000 shares (Batch# 12048, effective 5/19/04)	25.00	50.00
Transfers	3	Transfer 1 stock certificate into 3 stock certificates as follows: Elger East Finance Ltd., 1 x 50,000 shares; Jenirob Co. Ltd., 1 x 400,000 shares and 1 x 35,000 shares (Batch# 12049, effective 5/19/04)	25.00	75.00
		Total		$125.00

SEC- 02697

TROM 04782

Scot[redacted]

From: [redacted]grant@granta[redacted]
Sent: [redacted]May 19, 20[redacted]
To: [redacted]m
Subj[redacted]ctions

[redacted]count
[redacted]nal M[redacted]

Please send be[redacted]

For all certifica[redacted]

Attention: Phil[redacted]
Hypo Alpe Adr[redacted]
Landstrasse 12[redacted]
Schaan 9494
Liechtenstein
Tel: 004 232350140

For Kingsbridge:

Attention: Stephanie Ebert[redacted]
Investor Comm[redacted]c.
435 Martin St[redacted]
Blaine WA, 98[redacted]

5446

5/19/2004

SEC- 02698

Grant Atkins

Date: May 19/04

Time: 9:30 Am

To: Scott

Company: X-CLR

Fax Number:

From: Grant @ LXRS

Total Pages Including This Cover: 26

Note:

Scott: Can you call me regarding this fax before you create the certificates

19/04

Certs will get sent to Blair after Cnr Distribution

Tel: (604) 602-1125 Fax: (604) 608-3399 E-Mail: grant@grantatkins.com

LEXINGTON RESOURCES, INC.

May 19, 2004

Mr. Rob Stevens
Global Securities Transfer Inc.
191 University Boulevard, Suite 401
Cherry Creek Office
Denver, CO 80206

RE: LEXINGTON RESOURCES, INC. (the "Company")

Dear Rob:

Please find attached Notice and Agreement of Exercise of Options. Please issue FREE TRADING SHARES that are in process of being registered under Form S-8 that were granted to International Market Trend AG, that have been assigned to the individual listed below for bonifide work conducted on the Company's behalf. A complete package of information including Stock Option Plan, Exercise Forms, Stock Option Plan Agreement, S-8 Registration, execution pages of agreements, assignment agreements outlining full and complete payment, BOD Minutes, and other necessary documentation will be forwarded to your offices by next week. Please issue the following shares in the following denomination:

Richard Elliot-Square 51 Gloucester Road London SW7 4QN England	495,000 Free Trading Common Shares in Lexington Resources, Inc.

Yours sincerely,
LEXINGTON RESOURCES, LTD.

Grant Atkins, *Director*

3808
495,000
1247

LEXINGTON RESOURCES, INC.

May 19, 2004

Mr. Rob Stevens
Global Securities Transfer Inc.
191 University Boulevard, Suite 401
Cherry Creek Office
Denver, CO 80206

RE: LEXINGTON RESOURCES, INC. (the "Company")

Dear Rob:

Please find attached FREE TRADING SHARES in the capital of Lexington Resources, Inc. that have been issued under Form S-8 that were granted to Richard Eliot-Square per the paperwork you already have on file, such shares were issued on the date of this letter. Pursuant to a private share sale agreement between Richard Eliot-Square and Kingsbridge SA dated May 19, 2004, please cancel the certificate listed as:

3809 - 3810
495,000
10048

Richard Eliot-Square 51 Gloucester Road London SW7 4QN England	485,000 Free Trading Common Shares in Lexington Resources, Inc.

Please issue the following shares in the following denomination:

Kingsbridge SA Upper Carriage House Northbrook Farm Bentley Nr Farnham Surrey GU10 5EU	485,000 Free Trading Common Shares in Lexington Resources, Inc.
Kingsbridge SA Upper Carriage House Northbrook Farm Bentley Nr Farnham Surrey GU10 5EU	10,000 Free Trading Common Shares in Lexington Resources, Inc.

Yours sincerely,
LEXINGTON RESOURCES, LTD.

Grant Atkins, *Director*

HQ Offices: 435 Martin Street, Suite 2000, Blaine, WA U.S.A. 98230
Toll Free: (888) 848-7377 Tel: (714) 474-3811 Fax: (888) 706-7827
Internet: Lexingtonkingsbridge.com E-Mail: investor@lexingtonkingsbridge.com

LEXINGTON RESOURCES, INC.

May 19, 2004

Mr. Rob Stevens
Global Securities Transfer Inc.
191 University Boulevard, Suite 401
Cherry Creek Office
Denver, CO 80206

RE: LEXINGTON RESOURCES, INC. (the "Company")

Dear Rob:

Please find attached FREE TRADING SHARES in the capital of Lexington Resources, Inc. Pursuant to a private share sale agreement between Kingsbridge SA and the entities listed below dated May 19, 2004, please cancel the certificate listed as:

Kingsbridge SA Upper Carriage House Northbrook Farm Bentley Nr Farnham Surrey GU10 5EU	485,000 Free Trading Common Shares in Lexington Resources, Inc.

12049

Please issue the following shares in the following denomination:

Elger East Finance Ltd. Paseo Estate Road Town, Tortola British Virgin Islands	50,000 Free Trading Common Shares in Lexington Resources, Inc.
Jenkrob Company Ltd. Landstrasse 128 Schaan 9494 Lichtenstein	400,000 Free Trading Common Shares in Lexington Resources, Inc.
Jenkrob Company Ltd. Landstrasse 128 Schaan 9494 Lichtenstein	35,000 Free Trading Common Shares in Lexington Resources, Inc.

Yours sincerely,
LEXINGTON RESOURCES, LTD.

Grant Atkins, Director

US Offices: 405 Main Street, Suite 1000, Irvine, WA U.S.A. 92618
Toll Free: (888) 848-7377 Tel: (714) 476-3611 Fax: (888) 766-7377
Internet: Lexingtonalbridge.com E-Mail: investor@lexingtonalbridge.com

SEC- 02702

TRON 04787

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT is dated to be effective this 18th day of May, 2004 by and between Investor Communications International, Inc., a Washington corporation ("Assignor") and Richard Elliot Square, an individual ("Assignee").

WHEREAS, Assignor and Lexington Resources, Inc., (formerly Intergold Corporation) a Nevada corporation ("Lexington") entered into prior consulting arrangements and as a direct result Lexington owes a significant amount of funds to the Assignor.

WHEREAS, pursuant to services rendered by Assignor by its employees and/or consultants under the terms of current and prior consulting agreements, and as of March 31, 2004, and prior services and advances made by the Assignor to Lexington, Lexington is indebted to Assignor in the approximate amount of at least $600,000.00 (the "Debt");

WHEREAS, Assignee has provided bona fide services to Lexington in connection with the terms and provisions of the prior and current consulting agreements and prior arrangements, which services did not include directly or indirectly promotion or maintenance of a market for Lexington's securities nor were rendered in connection with the offer or sale of securities in a capital-raising transaction;

WHEREAS, Assignor desires to assign to Assignee a portion of its right, title and interest in the Debt in the amount of $500,000.00, and Assignee is willing to accept the assignment by Assignor of its right, title and interest in the Debt in the amount of $500,000.00.

THEREFORE, the parties to this Assignment Agreement agree as follows:

1. Assignor assigns to Assignee its right, title and interest in the Debt in the amount of $500,000.00 in exchange for the settlement and release of the Receivable in the amount of $500,000.00.

2. Assignee agrees to accept such assignment in full settlement and satisfaction of the Receivable.

3. Assignee further agrees to release and forever discharge Assignor from any and all causes of action, debts, sums of money, claims and demands whatsoever, in law or in equity, related to the Receivable, which Assignee now or hereafter can, shall or may have.

4. This Assignment Agreement shall be effective as of May 18, 2004 and shall be binding upon and inure to the benefit of the parties hereto and their respective assigns and successors.

The foregoing may be signed in counter parts, each of which so executed shall be deemed to be an original including each such copy sent by facsimile transmission, and such counterparts together shall constitute but one and the same instrument.

INVESTOR COMMUNICATIONS INTERNATIONAL, INC.

By: _____
Director, President

_____
Richard Elliot, Esquire

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT is dated to be effective this 18th day of May, 2004 by and between Richard Elliot Square, an individual ("Assignor") and Lexington Resources, Inc., a Nevada corporation ("Assignee").

WHEREAS, Assignee and Investor Communications International, Inc. ("ICI") has provided services to ICI for the sole and direct benefit of the Assignee;

WHEREAS, pursuant to services rendered by ICI by its employees and/or consultants under the terms of the prior and current consulting arrangements, and as of May 18, 2004, Assignee is indebted to ICI in at least the approximate amount of $600,000 (the "Debt");

WHEREAS, ICI and Assignor entered into an assignment agreement dated May 18, 2004 (the "ICI Assignment Agreement"), pursuant to which ICI assigned a portion of its right, title and interest in the Debt to Assignor in satisfaction and release of a debt in the amount of $495,000.00 due and owing to Assignor relating to bona fide services performed by Assignor under the terms of prior and current consulting arrangements (the "Receivable");

WHEREAS, Assignee adopted and approved a stock option plan dated June 23, 2003 and as amended and approved by the Board of Directors of the Assignee on November 19, 2003 and December 31, 2003 (the "Stock Option Plan");

WHEREAS, Assignee prepared a Form S-8 registration statement under the Securities Act of 1933, as amended, which was filed on April 23, 2004 and effective with the Securities and Exchange Commission on April 23, 2004 (the "Registration Statement"), pursuant to which 500,000 shares of common stock under the Stock Option Plan were registered;

WHEREAS, Assignee and International Market Trend AG ("IMT") entered into a stock option plan agreement dated February 22, 2004 pursuant to which Assignee granted IMT and/or its employees or consultants 495,000 stock options exercisable into 495,000 shares of common stock at $1.00 per option;

WHEREAS, Assignor executed a notice and agreement of exercise of option dated May 18, 2004 pursuant to which Assignor exercised 495,000 stock options at the exercise price of $1.00 per option to acquire 495,000 shares of the common stock of Assignee (the "Notice and Agreement of Exercise of Option");

WHEREAS, Assignor desires to assign to Assignee the Receivable as consideration for cash payment of the options pursuant to the terms of the Notice and Agreement of Exercise of Option; and

WHEREAS, the board of directors of Assignee pursuant to resolutions dated May 18, 2004 has acknowledged the ICI Assignment Agreement to be effective and has authorized the issuance

of 495,000 shares of common stock to Assignor in accordance with the terms of the Notice and Agreement of Exercise of Option.

THEREFORE, the parties to this Assignment Agreement agree as follows:

1. Assignor assigns to Assignee its right, title and interest in the Receivable as consideration for cash payment of the 495,000 stock options exercised at $1.00 per option to acquire 495,000 shares of the common stock of Assignee pursuant to the terms of the Notice and Agreement of Exercise of Option.

2. Assignee agrees to accept such assignment as cash payment for the 495,000 stock options exercised by Assignor at $1.00 per option to acquire 495,000 shares of the common stock of Assignee pursuant to the terms of the Notice and Agreement of Exercise of Option.

3. Assignee further agrees to issue 495,000 shares of its common stock in the name of Assignor in accordance with the provisions of the Stock Option Plan and Notice and Agreement of Exercise of Option.

4. This Assignment Agreement shall be effective as of May 18, 2004.

The foregoing may be signed in counter parts, each of which so executed shall be deemed to be an original including each such copy sent by facsimile transmission, and such counterparts together shall constitute but one and the same instrument.

Richard Ellins, Assignor

Lexington Resources, Inc.

By: _____
Grant Atkins, Director

Exhibit 8

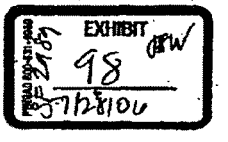
Message ID # 1362635 - Archived on Nov 1, 2004 6:02:16 AM

Subject: Fw: trades 10/29/04
From: Brent Pierce <brent@brentpierce.com>
To: Nicholas Thompson <nthompson@vfinance.com>
Sent Date: Nov 1, 2004 6:00:18 AM

Message Body Text:

----- Original Message -----
From: "Brent Pierce" <brent@brentpierce.com>
To: "Philippe Mast" <philippe.mast@hypo-alpe-adria.li>
Cc: <phil.mast@bluewin.ch>
Sent: Saturday, October 30, 2004 9:27 AM
Subject: Fw: trades 10/29/04

> Please book the following trades to accounts as follows:
> -LXRS purchase 15,000 CANACCORD to Newport
>
> -LXRS sale 15,000 Vfinance to Jenirob
> -LXRS Purchase 10,000Vfinance to Eurotrade
> -RVTIF purchase 3500 Vfinance to Newport
> -MIVT sales 5000 Vfinance to Eastern
> 8000 Vfinance to Jenirob
> 2000 Vfinance to Newport
> 5000 Vfinance to Eurotrade
> Please fax updates forthe following:
> Newport
> Jenirob
> Eastern
> Eurotrade
> Thanks BP
> ----- Original Message -----
> From: "Nicholas Thompson" <fininfo@blast.net>
> To: "Brent Pierce" <brent@brentpierce.com>
> Sent: Friday, October 29, 2004 1:27 PM
> Subject: trades 10/29/04
>
>
> My home number [redacted]
>
>
> b 3500 rvtif 1.1486
> s 15000 lxrs 2.508
> b 10000 lxrs 2.418
> s 20000 mivt .22
>
>
> I didn't send it to Phil yet.
>



> Talk to you over the weekend.
>
> nick
>
>
>

Exhibit 9

Exhibit 10

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13109

In the Matter of **Gordon Brent Pierce,** **Respondent.**	**Administrative Law Judge** **Carol Fox Foelak**

DIVISION OF ENFORCEMENT'S MOTION FOR THE ADMISSION OF NEW EVIDENCE

Pursuant to Rule 154 of the Commission's Rules of Practice, 17 C.F.R. § 201.154, the Division of Enforcement ("Division") moves for the admission of new evidence which only became available after the hearing in this matter. The new evidence, which is material to respondent Gordon Brent Pierce's liability and the amount of disgorgement Pierce should be ordered to pay, was received by the Division on March 10, 2009 from a foreign securities regulator, the Liechtenstein Finanzmarktaufsicht ("FMA"), pursuant to a request that was first made in 2006. The evidence consists of account documents and Lexington stock trading summaries for accounts at Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank") that were controlled by Pierce, directly or through his wife and daughter. The evidence shows that Pierce's wife and daughter were the beneficial owners of Lexington's controlling shareholder, Orient Explorations, Inc. ("Orient") – even though Pierce testified under oath that neither he nor his wife held any interest in Orient, and argued in these proceedings that he is thus not an affiliate of Lexington. The evidence further shows that Pierce received millions of dollars in additional illegal proceeds from sales of Lexington stock through offshore entities under his control. Pierce refused to produce these documents to the Division, and Pierce's appeals in Liechtenstein further delayed the FMA's production of them to the Division.

A. **The Rules for Administrative Proceedings Permit the Hearing Officer to Admit Additional Evidence After the Hearing.**

Under the Commission's rules, the hearing officer has the ability to accept documentary or other evidence as may be required for a full and true disclosure of the facts. 17 C.F.R. § 201.326. Also, the hearing officer may, for good cause, permit for extensions to the periods set forth in the Commission's rules for accepting the parties' proposed findings of fact and conclusions of law. In short, while the rules do not specifically provide for the acceptance of evidence after the hearing is concluded, the rules do not prohibit it and they allow the hearing officer to admit such evidence, when it is necessary for a complete record of the facts.[1]

As described below, the new evidence offered by the Division is highly relevant and had been requested by the Division long before the institution of these proceedings. The delay in receiving the documents was through no fault of the Division, but through Pierce's refusal to produce them and through delays in Liechtenstein, including appeals by Pierce, that prevented the foreign authorities from producing them sooner.

B. **The New Evidence Was Requested by the Division before these Proceedings.**

On October 19, 2005, the Division requested from Pierce, among other things, all documents relating to transactions of any kind in Lexington stock. See Declaration of Steven D. Buchholz filed herewith, at ¶ 2 and Exh. A (Division's original document request to Pierce). The Division also requested all statements from securities accounts for which Pierce exercised control or held a beneficial interest. Id. After the Commission issued a formal order of investigation on May 4, 2006, the Division issued a subpoena to Pierce requiring production of the same documents covered by the October 2005 request. Id. at ¶ 3 and Exh. B. In response to the subpoena, Pierce produced copies of statements from his personal account at Hypo Bank

[1] The Commission's rules do provide a specific procedure for submitting additional evidence after the filing of a petition for review of an Initial Decision, but before the Commission's issuance of a decision on appeal. 17 C.F.R. § 201.452. Under Rule 452, such a motion "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." See, e.g., In the Matter of Vindman, Initial Decision at 17 and nn. 49-51 (Admin. Proc. File No. 3-11247, Apr. 14, 2006) (Commission Opinion) (admitting new evidence that satisfied the requirements of Rule 452). If the rules permit the admission of additional evidence after appeal of an Initial Decision, the same showing should permit the hearing officer to admit additional evidence before an Initial Decision.

showing sales of Lexington stock in June 2004 alone that generated proceeds of $2.7 million. See Div. Exh. 18 (previously admitted into evidence). Pierce refused to produce any account records or other responsive documents of offshore companies under his control, including Newport Capital Corp. ("Newport"). See Buchholz Decl. at ¶ 4; see also Div. Exh. 62 at 42:18 – 46:20 (previously admitted excerpts of Pierce's investigative testimony, including repeated objections by Pierce's counsel based on alleged privacy protections in Liechtenstein, Switzerland, and other offshore jurisdictions where the companies were formed or held accounts). Even after Pierce filed a belated Schedule 13D on July 25, 2006 disclosing his personal Lexington stock holdings and those of his wife Dana Pierce, Newport, and three other offshore companies, Pierce refused to produce documents or provide information of the offshore entities related to Lexington stock transactions that Pierce himself directed. See Div. Exh. 15 (previously admitted).

As the Division's evidence during the hearing established, Hypo Bank sold millions of Lexington shares through its omnibus account at vFinance Investments, Inc. in 2004 and 2005, including sales that generated net proceeds of more than $8 million in June 2004 alone. See Div. Exhs. 21, 23-24, and 49 (all previously admitted). During the investigation, the Division requested records of Hypo Bank through the Liechtenstein FMA, including records that would identify the customers for which Hypo Bank was making those sales. See Buchholz Decl. at ¶ 5. Given Pierce's refusal to provide certain requested records, this alternative was among the few avenues available, although it became a very difficult means. The Division first attempted to obtain documents of Hypo Bank through the FMA in late 2006, but was informed that the FMA could not obtain the documents for the Division. See Buchholz Decl. at ¶ 6. 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. Id. at ¶ 7. As a result, the Division sent an additional request for documents to the FMA on February 20, 2008. Id. On July 31, 2008, when these proceedings were instituted, the FMA had not provided any materials in response to the Division's request. Id. at ¶ 8.

Finally, on December 10, 2008, Division staff in the San Francisco Regional Office learned that the FMA had been given additional powers and received a partial production of documents responsive to the Division's February 2008 request. Id. at ¶ 9. This production included responsive documents for only some of the Hypo Bank accounts that traded in Lexington stock. Id. at ¶ 10. Notably, 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. Id. at ¶ 11. The Division produced all of the FMA documents to Respondent on December 18, 2008. Id. at ¶ 12. The FMA informed the Division that the other Hypo Bank accountholders had filed appeals in Liechtenstein to prevent the FMA from providing the information to the Division, and that further responsive documents could not be produced until the appeals were resolved. Id. at ¶ 10.

On March 6, 2009, the Division learned that some of the appeals in Liechtenstein had been resolved and that the FMA would make another partial production of information for additional Hypo Bank accounts. Id. at ¶ 13. Division staff in the San Francisco Regional Office received these documents on March 10, 2009, and produced them to Respondent on March 13, 2009. Id. at ¶ 14. This production, unlike the December 2008 production, included documents related to Pierce's personal account at Hypo Bank, as well as Hypo Bank accounts of several offshore companies, including Newport, for which Pierce is identified as the beneficial owner and person authorized to conduct transactions in the accounts. Therefore, Pierce must have been one of the accountholders who appealed to prevent the FMA from producing responsive information to the Division.

C. The New Evidence Shows that Pierce's Wife and Daughter Owned the Controlling Block of Lexington Stock.

The March 2009 FMA production included certain records from an account held at Hypo Bank in Orient's name. In response to the Division's subpoena, Pierce did not produce any documents related to Orient. Orient is an offshore company that had been the majority shareholder of Lexington Oil and Gas and became the controlling shareholder of Lexington Resources on November 19, 2003 when it received 2,250,000 Lexington shares as a result of the

reverse merger, just over 50 percent of Lexington's outstanding stock. On January 21, 2004, Orient acquired another 750,000 shares, which increased its ownership stake to 64 percent. See Div. Exh. 55 at 8-9, 165 (previously admitted Lexington Form 10-K for fiscal year 2003); Div. Exh. 51 (previously admitted chart showing Lexington's total balance of share outstanding). Orient continued as Lexington's largest shareholder at least through 2006. See Div. Exh. 58 at 78 (previously admitted Form 10-K for 2006). Lexington's Form 10-K for 2003 attached a copy of the share exchange agreement by which Orient received the controlling stake in Lexington, which listed Orient's address as Pierce's personal address in the Cayman Islands. See Div. Exh. 55 at 165. Lexington's 10-K stated that Orient's sole shareholder was Meridian Trust, but did not disclose the beneficiaries of Meridian Trust. Id. at 71.

In his investigative testimony, Pierce admitted that the address listed for Orient was his personal address in the Cayman Islands, but stated that Lexington made an error in listing Orient as sharing Pierce's personal address. See Buchholz Decl. at ¶ 15 and Division's Exh. 78 attached thereto but not yet admitted, at 405:2-25 (additional excerpts from Pierce's investigative testimony). Pierce denied ever having an ownership interest in Orient or in the Lexington stock held by Orient:

> **Q: Have you ever had any ownership interest whatsoever in any of the stock that's referenced in the filing, the 2,250,000 shares?**
>
> **A: Absolutely not.**
>
> **Q: Has your wife?**
>
> **A: No.**

Id. at 406:1-6. Pierce testified that his current wife's name was Dana Marie Pierce and that he had a daughter named [redacted]. Id. at 12:1-5 and 13:19-24.

The documents for Orient's Hypo Bank account produced by the FMA in March 2009 include a statement of beneficial ownership signed by the offshore director of Orient. That document states that the sole shareholder of Orient is Canopus TCI, Ltd. as trustee of Meridian Trust, and that the beneficiaries of Meridian Trust are Dana Marie Pierce and [redacted]. See Buchholz Decl. at ¶ 16 and Division's Exh. 79 attached thereto but not yet admitted, at page

SEC 158416. It also states that Meridian Trust was created on July 25, 2003. Id. at page SEC 158418. In addition, the March 2009 production included email correspondence from Pierce to his primary contact at Hypo Bank requesting documents related to transactions in Orient's account. See Buchholz Decl. at ¶ 20 and Division's Exh. 83 attached thereto but not yet admitted, at page SEC 159147.

D. The New Evidence Shows that Pierce Received Millions of Dollars In Additional Illegal Proceeds from Lexington Stock Sales.

The OIP alleges that Pierce orchestrated an illegal distribution of Lexington stock, that Pierce personally received at least $2.7 million in his personal account at Hypo Bank as a result of the illegal distribution, and that in total approximately $13 million in proceeds were generated by stock sales through Hypo Bank (including the $2.7 million in Pierce's personal account) as a result of Pierce's illegal distribution of Lexington stock. OIP ¶¶ 14-16. Pierce did not produce any documents related to Lexington sales through Hypo Bank by offshore companies under his control. Therefore, at the Hearing Officer's request and based on the Hypo Bank information available to it at the time, the Division stated in its Motion for Summary Disposition filed on December 5, 2008 that it was seeking $2,077,969 in disgorgement from Pierce, based on the portion of the $2.7 million in Lexington sales in his personal account at Hypo Bank that the Division traced to his illegal distribution of purported S-8 stock.

The FMA production in March 2009 shows that Pierce received far more than just the $2.1 million in illegal proceeds from his personal Hypo Bank account. Indeed, he made millions of dollars in additional unlawful profits by selling Lexington shares through Newport and other offshore companies that had accounts at Hypo Bank. See Buchholz Decl. at ¶¶ 17-25 and Division's Exhs. 80-88 attached thereto but not yet admitted (account documents and trading summaries showing sales of Lexington stock in Hypo Bank accounts controlled by Pierce). For example, the FMA documents include a summary of Newport's Lexington sales that show sales of more than 1.2 million Lexington shares between February and June 2004, when Lexington's stock price was steadily rising from $3.00 to more than $7.00 per share. Id. at ¶ 19 and Division's Exh. 82 attached thereto, at pages SEC 159071-73. In June 2004 alone, when

Lexington's stock price was at its peak, Pierce sold nearly 400,000 shares through the Newport account (in addition to selling 400,000 shares through his personal account). Id. It appears that the vast majority of these shares were issued by Lexington purportedly pursuant to Form S-8 registration statements, transferred to Newport or the other offshore companies, and then sold by Pierce into the open market through Hypo Bank.[2] Therefore, it appears that Pierce received millions of dollars in additional ill-gotten gains from sales of Lexington shares that were part of his illegal stock distribution.

E. The New Evidence Is Highly Relevant and Should Be Admitted.

The new evidence is material to these proceedings in two different respects. First, it shows that Pierce's wife and daughter were the beneficial owners of Orient, Lexington's controlling shareholder, contrary to the testimony of Atkins and the statements made by Pierce's counsel at the hearing that Pierce had no connection to Orient. See Transcript at 323:23-324:6; 607:5-25. This further rebuts Respondent's argument that he was not an affiliate of Lexington and therefore qualified for an exemption from registering his stock sales. In light of the new evidence, there can be no doubt that Pierce was an affiliate of Lexington and had the ability to, and in fact did, control Lexington and its president Grant Atkins. Atkins admitted at the hearing that he never consulted with Orient or received any direction or input from Orient even though it was Lexington's majority shareholder; now it is clear that Orient simply represented a control block of Lexington's shares that gave Pierce the ability to direct Lexington and Atkins. See Transcript at 456:2-12; see also In the Matter of Dudchik, Initial Decision at 15 (Admin. Proc. File No. 3-12943, Dec. 5, 2008) (ALJ Mahony) (finding that person who sold stock was an affiliate, despite his attempt to create the appearance that he was not a control person and affiliate by having the company issue a control block of shares to his son).

Second, the new evidence shows that Pierce received millions of dollars in additional illegal proceeds from his sales of Lexington stock through accounts at Hypo Bank in the names

[2] The Division is currently analyzing the new evidence and will include with its post-hearing brief a new chart, which will be labeled as proposed Division's Exhibit 89, calculating the exact amount of additional disgorgement that it intends to seek from Respondent as a result of the new Hypo Bank evidence.

of offshore companies that he controlled. For example, through the Newport account at Hypo Bank, Pierce sold approximately 1.2 million shares between February and June 2004. Most of these shares had been issued by Lexington purportedly pursuant to registration statements on Form S-8, like the shares that Pierce sold in his personal Hypo Bank account for $2.7 million, as previously described at the hearing. Therefore, the new evidence shows that disgorgement far in excess of $2.1 million is warranted against Pierce in these proceedings.

In addition to being highly relevant, the new materials received from Hypo Bank had been requested by the Division long before the institution of these proceedings. The delay in the Division's receipt of the documents was due to Pierce's refusal to produce them and delays in Liechtenstein, including appeals by Pierce, rather than through any fault of the Division. Therefore, the Division can make even the showing required under Rule 452, which would permit the admission of additional evidence during appeal of an Initial Decision.

Accordingly, the Division hereby respectfully moves the Law Judge to admit Division's proposed Exhibits 78-89.

Dated: March 18, 2009

Respectfully submitted,

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Exhibit 11

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 PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW AGAINST RESPONDENT GORDON BRENT PIERCE

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In accordance with Rule 340 o f the Commission's Rules of Practice, the Division of Enforcement submits these Proposed Findings of Facts and Conclusions of Law against Respondent Gordon Brent Pierce ("Pierce"):

PROPOSED FINDINGS OF FACT

Pierce's Used His Consulting Firms To Exercise Control Of Intergold And Lexington:

1. Pierce is the president of Newport Capital ("Newport"), and became an officer and director of Newport prior to July 2001. Investigative Testimony Transcript of Gordon Brent Pierce dated July 27 and 28, 2006 ("Pierce Testimony") at 23 (Division's designations contained in Division's Exhibit 62). Newport provides financing and locates investment opportunities for companies. *Id.* at 20-21. Newport also provides investor relations and promotional services to public companies, either directly or through Pierce's other companies. *Id.* at 20, 53.

2. Newport does not have any employees, just consultants. Pierce provides consulting services to other companies through Newport. *Id.* at 27, 37. Pierce receives annual compensation from Newport of $800,000 to $900,000 for his consulting services. *Id.* at 66.

3. Pierce borrows money from Newport (which he approves on behalf of Newport) and sometimes paid down his loans from Newport by transferring his Lexington shares to Newport. *Id.* at 107, 109. Pierce also caused Newport to invest directly in Lexington on numerous occasions between late 2003 and 2006 in the form of loans and private placements. *See* Division's Exhibits 59, 60, 70; Hearing Transcript at 410, 414.

4. After identifying himself as a witness on behalf of himself, Pierce failed to appear at the hearing.

Pierce's Used His Control To Obtain 950,000 Vested Option Shares For Resale:

5. Intergold Corporation ("Intergold") was a shell corporation with essentially no business operations, income, or property by 2002. Respondent's Exhibits 1 at 3. In November 2003, Intergold merged with Lexington Oil & Gas Ltd. ("Lexington Oil") to form Lexington by issuing three million shares with restrictive legends to the shareholders of Lexington Oil and by changing Intergold's name to "Lexington Resources."

6. Atkins was the president of Intergold and became the president of Lexington. Respondent's Exhibit 5.

7. Pierce was an officer and director of Investor Communications International, Inc. ("ICI"). Pierce Testimony at 54. Pierce provided consulting services to ICI through Newport. *Id.* at 72. ICI in turn provided consulting services to Intergold and then Lexington until the first quarter of 2004. Transcript of Proceedings on February 2, 3 and 4, 2009 ("Hearing Transcript" or "Transcript") at 312-13.

8. Pierce was the "funds" and the "brains" behind ICI, while ICI's nominal president, Marcus Johnson ("Johnson"), only did administrative paperwork and filings. *Id.* at 94-95.

9. Atkins provided his services as president of Intergold in his capacity as a consultant for ICI. Pierce's Testimony at 64 (Division's Exhibit 62). While serving as the president of Intergold and then Lexington, Atkins received consulting fees from ICI for his services as president of Intergold and Lexington during 2002, 2003 and 2004. Those fees were $17,325 in 2002, $19,625 in 2003 and $60,000 in 2004. Transcript at 452-53; Respondent's Exhibit 5 at 5; Division's Exhibit 56 at 96.

10. ICI lent money to Intergold to allow that company to stay in business. By October 2003, Intergold owed a total of $1.2 million to ICI. Hearing Transcript at 301; Respondent's Exhibit 2.

11. Atkins worked to arrange a restructuring of Intergold. One of the key issues for Atkins to resolve was Intergold's debt to ICI. According to Atkins, "I couldn't go forward with a new company and try to raise money in it if there was this [ICI] debt that was outstanding ...." Transcript at 303.

12. Atkins restructured Intergold by giving Pierce's group a major stake in Intergold. First, Atkins gave Pierce's group 100,000 shares of stock with restrictive legends in lieu of $250,000 owed to Pierce. *Id.* at 303-04; Respondents' Exhibit 2.

13. Second, Atkins gave Pierce's group, through his consulting firm, International Market Trend AG ("IMT"), "the right and option ... to purchase all or any part of an aggregate 950,000

shares of the ... Company" for five years from November 18, 2003 in lieu of $475,000 owed to Pierce's group (the "Option Agreement"). Division's Exhibit 2 at 2.

14. When Atkins agreed to give Pierce's group the vested options for 950,000 shares, there were 521,184 Intergold common shares outstanding. Respondent's Exhibit 5 at 2. This meant that under the Option Agreement, Pierce's group received vested options — without paying cash — for 64% of Intergold's shares on a post-exercise basis. Division's Exhibit 51.

15. Atkins therefore gave Pierce's group a 64% block of the equity that Intergold's shareholders would retain as part of the forthcoming merger with Lexington Oil. It also gave Pierce's group the shares that they would sell to cash out after the merger.

Pierce's Control Over Lexington:

16. Following Intergold's merger with Lexington Oil on November 19, 2003, the 950,000 vested option shares granted to IMT represented 21.25% of Lexington's outstanding shares. Respondent's Exhibit 5 and 5-6. The largest block of shares, 63.9%, was purportedly owned by Orient. *Id.* at 6.

17. The sole shareholder of Orient is an off-shore trust whose only beneficiaries are Pierce's wife and daughter. Proposed Divisions' Exhibits 78, 79. Pierce's total influence over Lexington must therefore be measured by combining IMT's 21.25% stake with Orient's 63.90% stake.

18. Although Orient was supposedly the majority shareholder, it exercised no influence directly over Lexington's management. Atkins did not speak with Orient's representatives or even know who Orient's representatives were. While never talking to Orient's representatives, Atkins would speak with Pierce three or four times per week. Transcript at 455-56.

19. Lexington's shareholders and directors also exerted no control over the company. Lexington did not have any shareholder meetings during 2003 or 2004. After Atkins appointed additional directors to Lexington's board, the board still did not have meetings, except for quarterly meetings of the audit committee. Other board actions were handled through written consents. *Id,* at 457-58.

20. Lexington had only nominal business operations. Lexington had no revenues during 2003 and only $472,000 in revenues during 2004 (versus more than $6.5 million in expenses). Division's Exhibit 56 at 35. Most operational activities were performed by LMT, which provided consulting services to Lexington for financing, investor relations and locating oil and gas properties. Pierce Testimony at 67 (Division's Exhibit 62).

21. Pierce was an officer and director of IMT. *Id.* at 36. Pierce provided consulting services to IMT through Newport. *Id.* at 64-65. Pierce had Newport lend money to IMT. *Id.* at 95; Division's Exhibit 70. Pierce was the "funds" and the "brains" behind the business. Hearing Transcript at 96.

22. IMT also helped raise financing for Lexington in Europe and the United States. Pierce Testimony at 70. Lexington did not have any offices of its own, except for a corporate identification office in Las Vegas, Nevada.

23. Rather than having its own offices, Lexington used IMT's office in Blaine, Washington. IMT's administrative staff answered the phones for Lexington, forwarded telephone calls, directed emails, obtained shareholder inquiries and handled banking responsibilities. Hearing Transcript at 457-58.

24. Lexington also did not pay its officers, who therefore relied upon Pierce for income and loans. Both Lexington's president, Atkins, and chief financial officer, Vaughn Barbon ("Barbon"), did not receive salary payments from Lexington during 2003 and 2004. Instead, all of their reported compensation relating to Lexington came from ICI, the consulting group Pierce controlled. Division's Exhibit 56 at 96 (showing ICI payments of $60,000 to Atkins and $64,000 to Barbon during 2004).

25. While not receiving payments from Lexington, Atkins received large payments from Newport. Atkins was a paid consultant for Newport for five years, including the time when he was Lexington's president. Pierce gave Atkins his consulting assignments for Newport. Transcript at 451, 453-54.

26. Atkins also borrowed money from Pierce from 2004 to 2006 to remodel his home.

Although Atkins borrowed the money from Pierce, the funds came from Newport. Atkins repaid the loan by transferring stock to Newport. *Id.* at 453-54, 459. Although Atkins might have borrowed up to $400,000 from Pierce, he could not say what the total was.

27. During the hearing, Atkins would not provide the total amount of compensation that he received from Newport, and also refused to disclose even a general description of his income sources in 2003 and 2004. *Id.* at 454-55. Bank records indicate that from December 2003 to November 2004, Newport paid a total of $ 268,000 to Atkins. Division's Exhibit 70.

28. Pierce decided who should provide services to Intergold and Lexington. Intergold retained X-Clearing Corp. ("X-Clearing"), which was formerly known as Global Securities Transfer Inc., as its transfer agent in 2001.

29. Pierce made the decision to have Intergold retain X-Clearing, while Atkins merely memorialized the retention of X-Clearing. Hearing Transcript at 81-82. After Intergold's merger with Lexington Oil, X-Clearing continued to serve as the transfer agent for Lexington until 2004. Transcript at 83-84.

30. Intergold and Lexington were "slow pay" accounts. When X-Clearing's president, Robert L. Stevens ("Stevens") had trouble getting paid by Intergold or Lexington, he went to Pierce to get the bills paid because Pierce was the money behind the venture. *See Id.* at 104.

Pierce's Control Over Accounts At Hypo Bank And vFinance:

31. Pierce had an account in his own name at Hypo Bank. He was the only person authorized to conduct trading in his Hypo Bank account. Pierce Testimony at 42; Division's Exhibits 16-19; Proposed Division's Exhibit 87. Pierce owned Intergold shares prior to the merger with Lexington. Through the merger, Pierce's Intergold shares were converted into 42,561 Lexington shares, which Pierce deposited into his personal Hypo Bank account. Division's Exhibit 50.

32. As revealed in the new records produced to the Division on March 10, 2009, Pierce also controlled accounts at Hypo Bank in the names of Newport and another offshore company, Jenirob Company Ltd. ("Jenirob"). See Proposed Division's Exhibits 80 and 84.

33. In 2003 and at about the same time that Lexington began trading on the OTCBB, Pierce opened a brokerage account for Newport at vFinance. Pierce Testimony at 218; Division's Exhibit 25. Hypo Bank also held an omnibus account in its name at vFinance.

34. Hypo Bank traded for its customers, including Pierce and the offshore companies he controlled, through its omnibus vFinance account. *See* Division's Exhibits 17-19, 23-24 and Proposed Division's Exhibits 82-83, and 86 (brokerage records reflecting trades in Lexington shares). By trading in his Hypo Bank accounts through the omnibus vFinance account in Hypo Bank's name, Pierce ensured that neither his name nor the names of his companies appeared on the vFinance brokerage statements or on trading records kept by U.S. exchanges.

35. Pierce's primary broker at Hypo Bank was Philippe Mast ("Mast"). *See* Proposed Division's Exhibits 80-88. Mast also was a signatory on the account opening documents for Hypo Bank's omnibus account at vFinance. Division's Exhibit 21.

36. Mast and Pierce communicated if a Hypo Bank account was executing trades in Lexington shares. Division's Exhibit 67. According to Pierce, it was "regular protocol" for Mast to tell Pierce about Hypo Bank accounts that were trading in Lexington. Pierce Testimony at 391 (Division's Exhibit 62). Mast was also the contact person at Hypo Bank when X-Clearing arranged to transfer Lexington shares to a Hypo Bank account.

37. Stevens spoke with Mast to have Lexington shares transferred to Brown Brothers Harriman, which was Hypo Bank's clearing broker in the United States. Stevens helped Hypo Bank get shares that were in "street name" and therefore sellable on the open market. Hearing Transcript at 101-03.

38. Pierce also communicated with vFinance about its trading in Lexington shares for Hypo Bank. Nicholas Thompson ("Thompson") was the market maker for Lexington shares at the vFinance brokerage firm. Pierce had known Thompson for five years. *Id.* at 114, 228. Thompson sent Pierce emails discussing trading in Lexington shares that Thompson was executing for Hypo Bank's account at vFinance. Division's Exhibit 33.

39. Thompson would tell Pierce about a Lexington stock trade in Hypo Bank's account

before Thompson even told Mast about the trade. *Id.* Pierce testified that he communicated regularly with Thompson about Lexington trading in Hypo Bank's account. Pierce Testimony at 391-92.

Pierce's Receipt And Distribution Of Lexington Form S-8 Shares:

40. On November 21, 2003, Lexington filed a short-form registration statement, the November 2003 Foto' S-8, which purported to register Lexington's stock issuances to employees and consultants. The Form S-8 stated that the stock recipients must represent that the shares would not be sold or distributed in violation of the securities laws. November 2003 Form S-8 at 2, 19 (Division's Exhibit 6).

41. The November 2003 Form S-8 did not even contain so much as a supplemental prospectus to register resales by any Lexington shareholder, and therefore no disclosure whatsoever about the selling shareholders, their holdings, or their plan of distribution was provided. Subsequent Form S-8 filings also failed to contain even a supplemental prospectus. Transcript at 60, 62-63.

42. Lexington issued 350,000 pre-split shares on November 24, 2003 to Pierce, which Pierce transferred that same day to Newport. Division's Exhibit 40. Pierce obtained those 350,000 shares after representing that he was obtaining the Lexington shares for "investment purposes" only. Option Exercise Agreement dated November 24, 2003 at 1 (Division's Exhibit 10).

43. Contrary to the representations, Pierce caused Newport to sell 328,300 of those 350,000 pre-split Lexington shares to third persons. Division's Exhibit 40. These transactions left Newport with 21,700 pre-split Lexington shares.

44. Lexington also issued 150,000 pre-split shares on November 25, 2003 to Pierce, who represented that the shares were for investment purposes only. Division's Exhibit 11. Pierce transferred 50,000 of those shares on December 2, 2003 to Newport and retained the other 100,000 pre-split shares for his own account. Division's Exhibit 41. Pierce transferred these 100,000 Lexington shares to his personal account at Hypo Bank. Division's Exhibit 16; Proposed Division's Exhibit 88.

45. Pierce had originally asked to have these 150,000 shares issued with the 350,000

shares that he received on November 24, 2003. However, Atkins spoke with Pierce by telephone and advised Pierce that the 500,000 share issuance would cause Pierce to cross the 10% ownership threshold for reporting his stake in Lexington. Atkins recommended to Pierce that they structure the transaction to split the 500,000 shares into two blocks of 350,000 and 150,000 shares that would be issued on consecutive days. Hearing Transcript at 359-60, 473-75.

46. On January 22, 2004, Lexington issued 300,000 pre-split Lexington shares to Pierce's long-time associate, Richard Elliot-Square, pursuant to the November 2003 Form S-8. Respondent's Exhibit 27. On January 26, 2004, Elliot-Square transferred all 300,000 of those shares to Newport. Respondent's Exhibit 28. Elliot-Square has offered conflicting reasons for his receipt and transfer of those 300,000 shares. During the Division's investigation, Elliot-Square stated that the 300,000 shares might have been a mistaken payment of too many options for the work he performed. Transcript at 279-80 (quoting ttom Transcript of Richard Elliot-Square Interview dated February 28, 2007). Pierce later deposited these 300,000 shares into Newport's Hypo Bank account. Proposed Division's Exhibit 82.

47. 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 personal Hypo Bank account a total of 300,000 post-split Lexington shares that were issued under the November 2003 Form S-8.

48. Pierce's Hypo Bank account also contained 121,683 post-split Lexington shares that he received in exchange for his original Intergold shares. Division's Exhibit 17. As a result of the split, Newport received and deposited into its Hypo Bank account an additional 643,400 shares it received for the 300,000 shares it had acquired from Elliot-Square and the 21,700 shares it had acquired from Pierce. Proposed Division's Exhibit 82.

49. In February 2004, Pierce caused Newport to acquire for its account at Hypo Bank 25,000 post-split shares that Lexington had issued to Stevens pursuant to the November 2003 Foini S-8. *Id.* On May 19, 2004, Lexington issued 495,000 shares to Elliot-Square purportedly pursuant to a Form S-8 filed by Lexington in February 2004. Respondent's Exhibits 32-33.

50. Pierce caused Jenirob to acquire 435,000 of these shares the same day after they were issued to Elliot-Square and then Pierce deposited them in Jenirob's Hypo Bank account. Proposed Division's Exhibit 86. Pierce moved 100,000 of these shares from the Jenirob account to Newport's account at Hypo Bank on June 11,.2004. *Id.*

51. 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 in his personal Hypo Bank account for proceeds of $2.7 million. Division's Exhibits 18, 48. 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.

52. Under a first-in, first-out analysis (whereby the 121,683 post-split shares that Pierce received through the merger are treated as sold first), Pierce received $2,077,969 in proceeds from selling the 300,000 post-split shares that he retained from the November 2003 Form S-8 stock issuances. Division's Exhibits 48, 50.

53. Lexington filed another Form S-8 on June 8, 2004 (the "June 2004 Form S-8"). Division's Exhibit 7. Pursuant to the June 2004 Form S-8, Pierce received a total of 320,000 Lexington shares after stating in writing that the shares were for investment purposes only. Division's Exhibits 12-14. Pierce transferred all 320,000 shares to Newport on the same day that he received them. Division's Exhibits 44-45.

54. On June 25, 2004, Pierce caused Newport Capital to sell 80,000 of those 320,000 Lexington shares to another company Pierce controlled. Division's Exhibit 45. Pierce transferred the remaining 240,000 shares to Newport's account at Hypo Bank. Proposed Division's Exhibit 82.

55. Based upon documents that it received from Liechtenstein authorities within the past few days, the Division has determined that by June 2004, Pierce had moved to the Newport and Jenirob accounts at Hypo Bank a total of 1,634,400 Lexington shares that had been issued purportedly pursuant to Form S-8 registration statements. Proposed Division's Exhibit 89. Pierce sold these shares into the open market through the Newport and Jenirob accounts at Hypo Bank between February and December 2004. *Id.*

56. Under a similar first-in, first-out analysis, Pierce received a total of $5.454 million and $2.069 million in proceeds in the Newport and Jenirob accounts, respectively, from selling the additional 1.6 million Lexington shares that were originally issued under Forms S-8. *Id.*

57. Including his personal account and the Newport and Jenirob accounts at Hypo Bank, Pierce sold a total of two million S-8 shares for net proceeds on a first-in, first-out basis of $9.601 million. Division's Exhibit 50 and Proposed Division's Exhibit 89. Pierce sold more than one million of these shares during June 2004, when Lexington's stock price hit an all-time high of $7.46. *Id.*

58. Pierce's sales through the three accounts at Hypo Bank were part of Hypo Bank's sale of Lexington shares through its omnibus account at vFinance between February and December 2004, which included sales of 1.2 million shares in June 2004 alone. Division's Exhibits 26-28, 49. While Pierce's sales made up the vast majority of the sales in the vFinance Hypo Bank account, some of the third parties who purchased Lexington shares from Newport also transferred and sold their Lexington shares through accounts at Hypo Bank. Division's Exhibit 66.

59. On February 27, 2006, Lexington filed yet another Foim S-8 (the "February 2006 Form S-8"). Division's Exhibit 8. Lexington issued a total of 500,000 shares to Pierce in early March 2006.

60. Within days of receipt, Pierce had Lexington transfer those 500,000 shares to Newport. Pierce sold all of those Lexington shares in March 2006 through a brokerage account that Pierce opened for Newport at the Peacock Hislop Staley & Given Inc. brokerage firm ("Peacock Hislop") in Phoenix, Arizona. Pierce Testimony at 194; Division's Exhibit 29. Pierce made those sales at prices just slightly higher than he had paid to purchase those shares from Lexington a few days earlier. Division's Exhibit 46.

61. Finally, on March 14, 2006, Lexington filed one more Fonn S-8 (the "March 2006 Form S-8"). Division's Exhibit 9. Lexington issued a total of 500,000 shares to Pierce in mid-March 2006. Within days, Pierce had Lexington transfer those 500,000 shares to Newport.

62. Pierce sold 164,000 of these Lexington shares in March 2006 through the Newport

account at Peacock His op. Pierce acquired those shares for only a few cents less than the eventual selling price of those Lexington shares on the OTCBB. Division's Exhibit 30.

Pierce's Prior Bar By Canadian Securities Regulators:

63. Pierce attended the University of British Columbia for six to eight months, but never continued his education and never obtained any professional licenses. After leaving college, Pierce was a self-employed businessman. Pierce Testimony at 158-59.

64. Pierce has known Atkins since the early 1990s. Pierce and Atkins have worked together on ten different companies. *Id.* at 159-60.

65. In June 1993, Canadian securities regulators in British Columbia imposed a fifteen-year bar and $15,000 fine upon Pierce relating to his activities as a director of Bu-Max Gold Corp. ("Bu-Max"). According to stipulated findings, investor proceeds were diverted to unauthorized and undisclosed uses, including for Pierce's benefit.

66. During the investigation by Canadian securities regulators into Bu-Max, "Pierce tendered documents to the staff of the Commission which were not genuine." *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce,* Order Under Section 144 at 2 (June 8, 1993) (DiviSion's Exhibit 47).

67. The Staff subpoenaed documents from Pierce in May 2006. *See* Division's Exhibit 31. Pierce did not produce any emails relating to Lexington or his trading in response to the subpoena. According to Pierce, he deletes all of his emails on a daily basis. Pierce Testimony at 175-76.

PROPOSED CONCLUSIONS OF LAW

Pierce Violated Section 5 Of The Securities Act:

1. Pierce violated Section 5(a) of the Securities Act which imposed a registration requirement for his sales of Lexington securities in interstate commerce:

> *Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —*
>
> *(1)* to make use of any means or instruments of transportation or communication in interstate commerce or of the

> mails to sell such security through the use or medium of any prospectus or otherwise

15 U.S.C. § 77e(a) (emphasis added). Similarly, because his Lexington stock resales 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).

2. The purpose of Section 5's registration provisions is to ensure that the investing public is provided with the necessary material information about their contemplated investment. It is well-established that improper intent is not an element of a Section 5 violation. *E.g., SEC v. Lybrand,* 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002); *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).

3. Section 5's registration requirements apply to each and every sale of securities, including those issued under a Form S-8 registration statement. *SEC v. Cavanagh,* 155 F.3d 123, 133 (2d Cir. 1998). Interpretive Release No. 33-6188 (the "1980 Release"), which discusses the availability of the Foon S-8 registration statement for stock issuances to employees of the issuer, states that "Section 5 provides that *every offer or sale ofa security* made through the use of the mails or interstate commerce *must be accomplished through the use of a registration statement* meeting the Act's disclosure requirements, unless one of the several exemptions from registration set out in sections 3 and 4 of the Act is available." 45 Fed. Reg. 8960, 8962 (Feb. 11, 1980) (emphasis added).

4. The 1980 Release also provides that affiliates of the issuer must separately register their sales of S-8 shares. *Id.* at 8976-77. Form S-8's instructions specifically "advise all potential registrants that the registration statement does not apply to resales of the securities previously sold pursuant to the registration statement." Form S-8 General Instruction C.1 and n.2.

5. Pierce violated Section 5 with respect to his resales of Lexington S-8 shares. The Division established a *prima facie* case with evidence that (1) Pierce directly or indirectly sold Lexington shares, (2) no registration statement was in effect as to Pierce's sale of Lexington shares

d (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. March 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)).

6. Pierce admits that he sold Lexington shares through his Hypo Bank account in June 2004. Answer, ¶ 16. *See also* Division's Exhibit 18 (account statements for trading in Pierce's Hypo Bank account during June 2004). Brokerage records also establish that Pierce sold Lexington shares throughout all of 2004 and during March 2006. Division's Exhibits 16-19 (brokerage records reflecting sales of Lexington shares in Pierce's Hypo Bank account), 30 (brokerage records reflecting sales of Lexington shares in Newport's Peacock Hislop account) and 48 (Division's summary of Pierce's Lexington open market sales).

7. As a result, there is no genuine dispute that Pierce sold shares received through Lexington's S-8 offerings. Additionally, the evidence received from the Liechtenstein regulators proves that Pierce sold another 1.6 million Lexington shares through Newport and Jenirob accounts at Hypo Bank between February and December 2004. Proposed Division's Exhibits 82, 86, 89.

8. Pierce received his shares from Lexington under the purported November 2003, June 2004, February 2006 and March 2006 Form S-8 Registration Statements. Division's Exhibits 5-8. Those Form S-8s supposedly registered Lexington's issuance of shares to purported employees and consultants, but did not register the resale of those shares by the recipients. Transcript at 59-60, 62-63. The shares Pierce sold in the Newport and Jenirob accounts either came from Pierce of from other consultants who received the shares under purported S-8 registration statements that did not register any resales. It is therefore beyond dispute that Pierce resold his Lexington shares without filing a registration statement for those resales. Answer, § 16 (admitting that Pierce sold shares in June 2004 with registering those sales).

9. It is also beyond genuine dispute that instruments of interstate commerce were used in connection with Pierce's sales of Lexington shares. X-Clearing received instructions by mail, telephone and fax related to the transfer of Lexington S-8 shares to Pierce and then to other persons

and communicated with Mast at Hypo Bank to get the shares into "street name." Transcript at 102-03, 109; Respondent's Exhibits 16, 17, 22, 23, 37b-c, 38, 39b-d. Pierce communicated by telephone and email with Mast at Hypo Bank and Thompson at vFinance about trading in Lexington shares. Pierce Testimony at 391-92 (Division's Exhibit 62); Division's Exhibits 33, 34, 67.

Pierce Did Not Carry His Burden Of Proving An Exemption From Registration:

10. As demonstrated above, the Division established Pierce's *prima facie* violation of Section 5's registration requirements. Pierce therefore has the burden of proving that his resales of Lexington shares were exempt from registration whether or not Lexington supposedly used valid S-8 registration statements for its sales of shares to Pierce. *SEC v. Cavanagh, supra,* 155 F.3d at 133-34 (finding Section 5 violation for resales of S-8 shares without registering the resales). *See SEC v. Ralston Purina Co.,* 346 U.S. 119, 126 (1953).

11. Pierce's reliance upon a registration exemption must be strictly construed. *SEC v. M&A West Inc.,* 538 F.3d 1043, 1050-51 (9' Cir. 2008); *Sorrel v. SEC,* 679 F.2d 1323, 1326 (9`" Cir. 1982) (holding that exemptions are strictly construed and must be proven by party asserting exemption). Exemptions from registration are strictly construed to protect investors' access to material information. *In the Matter of Thomas .1 Dudchik and Rodney R. Schoemann,* Initial Decision at 14-15 (Admin. Proc. File No. 3-12943 Dec. 5, 2008) (All Mahony).

12. Although 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), Pierce cannot qualify for this exemption. As demonstrated below, the evidence establishes that Pierce falls within the Securities Act's definitions of an "issuer" and an 'underwriter," and is therefore precluded from relying upon Section 4(1).

Pierce Was An "Issuer"

13. Section 2(a)(11) of the Securities Act defines an "issuer" to include "any person directly or indirectly controlling or controlled by the issuer." 15 U.S.C. § 77b(a)(11). A person who constitutes an "affiliate" of the issuer is deemed to be an "issuer" with respect to the distribution of securities. *SEC v. Cavanagh, supra,* 155 F.3d at 134, *cited by In the Matter of Thomas J. Dudchik*

and Rodney R. Schoemann, supra, Initial Decision at 14.

14. Determining whether a person is affiliate involves looking at the totality of the circumstances, including a consideration of the person's influence upon the management and policies of the corporation. *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann, supra,* Initial Decision at 14 (citing and quoting *SEC v. Freiberg,* 2007 WL 2692041 at * 15 (D. Utah Sept. 12 2007)). An affiliate need not be an officer, director, manager, or shareholder of the issuer and does not have to exercise control in a continuous or active manner. *SEC v. International Chemical Development Corporation,* 469 F.2d 20, 30 (10thCri. 1972) (citing *Pennaluna & Co. v. SEC,* 410 F.2d 861, 866 (9thCir. 1969), *cert. denied* 396 U.S. 1007, 90 S. Ct. 562, 24 L. Ed. 2d 499 (1970)). The provision of financing and participation in the violative scheme can be enough to render a person an affiliate of the issuer. *Id.*

15. The hearing evidence establishes Pierce's status as an affiliate of Lexington. Pierce was the money and brains behind Lexington. Transcript at 82-83, 94-96. IMT's block of shares exceeded 20% and Pierce's initial exercise of 500,000 option shares represented a 10% block. Additionally, the owner of Lexington's majority shareholder, Orient, has just been revealed to be an off-shore trust whose beneficiaries are Pierce's wife and daughter. Proposed Division's Exhibits 78 and 79.

16. Although Orient was the nominal majority shareholder, Atkins did not communicate with, or even know the identity of its representatives. Instead, Atkins talked three or four times per week with Pierce. Although Lexington's nominal president, Atkins derived absolutely no income from Lexington itself. Instead, Atkins was dependent upon Pierce for financial support through consulting fees from ICI, consulting fees from Newport and personal loans from Pierce.

17. The totality of Pierce's ability to exercise influence over Atkins makes Pierce an affiliate of Lexington. *SEC v. International Chemical Development Corporation, supra,* 469 F.2d at 30; *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann, supra,* Initial Decision at 14 (describing and applying totality of circumstances test for affiliate status).

18. Pierce's affiliate status is also demonstrated by his ability to dictate the terms of the

merger between Intergold and Lexington. Because Intergold owed $1.2 million to ICI, Atkins knew that he could not alti act new investors to Lexington unless Pierce agreed to reduce that debt. Atkins therefore negotiated a deal whereby Pierce's consultants released $475,000 in debt for 950,000 vested option shares that represented 64% of Intergold's outstanding shares (calculated on a post-exercise basis). Division's Exhibit 51. As a result, Pierce was able to extract the majority of Intergold's benefit from the merger, and that ability demonstrates his corporate control.

19. Because he was in a position to kill Intergold's merger with Lexington unless he got what he wanted, Pierce also had enough control to insist that a registration statement be filed for his resales. Pierce's decision not to require registration of his resales was based on his obvious desire to conceal his acquisition and resale of those shares.

20. Filing a prospectus for his resales would have forced Pierce to disclose his large stock position and his prior bar by British Columbia securities regulators. That disclosu e would have warned investors that a large shareholder with a bar for deceptive conduct was selling his shares in Lexington, and thereby raised questions about Lexington's business prospects. Instead of making disclosures through a registration statement, Pierce decided to make undisclosed sales of his shares while Lexington's share price was rising and peaking.

Pierce Was An Underwriter

21. Pierce is also unable to rely upon the Section 4(1) exemption given the evidence establishing his underwriter status. 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).

22. 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 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.,* Initial Decision Release No. 250 at 9-12 (Admin. Proc. File No. 3-11310 May 11, 2004) (finding Section 5 violations and absence of exemption).

23. One compelling indication of Pierce's "underwriter" status is the short time period between his acquisition of the Lexington shares in November 2003 and his sale of those shares through Newport's account at Hypo Bank beginning in February 2004 and through Pierce's own account at Hypo Bank beginning in June 2004 (under the first-in, first-out methodology). *SEC v. M&A West, supra,* 538 F.3d at 1050-51. 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). Because Pierce's sales of the November 2003 Lexington S-8 shares took place in just three months for his Newport account and in just seven months for his personal account (with all sales completed within one year), Pierce cannot rely 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.

24. Pierce also held the 320,000 shares received under the June 2004 Form S-8 for a very short period. Within a few days, Newport sold 80,000 of those shares to a third party. Division's Exhibit 45. Pierce transferred the other 240,000 post-split shares to Newport's account at Hypo Bank. Pierce sold those Lexington shares between February and December 2004. Division's Exhibits 19, 24.

25. In early March 2006, Lexington issued 500,000 shares to Pierce under the February 2006 Form S-8. Within days, Pierce transferred those shares to Newport which deposited all of the shares into its Peacock Hislop account. Those shares were then sold in a few days for nearly the same price as the exercise price that Pierce paid to Lexington.

26. Similarly, Lexington issued another 500,000 shares to Pierce under the March 2006 Form S-8. Pierce quickly transferred those shares to Newport, which sold 164,000 of those shares through Peacock Hislop for prices that roughly equaled the exercise price paid by Pierce.

27. Because there was no profit for Pierce in selling the Lexington shares quickly for nearly the same price at which he acquired the shares, it is clear that Pierce's intention was to

distribute shares for Lexington by paying Lexington an exercise price roughly equal to the price for which the shares sold on the open market.

28. Additionally, Pierce distributed 1.6 million other Lexington shares using accounts for Newport and Jenirob at Hypo Bank. These facts establish that Pierce is an "underwriter" by engaging in a distribution of Lexington stock.

Pierce Violated Section 13(d) and Section 16(a) Of The Exchange Act:

29. 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).

30. The purpose of these Exchange Act Sections is to ensure that investors have timely knowledge of the identity of corporate insiders and their transactions in the company's stock. Investors can use that knowledge to assess how a company's insiders assess the company's future prospects — *i.e.*, negatively if large inside shareholders are selling their positions.

31. 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) (internal citation omitted).

38. Pierce did not file a Form 3, 4, or 5 regarding his Lexington transactions. Furthermore, Pierce admits that he did not disclose his ownership interest by filing a Schedule 13D until July 2006. Pierce's Answer, ¶ 17. Pierce's belated Schedule 13D reflects 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).

39. Additionally, a summary of documents establishes that Pierce actually had at least a 10% interest for all but a few days between November 2003 and May 2004. Division's Exhibit 51.

40. Atkins' testimony during the hearing established that Pierce deliberately attempted to evade his ownership disclosure requirements. Atkins learned that Pierce intended to exercise an option on 500,000 pre-split shares in November 2003.

41. Given the number of outstanding. Lexington shares, that exercise would have put Pierce over the 10% ownership threshold. Atkins therefore advised Pierce to split his 500,000 shares into two blocks of 350,000 and 150,000 shares that would be exercised on consecutive days in late November 2003. This scheme required, however, that Pierce quickly sell of some of his 350,000 shares to avoid having more than 10% of the outstanding shares when he acquired the second block of 150,000 on the next day. Transcript at 473-75.

42. The fact that Pierce was entitled to exercise an option on 500,000 shares is enough, however, to establish his beneficial ownership for purposes of Sections 13(d) and 16(a); such ownership exists as to any option (in this case for the total 500,000 shares) that Pierce could exercise in the next sixty days. 17 C.F.R. § 240.13d-3(d)(1). Atkins testimony regarding Pierce's planned exercise of options for 500,000 shares therefore establishes that Pierce crossed the reporting threshold in November 2003, but failed to file the required Schedule 13D and Forms 3, 4 and 5.

43. Pierce's Schedule 13D also failed to reflect [MT's acquisition of 950,000 vested Lexington options on November 18, 2003. Because Pierce has admitted his control over LMT, *see* Pierce's Answer, ¶9, his failure to disclose the IMT holdings as part of his beneficial holdings constitutes a violation of Sections 13(d)(1) and 16(a).

44. Atkins' testimony that Lexington would not have issued S-8 shares to IMT because such shares may only be issued to natural persons is inapt. As both Atkins and Pierce's expert witness testified, the. Option Agreement did not limit IMT to receiving S-8 shares. IMT had the right under the Option Agreement to acquire 950,000 restricted shares at any time. Transcript at 480-81,

548-49 That right triggered Pierce's and IMT' s beneficial ownership of 950,000 shares for reporting purposes under Sections 13(d) and 16(a) of the Exchange Act.

45. Finally, Pierce hid his majority ownership of Lexington by using Orient as the nominal shareholder, while never revealing that his wife and daughter were the beneficiaries of the trust that owned Orient. Pierce's deliberate concealment of his beneficial interest in Orient demonstrates that he consciously acted to attempt to evade his disclosure obligations under Sections 13(d) and 16(a) of the Exchange Act.

Pierce Should Disgorge His Lexington Stock Sale Proceeds:

46. Because Pierce violated Section 5 of the Securities Act through his unregistered sale of Lexington shares, Pierce should 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 from sale of unregistered securities); *Geiger v. SEC, supra* 363 F.3d at 488-89 (upholding disgorgement order against family partnership and owner for selling unregistered securities); *In the Matter of Lorsin, Inc., supra,* Initial Decision Release No. 250 at 15 (ordering, on summary disposition, that stock promoters and principals jointly and severally disgorge proceeds of unregistered stock sales).

47. The "purpose of disgorgement is to force 'a defendant to give up the amount by which he was unjustly enriched' rather than to compensate the victims of fraud." *S.E. C. v. Blavin,* 760 F.2d 706, 713 (6th Cir. 1985)(quoting *S.E.C. v. Commonwealth Chemical Securities, Inc.,* 574 F.2d 90, 102 (2d Cir. 1978)).

48. The Division's disgorgement formula only has to be a reasonable approximation of the gains causally connected to the violation. *SEC v. Patel,* 61 F.3d 137, 139 (2d Cir. 1995); *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).

49. Pierce does not dispute the Division's allegations that he received $2.7 million from his sales of Lexington shares in June 2004. *Compare* OIP, ¶ 111.16 *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.

50. At best, Pierce could try to show that his initial sales were of the 121,683 post-split Lexington shares (using a first-in, first-out method of calculating the sales proceeds) that he received during the reverse merger. His subsequent sales were of the 300,000 post-split shares provided to him under the November 2003 Form S-8. Those sales generated net proceeds of $2,077,969.

51. Based upon the Hypo Bank documents it just received, the Division has determined that Pierce sold 1,634,400 Lexington S-8 shares through Hypo Bank and vFinance using Newport for net proceeds of $5,454,197 and using Jenirob for net proceeds of $2,069,181. Proposed Division's Exhibit 89. Because those sales were in violation of Section 5's registration requirements, Pierce should disgorge total net proceeds of $9,601,347 ($2,077,969 + $5,454,197 +$2,069,181). *Id.*

52. 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. Sem, 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) (describing court's equitable discretion to award prejudgment interest).

53. The Initial Decision will therefore order Pierce to disgorge $9,601,347, plus pre-judgment interest on that amount, for his violation of Section 5.

A *Cease-And-Desist Order Against Pierce Is Appropriate:*

54. Section 8A of the Securities Act authorizes the Securities and Exchange Commission ("Commission") to issue a cease and desist order against any person who has been found to be "violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder." 15 U.S.C. § 77h-1(a).

55. Similarly, Section 21C(a) of the Exchange Act authorizes the Commission to issue a cease and desist order against any person who has been found to have violated any Exchange Act provision or rule. 15 U.S.C. § 78u-3(a).

56. In this case, a cease and desist order should be issued in light of Pierce's repeated and deliberate violations of Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act. *See, e.g., In the Matter of Lorsin, Inc., et al., supra,* Initial Decision Release No. 250 at 12-14 (issuing cease and desist order after finding that respondent sold unregistered shares). In determining whether to impose a cease and desist order, the Hearing Officer considered the egregiousness of Pierce's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of any assurances against future violations, Pierce's recognition of the wrongful nature of his conduct, and the likelihood that Pierce's activities will present opportunities for future violations. *Steadman, supra,* 603 F.2d at 1140 (quoting *SEC v. Blatt,* 583 F.2d 1325, 1334 n. 29 (5th Cir. 1978), *affirmed on other grounds,* 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981)).

57. No one of these particular factors is controlling. *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) (All Mahony) (imposing cease and desist orders based upon violation of record keeping provisions) (citing *SEC v. Fehn,* 97 F.3d 1276, 1295-96 (9thCir. 1996)). Because remedial sanctions should promote the "public interest," a Hearing Officer "weigh[s] the effect of [its] action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally." *Arthur Lipper Corp.,* 46 S.E.C. 78, 100 (1975); *In the Matter of Richard C. Spangler, Inc.,* 46 S.E.C. 238, 254 n.67 (1976).

58. All of the *Steadman* factors strongly favor a cease and desist order against Pierce. Pierce distributed over three million Lexington shares during a thirty-month period from November 2003 until March 2006 without the registration required by Section 5 of the Securities Act. In June 2004 alone, Pierce sold 300,000 of those shares through his own Hypo Bank account for $2.1 million in net proceeds.

59. Additionally, from November 2003 through March 2006, Pierce transferred Lexington

shares to Newport, a company he controlled, which then sold shares through Hypo Bank and another brokerage account. Pierce therefore engaged in a wide-ranging, long-lasting and highly lucrative distribution of Lexington shares that violated Section 5 of the Securities Act in an egregious and recurring fashion.

60. Similarly, Pierce did not file the necessary Schedule 13D form until June 2006, when his Lexington transactions were already under investigation, and never filed any Forms 3, 4, or 5 to disclose his transactions in Lexington shares. Pierce deliberately violated Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act to conceal his acquisition and sale of large blocks Lexington shares.

61. For example, Pierce and Atkins decided in late November 2003 to split a block of 500,000 shares to attempt to avoid disclosing his ownership interest. Similarly, Pierce and Atkins also made DAT the nominal recipient of the 950,000 shares to conceal the identities — particularly Pierce's — of the persons who would receive the shares.

62. Documents just released by Liechtenstein over Pierce's objections also establish that Pierce used Orient to conceal his family's majority stake in Lexington. As a result, Lexington's Form 10-KSB filings for 2003, 2004 and 2005 do not contain any mention of Pierce, including the section describing the company's 5% shareholders. Division's Exhibits 55-57; Hearing Transcript at 61, 63-64. That was no oversight. That was deliberate concealment.

63. In fact, only after Lexington's stock price had crashed and the staff sent a subpoena to Pierce in June 2006 did Pierce file a Schedule 13D in July 2006 and did Lexington disclose Pierce's ownership interest in the Form 10-KSB for 2006. Division's Exhibits 15 (Pierce's Schedule 13D filing) and 58 (Lexington's 2006 Form 10-KSB). Pierce's Schedule I3D filing also alludes to the enforcement action by British Columbia securities regulators. Division's Exhibit 15 at 6.

64. Pierce has made no effort to acknowledge or show remorse for his misconduct or to demonstrate that it will not happen again. Quite to the contrary, Pierce failed to attend the administrative hearing despite being listed as a witness for himself.

65. Finally, Pierce does not come to this proceeding with a clean record as a securities

professional. On June 8, 1993, Canadian securities regulators imposed a fifteen-year bar upon Pierce and a $15,000 fine for deceptive conduct that included misuse of funds and submitting false documents. *In the Matter Securities Act, S13.(7, 1985, chapter 83 And In the Matter of Gordon Brent Pierce,* Order Under Section 144 (June 8, 1993) (Division's Exhibit 47).

66. Far from recognizing the seriousness of that misconduct, Pierce sent a letter to the Peacock Hislop brokerage firm asserting that Canadian securities regulators were engaged in a "witch hunt" and that the Order was a product of a "kangaroo court proceeding." Division's Exhibit 29 at 2.

67. Accordingly, the Initial Decision contains a cease-and-desist order against Pierce's further violations of Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act because Pierce cannot be trusted to obey the securities laws in the future.

Dated: March 20, 2009

Res ctfully submitted,

John S. Yun
Steven D. Buchholz
Attorneys for
Division of Enforcement

Exhibit 12

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 POST-HEARING BRIEF AGAINST RESPONDENT GORDON BRENT PIERCE

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Gordon Brent Pierce ("Pierce"), a Canadian stock promoter with a previous record of securities law violations in British Columbia, made millions of dollars by selling Lexington Resources, Inc. ("Lexington") stock in violation of Section 5 of the Securities Act of 1933 ("Securities Act"). Pierce also concealed his ownership interest and transactions in Lexington stock in violation of Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 ("Exchange Act"). Although scienter is not an element of those violations, the evidence is nonetheless compelling that Pierce deliberately violated the federal securities laws to conceal his Lexington scheme from investors.

Pierce used two of his consulting firms, Investor Communications International, Inc. ("ICI") and International Market Trend AG ("IMT"), to control Lexington and its predecessor, Intergold Corporation ("Intergold"). Using his control, Pierce had Intergold grant 950,000 vested options to himself and his associates through IMT. Pierce exercised 500,000 of those options in November 2003 and transferred many of the shares to another company he controlled, Newport Capital ("Newport"). Pierce sold 100,000 of his shares (which became 300,000 shares on a post-split basis) through a brokerage account in his own name at Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank") for net proceeds of $2.1 million during June 2004, while Lexington's stock price peaked at over $7.00 per share. Pierce also used Newport and another off-shore company to sell other Lexington shares granted to him, or to associates like Richard Elliot-Square ("Elliot-Square"), for additional net proceeds of $7.5 million dollars during 2004.

Pierce's ability to sell so many Lexington shares and pocket millions of dollars was possible only because Pierce concealed from investors that he, as a major Lexington shareholder, was dumping his shares while the stock price was rising. Pierce did not, therefore, register his resales of Lexington shares in order to avoid revealing his intention to sell those shares. Pierce did not file a Schedule 13D reporting his Lexington stock ownership and did not file Forms 3, 4 and 5 reporting his Lexington stock holdings and transactions in order to avoid revealing his insider selling.

Pierce employed various schemes to hide his control of Lexington and dumping of shares.

He had Intergold grant the 950,000 vested options to IMT, even though that consulting firm was not currently providing any services and even though Pierce undoubtedly knew how many options he would receive. Pierce used used Hypo Bank to conduct the trades to impede access by regulators to trading records. Pierce failed to produce a single email to the Staff because he destroys all of his messages. Furthermore, as just revealed in documents produced by Liechtenstein regulators, Pierce concealed his ownership of Lexington by using a company secretly controlled by his family, Orient Explorations, Inc. ("Orient"), to hold the majority block shares.

When Pierce belatedly filed a Schedule 13D in July 2006 (which was after the Staff sent him a subpoena regarding his Lexington transactions), Pierce had liquidated nearly all of his Lexington shares and Lexington's stock price was just a dollar per share. By 2008, Lexington's only operating subsidiaries were in bankruptcy. Pierce's violations in this case are therefore apparent.

As demonstrated in the Motion for Summary Disposition filed by the Division of Enforcement ("Division"), Pierce's *prima facie* violation of Section 5 of the Securities Act has never been a matter of genuine dispute. His sales of Lexington shares from November 2003 through March 2006 constitute a *prima facie* violation of Section 5 because (i) Pierce sold the Lexington shares, (ii) there was no registration statement for Pierce's sales of the Lexington shares and (iii) Pierce used interstate commerce in selling those shares. *E.g.*, *SEC v. Lybrand*, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002). Pierce has even admitted making unregistered sales of Lexington shares for $2.7 million in June 2004 through his personal Hypo Bank account. Answer, ¶ 16. The hearing evidence only reinforced the existence of a *prima facie* violation involving Pierce's sales of Lexington shares (Division's Exhibit 48), his failure to register his sales (Transcript of Proceedings on February 2, 3 and 4, 2009 ("Hearing Transcript" or "Transcript") at 59-60, 62-63), and use of interstate commerce to carry out the sales (Transcript at 109).

After the Division established his *prima facie* violation of Section 5, Pierce had the burden to allege and prove that his Lexington stock sales were exempt from registration, even if Pierce received his stock under a purportedly valid S-8 registration statement filed by Lexington. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *SEC v. Cavanagh*, 155 F.3d 123, 133-34 (2d Cir.

1998) (finding Section 5 violation for resales of S-8 shares without registering the resales). Pierce's apparent reliance upon the registration exemption found in Section 4(1) of the Securities Act is unavailing. The hearing evidence proves that Pierce acted as an issuer and underwriter of Lexington shares, and is therefore precluded from relying upon the Section 4(1) exemption.

Pierce's status as an "issuer" is reflected by the direct and indirect control that he exercised over Intergold and then Lexington using his consulting firms, ICI and IMT, as well as by his influence over Grant Atkins ("Atkins"), the nominal president of Intergold and then Lexington. One month before the merger with Lexington, Intergold agreed to give Pierce's consulting group a 64% stake in that company by granting 950,000 vested options to IMT. That 950,000 share option grant ensured that Pierce received the lion's share of Intergold's benefit from the impending merger, as well as providing a way for Pierce to cash out – by exercising the options and selling the shares – when the merger was completed.

Pierce continued to exercise control after the merger through his large equity stake in Lexington and through large payments to Atkins by Pierce's companies. In addition, evidence just received by the Division establishes that Lexington's majority shareholder, Orient, was actually owned by a trust whose only beneficiaries were Pierce's wife and daughter. Proposed Division's Exhibits 78, 79 at SEC158416 (covered by Division's Motion for the Admission of New Evidence ("Division's Motion")). Thus, Pierce was a Lexington affiliate who could not use the Section 4(1) exemption. *E.g.*, *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann*, Initial Decision at 14-15 (Admin. Proc. File No. 3-12943 Dec. 5, 2008) (ALJ Mahony).

Pierce also engaged in a distribution of the Lexington shares, and therefore became a statutory "underwriter" as defined in Section 2(11) of the Securities Act. 15 U.S.C. § 77b(11). Pierce transferred to Newport most of the shares issued by Lexington within a few days, and then quickly resold the shares to other persons or deposited them into a brokerage account. Pierce sold all of his shares within one year, so as to engage in a distribution and become a statutory underwriter. *See SEC v. M&A West Inc.*, 538 F.3d 1043, 1050-51 (9th Cir. 2008).

As the Division's Motion for Summary Disposition demonstrated, Pierce violated the

disclosure requirements of Sections 13(d) and 16(a) of the Exchange Act because he did not file a Schedule 13D until July 2006, even though his reporting obligation began in November 2003. Pierce's Answer, ¶ 17. The Hearing Evidence only reinforces that Motion. Atkins testified that he warned Pierce in November 2003 that Pierce would go over a 10% reporting threshold. Furthermore, the additional evidence offered in the Division's Motion demonstrates that Pierce controlled Lexington's majority shareholder, Orient, because his wife and daughter owned Orient through an off-shore trust. Proposed Division's Exhibits 78, 79.

Pierce should be ordered to disgorge the proceeds from his illegal sale of unregistered Lexington shares. *Geiger v. SEC*, 363 F.3d 481, 488-89 (D.C. Cir. 2004). Pierce received about $2.1 million in net proceeds during June 2004 that flowed from his unregistered sale of Lexington shares through his personal account at Hypo Bank. Additionally, as discussed below and in the Division's motion, newly obtained evidence shows that Pierce sold 1.6 million more shares through Newport and another off-shore company – using brokerage accounts at Hypo Bank and vFinance. The proceeds from Pierce's sales of Lexington shares (that were originally issued using a Form S-8 registration statement) through these accounts total approximately $7.501 million for the period from February 2004 to December 2004. Proposed Division's Exhibit 89. The Hearing Officer should order Pierce to disgorge all $9.601 million in these sales proceeds – plus pre-judgment interest – in light of his violation of Section 5 of the Securities Act.

In addition to disgorging his gains, Pierce should be ordered to cease and desist from further violations. The repeated nature of Pierce's violations, the degree of scienter exhibited and the danger that Pierce is in a position to commit future violations all dictate in favor of a cease-and-desist order. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (describing factors for imposing remedial sanctions). Pierce violated Section 5's registration provisions over an extended period from 2003 to 2006. He is also continuing to violate the disclosure provisions of Sections 13(d) and 16(a) because he has failed to disclose his control over IMT's shares and has never disclosed his Lexington stock purchases and sales in the necessary Forms 3, 4 and 5. In addition to his repeated violations in this matter, Pierce has an adverse history with British Columbia securities regulators for deceptive

conduct and purposefully evaded his obligations under the federal securities laws. Indeed, Pierce thinks so little of securities regulators and the securities laws that he failed to appear for the hearing in this case.[1]

FACTUAL BACKGROUND

Overview Of Pierce's Stock Dumping Scheme:

To put Pierce's violations into perspective, the Division presents this overview of Pierce's illegal and concealed sales of millions of Lexington shares. In the fall of 2003, Lexington merged with the deeply indebted and basically defunct Intergold. To restructure Intergold and consummate a merger with Lexington, Atkins agreed to give Pierce and his associates a nearly two thirds stake in Intergold through a 950,000 share vested option grant. When Lexington began trading under the symbol "LXRS" in November 2003, investors were told that the shares were owned by a few shareholders including IMT and Orient. Investors were not told, however, that Pierce controlled IMT and, as new evidence now shows, Orient. They were also not told that Pierce was receiving 500,000 option shares through IMT and was in the process of selling those shares through Newport.

As a new oil and gas firm, Lexington had no revenues in 2003. Despite that lack of revenues, Lexington's share price began to rise dramatically during the first half of 2004. Division's Exhibit 48. This price rise was undoubtedly the result of ICI's and IMT's promotional activities with investors on behalf of Lexington. When Pierce began selling his shares on the open market in February 2004, the price was $3.00 per share on a 1,000 share daily volume. Lexington's shares price hit $7.46, on daily volume as high as one million shares, in June 2004. *Id.* Concealed from investors during this price run-up was Pierce's ownership stake in Lexington and sales of Lexington

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[1] After identifying himself as a witness on his own behalf, Pierce failed to appear at the hearing. Pierce's asserted reasons for not testifying are not believable. In reality, he was afraid of cross-examination and/or wanted to avoid asserting his Fifth Amendment privilege on the stand. The Hearing Officer should draw the negative inference that if Pierce had testified truthfully, his testimony would have been harmful to his case. *See In the Matter of Sky Scientific, Inc., et al.* Initial Decision at 3 (Admin. Proc. File No. 3-9201 March 5, 1999)(ALJ Mahony) (ruling that an administrative law judge "may draw adverse inferences from a witness' refusal to testify or explain facts that may be particularly within the witness' knowledge").

shares. Also concealed from investors during this period was Pierce's control over Lexington through his stock ownership and payments to Atkins.

Pierce's Used His Consulting Firms To Exercise Control Of Intergold And Lexington:

Pierce is the president of Newport, and became an officer and director of Newport prior to July 2001. Investigative Testimony Transcript of Gordon Brent Pierce dated July 27 and 28, 2006 ("Pierce Testimony") at 23 (Division's designations contained in Division's Exhibit 62). Newport provides financing and locates investment opportunities for companies. *Id.* at 20-21. Newport also provides investor relations and promotional services to public companies, either directly or through Pierce's other companies. *Id.* At 20, 53

Newport does not have any employees, just consultants. Pierce provides consulting services to other companies through Newport. *Id.* at 27, 37. Pierce receives annual compensation from Newport of $800,000 to $900,000 for his consulting services. *Id.* at 66. Pierce borrows money from Newport (which he approves on behalf of Newport) and sometimes paid down his loans from Newport by transferring his Lexington shares to Newport. *Id.* at 107, 109. Pierce also caused Newport to invest directly in Lexington on numerous occasions between late 2003 and 2006 in the form of loans and private placements. *See* Division's Exhibits 59, 60, 70; Hearing Transcript at 410, 414.

Pierce's Uses His Control To Obtain 950,000 Vested Option Shares For Resale:

Intergold was a shell corporation with essentially no business operations, income, or property by 2002. Respondent's Exhibits 1 at 3. In November 2003, Intergold merged with Lexington Oil & Gas Ltd. ("Lexington Oil") to form Lexington by issuing three million shares with restrictive legends to the shareholders of Lexington Oil and by changing Intergold's name to "Lexington Resources." Atkins was the president of Intergold, and became the president of Lexington. Respondent's Exhibit 5.

Pierce was an officer and director of ICI. Pierce Testimony at 54. Pierce provided consulting services to ICI through Newport. *Id.* at 72. ICI in turn provided consulting services to Intergold and then Lexington until the first quarter of 2004. Hearing Transcript at 312-13. Pierce was the "funds"

and the "brains" behind ICI, while ICI's nominal president, Marcus Johnson ("Johnson"), only did administrative paperwork and filings. *Id.* at 94-95.

Atkins provided his services as president of Intergold in his capacity as a consultant for ICI. Pierce's Testimony at 64 (Division's Exhibit 62). While serving as the president of Intergold and then Lexington, Atkins received consulting fees from ICI for his services as president of Intergold and Lexington during 2002, 2003 and 2004. Those fees were $17,325 in 2002, $19,625 in 2003 and $60,000 in 2004. Transcript at 452-53; Respondent's Exhibit 5 at 5; Division's Exhibit 56 at 93.

ICI lent money to Intergold to allow that company to stay in business. By October 2003, Intergold owed a total of $1.2 million to ICI. Hearing Transcript at 301; Respondent's Exhibit 2. Atkins worked to arrange a restructuring of Intergold. One of the key issues for Atkins to resolve was Intergold's debt to ICI. According to Atkins, "I couldn't go forward with a new company and try to raise money in it if there was this [ICI] debt that was outstanding ...." Transcript at 303.

Atkins restructured Intergold by giving Pierce's group a major stake in Intergold. First, Atkins gave Pierce's group 100,000 shares of stock with restrictive legends in lieu of $250,000 owed to Pierce. *Id.* at 303-04; Respondents' Exhibit 2. Second, Atkins gave Pierce's group, through IMT, "the right and option ... to purchase all or any part of an aggregate 950,000 shares of the ... Company" for five years from November 18, 2003 in lieu of $475,000 owed to Pierce's group (the "Option Agreement"). Division's Exhibit 2 at 2.

When Atkins agreed to give Pierce's group the vested options for 950,000 shares, there were 521,184 Intergold common shares outstanding. Respondent's Exhibit 5 at 2. This meant that under the Option Agreement, Pierce's group received vested options – without paying a dollar in cash – for 64% of Intergold's shares on a post-exercise basis. Division's Exhibit 51. Atkins therefore gave Pierce's group a 64% block of the equity that Intergold's shareholders would retain as part of the forthcoming merger with Lexington Oil. It also gave Pierce's group the shares that they would sell to cash out following the merger.

Pierce's Control Over Lexington:

Following Intergold's merger with Lexington Oil on November 19, 2003, the 950,000 vested

option shares granted to IMT represented 21.25% of Lexington's outstanding shares. Respondent's Exhibit 5 and 5-6. The largest block of shares, 63.9%, was purportedly owned by Orient. *Id.* at 6. According to a document just received by the Division, the sole shareholder of Orient is an off-shore trust whose only beneficiaries are Pierce's wife and daughter. Proposed Division's Exhibits 78, 79. Pierce's total influence over Lexington must therefore be measured by combining IMT's 21.25% stake with Orient's 63.90% stake.

Although Orient was supposedly the majority shareholder, it exercised no influence directly over Lexington's management. Atkins did not speak with Orient's representatives or even know who Orient's representatives were. While never talking to Orient's representatives, Atkins would speak with Pierce three or four times per week. Transcript at 455-56.

Lexington's shareholders and directors also exerted no control over the company. Lexington did not have any shareholder meetings during 2003 or 2004. After Atkins appointed additional directors to Lexington's board, the board still did not have meetings, except for quarterly meetings of the audit committee. Other board actions were handled through written consents. *Id.* at 457-58.

Lexington had only nominal business operations. Lexington had no revenues during 2003 and only $472,000 in revenues during 2004 (versus more than $6.5 million in expenses). Division's Exhibit 56 at 35. Most operational activities were performed by IMT, which provided consulting services to Lexington for financing, investor relations and locating oil and gas properties. Pierce Testimony at 67 (Division's Exhibit 62). Pierce was an officer and director of IMT. *Id.* at 36. Pierce provided consulting services to IMT through Newport. *Id.* at 64-65. Pierce had Newport lend money to IMT. *Id.* at 95; Division's Exhibit 70. Pierce was the "funds" and the "brains" behind the business. Hearing Transcript at 96.

IMT also helped raise financing for Lexington in Europe and the United States. Pierce Testimony at 70. Lexington did not have any offices of its own, except for a corporate identification office in Las Vegas, Nevada. Rather than having its own offices, Lexington used IMT's office in Blaine, Washington. IMT's administrative staff answered the phones for Lexington, forwarded telephone calls, directed emails, obtained shareholder inquiries and handled banking responsibilities.

Hearing Transcript at 457-58.

Lexington also did not pay its officers, who therefore relied upon Pierce for income and loans. Both Lexington's president, Atkins, and chief financial officer, Vaughn Barbon ("Barbon"), did not receive salary payments from Lexington during 2003 and 2004. Instead, all of their reported compensation relating to Lexington came from ICI, the consulting group Pierce controlled. Division's Exhibit 56 at 96 (showing ICI payments of $60,000 to Atkins and $64,000 to Barbon during 2004).

While not receiving payments from Lexington, Atkins received large payments from Newport. Atkins was a paid consultant for Newport for five years, including the time when he was Lexington's president. Pierce gave Atkins his consulting assignments for Newport. Transcript at 451, 453-54. Atkins also borrowed money from Pierce from 2004 to 2006 to remodel his home. Although Atkins borrowed the money from Pierce, the funds came from Newport. Atkins repaid the loan by transferring stock to Newport. *Id.* at 453-54, 459. Although Atkins might have borrowed up to $400,000 from Pierce, he could not say what the total was.

During the hearing, Atkins would not provide the total amount of compensation that he received from Newport, and also refused to disclose even a general description of his income sources in 2003 and 2004. *Id.* at 454-55. Bank records indicate that from December 2003 to November 2004, Newport paid a total of $ 268,000 to Atkins. Division's Exhibit 70.

Pierce decided who should provide services to Intergold and Lexington. Intergold retained X-Clearing Corp. ("X-Clearing"), which was formerly known as Global Securities Transfer Inc., as its transfer agent in 2001. Pierce made the decision to have Intergold retain X-Clearing, while Atkins merely memorialized the retention of X-Clearing. Hearing Transcript at 81-82. After Intergold's merger with Lexington Oil, X-Clearing continued to serve as the transfer agent for Lexington until 2004. Transcript at 83-84. Intergold and Lexington were "slow pay" accounts. When X-Clearing's president, Robert L. Stevens ("Stevens") had trouble getting paid by Intergold or Lexington, he went to Pierce to get the bills paid because Pierce was the money behind the venture. *See Id.* at 104.

Pierce's Control Over Accounts At Hypo Bank And vFinance:

Pierce had an account in his own name at Hypo Bank. He was the only person authorized to conduct trading in his Hypo Bank account. Pierce Testimony at 42; Division's Exhibits 16-19; Proposed Division's Exhibit 87.[2] As revealed in the new records produced to the Division on March 10, 2009, Pierce also controlled accounts at Hypo Bank in the names of Newport and another offshore company, Jenirob Company Ltd. ("Jenirob"). *See* Proposed Division's Exhibits 80 and 84.

In 2003 and at about the same time that Lexington began trading on the OTCBB, Pierce opened a brokerage account for Newport at vFinance. Pierce Testimony at 218; Division's Exhibit 25. Hypo Bank also held an omnibus account in its name at vFinance. Hypo Bank traded for its customers, including Pierce and the offshore companies he controlled, through its omnibus vFinance account. *See* Division's Exhibits 17-19, 23-24 and Proposed Division's Exhibits 82-83, and 86 (brokerage records reflecting trades in Lexington shares). By trading in his Hypo Bank accounts through the omnibus vFinance account in Hypo Bank's name, Pierce ensured that neither his name nor the names of his companies appeared on the vFinance brokerage statements or on trading records kept by U.S. exchanges.

Pierce's primary broker at Hypo Bank was Philippe Mast ("Mast"). *See* ProposedDivision's Exhibits 80-88. Mast also was a signatory on the account opening documents for Hypo Bank's omnibus account at vFinance. Division's Exhibit 21. Mast and Pierce communicated if a Hypo Bank account was executing trades in Lexington shares. Division's Exhibit 67. According to Pierce, it was "regular protocol" for Mast to tell Pierce about Hypo Bank accounts that were trading in Lexington. Pierce Testimony at 391 (Division's Exhibit 62). Mast was also the contact person at Hypo Bank when X-Clearing arranged to transfer Lexington shares to a Hypo Bank account.[3]

2
Pierce owned Intergold shares prior to the merger with Lexington. Through the merger, Pierce's Intergold shares were converted into 42,561 Lexington shares, which Pierce deposited into his personal Hypo Bank account. Division's Exhibit 50.

3
Stevens spoke with Mast to have Lexington shares transferred to Brown Brothers Harriman, which
(continued...)

Pierce also communicated with vFinance about its trading in Lexington shares for Hypo Bank. Nicholas Thompson ("Thompson") was the market maker for Lexington shares at the vFinance brokerage firm. Pierce had known Thompson for five years. *Id.* at 114, 228. Thompson sent Pierce emails discussing trading in Lexington shares that Thompson was executing for Hypo Bank's account at vFinance. Division's Exhibit 33. In fact, Thompson would tell Pierce about a Lexington stock trade in Hypo Bank's account before Thompson even told Mast about the trade. *Id.* Pierce testified that he communicated regularly with Thompson about Lexington trading in Hypo Bank's account. Pierce Testimony at 391-92.

Pierce's Receipt And Distribution Of Lexington Form S-8 Shares:

On November 21, 2003, Lexington filed a short-form registration statement, the November 2003 Form S-8, which purported to register Lexington's stock issuances to employees and consultants. The Form S-8 stated that the stock recipients must represent that the shares would not be sold or distributed in violation of the securities laws. November 2003 Form S-8 at 2, 19 (Division's Exhibit 6). The November 2003 Form S-8 did not even contain so much as a supplemental prospectus to register resales by any Lexington shareholder, and therefore no disclosure whatsoever about the selling shareholders, their holdings, or their plan of distribution was provided. Subsequent Form S-8 filings also failed to contain even a supplemental prospectus. Transcript at 60, 62-63.

Lexington issued 350,000 pre-split shares on November 24, 2003 to Pierce, which Pierce transferred that same day to Newport. Division's Exhibit 40. Pierce obtained those 350,000 shares after representing that he was obtaining the Lexington shares for "investment purposes" only. Option Exercise Agreement dated November 24, 2003 at 1 (Division's Exhibit 10). Contrary to the representations, Pierce caused Newport to sell 328,300 of those 350,000 pre-split Lexington shares to third persons. Division's Exhibit 40. These transactions left Newport with 21,700 pre-split

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3 (...continued)
was Hypo Bank's clearing broker in the United States. Stevens helped Hypo Bank get shares that were in "street name" and therefore sellable on the open market. Hearing Transcript at 101-03.

Lexington shares.

Lexington also issued 150,000 pre-split shares on November 25, 2003 to Pierce, who represented that the shares were for investment purposes only. Division's Exhibit 11. Pierce transferred 50,000 of those shares on December 2, 2003 to Newport and retained the other 100,000 pre-split shares for his own account. Division's Exhibit 41. Pierce transferred these 100,000 Lexington shares to his personal account at Hypo Bank. Division's Exhibit 16; Proposed Division's Exhibit 88.

Pierce had originally asked to have these 150,000 shares issued with the 350,000 shares that he received on November 24, 2003. However, Atkins spoke with Pierce by telephone and advised Pierce that the 500,000 share issuance would cause Pierce to cross the 10% ownership threshold for reporting his stake in Lexington. Atkins recommended to Pierce that they structure the transaction to split the 500,000 shares into two blocks of 350,000 and 150,000 shares that would be issued on consecutive days. Hearing Transcript at 359-60, 473-75.

On January 22, 2004, Lexington issued 300,000 pre-split Lexington shares to Pierce's long-time associate, Elliot-Square, pursuant to the November 2003 Form S-8. Respondent's Exhibit 27. On January 26, 2004, Elliot-Square transferred all 300,000 of those shares to Newport. Respondent's Exhibit 28.[4] Pierce later deposited these 300,000 shares into Newport's Hypo Bank account. Proposed Division's Exhibit 82.

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 personal Hypo Bank account a total of 300,000 post-split Lexington shares that were issued under the November 2003 Form S-8. Pierce's Hypo Bank account also contained 121,683 post-split Lexington shares that he received in exchange for his original Intergold shares. Division's

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Elliot-Square has offered conflicting reasons for his receipt and transfer of those 300,000 shares. During the Division's investigation, Elliot-Square stated that the 300,000 shares might have been a mistaken payment of too many options for the work he performed. Transcript at 279-80 (quoting from Transcript of Richard Elliot-Square Interview dated February 28, 2007).

Exhibit 17. As a result of the split, Newport received and deposited into its Hypo Bank account an additional 643,400 shares it received for the 300,000 shares it had acquired from Elliot-Square and the 21,700 shares it had acquired from Pierce. Proposed Division's Exhibit 82.

In February 2004, Pierce caused Newport to acquire for its account at Hypo Bank 25,000 post-split shares that Lexington had issued to Stevens pursuant to the November 2003 Form S-8. *Id.* On May 19, 2004, Lexington issued 495,000 shares to Elliot-Square purportedly pursuant to a Form S-8 filed by Lexington in February 2004. Respondent's Exhibits 32-33. Pierce caused Jenirob to acquire 435,000 of these shares the same day after they were issued to Elliot-Square and then Pierce deposited them in Jenirob's Hypo Bank account. Proposed Division's Exhibit 86. Pierce moved 100,000 of these shares from the Jenirob account to Newport's account at Hypo Bank on June 11, 2004. *Id.*

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 in his personal Hypo Bank account for proceeds of $2.7 million. Division's Exhibits 18, 48. 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.[5] Under a first-in, first-out analysis (whereby the 121,683 post-split shares that Pierce received through the merger are treated as sold first), Pierce received $2,077,969 in proceeds from selling the 300,000 post-split shares that he retained from the November 2003 Form S-8 stock issuances. Division's Exhibits 48, 50.

Lexington filed another Form S-8 on June 8, 2004 (the "June 2004 Form S-8"). Division's Exhibit 7. Pursuant to the June 2004 Form S-8, Pierce received a total of 320,000 Lexington shares after stating in writing that the shares were for investment purposes only. Division's Exhibits 12-14. Pierce transferred all 320,000 shares to Newport on the same day that he received them. Division's Exhibits 44-45. On June 25, 2004, Pierce caused Newport Capital to sell 80,000 of those 320,000

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[5] Earlier in 2004, Pierce sold some of the 121,683 post-split Lexington shares that he had acquired as part of the reverse merger and deposited into his Hypo Bank account.

Lexington shares to another company Pierce controlled. Division's Exhibit 45. Pierce transferred the remaining 240,000 shares to Newport's account at Hypo Bank. Proposed Division's Exhibit 82.

Based upon documents that it received from Liechtenstein authorities within the past few days, the Division has determined that by June 2004, Pierce had moved to the Newport and Jenirob accounts at Hypo Bank a total of 1,634,400 Lexington shares that had been issued purportedly pursuant to Form S-8 registration statements. Proposed Division's Exhibit 89. Pierce sold these shares into the open market through the Newport and Jenirob accounts at Hypo Bank between February 2004 and December 2004. *Id.* Under a similar first-in, first-out analysis, Pierce received a total of $5.454 million and $2.069 million in proceeds in the Newport and Jenirob accounts, respectively, from selling the additional 1.6 million Lexington shares that were originally issued under Forms S-8. *Id.*

Therefore, including his personal account and the Newport and Jenirob accounts at Hypo Bank, Pierce sold a total of two million S-8 shares for net proceeds on a first-in, first-out basis of $9.601 million. Division's Exhibit 50 and Proposed Exhibit 89. Pierce sold more than one million of these shares during June 2004, when Lexington's stock price hit an all-time high of $7.43. Division's Exhibit 50 and Proposed Exhibit 89. Pierce's sales through the three accounts at Hypo Bank were part of Hypo Bank's sale of Lexington shares through its omnibus account at vFinance. Division's Exhibits 23-24, 49.[6]

On February 27, 2006, Lexington filed yet another Form S-8 (the "February 2006 Form S-8"). Division's Exhibit 8. Lexington issued a total of 500,000 shares to Pierce in early March 2006. Within days of receipt, Pierce had Lexington transfer those 500,000 shares to Newport. Pierce sold all of those Lexington shares in March 2006 through a brokerage account that Pierce opened for Newport at the Peacock Hislop Staley & Given Inc. brokerage firm ("Peacock Hislop") in Phoenix, Arizona. Pierce Testimony at 194; Division's Exhibit 29. Pierce made those sales at prices just

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6 While Pierce's sales made up the vast majority of the sales in the vFinance Hypo Bank account, some of the third parties who purchased Lexington shares from Newport also transferred and sold their Lexington shares through accounts at Hypo Bank. Division's Exhibit 66.

slightly higher than he had paid to purchase those shares from Lexington a few days earlier. Division's Exhibit 46.

Finally, on March 14, 2006, Lexington filed one more Form S-8 (the "March 2006 Form S-8"). Division's Exhibit 9. Lexington issued a total of 500,000 shares to Pierce in mid-March 2006. Within days, Pierce had Lexington transfer those 500,000 shares to Newport. Pierce sold 164,000 of these Lexington shares in March 2006 through the Newport account at Peacock Hislop. Pierce acquired those shares for only a few cents less than the eventual selling price of those Lexington shares on the OTCBB. Division's Exhibit 30.

Pierce's Prior Bar By Canadian Securities Regulators:

Pierce attended the University of British Columbia for six to eight months, but never continued his education and never obtained any professional licenses. After leaving college, Pierce was a self-employed businessman. Pierce Testimony at 158-59. Pierce has known Atkins since the early 1990s. Pierce and Atkins have worked together on ten different companies. *Id.* at 159-60.

In June 1993, Canadian securities regulators in British Columbia imposed a fifteen-year bar and $15,000 fine upon Pierce relating to his activities as a director of Bu-Max Gold Corp. ("Bu-Max"). According to stipulated findings, investor proceeds were diverted to unauthorized and undisclosed uses, including for Pierce's benefit. Additionally, during the investigation by Canadian securities regulators into Bu-Max, "Pierce tendered documents to the staff of the Commission which were not genuine." *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce*, Order Under Section 144 at 2 (June 8, 1993) (Division's Exhibit 47).

The Staff subpoenaed documents from Pierce in May 2006. *See* Division's Exhibit 31. Pierce did not produce any emails relating to Lexington or his trading in response to the subpoena. According to Pierce, he deletes all of his emails on a daily basis. Pierce Testimony at 175-76.

LEGAL ARGUMENT

I. PIERCE VIOLATED SECTION 5 OF THE SECURITIES ACT.

Pierce violated Section 5(a) of the Securities Act which imposed a registration requirement for his sales of Lexington securities in interstate commerce:

> *Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –*
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise

15 U.S.C. § 77e(a) (emphasis added). Similarly, because his Lexington stock resales 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).

The purpose of Section 5's registration provisions is to ensure that the investing public is provided with the necessary material information about their contemplated investment. It is well-established that improper intent is not an element of a Section 5 violation. *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).

Section 5's registration requirements apply to each and every sale of securities, including those issued under a Form S-8 registration statement. *SEC v. Cavanagh*, *supra*, 155 F.3d at 133. Interpretive Release No. 33-6188 (the "1980 Release"), which discusses the availability of the Form S-8 registration statement for stock issuances to employees of the issuer, states that "Section 5 provides that *every offer or sale of a security* made through the use of the mails or interstate commerce *must be accomplished through the use of a registration statement* meeting the Act's disclosure requirements, unless one of the several exemptions from registration set out in sections 3 and 4 of the Act is available." 45 Fed. Reg. 8960, 8962 (Feb. 11, 1980) (emphasis added). The 1980 Release also provides that affiliates of the issuer must separately register their sales of S-8 shares. *Id.* at 8976-77. Form S-8's instructions specifically "advise all potential registrants that the registration statement does not apply to resales of the securities previously sold pursuant to the registration statement." Form S-8 General Instruction C.1 and n.2.

Pierce violated Section 5 with respect to his resales of Lexington S-8 shares. The Division established a *prima facie* case with evidence that (1) Pierce directly or indirectly sold Lexington

shares, (2) no registration statement was in effect as to Pierce's sale of 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. March 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)).

Pierce admits that he sold Lexington shares through his Hypo Bank account in June 2004. Answer, ¶ 16. *See also* Division's Exhibit 18 (account statements for trading in Pierce's Hypo Bank account during June 2004). Brokerage records also establish that Pierce sold Lexington shares throughout all of 2004 and during March 2006. Division's Exhibits 16-19 (brokerage records reflecting sales of Lexington shares in Pierce's Hypo Bank account), 30 (brokerage records reflecting sales of Lexington shares in Newport's Peacock Hislop account) and 48 (Division's summary of Pierce's Lexington open market sales). As a result, there is no genuine dispute that Pierce sold shares received through Lexington's S-8 offerings. Additionally, the evidence received from the Liechtenstein regulators proves that Pierce sold another 1.6 million Lexington shares through Newport and Jenirob accounts at Hypo Bank between February 2004 and December 2004. Proposed Division's Exhibits 82, 86, 89

Pierce received his shares from Lexington under the purported November 2003, June 2004, February 2006 and March 2006 Form S-8 Registration Statements. Division's Exhibits 5-8. Those Form S-8s supposedly registered Lexington's issuance of shares to purported employees and consultants, but did not register the resale of those shares by the recipients. Transcript at 59-60, 62-63. The shares Pierce sold in the Newport and Jenirob accounts either came from Pierce or from other consultants who received the shares under purported S-8 registration statements that did not register any resales. It is therefore beyond dispute that Pierce resold his Lexington shares without filing a registration statement for those resales. Answer, § 16 (admitting that Pierce sold shares in June 2004 with registering those sales).

It is also beyond genuine dispute that instruments of interstate commerce were used in connection with Pierce's sales of Lexington shares. X-Clearing received instructions by mail,

telephone and fax related to the transfer of Lexington S-8 shares to Pierce and then to other persons and communicated with Mast at Hypo Bank to get the shares into "street name." Transcript at 102-03, 109; Respondent's Exhibits 16, 17, 22, 23, 37b-c, 38, 39b-d. Pierce communicated by telephone and email with Mast at Hypo Bank and Thompson at vFinance about trading in Lexington shares. Pierce Testimony at 391-92 (Division's Exhibit 62); Division's Exhibits 33, 34, 67.

II. PIERCE CANNOT PROVE AN EXEMPTION FROM REGISTRATION.

A. Pierce Has The Burden Of Proving An Exemption.

As demonstrated above, the Division established Pierce's *prima facie* violation of Section 5's registration requirements. Pierce therefore has the burden of proving that his resales of Lexington shares were exempt from registration whether or not Lexington supposedly used valid S-8 registration statements for its sales of shares to Pierce. *SEC v. Cavanagh, supra*, 155 F.3d at 133-34 (finding Section 5 violation for resales of S-8 shares without registering the resales). *See SEC v. Ralston Purina Co., supra*, 346 U.S. at 126 (1953). Pierce's reliance upon a registration exemption must be strictly construed. *SEC v. M&A West Inc., supra*, 538 F.3d at 1050-51; *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). Exemptions from registration are strictly construed to protect investors' access to material information. *In the Matter of J. Dudchik and Rodney R. Schoemann, supra*, Initial Decision at 14.

B. Pierce Cannot Establish The Section 4(1) Exemption.

Although 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), Pierce cannot qualify for this exemption. As demonstrated below, the evidence establishes that Pierce falls within the Securities Act's definitions of an "issuer" and an "underwriter," and is therefore precluded from relying upon Section 4(1).

1. Pierce's Control Over Lexington Made Him An "Issuer."

Section 2(a)(11) of the Securities Act defines an "issuer" to include "any person directly or indirectly controlling or controlled by the issuer." 15 U.S.C. § 77b(a)(11). A person who constitutes

an "affiliate" of the issuer is deemed to be an "issuer" with respect to the distribution of securities. *SEC v. Cavanagh, supra,* 155 F.3d at 134, *cited by In the Matter of Thomas J. Dudchik and Rodney R. Schoemann, supra,* Initial Decision at 14.

Determining whether a person is an affiliate involves looking at the totality of the circumstances, including a consideration of the person's influence upon the management and policies of the corporation. *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann, supra,* Initial Decision at 14 (citing and quoting *SEC v. Freiberg,* 2007 WL 2692041 at * 15 (D. Utah Sept. 12, 2007)). An affiliate need not be an officer, director, manager, or shareholder of the issuer and does not have to exercise control in a continuous or active manner. *SEC v. International Chemical Development Corporation,* 469 F.2d 20, 30 (10th Cir. 1972) (citing *Pennaluna & Co. v. SEC,* 410 F.2d 861, 866 (9th Cir. 1969), *cert. denied* 396 U.S. 1007, 90 S. Ct. 562, 24 L. Ed. 2d 499 (1970)). The provision of financing and participation in the violative scheme can be enough to render a person an affiliate of the issuer. *Id.*

The hearing evidence establishes Pierce's status as an affiliate of Lexington. Pierce was the money and brains behind Lexington. Transcript at 82-83, 94-96. IMT's block of shares exceeded 20% and Pierce's initial exercise of 500,000 option shares represented a 10% block. Additionally, the owner of Lexington's majority shareholder, Orient, has just been revealed to be an off-shore trust whose beneficiaries are Pierce's wife and daughter. Proposed Division's Exhibits 78 and 79.

Although Orient was the nominal majority shareholder, Atkins did not communicate with, or even know the identity of its representatives. Instead, Atkins talked three or four times per week with Pierce. Lexington's nominal president, Atkins, derived absolutely no income from Lexington itself. Instead, Atkins was dependent upon Pierce for financial support through consulting fees from ICI, consulting fees from Newport and personal loans from Pierce. The totality of Pierce's ability to exercise influence over Atkins makes Pierce an affiliate of Lexington. *SEC v. International Chemical Development Corporation, supra,* 469 F.2d at 30; *In the Matter of Thomas J. Dudchik and Rodney R. Schoemann, supra,* Initial Decision at 14 (describing and applying totality of circumstances test for affiliate status).

Pierce's affiliate status is also demonstrated by his ability to dictate the terms of the merger between Intergold and Lexington. Because Intergold owed $1.2 million to ICI, Atkins knew that he could not attract new investors to Lexington unless Pierce agreed to reduce that debt. Atkins therefore negotiated a deal whereby Pierce's consultants released $475,000 in debt for 950,000 vested option shares that represented 64% of Intergold's outstanding shares (calculated on a post-exercise basis). Division's Exhibit 51. As a result, Pierce was able to extract the majority of Intergold's benefit from the merger, and that ability demonstrates his corporate control.

Because he was in a position to kill Intergold's merger with Lexington unless he got what he wanted, Pierce also had enough control to insist that a registration statement be filed for his resales. Pierce's decision not to register his resales was based on his obvious desire to conceal his acquisition and resale of those shares. Filing a prospectus for his resales would have forced Pierce to disclose his large stock position and his prior bar by British Columbia securities regulators. That disclosure would have warned investors that a large shareholder with a bar for deceptive conduct was selling his shares in Lexington, and thereby raised questions about Lexington's business prospects. Instead of making disclosures through a registration statement, Pierce decided to make undisclosed and unregistered sales of his shares while Lexington's share price was rising and peaking.

2. **Pierce's Distribution Of Shares Made Him An "Underwriter."**

Pierce is also unable to rely upon the Section 4(1) exemption given the evidence establishing his underwriter status. 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 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.*, Initial Decision Release No. 250 at 9-12 (Admin. Proc. File No. 3-11310 May 11, 2004) (finding Section 5 violations and absence of exemption).

One compelling indication of Pierce's "underwriter" status is the short time period between his acquisition of the Lexington shares in November 2003 and his sale of those shares through Newport's account at Hypo Bank beginning in February 2004 and through Pierce's own account at Hypo Bank beginning in June 2004 (under the first-in, first-out methodology). *SEC v. M&A West*, *supra*, 538 F.3d at 1050-51. According to the Securities Act Rule 144(k) that was in effect in 2004, the minimum holding period for the safe harbor from registration was twelve months. 17 C.F.R. § 230.144(a)(1) (2004). Because Pierce's sales of the November 2003 Lexington S-8 shares took place in just three months for his Newport account and in just seven months for his personal account (with all sales were completed within one year), Pierce cannot rely 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.

Pierce also held the 320,000 shares received under the June 2004 Form S-8 for a very short period. Within a few days, Newport sold 80,000 of those shares to a third party. Division's Exhibit 45. Pierce transferred the other 240,000 post-split shares to Newport's account at Hypo Bank. Pierce sold those Lexington shares between February and December 2004. Division's Exhibits 19, 24.

In early March 2006, Lexington issued 500,000 shares to Pierce under the February 2006 Form S-8. Within days, Pierce transferred those shares to Newport which deposited all of the shares into its Peacock Hislop account. Those shares were then sold in a few days for nearly the same price as the exercise price that Pierce paid to Lexington. Similarly, Lexington issued another 500,000 shares to Pierce under the March 2006 Form S-8. Pierce quickly transferred those shares to Newport and then sold 164,000 of those shares through Peacock Hislop for prices that roughly equaled the exercise price paid by Pierce. Because there was no profit for Pierce in selling these Lexington shares quickly for nearly the same price at which he acquired the shares, it is clear that Pierce's intention was to distribute shares for Lexington by paying Lexington an exercise price roughly equal to the price for which the shares sold on the open market.

Additionally, Pierce distributed 1.6 million other Lexington shares using accounts for Newport and Jenirob at Hypo Bank. These facts establish that Pierce is an "underwriter" by engaging in a distribution of Lexington stock.

III. 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). The purpose of these Exchange Act Sections is to ensure that investors have timely knowledge of the identity of corporate insiders and their transactions in the company's stock. Investors can use that knowledge to assess how a company's insiders assess the company's future prospects – *i.e.*, negatively if large inside shareholders are selling their positions.

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) (internal citation omitted).

Pierce did not file a Form 3, 4, or 5 regarding his Lexington transactions. Furthermore, Pierce admits that he did not disclose his ownership interest by filing a Schedule 13D until July 2006. Pierce's Answer, ¶ 17. Pierce's belated Schedule 13D reflects 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). Additionally, the Divisions' evidence established that Pierce actually had at least a 10% interest for all but a few days between November 2003 and May 2004. Division's Exhibit 51.

Atkins' testimony during the hearing established that Pierce deliberately attempted to evade his ownership disclosure requirements. Atkins learned that Pierce intended to exercise an option on 500,000 pre-split shares in November 2003. Given the number of outstanding Lexington shares, Atkins recognized that this exercise would have put Pierce over the 10% ownership threshold. Atkins therefore advised Pierce to split his 500,000 shares into two blocks of 350,000 and 150,000 shares that would be exercised on consecutive days in late November 2003. This scheme required, however, that Pierce quickly sell off some of his 350,000 shares to avoid having more than 10% of the outstanding shares when he acquired the second block of 150,000 on the next day. Transcript at 473-75.

The fact that Pierce was entitled to exercise an option on 500,000 shares is enough, however, to establish his beneficial ownership for purposes of Sections 13(d) and 16(a); such ownership exists as to any option (in this case for the total 500,000 shares) that Pierce could exercise in the next sixty days. 17 C.F.R. § 240.13d-3(d)(1). Atkins' testimony regarding Pierce's planned exercise of options for 500,000 shares therefore establishes that Pierce crossed the reporting threshold in November 2003, but failed to file the required Schedule 13D and Forms 3, 4 and 5.

Pierce's Schedule 13D also failed to reflect IMT's acquisition of 950,000 vested Lexington options on November 18, 2003. Because Pierce has admitted his control over IMT, *see* Pierce's Answer, ¶ 9, his failure to disclose the IMT holdings as part of his beneficial holdings constitutes a violation of Sections 13(d)(1) and 16(a).[7]

Finally, Pierce hid his majority ownership of Lexington by using Orient as the nominal shareholder, while never revealing that his wife and daughter were the beneficiaries of the trust that owned Orient. Pierce's deliberate concealment of his beneficial interest in Orient demonstrates that

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[7] Atkins' testimony that Lexington would not have issued S-8 shares to IMT because such shares may only be issued to natural persons is inapt. As both Atkins and Pierce's expert witness testified, the Option Agreement did not limit IMT to receiving S-8 shares. IMT had the right under the Option Agreement to acquire 950,000 restricted shares at any time. Transcript at 480-81, 548-49. That right triggered Pierce's and IMT's beneficial ownership of 950,000 shares for reporting purposes under Sections 13(d) and 16(a) of the Exchange Act.

he consciously acted to attempt to evade his disclosure obligations under Sections 13(d) and 16(a) of the Exchange Act.

IV. PIERCE SHOULD DISGORGE HIS STOCK SALE PROCEEDS.

Because Pierce violated Section 5 of the Securities Act through his unregistered sale of Lexington shares, 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 from sale of unregistered securities); *Geiger v. SEC, supra* 363 F.3d at 488-89 (upholding disgorgement order against family partnership and owner for selling unregistered securities); *In the Matter of Lorsin, Inc., supra*, Initial Decision Release No. 250 at 15 (ordering, on summary disposition, that stock promoters and principals jointly and severally disgorge proceeds of unregistered stock sales). The "purpose of disgorgement is to force 'a defendant to give up the amount by which he was unjustly enriched' rather than to compensate the victims of fraud." *S.E.C. v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985)(quoting *S.E.C. v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978)).

The Division's disgorgement formula only has to be a reasonable approximation of the gains causally connected to the violation. *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995); *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 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 his initial sales were of the 121,683 post-split Lexington shares (using a first-in, first-out method of calculating the sales proceeds) that he received during the reverse merger. His subsequent sales were of the 300,000 post-split shares provided to

him under the November 2003 Form S-8. Those sales generated net proceeds of $2,077,969.

Based upon the Hypo Bank documents it just received, the Division has determined that Pierce sold 1,634,400 Lexington S-8 shares through Hypo Bank and vFinance using Newport for net proceeds of $5,454,197 and using Jenirob for net proceeds of $2,069,181. Proposed Division's Exhibit 89. Because those sales were in violation of Section 5's registration requirements, Pierce should disgorge total net proceeds of $9,601,347 ($2,077,969 + $5,454,197 + $2,069,181). *Id.*

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) (describing court's equitable discretion to award prejudgment interest). The Hearing Officer should therefore order Pierce to disgorge $9,601,347, plus pre-judgment interest on that amount, for his violation of Section 5.

V. A CEASE AND DESIST ORDER IS NECESSARY TO PROTECT INVESTORS FROM FURTHER VIOLATIONS BY PIERCE.

Section 8A of the Securities Act authorizes the Commission to issue a cease and desist order against any person who has been found to be "violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder." 15 U.S.C. § 77h-1(a). Similarly, Section 21C(a) of the Exchange Act authorizes the Commission to issue a cease and desist order against any person who has been found to have violated any Exchange Act provision or rule. 15 U.S.C. § 78u-3(a).

In this case, a cease and desist order should be issued in light of Pierce's repeated and deliberate violations of Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act. *See, e.g., In the Matter of Lorstn, Inc., et al., supra*, Initial Decision Release No. 250 at 12-14 (issuing cease and desist order after finding that respondent sold unregistered shares). In determining whether to impose a cease and desist order, the Hearing Officer should consider the egregiousness

of Pierce's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of any assurances against future violations, Pierce's recognition of the wrongful nature of his conduct, and the likelihood that Pierce's activities will present opportunities for future violations. *Steadman, supra*, 603 F.2d at 1140 (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n. 29 (5th Cir. 1978), *affirmed on other grounds*, 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981)).

No one of these particular factors is controlling. *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 based upon violation of record keeping provisions) (citing *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996)). Because remedial sanctions should promote the "public interest," the Hearing Officer "weigh[s] the effect of [its] action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally." *Arthur Lipper Corp.*, 46 S.E.C. 78, 100 (1975); *In the Matter of Richard C. Spangler, Inc.*, 46 S.E.C. 238, 254 n.67 (1976).

All of the *Steadman* factors strongly favor a cease and desist order against Pierce. Pierce distributed over three million Lexington shares during a thirty-month period from November 2003 until March 2006 without the registration required by Section 5 of the Securities Act. In June 2004 alone, Pierce sold 300,000 of those shares through his own Hypo Bank for $2.1 million in net proceeds. Additionally, from November 2003 through March 2006, Pierce transferred Lexington shares to Newport, a company he controlled, which then sold shares through Hypo Bank and another brokerage account. Pierce therefore engaged in a wide-ranging, long-lasting and highly lucrative distribution of Lexington shares that violated Section 5 of the Securities Act in an egregious and recurring fashion.

Similarly, Pierce did not file the necessary Schedule 13D form until June 2006, when his Lexington transactions were already under investigation, and never filed any Forms 3, 4, or 5 to disclose his transactions in Lexington shares. Pierce deliberately violated Section 5 of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act to conceal his acquisition and sale of large blocks Lexington shares. For example, Pierce and Atkins decided in late November 2003 to split

a block of 500,000 shares to attempt to avoid disclosing his ownership interest. Similary, Pierce and Atkins also made IMT the nominal recipient of the 950,000 vested options to conceal the identities – particularly Pierce's – of the persons who would receive the shares.

Documents just released by Liechtenstein over Pierce's objections also establish that Pierce used Orient to conceal his family's majority stake in Lexington. As a result, Lexington's Form 10-KSB filings for 2003, 2004 and 2005 do not contain any mention of Pierce, including the section describing the company's 5% shareholders. Division's Exhibits 55-57; Hearing Transcript at 61, 63-64. That was no oversight. That was deliberate concealment. In fact, only after Lexington's stock price had crashed and the staff sent a subpoena to Pierce in June 2006 did Pierce file a Schedule 13D in July 2006 and did Lexington disclose Pierce's ownership interest in the Form 10-KSB for 2006. Division's Exhibits 15 (Pierce's Schedule 13D filing) and 58 (Lexington's 2006 Form 10-KSB). Pierce's Schedule 13D filing also alludes to the enforcement action by British Columbia securities regulators. Division's Exhibit 15 at 6. Because Pierce consciously violated the federal securities laws, a cease and desist order is necessary to protect investors from future violations.

Pierce has made no effort to acknowledge or show remorse for his misconduct or to demonstrate that it will not happen again. Quite to the contrary, Pierce failed to attend the administrative hearing despite being listed as a witness for himself.

Finally, Pierce does not come to this proceeding with a clean record as a securities professional. On June 8, 1993, Canadian securities regulators imposed a fifteen-year bar upon Pierce and a $15,000 fine for deceptive conduct that included misuse of funds and submitting false documents. *In the Matter of Securities Act, S.B.C. 1985, chapter 83 And In the Matter of Gordon Brent Pierce*, Order Under Section 144 (June 8, 1993) (Division's Exhibit 47). Far from recognizing the seriousness of that misconduct, Pierce sent a letter to the Peacock Hislop brokerage firm asserting that Canadian securities regulators were engaged in a "witch hunt" and that the Order was a product of a "kangaroo court proceeding." Division's Exhibit 29 at 2. Accordingly, a cease-and-desist order against further violations is necessary because Pierce cannot be trusted to obey the securities laws in the future.

CONCLUSION

For the reasons described above and based upon the entire record, the Hearing Officer should find that Pierce violated the registration provisions in Section 5 of the Securities Act and the disclosure provisions in Sections 13(d) and 16(a) of the Exchange Act. The Hearing Officer should also order Pierce to pay $2.1 million in disgorgement on his personal account S-8 stock sales, another $5.454 million on his Newport account stock sales and another $2.069 million on his Jenirob account stock sales, plus prejudgment interest on those amounts. The Hearing Officer should also impose a cease-and-desist order against further violations by Pierce.

Dated: March 20, 2009

Respectfully submitted,

John S. Yun
Steven Buchholz
Attorneys for
Division of Enforcement

Exhibit 13

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13109

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
April 7, 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, and the record of evidence was closed on March 6, 2009. Lexington Res., Inc., Admin. Proc. No. 3-13109 (A.L.J. Mar. 6, 2009) (unpublished). The Division of Enforcement (Division) and Pierce filed their proposed findings of fact and conclusions of law and post-hearing briefs on March 20 and April 3, 2009, respectively.

The Order Instituting Proceedings (OIP) authorizes disgorgement. At the October 10, 2008, prehearing conference, the undersigned advised that the disgorgement figure must be fixed so that Pierce could evaluate whether he wanted to present evidence concerning his ability to pay at the hearing, as required by the Securities and Exchange Commission's rules;[2] the Division stated that it was seeking $2.7 million in disgorgement. Tr. 8-9. The Division refined this figure in its December 5, 2008, Motion for Summary Disposition to $2,077,969 plus prejudgment interest, which it alleged are ill-gotten gains from Pierce's sale of allegedly unregistered stock.

Under consideration is the Division's Motion for the Admission of New Evidence, filed March 19, 2009, and responsive pleadings. The new evidence consists of information that the Division received from a foreign securities regulator, the Liechtenstein Finanzmarktaufsicht (FMA), on March 10, 2009. The Division argues that the new material bears on the issue of liability and also shows that over $7 million in additional ill-gotten gains should be disgorged, representing alleged profits from the sale of allegedly unregistered stock by two corporations that Pierce allegedly controlled, Jenirob Company, Ltd. (Jenirob), and Newport Capital Corp. (Newport). Pierce argues that admitting new evidence at this late date violates due process and provides additional exhibits that contravene the Division's new exhibits or diminish their weight. In reply, the Division states that the delay in producing the new material to the Division was entirely Pierce's

[1] The proceeding had ended previously as to Respondents Lexington Resources, Inc., and Grant Atkins. Lexington Res., Inc., 94 SEC Docket 11844 (Nov. 26, 2008).

[2] See 17 C.F.R. §201.630; Terry T. Steen, 53 S.E.C. 618, 626-28 (1998).

fault, as he refused to supply it in response to a 2006 subpoena and actively opposed its release to the Division by the FMA.

Under the circumstances the record of evidence will be reopened to admit Division Exhibits 78 – 89 for use on the issue of liability, but not for the purpose of disgorgement based on sales of stock by Newport and Jenirob. These entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP.[3] To ensure fairness, Respondent Exhibits A – M will also be admitted, and Pierce may offer additional exhibits and a supplement to his proposed findings of fact and conclusions of law and post-hearing brief by April 17, 2009, if desired.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

[3] 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. See 17 C.F.R. §201.200(d); J. Stephen Stout, 52 S.E.C. 1162, 1163 n.2 (1996).

Exhibit 14

INITIAL DECISION RELEASE NO. 379
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13109

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	
LEXINGTON RESOURCES, INC.,	:	INITIAL DECISION
GRANT ATKINS, and	:	June 5, 2009
GORDON BRENT PIERCE	:	

APPEARANCES: John S. Yun and Steven D. Buchholz for the Division of Enforcement, Securities and Exchange Commission

Christopher B. Wells for Gordon Brent Pierce

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision orders Gordon Brent Pierce (Pierce) to cease and desist from violations of Sections 5(a) and 5(c) of the Securities Act of 1933 (Securities Act) and 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, and to disgorge ill-gotten gains of $2,043,362.33.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on July 31, 2008, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act. The proceeding has ended as to Respondents Lexington Resources, Inc. (Lexington), and Grant Atkins (Atkins). Lexington Res., Inc., Securities Act Release No. 8987 (Nov. 26, 2008).

The undersigned held a three-day hearing in Seattle, Washington, on February 2 through 4, 2009. The Division of Enforcement (Division) called three witnesses from whom testimony was taken, and Pierce called an additional three witnesses, including an expert witness. Pierce

himself, who was called as a witness by the Division, did not appear in person at the hearing and thus did not testify.[1] Numerous exhibits were admitted into evidence.[2]

The findings and conclusions in this Initial Decision are based on the record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the following post-hearing pleadings were considered: (1) the Division's March 23, 2009, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief; (2) Respondent's April 6, 2009, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief; and (3) the Division's April 27, 2009, Reply. All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

B. Allegations and Arguments of the Parties

The proceeding concerns the alleged unregistered distribution of Lexington stock. The allegations against Pierce are that he violated the registration provisions of the Securities Act, Sections 5(a) and 5(c), and reporting provisions of the Exchange Act, Sections 13(d) and 16(a) and Rules 13d-1, 13d-2, and 16a-3 thereunder. Specifically, the OIP alleges that Pierce violated Securities Act Sections 5(a) and 5(c) by reselling shares he received from Lexington without a valid registration statement or exemption from registration, obtaining at least $2.7 million in proceeds from such sales in June 2004. Pierce's Answer to the OIP admits the June 2004 sales for proceeds of at least $2.7 million but states that the sales were not registered with the Commission because the shares sold were already registered and freely trading in the open market. The Division is seeking a cease-and-desist order and disgorgement plus prejudgment interest for this alleged violation.

As to the alleged reporting violations, Exchange Act Section 13(d) applies to those who own or control more than five percent of any class of equity security registered under Exchange Act Section 12, while Exchange Act Section 16(a) applies to those who own or control more than ten percent. The OIP alleges that Pierce late-filed, on July 25, 2006, a Schedule 13D, as required by Exchange Act Section 13(d) and Rules 13d-1 and 13d-2, concerning his ownership or control of Lexington stock during the period from November 2003 to May 2004. Pierce's Answer admits the late filing. The OIP also alleges that Pierce owned or controlled and traded in more than ten percent of Lexington stock during that period but that the Schedule 13D stated that he owned or controlled less than that amount and that he did not file Forms 3, 4, or 5, as required by Exchange Act Section

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[1] Pierce's failure to appear in person at the hearing was unexpected. At the September 29, 2008, prehearing conference, Pierce's counsel urged that the hearing not be scheduled during December as Pierce would not be available during that month. See Prehearing Tr. 7 (Sept. 29, 2008). Pierce was listed as a witness on his December 15, 2008, filing, "Designation of Witnesses," for his case in chief. However, at the hearing, Pierce's counsel represented that Pierce is a target of a federal criminal investigation involving CellCyte Genetics Corporation and was concerned that he might be arrested if his whereabouts became known in the United States Courthouse in Seattle, where the hearing was held and where the United States Attorney's Office is located. Tr. 5-7.

[2] Citations to the transcript will be noted as "Tr. __." Citations to exhibits offered by the Division and Pierce will be noted as "Div. Ex. __" and "Resp. Ex. __" respectively.

16(a) and Rule 16a-3 thereunder. Pierce denies that he owned or controlled more than ten percent, and thus denies that he filed an inaccurate Schedule 13D or that he violated Exchange Act Section 16(a) and Rule 16a-3. The Division is seeking a cease-and-desist order for the alleged reporting violations.

C. Procedural Issues

1. Adverse Inference from Refusal to Testify

By not appearing in person at the hearing, Pierce declined to testify on his own behalf or as a witness called by the Division. An adverse inference may be drawn from a respondent's refusal to testify in a Commission administrative proceeding. See Pagel, Inc. v. SEC, 803 F.2d 942, 946-47 (8th Cir. 1986); N. Sims Organ & Co. v. SEC, 293 F.2d 78, 80-81 (2d Cir. 1961); see also Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (Fifth Amendment privilege against self-incrimination does not forbid drawing adverse inferences from an inmate's failure to testify at his own disciplinary proceedings). Therefore, Pierce's silence may be considered along with other relevant evidence in assessing the evidence against him. See Pagel, Inc., 803 F.2d at 947.

Pierce argues that his failure to appear at the hearing results from the Division's violation of his due process rights, and that the Division is acting with unclean hands. Tr. 5-11; Resp. G. Brent Pierce's Motion for Dismissal for Violation of Due Process, Estoppel, and Unclean Hands (Due Process Motion). Pierce claims that the Division used "unfair and deceptive means . . . to accomplish service of the OIP on [him]." Answer at 8. As a basis for his claims, Pierce says that he agreed to give testimony in the CellCyte Genetics Corporation matter at his office building in Vancouver, British Columbia, on July 31, 2008. Decl. of Christopher B. Wells at 2 (Sept. 29, 2008). Pierce's counsel stated on the record that Pierce would not be served "as a result of documents handed to him in the course of his testimony." Id. at 4. The Division effected service of the Lexington OIP on Pierce, in the lobby of his building, after his testimony had concluded. Id. For relief, Pierce requests dismissal of the OIP, or in the alternative, a stay of this proceeding.

Pierce's arguments set out in the Due Process Motion fail as a matter of law. First, he cannot invoke estoppel or unclean hands claims against the Division while it is pursuing an enforcement matter in the public interest. See SEC v. Blavin, 557 F. Supp. 1304, 1310 (E.D. Mich. 1983), aff'd, 760 F.2d 706 (6th Cir. 1985); SEC v. Gulf & W. Indus., Inc., 502 F. Supp. 343, 348 (D.D.C. 1980) (citations omitted). Next, Pierce's due process claim fails because he does not articulate any particular constitutional violation, and only refers to a vague risk of being served with pleadings relating to another investigation. See United States v. Stringer, 535 F.3d 929, 940 (9th Cir. 2008) (SEC's duty is to refrain from misleading about the existence of a parallel investigation). Neither continuing with the instant civil administrative proceeding, nor the facts surrounding service of the OIP, in light of Pierce's nebulous fear of receiving service of process in another matter, are "so shocking to due process values that it must be dismissed."[3] United States v. Doe, 125 F.3d 1249, 1254 (9th Cir. 1997). Indeed, maintenance of parallel

[3] Accordingly, Pierce's Due Process Motion is denied.

criminal and civil proceedings does not violate due process. See SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980), cert. denied, 449 U.S. 933 (1980).

2. Investigative Testimony

The Division took investigative testimony concerning the events at issue from Pierce on July 27 and 28, 2006. Because of his refusal to testify at the hearing concerning the events at issue, the undersigned admitted excerpts of the investigative testimony as Div. Exs. 62, 76, and 77, and Resp. Ex. 57. Excerpts rather than the entire transcripts were admitted in order to avoid burdening the record. See Del Mar Fin. Servs., Inc., 56 S.E.C. 1332, 1350-51 (2003). Fairness to Pierce was ensured through admitting Resp. Ex. 57, consisting of excerpts designated by him.

II. FINDINGS OF FACT

A. Relevant Parties

1. Lexington

Lexington was a Nevada corporation located in Las Vegas, Nevada. It was formed in 1996 under the name All Wrapped Up, Inc., and changed its name to Intergold, Inc. (Intergold), in 1997, when it began the business of exploration of gold and precious metals in the United States. Div. Ex. 55 at SEC 103234. Intergold subsequently acquired Lexington Oil & Gas Co. Ltd. (Lexington Oil & Gas), an Oklahoma limited liability company, and changed its name to Lexington Resources, Inc. Id.; Resp. Ex. 5. It exited the gold exploration business, and billed itself as being "engaged in the acquisition and development of oil and gas properties in the United States." Div. Ex. 55 at SEC 103235. Lexington had no full time employees; instead, the day-to-day operations were carried out by Atkins and one of the directors, Douglas Humphries (Humphries). Tr. 338-39; Div. Ex. 55 at SEC 103239. Other necessary functions were performed by outside consultants. Div. Ex. 55 at SEC 103239. Lexington employed the consulting firm International Market Trend AG (IMT) to provide administrative support and various other services. Tr. 311-13; Resp. Ex. 4. Lexington did not have its own offices; instead, the company was managed out of IMT's offices in Blaine, Washington. Tr. 457-58.

On November 19, 2003, the shareholders of Intergold and Lexington Oil & Gas entered into a share exchange agreement whereby Intergold acquired all of the outstanding stock of Lexington Oil & Gas. Div. Ex. 55 at SEC 103237; Resp. Ex. 5. The newly merged company, Lexington, issued three million restricted common shares to Lexington Oil & Gas's shareholders. Tr. 321; Div. Ex. 55 at SEC 103237; Resp. Ex. 5-6. The new capital structure left Lexington Oil & Gas's shareholders owning eighty-five percent of the new company's shares. Div. Ex. 55 at SEC 103278. Orient Explorations Ltd. (Orient) owned sixty-four percent of Lexington. Resp. Ex. 5. Humphries was a significant shareholder after the acquisition, holding twenty-two percent of Lexington's stock. Id. Lexington's new ticker symbol was LXRS, and it began trading on the over-the-counter market under that symbol on November 20, 2003. Resp. Ex. 8.

During 2003 and 2004, Lexington never held a shareholder meeting. Tr. 457. Lexington's Board of Directors did not meet regularly during this period either. Tr. 457-58.

Instead, important matters were resolved via consent resolutions on an ongoing basis. Tr. at 457-58.

On March 4, 2008, Lexington filed a Chapter 11 bankruptcy petition. Answer at 3. The petition was converted to Chapter 7 liquidation on April 22, 2008. Id.; Div. Ex. 52.

2. Pierce

Pierce was born in 1957 and is a citizen of Canada. Div. Ex. 62 at 10-11. He attended the University of British Columbia for a short time. Id. at 158. He has no academic training in accounting or finance. Id. At the time he gave his investigative testimony, he resided in Vancouver, British Columbia. Resp. Ex. 57 at SEC-2329. Pierce is the beneficial owner of, and works as president and director for Newport Capital Corporation (Newport), an entity based in Switzerland.[4] Div. Exs. 62 at 20, 80. He is also the beneficial owner of Jenirob Company Ltd. (Jenirob). Div. Ex. 84. At the time of his investigative testimony, he had worked for Newport for more than seven years. Div. Ex. 62 at 21. He received a salary of $800,000 to $900,000 from Newport in 2005. Id. at 66. Prior to his affiliation with Newport, Pierce was self-employed. Id. at 158-59. He worked with start-up companies in many different industries, helping take them public. Id. at 159. Pierce first met Atkins in the early 1990's, when he hired Atkins to write the business plan for a company he founded. Id. He and Atkins have worked together at approximately ten companies, most of them publicly traded. Id. at 160. Atkins consulted Pierce in the restructuring of Intergold into Lexington. Tr. 339-41. Atkins continued to consult Pierce about Lexington, speaking to him multiple times every week during 2003 and 2004. Tr. 455-56.

Pierce was sanctioned by the British Columbia Securities Commission (BCSC) in 1993 for conduct that occurred in 1989. Div. Exs. 47, 62 at 167. He settled a proceeding with the BCSC in which he agreed the following facts were true. He was a control person behind an entity called Valet Video and Pizza Services Ltd. (Valet), and his nominee served as president and sole director of Valet. Div. Ex. 47. Bu-Max Gold Corp. (Bu-Max), a publicly traded British Columbia company, circulated a prospectus and made a securities offering that garnered proceeds for an exploration program. Id. Almost half the proceeds were paid by Bu-Max's directors to Valet for purposes that did not benefit Bu-Max; instead, those monies benefitted Pierce and his nominee at Valet. Id. During the BCSC's investigation, Pierce provided documents that "were not genuine." Id. As a sanction, Pierce was barred from using certain exemptions available under the British Columbia Securities Act for fifteen years. Id. Additionally, he was barred from serving as an officer or director of any reporting issuer, or serving as the officer or director for any issuer that provides management, administrative, promotional, or consulting services to a reporting issuer for fifteen years. Id. Finally, he was fined $15,000. Id.

[4] Pierce testified that he did not have an ownership stake of any kind in Newport. Div. Ex. 62 at 197.

During his investigative testimony, and in his Answer, Pierce admitted he violated the reporting requirements under Section 13 of the Exchange Act. Answer at 7; Div. Ex. 62 at 31-33.

At the time of his investigative testimony, Pierce served as an officer or director of the following entities: Newport, IMT, Parc Place Investments, AG (Parc Place), Sparten Asset Group (Sparten), Waterside Developments [Cayman], Inc., Palm Tree Properties [Cayman] Ltd., and Pierco Petroleum. Id. at 35-36. Pierce negotiated with consultants on behalf of Investor Communications International, Inc. (ICI) and IMT, and generally entered into oral contracts with these consultants for the services they would provide to the clients. Id. at 91. Pierce never served as an officer or a director of Lexington. Tr. 372. Newport provided Pierce with a revolving line of credit. Div. Ex. 62 at 107. Pierce used draws on the line of credit to pay the exercise price on his Lexington options, and he sometimes transferred Lexington shares to Newport to pay down the loan. Tr. 107, 109, 122.

Pierce had brokerage accounts with Piper Jaffrey and Hypo Bank in Liechtenstein. Piper Jaffrey closed his account when the Commission began its investigation of the Lexington matter. Id. at 38-39. He opened the brokerage account at Hypo Bank in 2003. Id. at 40, Div. Ex. 87. Pierce testified that these were the only accounts in which he held Lexington stock. Div. Ex. 62 at 210-11. Hypo Bank, in turn, opened an omnibus account with Nicholas Thompson (Thompson)[5] at vFinance, Inc., (vFinance) (Hypo account). Div. Ex. 21. Newport also had brokerage accounts with Hypo Bank, Thompson at vFinance,[6] Craig Sommers at Peacock Hislop Staley & Givens, Inc. (Peacock Hislop), and Rich Fredericks at SG Martin, LLC. Div. Exs. 25, 29, 62 at 114, 71, 80. Pierce traded Lexington stock on behalf of Newport in all these accounts. Div. Ex. 62 at 215-16. Thompson was given discretionary power to trade Newport's account at one point. Id. at 224-25. Pierce did not have a personal account with Thompson at vFinance. Id. at 115. Pierce also traded Lexington stock on behalf of Sparten in Sparten's account with Peacock Hislop. Id. at 180, 182.

At the end of Intergold's fiscal year 2002, Pierce held the rights to 1.35 million common shares of Intergold through options granted to him by Intergold's Board of Directors. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003) (official notice).

3. Atkins

Atkins is a resident of Vancouver, British Columbia. Tr. 288. He attended the University of British Columbia and graduated with a degree in commerce and business. Tr. 288-89. He has worked primarily as a start-up and small business consultant. Tr. 289. He became an officer and director of Intergold in the late 1990s. Tr. 291. At the end of 2002, he was the sole officer and director of Intergold. Tr. 292-93. His compensation as president of Intergold/Lexington for 2003 was $19,625, and $60,000 as president of Lexington in 2004. Tr. 452-53; Div. Ex. 55 at SEC 103258, Div. Ex. 56 at SEC 101304. Though he regularly consulted Pierce on the management of Lexington, Atkins was unaware of who the representatives for

[5] Thompson was also a market-maker for Lexington's stock. Div. Ex. 62 at 114.
[6] Pierce opened Newport's vFinance account on July 11, 2002. Div. Ex. 25.

Lexington's largest shareholder, Orient, were. Tr. 455-56. In addition to working as a consultant for ICI, he also consulted for Newport, and Pierce controlled his assignments there. Tr. 371-72; 453-54. Pierce and Newport also arranged for loans for Atkins from time to time. Tr. 372-73; 453-54. Newport's banking records show payments to Atkins totaling $268,000 for the period from December 2003 to November 2004. Div. Ex. 70. At one point, Newport's loans to Atkins may have totaled $400,000. Tr. 453. According to Atkins, the loans were eventually repaid. Tr. 453. Atkins testified that despite his financial relationship with Newport, it did not control any of his decision-making as head of Lexington. Tr. 373.

4. Newport

Newport is incorporated in Belize and domiciled in Switzerland. Div. Ex. 29 at SEC 142764, 142774. Newport invests in public companies and helps them raise capital, provides investor relation services, and aids companies in finding suitably-matched acquisition opportunities. Div. Ex. 62 at 20. Newport invested $718,000 in Lexington in a private placement in April 2004. Tr. 410; Resp. Ex. 41. Newport has no employees, only consultants. Div. Ex. 62 at 27. It does not contract directly with publicly traded U.S. companies for providing its services, but uses other entities to enter into direct relationships with its clients. Id. at 53. At the time of the Intergold/Lexington Oil & Gas merger, Newport owned 2.6% of Intergold's stock. Resp. Ex. 5. As noted above, Pierce is the beneficial owner of Newport.

5. ICI

ICI was a consulting company that provided many services to its clients. It provided services such as merger and acquisition and joint venture recruitment. Tr. 239-40. ICI helped companies become listed on different stock exchanges around the world. Tr. 239-40. ICI was the vehicle used by Newport to contract with client companies in the United States. Div. Ex. 62 at 53. Pierce was either a president or director of ICI, and the driving force behind it. Id. at 54. Consultants affiliated with ICI included Pierce, Atkins, Richard Elliot-Square (Elliot-Square), Len Braumberger, Marcus Johnson (Johnson), Vaughn Barbon (Barbon), and Alexander Cox (Cox). Tr. 306-07. Intergold had a consulting agreement with ICI, which it signed January 1, 1999. Div. Ex. 55 at SEC 103239. ICI provided a variety of services to Intergold, including strategy development, investor relations, bookkeeping and other backoffice functions, and litigation management. Id. Atkins provided his services as President/Chief Executive Officer, and Barbon provided his services as Chief Financial Officer, to Intergold through ICI. Id. at SEC 103293, 103301. Those two were the only ICI consultants that provided corporate officer or director services to Intergold. Tr. 310-11. ICI provided Atkins and Barbon with their salaries. Div. Ex. 56 at SEC 101304. ICI did not provide Intergold with invoices that tracked the hours its consultants spent working for Intergold. Tr. 493. ICI consultant Elliot-Square reported to Pierce, and not Atkins, when he provided services to Intergold/Lexington. Tr. 393.

On September 27, 1999, Intergold filed suit against AuRIC Metallurgical Laboratories, LLC (AuRIC), and Dames & Moore Group (Dames & Moore) (collectively, defendants) in district court in Utah for breach of contract and related claims. Tr. 291-92; Resp. Ex. 56. The defendants filed several counterclaims against Intergold. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003). Pierce was a named party in the defendants' counterclaims. Id.

Intergold entered into a funds sharing agreement with Tristar Financials Services, Inc. (Tristar), and Cox, in which Tristar and Cox agreed to fund the litigation for Intergold in exchange for a share of any proceeds obtained by Intergold from the litigation. Id.[7] The parties engaged in extensive discovery, but the matter settled in September 2001 before trial. Resp. Ex. 56; Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003). In 2000, Dames & Moore filed suit against Intergold in Idaho to foreclose on property against which it had liens. Id. That litigation was settled in conjunction with the litigation occurring in Utah. Id.

Pierce, Atkins, and Johnson worked on behalf of Intergold to manage the litigation. Tr. 296-97. All three provided their services to Intergold through ICI as consultants. Tr. 298-99. Intergold did not pay any of the three directly for their services; Atkins received payment from ICI, if he was compensated with cash at all. Tr. 299. Pierce never submitted an invoice or an expense statement for his work on the litigation. Tr. 493-94. The settled litigation yielded $798,000 in cash for Intergold, but it all went to cover the costs of the litigation incurred by Intergold's counsel and Tristar. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003).

At the end of 2002, ICI owned over nine percent of Intergold's stock. Id. At the time of the Intergold/Lexington Oil & Gas merger, ICI owned 4.5% of Intergold's stock. Resp. Ex. 5.

6. Parc Place

Parc Place provided capital raising services to Lexington in at least one instance, and was compensated with a finder's fee. Tr. 343-47; Resp. Ex. 57 at SEC-02467-69. Pierce represented Parc Place in its dealing with Lexington. Tr. 346. On November 20, 2003, Lexington entered into a consulting agreement with Parc Place, in which Parc Place contracted to aid Lexington in securing a private placement of capital for a twenty percent finder's fee.[8] Div. Ex. 55 at SEC 103257; Resp. Ex. 9. On November 26, 2003, James Dow invested $250,000 with Lexington through Parc Place, and received 100,000 shares of restricted common stock. Tr. 343-45. Parc Place received $25,000 for a finder's fee on December 1, 2003. Tr. 347-49. Earlier in the year, on October 13, 2003, Intergold issued 10,000 shares of restricted common stock to Parc Place for partial payment of a prior debt. Div. Ex. 55 at SEC 103257.

7. IMT

IMT provided services similar to Newport and ICI, including sending client company material to potential investors. Div. Ex. 62 at 37, 49-50, 97-98. Pierce was instrumental in the formation of the company, which occurred three to four years prior to his investigative testimony. Id. at 51. For consultants who submitted invoices to IMT, Pierce reviewed and approved payment of those invoices. Id. at 104-05. IMT borrowed money from Newport to cover expenses, with Pierce approving the loan on behalf of Newport. Id. at 257.

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[7] Cox owned seventeen percent of Intergold's common stock. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003).

[8] The finder's fee was payable in ten percent cash and ten percent restricted stock. Resp. Ex. 9.

IMT took over when ICI ceased its services to Lexington in 2003. Tr. 244, 312-13, 316-17, 339. Most of the consultants who had served Lexington through ICI continued to serve Lexington through IMT. Id. at 308-09, 312-13. On November 10, 2003, Lexington entered into a Financial Consulting Services Agreement with IMT (IMT Agreement)[9] under which IMT contracted to provide financial and business development services to Lexington. Div. Ex. 55 at SEC 103239; Resp. Ex. 4. The IMT Agreement specifically excluded capital raising activities from IMT's functions. Resp. Ex. 4 at IMT 54-55. IMT had not provided any services to Lexington prior to the signing of the IMT Agreement. Tr. 313. On November 18, 2003, Lexington and IMT entered into a Stock Option Plan Agreement (IMT Option Plan). Tr. 317-18; Resp. Ex. 7. The IMT Option Plan granted IMT 950,000 Lexington vested common stock option shares with an exercise price of $0.50 per share. Id. The IMT Option Plan did not specifically limit the stock option grant to shares registered on a Form S-8. Tr. 481-82; Resp. Ex. 7. Pierce testified that the exercise price and the number of shares were set by Atkins and Lexington without input from him, while Atkins testified the number of shares and the exercise price were resolved in negotiations with Pierce and Johnson. Tr. 463-64; Resp. Ex. 57 at SEC-02392-94. Pierce, as the president and a director of IMT as of November 10, 2003, agreed to those terms on behalf of IMT. Div. Ex. 62 at 59; Resp. Ex. 57 at SEC-2395. Pierce testified that in addition to the stock option compensation, Lexington paid IMT $10,000 per month in cash. Id. at SEC-02396.

Pierce provided his services to IMT through Newport, and he was compensated for his services through Newport. Div. Ex. 62 at 64-65. In the Lexington matter, he was never compensated by IMT for services he provided to Lexington. Id. Pierce claims he provided a wide range of services to Lexington, including sourcing oil and gas company properties, setting up drilling activities, engaging in financing activities, and providing investor relation services. Id. at 66-68, 70. He provided the same services to Lexington through ICI. Id. at 72. Other consultants provided similar investor relation services to Lexington through IMT, and were compensated, at Pierce's direction, with Lexington options. Id. at 102-03.

8. Global Securities Transfer, Inc.

Global Securities Transfer, Inc. (a/k/a X-Clearing Corp.) (Global) served as Intergold's, and subsequently Lexington's, transfer agent. Tr. 80-81, 360-61. Robert Stevens (Stevens) was the head of Global. Id. at 80. Newport owned approximately twenty-five percent of the transfer agent. Div. Ex. 62 at 336-37. Whenever Stevens had trouble getting paid by Lexington in a timely manner, he went to Pierce to rectify the situation. Tr. 104-05.

[9] Atkins is listed in the Agreement as the agent of notice for Lexington and executed the agreement on behalf of Lexington; Elliot-Square is listed as the agent of notice for IMT and executed the agreement on behalf of IMT. Resp. Ex. 4 at IMT 57-58.

B. Lexington's Stock-For-Debt Program with Pierce and ICI/IMT

At the time of the Intergold/Lexington Oil & Gas merger, Intergold owed ICI approximately $1.3 million (ICI debt).[10] Div. Ex. 55 at SEC 103287; Resp. Exs. 2, 15b at IMT 87. The debt owed by Intergold to ICI consisted of both outstanding payments due for services and advances made by ICI on Intergold's behalf, incurred before the acquisition of Lexington Oil & Gas. Div. Ex. 55 at SEC 103255. A substantial amount of the tally had accrued during the pendency of the Dames & Moore/AuRIC litigation. Tr. 299-306.

Intergold and ICI agreed, as part of the reorganization of Intergold into Lexington, that stock would be issued to settle the debts to ICI and its consultants. Tr. 302-04, 315. The agreement called for an allocation of stock directly to ICI to cover part of the debt, with the remainder of the debt being assigned to ICI's consultants. Tr. 304, 311. The newly created Lexington would then issue stock options to the consultants, and allow the consultants to use the debt to cover the exercise price of the options. Tr. 304. In anticipation of this plan, on August 7, 2003, Intergold's Board of Directors approved an employee stock option plan (Stock Option Plan).[11] Div. Ex. 55 at SEC 103249. Officers, directors, employees, and consultants were all eligible beneficiaries of the Stock Option Plan. Id. at SEC 103249. The Stock Option Plan authorized the Board to issue up to one million common share options, to set the options' exercise price, and to determine acceptable forms of consideration for exercising the options. Id. at SEC 103249-50.

Under the IMT Agreement, Lexington agreed to grant 950,000 common share stock options, pursuant to the Stock Option Plan, with an exercise price of $0.50 per share to IMT.[12] Tr. 315-17; Div. Ex. 55 at SEC 103239, 103251; Resp. Ex. 4 at IMT 55. As part of the IMT Agreement, Lexington contracted to issue the stock to IMT's designees, consultants, and employees who had performed services for it. Id. It promised to issue the securities "with a mutually acceptable plan of issuance as to relieve securities or [IMT] from restrictions upon transferability of shares in compliance with applicable registration provisions or exemptions." Id. The consultants wanted free trading shares, and Lexington intended to accommodate them. Tr. 351-52, 355-56. However, the IMT Option Plan specifically required the consultants to represent to Lexington, when they exercised options, that "all Option Shares shall be acquired solely . . . for investment purposes only and with no view to their resale or other distribution of any kind." Resp. Ex. 7 at IMT 62. The shares were to be denoted "Clearstream eligible" so that the transfer agent could make the shares tradable in street name in Europe. Tr. 366-67. Pierce directed Atkins to have the shares so marked. Resp. Ex. 57 at SEC-02450-51.

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[10] The debt amounts owed ICI as of November 19, 2003, were: $672,805 in accrued management fees, loans of $356,998, and accrued interest of $282,477. Div. Ex. 55 at SEC 103287.

[11] In a Form 8-K filed on November 20, 2003, Lexington notes the Board of Directors approved the Stock Option Plan on March 15, 2003, and that the shareholders ratified it on August 7, 2003. Resp. Ex. 8. This discrepancy does not affect the findings of fact in this Initial Decision.

[12] Humphries received the remaining 50,000 option shares approved in the Stock Option Plan. Div. Ex. 55 at SEC 103251.

Intergold/Lexington began to enact its reorganization plan. On October 15, 2003, Intergold issued 100,000 shares of restricted common stock to ICI, and ICI accepted those shares as payment for $250,000 of the ICI debt. Div. Ex. 55 at SEC 103255, 103285; Resp. Exs. 2-3. The effective date of the restricted stock settlement was November 30, 2003. Tr. 379-80; Resp. Ex. 2. As noted above, Lexington and IMT entered into the IMT Option Plan on November 18, 2003, which granted IMT 950,000 common share options of Lexington. Resp. Ex. 7. On November 19, 2003, Lexington had 4,521,184 shares outstanding as of this date, and thus the grant made under the IMT Option Plan represented twenty-one percent of Lexington's float. Resp. Exs. 5-6. On November 21, 2003, Lexington filed a "Form S-8 For Registration Under the Securities Act of 1933 of Securities to be Offered to Employees Pursuant to Employee Benefit Plans" (First S-8). Div. Ex. 55 at SEC 103250. The First S-8 did not contain a reoffering prospectus. Tr. 60; Div. Ex. 6. It registered one million shares of Lexington common stock. Tr. 314-15. On November 20, 2003, Lexington filed a Form 8-K, covering issues in its change of control, and listed IMT as a beneficial owner of 21.25% of its common stock. Resp. Ex. 8.

IMT served as a placeholder for distribution of stock option shares to the ICI/IMT consultants, but IMT did not exercise the options. Tr. 318-19. Pierce, Atkins, and to a lesser extent, Johnson, decided how to allocate the 950,000 stock options among the consultants. Tr. 326; Div. Ex. 62 at 80, 112, 133-34, 146. On November 24, 2003, Braumberger was allocated 25,000 option shares. Tr. 357; Resp. Ex. 11a. Concurrent with the allocation of option shares by IMT to Braumberger, ICI allocated $12,500 in debt owed it by Lexington to Braumberger. Tr. 357; Res. Ex. 11b. Braumberger then assigned the debt to Lexington, in consideration of the $0.50 per share option exercise price. Tr. 357; Resp. Ex. 11c. The process was repeated as to Stevens, who also received 25,000 option shares and $12,500 in ICI debt, which he assigned to Lexington. Tr. 358-59; Resp. Ex. 14a-c. Pierce received 350,000 option shares and $209,435.08 in ICI debt. Tr. 359-60; Resp. Ex 15a-c. The next day, November 25, 2003, Pierce received another 150,000 option shares and $34,435.08 in ICI debt, which he again assigned to Lexington. Tr. 360-61; Resp. Ex. 18a-c. The two allocations to Pierce were attempts by him and Atkins to avoid pushing Pierce over the ten percent beneficial ownership threshold. Tr. 360-61. Pierce, while giving his investigative testimony, claimed that he did not remember why he executed two options grants on back-to-back days. Resp. Ex. 57 at SEC-2441-42.

Several Lexington share blocks were immediately assigned to Newport, and then other individuals and entities, at Pierce's direction. On November 24, 2003, Atkins, at Pierce's direction, sent a letter to Stevens directing him to cancel the issuance of Pierce's 350,000 share block and issue those shares to Newport, based on a November 24, 2003, private sale between Pierce and Newport. Tr. 370-373; Resp. Ex. 13. Pierce testified that he transferred 350,000 shares to Newport to satisfy some of his debt to Newport; Atkins testified that the transfer was to enable Pierce to avoid having a ten percent beneficial ownership in Lexington. Tr. 360-61; Div. Ex. 62 at 107, 133, 206; Resp. Ex. 57 at SEC-2445. The next day, Atkins, at Pierce's direction, sent a letter to Stevens, cancelling the previous day's order regarding the 350,000 share block, and, instead, directing him to issue shares to various individuals and entities, based on private sale agreements between those entities and Newport dated November 25, 2003. Tr. 378-79; Div. Ex. 62 at 200; Resp. Ex. 16. Newport retained 41,700 shares out of the 350,000 share block. Resp. Ex. 16.

On November 30, 2003, Atkins sent Stevens a letter, instructing him to issue 100,000 restricted shares to ICI, pursuant to the restricted stock settlement agreement executed on October 15, 2003. Tr. 379-81; Resp. Ex. 19. Atkins recognized that these shares were not registered. Tr. 381-83. On December 1, 2003, Atkins sent Stevens a letter requesting that he issue the 100,000 restricted shares allocated to ICI on October 15, 2003, to Newport pursuant to a private share sale between ICI and Newport dated the same day. Id. at 381-82; Resp. Ex. 20. The same day, Atkins sent Stevens a letter, instructing him to issue 66,667 shares of the 100,000 restricted share block to an individual and an entity, based on a private share sale between them and Newport. Newport retained 33,333 restricted shares. Tr. 383-84; Resp. Ex. 21. It is found that all the restricted stock distributions were made at Pierce's behest, as he was the beneficial owner, agent, and officer for Newport. Tr. 371-73.

On December 2, 2003, Atkins sent Stevens a letter, at Pierce's direction, instructing him to issue 50,000 shares of the 150,000 share block exercised by Pierce on November 25, 2003, to Newport, based on a private sale between Pierce and Newport. Tr. 383-84; Resp. Ex. 22. That same day Atkins sent Stevens a letter, at Pierce's direction, instructing him to issue the 50,000 shares just assigned to Newport, to two individuals based on a private sale between Newport and those individuals. Tr. 385-86; Resp. Ex. 23. Those individuals were already investors in Lexington. Tr. 385-86.

On December 31, 2003, Lexington's Board of Directors amended the Stock Option Plan to allow it to issue up to four million common share options. Div. Ex. 55 at SEC 103250. On January 14, 2004, Lexington's Board of Directors approved a forward stock split of three-for-one of the issued and outstanding common shares. Id. at SEC at 103247. The forward stock split was effectuated on January 26, 2004. Id. at SEC 103249. At that time, Lexington's issued and outstanding common shares increased from 4,281,184 to 12,843,552. Id. at SEC 103258.

On January 22, 2004, Elliot-Square exercised 300,000 Lexington option shares in the manner described above. Tr. 392-93; Resp. Ex. 26a-c. That same day, Atkins sent Stevens a letter directing those shares be issued to Elliot-Square. Resp. Ex. 27. On January 26, 2004, Atkins sent Stevens a letter, at Elliot-Square's request, instructing him to cancel the 300,000 shares issued to Elliot-Square, and, instead, to issue those shares to Newport because a private sale had occurred between Newport and Elliot-Square. Tr. 393; Resp. Ex. 28.

On February 2, 2004, Lexington and IMT entered into a second Stock Option Plan Agreement (Second IMT Option Plan). Tr. 394-95; Resp. Ex. 31. Lexington agreed to allocate 895,000 common share options to IMT, with 495,000 options shares having an exercise price of $1.00 and the other 400,000 shares having an exercise price of $3.00. Tr. 394-95; Resp. Ex. 31.

On May 18, 2004, IMT directed 495,000 option shares and assigned $495,000 in ICI debt to Elliot-Square, and Elliot-Square assigned the debt to Lexington as consideration for his exercise price for the options. Tr. 395-96; Resp. Ex. 32a-c. The assignment of ICI debt to Elliot-Square represented the last of the debt Lexington owed ICI and its consultants. Tr. 405. On May 19, 2004, Atkins sent Stevens a series of letters directing him how to issue Elliot-Square's Lexington shares. Resp. Exs. 33-35. The first letter directed Stevens to issue 495,000 shares to Elliot-Square. Resp. Ex. 33. The second letter instructed Stevens to cancel that

certificate, and to issue the shares in two certificates of 10,000 shares and 485,000 shares to Kingsbridge SA, based on a private sale agreement between Elliot-Square and Kingsbridge SA. Resp. Ex. 34. The third letter directed Stevens to cancel the issuance to Kingsbridge SA for the 485,000 share certificate, and, instead, to issue 50,000 shares to Eiger East Finance Ltd. and two share blocks to Jenirob of 400,000 and 35,000. Resp. Ex. 35.

C. Pierce's Sales of Lexington Stock

As of December 31, 2003, Pierce had 142,561 shares of Lexington deposited in the Hypo account. Div. Ex. 16 at SEC 106712. Of those, 100,000 shares were granted under the IMT Option Plan. Div. Ex. 50. Pierce forwarded the stock certificate for those 100,000 shares to Hypo Bank on December 3, 2003. Div. Ex. 88 at SEC 159213. In turn, Hypo Bank sent the stock certificate to Brown Brothers Harriman and Co. in New York so that the shares could be held in street name. Id. at SEC 159214. Pierce sold 2,000 shares January 26, 2004, leaving his account holding 40,561 pre-split Lexington shares that were not granted under the IMT Option Plan. Id. at 159204. On February 2, 2004, Stevens directed 25,000 post-split shares that he had received from Lexington, as part of the First S-8 issuance, to be deposited in Pierce's Hypo brokerage account.[13] Id. at SEC 159221. After the stock splint, as of April 30, 2004, Pierce held 446,683 shares of Lexington in the Hypo brokerage account, of which 325,000 shares were distributed from the IMT Option Plan. Div. Ex. 18 at SEC 106679. During May 2004, Pierce sold 5,000 shares of Lexington from his Hypo brokerage account. Id. at SEC 106676. During June 2004, Pierce sold 395,675 Lexington shares from his Hypo brokerage account. Id. at SEC 106668-69. Using a first-in, first-out method, he exhausted his holdings of Lexington stock acquired prior to the IMT Option Plan shares on June 24, 2004. Id. at SEC 106668. In July 2004, Pierce sold 3,500 Lexington shares for $13,348.90; in September 2004, Pierce sold the remaining 42,508 shares of Lexington for a total of $111,048.60. Div. Ex. 19 at SEC 106661, 106647. Thus, Pierce's gross sales in his personal Hypo brokerage account from Lexington stock granted under the IMT Option Plan were $2,113,362.33. Div. Ex. 18. His cost basis for the 300,000 IMT Option Plan shares was $50,000 and $20,000 for the shares transferred by Stevens; his total profit for selling shares acquired under the IMT Option Plan was $2,043,362.33. Id.; Div. Ex. 88.

vFinance statements from the Hypo Bank omnibus account reflect many trades in Lexington shares during this period. Div. Ex. 24. While no one trade perfectly matches the trades that Pierce ordered from his personal account, several trades appear to be blocks of Lexington shares that were sold through Hypo Bank's omnibus vFinance account from different accounts that Pierce controlled. On June 24, 2004, Pierce sold 50,000 Lexington shares from his personal account, 50,000 shares from the Jenirob account, and 10,052 shares from the Newport account, and all transactions had a settlement date of June 29, 2004. Div. Exs. 82 at SEC 159071, 86 at SEC 158581, 88 at SEC 159204. The account statement for the Hypo Bank omnibus account shows a block of 153,052 Lexington shares sold, with a settlement date of June

[13] Stevens directed 25,000 shares be deposited in Newport's and Pierce's account. The share deposits were repayment for a $40,000 note owed to Pierce. Div. Ex. 88 at SEC 159221. Thus, Pierce's cost basis for the 25,000 shares deposited in his personal account is $0.80 per share, or $20,000.

29, 2004. Div. Ex. 24 at SEC 9409.42. On June 25, 2004, Pierce sold 73,432 Lexington shares from his personal account, 30,000 shares from the Jenirob account, and 22,000 shares from the Newport account, and all transactions had a settlement date of June 30, 2004. Div. Exs. 82 at SEC 159071, 86 at SEC 158581, 88 at SEC 159204. The account statement for the Hypo Bank omnibus account shows a block of 170,432 Lexington shares sold, with a settlement date of June 30, 2004. Div. Ex. 24 at SEC 9409.43.

D. Pierce's Ownership of Lexington

As of December 31, 2003, Newport held 11,833 shares of Lexington stock in its vFinance account. Div. Ex. 26 at SEC 9409.125. As noted above, Newport retained 75,033 shares of Lexington stock after distributing part of the allocations Pierce made to third parties. Newport also owned 250,000 shares of Lexington restricted stock transferred to it by ICI. Pierce held 142,561 shares personally. Pierce also retained control over 400,000 Lexington shares granted to IMT that were as yet unassigned. Lexington had 4,281,184 common shares outstanding on December 31, 2004, giving Pierce an 11.2% direct interest in Lexington through his personal shares and the shares owned by Newport. Including the unexercised options granted to IMT, over which Pierce had dispositive power, he had a 20.5% interest in the company.

As noted above, Elliot-Square transferred 400,000 shares to Newport on January 26, 2004. Resp. Ex. 28. On February 2, 2004, Lexington and IMT agreed to the Second IMT Option Plan, which granted IMT 895,000 shares. That same day, Stevens transferred 25,000 shares to both Newport and Pierce. Div. Ex. 88 at SEC 159221. This left Pierce personally holding 446,683 post-split Lexington shares, with Newport holding 1,935,589 post-split Lexington shares. Lexington's stock split increased outstanding common shares to 12,843,552, giving Pierce an 18.5% beneficial interest in Lexington. The execution of the Second IMT Option Agreement added 895,000 shares to the common shares, for a total of 13,738,552 shares. Div. Ex. 55 at SEC 103258. Including the unexercised options granted to IMT, over which Pierce had dispositive power, he had 23.9% interest in Lexington on February 2, 2004.

III. CONCLUSIONS OF LAW

It is concluded that Pierce violated Sections 5(a) and 5(c) of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder.[14]

A. Pierce's Violations of Section 5 of the Securities Act

The OIP alleges that Pierce violated Sections 5(a) and 5(c) of the Securities Act by offering to sell, selling, and delivering after sale to members of the public, Lexington stock when no registration statement was filed or in effect and no exemption from registration was available.

[14] On February 2, 2009, at the conclusion of the Division's direct case, Pierce moved for summary disposition dismissing the charges against him. Tr. 211-19. The undersigned deferred ruling on the motion. Tr. 219. In light of the decision herein, Pierce's motion for summary disposition is denied.

Section 5(a) of the Securities Act provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. § 77e(a) (2008). Section 5(c) of the Securities Act provides:

> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

15 U.S.C. § 77e(c) (2008). The purpose of the registration requirement, and the Securities Act as a whole, is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions." SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953).

A prima facie case for a violation of Section 5 of the Securities Act is established by showing that: (1) no registration statement was in effect or filed as to the securities; (2) a person, directly or indirectly, sold or offered to sell the securities; and (3) the sale was made through the use of interstate facilities or the mails. See SEC v. Cont'l Tobacco Co., 463 F.2d 137, 155 (5th Cir. 1972). A showing of scienter is not required. See SEC v. Universal Major Indus. Corp., 546 F.2d 1044, 1047 (2d Cir. 1976).

The Division argues that it has presented a prima facie case against Pierce for the sales from his personal account of Lexington stock that he acquired from the First S-8. Pierce argues, however, that he did not violate Section 5 of the Securities Act because the shares were registered on Form S-8, and he provided legitimate services to receive those shares.

The Division has shown that Pierce committed a prima facie violation of Section 5 of the Securities Act. Section 5 of the Securities Act is transaction specific, and, thus, the prima facie inquiry focus is on Pierce's transactions, not Lexington's filing of a Form S-8. SEC v. Cavanagh, 155 F.3d 129, 133 (2nd Cir. 1998); see Allison v. Ticor Title Ins. Co., 907 F.2d 645, 648 (7th Cir. 1990). Pierce admits he relied on Lexington's filing of a Form S-8, though that registration statement did not contain a reoffer prospectus to cover Pierce's subsequent trades. Pierce's reliance on the Form S-8 filed by Lexington is misplaced; his subsequent transactions must be registered, or he must present a valid exemption. The instructions accompanying Form

S-8 say as much. See General Instructions C.1 and C.2 to Form S-8. The Division has shown Pierce sold the stock while it was held in street name at Brown Brothers Harriman and Co. in New York, through the Hypo Bank omnibus account at vFinance, satisfying the second and third prongs of the prima facie case.

Thus, the burden shifts to Pierce to prove the availability of any exemptions. See Ralston Purina, 346 U.S. at 126. Exemptions from registration are affirmative defenses that must be proved by the person claiming the exemptions. See Swenson v. Engelstad, 626 F.2d 421, 425 (5th Cir. 1980) (collecting cases); Lively v. Hirschfeld, 440 F.2d 631, 632 (10th Cir. 1971) (collecting cases). Claims of exemption from the registration provisions of the Securities Act are construed narrowly against the claimant. See SEC v. Murphy, 626 F.2d 633, 641 (9th Cir. 1980) (citing SEC v. Blazon Corp., 609 F.2d 960, 968 (9th Cir. 1979)); Quinn & Co. v. SEC, 452 F.2d 943, 946 (10th Cir. 1971) (citing United States v. Custer Channel Wing Corp., 376 F.2d 675, 678 (4th Cir. 1967)). "Evidence in support of an exemption must be explicit, exact, and not built on mere conclusory statements." Robert G. Weeks, 56 S.E.C. 1297, 1322 (2003) (citing V.F. Minton Securities, Inc., 51 S.E.C. 346, 352 (1993)).

Pierce claims that his sales of Lexington stock were exempt under Section 4(1) of the Securities Act. Section 4(1) exempts from the registration requirements "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1). 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." Owen V. Kane, 48 S.E.C. 617, 619 (1986), aff'd, 842 F.2d 194 (8th Cir. 1988). Pierce argues that the burden is not on him to prove the Section 4(1) exemption because the Lexington shares he sold were registered on Form S-8, and therefore not "restricted securities," but he cites no authority supporting his position. Indeed, the courts have held the contrary position. See, e.g., SEC v. Parnes, No. 01 CIV 0763 LLS THK, 2001 WL1658275, at *6 (S.D.N.Y. Dec. 26, 2001) ("[A] plaintiff need not plead the inapplicability of an exemption, as the party claiming exemption from registration requirements bears the burden of proving that the exemption applies."); SEC v. Tuchinsky, No. 89-6488-CIV 1-1 RYSKAMP, 1992 WL 226302, at *4 (S.D. Fla. June 29, 1992) (asserting that a defendant who sold stock that he collected as collateral for a loan bore the burden of proving he had an exemption from registration at trial). Thus, it is incumbent on Pierce to prove his claimed exemption.

Pierce has failed to prove his claimed exemption. Indeed, the Division has adduced a significant amount of evidence that disaffirms Pierce's position. The Division convincingly argues that Pierce was an affiliate and cannot avail himself of the Section 4(1) exemption. Section 2(a)(11) defines "issuer" to include "any person directly or indirectly controlling or controlled by the issuer . . . ." Id. "A control person, such as an officer, director, or controlling shareholder, is an affiliate of an issuer, and is treated as an issuer when there is a distribution of securities." Cavanagh, 155 F.3d at 134. An "affiliate of an issuer" is "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." 17 C.F.R. § 230.144(a)(1) (2008).

"Control" is defined as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of

voting securities, by contract, or otherwise." 17 C.F.R. § 230.405. "The affiliate inquiry is based on the totality of the circumstances, 'including an appraisal of the influence upon management and policies of a corporation by the person involved.' Affiliates are most often officers, directors, or majority shareholders—people who exercise control and influence over the company's policies or finances." SEC v. Freiberg, No. 2:05-CV-00233PGC, 2007 WL 2692041, *15 (D. Utah Sept. 12, 2007). Courts have looked to whether or not the person in question was capable of obtaining the required signatures of the issuer and its officers and directors on a registration statement. See SEC v. Lybrand, 200 F. Supp. 2d 384, 395 (S.D.N.Y. 2002) (quoting Cavanagh, 1 F. Supp. 2d 337, 366 (S.D.N.Y. 1998)).

As noted above, Atkins and Pierce were associates for many years. Atkins admitted that Pierce loaned him substantial sums of money and controlled his consulting assignments. Pierce, through Newport, provided Atkins with additional funds in 2003-04. Atkins' assertion that he could manage Lexington independently despite his relationship with Newport/Pierce is not consistent with this evidence. In fact, standing alone, Pierce's relationship with Atkins is sufficient to demonstrate his status as a control person.

Additionally, Pierce was a significant owner of Intergold stock, and after the acquisition, Lexington stock. He took measures to disguise his ownership of Lexington after he exercised his option shares. He and Atkins attempted to structure Pierce's first stock option exercise so that he would not cross the ten percent ownership threshold. He transferred the stock to Newport, in which Pierce testified he had no ownership interest, but the account documents he submitted to Hypo Bank demonstrate he was the beneficial owner. Pierce caused Newport to purchase Lexington stock in a private placement.

Other evidence points to Pierce's control of Lexington. Pierce controlled ICI and IMT, which provided consultants to Lexington, so Pierce determined who worked at Lexington. Elliot-Square, when he consulted for Lexington, reported to Pierce, not Atkins. Lexington operated out of the same office as IMT. Stevens knew that when he needed to get paid by Lexington, he should go to Pierce. Certainly, Pierce had the requisite power over Lexington to secure the signatures of its officers and directors on a registration statement.

The totality of the circumstances—Pierce's sway over Lexington's CEO, Atkins, his substantial ownership of Lexington stock, his control over the consultants assigned to work for Lexington—all point to Pierce's control of Lexington. His control of Lexington demonstrates that he was an affiliate, and thus cannot claim the Section 4(1) exemption. Thus, it is concluded that Pierce sold his Lexington stock without a valid registration statement or exemption from registration, violating Section 5 of the Securities Act.

B. Pierce's Violations of Sections 13(d) and 16(a) of the Exchange Act

The OIP alleges that Pierce violated Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder, by failing to make timely required filings disclosing his beneficial ownership of Lexington stock.

Section 13(d)(1) of the Exchange Act requires any person who acquires a direct or indirect beneficial ownership of five percent or more of an equity security registered under the Securities Act to file statements with the Commission within ten days of acquiring that interest. 15 U.S.C. § 78m(d)(1). Exchange Act Rule 13d-1 requires a person reporting his ownership to file a Form 13D with the Commission, and Exchange Act Rule 13d-2 requires reporting persons to update their Forms 13D if their holdings increase or decrease by one percent. 17 C.F.R. §§ 240.13d-1, .13d-2, .13d-101. Exchange Act Rule 13d-3 defines beneficial ownership to include any person who has the right to acquire ownership within sixty days via exercise of an option contract. 17 C.F.R. § 240.13d-3(d)(1)(A).

Section 16(a) of the Exchange Act places similar filing requirements on any person who acquires a direct or indirect beneficial interest in more than ten percent of any class of any equity security registered under the Securities Act. 15 U.S.C. § 78p(a). Exchange Act Rule 16a-3 requires beneficial owners to file an initial report of ownership on a Form 3, report changes in beneficial ownership by filing a Form 4, and annually file a Form 5. 17 C.F.R. § 240.16a-3(a). A finding of scienter is not required to demonstrate a violation of either section. See SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1167 (D.C. Cir. 1978) (holding scienter not required for violation of Section 13(d)(1) of the Exchange Act); SEC v. Blackwell, 291 F. Supp. 2d 673, 694-95 (S.D. Ohio 2003) (holding scienter not required for violation of Section 16(a) of the Exchange Act).

The Division argues that Pierce violated Section 13(d) of the Exchange Act during much of the time he owned Lexington stock, and he admits as much. He failed to file a Form 13D when he became a five percent beneficial owner in November 2003, and he did not make any filings to update his status as he sold his Lexington stock. He was also a five percent beneficial owner of Intergold, prior to the merger, through his control of Intergold shares owned by ICI and Newport. He first filed a Form 13D in July 2006.

The Division also argues that Pierce violated Section 16(a) of the Exchange Act between November 2003 and May 2004, by failing to file Forms 3, 4, or 5 disclosing his ten percent ownership interest in Lexington. Pierce counters that the Division's inclusion of the 950,000 option shares allocated to IMT in its calculation of his beneficial ownership is improper. However, Pierce's argument regarding the IMT options is irrelevant, as he passed the threshold for reporting under Section 16(a) of the Exchange Act through his holding Lexington stock in Newport's name. His acquisition of Lexington stock from his options exercise on November 23 and 24, 2003, took him over the ten percent reporting threshold. Because he is the beneficial owner of Newport, the attempt to evade reporting his beneficial ownership of Lexington by transferring Lexington stock to Newport was ineffectual. Pierce was required by Exchange Act Rule 16a-3 to file an initial report of ownership on a Form 3. He held more than ten percent of Lexington's outstanding stock on December 31, 2003, triggering a requirement to file a Form 5 under Exchange Act Rule 16a-3. Newport's acquisition of Elliot-Square's Lexington stock on January 26, 2004, represented an acquisition of more than one percent of Lexington outstanding stock, triggering the requirement to file a Form 4 under Exchange Act Rule 16a-3. Thus, on at least three occasions, Pierce violated Exchange Act Section 16(a) and Rule 16a-3 thereunder.

IV. SANCTIONS

The Division requests a cease-and-desist order and disgorgement of $9,601,347. As discussed below, Pierce will be ordered to cease and desist from violations of Sections 5(a) and 5(c) of the Securities Act and of Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder, and to disgorge ill-gotten gains of $2,043,362.33.

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See 15 U.S.C. § 78ao(b)(6) of the Exchange Act. The Commission considers factors including:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. See Schield Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006).

B. Sanctions

1. Cease and Desist

Sections 8A of the Advisers Act and 21C of the Exchange Act authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of the Acts or rules thereunder. KPMG Peat Marwick LLP, 54 S.E.C. 1135 (2001), reh'g denied, 55 S.E.C. 1 (2001), pet. denied, 289 F.3d 109 (2002), reh'g en banc denied, 289 F.3d 109 (D.C. Cir. 2002).

Pierce's conduct was egregious and recurrent. He sold 325,000 shares of Lexington stock acquired from the IMT Option Plan over a period of four months without filing a registration statement to cover the transactions. As a control person making unregistered sales, he deprived the investing public of valuable information. He took measures to evade the beneficial ownership reporting requirements under Section 16(a) of the Exchange Act, and ignored the reporting requirements of Section 13(d) of the Exchange Act for more than two years. Pierce's failure to make disclosures regarding his beneficial ownership also deprived the investing public of valuable information. Pierce's failure to give assurances against future violations or to recognize the wrongful nature of his conduct is underscored by his failure to appear in person and give testimony on these or any other topics. Although a finding of scienter is not required to find any of the violations of Section 16(a) of the Exchange Act, the record is

replete with evidence that Pierce acted with a high degree of scienter in attempting to conceal his ownership of Lexington stock.

Pierce's occupation will present opportunities for future violations. His violations are recent, and, in many ways, mirror the behavior for which the BCSC sanctioned him. The degree of harm to investors and the market place is quantified in his ill-gotten gains of at least $2,043,362.33. Further, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975).

2. Disgorgement

Sections 8A of the Securities Act and 21C of the Exchange Act authorize the Commission to order Pierce to disgorge ill-gotten gains. Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989); see also Hateley v. SEC, 8 F.3d 653, 655-56 (9th Cir. 1993). It returns the violator to where he would have been absent the violative activity. The amount of the disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation. See Laurie Jones Canady, 69 SEC Docket 1468, 1487 n.35 (April 5, 1999) (quoting SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996)); see also SEC v. First Pac. Bancorp, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998) (holding disgorgement amount only needs to be a reasonable approximation of ill-gotten gains); accord First City Fin. Corp., 890 F.2d at 1230-31.

The Division requests disgorgement of $9,601,347. The actual profits Pierce obtained from his wrongdoing charged in the OIP amount to $2,043,362.33. Pierce will be ordered to disgorge that amount, with prejudgment interest. This is roughly consistent with the sum that the Division represented, before the hearing, that it was seeking as ill-gotten gains from the sale of unregistered stock alleged in the OIP. At the September 29, 2008, prehearing conference, the undersigned advised that the disgorgement figure must be fixed so that Pierce could evaluate whether he wanted to present evidence concerning his ability to pay at the hearing, as required by the Commission's rules;[15] the Division stated that it was seeking $2.7 million in disgorgement. Prehearing Tr. 8-9 (Sept. 29, 2008). The Division refined this figure in its December 5, 2008, Motion for Summary Disposition to $2,077,969 plus prejudgment interest.

Subsequently, based on newly discovered evidence that the Division received after the hearing, the Division argued that over seven million dollars in additional ill-gotten gains should be disgorged, representing profits from the sale of unregistered stock by Jenirob and Newport. However, as the undersigned ruled previously, these entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP.[16] The Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing

[15] See 17 C.F.R. §201.630; Terry T. Steen, 53 S.E.C. 618, 626-28 (1998).
[16] Lexington Res., Inc., Admin. Proc. No. 3-13109 (A.L.J. Apr. 7, 2009) (unpublished).

beyond the framework of the original OIP. See 17 C.F.R. §201.200(d); J. Stephen Stout, 52 S.E.C. 1162, 1163 n.2 (1996).

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on May 21, 2009.

VI. ORDER

IT IS ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce CEASE AND DESIST from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 and of Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 and Rules 13d-1, 13d-2, and 16a-3 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce DISGORGE $2,043,362.33 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600. Pursuant to Rule 600(a), prejudgment interest is due from July 1, 2004, through the last day of the month preceding the month in which payment is made.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak

Carol Fox Foelak
Administrative Law Judge

CFF 6/5/2009

Exhibit 15

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9050 / July 8, 2009

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 60263 / July 8, 2009

Admin. Proc. File No. 3-13109

In the Matter of

GORDON BRENT PIERCE

NOTICE THAT INITIAL DECISION HAS BECOME FINAL

The time for filing a petition for review of the initial decision in this proceeding has expired. No such petition has been filed by Gordon Brent Pierce, and the Commission has not chosen to review the decision as to him on its own initiative.

Accordingly, notice is hereby given, pursuant to Rule 360(d) of the Commission's Rules of Practice, 1/ that the initial decision of the administrative law judge 2/ has become the final decision of the Commission with respect to Gordon Brent Pierce. The orders contained in that decision are hereby declared effective. The initial decision ordered that, pursuant to Section 8(a) of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce cease and desist from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 and Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 and Rules 13d-1, 13d-2, and 16a-3 thereunder. The initial decision further ordered that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce disgorge $2,043,362.33 plus

1/ 17 C.F.R. § 201.360(d).

2/ Gordon Brent Pierce, Initial Decision Rel. No. 379 (June 5, 2009), ___ SEC Docket ___.

prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600.

For the Commission by the Office of the General Counsel, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

Exhibit 16

ORIGINAL

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Attorneys for G. Brent Pierce

FILED

JUL - 9 2010

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GORDON BRENT PIERCE,

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant.

Civil No. 10-3026 MEJ

DECLARATION OF G. BRENT PIERCE

Upon penalty of perjury under the laws of the United States and British Columbia, Canada, the undersigned declares that the following is true.

1. I am a respondent in a new administrative proceeding (the "Second Proceeding") together with Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") (together, the "Corporate Respondents") brought by the U.S. Securities and

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Exchange Commission (the "Commission" or "SEC"). The Second Proceeding covers the same transactions and claims that were addressed and resolved in an earlier SEC administrative proceeding.

2. On July 31, 2008, the Commission brought the earlier administrative proceeding by issuing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (the "First Proceeding"). In the First Proceeding, the Commission's Division of Enforcement (the "Division") claimed that the other respondents and I had violated the registration provisions of the Securities Act of 1933 (the "Securities Act"), Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c), and that I had violated the reporting provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), Sections 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a). The First OIP contended that my "associates" and I had generated resale proceeds of $13 million in Lexington stock distributions in 2004 through an "offshore company" (obviously Newport) resulting from registration violations of the Securities Act caused by my resale of shares registered under Lexington's Form S-8 stock option plan. Documents recording the Lexington S-8 stock transfers upon my resale and through Newport made clear that Jenirob was one of my alleged "associates" that had received a portion of the $13 million in resale proceeds.

3. On June 5, 2009, ALJ Foelak issued an Initial Decision in the First Proceeding (the "Initial Decision"). I did not agree with ALJ Foelak's grounds for holding me liable for registration violations and ordering me to pay disgorgement. I refrained from filing a petition for review or a motion to correct a manifest error or otherwise appealing the Initial Decision to the Commission, because the amount for which I was "ordered to pay disgorgement" could have been increased from just over $2 million to roughly $9.5 million. If I had appealed any aspect of the Initial Decision to the Commission, the Division could have cross-appealed, seeking to increase the disgorgement order to $7.5 million. Conversely, I would have

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appealed every aspect of the Initial Decision with which I disagreed, on numerous grounds, had the Division appealed to the Commission to expand the OIP as necessary and otherwise to increase the disgorgement order by $7.5 million before a final decision. The Division did not petition or otherwise appeal, and I relied on the Division's election, and manifest representation that a $2 million rather than $9.5 million disgorgement order was adequate remedial relief, when I declined to prosecute my rights of appeal.

4. The ALJ had ruled in her Initial Decision that the Commission had the authority to order me to pay disgorgement of the additional $7.5 million sought by the Division. Had the Commission notified me that it would consider doing so, I would have challenged all aspects of the Initial Decision timely at every stage of an appeal. On July 8, 2009, the Commission issued a Notice informing me that "the Commission has not chosen to review the decision as to [my liability for disgorgement] on its own initiative" and, thus, pursuant to 17 C.F.R. § 201.360(d), the Initial Decision "has become the final decision of the Commission with respect to Gordon Brent Pierce. The orders contained in that decision are hereby declared effective." I relied on the Commission's decision not to increase the amount I was ordered to disgorge in the "orders contained in that decision," just as I had relied on the ALJ's observation in the Initial Decision and the Rules of Practice promulgated by the Commission that the Commission had the power to alter the Initial Decision and conduct further hearings before entering a final order of disgorgement. I had likewise relied on the Division's apparent acquiescence in a final order to pay disgorgement of just over $2 million rather than the roughly $9.5 million the Division had previously thought necessary for remedial relief. Consequently the "Final Decision" on "Whether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act" for registration violations was that I should be ordered to pay $2,043,362.33. Based on that representation, in contrast to the $9.5 million under consideration, I declined to exercise my right of appeal of the Commission's Final Decision to a court of appeals. The Final Decision

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contained no notice by the Commission that it was reserving its right to institute new proceedings concerning the $7.5 million in disgorgement already resolved in my favor. Not *until* after my rights of appeal had expired on the liability rulings and $2.1 million disgorgement order did the Commission so notify me. I relied on the absence of any such notice or reservation in the Final Decision when I declined to challenge the Final Decision with a timely appeal to a court of appeals.

5. Further relying on the Final Decision, through counsel I undertook settlement negotiations with the Commission to satisfy my obligations under the order to pay disgorgement. After several exchanges, I offered an amount and terms the Division had previously identified as sufficient to earn its recommendation that the Commission accept. When I made that offer, I was informed *for the first time* that the Division was recommending that the Commission commence another administrative proceeding seeking another order to pay disgorgement, this time for the $7.5 million that the Commission had declined to order in its Final Decision. I was advised only then that the settlement offer the Division had elicited from me would not resolve the new disgorgement order the Division was recommending.

6. On June 8, 2010, the Commission brought the Second Proceeding against me based on the same 2004 transactions in Lexington shares that were covered by the First Proceeding. The new OIP entails an order that I pay disgorgement of the same $7.5 million the Division had unsuccessfully urged the ALJ to order but then declined to urge the Commission to order, after the ALJ's refusal. The new June 8, 2010 Order Instituting Cease-and-Desist Proceedings (the "Second OIP") is captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 (the "Second Admin Proceeding").

7. The Second Proceeding is causing me irreparable harm, including damage to my business reputation. It is depriving me of business opportunities, adding to financial pressures from newly circumspect lenders, and imposing costs, expense and prejudice I am

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now suffering in a variety of ways. The Second Proceeding implies that I have engaged in illegal conduct supplemental to that litigated in the First Proceeding, so that a new regulatory action is required, *which is false. Not only do* persons with whom I do business have difficulty understanding that the Second Proceeding does not involve alleged misconduct different than the First Proceeding, members of the press have the same problem, and spread the *same false impression.*

8. Attached as Exhibit A is a sampling of articles from widely read and quoted publications. This sample includes articles from "Trading Markets" dated June 9, 2010, and "Stockwatch" and "Investor Village," both by the same author and dated June 10, 2010. Each of these publications appears throughout North America and Europe on the internet. These and others like them are read by private and institutional investors, stock brokers, investment firms, bankers and financial intermediaries, government agencies and securities market regulators. They also serve as primary sources of financial news information for local and regional news and wire services. In other words, this information in one form or other is delivered to virtually everyone who knew or cared about my regulatory dispute with the Commission in the First Proceeding and its resolution. The sample news articles and others reporting the Second Proceeding convey the message that I have been engaged in additional misconduct not resolved earlier. They do not mention that the Commission considered and declined to disgorge the $7.5 million, or that the Division unsuccessfully asked that I be ordered to pay that amount in disgorgement due to control of Newport and Jenirob, or that the Division declined to appeal the adverse ruling, or that the Commission never notified me it would revisit the issue after my appeal rights on the relief it did order had expired. Other news articles have publicized the Second Proceeding in the same misleading fashion.

9. Since the Final Decision in the First Proceeding, long time bankers coincidentally and unilaterally have closed bank accounts belonging to me, my wife, my daughter and my private companies, without explanation. I was attempting to mitigate the

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adverse effects of the Final Decision in the First Proceeding, and was about to make further progress by settling the disgorgement order therein, when I was informed that a second proceeding would be recommended by the Division. This surprise came after I had made significant and somewhat successful efforts to re-establish financial relations with new bankers for myself, my family members and businesses. These new relations are now being threatened by the Second Proceeding, even though it was part and parcel of the First Proceeding.

10. Prior to the Final Decision, I had conducted business involving many financings and transactions with public companies other than Lexington for many years, without findings of violations by any court or securities regulator. The Final Decision in the First Proceeding affected my ability to continue lawful investment activities, but I was resigned to tolerate the consequences of not challenging the Final Decision in the First Proceeding in order to end the Lexington matter and start afresh. Publication of the Second Proceeding, however, has created an unfair impression of new violations that is threatening my ability to carry on with lawful activities and lawfully pursue my occupation as an investment consultant and securities trader.

11. I believe that the irreparable financial harm and emotional hardship my family and I are experiencing will continue unless the Commission is precluded from prosecuting the Second Proceeding.

DATED this 9th day of June, 2010, in Vancouver, British Columbia, Canada.

G. Brent Pierce, Declarant

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ENFORCEMENT PROCEEDINGS - In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.

Posted on: Wed, 09 Jun 2010 16:19:08 EDT
Symbols: LXRS

Jun 09, 2010 (SECURITIES AND EXCHANGE COMMISSION RELEASE/ContentWorks via COMTEX) --

On June 8, 2010, the Commission issued an Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 (Order) against Gordon Brent Pierce, 52, of Vancouver, Canada, Newport Capital Corp., and Jenirob Company Ltd.

Pierce was found in a previous Commission action to have violated the federal securities laws in connection with his trading in the stock of Lexington Resources, Inc., a now defunct oil and gas company. Pierce was ordered to disgorge approximately $2 million in illegal trading profits from Lexington sales in his personal account.

In the new enforcement action, the Division of Enforcement seeks to recover an additional $6 million in profits from Lexington sales that Pierce reaped through accounts in the names of two offshore companies, Newport Capital Corp. and Jenirob Company Ltd., which the Division of Enforcement alleges Pierce secretly controlled and concealed from the Commission.

The Division of Enforcement alleges in the Order that in 2004, Pierce controlled Lexington by holding the majority of its stock and by providing Lexington a consultant CEO employed by Pierce. According to the allegations, Pierce sold 1.6 million shares of Lexington stock to the public through the Newport and Jenirob accounts for nearly $8 million while Pierce and his business associates conducted a massive spam and newsletter campaign touting Lexington stock.

The Division of Enforcement alleges that Pierce, Newport and Jenirob violated the registration provisions of Sections 5(a) and 5(c) of the Securities Act of 1933.

An administrative hearing will be scheduled to determine whether the allegations in the Order are true, and to provide Pierce, Newport and Jenirob an opportunity to establish any defenses to the allegations. The proceedings also will determine whether remedial actions are appropriate. As directed by the Commission, the administrative law judge shall issue an initial decision in this matter no later than 300 days from the date of service of the Order. (Rel. 33-9125; File No. 3-13827)

For full details on (LXRS) LXRS, (LXRS) has Short Term PowerRatings at TradingMarkets. Details on (LXRS) Short Term PowerRatings is available at This Link.

SEC files second case against Pierce for Lexington

2010-06-10 14:16 ET - Street Wire

Also Street Wire (U-*SEC) U.S. Securities and Exchange Commission
Also Street Wire (U-LXRS) Lexington Resources Inc

by Mike Caswell

U.S. Securities and Exchange Commission	
Symbol	*SEC
Shares Issued	n/a
Close	n/a
Recent Sedar Documents	

The U.S. Securities and Exchange Commission has launched another administrative case against Vancouver promoter Gordon Brent Pierce for the Lexington Resources Inc. promotion, seeking to recover an additional $7.7-million in illicit profits from the scheme. (All figures are in U.S. dollars.) The SEC claims that Mr. Pierce sold 1.6 million Lexington shares through offshore accounts as he co-ordinated a spam-fuelled promotion in 2004.

The case marks the second time that the SEC has filed an enforcement action against Mr. Pierce over Lexington. The regulator previously won an order directing him to pay $2.04-million in illicit profits after a judge found that he pumped the stock to $7.50 through spam and newsletters and then sold 300,000 shares.

The current case cites the same promotion, but it seeks money the SEC was not aware of when it filed the initial action. This time the regulator is asking for the proceeds of sales made through accounts held in the names of two companies that Mr. Pierce controlled, Newport Capital Corp. and Jenirob Company Ltd. The companies held accounts at Hypo Bank, which operates in Liechtenstein, a small country that values privacy laws. The SEC had previously been unable to determine the beneficial owner of the shares.

The second Lexington case

The second case came in the form of an order instituting proceedings filed on June 8, 2010. The nine-page document mostly repeats the allegations set forth in the initial case. According to the SEC, the scheme began in October, 2003, when Lexington's predecessor, Intergold Corp., entered the oil and gas business by conducting a reverse merger with a private company called Lexington Oil and Gas LLC. As part of the transaction, Mr. Pierce and an associate received 3.2 million free-trading shares.

The men then embarked on a promotional campaign that pushed the stock from $3 to $7.50, according to the SEC. The regulator says that a publishing company Mr. Pierce controlled sent millions of spam e-mails and newsletters, which coincided with a flurry of optimistic news releases from the company. From February to June, 2004, the stock's daily volume rose from 1,000 shares to a peak of more than one million shares.

At the same time, Mr. Pierce sold 300,000 shares through his personal account and transferred 1.6 million shares to Newport and Jenirob's accounts at Hypo Bank. The bank, which also held stock owned by Mr. Pierce's associate, sold 2.5 million Lexington shares, the SEC claims. Proceeds from the sales totalled $13-million, including $8-million in June, 2004, alone.

The SEC says it took a lengthy period of time to determine the beneficial owner of the 1.6 million shares because Mr. Pierce not only refused to co-operate, he filed appeals in Liechtenstein that delayed the SEC's efforts to uncover the true ownership. It is not clear how the SEC eventually learned that Mr. Pierce was the beneficial owner of the shares. The order simply states that the "Division received additional documents" that allowed it to trace the ownership to Mr. Pierce.

The SEC has not yet set a date for a hearing.

The case against Mr. Pierce is not the first time that regulators have been interested in Hypo Bank. On May 28, 2008, the B.C. Securities Commission issued a cease trade order against it, stating that the bank was a conduit for suspicious trading. The bank had refused to disclose the identities of clients who had sold $165-million worth of stock in several pink sheets and OTC Bulletin Board companies, citing privacy laws in Liechtenstein.

The first Lexington case

The first Lexington case named Mr. Pierce and another Vancouver promoter, Grant Atkins, as respondents. Mr. Atkins settled without a hearing on Nov. 26, 2008, agreeing to an order barring future violations of the U.S. Securities Act. He did not admit to any wrongdoing.

Mr. Pierce did not settle, so the SEC convened a three-day hearing in Seattle on Feb. 2, 2009, before an administrative law judge. Mr. Pierce did not personally attend, instead sending his lawyer. He said he was concerned that he could be arrested if he entered the United States because prosecutors were investigating his role with another company, CellCyte Genetics Corp.

Judge Carol Foelak issued a decision on June 5, 2009, in which she ordered Mr. Pierce to pay $2.04-million. She said that his failure to appear in person was unexpected, and she was entitled to draw an adverse inference from it. He did not provide any assurances that he would not commit any future violations, nor did he recognize the "wrongful nature" of his conduct.

The judge also noted that Mr. Pierce took active steps to avoid reporting himself as a shareholder of Lexington, transferring stock between himself and his companies so that he did not surpass the 10-per-cent reporting threshold. In addition to the $2.04-million financial penalty, she entered an order preventing future violations of the U.S. Securities Act.

BCSC banned Pierce

The SEC cases are not the first regulatory actions Mr. Pierce has faced. On June 8, 1993, the BCSC banned him for 15 years after he improperly received money from Bu-Max Gold Corp., a former Vancouver Stock Exchange listing. In an agreed statement of facts, Mr. Pierce admitted that the company raised $210,000 (Canadian) in May, 1989, for exploration, and then paid $100,000 (Canadian) of the money to a private company he controlled "for purposes which did not benefit Bu-Max." In addition to the 15-year ban (which expired on June 8, 2008), Mr. Pierce agreed to pay a $15,000 (Canadian) fine.

A West Vancouver home

The SEC says it will attempt to serve its most recent action on Mr. Pierce by sending it through the Office of International Affairs, and by sending it directly to Mr. Pierce at his home. It lists his address as 124 31st St. in West Vancouver, a house that is listed for sale for $9.98-million (Canadian). According to real estate advertising, the house is on a waterfront lot overlooking Vancouver's inner harbour. The 7,000-square-foot, five-bedroom home has a full gym, three-car garage, hot tub, outdoor pool, tiled waterslide, movie theater and a separate guest suite. Property records show that Mr. Pierce and his wife Dana purchased it on Aug. 15, 2007, for $10.4-million (Canadian).

Reader Comments - Comments are open and unmoderated, although libelous remarks, including names, may be deleted. Opinions expressed do not necessarily reflect the views of Stockwatch.
For information regarding Canadian libel law, please view the University of Ottawa's FAQ regarding Defamation and SLAPPs.

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this guy is going to jail forsure

Posted by stockman @ 2010-06-10 14:42

These guys never learn despite being represented by former Assistant US Attorneys, do they?

Nice house. Would make a great location for an SEC and/or DOJ office in British Columbia. It's readily apparent that's the only way to clean Vancouver up.

Print

EOR.V msg # 16688 6/11/2010 11:25:10 AM
By: Jeauxmon

Re: some things don't change in Vancouver

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2010-06-10 14:16 ET - Street Wire

Also Street Wire (U-*SEC) U.S. Securities and Exchange Commission
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Print

Exhibit 17

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

DIRECT DIAL: 415-705-2318
FAX NUMBER: 415-705-2501

January 12, 2010

VIA EMAIL AND U.S. MAIL

Christopher B. Wells, Esq.
Lane Powell P.C.
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

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

Dear Mr. Wells:

This letter confirms the telephone conversation today in which the staff of the Securities and Exchange Commission (the "Commission") advised you that it intends to recommend that the Commission institute administrative and cease-and-desist proceedings against Gordon Brent Pierce, Newport Capital Corp. and Jenirob Company Ltd., alleging that they violated Sections 5(a) and 5(c) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. §§ 77e(a) and (c)] in connection with sales of Lexington stock in accounts held in the names of Newport and Jenirob. In the contemplated proceedings, the staff may seek a cease-and-desist order and disgorgement plus prejudgment interest against all respondents, and a penny stock bar against Mr. Pierce.

In accordance with Rule 5(c) of the Commission's Rules on Informal and Other Procedures [17 C.F.R. § 202.5(c)], we are offering Mr. Pierce, Newport and Jenirob the opportunity to make Wells submissions. We enclose for your information a copy of Securities Act of 1933 Release No. 5310 entitled "Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations." If they wish to make a written or videotaped submission setting forth any reasons of law, policy or fact why they believe the proceedings should not be instituted, or bringing any facts to the Commission's attention in connection with its consideration of this matter, please forward the submission to the staff by no later than January 26, 2010. Any written submission should be limited to 40 pages, and any video submission should not exceed 12 minutes. Please inform us by no later than January 19, 2010 whether Mr. Pierce, Newport and Jenirob will be making a Wells submission.

Any Wells submissions should be addressed to Marc J. Fagel, Regional Director, at the San Francisco Regional Office.

In the event the staff makes an enforcement recommendation to the Commission on this matter, we will forward any Wells submissions to the Commission. Please be advised that the Commission may use the information contained in such a submission as an admission, or in any other manner permitted by the Federal Rules of Evidence, in connection with Commission enforcement proceedings, or otherwise. This practice is explicitly provided for in the list of

Routine Uses of Information (Item 4), which is contained in Form 1662, "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena." For your information, a copy of Form 1662 is enclosed. Please also be advised that any Wells submissions may be discoverable by third parties in accordance with applicable law.

If you have any questions, please contact Steven Buchholz at 415-705-8101.

Sincerely,

Tracy L. Davis
Assistant Regional Director

Encls: Securities Act of 1933 Release No. 5310
SEC Form 1662

Exhibit 18

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

BRENT PIERCE'S WELLS COMMITTEE SUBMISSION TO SEC UNDER 17 CFR §202.5(c)

TABLE OF CONTENTS

I. Violations Alleged and Relief Recommended by the Staff

The Enforcement Division Staff in the San Francisco Office (collectively, the "Division") of the U.S. Securities and Exchange Commission ("Commission") is proposing the re-commencement of previously adjudicated administrative cease-and-desist proceedings. See App. H (Jan. 12, 2010 Staff letter). The Division proposes that the Commission prosecute Brent Pierce (Gordon Brent Pierce, "Mr. Pierce"), Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") for alleged violations of Sections 5(a) and 5(c) of the Securities Act of 1933 (the "1933 Act") [15 U.S.C. § § 77e(a) and (c)] in connection with sales of Lexington stock in accounts held in the names of Newport and Jenirob. The relief sought is unclear: "In the contemplated proceedings, the staff ***may*** seek a cease-and-desist order and disgorgement plus prejudgment interest against all respondents and a penny stock bar against Mr. Pierce." App. H.

II. Summary of Brent Pierce's Response

In July 2008, the Commission instituted cease-and-desist proceedings against Pierce and others in connection with the issuance and sale of Lexington Resources, Inc. shares by "Pierce and his associates" during the period "between 2003 and 2006."[1] The Commission could have awaited the outcome of pending requests to a foreign securities regulator rather than commencing the proceedings at the time. But instead of waiting for the outcome in the foreign forum, the Commission elected to prosecute claims in the administrative hearing that closed in February 2009. After the hearing closed, the administrative law judge ("ALJ") re-opened the record, admitted the Division's new evidence of Lexington trading profits by Newport and Jenirob, and considered the Division's arguments to disgorge those profits from Mr. Pierce. Thus, the Division belatedly added to its disgorgement claim, "seven [and

[1] Lexington Res., Inc., File No. 3-13109, Order Instituting Proceedings Pursuant to § 8A of the Securities Act of 1933 and § 21C of the Securities Act of 1934 (Jul. 31, 2008) (App. A); Order Making Findings and Imposing Cease-And-Desist Orders Pursuant to § 8A or the Securities Act of 1933 As To Lexington Resources, Inc. and Grant Atkins (Nov. 26, 2008).

a half] million dollars . . . representing profits from the sale of the unregistered stock by Jenirob and Newport" based on new evidence from the foreign securities regulator.[2] Although the ALJ admitted the evidence against Mr. Pierce, who remained the sole respondent, she ruled that disgorgement of profits from Newport and Jenirob, who were not mentioned in the OIP and had not been added as respondents, would be outside the scope of the order instituting proceedings. Initial Decision at 20, App. F.

The June 5, 2009 initial decision became final after the Division decided not to appeal the resulting relief to the Commission. Even though Mr. Pierce did not agree with parts of the initial decision, he likewise did not appeal to the Commission to adjust the relief. Mr. Pierce had incurred substantial expense in the four-year investigation and proceedings and desired finality of the $9.5 million claim against him. The Commission's rules provide for such reciprocal finality. The finality was equally applied to Mr. Pierce's decision whether to challenge the $2 million disgorgement award against him and the Division's decision not to ask the Commission to evaluate the new evidence for purposes of altering the disgorgement award -- which would have evoked a cross-petition by Mr. Pierce. On July 9, 2009 the Commission adopted the Initial Decision as its final ruling, declining to use the new evidence for purposes of altering the amount to be disgorged from Mr. Pierce or requiring further consideration of that subject, which was clearly before it in the record. App. G. Through counsel, Mr. Pierce subsequently contacted the Division about settling and discharging the monetary relief.

Roughly six months after the Commission's final decision, the Division has recommended that the Commission start new proceedings against Mr. Pierce, and add Jenirob and Newport as respondents "in connection of Lexington stock in accounts held in the names of Newport and Jenirob."[3] The Division is bent upon disgorging another $7.5 million from Mr. Pierce, despite the prior adverse ruling, but it is unwilling to test its "do over" in a federal court proceeding. The Division seeks the shelter of a

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[2] Lexington Res., Inc., File No. 3-12109, Initial Decision at 20 (Jun. 5, 2009)(App. F); Exs. 17-23 to Decl. of Steven D. Bucholz in Supp. of Div. Of Enforcement's Mot. for Admission of New Evidence (Mar. 18, 2009); Div. Of Enforcement's Mot. for Admission of New Evidence (Mar. 18, 2009); Division's Updated List of Admitted Hearing Exhibits, Nos. 79-89.
[3] Letter from Tracy L. Davis (Jan. 12, 2010), App. H.

second administrative proceeding because its defiance of fundamental principles of fairness and due process and would not be well received in court.

The "final" decision in the concluded proceedings extinguishes and precludes the claims and relief sought against Mr. Pierce in the proposed new proceeding. The revived claims arise from the same series of transactions. They *could have been litigated* and *actually were litigated* with respect to *Mr. Pierce* in the prior proceeding. The Commission was under the compulsion not to split a claim. Having brought the prior proceeding upon part of a claim – actually, all of a claim against Mr. Pierce -- the Commission may not sue to recover upon the rest of the claim. There is administrative preclusion. Using an administrative adjudicative process to circumvent fundamental fairness and longstanding legal precedent should not become part of the Commission's enforcement policy. The doctrines of claim and issue preclusion apply to bar the repeat action against Mr. Pierce.

III. Discussion and Analysis

A. Background Fact Summary.

Mr. Pierce resides in Vancouver, British Columbia, Canada. In October 2005, Mr. Pierce received a request by the Division to supply information voluntarily during the course of an informal investigation of trading in the shares of OTCBB company Lexington Resources, Inc. ("Lexington"). Mr. Pierce cooperated with the Staff, and supplied most of the requested information voluntarily, including his personal U.S. brokerage firm trading records. Mr. Pierce even produced records of his personal trading in Lexington in an account at Hypo Alpe-Adria-Bank of Liechtenstein ("Hypo Bank").

B. The Commission's 2008 Order Initiating Proceedings Was Broad.

On July 31, 2008, the Commission issued its Order Instituting Proceedings against Pierce, Atkins and Lexington Resources. See App. A. The Order stated in part:

> II.
>
> After an investigation, the Division of Enforcement alleges that:

Nature of the Proceeding

1. This matter involves the unregistered distribution of stock in a Las Vegas microcap company, allowing a Canadian stock promoter to reap millions of dollars in unlawful profits without disclosing to investors information mandated by the federal securities laws. Between 2003 and 2006, Lexington Resources, Inc., a purported oil and gas company, and its CEO and Chairman Grant Atkins, issued nearly five million shares of Lexington common stock to promoter Gordon Brent Pierce *and his associates*. Pierce and his associates then spearheaded a massive promotional campaign, including email spam and mass mailings. As Lexington's stock price skyrocketed to $7.50 per share, Pierce and his associates resold their stock to public investors through an account at an offshore bank, netting millions of dollars in profits; Lexington's operating subsidiary subsequently filed for bankruptcy and its stock now trades below $0.02 per share.

...

Respondents

3. Lexington is a Nevada corporation formed in November 2003...

4. Grant Atkins has been CEO and Chairman of Lexington since its inception in November 2003 and was CEO and Chairman of Lexington's predecessor, Intergold. Atkins, 48, is a Canadian citizen residing in Vancouver, British Columbia.

5. Gordon Brent Pierce has acted as a "consultant" to Lexington and other issuers in the U.S. and Europe through various *consulting companies that he controls*. Pierce, 51, is a Canadian citizen residing in Vancouver, British Columbia and the Cayman Islands.

...

Pierce Engaged in a Further Illegal Distribution of Lexington Stock

14. After receiving the shares from Lexington, Pierce engaged in a further illegal distribution of his own. Pierce acted as an underwriter because he acquired the shares with a view to distribution. Almost immediately after receiving the shares, Pierce transferred or sold them *through his offshore company*.

15. Pierce and *his associates* deposited about 3 million Lexington shares in accounts at an offshore bank. Between February and July 2004, about 2.5 million Lexington shares were sold to the public through an omnibus brokerage account in the United States in the name of the offshore bank, generating sales proceeds of over $13 million.

16. Pierce personally sold at least $2.7 million in Lexington stock through the offshore bank in June 2004 alone. Pierce's sales were not registered with the Commission. (Underline and italics added.)

Respondents Atkins and Lexington Resources, Inc. settled with the Commission in consent orders.[4] Mr. Pierce contested all of the remedial relief sought.

During his investigative testimony, Mr. Pierce confirmed that he served as an officer or director of Newport and he and Newport had brokerage accounts with Piper Jaffrey in the U.S. and Hypo Bank in Liechtenstein. Initial Decision at 5-6, App. F. Newport is incorporated in Belize and domiciled in Switzerland. Id. at 7. Mr. Pierce admitted that he served as a director of Newport and stated, "I have an interest in Newport Capital" but no interest in Jenirob and declined to identify who did have an interest in Jenirob. Div. Hearing Ex. 78, Tr. at 394-96.

C. There Is a Final Decision in the Proceedings Commenced in 2008.

In February 2009, there was a three-day evidentiary hearing. App. F at 1. Although the hearing closed on February 4, the record was kept open pending the receipt of several exhibits. Lex. Res., Inc., Admin. Proc. No. 3-13109 (Mar. 6, 2009) (unpublished). The record closed on March 6, 2009. Lex. Res., Inc., Admin. Proc. No. 3-13109 (A.L.J. Mar. 6, 2009) (unpublished). On April 7, 2009, the ALJ opened the record to consider the Division's new evidence. App. E. This included Division Hearing Exhibits 79-89, which supported the Division's claim for another $7.5 million to be disgorged from Pierce, based on trading profits of Newport and Jenirob. This is precisely the same claim that the Division now urges the Commission to prosecute by exploiting exactly the same evidence.

ALJ Carol Fox Foelak made a June 5, 2009 initial decision. App. F. The initial decision at page 18 states:

> The Division requests a cease-and-desist order and disgorgement of $9,601,347. As discussed below, Pierce will be ordered to cease and desist from violations of Sections 5(a) and 5(c) of the Securities Act and of Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder, and to disgorge ill-gotten gains of $2,043,362.33.

[4] Order Making Findings and Imposing Cease-And-Desist Orders Pursuant to § 8A or the Securities Act of 1933 As To Lexington Resources, Inc. and Grant Atkins (Nov. 26, 2008).

App. F. The decision at page 20 states how the Commission's request for disgorgement changed over time:

> The Division requests disgorgement of $9,601,347. The actual profits Pierce obtained from his wrongdoing charged in the OIP amount to $2,043,362.33. Pierce will be ordered to disgorge that amount, with prejudgment interest. This is roughly consistent with the sum that the Division represented, before the hearing, that it was seeking as ill-gotten gains from the sale of unregistered stock alleged in the OIP. At the September 29, 2008, prehearing conference, the undersigned advised that the disgorgement figure must be fixed so that Pierce could evaluate whether he wanted to present evidence concerning his ability to pay at the hearing, as required by the Commission's rules;[15] the Division stated that it was seeking $2.7 million in disgorgement. Prehearing Tr. 8-9 (Sept. 29, 2008). The Division refined this figure in its December 5, 2008, Motion for Summary Disposition to $2,077,969 plus prejudgment interest.
>
> Subsequently, based on newly discovered evidence that the Division received after the hearing, the Division argued that over seven million dollars in additional ill-gotten gains should be disgorged, representing profits from the sale of unregistered stock by Jenirob and Newport. However, as the undersigned ruled previously, these entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP.[16] 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. See 17 C.F.R. §201.200(d); J. Stephen Stout, 52 S.E.C. 1162, 1163 n.2 (1996).

App. F.[5]

When neither party filed a timely petition for review in July 2009, the initial decision became final.[6] App. D. The sole basis for the Division's proposal to retry Mr. Pierce on the $7.5 disgorgement claim – and throw in another injunctive claim (a penny stock bar) that it could have included in the first proceeding – is its pretense that the issue of relief was not before the Commission in 2009. Even if the

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[5] The ALJ nevertheless applied a very expansive view in practice. The OIP did not contain any control person liability allegations against Mr. Pierce, nor did it allege that he was an affiliate of Lexington Resources for purposes of Section 5 liability. App. A. But that did not prevent the ALJ from allowing the Division's tardy claims and incorporating them into the initial decision. App. F. Resp't G. Brent Pierce's Post-Hearing Br. at 21-22, 25-28 (Apr. 3, 2009) (claiming the Division was estopped from seeking equitable relief, had unclean hands, and was denying due process rights, when it made new claims at the hearing and in post-hearing briefing that Pierce was the controlling person of Lexington and asserted a new affiliate theory, *after* the Division had earlier asserted in response to Pierce's motion for more definite statement and in the Division's summary judgment motion and during a pre-hearing conference that the Division did not contend Pierce acted as a controlling person when Lexington violated Section 5), App. D.

[6] See S.E.C. Rule of Practice 410(a)–(b), 17 C.F.R. § 201.410(a)(b); see, e.g., In re Woessner, Rel No. 2164, 80 S.E.C. Docket 2847, 2003 WL 22015406 (Aug. 26, 2003) (granting both the Division of Enforcement's and the respondent's petitions for review of the initial decision).

Division could split out component parts of relief, however, the amount of disgorgement was plainly before the Commission and the penny stock bar could have been litigated as well.

The ALJ allowed the Division's new evidence, but refused the Division's request to increase the amount to be disgorged from Mr. Pierce. Apr. 7, 2009 Order, App. E. The Division declined to follow the Commission's Rule of Practice and submit (or resubmit) its new evidence to the Commission, when this matter was before the Commission. 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.

Mr. Pierce opposed the ALJ's use of the new evidence on this very ground. Pierce Opp'n to Mot. for Admission of New Evidence at 3-9 (Mar. 26, 2009), App. C. Rather than submit the new evidence to the ALJ before her ruling, the Division also had the opportunity to wait, and submit the new evidence to the Commission itself for purposes of increasing the amount to be disgorged by Mr. Pierce to include the $7.5 million in trading profits of Newport and Jenirob. Or, without regard to the prior impropriety, the Division could have resubmitted the new evidence to the Commission and argued for the higher disgorgement amount based on the new evidence. The evidence was already admitted into the record against Mr. Pierce when the initial decision was issued. The materiality of the new evidence and the question whether "there were reasonable grounds for failure to adduce such evidence previously [for disgorgement purposes]" were likewise before the Commission.

The Division elected not to "file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission." Rule 452. After the initial decision, the

Division declined to submit a petition for review to include a motion to add Newport and Jenirob as respondents or even to consider the new evidence for the sole purpose of expanding the remedial relief against existing respondent Pierce. Such issues were already before the Commission, which had the option to "*accept or hear additional evidence ... remand* the proceeding to a self-regulatory organization, *or ... remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.*" The Commission elected not to do so, even though it had the authority "upon its own motion." Rule 452.

Just as Mr. Pierce could have petitioned to the Commission to overturn the ALJ's liability finding, or to reduce the amount to be disgorged, the Division could have petitioned to have the amount to be disgorged increased, by up to $7.5 million. But it did not. Likewise, the Commission had the authority to conduct further proceedings after the ALJ's decision and alter the amount to be disgorged or other aspects of the relief "*prior to the issuance of a decision by the Commission.*" But it did not.

In reliance on the Commission's notice of its "final" decision on July 9, 2009, Mr. Pierce did not pursue appeal to the federal circuit court of appeals. The decision to disgorge over $2 million from Mr. Pierce was certainly not favorable to him. If he now sought to overturn that award, the Commission would no doubt oppose him, and make the very arguments Mr. Pierce now makes. Conversely, the Commission's *"final" decision not to increase the disgorgement* amount to $9.5 million when the evidence and arguments were before the Commission was favorable to Mr. Pierce, leaving him no reason to appeal that aspect of the decision to the federal circuit court. Consequently, in reliance on the Commission's "final" decision limiting the relief to disgorgement of $2 million and no penny stock bar, Mr. Pierce waived his right to appeal the Commission's "final" decision.

Any new action by the Commission on this relief would not only contradict established law and the Commission's own Rules of Practice, it would be bad policy. The Commission would be exploiting its own inconsistent conduct, contending that there would be no damage to fundamental fairness by creating a "Hobson's Choice" for respondents. The Division appeared to violate the Commission's Rules of Practice by submitting the new evidence to the ALJ after the hearing closed, rather than submitting it to the Commission instead. Pierce Opp'n. at 3-9, App. C. The ALJ adopted the rule breach by admitting the new evidence. By exploiting the new evidence apparently in breach of the Rules of Practice, and fundamental fairness, the Division obtained a favorable decision by the ALJ, in which the evidence and analysis of the Newport and Jenirob trading as it related to respondent Pierce was thoroughly embedded. That consequence cannot now be undone; yet the Division would have the Commission reap the benefits of that action without bearing the burdens.

The Division then failed to follow the same Rules to submit the new evidence and a larger disgorgement demand (or other expansion of the remedial relief, such as a penny stock bar). The Commission then sanctioned all of this conduct, left the relief undisturbed and declined to increase the relief or risk holding further proceedings to do so, in which the relief might have been reduced rather than increased. If the Commission were to institute the new administrative proceeding under these circumstances, it would simply teach the public that the ends justify the means, and rules don't matter – not a message that a regulator should send, and not a message condoned by the courts.

D. The Final Decision Operates to Merger, Extinguish, and Preclude Claims that Were or Could Have Been Raised in the Prior Proceedings.

It is well established that the government may be precluded from relitigating claims. See, e.g., United States v. Stauffer Chem. Co., 464 U.S. 165, 169 (1984) ("we agree that the doctrine of mutual

defensive collateral estoppel is applicable against the Government to preclude the relitigation of the very same issue already litigated against the same party in another case involving the virtually identical facts"). "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 n. 7 (1966). Here, the Division and the Commission have already established that there was an adequate opportunity to litigate the question of remedial relief -- whether such relief should include a cease and desist order, which could have included a penny stock bar, and an additional $7.5 million should be disgorged from Mr. Pierce in connection with Lexington trading by his OIP "associates," Newport and Jenirob. The Division and the Commission both left undisturbed a ruling issued after the injunctive and disgorgement issues were litigated, at least as to Mr. Pierce's liability and the scope of any disgorgement award, "the Commission has not chosen to review the decision as to him [Pierce] on its own initiative." App. F.

"Under the doctrine of claim preclusion, '[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.'" Rivet v. Regions Bank, 522 U.S. 470, 477 (1988) (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981)). "[A] valid final adjudication of a claim precludes a second action on that claim or any part of it." Baker v. General Motors Corp., 522 U.S. 222, 233 (1998).

Just as the doctrines of issue and claim preclusion apply to respondents in SEC proceedings,[7] so too the same doctrines apply to the Commission. Here, the Commission was acting as a plaintiff and was "required to join [its] legal and equitable claims to avoid the bar of res judicata." Lytle v.

[7] See, e.g., In re Carman, Release No. 343, 92 S.E.C. Docket 1476 (Jan. 25, 2008) (concluding permanent injunction in court action was entitled to collateral estoppel effect against respondent in a SEC proceeding); In re Snell and Lecroy, Release No. 330, 90 SEC Docket 1536 (May 3, 2007) (stating the Commission has frequently applied the doctrine of collateral estoppel to prevent a respondent from relitigating the factual findings or the legal conclusions of an underlying criminal proceeding in the follow-on administrative proceeding and citing decisions).

Household Mfg., Inc., 494 U.S. 545, 552 (1990). In Lytle, the United States Supreme Court cited the Fourth Circuit's Harnett decision. Id. ("See Harnett v. Billman, 800 F.2d 1308, 1315 (4th Cir. 1986) (holding that prior adjudication barred a claim that arose out of the same transactions and that could have been raised in the prior suit)." In Harnett, the circuit court held that claims arising out of corporate spin-offs and freeze-out mergers forming the basis for a prior action were precluded under the doctrine of res judicata. The barred claims included those under the 1993 and 1934 Acts. Id. at 1314-15. The applicable standard for res judicata was:

> Harnett is therefore subject to the general principle that the judgment in *Harnett I* extinguishes any claims that might have been raised in that litigation and that are, for res judicata purposes, the same claims as those advanced in the earlier case. Res judicata precludes the litigation by the plaintiff in a subsequent action of claims "with respect to all or any part of the transaction, or series of connected transactions, out of which the [first] action arose." . . . .
>
> . . . The rule of claim preclusion we apply, however, asks only if a claim made in the second action involves a right arising out of the same transaction or series of connected transactions that gave rise to the claims in the first action. To decide this, we measure the scope of "transaction or series of connected transactions" by considering pragmatic factors such as common origin and relation, as well as whether the acts giving rise to the claim would be considered as part of the same unit by the parties in their business capacities. *See* Restatement (Second) of Judgments § 24(2) (1982). Claims may arise out of the same transaction or series of transactions even if they involve different harms or different theories or measures of relief. *Id.* comment c.

Id. at 1314 (adding underline).

That pragmatic legal standard (adopted in federal courts throughout the United States) applies to the Division's proposed "new" claims for disgorgement and injunctive relief that arise from the very same series of transactions involving the sale of Lexington shares four or more years ago. The Division/Commission asserted the same claims and sought the same relief in the prior proceedings. It is precluded from prosecuting a second proceeding on "any part" of the prior claim. "[A] valid final adjudication of a claim precludes a second action on that claim or any part of it." Baker v. General Motors Corp., 522 U.S. at 233 (1998). It is precluded from "relitigating issues that were or could have

been raised in that action.'" Rivet v. Regions Bank, 522 U.S. at 477. The Commission did not express the intention to reserve the rest of the claim for another action. Furthermore, neither the administrative law judge nor the Commission made a determination that the initial decision was "without prejudice" to a second action on the scope of the relief awarded against Mr. Pierce.

The Division submitted evidence, argued in its pleadings and otherwise pursued claims against Mr. Pierce based on his actions on behalf of Newport and Jenirob.[8] The twenty-one page initial decision refers to the proposed new respondent "Newport" over sixty-five times and to the other new respondent "Jenirob" six times.[9] The decision also concludes that Mr. Pierce is the beneficial owner of Newport and Jenirob[10] and refers to sales by Pierce of Lexington shares in the accounts of Newport and Jenirob.[11] But the decision declined to grant disgorgement relief against Mr. Pierce based on the trading profits of Newport and Jenirob. The Division declined to appeal that order, and the Commission declined to overrule it in any manner. As a result, the rejected disgorgement and forgone penny stock bar claims were extinguished and merged into the prior proceeding and the proposed second proceeding is barred. The claims arose from the same nucleus of operative facts -- the facts are so interwoven to constitute a

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[8] In addition to requesting the disgorgement of profits from Mr. Pierce due to Lexington stock sales by Newport and Jenirob, the Division argued that the transactions with Newport and Jenirob proved that Pierce acted as an underwriter and violated § 5(a) of the Securities Act. See, e.g., Div. Of Enforcement's Post-Hearing Br. against Gordon Brent Pierce at 1 (Mar. 20, 2009) ("Pierce also used Newport . . . to sell Lexington shares granted to him, or to associates . . . for additional net proceeds of $7.4 million dollars during 2004."). Id. at 3 ("Pierce . . . became a statutory 'underwriter' . . . Pierce transferred to Newport most of the shares issued by Lexington within a few days, and then quickly resold the shares to other persons or deposited them into a brokerage account."). Id. at 21 ("One compelling indication of Pierce's underwriter status is the short time period between his acquisition of the Lexington shares . . . and his sale of those shares through Newport's account . . ."). Id. at 22 ("Additionally, Pierce distributed 1.6 million other Lexington shares using accounts for Newport and Jenirob at Hypo Bank. These facts establish that Pierce is an 'underwriter' . . ."). See also id. at 6, 10-11, 13-17, 28. And see Division's Pre-Hearing Brief at 6-10 (Dec. 5, 2008) (contending that sales through Newport proved that Mr. Pierce acted as an underwriter and violated Section 5), App. C.

[9] App. F.

[10] "Pierce is the beneficial owner of, and works as president and director for Newport Capital Corporation (Newport), an entity based in Switzerland. Div. Exs. 62 at 20, 80. He is also the beneficial owner of Jenirob Company Ltd. (Jenirob)." App. F at 5.

[11] "On June 24, 2004, Pierce sold 50,000 Lexington shares from his personal account, 50,000 shares from the Jenirob account, and 10,052 shares from the Newport account, and all transactions had a settlement date of June 29, 2004. Div. Exs. 82 at SEC 159071, 86 at SEC 158581, 88 at SEC 159204. . . . On June 25, 2004, Pierce sold 73,432 Lexington shares from his personal account, 30,000 shares from the Jenirob account, and 22,000 shares from the Newport account, and all transactions had a settlement date of June 30, 2004. Div. Exs. 82 at SEC 159071, 86 at SEC 158581, 88 at SEC 159204." App. F at 13.

single claim and cannot be dressed up to look different and to support a separate new claim. See, e.g., Lane v. Peterson, 889 F.2d 737, 744 (8th Cir. 1990) (holding res judicata applied and stating "it prevents parties from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different. Thus, where a plaintiff fashions a new theory of recovery or cites a new body of law that was arguably violated by a defendant's conduct, res judicata will still bar the second claim if it is based on the same nucleus of operative facts as the prior claim.").

E. Additional Injunctive, Disgorgement and Other Ancillary Relief is Unwarranted.

The additional proposed relief is unwarranted against Mr. Pierce. The Commission already has a disgorgement and cease-and-desist order against Mr. Pierce which was effective in July 2009.[12] Mr. Pierce has also contacted the Division about settling the prior disgorgement award.[13] These are but a few of the actions Mr. Pierce as taken in reliance on the Commission's announcement of a "final" decision in July 2008.

IV. Conclusion

The Division's recommended "repeat" action is not well founded. The action would be based on a series of transactions that started in 2003 and have been the subject of proceedings before the SEC and more recently in bankruptcy court and in federal district court in Oklahoma. The new proposed claims are extinguished and merged by the final decision in the prior proceedings before the Commission. The Commission should adhere to established legal precedent and decline to institute the proposed proceeding.

[12] SEC v. China Energy Savings Tech., Inc., 2009 U.S. Dist. Lexis 27187, Cas. No. 06-CV-6402 (E.D.NY. Mar. 27, 2009) (granting SEC an injunction against further violations but denying SEC's request for penney stock bar).

[13] In November 2009, Mr. Pierce settled related claims brought by the trustee in the bankruptcy of Lexington Resources who filed claims both in bankruptcy court and in the federal district court in Oklahoma. See generally Gerald R. Miller v. Gordon Pierce, et al., Case No. CIV-09-096-FHS (E.D. of Okla); see, e.g., Dkt. No. 63 (Administrative Closing Order).

APPENDIXES

A. Order Instituting Cease-and-Desist Proceedings (July 31, 2008).

B. Division of Enforcement's Pre-Hearing Br. Against Resp't Gordon Brent Pierce (Dec. 5, 2008).

C. Resp't Pierce's Opp'n to Division's Mot. for the Admission of New Evidence and Pierce's Mot. to Strike (Mar. 26, 2009)

D. Resp't G. Brent Pierce's Post-Hearing Br. (Apr. 3, 2009).

E. Order (Apr. 7, 2009).

F. Initial Decision (Jun. 5, 2009).

G. Notice that Initial Decision Has Become Final (Jul. 5, 2009).

H. Letter from Tracy L. Davis (Jan. 12, 2010).

Exhibit 19

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9125 / June 8, 2010

ADMINISTRATIVE PROCEEDING
File No. 3-13927

In the Matter of **Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") against Gordon Brent Pierce ("Pierce"), Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement ("Division") alleges that:

Nature of the Proceeding

1. This matter involves an unregistered distribution of stock by Gordon Brent Pierce, a Canadian stock promoter. Pierce reaped $7.7 million in unlawful profits by selling stock in Lexington Resources, Inc. ("Lexington"), a now defunct oil and gas company, through two offshore companies that he controlled, Newport Capital Corp. and Jenirob Company Ltd. Pierce, Newport and Jenirob did not register their sales or qualify for an exemption from registration.

2. Beginning in late 2003, Pierce controlled Lexington by holding the majority of its stock and by providing Lexington a consultant CEO who was employed by Pierce. In 2003 and 2004, Pierce directed the CEO to issue 3.2 million Lexington shares without restrictive legends to Pierce and one of Pierce's associates. Pierce then distributed these shares during 2004 while he conducted a massive spam and newsletter campaign touting Lexington stock. As Lexington's stock

price skyrocketed to $7.50 per share, Pierce sold 1.6 million of the 3.2 million shares to the public through accounts of Newport and Jenirob at an offshore bank for profits of $7.7 million. This was in addition to $2 million in profits Pierce made through sales of Lexington stock in his personal account, sales found to be in violation of the federal securities laws in a previous action filed by the Division. See In the Matter of Gordon Brent Pierce, Admin. Proc. File No. 3-13109 (Initial Decision dated June 5, 2009; Notice that Initial Decision Has Become Final dated July 8, 2009).

Respondents

3. Pierce has provided stock promotion and capital raising services to Lexington and other issuers in the U.S. and Europe through various consulting companies that he controls. Pierce, 52, is a Canadian citizen residing in Vancouver, British Columbia and the Cayman Islands.

4. Newport is a privately-held corporation organized in March 2000 under the laws of Belize. Newport has a registered agent in Belize and maintains offices in Zürich, Switzerland and London, England. Pierce has been President and a director of Newport since 2000.

5. Jenirob is a privately-held corporation organized in January 2004 under the laws of the British Virgin Islands. Jenirob has a registered agent in the British Virgin Islands and uses the mailing address of a law firm in Liechtenstein.

Facts

Pierce Controlled Lexington

6. Lexington is a Nevada corporation that was a public shell company known as Intergold Corp. until November 2003, when it entered into a reverse merger with a private company known as Lexington Oil and Gas LLC and changed its name to Lexington Resources. Lexington's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act from 2003 until June 4, 2009, when its registration was revoked. From 2003 to 2007, Lexington stock was quoted on the over-the-counter bulletin board under the symbol "LXRS." In 2008, Lexington's only operating subsidiaries entered Chapter 7 bankruptcy.

7. From 2002 to 2007, Pierce provided Intergold and then Lexington with operating funds, stock promotion services and capital-raising services through at least three different consulting companies that Pierce controlled, including Newport. Pierce used these companies to conceal his role and avoid being identified by name in Commission filings.

8. From 2002 to 2004, an individual who worked for Pierce served as CEO and Chairman of Intergold and then Lexington through a consulting arrangement with one of the companies that Pierce controlled. The individual was paid by Pierce's consulting company, not by Intergold or Lexington. The individual also worked for Pierce through Newport and received more than $250,000 from Newport in 2004.

9. Intergold and Lexington did not have their own offices, but used the offices of Pierce's consulting companies in northern Washington State, near Vancouver, Canada. Pierce's employees answered telephones, responded to shareholder inquiries, and performed all other administrative functions for Intergold and Lexington.

10. By October 2003, shortly before the reverse merger, Intergold owed one of Pierce's consulting companies nearly $1.2 million. On November 18, 2003, to satisfy part of this debt, the CEO and Chairman of Intergold agreed to issue to Pierce, through one of his consulting companies, vested options to acquire 950,000 shares of the public company. At the time, these shares constituted 64% of Intergold's outstanding shares (on a post-exercise basis).

11. Three days later, as part of the reverse merger, the CEO and Chairman agreed to issue 2.25 million additional shares with restrictive legends to another offshore company that Pierce formed and controlled. As a result, Pierce controlled more than 70% of Lexington's outstanding stock after the reverse merger.

12. Shortly after the reverse merger, Lexington purchased an interest in an oil and gas property owned by Pierce, and then Lexington hired another company controlled by Pierce to drill a well on that property. Lexington later purchased interests in a handful of other oil and gas properties and drilled a few additional wells that produced small amounts of natural gas, but Lexington never generated any meaningful revenue.

Lexington Issued Millions of Shares to Pierce and His Associates

13. Within days of the reverse merger, Lexington began issuing stock to Pierce and his associates pursuant to the stock options granted to Pierce's consulting company. Pierce told Lexington's CEO and Chairman who should receive the shares and how many.

14. Between November 2003 and January 2004, Lexington issued 500,000 shares to Pierce and 300,000 shares to one of Pierce's associates. These became 1.5 million shares and 900,000 shares, respectively, upon Lexington's three-for-one stock split on January 29, 2004.

15. In February 2004, Pierce told Lexington's CEO and Chairman to grant his company additional stock options. Lexington then issued an additional 320,000 shares to Pierce and 495,000 shares to Pierce's associate in May and June 2004. In total, Pierce and his associate received 3.2 million shares (on a post-split basis) between November 2003 and June 2004, all without restrictive legends.

16. Lexington improperly attempted to register these issuances by filing registration statements on Form S-8, an abbreviated form of registration statement that may not be used for the issuance of shares to consultants who provide stock promotion or capital-raising services, like Pierce and his associate. Lexington's invalid S-8 registration statements only purported to cover issuances by Lexington, not any subsequent resales by Pierce and his associate.

Pierce Conducted a Promotional Campaign Touting Lexington Stock

17. In late February 2004, Pierce and his associate began actively promoting Lexington by sending millions of spam emails and newsletters through a publishing company that Pierce controlled. At the same time, Lexington issued a flurry of optimistic press releases about its current and potential operations.

18. During the promotional campaign, Pierce personally met with potential Lexington investors and distributed folders with promotional materials and press releases. Pierce's associate worked for Pierce's publishing company and was responsible for communicating with potential Lexington investors in Europe through Pierce's consulting company.

19. From February to June 2004, Lexington's stock price increased from $3.00 to $7.50, and Lexington's average trading volume increased from 1,000 to about 100,000 shares per day, reaching a peak of more than 1 million shares per day in late June 2004.

Pierce Distributed Lexington Stock Through Newport and Jenirob

20. The stock option agreements between Lexington and Pierce's consulting company and the option exercise agreements signed by Pierce and his associate provided that all shares were to be acquired for investment purposes only and with no view to resale or other distribution. No registration statements were filed relating to any resales of Lexington stock by Pierce, Newport or Jenirob.

21. Of the 3.2 million shares Lexington issued to Pierce and his associate between November 2003 and June 2004, Pierce sold 300,000 through his personal account at a bank in Liechtenstein and distributed 2.8 million through Newport and Jenirob.

22. Within days of Lexington's issuance of these 2.8 million shares, Pierce instructed Lexington's CEO and Chairman to transfer them all to Newport or Jenirob. Pierce then further transferred 1.2 million of the 2.8 million shares to ten individuals and entities in Canada and the U.S., and Pierce transferred the remaining 1.6 million shares to the bank in Liechtenstein.

23. Pierce produced to the Division copies of statements from his personal account at the bank in Liechtenstein showing that he sold 300,000 Lexington shares in June 2004 for net proceeds of $2 million. Pierce refused to produce any documents relating to sales of Lexington stock that he made through accounts at the Liechtenstein bank other than his personal account.

24. During 2004, the Liechtenstein bank sold 2.5 million Lexington shares in the open market through an omnibus brokerage account in the U.S. held in the Liechtenstein bank's name for proceeds of more than $13 million, including $8 million in June 2004 alone.

25. In March 2009, the Division received additional documents relating to the Liechtenstein bank's sales of Lexington stock. These documents showed that, in 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.

26. In addition to his refusal to produce records pertaining to Newport and Jenirob, Pierce filed appeals in Liechtenstein that further delayed the Division's efforts to obtain documents related to Pierce's Lexington stock sales through the Newport and Jenirob accounts.

Pierce Was Previously Found Liable For Unregistered Lexington Stock Sales In His Personal Account

27. On July 31, 2008, the Commission instituted cease-and-desist proceedings against Pierce, Lexington and Lexington's CEO/Chairman to determine whether all three respondents violated Sections 5(a) and 5(c) of the Securities Act and whether Pierce also violated the Securities Exchange Act of 1934 (the "Exchange Act") by failing to accurately report his Lexington stock ownership and transactions. Admin. Proc. File No. 3-13109. In that action, the Division sought disgorgement from Pierce of the $2 million in net proceeds from his sale of the 300,000 Lexington shares in his personal account at the Liechtenstein bank in June 2004.

28. An evidentiary hearing in the prior action was held regarding Pierce February 2-4, 2009.

29. Before issuance of the Initial Decision in the prior action, the Division moved to admit the new evidence first received in March 2009 showing that Pierce sold an additional 1.6 million Lexington shares through the Newport and Jenirob accounts, and also sought the additional $7.7 million in disgorgement. The new evidence was admitted in the prior action, but the Administrative Law Judge ruled that disgorgement of the $7.7 million in proceeds from Pierce's sales in the Newport and Jenirob accounts was outside the scope of the Order Instituting Proceedings ("OIP") in the prior action because Newport and Jenirob were not named in the OIP.

30. The Initial Decision in the prior action, issued June 5, 2009, found that Pierce committed the alleged violations of the Securities Act and Exchange Act and ordered Pierce to disgorge $2,043,362.33 in proceeds from his sale of the 300,000 Lexington shares in his personal account. Neither party appealed the Initial Decision and it became the final decision of the Commission on July 8, 2009.

Violations

31. As a result of the conduct described above, Respondents Pierce, Newport and Jenirob violated Sections 5(a) and 5(c) of the Securities Act, which, among other things, unless a registration statement is on file or in effect as to a security, prohibit any person, directly or indirectly, from: (i) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; (ii) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or (iii) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the

use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate that cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. Whether, pursuant to Section 8A of the Securities Act, all Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a) and 5(c) of the Securities Act; and

C. Whether Respondents should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answer, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within

the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

[redacted]

Exhibit 20

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ORIGINAL

FILED
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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JSW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CV 10 80129 MISC

SECURITIES AND EXCHANGE COMMISSION, Applicant, vs. GORDON BRENT PIERCE, Respondent.	Misc. No. **SECURITIES AND EXCHANGE COMMISSION'S APPLICATION FOR AN ORDER ENFORCING ADMINISTRATIVE DISGORGEMENT ORDER AGAINST RESPONDENT GORDON BRENT PIERCE** **(Administrative Enforcement Action)**

APPLICATION FOR AN ORDER ENFORCING

ADMINISTRATIVE DISGORGEMENT ORDER

Pursuant to Section 20(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77t(c), and Section 21(e) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78u(e), the Securities and Exchange Commission ("Commission") hereby applies for an order compelling payment by Gordon Brent Pierce of the $2,043,362 in disgorgement and $867,495 in prejudgment and post-judgment interest that the Commission has ordered Pierce to pay. On July 8, 2009, the Commission ordered Pierce to pay disgorgement and interest based on the finding, after an evidentiary hearing, that Pierce violated Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and (c), by making unregistered offers and sales of securities and that Pierce violated Sections 13(d) and 16(a) of the Exchange Act, 15 U.S.C. §§ 78m(d) and 78p(a), by not disclosing his beneficial ownership and transactions in securities. The Commission ordered Pierce to pay $2,043,362 in disgorgement, plus prejudgment interest, by no later than July 9, 2009, but Pierce has not done so. This motion is being made on the grounds that the Commission may apply to any federal district court for the enforcement of the Commission's order against Pierce. 15 U.S.C. §§ 77t(c) and 78u(e).

This Application is supported by the attached Memorandum of Points and Authorities, the attached Declaration of Steven D. Buchholz, the [Proposed] Order and such evidence and oral argument as the Court chooses to entertain.

Dated: June 8, 2010

Respectfully submitted,

John S. Yun
Steven D. Buchholz
Attorneys for Applicant
SECURITIES AND EXCHANGE COMMISSION

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

During February 2009, Administrative Law Judge Carol Fox Foelak conducted a three-day evidentiary hearing based upon the institution of an administrative proceeding by the Securities and Exchange Commission ("Commission") against respondent Gordon Brent Pierce ("Pierce") at the request of the Commission's Division of Enforcement. As alleged and ultimately determined after the full evidentiary hearing, Pierce violated Section 5 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77e, by making unregistered offers and sales of the common stock of Lexington Resources, Inc. ("Lexington") and violated Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78m(d) and 78p(a), by failing to report his beneficial ownership interests and transactions in Lexington's common stock. In her June 5, 2009 Initial Decision, Administrative Law Judge Foelak ordered Pierce to disgorge his ill-gotten gains in the amount of $2,043,362, plus prejudgment and post-judgment interest calculated through the last day of the month preceding the month in which payment is made. Supporting Declaration of Steven D. Buchholz ("Buchholz Declaration"), Exhibit A. Pierce did not appeal the Initial Decision to the Commission within twenty-one days, and the Commission therefore made the Initial Decision final on July 8, 2009. Buchholz Declaration, Exhibit B. Under the Commission's Rules of Practice, Pierce was required to pay disgorgement and prejudgment interest to the Commission no later than July 9, 2009, the first day after the Initial Decision became final. 17 C.F.R. § 201.601.

Pierce has failed to make any payment, and is therefore in violation of the Commission's order. The Court should therefore order Pierce to comply with the Commission's disgorgement order by paying the full amount of $2,043,362 in disgorgement, along with $867,495 in prejudgment and post-judgment interest accrued through May 31, 2010. 15 U.S.C. § 77t(c) (authorizing Commission's application to any district court to obtain writs of mandamus compelling compliance with "any order of the Commission made in pursuance of" the Securities Act); 15 U.S.C. § 78u(e) (similar provision regarding the Exchange Act).

II. FACTUAL BACKGROUND

On July 31, 2008, the Commission provided notice to Pierce that an evidentiary hearing would be held to determine whether Pierce committed securities law violations as alleged in the Order Instituting Cease-and-Desist Proceedings ("OIP") in a proceeding entitled *In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce*, Admin Proc. File No. 3-13109 (the "Administrative Proceeding"). Buchholz Declaration, Exhibit C.

According to the OIP, between approximately November 2003 and March 2006, Lexington issued shares of common stock to Pierce and his associates purportedly pursuant to registration statements which, however, could only be used in certain circumstances that did not legally apply. During the course of Lexington's stock issuances, Pierce and his associates illegally received more than 5 million shares of Lexington common stock. Pierce then resold his shares without the necessary registration for his sales and pocketed millions of dollars. Pierce dumped his Lexington shares on an unwary public while he and his associates conducted a massive promotional campaign to pump up the price of Lexington's stock. OIP, ¶¶ 7, 10, 16.

The OIP also alleged that Pierce violated Sections 5(a) and 5(c) of the Securities Act by offering and selling Lexington shares without the necessary registration for those offers and sales. The Division of Enforcement further alleged that Pierce violated Sections 13(d) and 16(a) of the Exchange Act by failing to file the required forms with the Commission to disclose his beneficial ownership of – and transactions in – Lexington shares as required by Exchange Act Rules 13d-1, 13d-2 and 16a-3. OIP, ¶¶ 20-21.

In her Initial Decision, Administrative Law Judge Carol Fox Foelak determined that the Division of Enforcement had proven Pierce's violation of Sections 5(a) and 5(c) of the Securities Act by offering and selling Lexington shares in interstate commerce without registering his offers and sales, and rejected Pierce's defense. Initial Decision at 15-16. Administrative Law Judge Foelak also determined that Pierce violated the requirement under Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d), that he report his ownership interest by filing the appropriate disclosure, and that Pierce violated the requirement under Section 16(a) of the Exchange Act, 15 U.S.C. § 78p(a), that he report his transactions in Lexington stock. *Id.* at 17-18.

In determining what remedies to impose upon Pierce in light of his securities law violations, the Administrative Law Judge found:

> Pierce's conduct was egregious and recurrent. . . . As a control person making unregistered [Lexington stock] sales, he deprived the investing public of valuable information. . . . Pierce's failure to make disclosures regarding his beneficial ownership also deprived the investing public of valuable information. Pierce's failure to give assurances against future violations or to recognize the wrongful nature of his conduct is underscored by his failure to appear in person and give testimony on these or any other topics. Although a finding of scienter is not required to find any of the violations of Section 16(a) of the Exchange Act, the record is replete with evidence that Pierce acted with a high degree of scienter in attempting to conceal his ownership of Lexington stock.

Id. at 19.[1]

The Initial Decision also describes in detail the factual basis for the further finding that Pierce was unjustly enriched as a result of his securities law violations. Based on the evidence as presented at the hearing, the amount by which he was enriched was calculated as $2,043,362. Pierce was therefore ordered to pay that amount in disgorgement, plus interest. *Id.* at 20. According to the Initial Decision, interest should be calculated based on Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600, and is due from July 1, 2004 through the last day of the month preceding the month in which payment is made. *Id.* at 21. Through May 31, 2010, interest of $867,495 was due. *See* 17 C.F.R. § 201.600(b) (providing that interest on disgorgement is computed at the IRS underpayment rate established by 26 U.S.C. § 6621(a)(2) and compounded quarterly); *see also* Buchholz Declaration, Exhibit D (chart calculating amount of interest owed as of May 31, 2010).

As described in the Initial Decision, the recommended sanctions were to take effect unless a party filed an appeal from the Initial Decision within twenty-one days. Initial Decision at 21. No party filed an appeal of the Initial Decision, and the Commission therefore issued notice that the Initial Decision became final on July 8, 2009. Notice That Initial Decision Has Become Final, *In the Matter of Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (July 8, 2009) (Buchholz

[1] The Initial Decision ordered Pierce to cease and desist from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act and of Sections 13(d) and 16(a) of the Exchange Act and of Exchange Act Rules 13d-1, 13d-2 and 16a-3. *Id.* at 19-21.

Declaration, Exhibit B). Under the Commission's Rules of Practice, Pierce was required to pay the disgorgement and prejudgment interest to the Commission by July 9, 2009, the first day after the Initial Decision became final. 17 C.F.R. § 201.601(a). Pierce has, however, failed to pay any amount of the disgorgement and interest that was ordered by the Commission. Buchholz Declaration, ¶ 5.

III. LEGAL ARGUMENT

A. Congress Has Authorized This Action To Enforce The Payment Order.

Congress has authorized the Commission to seek judicial assistance in enforcing its orders under the federal securities laws. In particular, Section 20(c) of the Securities Act, 15 U.S.C. § 77t(c), provides in pertinent part:

> Upon application of the Commission, the district courts of the United States and the United States courts of any Territory shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any order of the Commission made in pursuance thereof.

Similarly, Section 21(e) of the Exchange Act, 15 U.S.C. § 78u(e), authorizes any federal district court to issue a writ of mandamus or order compelling any person to comply with an order by the Commission issued under the provisions of the Exchange Act.

B. An Order Compelling Pierce's Compliance Is Appropriate.

After notice and a full evidentiary hearing, Pierce was ordered to pay $2,043,362 in disgorgement, based on the "actual profits Pierce obtained from his wrongdoing charged in the OIP." Initial Decision at 20. The wrongdoing alleged and established against Pierce included his unregistered offer and sale of Lexington securities in violation of Sections 5(a) and 5(c) of the Securities Act. As a result, Section 20(c) of the Securities Act authorizes the Court to enforce the disgorgement award by issuing a writ commanding Pierce's compliance. 15 U.S.C. § 77t(c). Because Pierce also was found to have violated Sections 13(d) and 16(a) of the Exchange Act by deliberately failing to disclose his holdings and transactions, Section 21(e) of the Exchange Act

provides further basis for enforcing the disgorgement award by issuing an order directing Pierce's compliance. 15 U.S.C. § 78u(e).[1]

Enforcing a disgorgement order – such as the Commission's order against Pierce – is an important component of the statutory scheme for protecting investors from securities law violations. Because Pierce was found to have violated the federal securities laws, the Commission had the power to order his disgorgement of his ill-gotten gains. *See, e.g., SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985).

The "purpose of disgorgement is to force 'a defendant to give up the amount by which he was unjustly enriched.'" *Id.* (quoting *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978)). Disgorgement may encompass all benefits derived by a violator. *See SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1192 (9th Cir. 1998); *C.F.T.C. v. British American Commodity Options Corporation*, 788 F.2d 92, 93-94 (2d Cir. 1986).

As proven in the Administrative Proceeding, Pierce derived over $2 million in personal profits by making unregistered sales of securities and failing to make the required disclosures to investors. This Court's enforcement of the Commission's disgorgement order will help protect investors by depriving Pierce, a securities law violator, of his profits from such illegal activities.

IV. CONCLUSION

This Court should enforce the Commission's payment order by compelling Pierce to pay to the Commission $2,043,362 in disgorgement, $867,495 in interest, and all additional interest that may accrue before payment is made.

Dated: June 8, 2010

Respectfully submitted,

John S. Yun
Steven D. Buchholz
Attorneys for Applicant
SECURITIES AND EXCHANGE COMMISSION

[1] Venue is proper in any district of the United States under 28 U.S.C. § 1391 because Pierce is a Canadian citizen who resides in Vancouver, British Columbia. *See* Initial Decision at 5.

Exhibit 21

COPY

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GORDON BRENT PIERCE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GORDON BRENT PIERCE, Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION, Defendant.	Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

I. INTRODUCTION

1. Plaintiff Gordon Brent Pierce ("Pierce") brings this Complaint for Declaratory and Injunctive Relief against the Defendant Securities and Exchange Commission ("Commission") to preliminarily and permanently enjoin the Commission from prosecuting or otherwise continuing

the pending administrative proceedings against Pierce captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 (the "Second Action), or any other agency action involving claims and conduct previously litigated, finally decided and not appealed from in the Commission's prior administrative proceedings captioned *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (the "First Action").

2. The Commission lacks jurisdiction and authority to prosecute the Second Action, which is barred by res judicata, collateral estoppel, issue preclusion, equitable estoppel and fundamental principles of due process. In the First Action, the Commission's Division of Enforcement ("Division") claimed that Pierce realized approximately $7.5 million in profits from the improper sale of unregistered stock by two offshore companies which the Division alleged Pierce controlled. The ALJ admitted the Division's evidence and considered its disgorgement claim, but refused to grant the Division the relief it sought. In response to the ALJ's decision, the Division did not move to amend the order instituting proceedings in the First Action or appeal the ALJ's decision denying its disgorgement claim and, although it had authority to do so on its own initiative, the Commission similarly refused to review, reverse or modify the ALJ's decision. Instead, the Commission adopted the ALJ's decision as its own final judgment in the First Action.

3. Months later, the Division ignored the preclusive effect of that prior judgment and its own acquiescence therein, when it filed the Second Action against Pierce. The Second Action alleges the very same $7.5 million disgorgement claim the Division asserted, the ALJ rejected and the Commission refused to reconsider in the First Action—all of which Pierce relied upon when he elected not to appeal the First Action in the interests of finality. The Commission does not get a second bite at the apple. Pierce brings this action to immediately forestall further unlawful, costly and vexatious litigation by the Commission.

II. JURISDICTION AND VENUE

4. This action arises under the Securities Act of 1933, 15 U.S.C. § 77 *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.*, the Administrative Procedure Act, 5 U.S.C. §§ 702 - 706, and the Due Process Clause of the United States Constitution.

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 (the Administrative Procedure Act). The Court has authority to grant the declaratory and injunctive relief sought herein pursuant to 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act) and 28 U.S.C. § 1651 (the All Writs Act).

6. Pierce is not required to exhaust administrative remedies with the Commission in the Second Action as a prerequisite to judicial declaratory and injunctive relief in this action because:

(a) Pierce will suffer irreparable injury from the Commission's continued prosecution of the Second Action and its threat therein to bring still more such actions;

(b) the Commission lacks authority and jurisdiction to prosecute the Second Action because (1) that action is absolutely barred by the doctrines of res judicata and/or equitable estoppel, and (2) continued prosecution of that unlawful and unauthorized action and the threat to bring still more of such actions would constitute harassing and vexatious duplicative litigation, which would constitute an abuse of process and would be in violation of Pierce's due process rights;

(c) no agency expertise or fact-finding is necessary to the determination of the purely legal, constitutional or judicial discretionary issues raised herein, none of which pertains to the merits of the substantive allegations raised in the Second Action; and

(d) resort to administrative processes would be futile inasmuch as the Commission has already considered and rejected Pierce's demand that the Commission observe the finality of the First Action and refrain from initiating a Second Action.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). Further, the Commission has conceded proper venue in this Court by filing an action against Pierce to enforce the First Action, Case No. 3:10-mc-80129, in this Court, which action remains pending, as described further below.

III. PARTIES

8. Plaintiff Gordon Brent Pierce is a Canadian citizen residing in Vancouver, British Columbia and the Cayman Islands.

9. Defendant the Securities and Exchange Commission is the federal administrative agency of the United States with authority to enforce the Securities Act of 1933 and the Securities Exchange Act of 1934.

IV. GENERAL ALLEGATIONS

A. The First Action

10. Beginning sometime in 2005, the Commission initiated an investigation of Pierce in connection with alleged violation of securities registration and reporting requirements in connection with the trading of Lexington Resources, Inc.'s ("Lexington") common stock. Following its investigation, on July 3, 2007, the Commission informed Pierce that it intended to bring an administrative action against Pierce. At the Commission's invitation, Pierce filed a Wells Committee Submission, 17 C.F.R. § 202.5(c), in response to the Commission's threatened action, to no avail.

11. On July 31, 2008, the Commission's Division of Enforcement brought the First Action by filing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") against Pierce and others in a proceeding captioned *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109. The Division claimed that Pierce violated the registration provisions of the Securities Act, Sections 5i. and 5(c), 15 U.S.C.§ 77e(a) & (c), and the reporting provisions of the Exchange Act, Sections 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a).[1]

12. The First OIP alleged, among other things, that Pierce and "his associates" violated the registration provisions by reselling shares they received from Lexington without a valid registration statement or exemption from registration in 2004. The First OIP further alleged that Pierce violated the reporting provisions by late-filing a Schedule 13D concerning his ownership or control of Lexington stock during the period November 2003 to May 2004, and failing to file Forms 3, 4 or 5 in connection with Pierce's alleged ownership or control of more than ten percent of Lexington stock during that period.

[1] The other Respondents, Lexington and Grant Atkins, separately settled with the Commission in consent orders.

13. The First OIP was broad and, as it turned out, malleable. It provided, "[T]he Commission deems it necessary and appropriate that cease-and-desist proceedings be instituted to determine ... [w]hether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act" for registration violations resulting from Lexington stock sales by "Pierce and ***his associates***," "sold ... through ***his offshore company***" and "generating sales proceeds over $13 million ... " *Id.* ¶¶ 14-16 (emphasis added). The First OIP alleged that proceeds from such sales exceeded $13 million. *Id.*, ¶15.

14. When Pierce insisted that the Commission identify the "associates" and "his offshore company," the Division took the position, permitted by the ALJ, that transaction documents with which Pierce was familiar identified the "associates" and Pierce's "offshore company." Documents used in the First Action made it obvious that the "offshore company" was Newport Capital Corp. ("Newport"), and that Jenirob Company ("Jenirob") was another one of the "associates" whose Lexington stock sales collectively generated $13 million. As a result of this informal amendment process, without ever formally moving to amend the First OIP, the Division and ALJ, and thus the Commission itself, specifically claimed that, to the extent Newport and Jenirob were involved in the resale of Lexington stock by Pierce, the OIP included both for purposes of "determin[ing]" whether Mr. Pierce committed registration violations, and "[w]hether Respondent Pierce should be ordered to pay disgorgement."

15. Pierce answered the First OIP and denied liability. His motion for a more definite statement accompanied the answer and was resolved as described above. Several months of discovery and other preliminary proceedings followed. On December 5, 2008, the Division filed a motion for Summary Disposition in which it clarified that it sought $2,077,969 in disgorgement, plus interest, from Pierce, which represented the amount Pierce individually realized on the sale of Lexington stock during 2004.

16. A three-day hearing was held before Administrative Law Judge Foelak in the First Action in February 2009. The hearing was closed on February 4, 2009, and the record of evidence was closed on March 6, 2009.

B. <u>The Commission's Claim for Additional Disgorgement</u>

17. On March 18, 2009, the Division moved for the admission of new evidence that had become available after the record of evidence had closed (hereinafter, the "New Evidence"). The Commission had induced a foreign regulator to produce the New Evidence in March 2009 by representing in February 2008, apparently without any correction, that the Commission was investigating antifraud claims by Pierce. But no antifraud claims were included in the OIP.

18. The Division claimed that the New Evidence showed that—in addition to the $2,077,969 Pierce allegedly made from the sale of Lexington shares on his personal account—Pierce had "made millions of dollars in additional unlawful profits by selling Lexington shares" through two offshore company "associates" he purportedly controlled, specifically Newport and Jenirob. The Division alleged that "the new evidence shows that disgorgement far in excess of $2.1 million is warranted against Pierce in these proceedings." The Division perceived no need to seek expansion of the First OIP in light of the position it had previously taken in response to Pierce's request for a more definite statement; that is, the First OIP covered the issue of "[w]hether Pierce should be ordered to pay disgorgement" regarding sales of Lexington shares by Pierce involving "his associates" and "offshore company." As such, the Division did not move the ALJ or the Commission to expand the First OIP in any respect, as it was plainly permitted to do. *See* 17 C.F.R. § 201.200(d)(2).

19. Less than a week later, the Division filed its post-hearing brief. The Division repeatedly cited to the New Evidence in support of its claim that Pierce reaped alleged profits from the sale of unregistered Lexington stock by Newport and Jenirob. Specifically, in addition to the $2,077,969 million Pierce allegedly made from the sale of Lexington stock on his personal account, the Division argued that the New Evidence showed that Pierce should be ordered to pay disgorgement of an additional $7,523,378, which reflected alleged net proceeds from the sale of Lexington shares by Newport and Jenirob in 2004.

20. The Division's Proposed Findings of Fact and Conclusions of Law, filed in conjunction with the Division's post-hearing brief, similarly contained a myriad of proposed findings pertaining to the New Evidence, including:

> ... As revealed in the new records produced by the Division on

> March 10, 2009, Pierce also controlled accounts at Hypo Bank in the names of Newport and another offshore company, Jenirob ...[.]
>
> * * *
>
> ... Based upon documents that it received from Liechtenstein authorities ... , the Division has determined that by June 2004, Pierce had moved to the Newport and Jenirob accounts a total of 1,634,400 Lexington shares that had been issued purportedly pursuant to Form S-8 registration statements. ... Pierce sold these shares in the open market through Newport and Jenirob accounts at the Hypo Bank between February and December 2004.

(Proposed Findings of Fact 32 & 55). The Division likewise proposed a conclusion of law that, because the Newport and Jenirob "sales were in violation of Section 5's registration requirements, Pierce should disgorge total net proceeds of $9,601,347," of which $7,523,378 was derived from Newport and Jenirob sales.

21. Pierce opposed the Division's motion to admit the New Evidence. Among other things, Pierce pointed out that the Commission's own Rule of Practice 452, 17 C.F.R. § 201.452, allowed the Division to move the Commission to admit additional evidence, but no rule allowed the Division to seek the introduction of new evidence directly to the ALJ following the close of evidence. Pierce also argued that the New Evidence did not support the Division's theories of liability and disgorgement in any event.

22. On April 7, 2009, ALJ Foelak issued an order granting the Division's motion to admit the New Evidence. ALJ Foelak ruled: "Under the circumstances the record of evidence will be reopened to admit [the New Evidence] for use on the issue of liability, but not for the purpose of disgorgement based on sales of stock by Newport and Jenirob. These entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP."

23. Having admitted the New Evidence as material to the issue of liability, ALJ Foelak's ruling that she could not consider it for purposes of determining disgorgement was plainly inconsistent with the Division's and the ALJ's prior position that the First OIP included allegations related to Newport and Jenirob as the "offshore compan[ies]" and "associates" who had received portions of the $13 million in stock sale proceeds. As noted above, the First OIP specifically alleged that Pierce had "transferred or sold [Lexington stock] through his offshore

company," and asked, "[w]hether *Respondent Pierce should be ordered to pay disgorgement* pursuant to Section 8A(e) of the Securities Act" because of registration violations involving Pierce's resale or distribution through his "offshore company" and profits on "sales proceeds of over $13 million" by "Pierce and his associates."

24. In response to the ALJ's ruling, the Division could have requested either the ALJ or the commission to expressly add Newport and Jenirob as parties in the caption and include them in the determination of whether they – in addition to Mr. Pierce – should be ordered to pay disgorgement; and then served them with process for a hearing. The Division did not move to amend, nor did it otherwise appeal or make any submission to the Commission to address the ALJ's determination that Pierce could not be ordered to pay disgorgement as it related to his alleged control of Newport and Jenirob accounts. *See* 17 C.F.R. § 201.200(d). The Division's acquiescence signaled to Pierce that the Division, like the ALJ, had determined that, to the extent remedial relief were granted, the approximately $2.1 million figure previously identified would be adequate. Indeed, as discussed below, the Division never took any steps to appeal or otherwise reverse any of ALJ Foelak's rulings.

C. <u>The Initial Decision</u>

25. On June 5, 2009, ALJ Foelak issued an Initial Decision in the First Action, Release No. 379 (the "Initial Decision"). The Initial Decision was replete with cites to the New Evidence and accepted the Division's claim that Pierce controlled Newport and Jenirob, and, among other things, that Pierce violated the reporting requirements of Sections 13(d)(1) and 16(a) of the Exchange Act by virtue of the Lexington stock he purportedly controlled and sold through Newport. The Initial Decision ordered Pierce to disgorge $2,043,362.33, which ALJ Foelak concluded was the amount of profit Pierce allegedly made from the sale of Lexington stock from his personal account.

26. With respect to the New Evidence, the Initial Decision incorporated ALJ Foelak's prior ruling, noting further that, "based on newly discovered evidence ..., the Division argued that over seven million dollars in additional ill-gotten gains should be disgorged, representing profits from the sale of unregistered stock by Jenirob and Newport. However, as the undersigned ruled

previously, *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." The Initial Decision also specifically noted that "[a]ll arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected." Of course, Newport and Jenirob *were* "mentioned in the OIP," in light of Pierce's motion for a more definite statement and the ensuing statements by the Division in hearings and pleadings. The Division did not seek reconsideration or immediate discretionary review of ALJ Foelak's Initial Decision on behalf of the Commission, in which she "determined" that the cease and desist orders she entered and the amount "Respondent Pierce should be ordered to pay disgorgement" were adequate to serve the remedial interests of the public.

D. The Division Does Not Appeal

27. Pursuant to the Commission's Rules of Practice, both parties had 21 days to seek review of the Initial Decision with the Commission. *See* 17 C.F.R. §§ 201.360(b) and 410(a). The Division did not file a petition for review. In so doing, the Division chose not to appeal, and in fact accepted, ALJ Foelak's decision—manifested in both her order admitting the New Evidence and the Initial Decision itself—to deny the Division's claim (as well as its proposed findings and conclusions) that "Pierce should be ordered to pay disgorgement" of profits made from the sale of Lexington stock by Newport and Jenirob. Indeed, the Division manifested its agreement that the remedial relief ordered by the Initial Decision was complete and adequate to redress all the conduct and litigated in the First Action; that is, that "Pierce should be ordered to pay disgorgement" of approximately $2.1 million rather than $9.6 million.

28. Although Pierce believed that the Initial Decision was erroneous, including the ruling that registration violations had occurred, Pierce did not file a petition for review with the Commission. In electing not to file a petition for review, thereby foregoing his right to challenge the Initial Decision with the Commission, Pierce specifically relied on the decision by the Division not to (a) seek review of ALJ Foelak's disgorgement ruling by the Commission or (b) request the Commission to amend the OIP as necessary to include a claim for an order that Pierce

pay disgorgement of the alleged Newport and Jenirob profits. Pierce had incurred substantial expense during the Commission's investigation and proceedings, and desired finality with respect to the Division's approximately $9.5 million disgorgement claim against him.

29. There was good reason for the Division not to vindicate its position through an appeal of the Initial Decision. Although the Division had taken the position, contrary the ALJ Foelak's ruling, that the First OIP did not require amendment – because Newport and Jenirob were "offshore companies" and "associates" of Pierce within the meaning of the First OIP and, thus, sufficient "mentioned in the OIP" – the Division also understood that, if it were to appeal the ALJ's Initial Decision in this respect, a cross-appeal by Pierce could ultimately lead to reversal of the ALJ's underlying liability findings, and a ruling by the Commission that no disgorgement of any amount was warranted.

30. Indeed, had the Division appealed or sought any other relief from the Commission, Pierce would have filed a petition for review and/or cross-review and vigorously contested liability under the Initial Decision as well as any effort to increase the order to pay disgorgement beyond the $2.1 million ALJ Foelak ordered. *See* 17 C.F.R. § 410(b) ("[i]n the event a petition for review is filed, any other party to the proceeding may file a cross-petition for review within ... ten days from the date that the petition for review was filed"). Because he did not file a petition for review in reliance on the Division's actions and acquiescence in the total disgorgement amount, Pierce also surrendered his right to seek judicial review of the Initial Decision. *See* 17 C.F.R. § 410(e) ("a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review of a final order entered pursuant to such decision").

31. Even though neither party filed a petition for review, the Commission still had plenary authority "on its own initiative" to review ALJ Foelak's Initial Decision, and to reverse, modify, set aside or remand any or all of the Initial Decision, including ALJ Foelak's decision to consider the New Evidence for purposes of Pierce's alleged liability, but denying the Division's claim that Pierce should be ordered to disgorge an additional $7.5 million in connection with the sale of Lexington stock by Newport and Jenirob. *See* 17 C.F.R. § 201.411(a) & (c). As noted above, the Commission also retained the authority "[u]pon its own motion," to accept and

consider the New Evidence for any purpose, or order further proceedings with the ALJ thereon. *See* 17 C.F.R. § 201.452.

32. The Commission, however, decided not to review or modify ALJ Foelak's Initial Decision or order further proceedings in the First Action. Rather, on July 8, 2009, the Commission issued a Notice informing the parties that "the Commission has not chosen to review the decision as to [Pierce] on its own initiative" and, thus, pursuant to 17 C.F.R. § 201.360(d), the Initial Decision "has become the final decision of the Commission with respect to Gordon Brent Pierce. The orders contained in that decision are hereby declared effective." And with that, the Initial Decision became the Commission's "Final Decision." In short, that "Final Decision" decided the question posed in the First OIP and litigated in the First Action: "Whether Respondent Pierce should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act" for registration violations by Pierce "and his associates."

E. The Second Action

33. Over the next several months, Pierce and Commission staff negotiated terms upon which Pierce could satisfy the $2,043,362.33 disgorgement remedy, plus prejudgment interest, imposed on Pierce by the Commission's Final Decision in the First Action. In doing so, Pierce relied on the Division's manifest agreement that disgorgement had been "determined" with finality when Pierce exchanged compromise and settlement offers with the Division in an effort to resolve his disgorgement obligations.

34. Only after Pierce had increased his offer to an amount the Division had represented would be acceptable, did the Commission staff inform Pierce that the Commission intended to initiate a new administrative action against him in an effort to re-litigate its determination that Pierce be ordered to pay disgorgement for registration violations resulting from his resale and distribution of Lexington shares. The Commission intended to revive the question whether Pierce should be ordered to pay disgorgement of the alleged $7.5 million in net proceeds received by Newport and Jenirob from the sale of Lexington stock in 2004. Facing the prospect of another burdensome and costly administrative action sparking a new round of bad publicity on a claim that had been considered and finally decided as unnecessary to the remedial

relief ordered against him in the First Action, and believing that Commission staff had been dealing with him in bad faith, Pierce immediately broke off further negotiations for payment under the Final Decision.

35. In an effort to forestall the Commission's threatened action, in February 2010, Pierce delivered a Wells Committee Submission to the Commission arguing, among other things, that the Commission was barred by res judicata and estopped from re-litigating claims previously litigated and decided in the First Action. Pierce specifically reminded the Commission that the Division did not appeal its rejected $7.5 million disgorgement claim to the Commission, nor did the Commission itself choose to review, modify or overrule the Initial Decision's disgorgement remedy, although it had the authority and discretion to do so. The Commission either rejected or ignored Pierce's Wells Submission arguments.

36. On June 8, 2010, the Commission brought the Second Action against Pierce by issuing an Order Instituting Cease-and-Desist Proceedings (the "Second OIP") against Pierce in a proceeding captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927. As in the First Action, the Division claims that Pierce violated the registration provisions of the Securities Act, Sections 5i. and 5(c), 15 U.S.C.§ 77(e)(a) & (c) in connection with the sale of unregistered Lexington stock in 2004. The Commission again chose to prosecute claims in its own internal forum, when it could have brought them in a federal district court, because it understood that a court would recognize immediately that the Commission's statutory authority and jurisdictional basis under Section 8A of the Securities Act for the Second OIP no longer existed as to Pierce.

37. The allegations contained in the Second OIP are based exclusively on the same transactions, the same time period, and the same New Evidence that the Division litigated and the Commission considered in the First Action. Indeed, the Second OIP is replete with language culled nearly verbatim from the Proposed Findings of Fact and Conclusions of Law which the Division proffered, but ALJ Foelak refused to adopt, in the First Action, including:

> ... In March 2009, the Division received additional documents relating to the Liechtenstein bank's sales of Lexington stock. These documents showed that, in 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.

(Second OIP, ¶ 25).

38. Just as important, in the Second Action, the Division seeks the more than $7.5 million disgorgement award (now $7.7 million) that ALJ Foelak rejected in the Initial Decision, which the Division and later the Commission chose not to challenge or disturb in the First Action. The Division admits all of this on the face of the Second OIP:

> ... On July 31, 2008, the Commission instituted cease-and-desist proceedings against Pierce ... [.] In that action, the Division sought disgorgement from Pierce of the $2 million in net proceeds from the sale of 300,000 Lexington shares in his personal account ... in 2004. ...
>
> ... Before issuance of the Initial Decision in the prior action, the Division moved to admit the new evidence ... ***and also sought the additional $7.7 million in disgorgement.*** The new evidence was admitted in the prior action, but the Administrative Law Judge ruled that disgorgement of the $7.7 million in Pierce's sales in the Newport and Jenirob accounts was outside the scope of the [OIP] in the prior action because Newport and Jenirob were not named in the OIP.
>
> ... The Initial Decision in the prior action, issued June 5, 2009, found that Pierce committed the alleged violations of the Securities Act and Exchange Act and ordered Pierce to disgorge $2,043,362.33 in proceeds from his sale of the 300,000 Lexington shares in his personal account. ***Neither party appealed the Initial Decision and it became the final decision of the Commission on July 8, 2009.***

(Second OIP, ¶¶ 27, 29 & 30, emphasis added). In short, it is clear that the Commission hopes to directly or indirectly benefit from the preclusive effect of the Final Decision to establish Pierce's liability in the Second Action, while, at the same time, escaping the preclusive effect of the Final Decision on the Commission's ability to re-litigate the amount to be disgorged from Pierce, which the Division elected not to challenge and the Commission elected not to revise. Indeed, the Second OIP admits its purpose is "to determine: ... Whether Respondents [Pierce, Newport and Jenirob] should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act,"

which is precisely what was decided in the Final Decision, at least as to Pierce.

39. Equally troublesome, in the Second OIP, the Commission again uses the term "associates." Through this pleading device, the Commission threatens to repeat another round of repetitive litigation if it doesn't achieve all it wants in the Second Action. This threat of future administrative actions is never ending if, as the Commission apparently hopes, reference to unnamed "associates" in the body of the OIP allows it to escape ordinary principles of res judicata.

F. The Collection Action

40. The Commission's desire to have it both ways is further reflected by its efforts to enforce the Final Decision in the First Action. On June 8, 2010, the same day it filed the Second Action, the Commission filed an action in the United States District Court for the Northern District of California at San Francisco, Case No. 3:10-mc-80129, to enforce the disgorgement remedy imposed by the Final Decision (the "Collection Action"). In the Collection Action, the Commission expressly recognizes that the Final Decision represents a final judgment of the claims litigated in the First Action. The Commission seeks an equitable remedy, entry of a court order enforcing its Final Decision, while inequitably abusing its power to act in a quasi-judicial capacity by prosecuting the Second Action and threatening more such actions.

V. FIRST CAUSE OF ACTION

(Declaratory/Injunctive Relief – Res Judicata)

41. Pierce adopts and incorporates by reference the allegations contained in paragraphs 1 through 40 above as if fully set out herein.

42. An actual controversy of a justifiable nature presently exists between Pierce and the Commission as to whether the Commission acted illegally, without authority and in violation of the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Administrative Procedure Act when it filed a Second Action against Pierce in an effort to re-litigate the precise claims previously litigated and finally decided in the First Action, and thus absolutely barred by the doctrine of res judicata, including collateral estoppel, issue preclusion and claim preclusion.

43. The issuance of declaratory and/or injunctive relief on res judicata grounds by this Court will terminate the existing controversy between the parties because such relief will require the Commission to cease prosecution of the Second Action, and preclude any other or future agency action involving claims and conduct previously litigated, finally decided and not appealed from in the First Action.

VI. SECOND CAUSE OF ACTION

(Declaratory/Injunctive Relief – Equitable Estoppel)

44. Pierce adopts and incorporates by reference the allegations contained in paragraphs 1 through 40 above as if fully set out herein.

45. An actual controversy of a justifiable nature presently exists between Pierce and the Commission as to whether the Commission should be equitably estopped from prosecuting the Second Action against Pierce where:

(a) the Division knew when it did not appeal the Initial Decision to the Commission, and the Commission knew when it did not review the Initial Decision, that the Commission intended to subsequently initiate the Second Action;

(b) the Commission intended Pierce to rely on its purported acquiescence in the finality of the Initial Decision and Final Decision in the First Action, including the order to pay disgorgement pursuant to Section 8A(e) of the Securities Act;

(c) Pierce did not know until long after the period for appeal of the Initial Decision and/or Final Decision lapsed that the Commission intended to subsequently initiate the Second Action;

(d) Pierce detrimentally relied on the Commission's conduct by waiving his right to appeal the Initial Decision and/or Final Decision in the First Action;

(e) the Commission's conduct in this regard was affirmative, and not mere negligence; and

(f) unless estopped from proceeding on the Second Action, the Commission's conduct will cause a serious injustice to Pierce and will unduly harm the public interest.

46. The issuance of declaratory and/or injunctive relief by this Court on the equitable

estoppel issue will terminate the existing controversy between the parties because such relief will require the Commission to cease prosecution of the Second Action and prevent future prosecutions by the Commission on the same adjudicated facts and claims.

VII. THIRD CAUSE OF ACTION

(Declaratory/Injunctive Relief – Violation of Due Process)

47. Pierce adopts and incorporates by reference the allegations contained in paragraphs 1 through 40 above as if fully set out herein.

48. An actual controversy of a justifiable nature presently exists between Pierce and the Commission as to whether the Commission violated and continues to violate Pierce's right to due process guaranteed by the United States Constitution by subjecting Pierce to unlawful, harassing and costly duplicative litigation of the Second Action. Moreover, the Commission's use of the term "associates" again in the Second OIP demonstrates its intent to threaten and/or commence future further unlawful, harassing and costly duplicative litigation.

49. The issuance of declaratory and/or injunctive relief by this Court on the due process issue will terminate the existing controversy between the parties because such relief will require the Commission to cease prosecution of the Second Action and refrain from commencing more such actions. This relief will not only mitigate the Commission's violation of Pierce's right to due process, but it will protect the public's interest in deterring any other or future agency action involving unlawful, harassing and costly duplicative litigation previously litigated, finally decided and not appealed from in the First Action in accordance with regulatory requirements.

* * *

WHEREFORE, Pierce respectfully requests the following relief:

A. That the Court declares that the Commission acted illegally and without statutory authority, and violated Pierce's constitutional rights, by filing and prosecuting the administrative cease-and-desist proceedings captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927, as further described herein;

B. That the Court issue a preliminary and permanent injunction enjoining the Commission from continuing the administrative cease-and-desist proceedings against Pierce captioned *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927, or any other or future agency action involving claims and conduct previously litigated, finally decided and not appealed from in the Commission's prior administrative proceedings against Pierce captioned *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109;

C. That the Commission temporarily be barred from continuing to apply for, procure or use for the purpose of disgorging assets, the order proposed in this Court in the Collection Action, Misc. No. CV-10-80129-MISC, and that such action, an application for a court order enforcing the Commission's Final Decision of July 8, 2009 in Administrative Proceeding File No. 3-13109, be stayed until the relief sought by Pierce herein is finally adjudicated.

D. An award of reasonable attorneys fees and costs as may be permitted by law; and;

E. For such other and further relief as the Court deems just and proper.

Dated: July 9, 2010

CHRISTOPHER B. WELLS
DAVID C. SPELLMAN
RYAN P. MCBRIDE
LANE POWELL PC

WILLIAM F. ALDERMAN
ORRICK, HERRINGTON & SUTCLIFFE LLP

William F. Alderman

WILLIAM F. ALDERMAN
Attorneys for Plaintiff
GORDON BRENT PIERCE

Exhibit 22

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON, JUDGE

GORDON BRENT PIERCE,

PLAINTIFF,

VS. NO. C-10-03026 SI
PAGES 1 - 27

SECURITIES AND EXCHANGE COMMISSION,

DEFENDANT.

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

VS. NO. C-10-80129-MISC (SI)

GORDON BRENT PIERCE,

DEFENDANT.

SAN FRANCISCO, CALIFORNIA
FRIDAY, AUGUST 13, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES ON NEXT PAGE.

REPORTED BY: KATHERINE WYATT, CSR, RPR, RMR
OFFICIAL REPORTER, USDC
COMPUTERIZED TRANSCRIPTION BY ECLIPSE

TO SKIP THE EXHAUSTION OF ADMINISTRATIVE REMEDIES, IT IS REQUIRED THERE BE IRREPARABLE INJURY. THE SUPREME COURT IN SO CAL AND SEVERAL OTHER COURTS HAVE SAID THAT:

"LITIGATION EXPENSES, HOWEVER SUBSTANTIAL AND IRRECOUPABLE, DO NOT CONSTITUTE IRREPARABLE INJURY."

AND WHILE WE'RE ON THE SECOND PRONG FOR A CLAIM OF TRO PRELIMINARY INJUNCTION, FOR THE SAME REASONS THEY CAN'T DEMONSTRATE IRREPARABLE INJURY FOR PURPOSES OF THEIR MOTION.

THEY ALSO HAVE TO SHOW THAT THE COMMISSION DID NOT HAVE AUTHORITY TO ADJUDICATE. UNDER THE CASE LAW WHAT THAT MEANS IS AUTHORITY, AUTHORITY TO HOLD THE HEARING, NOT THAT THERE'S SOME AFFIRMATIVE DEFENSE THAT MAY END UP DEFEATING THE CASE.

FOR INSTANCE, IF THE SEC HAD BROUGHT AN ACTION TO ENFORCE A PURELY CRIMINAL STATUTE WHICH ONLY JUSTICE CAN ENFORCE, IN THAT CASE IT MIGHT BE BEYOND OUR AUTHORITY TO ADJUDICATE.

IF SOMEONE HAS A DEFENSE, AN AFFIRMATIVE DEFENSE SUCH AS RES JUDICATA OR EQUITABLE ESTOPPEL DOES NOT APPLY.

NOR CAN PIERCE CLAIM UNDER THE LAW THAT IT WOULD BE FUTILE TO GO THROUGH THE ADMINISTRATIVE PROCESS. THE COMMISSION RULES SPECIFICALLY PERMIT THE DEFENSE OF RES JUDICATA ALONG WITH STATUTE OF LIMITATIONS AND OTHER EQUITABLE DEFENSES TO BE RAISED IN A PROCEEDING.

THE CITE FOR THAT, WHICH I APOLOGIZE IS NOT OUR BRIEF, IS 17 CFR 201.220 (C).

SO THEY HAD THAT OPPORTUNITY. IN FACT, THEY HAVE FILED AN ANSWER IN WHICH THEY HAVE RAISED RES JUDICATA AND EQUITABLE ESTOPPEL AS DEFENSES.

THEY ARE ENTITLED TO BRING THOSE CLAIMS BEFORE AN ALJ. THEY CAN DO IT BY A MOTION BY SUMMARY DISPOSITION, AND THEY CAN RAISE THAT ISSUE. AND THEN, IF THEY DON'T LIKE THE RESULT THERE, THEY CAN APPEAL. THEY CAN TRY AN INTERLOCUTORY APPEAL TO THE FULL COMMISSION.

OR IF THEY LOSE ON THAT GROUND, AND THERE IS AN INTERLOCUTORY APPEAL GRANTED, AT THE CONCLUSION OF THE ADMINISTRATIVE PROCEEDING BEFORE THE ALJ THEY CAN MAKE THAT ONE OF THEIR CLAIMS.

ASSUMING THAT THE COMMISSION PREVAILS ON ITS PRIMARY CLAIMS, THEY CAN RAISE THAT BEFORE THE COMMISSION. THEY CAN ALSO SEEK TO STAY THE EFFECT OF A COMMISSION ORDER ON THAT AND SEEK AN APPEAL TO THE COURT OF APPEALS.

SO THE COMMISSION IS IN NO WAY TRYING TO KEEP THIS FROM THE FEDERAL COURTS. THEY WILL HAVE AMPLE OPPORTUNITY TO DO THAT, AND THERE'S NO REASON TO THINK THAT IT IS FUTILE TO AVAIL THEMSELVES OF THE COMMISSION'S PROCESSES WHICH GIVE THEM FULL RIGHTS, YOU KNOW, TO BRING WITNESSES TO MAKE THEIR ARGUMENTS WHENEVER AND WHEREVER.

WITH REGARD TO THEIR CITING TO CONTINENTAL CAN, CONTINENTAL CAN, EVEN THE SEVENTH CIRCUIT HAS RECOGNIZED IS NO LONGER GOOD LAW IN LIGHT OF FTC VERSUS SOUTHERN CALIFORNIA.

Exhibit 23

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GORDON BRENT PIERCE,

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant.

No. C 10-3026 SI

ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, DISMISSING 10-3026 SI FOR LACK OF JURISDICTION; AND GRANTING APPLICATION FOR ENFORCEMENT OF DISGORGEMENT ORDER IN 10-80129 MISC

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

v.

GORDON BRENT PIERCE,

Respondent.

No. C 10-80129 MISC

On August 13, 2010, the Court held a hearing on Gordon Brent Pierce's motion for a temporary restraining order, preliminary injunction and a stay, and the SEC's application for an order enforcing an administrative disgorgement order. For the reasons set forth below, the Court DENIES Pierce's motion and GRANTS the SEC's application.

BACKGROUND

These related cases arise out of two separate administrative enforcement proceedings brought by the Securities and Exchange Commission (SEC) against Gordon Brent Pierce, a Canadian citizen.

The SEC initiated the first proceeding on July 31, 2008 by filing an Order Instituting Cease-and-Desist Proceedings ("First OIP") against Pierce, Lexington Resources, Inc., and Lexington's CEO Grant Atkins. The SEC claimed that Pierce violated the registration provisions of the Securities Act of 1933, Sections 5(a) and 5(c), 15 U.S.C. § 77e(a) & (c), and the reporting provisions of the Exchange Act of 1934, Section 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a). Wells Decl. Ex. A (C 10-3046).

The First OIP charged, *inter alia*, that Pierce transferred or sold Lexington Resources stock "through his offshore company," OIP ¶ 14, and that "Pierce and his associates" deposited shares in accounts at an offshore bank. *Id.* ¶ 15. Pierce moved for a more definite statement, and in response the SEC took the position that transaction documents with which Pierce was familiar identified the "associates" and the "offshore company"; those documents indicated that the "offshore company" was Newport Capital Corp. (Newport) , and that Jenirob Company, Ltd. (Jenirob) was one of the "associates." Pierce asserts that "as a result of this informal amendment process, without ever actually moving to amend the First OIP, the Commission itself specifically claimed that, to the extent Newport and Jenirob were involved in the resale of Lexington stock by Pierce, the OIP included both for purposes of 'determining' whether Mr. Pierce committed registration violations, and 'whether Respondent Pierce should be ordered to pay disgorgement.'" Motion at 4:12-16.

Administrative Law Judge Foelak held a three day hearing in February 2009. After the close of evidence, the SEC moved for the admission of new evidence obtained from a foreign regulator which purportedly showed that in addition to Pierce's sales through his personal account, Pierce had illegally sold 1.6 million shares of Lexington stock for $7.7 million through two Liechtenstein accounts that Pierce controlled in the names of Newport and Jenirob. Pierce opposed the admission of the new evidence. In an order dated April 7, 2009, the ALJ held that the new evidence would be admitted for purposes of liability, but not for disgorgement:

> The Order Instituting Proceedings (OIP) authorizes disgorgement. At the October 10, 2008 prehearing conference, the undersigned advised that the disgorgement figure must be fixed so that Pierce could evaluate whether he wanted to present evidence concerning his ability to pay at the hearing, as required by the Securities and Exchange Commission rules; the Division stated that it was seeking $2.7 million in disgorgement. Tr. 8-9. The Division refined this figure in its December 5, 2008, Motion for Summary Disposition to $2,077,969 plus prejudgment interest, which it alleged are ill-gotten gains from Pierce's sale of allegedly unregistered stock.

> Under consideration is the Division's Motion for the Admission of New Evidence, filed March 19, 2009, and responsive pleadings. The new evidence consists of information that the Division received from a foreign securities regulator, the Liechtenstein Finanzmarktaufsicht (FMA), on March 10, 2009. The Division argues that the new material bears on the issue of liability and also shows that over $7 million in additional ill-gotten gains should be disgorged, representing alleged profits from the sale of allegedly unregistered stock by two corporations that Pierce allegedly controlled, Jenirob Company, Ltd. (Jenirob), and Newport Capital Corp. (Newport). Pierce argues that admitting new evidence at this late date violates due process and provides additional exhibits that contravene the Division's new exhibits or diminish their weight. In reply, the Division states the delay in producing the new material to the Division was entirely Pierce's fault, as he refused to supply it in response to a 2006 subpoena and actively opposed its release to the Division by the FMA.
>
> Under the circumstances the record of evidence will be reopened to admit Division Exhibits 78 - 89 for use on the issue of liability, but not for the purpose of disgorgement based on sales of stock by Newport and Jenirob. These entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP. To ensure fairness, Respondent Exhibits A - M will also be admitted, and Pierce may offer additional exhibits and a supplement to his proposed findings of fact and conclusions of law and post-hearing brief by April 17, 2009, if desired.

Wells Decl. Ex. L (footnotes omitted).

On June 5, 2009, ALJ Foelak issued an Initial Decision finding that Pierce violated the Securities Act by offering and selling shares of Lexington Resources stock without the necessary registration for those offers and sales, and that he violated the Exchange Act by failing to file the required forms with the Securities and Exchange Commission to disclose his beneficial ownership of, and transactions in, Lexington shares. The ALJ found that Pierce was unjustly enriched in the amount of $2,043,362.33, and she ordered Pierce to pay that amount in disgorgement, plus interest. The disgorgement amount was based on evidence regarding sales of 300,000 shares made from Pierce's personal account.

The Initial Decision stated that the recommended sanctions were to take effect unless a party filed an appeal within 21 days. No party filed an appeal, and on July 8, 2009, the SEC issued notice that the Initial Decision was final. Buchholz Decl. Ex. B. Under the SEC's Rules of Practice, Pierce was required to pay the disgorgement and interest by July 9, 2009, the first day after the Initial Decision became final. 17 C.F.R. § 201.601(a). Pierce has not paid any amount of the disgorgement and interest. On June 8, 2010, the SEC filed an Application for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce, *Securities and Exchange Commission v. Gordon Brent Pierce*, C 10-80129 MISC.

Also on June 8, 2010, the SEC initiated an administrative enforcement proceeding against Pierce,

Jenirob and Newport. This proceeding alleges that Pierce reaped $7.7 million in unlawful profits by selling 1.6 million shares of stock through Jenirob and Newport. In the second proceeding, the SEC alleges that Pierce controlled Lexington by holding a majority of its stock and by providing Lexington a consultant CEO who was employed by Pierce, and that Pierce made the stock sales through Newport and Jenirob while he directed a widespread scam and newsletter campaign touting Lexington's stock. To date, no rulings have been made on these allegations.

On July 9, 2010, Pierce filed a lawsuit in this Court, *Gordon Brent Pierce v. Securities and Exchange Commission*, C 10-3026 SI. Pierce seeks to enjoin the SEC from prosecuting the second administrative enforcement proceeding on the ground that it is barred by res judicata, collateral estoppel, issue preclusion, equitable estoppel and due process. The complaint seeks declaratory and injunctive relief, and alleges three claims: (1) declaratory/injunctive relief – res judicata; (2) declaratory/injunctive relief – equitable estoppel; and (3) declaratory/injunctive relief – violation of Due Process.

Now before the Court are the SEC's application for an order enforcing the administrative disgorgement order, and Pierce's motion for a temporary restraining order, preliminary injunction, and stay. Pierce seeks (1) a temporary restraining order and an order to show cause why a preliminary injunction should not be issued against the SEC enjoining it from proceeding with the second administrative proceeding; and (2) a temporary stay of the SEC's application for an order enforcing the disgorgement order pending a determination of the merits of the issues raised in the civil case filed by Pierce (10-3026 SI).

DISCUSSION

I. *Pierce v. SEC*, C 10-3026 SI

A threshold question is whether the Court has jurisdiction over Pierce's complaint. The complaint alleges that this case arises under the Securities and Exchange Acts, the Administrative Procedure Act, and the Due Process Clause of the United States Constitution, and that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 (the Administrative Procedure Act). Compl. ¶¶ 4-5. The complaint also alleges that the Court has the authority to grant the declaratory and injunctive relief sought pursuant to 28 U.S.C. §§ 2201 and

2202 (the Declaratory Judgment Act) and 28 U.S.C. § 1651 (the All Writs Act). *Id.* ¶ 5.

The SEC asserts that the Securities and Exchange Acts do not confer jurisdiction because Pierce does not bring any claims under the Securities and Exchange Acts, and rather he brings this case to halt the SEC's enforcement of the federal securities laws against him. The three claims for declaratory and injunctive relief alleged in the complaint do not arise under the Securities or Exchange Acts. Pierce does not cite any authority for the proposition that an action seeking to enjoin an SEC administrative proceeding arises under the federal securities laws, and in his briefing, Pierce appears to have abandoned the assertion that this Court has jurisdiction based upon the federal securities laws. The Court agrees with the SEC that the federal securities laws do not provide a basis for jurisdiction over Pierce's complaint.

The SEC also contends that the Administrative Procedure Act does not provide a basis for jurisdiction. Pierce asserts that Section 705 of the APA provides a basis for jurisdiction. *See* Pl's Motion at 13 n.4. That section provides,

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. However, as the SEC notes, Section 703 of the APA provides that "the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . . ." 5 U.S.C. § 703. The federal securities laws provide that judicial review of SEC orders is vested in the Court of Appeals. Section 25(a) of the Exchange Act states,

> A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or be set aside in whole or in part.

15 U.S.C. § 78y(a)(1); *see also* 15 U.S.C. § 77i(a) (similar language in Securities Act); *see also Public Utility Comm'r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) ("[W]here a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review.").

Pierce simply asserts that the APA confers jurisdiction, *see* Pl's Motion at 13:n. 4, and does not address the authority cited by the SEC. Pierce's reply does not mention the APA as a basis for jurisdiction, and thus it appears that Pierce has abandoned this contention. The Court concludes that because Congress has established a specific statutory system for judicial review of SEC actions by the Court of Appeals, Pierce cannot rely on the APA's general review provisions as a source of jurisdiction.

Pierce suggests that the Court has jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and 2202. However, "[t]he use of the declaratory judgment statute does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint brought without the use of 28 U.S.C. § 2201." *Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 15-16 (1983)). Similarly, the All Writs Act is not an independent source of federal question jurisdiction. *See Stafford v. Superior Ct.*, 272 F.2d 407, 409 (9th Cir. 1959) ("The All Writs Act . . . does not operate to confer jurisdiction . . . since it may be invoked by a . . . court only in aid of jurisdiction which it already has."). As such, Pierce's reliance on *SEC v. G.C. George Sec. Inc.*, 637 F.2d 685 (9th Cir. 1981), is unavailing. There, the Ninth Circuit held that a district court had jurisdiction to enjoin an administrative proceeding which allegedly violated a settlement agreement that the district court had approved, where the settlement agreement expressly conferred jurisdiction on the court to enforce the terms of the settlement agreement. *Id.* at 687-88. The Ninth Circuit held that the district court's jurisdiction was based on the court's retained continuing jurisdiction, as well as the All Writs Act. *Id.* The Ninth Circuit remanded to the district court to consider whether administrative exhaustion was required. *Id.* at 688-89.

Finally, Pierce asserts that the Court has jurisdiction based on his due process claim, and under 28 U.S.C. § 1337, which confers original jurisdiction in actions arising under acts regulating commerce.[1] Pierce relies on *Martin v. Hodel*, 692 F. Supp. 637 (W.D. Va. 1998). In *Martin*, a coal mine operator brought suit to enjoin the government from prosecuting the operator in an administrative proceeding for

[1] The complaint does not allege 28 U.S.C. § 1337 as a basis for jurisdiction, and Pierce did not assert this argument until his reply papers. *See* Reply at 2:13-14. Nevertheless, the Court will consider this ground because the analysis of whether 28 U.S.C. § 1337 provides a basis for jurisdiction is essentially the same as whether the due process claim provides a basis for jurisdiction, namely whether the administrative agency is acting unlawfully, and thus falls in a narrow exception where the court has jurisdiction and a party is excused from exhausting administrative remedies.

a violation of the Surface Mining Control and Reclamation Act. The coal mine operator had previously been charged with a violation of the Act, and had prevailed when an administrative law judge found that the operator's mine was exempt from the Act. *Id.* at 638. Seven years later, the government charged the operator with the same violation of the Act based upon the same site. The operator filed suit in federal court to enjoin the administrative prosecution, arguing "since the ALJ found Martin's Dickenson County mining operation within the Act's two acre exemption in 1981, OSM is barred from further action for the same violation at the identical site when Martin has engaged in no further mining at the site." *Id.* The government argued that the court lacked jurisdiction because the operator was required to exhaust his administrative remedies before seeking judicial review. The district court held that while administrative exhaustion is generally required, "Individuals are not required to exhaust administrative remedies when the administrative agency is acting unlawfully." *Id.* at 639. The court held that "although the Act affords no specific review procedure for the illegal action by the Secretary, the court may rely on its general federal jurisdiction pursuant to 28 U.S.C.A. § 1337 (original jurisdiction for civil actions arising under any Act of Congress regulating commerce) to adjudicate this dispute." *Id.* The court relied on *Leedom v. Kyne*, 358 U.S. 184 (1958), in which the Supreme Court held that a district court had jurisdiction under 28 U.S.C. § 1337 to enjoin a federal agency when the agency was acting in excess of its delegated powers and contrary to a specific provision in its authorizing Act.

The exception recognized in *Leedom* is a narrow one. The Ninth Circuit recently addressed *Leedom* in *AMERCO v. N.L.R.B.*, 458 F.3d 883 (9th Cir. 2006). Although *AMERCO* arose in the labor context, as did *Leedom*, the Court finds *AMERCO* and its discussion of *Leedom* instructive. In *AMERCO*, the NLRB brought an administrative complaint against AMERCO for alleged unfair labor practices. After the administrative trial was underway, AMERCO filed suit in district court seeking an injunction to stop the administrative proceeding on due process grounds. AMERCO alleged that the NLRB "had tried them in absentia for the first three weeks of the hearing, in an effort to gain an unfair advantage from their absence and lack of representation, and with full knowledge that a complaint ultimately would be filed against them." *Id.* at 886. The district court dismissed AMERCO's lawsuit for lack of jurisdiction, holding that AMERCO was required to exhaust its administrative remedies, and ultimately seek judicial review in the Court of Appeals. *Id.*

The Ninth Circuit affirmed. The court held that "[r]egardless of the viability of AMERCO's constitutional claims, the district court lacked jurisdiction to remedy them" because Section 10 of the National Labor Relations Act vests exclusive jurisdiction in the Court of Appeals to review errors arising from unfair labor practice proceedings. *Id.* at 887. Section 10 of the NLRA provides,

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . by filing in such a court a written petition praying that the order of the Board be modified or set aside.

29 U.S.C. § 160(f). The Ninth Circuit noted that "Section 10 provides no separate process for obtaining injunctive relief prior to the issuance of a final order." *Id.* at 887. In addition, the court emphasized that "the exception advanced by AMERCO is inconsistent with the doctrine of administrative exhaustion. Exhaustion serves two vital purposes: first, to give the agency an initial opportunity to correct its mistakes before courts intervene; and second, to enable the creation of a complete administrative record should judicial review become necessary." *Id.* at 888. The Ninth Circuit also rejected AMERCO's argument that the district court had jurisdiction under *Leedom*. The court noted that *Leedom* arose in the context of a Section 9 representation proceeding, for which Congress has not provided any judicial review. *Id.* at 888-89. "The exception[] of *Leedom* derive[s] from the inequity that would result if no court could review claims that the NLRB acted unconstitutionally or contrary to statutory authority in a Section 9 determination." *Id.* at 889. "[W]e hold that the *Leedom* . . . exception[] does not apply outside the context of Section 9 actions or other situations in which meaningful judicial review is unavailable." *Id.* at 889-90.

As in *AMERCO*, the federal securities laws provide for exclusive judicial review of SEC orders in the Court of Appeals, and indeed the language of Section 10 of the NLRA is very similar to the language of Section 25(a) of the Exchange Act and Section 9(a) of the Securities Act. Similarly, the federal securities laws do not provide for a separate process for obtaining injunctive relief prior to the issuance of a final order. *AMERCO* emphasized the importance of administrative exhaustion, and the narrowness of the *Leedom* exception. Pierce contends that exhaustion should be excused because pursuit of administrative remedies would be futile. Pierce states that when he first learned that the SEC was contemplating a second enforcement action, he submitted a "Wells submission" to the SEC

asserting that a second administrative proceeding would be barred by res judicata, and that the SEC nevertheless initiated the second proceeding. However, as the SEC notes, under Section 554(d)(2) of the APA, the members of a body of an agency, such as the SEC, are expressly permitted to participate both in the "investigative or prosecuting functions for an agency" and the agency's review of any recommended decision from that proceeding. *See* 5 U.S.C. § 554(d)(2)(c); *see also San Francisco Mining Exch. v. SEC*, 378 F.2d 162, 167-68 (9th Cir. 1967) (holding that fact that Commission "had considered the staff report in determining whether to authorize the proceeding" "does not tend to show that any Commissioner had prejudged the case, or was biased and prejudiced concerning it"). The pending administrative proceeding affords a full range of quasi-judicial review and protections to Pierce, and Pierce has the opportunity to submit any relevant evidence and assert his defenses, including the arguments that the proceeding is barred by res judicata and equitable estoppel. *See* 17 C.F.R. § 201.220(c) (providing that "[a] defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer" to an Order Instituting Proceedings).

Numerous courts have rejected similar efforts to enjoin SEC administrative proceedings, and held that parties must exhaust administrative remedies prior to seeking judicial review, including when the party seeking the injunction claims that the administrative proceedings violate due process. *See SEC v. R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir. 1963) (reversing district court order enjoining SEC administrative proceeding because administrative remedies not exhausted; plaintiff claimed due process violation and that SEC Commissioner should be disqualified); *Wolf Corporation v. SEC*, 317 F.2d 139, 142 (D.C. Cir. 1963) (upholding refusal to enjoin SEC's stop order proceeding against issuer's proposed securities registration, and holding that claims relating to evidence allegedly seized in violation of the Fourth Amendment and challenges to the Commission's authority must first be made to the Commission); *First Jersey Sec. Inc. v. SEC*, 553 F. Supp. 205, 208-09 (S.D.N.J. 1982) (refusing to enjoin SEC administrative proceedings, where plaintiff alleged various constitutional and statutory violations because Second Circuit precedent mandates that "the procedures established for review of SEC actions deprive this court of jurisdiction over suits that seek to interrupt the agency proceedings").

Pierce is correct that in exceptional circumstances courts have enjoined administrative proceedings, such as *Martin v. Hodel*, 692 F. Supp. 637 (W.D. Va. 1998), where the court found the

administrative agency was acting ultra vires. Pierce also relies on *Continental Can Company, U.S.A. v. Marshall*, 603 F.2d 590 (7th Cir. 1979), and *Safir v. Gibson*, 432 F.2d 137 (2d Cir. 1970). However, *Martin*, *Continental Can*, and *Safir* are distinguishable because in those cases, the plaintiffs filed suit in federal court after they had prevailed on the merits in administrative proceedings, and then were subject to new administrative proceedings charging them with liability based on the precise conduct adjudicated in the earlier proceedings. The courts enjoined the new administrative proceedings on the ground that those proceedings were vexatious, harassing, and barred by res judicata. Here, in contrast, in the first administrative proceeding Pierce was found liable and ordered to pay disgorgement based on sales of stock from his personal account, while the second administrative proceeding names Pierce, Newport and Jenirob, and seeks disgorgement based on sales of stock through Newport and Jenirob. On the face of it, Pierce's two administrative proceedings are not analogous to the circumstances presented in *Martin*, *Continental Can*, and *Safir*.

Moreover, in *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 433 (7th Cir. 1991), the Seventh Circuit questioned the continuing vitality of *Continental Can* in light of the Supreme Court's decision in *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980. In *R.R. Donnelley*, the court held that even when the second administrative proceeding relitigates the issues raised in a prior action, federal courts lack jurisdiction to intervene in the administrative process because there is no final administrative order subject to judicial review. In *R.R. Donnelley*, a commercial printer filed a petition in the Court of Appeals seeking review of the FTC's denial of the printer's motion to dismiss an administrative complaint. The printer argued that the administrative complaint was barred by issue preclusion because a district judge had previously found, in a separate proceeding and after a trial, in the printer's favor. The printer argued, as Pierce does here, that the injury it was suffering was being required to undergo the costly and time-consuming administrative process. *Id.* at 430.

> We may assume that the ALJ is mistaken, that the FTC will eventually hand Donnelley the laurel. We may even assume that if the FTC does not do this, a court will set aside its order. Still, this case is far from over. The long road ahead is precisely Donnelley's beef. [*FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980) (*Socal*),] held that the filing of a complaint is not a final decision even though it finally determines that there is reasonable cause to proceed. Resolution of an issue is one thing, resolution of the case another.

Id. at 431. The court held that there is no civil "right not to be tried": "An inadequate opportunity

(sometimes even an inadequate incentive) to present one's case the first time may permit another shot in civil litigation. Legal errors by the judge may be overturned and the case re-done. Preclusion in a civil case creates a 'right not to be tried' only in the sense that it creates a right to win; but many legal doctrines do that without also creating a right to interlocutory appellate review." *Id.* at 432-33. With regard to *Continental Can*, the Seventh Circuit noted that *Continental Can* did not discuss jurisdiction or the final order rule, and "whether there is *any* life to *Continental Can* after *Socal* remains to be seen." *Id.* at 433 (emphasis in original).

This Court emphasizes that it is not ruling on the merits of Pierce's res judicata defense, or any other defense; those defenses should be made to the SEC, and ultimately the Court of Appeals if Pierce does not prevail before the agency. However, the Court does find that on this record, Pierce has not shown that shown that this case falls within the narrow class of cases where administrative exhaustion is excused and federal court intervention in ongoing administrative proceedings is warranted.

II. *SEC v. Pierce*, 10-80129 MISC

The SEC has filed this application to enforce the disgorgement order pursuant to Section 20(c) of the Securities Act and Section 21(e) of the Exchange Act. Those sections provide that "Upon application of the Commission, the district courts of the United States . . . shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any order of the Commission made in pursuance thereof." 15 U.S.C. § 77r(c) (Securities Act); *see also* 15 U.S.C. § 78u(e) (similar provision regarding Exchange Act). Because they are initiated by an "application," a Section 20(c) proceeding and a Section 21(e) proceeding may be decided in a summary proceeding rather than in a formal civil action under the Federal Rules of Civil Procedure. *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). The Ninth Circuit has explained,

> Summary proceedings are particularly appropriate where the merits of the dispute have already been litigated extensively before the NASD, the Commission, and on appeal to a circuit court, where the only remedy sought is enforcement of the previously upheld order. . . .
>
> Section 21(e) is an enforcement mechanism; its purpose is to ensure that NASD members comply with the Commission. There is no evidence in the statute or its legislative history from which to infer that § 21(e) was enacted to create another layer of adjudication. Rather, § 21(e) authorizes district courts to issue writs of mandamus,

> injunctions, and orders commanding NASD members, who violate Commission orders, to comply with the Commission or face federal contempt charges. The forcefulness of § 21(e)'s language is further evidence that Congress intended to authorize a more summary procedure. By the time a § 21(e) application is filed by the Commission, the time and opportunity for adjudicating the merits of the claim have been exhausted; all that is left to do is enforce the order. Appellants should not be permitted to exploit this statutory provision to delay and prolong the enforcement of a duly issued order of the Commission.

Id. at 657-58. In a summary proceeding, the respondent must be provided an opportunity to respond to the application. *Id.* at 658-59. However, the respondent cannot relitigate the merits. *Id.* at 658.

Here, Pierce does not dispute that the administrative disgorgement order is final. Instead, Pierce seeks a temporary stay of the enforcement proceeding until the propriety of the new administrative action is litigated. As discussed *supra*, the Court concludes that Pierce must exhaust his administrative remedies in the new action, and thus this Court lacks jurisdiction over his federal action. Further, the new administrative action has no impact whatsoever on Pierce's obligation to pay the disgorgement order. Pierce cannot and does not challenge the validity of the disgorgement order before this Court; instead, he challenges the validity of the new administrative action. As the SEC argues, if Pierce is found liable in the new administrative proceeding, Pierce must pay the current $2 million disgorgement amount plus any additional disgorgement ordered based on the second action. If, on the other hand, Pierce is found not liable in the new administrative proceeding, Pierce must still pay the $2 million disgorgement order.

Accordingly, the Court GRANTS the SEC's application enforcing the administrative disgorgement order. The Court orders that within 21 days from the date of this Order, respondent Gordon Brent Pierce shall comply with the Commission's administrative disgorgement order by paying the full amount of $2,043,362 in disgorgement, plus pre-judgment and post-judgment interest at the rate established by 26 U.S.C. § 6621(a)(2), beginning July 1, 2004 through the last day of the month preceding the month in which payment is made, compounded quarterly. Through May 31, 2010, total pre-judgment and post-judgment interest was $867,495. Payment of disgorgement and interest shall be made to the Commission, in accordance with Rule 601 of the Commission's Rules of Practice, 17 C.F.R. § 201.601, by United States postal money order, wire transfer, certified check, bank cashier's check, or bank money order made payable to the Securities and Exchange Commission. Payment shall be

accompanied by a letter that identifies the name and number of the administrative proceeding against Pierce and that identifies Pierce as the respondent making payment. A copy of the letter and the instrument of payment shall be sent to counsel for the Division of Enforcement.

CONCLUSION

For the foregoing reasons, the Court DENIES Pierce's motion for a TRO, preliminary injunction and stay (Docket No. 6 in C 10-3026 SI) and GRANTS the SEC's application for an order enforcing administrative disgorgement order (Docket No. 1 in C 10-80129 MISC). The Court DISMISSES *Pierce v. SEC*, C 10-3026 for lack of jurisdiction and failure to exhaust administrative remedies. The clerk shall close both files.

IT IS SO ORDERED.

Dated: September 2, 2010

SUSAN ILLSTON
United States District Judge

Exhibit 24

Alderman, William

From: Buchholz, Steven [BuchholzS@sec.gov]
Sent: Tuesday, February 01, 2011 3:04 PM
To: Alderman, William
Cc: Wells, Christopher; Dicke, Michael S.; Yun, John S.
Subject: RE: SEC v. Pierce

Bill,

The payment of $510,459.65 was received.

Steve

From: Alderman, William [mailto:walderman@orrick.com]
Sent: Monday, January 31, 2011 7:16 PM
To: Buchholz, Steven; Dicke, Michael S.; Yun, John S.
Cc: Wells, Christopher
Subject: RE: SEC v. Pierce

Dear Colleagues – The final $510,459.65 due from Brent Pierce under Judge Illston's September 2 and December 17 orders was wired today from our trust account to the SEC Treasury, in accordance with your prior instructions. Please confirm receipt. Thanks, and best regards. Bill

O

ORRICK

WILLIAM F. ALDERMAN
Partner

ORRICK, HERRINGTON & SUTCLIFFE LLP
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO, CA 94105-2669

tel 415-773-5944
fax 415-773-5759
walderman@orrick.com
bio | vcard

www.orrick.com

From: Buchholz, Steven [mailto:BuchholzS@sec.gov]
Sent: Tuesday, January 04, 2011 5:28 PM
To: Alderman, William
Cc: Dicke, Michael S.; Yun, John S.; Wells, Christopher
Subject: RE: SEC v. Pierce

We have confirmation from DC that the $1 million wire was received on 12/23/10. The current amount remaining is $510,459.65. If payment is made by the end of January, that is the total amount due; on February 1 the amount will increase to $511,735.80 (these are the same amounts that were on the spreadsheet I forwarded).

Steve

From: Alderman, William [mailto:walderman@orrick.com]
Sent: Thursday, December 23, 2010 1:40 PM
To: Dicke, Michael S.
Cc: Yun, John S.; Buchholz, Steven; Wells, Christopher
Subject: SEC v. Pierce

Hi Mike – This confirms that we have sent a wire today in the amount of $1 million from our trust account to the SEC Treasury, in accordance with your prior instructions, to be applied to the amounts due from Brent Pierce under Judge Illston's September 2 and December 17 orders. Please confirm receipt. Thanks.

Here's wishing a good holiday weekend and happy new year to all. Bill

ORRICK

WILLIAM F. ALDERMAN
Partner

ORRICK, HERRINGTON & SUTCLIFFE LLP
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Exhibit 25

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

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

August 11, 2008

VIA U.S. MAIL

Christopher B. Wells, Esq.
Lane Powell P.C.
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

Re: In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce (SF-2989-C); Admin. Proceeding File No. 3-13109

Dear Mr. Wells:

Pursuant to Rule 230 of the Securities and Exchange Commission ("Commission") Rules of Practice, enclosed is a list of documents, CDs, and other media that are being made available to your client for inspection and copying at the Commission's San Francisco Regional Office.

You may inspect these materials in our offices before requesting that any copies be made. Alternatively, you may request that copies be made and sent to you from the list. In either event, pursuant to Rule 230(f), you will be responsible for the cost of photocopying the documents and copying or printing from the other media. If you request that we copy the documents and send them to you, the cost per page will be no more than $0.24, exclusive of any applicable shipment cost and sales taxes. We estimate that the materials include about 60,000 pages and 30 CDs or DVDs, in addition to one hard drive.

Please feel free to call me at 415-705-8101 if you wish to discuss this matter.

Sincerely,

Steven D. Buchholz
Staff Attorney

Encl: Document List

DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce (SF-2989-C)

Administrative Proceeding File No. 3-13109

1) Transcripts and transcript exhibits from investigative testimony;

2) Subpoenas issued by the Division of Enforcement ("Division");

3) Written requests to persons not employed by the Commission to provide documents or to be interviewed and correspondence related to the requests;

4) Hard drive image obtained by the Division from Nicholas Thompson (one external hard drive, 120 GB);

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6) Documents and one CD obtained by the Division from the NASD;

7) Documents and ten CDs obtained by the Division from vFinance Investments, Inc. ("vFinance");

8) Documents obtained by the Division from Transfer Online;

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14) Documents obtained by the Division from Knight Equity Markets;

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19) Documents and one CD obtained by the Division from American News Publishing;

DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

20) Documents, five CDs, and three DVDs obtained by the Division from Leonard Braumberger;

21) Documents and one CD obtained by the Division from Piper Jaffray;

22) Documents obtained by the Division from Richard Elliot-Square;

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24) Documents obtained by the Division from Stephanie Ebert;

25) Documents obtained by the Division from Vaughn Barbon;

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44) Documents obtained by the Division from James Matthews;

45) Documents obtained by the Division from OptionsXpress;

46) One CD with electronic documents obtained by the Division via email from vFinance, Patrick Hayes, Amy LaRochelle, John Matthews, James Dow, OptionsXpress, and Peacock, Hislop, Staley & Given;

47) Formal Order of Investigation regarding Lexington;

48) Wells submission of Lexington;

49) Wells submission of Grant Atkins; and

50) Wells submission of Gordon Brent Pierce.

With respect to the documents produced by vFinance Investments, there are many pages of documents (such as supervisory manuals) that are not relevant to the current administrative proceeding, but will nonetheless be made available for your inspection because they were produced during the same investigation.

Exhibit 26

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 James T. Kelly**

NOTICE THAT THE DIVISION OF ENFORCEMENT HAS MADE ITS INVESTIGATIVE FILE AVAILABLE FOR INSPECTION AND COPYING

Pursuant to the Order dated June 24, 2010, the Division of Enforcement ("Division") files herewith copies of its June 15, 2010 written notices to Respondents Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. making the Division's investigative file available for inspection and copying pursuant to Securities and Exchange Commission ("Commission") Rule of Practice 230. The written notices informed Respondents as to the size and location of the Division's investigative file and included an attached Document List describing categories of documents included in the investigative file.

The Division has included for inspection and copying all documents received from foreign securities regulators (see category number 49 of the Document List), but intends to withhold from inspection and copying all correspondence between the foreign securities regulators and the Commission's Office of International Affairs pursuant to Sections 24(d) and 24(e) of the Securities Exchange Act of 1934, including cover letters for the productions

received from the foreign securities regulators. The Division does not intend to withhold any other documents from its investigative file from inspection and copying.

Dated: June 24, 2010

Respectfully submitted,

John S. Yun
Steven D. Buchholz
44 Montgomery Street, Suite 2600
San Francisco, CA 94104
Phone: (415) 705-2500
Fax: (415) 705-2501
Attorneys for DIVISION OF ENFORCEMENT

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

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Christopher B. Wells, Esq.
Lane Powell P.C.
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Mr. Wells:

Pursuant to Rule 230 of the Securities and Exchange Commission ("Commission") Rules of Practice, enclosed is a list of documents, CDs, and other media that are being made available to your client for inspection and copying at the Commission's San Francisco Regional Office.

You may inspect these materials in our offices before requesting that any copies be made. Alternatively, you may request that copies be made and sent to you from the list. In either event, pursuant to Rule 230(f), you will be responsible for the cost of photocopying the documents and copying or printing from the other media. If you request that we copy the documents and send them to you, the cost will be no more than $0.24 per page, exclusive of any applicable shipment cost and sales taxes. We estimate that the materials include about 70,000 pages and 32 CDs or DVDs, in addition to one hard drive.

Please contact me if you have any questions about inspecting or copying the documents.

Sincerely,

Steven D. Buchholz
Staff Attorney, Division of Enforcement

Encl: Document List

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Administrative Proceeding File No. 3-13927

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

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Mr. Gordon Brent Pierce
124 31st Street
West Vancouver, BC V7V 4P3
CANADA

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Mr. Pierce:

Pursuant to Rule 230 of the Securities and Exchange Commission ("Commission") Rules of Practice, enclosed is a list of documents, CDs, and other media that are being made available to you for inspection and copying at the Commission's San Francisco Regional Office.

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Please contact me if you have any questions about inspecting or copying the documents, or have your counsel contact me if you are represented by counsel.

Sincerely,

Steven D. Buchholz
Staff Attorney, Division of Enforcement

Encl: Document List

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UNITED STATES
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44 Montgomery Street
SUITE 2600
SAN FRANCISCO, CALIFORNIA 94104

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Newport Capital Corp.
c/o The Belize Bank Limited (registered agent)
60 Market Square
P.O. Box 364
Belize City
BELIZE

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Newport Capital Corp.:

Pursuant to Rule 230 of the Securities and Exchange Commission ("Commission") Rules of Practice, enclosed is a list of documents, CDs, and other media that are being made available to you for inspection and copying at the Commission's San Francisco Regional Office.

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Sincerely,

Steven D. Buchholz
Staff Attorney, Division of Enforcement

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EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Newport Capital Corp.
c/o Mr. Gordon Brent Pierce
124 31st Street
West Vancouver, BC V7V 4P3
CANADA

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Newport Capital Corp.:

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Steven D. Buchholz
Staff Attorney, Division of Enforcement

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UNITED STATES
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FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Jenirob Company Ltd.
c/o Morgan & Morgan Trust Corporation Ltd. (registered agent)
Pasea Estate
Road Town, Tortola
BRITISH VIRGIN ISLANDS

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Jenirob Company Ltd.:

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Steven D. Buchholz
Staff Attorney, Division of Enforcement

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22) Documents obtained by the Division from Richard Elliot-Square;

23) Documents obtained by the Division from Fletcher Lewis Engineering;

24) Documents obtained by the Division from Stephanie Ebert;

25) Documents obtained by the Division from Vaughn Barbon;

26) Documents obtained by the Division from Bank of America;

27) Documents obtained by the Division from JP Morgan/Chase/Bank One;

28) Documents obtained by the Division from SG Martin Securities;

29) Two CDs obtained by the Division from Raymond James Financial;

30) Documents obtained by the Division from Peacock, Hislop, Staley & Given;

31) Documents obtained by the Division from Pennaluna & Co.;

32) Documents obtained by the Division from Saturna Capital;

33) Documents and one CD obtained by the Division from TD Ameritrade;

34) Documents obtained by the Division from Deutsche Bank Alex Brown;

35) Documents and one CD obtained by the Division from Pinnacle Energy Services;

36) Documents and one CD obtained by the Division from Pershing LLC;

37) Documents obtained by the Division from Legent Clearing;

38) Documents and one CD obtained by the Division from First Southwest;

39) Documents obtained by the Division from Robert L. Stevens;

40) One CD obtained by the Division from Pink Sheets LLC;

41) Documents obtained by the Division from James Dow;

42) Documents obtained by the Division from Whitley Penn;

43) Documents and one CD obtained by the Division from Verizon Wireless;

44) Documents obtained by the Division from James Matthews;

DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

45) Documents obtained by the Division from OptionsXpress;

46) One CD with electronic documents obtained by the Division via email from vFinance, Patrick Hayes, Amy LaRochelle, John Matthews, James Dow, OptionsXpress, and Peacock, Hislop, Staley & Given;

47) Formal Order of Investigation regarding Lexington;

48) Wells submissions;

49) Documents obtained by the Division from foreign securities regulators; and

50) Transcripts and exhibits from the evidentiary hearing In the Matter of Gordon Brent Pierce, Admin. Proceeding File No. 3-13109.

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

DIRECT: 415-705-8101
FAX: 415-705-2331
EMAIL: BUCHHOLZS@SEC.GOV

June 15, 2010

VIA U.S. MAIL

Jenirob Company Ltd.
c/o Mr. Gordon Brent Pierce
124 31st Street
West Vancouver, BC V7V 4P3
CANADA

Re: In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd. (Admin. Proceeding File No. 3-13927)

Dear Jenirob Company Ltd.:

Pursuant to Rule 230 of the Securities and Exchange Commission ("Commission") Rules of Practice, enclosed is a list of documents, CDs, and other media that are being made available to you for inspection and copying at the Commission's San Francisco Regional Office.

You may inspect these materials in our offices before requesting that any copies be made. Alternatively, you may request that copies be made and sent to you from the list. In either event, pursuant to Rule 230(f), you will be responsible for the cost of photocopying the documents and copying or printing from the other media. If you request that we copy the documents and send them to you, the cost will be no more than $0.24 per page, exclusive of any applicable shipment cost and sales taxes. We estimate that the materials include about 70,000 pages and 32 CDs or DVDs, in addition to one hard drive.

Please contact me if you have any questions about inspecting or copying the documents, or have your counsel contact me if you are represented by counsel.

Sincerely,

Steven D. Buchholz
Staff Attorney, Division of Enforcement

Encl: Document List

DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.
Administrative Proceeding File No. 3-13927

1) Transcripts and transcript exhibits from investigative testimony;

2) Subpoenas issued by the Division of Enforcement ("Division");

3) Written requests to persons not employed by the Commission to provide documents or to be interviewed and correspondence related to the requests;

4) Hard drive image obtained by the Division from Nicholas Thompson (one external hard drive, 120 GB);

5) Documents and two CDs obtained by the Division from National Financial Services;

6) Documents and one CD obtained by the Division from the NASD;

7) Documents and ten CDs obtained by the Division from vFinance Investments, Inc. ("vFinance");

8) Documents obtained by the Division from Transfer Online;

9) Documents obtained by the Division from X-Clearing Corporation;

10) Documents obtained by the Division from Nicholas Thompson;

11) Documents obtained by the Division from Brown Brothers Harriman;

12) Documents obtained by the Division from Lexington Resources, Inc. ("Lexington");

13) Documents obtained by the Division from Ivan Saldana;

14) Documents obtained by the Division from Knight Equity Markets;

15) Documents obtained by the Division from Grant Atkins;

16) Documents obtained by the Division from International Market Trend;

17) Documents obtained by the Division from Brent Pierce;

18) Documents obtained by the Division from Investor Communications International;

19) Documents and one CD obtained by the Division from American News Publishing;

20) Documents, five CDs, and three DVDs obtained by the Division from Leonard Braumberger;

DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

21) Documents and one CD obtained by the Division from Piper Jaffray;

22) Documents obtained by the Division from Richard Elliot-Square;

23) Documents obtained by the Division from Fletcher Lewis Engineering;

24) Documents obtained by the Division from Stephanie Ebert;

25) Documents obtained by the Division from Vaughn Barbon;

26) Documents obtained by the Division from Bank of America;

27) Documents obtained by the Division from JP Morgan/Chase/Bank One;

28) Documents obtained by the Division from SG Martin Securities;

29) Two CDs obtained by the Division from Raymond James Financial;

30) Documents obtained by the Division from Peacock, Hislop, Staley & Given;

31) Documents obtained by the Division from Pennaluna & Co.;

32) Documents obtained by the Division from Saturna Capital;

33) Documents and one CD obtained by the Division from TD Ameritrade;

34) Documents obtained by the Division from Deutsche Bank Alex Brown;

35) Documents and one CD obtained by the Division from Pinnacle Energy Services;

36) Documents and one CD obtained by the Division from Pershing LLC;

37) Documents obtained by the Division from Legent Clearing;

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39) Documents obtained by the Division from Robert L. Stevens;

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DOCUMENTS AVAILABLE FOR INSPECTION AND COPYING PURSUANT TO SEC RULE OF PRACTICE 230

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47) Formal Order of Investigation regarding Lexington;

48) Wells submissions;

49) Documents obtained by the Division from foreign securities regulators; and

50) Transcripts and exhibits from the evidentiary hearing In the Matter of Gordon Brent Pierce, Admin. Proceeding File No. 3-13109.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13927

Administrative Law Judge
James T. Kelly

In the Matter of

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

Respondents.

[redacted]

[redacted]

[redacted]

Exhibit 27

Christopher B. Wells, WSBA #08302
LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
Telephone: (206) 223-7084
Fax: (206) 223-7107
Email: wellsc@lanepowell.com

Attorneys for G. Brent Pierce

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-3109

In the Matter of **LEXINGTON RESOURCES, INC., GRANT ATKINS, and GORDON BRENT PIERCE,** **Respondents.**	**MOTION FOR MORE DEFINITE STATEMENT**

Pursuant to Rule 220(d) of the Rules of Practice, respondent Gordon Brent Pierce moves for a more definite statement of allegations in the Order Instituting Proceedings ("OIP").

Indefinite Allegations

1. In paragraph 1 of the OIP, the term "associates" of Mr. Pierce is not defined. This term is used elsewhere in the OIP, yet nowhere is it defined. The Enforcement Division should be required to define the term, "associates" of Mr. Pierce.

2. In paragraph 2, the OIP alleges that Mr. Pierce provided ineligible capital raising and stock promotional services in exchange for stock option shares registered on Form S-8.

But Lexington Resources issued a number of S-8 shares in a number of grants over a number of years. The OIP does not specify which grants. For example, the largest capital funding took place in 2005 (*see* Form SB-2 dated October 14, 2005), but the OIP does not restrict the allegations to all S-8 grants in 2005 or to any particular grant in any specific year. The Division should be required to specify by date each S-8 grant in which it alleges Mr. Pierce received shares in exchange for capital raising services, each grant that resulted from promotional services and, as to each, also identify which capital raising effort and which stock promotion comprised Mr. Pierce's ineligible services. (This should be done in tabular form, which would better enable Mr. Pierce, the other respondents and the Hearing Officer to track the Division's allegations and proof on issues common to all parties.)

3. In paragraph 6, the OIP alleges that Mr. Pierce "set up" an "offshore entity" that "owned" Lexington Oil and Gas but does not identify the offshore entity to which it refers. The Division should be required to identify this entity.

4. In paragraph 7, the OIP refers to Mr. Pierce's "longtime business associates" and to "his associates" who received Form S-8 shares but again does not identify any of those "associates" with respect to any Form S-8 shares issued under any specific grant during the November 2003 to March 2006 time frame. The Division should be required to identify each such "associate" for each S-8 grant, by name, date of grant and the amount of shares granted. The Division should further be required to identify each recipient of S-8 shares who provided capital raising or stock promotional services for a specific grant and what funding, by date and amount, such services yielded.

5. In paragraph 9, the OIP alleges that Mr. Pierce "served as both a stock promoter and capital-raiser" during the entire period from late 2003 to 2006. But the OIP does not allege that the activities described in paragraph 9 were the only services provided by Mr.

Pierce, nor does it explain which capital financings, by date and amount, were the product of these activities, nor does it explain why Mr. Pierce's managerial services were not the ones for which he was compensated with Form S-8 shares but the unspecified capital raising and stock promotional activities were. The Division should be required either to make the allegation that capital raising or stock promotional services were the only services supplied by Mr. Pierce with respect to each S-8 grant he received (which cannot be done in good faith) or identify which grants resulted from which of these ineligible services and which did not. The Division has further alleged that Mr. Pierce "used some of his S-8 stock to compensate others who helped" raise capital and promote stock but has not identified which individuals, which S-8 stock grants and which transactions are referred to. The Division should be required to identify these transactions by date of the S-8 share grant involved, date of Mr. Pierce's transfer of these S-8 shares, share amount and recipient.

6. In paragraph 15, the OIP again refers to Mr. Pierce's "associates" without identifying them. Paragraph 15 also refers to an "omnibus brokerage account in the United States in the name of the offshore bank" without identifying the brokerage firm, the offshore bank or the account participants in the "omnibus" account. The Division should be required to identify each person included within the meaning of the term "associates" and to identify the offshore bank, the United States brokerage firm, the "omnibus account" and each of the account participants who was an "associate" of Mr. Pierce.

7. In paragraph 17, the OIP alleges that Mr. Pierce owned between 10 and 60 percent of Lexington's outstanding stock from November 2003 to May 2004 and alleges in paragraph 18 that Mr. Pierce's curative Schedule 13D filed on July 25, 2006 was inaccurate. But the OIP does not identify what persons other than those listed in the

Schedule 13D held Lexington stock beneficially owned or controlled by Mr. Pierce. The Division should be required to identify all such persons.

Further Reasons for More Definite Statement

It is impractical, unreasonably burdensome and expensive for Mr. Pierce to speculate about what conduct the Division alleges was unlawful. This is particularly unfair, given that the Division has been investigating Lexington Resources for three years.

One year ago, the Division issued a letter inviting a Wells Committee submission in response to its recommendation to file a civil injunctive action in federal court. (No reference was made to an administrative proceeding, but here we are.) *See* Exhibit A (July 3, 2007 letter to the undersigned) to Brent Pierce's Wells Committee Submission to SEC under 17 CFR §202.5(c), attached as Exhibit 1 hereto. Mr. Pierce provided as much detail as possible to explain his position, despite a lack of clarity as to the basis for the Division's proposal. But in contrast to Mr. Pierce's precision, the Division has backtracked, and supplied far less detail in its OIP. Indeed, the OIP seems designed not to provide notice and an opportunity for a hearing, but rather to provide titillating intrigue for the press.

It is hardly fair to Mr. Pierce, or the other respondents, to allow the Division to proceed to a hearing on the fuzzy notice supplied by the OIP. The Division is bound to "ambush" Mr. Pierce. Moreover, the Division's lack of specifics in the OIP subtly and improperly shifts the burden of persuasion upon Mr. Pierce, forcing him to struggle to respond to incomprehensible terms such as "his associates" and a miasma of S-8 grants perhaps but maybe not under attack. Unless the OIP is clarified, the Division will have been allowed to exploit Mr. Pierce's candor in his Wells submission while continuing to hide its own position behind the OIP's elusive allegations. Ultimately, the Division's tactics will not help the Hearing Officer, nor will they benefit the record. But Mr. Pierce will feel the greatest impact.

Conclusion

The Hearing Officer should order the Division to provide the details requested above by amending the OIP and delivering it to counsel no later than October 30, 2008.

DATED this 20th day of August, 2008.

LANE POWELL PC

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

Exhibit 28

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

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT PIERCE'S MOTION FOR MORE DEFINITE STATEMENT

Marc J. Fagel
John S. Yun
Steven D. Buchholz
DIVISION OF ENFORCEMENT
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, Suite 2600
San Francisco, CA 94104
Phone: (415) 705-8101
Fax: (415) 705-2501

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT PIERCE'S MOTION FOR MORE DEFINITE STATEMENT

I. Introduction

The Division of Enforcement ("Division") submits this response to the motion by respondent Gordon Brent Pierce ("Respondent" or "Pierce") for a more definite statement of certain allegations in the Order Instituting Proceedings ("OIP") in this matter. In light of the material already made available to Pierce and his own knowledge of the facts, Respondent has more than enough information to prepare a defense. His motion for a more definite statement is therefore unfounded. Nonetheless, the Division provides Respondent with additional information below, to the extent that such information is relevant to the claims being made against Pierce. Other than the allegations for which the Division provides additional information below, the Division opposes Respondent's motion for more definite statement.

II. Legal Standards For A Motion For More Definite Statement

The Commission's Rules of Practice require that an OIP to which an answer must be filed "shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto." Rule 200(b)(3) (17 C.F.R. § 200.200(b)(3)). Where the OIP provides sufficient information for the respondent to prepare a defense, no more definite statement is necessary. See In re Monetta Financial Services, Inc., Release No. APR-563 (available at 1998 WL 211406) (Apr. 21, 1998) (citing In re Morris J. Reiter, 39 S.E.C. 484, 486 (1959)). Respondents "are not entitled to a disclosure of the evidence upon which the Division intends to rely." Id.

III. The Division's Allegations Against Pierce In the OIP

The Division is bringing a focused case against Pierce, and he possesses all of the necessary information to prepare a defense to the Division's case. The Division alleges that Pierce violated Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") by offering and selling shares of Lexington Resources, Inc. ("Lexington") without filing a registration statement or qualifying for an exemption with regard to his stock offers and sales. The Division

further alleges that because Pierce obtained his shares from Lexington with the goal of selling, rather than holding, them, he engaged in a distribution of the shares as an underwriter. Pierce's status as an underwriter precluded him from relying upon the exemption from registration provided in Section 4(1) of the Securities Act. Pierce therefore sold shares without filing an effective registration statement or qualifying for an exemption from registration.

The OIP therefore alleges in paragraph 14 that Pierce acted as an underwriter in an illegal distribution of stock in Lexington by acquiring shares with a view to distribution and then transferring or selling them almost immediately after he received them. The Division has made its investigative files available to Pierce and he is aware of the issuances of Lexington stock that he received purportedly pursuant to registration statements that Lexington filed on Form S-8. As a result, Pierce does not meet the test for obtaining a more definite statement. Nonetheless, the Division states that Lexington filed registration statements on the following dates and then issued shares to Pierce in the following amounts, which Pierce then transferred or sold as an underwriter in an illegal distribution: November 21, 2003 (1.6 million shares[1]); June 8, 2004 (320,000 shares); February 27, 2006 (500,000 shares); and March 14, 2006 (500,000 shares).

In paragraph 16, the OIP alleges that Pierce sold at least $2.7 million in Lexington stock through an omnibus brokerage account in the U.S. in the name of an offshore bank. The Division has made its investigative files available to Pierce, and he undoubtedly is aware of the identity of the offshore bank and U.S. brokerage firm through which he sold Lexington stock. Nonetheless, the Division states that the U.S. brokerage account was held at vFinance Investments, Inc. and the offshore bank in whose name the omnibus account was held is Hypo Alpe-Adria Bank of Liechtenstein.

The OIP further alleges in paragraphs 17 to 19 that Pierce owned or controlled more than 10 percent of Lexington's stock during specified time periods and failed to file required reports accurately disclosing his beneficial ownership and changes in his ownership. Pierce is aware of the entities he controlled that owned Lexington stock during the periods specified in the OIP. Despite Pierce's knowledge of the underlying facts, the Division states that Pierce's belated

[1] This share amount is adjusted for Lexington's three-for-one stock split on January 29, 2004.

Schedule 13D was inaccurate because it did not include all of the Lexington stock owned by the entities Pierce listed in the 13D and because it failed to include all of the vested stock options that Lexington granted to another entity, International Market Trend. Pierce controlled International Market Trend and its vested stock options, and therefore was required to include those Lexington holdings in reports disclosing his beneficial ownership and changes in his ownership.

Paragraphs 20 and 21 of the OIP plainly state the specific securities statutes and rules that the Division alleges Pierce violated through his conduct. No more definite statement of the law, or of any facts, is needed to permit Pierce to respond to the allegations against him in the OIP, as he already has responded by admitting or denying the allegations that pertain directly to violations allegedly committed by him. See Answer of G. Brent Pierce at ¶¶ 14, 16, and 17-21.

Pierce requests additional information about other allegations in the OIP that relate to services provided and stock received by associates of Pierce. That information is not necessary to permit Pierce to respond to the allegations against him because it pertains to the violations allegedly committed by Lexington and Respondent Grant Atkins, not by Pierce. Therefore, no more definite statement with regard to that information should be required.

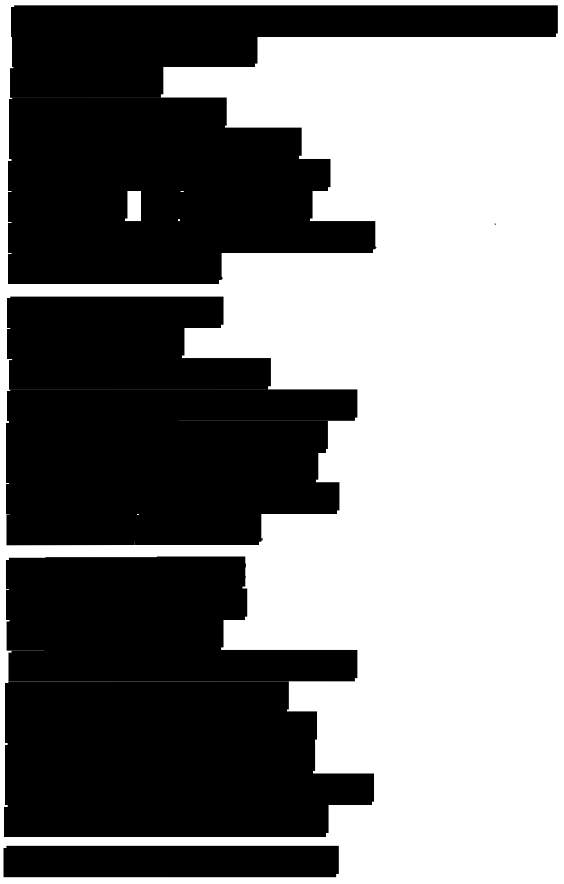
Accordingly, other than the allegations for which the Division has provided additional information above, the Division respectfully requests that the Hearing Officer deny Respondent's motion for more definite statement.

Dated: September 17, 2008

Respectfully submitted,

Marc J. Fagel
John S. Yun
Steven D. Buchholz
DIVISION OF ENFORCEMENT
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, Suite 2600
San Francisco, CA 94104
Phone: (415) 705-8101
Fax: (415) 705-2501

[redacted]



UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-13927

In the Matter of	)	
	)	
	)	**SUPPLEMENTAL DECLARATION OF CHRISTOPHER B. WELLS IN SUPPORT OF RESPONDENT PIERCE'S POST-ORAL ARGUMENT BRIEF**
GORDON BRENT PIERCE, NEWPORT CAPITAL CORP., AND JENIROB COMPANY LTD.,	)	
	)	
	)	
	)	
Respondents.	)	

I, Christopher B. Wells, declare as follows:

1. I am one of the attorneys for respondent G. Brent Pierce in the above-entitled administrative proceeding. I previously represented Mr. Pierce in an earlier administrative proceeding entitled *In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109 (the "First Proceeding"). I also represented Mr. Pierce in responding to the SEC Division of Enforcement's request for documents and testimony during the investigation that led to both administrative proceedings. I have personal knowledge of the facts stated in this declaration, and I could and would testify competently to those facts if called as a witness.

2. Attached as Exhibit A hereto is a true and correct copy of a letter to me from SEC Division of Enforcement attorney Steven D. Buchholz dated May 17, 2006, together with the subpoena and Form 1662 enclosed with that letter.

3. Attached as Exhibit B hereto is a true and correct copy of my letter to Mr. Buchholz dated July 21, 2006, together with the "subpoena attachment to Brent Pierce, with responses" enclosed with that letter.

4. Attached as Exhibit C hereto are true and correct copies of pages from the transcript of testimony given by Brent Pierce on July 27-28, 2006 in connection with the SEC's private investigation entitled "In the Matter of Lexington Resources, Inc. (SF 2989)," at which I was present.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Seattle, Washington on June 29, 2011.

Christopher B. Wells

EXHIBIT A

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
SAN FRANCISCO DISTRICT OFFICE
44 Montgomery Street
Suite 2600
San Francisco, California 94104

Direct Dial: 415-293-8312
Fax Number: 415-705-2331
Email: BUCHHOLZS@sec.gov

May 17, 2006

VIA FACSIMILE TO 206-223-7107
AND U.S. MAIL

Christopher B. Wells, Esq.
Lane Powell P.C.
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

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

Dear Mr. Wells:

Pursuant to a formal order of private investigation entered by the United States Securities and Exchange Commission ("Commission") in the above-referenced matter, the staff of the Commission is issuing the enclosed subpoena to your client Brent Pierce. The attachment to the subpoena contains the same request for documents that was included in the staff's request to Mr. Pierce dated October 19, 2005 and extends the relevant time period through today, May 17, 2006.

Please read the subpoena and this letter carefully. This letter answers some questions Mr. Pierce may have about the subpoena. Please also read the enclosed Form 1662. Compliance with the subpoena is mandatory; failure to comply may result in a fine and/or imprisonment.

Producing Documents

What materials must be produced?

The subpoena requires production of the documents described in the attachment to the subpoena. The attachment defines some terms (such as "document") before listing what must be produced. These documents must be produced to the Commission by May 31, 2006.

Please note that if copies of a document differ in any way, they are considered separate documents and each one must be produced. For example, if there are two copies of the same letter, but only one of them has handwritten notes on it, both the clean copy and the one with notes must be produced.

If you prefer, photocopies of the originals may be produced. The Commission cannot reimburse copying costs. The copies must be identical to the originals, including even faint marks or print. If you choose to send copies, the originals must be kept in a safe place. We will accept the copies for now, but may require production of the originals later.

EXHIBIT A

If photocopies are produced, please put an identifying notation on each page of each document to indicate that Mr. Pierce produced it, and number the pages of all the documents submitted. Please make sure the notation and number do not conceal any writing or marking on the document. If originals are produced, please do not add any identifying notations.

Do I need to send anything else?

You should enclose a list briefly describing each item produced. The list should state to which category number(s) in the subpoena attachment each item responds.

Mr. Pierce also should include a cover letter stating whether he believes he has met his obligations under the subpoena by searching carefully and thoroughly for everything called for by the subpoena, and producing it all to us.

What if I do not produce everything described in the attachment to the subpoena?

The subpoena requires production of all the materials described in it. If, for any reason – including a claim of attorney-client privilege – you do not produce something called for by the subpoena, you should submit a list of what is not being produced. The list should describe each item separately, noting:

- its author(s);
- its date;
- its subject matter;
- the name of the person who has the item now, or the last person known to have it;
- the names of everyone who ever had the item or a copy of it, and the names of everyone who was told the item's contents; and
- the reason the item was not produced.

If you withhold anything on the basis of a claim of attorney-client privilege or attorney work product protection, you should also identify the attorney and client involved.

Where should I send the materials?

Please send the materials to:

Steven D. Buchholz
U.S. Securities and Exchange Commission
44 Montgomery Street, 26th Floor
San Francisco, California 94104

Testifying

Where and when do I testify?

The subpoena requires Mr. Pierce to testify under oath regarding this matter before officers of the Commission at 700 Stewart Street, Fifth Floor, Seattle, Washington 98101 on Wednesday, June 7, 2006 at 9:00 a.m.

Other Important Information

What will the Commission do with the materials produced?

The enclosed Form 1662 includes a List of Routine Uses of information provided to the Commission. This form has other important information for Mr. Pierce. Please read it carefully.

Has the Commission determined that anyone has done anything wrong?

This investigation is a non-public, fact-finding inquiry. We are trying to determine whether there have been any violations of the federal securities laws. The investigation and the subpoena do not mean that we have concluded that anyone has broken the law. Also, the investigation does not mean that we have a negative opinion of any person, entity, or security.

I have read this letter, the subpoena, and Form 1662, but I still have questions. What should I do?

If you have any other questions, please call me at 415-293-0312.

Very truly yours,

Steven D. Buchholz
Staff Attorney, Office of Enforcement

Encls: Subpoena, with Attachment
Form 1662

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

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.

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.

22) All DOCUMENTS relating to the lease, rental, or ownership of premises located at Rennweg 28, CH-8001 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 84 Brook Street, Mayfair, 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 16377 Lincoln Woods Court, Surrey, British Columbia B3S 0J8, Canada; including but not limited to agreements and records of payments.

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena

False Statements and Documents

Section 1001 of Title 18 of the United States Code provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

Testimony

If your testimony is taken, you should be aware of the following:

1. *Record.* Your testimony will be transcribed by a reporter. If you desire to go off the record, please indicate this to the Commission employee taking your testimony, who will determine whether to grant your request. The reporter will not go off the record at your, or your counsel's, direction.

2. *Counsel.* You have the right to be accompanied, represented and advised by counsel of your choice. Your counsel may advise you before, during and after your testimony; question you briefly at the conclusion of your testimony to clarify any of the answers you give during testimony; and make summary notes during your testimony solely for your use. If you are accompanied by counsel, you may consult privately.

If you are not accompanied by counsel, please advise the Commission employee taking your testimony whenever during your testimony you desire to be accompanied, represented and advised by counsel. Your testimony will be adjourned to afford you the opportunity to arrange to do so.

You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. If you are represented by counsel who also represents other persons involved in the investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours.

3. *Transcript Availability.* Rule 6 of the Commission's Rules Relating to Investigations, 17 CFR 203.6, states:

> A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however,* That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

If you wish to purchase a copy of the transcript of your testimony, the reporter will provide you with a copy of the appropriate form. Persons requested to supply information voluntarily will be allowed the rights provided by this rule.

4. *Perjury.* Section 1621 of Title 18 of the United States Code provides as follows:

> Whoever . . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly .... willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true.... is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years or both . . . .

5. *Fifth Amendment and Voluntary Testimony.* Information you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency.

You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty or forfeiture.

If your testimony is not pursuant to subpoena, your appearance to testify is voluntary, you need not answer any question, and you may leave whenever you wish. Your cooperation is, however, appreciated.

6. *Formal Order Availability.* If the Commission has issued a formal order of investigation, it will be shown to you during your testimony, at your request. If you desire a copy of the formal order, please make your request in writing.

Submissions and Settlements

Rule 5(c) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(c), states:

> Persons who become involved in . . . investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding. Submissions by interested persons should be forwarded to the appropriate Division Director, Regional Director, or District Administrator with a copy to the staff members conducting the investigation and should be clearly referenced to the specific investigation to which they relate. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

The staff of the Commission routinely seeks to introduce submissions made pursuant to Rule 5(c) as evidence in Commission enforcement proceedings, when the staff deems appropriate.

Rule 5(f) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(f), states:

> In the course of the Commission's investigations, civil lawsuits, and administrative proceedings, the staff, with appropriate authorization, may discuss with persons involved the disposition of such matters by consent, by settlement, or in some other manner. It is the policy of the Commission, however, that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him. This policy reflects the fact that neither the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.

Freedom of Information Act

The Freedom of Information Act, 5 U.S.C. 552 (the "FOIA"), generally provides for disclosure of information to the public. Rule 83 of the Commission's Rules on Information and Requests, 17 CFR 200.83, provides a procedure by which a person can make a written request that information submitted to the Commission not be disclosed under the FOIA. That rule states that no determination as to the validity of such a request will be made until a request for disclosure of the information under the FOIA is received. Accordingly, no response to a request that information not be disclosed under the FOIA is necessary or will be given until a request for disclosure under the FOIA is received. If you desire an acknowledgment of receipt of your written request that information not be disclosed under the FOIA, please provide a duplicate request, together with a stamped, self-addressed envelope.

Authority for Solicitation of Information

Persons Directed to Supply Information Pursuant to Subpoena. The authority for requiring production of information is set forth in the subpoena. Disclosure of the information to the Commission is mandatory, subject to the valid assertion of any legal right or privilege you might have.

Persons Requested to Supply Information Voluntarily. One or more of the following provisions authorizes the Commission to solicit the information requested: Sections 19 and/or 20 of the Securities Act of 1933; Section 21 of the Securities Exchange Act of 1934; Section 321 of the Trust Indenture Act of 1939; Section 42 of the Investment Company Act of 1940; Section 209

of the Investment Advisers Act of 1940; and 17 CFR 202.5. Disclosure of the requested information to the Commission is voluntary on your part.

Effect of Not Supplying Information

Persons Directed to Supply Information Pursuant to Subpoena. If you fail to comply with the subpoena, the Commission may seek a court order requiring you to do so. If such an order is obtained and you thereafter fail to supply the information, you may be subject to civil and/or criminal sanctions for contempt of court. In addition, if the subpoena was issued pursuant to the Securities Exchange Act of 1934, the Investment Company Act of 1940, and/or the Investment Advisers Act of 1940, and if you, without just cause, fail or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, correspondence, memoranda, and other records in compliance with the subpoena, you may be found guilty of a misdemeanor and fined not more than $1,000 or imprisoned for a term of not more than one year, or both.

Persons Requested to Supply Information Voluntarily. There are no direct sanctions and thus no direct effects for failing to provide all or any part of the requested information.

Principal Uses of Information

The Commission's principal purpose in soliciting the information is to gather facts in order to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or rules for which the Commission has enforcement authority, such as rules of securities exchanges and the rules of the Municipal Securities Rulemaking Board. Facts developed may, however, constitute violations of other laws or rules. Information provided may be used in Commission and other agency enforcement proceedings. Unless the Commission or its staff explicitly agrees to the contrary in writing, you should not assume that the Commission or its staff acquiesces in, accedes to, or concurs or agrees with, any position, condition, request, reservation of right, understanding, or any other statement that purports, or may be deemed, to be or to reflect a limitation upon the Commission's receipt, use, disposition, transfer, or retention, in accordance with applicable law, of information provided.

Routine Uses of Information

The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.

Set forth below is a list of the routine uses which may be made of the information furnished.

1. To coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, securities self-regulatory organizations, and foreign securities authorities.

2. By SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities laws.

3. Where there is an indication of a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred to the appropriate agency, whether federal, state, or local, a foreign governmental authority or foreign securities authority, or a securities self-regulatory organization charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute or rule, regulation or order issued pursuant thereto.

4. In any proceeding where the federal securities laws are in issue or in which the Commission, or past or present members of its staff, is a party or otherwise involved in an official capacity.

5. To a federal, state, local or foreign governmental authority or foreign securities authority maintaining civil, criminal or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit.

6. To a federal, state, local or foreign governmental authority or foreign securities authority, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

7. In connection with proceedings by the Commission pursuant to Rule 102(e) of its Rules of Practice, 17 CFR 201.102(e).

8. When considered appropriate, records in this system may be disclosed to a bar association, the American Institute of Certified Public Accountants, a state accountancy board or other federal, state, local or foreign licensing or oversight authority, foreign securities authority, or professional association or self-regulatory authority performing similar functions, for possible disciplinary or other action.

9. In connection with investigations or disciplinary proceedings by a state securities regulatory authority, a foreign securities authority, or by a self-regulatory organization involving one or more of its members.

10. As a data source for management information for production of summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies, and to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act or to locate specific individuals for personnel research or other personnel management functions.

11. In connection with their regulatory and enforcement responsibilities mandated by the federal securities laws (as defined in Section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), or state or foreign laws regulating securities or other related matters, records may be disclosed to national securities associations that are registered with the Commission, the Municipal Securities Rulemaking Board, the Securities Investor Protection Corporation, the federal banking authorities, including but not limited to, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, state securities regulatory or law enforcement agencies or organizations, or regulatory law enforcement agencies of a foreign government, or foreign securities authority.

12. To any trustee, receiver, master, special counsel, or other individual or entity that is appointed by a court of competent jurisdiction or as a result of an agreement between the parties in connection with litigation or administrative proceedings involving allegations of violations of the federal securities laws (as defined in Section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)) or the Commission's Rules of Practice, 17 CFR 202.100-900, or otherwise, where such trustee, receiver, master, special counsel or other individual or entity is specifically designated to perform particular functions with respect to, or as a result of, the pending action or proceeding or in connection with the administration and enforcement by the Commission of the federal securities laws or the Commission's Rules of Practice.

13. To any persons during the course of any inquiry or investigation conducted by the Commission's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.

14. To any person with whom the Commission contracts to reproduce, by typing, photocopy or other means, any record within this system for use by the Commission and its staff in connection with their official duties or to any person who is utilized by the Commission to perform clerical or stenographic functions relating to the official business of the Commission.

15. Inclusion in reports published by the Commission pursuant to authority granted in the federal securities laws (as defined in Section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)).

16. To members of advisory committees that are created by the Commission or by the Congress to render advice and recommendations to the Commission or to the Congress, to be used solely in connection with their official designated functions.

17. To any person who is or has agreed to be subject to the Commission's Rules of Conduct, 17 CFR 200.735-1 to 735-18, and who assists in the investigation by the Commission of possible violations of federal securities laws (as defined in Section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), in the preparation or conduct of enforcement actions brought by the Commission for such violations, or otherwise in connection with the Commission's enforcement or regulatory functions under the federal securities laws.

18. Disclosure may be made to a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.

19. To respond to inquiries from Members of Congress, the press and the public which relate to specific matters that the Commission has investigated and to matters under the Commission's jurisdiction.

20. To prepare and publish information relating to violations of the federal securities laws as provided in 15 U.S.C. 78c(a)(47), as amended.

21. To respond to subpoenas in any litigation or other proceeding.

22. To a trustee in bankruptcy.

23. To any governmental agency, governmental or private collection agent, consumer reporting agency or commercial reporting agency, governmental or private employer of a debtor, or any other person, for collection, including collection by administrative offset, federal salary offset, tax refund offset, or administrative wage garnishment, of amounts owed as a result of Commission civil or administrative proceedings.

Small Business Owners: The SEC always welcomes comments on how it can better assist small businesses. If you have comments about the SEC's enforcement of the securities laws, please contact the Office of Chief Counsel in the SEC's Division of Enforcement at 202-942-4530 or the SEC's Small Business Ombudsman at 202-942-2950. If you would prefer to comment to someone outside of the SEC, you can contact the Small Business Regulatory Enforcement Ombudsman at http://www.sba.gov/ombudsman or toll free at 888-REG-FAIR. The Ombudsman's office receives comments from small businesses and annually evaluates federal agency enforcement activities for their responsiveness to the special needs of small business.

EXHIBIT B

LANE POWELL
ATTORNEYS & COUNSELORS

CHRISTOPHER B. WELLS
206-223-7084
WELLSC@LANEPOWELL.COM

July 21, 2006

Via Email and Overnight Air

Steven D. Buchholz, Esq.
Staff Attorney
Securities and Exchange Commission
San Francisco District Office
44 Montgomery Street
Suite 2600
San Francisco, CA 94104

cc (w/o encl): Office of Freedom of Information and Privacy Act Operations
SEC, Operations Center
6432 General Green Way
Alexandria, VA 22312-2413

Subject: **In the Matter of Lexington Resources, Inc.,(SF-2989)**
FOIA Confidential Treatment Request by Subpoena Recipient

Dear Mr. Buchholz:

With this letter, we are transmitting documents produced by Brent Pierce ("Pierce") under subpoena, along with a "Subpoena Attachment to Brent Pierce with Responses."

We are also revising a document previously produced by International Market Trend, Inc. ("IMT") by enclosing IMT 002589-A, which contains several additional IMT email addresses.

The enclosed Brent Pierce documents are numbered BP 00185-00424. These are all marked "CONFIDENTIAL," because they are personal, private financial records. We request that all records marked "CONFIDENTIAL" receive confidential treatment for all purposes, including any use as an exhibit discussed in taking testimony or any response to a request under the Freedom of Information Act.

Mr. Pierce is still gathering documents with the intention to produce them before you begin taking his testimony on Thursday, July 27, 2006. When we submit them, we will revise the

responses to Mr. Pierce's subpoena attachment, in order to correlate the documents produced to particular subpoena attachment request numbers.

If you need additional information or have any question or suggestion, please contact me. Thank you.

Yours truly,

LANE POWELL PC

Christopher B. Wells

CBW:srf
Enclosures
cc: Brent Pierce
IMT
Stephanie Ebert
121503.0001/1312292.1

Subpoena Attachment to Brent Pierce
WITH RESPONSES

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.

   Objection, the term "affiliated" is vague. But, subject to the objection and interpreting the term "affiliated" to mean an entity as to which Brent Pierce served

as an officer or director or was a majority shareholder, responsive documents pertaining to Lexington are being produced. E.g., see response to No. 4 below.

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

Brent Pierce (Gordon Brent Pierce).

Former residence: [redacted], Surrey B.C. Canada [redacted].

New residence as of July 5, 2006: [redacted] Vancouver, B.C., VGB 1B1, Canada.

Telephone numbers: 6[redacted] (land line); [redacted] and the fax has been changed to [redacted] the mobile number remains unchanged.

Passport No.: [redacted] has been changed upon renewal to: [redacted]. See copy of passport, [redacted]

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

This request is unduly broad and invasive of Mr. Pierce's privacy, as well as the privacy of persons involved in his financial transactions who have had nothing to do with Lexington. Subject to this objection, however, Mr. Pierce is producing responsive financial records that pertain to his trading in Lexington stock.

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.

Objection as to brokerage account statements of entities that have authorized discretionary trading of Lexington stock but have not authorized Mr. Pierce to produce their records. (Mr. Pierce is producing a new Schedule 13D report of the trading in Lexington stock by persons/entities described in this request.) Piper Jaffray brokerage statements for Mr. Pierce have been produced. Mr. Pierce is producing records of an offshore account reflecting the remainder of his personal Lexington stock trades. See BP 00244-418.

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

Option exercise agreements have already been produced, and Mr. Pierce does not have documents related to more recent option exercises. (See Lexington documents.)

6. DOCUMENTS sufficient to identify by name, address, telephone number, and email 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 relation, media relations, investor relation, or investor communications services relating to LEXINGTON RESOURCES.

Brent Pierce has no responsive documents.

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.

Some responsive documents already have been provided by IMT. See also the new Schedule 13D report Mr. Pierce is producing.

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

Mr. Pierce has not been able to locate responsive documents, except for BP 00189-242 and documents responsive to other requests herein.

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

Mr. Pierce has not been able to locate responsive documents, except for BP 00189-242 and documents responsive to other requests herein.

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.

Responsive documents were produced by IMT, which previously provided copies of its invoices to Lexington. Mr. Pierce does not maintain personal copies of these invoices.

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.

Option exercise and securities brokerage records have been or are being provided and Mr. Pierce does not have documents related to more recent option exercises. (See Lexington documents.) Mr. Pierce is providing records responsive to Request No. 12, some of which could be responsive to this request as well. See BP 00419-424 and response to No. 4 above.

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.

Stock option records have already been produced and Mr. Pierce does not have documents related to more recent option exercises. (See Lexington documents.) Mr. Pierce is producing banking, securities brokerage or other financial records responsive to this request, to the extent they can be retrieved. See BP 00419-424 and response to No. 4 above.

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 emails, facsimiles, and internet postings, relating to LEXINGTON RESOURCES.

Mr. Pierce does not maintain these records, and has no responsive documents to produce. (See Lexington and IMT documents.)

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

Objection, the request lacks foundation and presumes incorrect facts. Brent Pierce does not prepare Lexington press releases or promotional brochures. (Lexington prepares press releases and promotional material itself or through other vendors. Lexington reviews its print material before providing the material for distribution. Mr. Pierce does not gather documents to support statements by Lexington.) Mr. Pierce has no responsive documents.

15. DOCUMENTS sufficient to identify all internet services provider accounts and email addresses maintained by YOU.

Mr. Pierce is attempting to locate an invoice from Enom, which he believes to be his only internet service provider. Mr. Pierce's personal email addresses are: [redacted].

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.

Mr. Pierce has no responsive documents that pertain to Lexington.

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

Mr. Pierce has no responsive documents that pertain to Lexington.

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

Mr. Pierce objects because this request is unduly broad, burdensome and invasive of Mr. Pierce's privacy and the privacy of others with whom he has communicated by telephone. If this request is narrowed, and the relevancy explained, Mr. Pierce will reconsider this objection.

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

Mr. Pierce has previously provided responsive documents (and IMT, and presumably ICI, provided debt assignments for some Lexington options to ICI or IMT optionees).

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.

Mr. Pierce is producing his responsive records (Schedule 13D report) of trades in Lexington stock.

21. All DOCUMENTS relating to the lease, rental, or ownership of premises located at [redacted], Bellingham, WA 98225; including but not limited to agreements and records of payments.

Mr. Pierce has no responsive records, and IMT has produced the responsive document – its lease of these premises.

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

Assuming responsive documents exist, Mr. Pierce cannot produce these documents without authorization from the businesses at that address.

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

Assuming responsive documents exist, Mr. Pierce cannot produce these documents without authorization from the businesses at that address.

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

Mr. Pierce is producing a copy of a title report showing his ownership (with his wife as a joint tenant) of the residence at this address. See BP 00185-187.

EXHIBIT C

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)
) File No. SF-02989-A
LEXINGTON RESOURCES, INC.)

WITNESS: Brent Pierce
PAGES: 1 through 246
PLACE: Lane Powell
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101

DATE: Thursday, July 27, 2006

The above-titled matter came on for hearing, pursuant to notice, at 8:45 a.m.

APPEARANCES:

On behalf of the Securities and Exchange Commission:
STEVEN D. BUCHHOLZ, ESQ.
TRACY L. DAVIS, ESQ.
Division of Enforcement
Securities and Exchange Commission
44 Montgomery Street, Suite 2600
San Francisco, CA 94104

On behalf of the witness:
CHRISTOPHER B. WELLS, ESQ.
Lane Powell
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
KEVIN WOODALL
Crossin Corlstine Woodall
660 - 220 Cambie Street
Vancouver, B.C. V6Z7B9

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EXHIBIT C

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A Yes.
Q How much time do you spent in Zurich?
A In the office in Zurich, not a lot. In Europe, quite a bit.
Q How long have you been working for Newport Capital Corp.?
A I believe it's seven or eight years or longer.
Q In the last year, how would you -- how much would you approximate of the time you would spend in Europe?
A Probably had at least 12 to 15 trips to Europe.
Q What positions do you hold with Newport Capital Corp.?
A I'm an officer and director of the company.
Q What office do you hold?
A President.
Q Who were the other directors?
A It's a company called Cockburn Directors, Paul Dempsey.
BY MS. DAVIS:
Q Did you say Cockburn?
A Yes.
Q Okay. If you can just spell that for the court reporter, you should do so because she's taking down --
A C-O-C-K-B-U-R-N.
Q And you said Paul Dempsey?

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A Paul Dempsey.
Q D-E-M-P-S-E-Y?
A Yes.
BY MR. BUCHHOLZ:
Q So the director is actually Cockburn Directors?
A That's correct. He's the representative.
Q Are there any other directors?
A No.
Q And Mr. Dempsey is the representative, so what does that mean? He controls the --
A For -- for Cockburn.
Q For Cockburn.
Who is Mr. Dempsey?
A He's an attorney. I believe he's an attorney.
Q Where is he based?
A He's based in the Turk and Caicos Islands.
Q Are there any other officers of Newport Capital Corp.?
A There is a secretary. I can't begin to tell you who that is. And an assistant secretary, Stephanie Ebert.
Q So there's a corporate secretary?
A Yes, but I can't remember off the top of my head.
Q Is it a man or a woman?
A I just don't remember right now.
Q Where is the person based?

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A In the Turk and Caicos Islands.
Q And you said that there's an assistant secretary?
A Yes.
Q That's Stephanie Ebert?
BY MS. DAVIS:
Q Mr. Pierce, how long have you been an officer of Newport Capital?
A I can't remember.
Q The entire time that you've worked there?
A I don't believe so.
Q But more than five years?
A I believe so.
Q And what about -- how long have you held the title of president?
A Again, I don't remember. I could get you that information. I just don't remember.
Q Did you become the president the same time that you became an officer?
A I don't remember.
Q Who appointed you president of Newport Capital?
A Again, I'd have to get you that information.
Q Who -- okay. Who appointed you a director of Newport Capital?
A Again, I'd have to get you that information.
BY MR. BUCHHOLZ:

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Q Does Newport have board minutes or something like that where you could determine?
A Yes.
Q Where are they maintained?
MR. WOODALL: If I could just interject for a minute, one of our concerns is Mr. Pierce complying with the law of the jurisdiction of Newport, as well as Canadian law regarding information he can disclose.
So we're not necessarily at the moment objecting or refusing to provide the information. We need to determine to what extent Mr. Pierce in his capacity as an officer and director he is at liberty to disclose minutes and other information that may be confidential to Newport.
So for the moment at least, as I say, we're not objecting to provide the information. We need to determine whether he is lawfully entitled to do so in accordance with the law and the jurisdiction, as well as applicable Canadian law.
MS. DAVIS: Okay, and you said which jurisdiction, Canadian and the other one?
MR. WOODALL: The jurisdiction where Newport is resident in.
BY MS. DAVIS:
Q Okay. Was it Zurich, or which resident?
A The office in Zurich, so. It is a Belize

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corporation.
Q So resident in Belize?
A Yes.
MR. WELLS: Well, I'll object to the extent the question requires a legal conclusion. I think we're in that -- on that turf. I understand you're just asking for the witness's understanding but --
BY MR. BUCHHOLZ:
Q Okay. And it is your understanding that there are minutes? There may be an issue in terms of --
A Yes.
Q -- providing them, but there are minutes.
Did you form Newport Capital Corp.?
A No.
Q Who did?
MR. WOODALL: That's one of the areas that requires consideration as to the extent to which Mr. Pierce is at liberty to disclose information about who formed the Newport Capital.
BY MR. BUCHHOLZ:
Q Who asked you or who did you talk to about getting involved with Newport?
MR. WELLS: Well, that's just a derivative of the same question that Mr. Woodall just objected to.
MR. BUCHHOLZ: Well, I can ask him more generally.

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If you want to object, you can object.
BY MR. BUCHHOLZ:
Q How did you come to be an officer and director of Newport?
MR. WOODALL: Perhaps I can explain the problem. The problem is that there are, as we understand it at least, laws concerning disclosure of ownership interests and similar confidential areas, and the problem with the question about who asked him to become a party -- or rather become part of Newport Capital may lead into an area which is confidential, in which Mr. Pierce is not at liberty, under Belize law or possibly Swiss law, as well, to disclose.
MR. WOODALL: As you said, it's not a matter of refusing to understand, but once we understand specific questions, we can determine more precisely whether there are concerns about foreign confidentiality law.
BY MR. BUCHHOLZ:
Q Okay. We may come back to that later. I'm going to move on.
Just a couple of other questions just to confirm, you've listed all of the officers and directors of Newport Capital, correct?
A The current ones, yeah.
Q Okay. Who were there previous ones?
A Again, I don't recollect, but it's possible, so.

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Q But as you sit here today, you don't recall others?
A I don't -- I just don't remember.
Q How many -- or does Newport Capital have employees?
A No. Consultants.
Q Who are -- well, approximately how many consultants does Newport have?
A That's a tough question to answer.
Q Well, currently what's your understanding of about how many people are providing consulting services to Newport?
MR. WOODALL: I think with respect to the affairs of Newport, in -- insomuch as they regard what his business activities are and so on, I would prefer if you can ask the questions, and we can get back to you once we have the specific questions because questions about, for example, the scope of its operations may also -- I'm not saying they are, but they may also be covered by secured confidentiality legislation.
So once we know what the specific questions are, we can give Mr. Pierce advice as to what his obligations are and the scope of his rights to answer questions.
MS. DAVIS: Right. I understand that, but unfortunately, the way that our process works, we don't provide questions in advance. And so that's essentially what you're asking is that we tell you what the questions are, and then you go and figure out whether you can allow him to

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answer the questions. And the way that the process works is either Mr. Pierce objects and you instruct him not to answer the question, or he answers the question. But we don't, as a matter of procedure, we don't provide questions in advance for purposes of our -- our testimony.
MR. WOODALL: Well, I'm sure the point here isn't to trick him.
MS. DAVIS: No.
MR. WOODALL: The point is to get the information.
MS. DAVIS: That's right.
MR. WOODALL: So I don't see any -- I don't mean to tell you how to do your business. Obviously you know it, and I don't, but I don't see any problem with finding out what -- with him finding out what it is.
These matters are quite a technical nature that you want to find out, and then we can determine, once we know of -- two things, one is what are the answers because in some cases he may simply not know the answer.
MS. DAVIS: Right.
MR. WOODALL: And in other cases it may be that there are confidentiality issues, or there may not be.
MS. DAVIS: Right.
MR. WOODALL: And so if the purpose is simply to get the information as accurately as possible, and in accordance with his obligations, while it may be a departure

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from your ordinary procedure, it seems to me the more practical route is to ask the questions, we can get the transcript of them, and then we can provide you with the information through Mr. Wells in due course.

MS. DAVIS: Right and --

MR. BUCHHOLZ: We would probably at that point need to call you back to -- once you've confirmed what he's allowed to provide or willing to provide, we can call him back and have testimony again.

MR. WOODALL: That's fine.

MS. DAVIS: And sounds -- and what we'd like to do is, I mean in terms of scheduling testimony in our investigations, we don't want to become a drawn-out process, just so you understand, sort of the way our process works.

And so if your intent is to go and figure out whether or not Mr. Pierce can answer the questions or provide the information, you know, we would expect that you would get back us within a week as opposed to within three months or something like that because we don't hold up investigations for those purposes.

MR. WOODALL: I appreciate that.

MS. DAVIS: Okay.

(SEC Exhibit No. 64 marked for identification.)

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BY MR. BUCHHOLZ:

Q Mr. Pierce, I'm handing you a document that's been marked as Exhibit 64.

MR. BUCHHOLZ: Do you have copies of this, Counsel? This is the filing you indicated you think that you did.

MR. WELLS: I just didn't bring it up with me.

MR. BUCHHOLZ: I didn't make a lot of copies.

MR. WELLS: We're fine.

BY MR. BUCHHOLZ:

Q Okay. Exhibit 64 has pages that are Bates labeled BP 00425 through 439, and it appears to be a filing with the United States Securities and Exchange Commission on behalf of yourself and Newport Capital Corp.

If you can take a moment, Mr. Pierce, and look through Exhibit 64 and let me know if you recognize it?

A Yes, I do.

Q What is Exhibit 64?

A It's a 13D filing.

Q Did you make that filing?

A Yes, I did.

Q Did you also make it on behalf of Newport Capital Corp. in addition to on behalf of yourself?

A Yes.

MS. DAVIS: What is your understanding as to why you filed the Schedule 13D to the Securities and Exchange

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Commission?

MR. WELLS: Let me -- I'm not going to -- I won't -- not exactly going to object, but I'm going to ask Mr. Pierce to be careful when he answers not to disclose any of the contents of any conversation with legal counsel in Canada or the United States, but go ahead and please answer the question without referring to any specific conversation.

THE WITNESS: It's to do with ownership of shares.

BY MS. DAVIS:

Q What was your understanding as to why you filed the Schedule 13D?

A Because of the percentage of ownership combined between myself Newport and other entities.

Q Okay, and the shares of Lexington Resources?

A Correct.

BY MR. BUCHHOLZ:

Q Did you provide the factual information for the charts at Exhibit A and Exhibit B, which are at Pages BP 436 and 437?

A Yes, I did.

Q Were there times in the past three years then when Newport and yourself crossed over the 5 percent threshold of ownership based on these charts; is that your understanding?

A That's my understanding.

Q Did you file any 13D filings personally at any other time for Lexington Resources stock ownership?

A No.

Q Didn't you file any on behalf of Newport Capital at any other time?

A No.

Q This is dated June 26, 2006; is that right?

That's the date on the first page, I guess, if we go to signature page, the last page, it's dated July 25, 2006?

A Correct.

Q So are those your signatures on the last page?

A Yes, they are.

Q And you signed on July 25, 2006?

A Yes.

Q And on the first page where it says June 26, 2006, it says underneath that "date of event which requires filing of this statement"; do you see that?

A Yes, I do.

Q What was that event?

A I'm sorry. I don't understand.

Q What event occurred on June 26, 2006, that required filing of this 13D to your understanding?

MR. WELLS: Again, please take care to not disclose the contents of any conversation with any legal counsel.

THE WITNESS: I don't know how to answer the

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question. I'm sorry.
BY MR. BUCHHOLZ:
Q Do you have an understanding of an event that occurred on June 26, 2006, that required this filing? Just asking if you have an understanding.
A Prior to that date, I came to the realization that a 13D needed to be filed.
BY MS. DAVIS:
Q I'm sorry. You said prior to June 26, 2006, you came to the realization that a 13D needed to be filed; is that right?
A That's correct.
Q Okay. When did you come to that realization?
A Within the last 90 to 120 days.
BY MR. BUCHHOLZ:
Q Okay. Do you do work for Newport Capital from your home?
A In my home in Vancouver?
Q Yes.
A Very rarely.
Q Do you maintain an office at the 28 Rennweg, Zurich, address?
A Yes, I do.
Q Do you maintain offices for Newport anywhere else?
A There is an office in London.

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Q What's the address?
A I would have to get that for you. I don't use that office.
Q Do you maintain offices for Newport Capital anywhere else other than the Rennweg address in Zurich?
A No.
Q Does Newport Capital have any other offices other than the London and the Zurich offices?
A Not to my knowledge.
Q Do you have a telephone number at your office in Zurich?
A Yes, I do.
Q Do you know it?
A I'll provide it to you again. They're long numbers, that long.
Q Do you maintain any other telephone numbers that you have not discussed so far related to Newport Capital?
A I believe those are the only numbers Newport has. They have a number in London, and they have a number in Zurich, and of course a fax line.
Q Do you currently work for any other companies or entities?
A Through Newport Capital.
Q So do you mean Newport Capital may act as a consultant or provider of services to other entities?

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A Correct.
Q But you don't do any direct work for any other companies or entities other than Newport?
A Correct.
Q Have you provided services directly to any companies other than Newport Capital in the last three years?
A I don't believe so. It's all through Newport Capital.
Q Are you currently an officer or director of any other companies other than Newport Capital?
A Yes, I am.
Q Which ones?
A Full name International Market Trend AG, Parc Place Investments AG, Sparten Asset Group, Waterside Developments Cayman, in brackets, Inc.
Q So after Waterside Developments, in brackets, Cayman?
A Yes. Could be LTD. I'm pretty sure it's Inc., but it could be LTD.
And Palm Tree Properties Cayman, in brackets, and I think it is LTD. And I'm not sure. Pierco.
THE REPORTER: I'm sorry?
THE WITNESS: It's called Pierco Petroleum. I was a director, so I don't know if I still am a director. So I'm just putting that out to you. That's all that comes to mind

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right now.
BY MR. BUCHHOLZ:
Q Those are the current ones?
A I believe so.
Q What positions do you hold with International Market Trend AG?
A President/director. Oh, I'm sorry. There's a subsidiary of International Market Trend, which is just International Market Trend, Inc., which is a Washington corporation. So I'm a director and president of that company, as well.
Q What positions do you hold at Parc Place Investments AG? And was that "Parc" with a C?
A P-A-R-C, yeah.
Q What positions do you hold?
A President/director.
Q What about Sparten Asset Group?
A President, and I have been a director. I just don't know if I'm still a director.
Q What about Waterside Developments?
A President/director.
Q Palm Tree Properties?
A President/director.
Q And you say you were president of Pierco?
A I don't know.

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Q You were also a director at one point, and you're not sure --
A I believe so, yeah. It used to be called a different name. So I know I was at one point, but I just don't know.
Q What was the previous name?
A Oak Hills Energy, Inc.
Q Do you maintain offices for your work or affiliation with any of these companies other than Newport?
A You mean actually have a physical address; is that what you mean?
Q Yes, a place where you go to do work for them.
A Other than -- I work out of my Swiss office.
Q Is Newport involved in all of these companies that you've listed, or do you do that separately from Newport?
A I guess I don't know what you mean by "involved."
Q Well, earlier you said that Newport was the only company you directly provided services for, and then Newport provided services --
A Right.
Q -- to other companies?
A Yes.
Q Are these companies that Newport provides services to?
A International Market Trend provided services, too.

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Newport does consulting services, too.
Q What about Parc Place?
A No.
Q Sparten?
A No.
Q Waterside Developments?
A No.
Q Palm Tree Properties?
A No.
Q Pierco or Oak Hills?
A I believe so.
Q With which institutions do you currently hold brokerage accounts?
A I only have one brokerage account with the Hypo Bank. I used to have another one, but they shut it down when you guys started your investigation.
Q Which institution was that one?
A Piper Jaffray.
Q With which branch of Piper did you have an account?
A It was in the state of Washington. They had moved, so I couldn't -- I can't remember exactly where.
Q With which branch of Hypo Bank do you have an account?
A The bank in Liechtenstein.
Q Do you have a broker or a person you work with at

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Hypo Bank in Liechtenstein?
MR. WELLS: We run into the same problem. We're talking about Switzerland and disclosure now, and that makes me nervous. I'm sure it makes Mr. Woodall even more nervous.
MR. WOODALL: So just making a note there. I missed the last question.
MS. DAVIS: The name of his broker or the person he works with for his Hypo Bank account Liechtenstein.
MR. WOODALL: Yeah. I think the same potential foreign confidentiality law concerns arise, but the request for that information is on the record.
MR. WELLS: As you can see from Mr. Pierce's production, he is providing information from foreign jurisdictions about himself. That he can do, but it's a much riskier proposition to provide information about other people. So that's the problem we run into with these questions.
MS. DAVIS: Like knowing who his banker is or broker is in Liechtenstein?
MR. WELLS: We're -- you know, I'm not a Swiss lawyer. I don't think any of us in this room is a Swiss lawyer, a Liechtenstein lawyer, a Belize lawyer, or a Grand Turks and Caicos lawyer, et cetera, but we've all read articles that disclosure laws that don't seem to work the way we would expect them to in the US.

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BY MR. BUCHHOLZ:
Q Mr. Pierce, did you open the accounts with Hypo Bank in Liechtenstein?
A Yes, I did.
Q When?
A It'll be concurrent with the documents I provided. I just don't remember exactly.
Q So roughly 2003?
A That sounds about right. Yeah.
Q Why did you open the brokerage account in Liechtenstein?
A Because I spend a majority of my time in Europe.
Q Do you have any brokerage accounts in Canada?
A No.
Q When did you last have brokerage accounts in Canada?
A 20 years ago.
Q Was there something about Liechtenstein that you thought made it an attractive jurisdiction for you to have a brokerage account in?
A The reason that I decided to deal with that institution is because a lot of the companies that I personally invest in trade on foreign exchanges, and they facilitate that.
Q Did any business partner or colleague tell you

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about Hypo Bank in Liechtenstein as a place where you could have a brokerage account?
A I can't recall how it came to be.
Q Have you ever worked for Hypo Bank in any capacity?
A No.
(SEC Exhibit No. 65 marked for identification.)
Q Mr. Pierce, I'm handing you a document that's been marked as Exhibit 65. It is a collection of certain portions of the records that you produced to us from what appears to be your account at Hypo Bank. The pages have Bates numbers in the lower right-hand corner, or left-hand corner, depending on how you look at it.
BP 00267 is the first page. BP 00335 is the last page, but for the record, the -- all the pages are not included. I only included certain pages.
If you could just take a moment and look through that and let me if those appear to be records from your Hypo Bank account that you produced to the SEC.
A They all appear to have my account number on them.
Q Which is your account number?
A [redacted] That's how I recognize it.
Q So after the 10 decimal?
A Yeah.
Q [redacted]

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A Yes.
Q Is this account in your name?
A Yes.
Q Do you just have one account?
A Yes. Well, there's actually a US dollar account and a Euro account.
Q Right.
A But it's the same account number.
Q Right. So if we look at the first page and the second page, one has a USD suffix and one has a UR suffix?
A Yes.
Q But those are just two different currency denominations in your [redacted] account?
A That's correct, yeah.
Q Does anyone else have authority to trade in your Hypo Bank account?
A No.
Q Do you have authority to trade in any other Hypo Bank accounts?
MR. WELLS: Well, I'm a little concerned, again, that while it seems -- that seems like a very innocuous question in our jurisdiction, we're talking about I think a Liechtenstein or Hypo Bank account, which could be in Switzerland, Liechtenstein, or some other jurisdiction where identities are kept highly secret.

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As an example, if you'll look at the Exhibit 65, I don't -- I don't think you'll even see Mr. Pierce's name on here anywhere. I think there's just a number. There's not the name of any individual from Hypo Bank who might help him service the account.
So, again, I think we may be running into territory where Mr. Pierce may get in trouble under some foreign jurisdiction law by answering a question that he would otherwise be safe in answering in our jurisdiction.
MR. WOODALL: One of the -- one of the concerns I have with the form of the question is it is unclear whether you are asking him whether he has authority regarding accounts in his own name, or whether you're asking whether he has authority to exercise accounts in other people's names, and it's the -- it's the latter that gives me the greater concern because the question could include, for example, that he has authority to -- to deal in the account -- in the accounts in the names of -- and beneficial ownership of persons other than himself, and that's the area of the foreign confidentiality law that I'm talking about.
MR. WELLS: Just to clarify, I hate to keep going on because I know you need to move on with your questioning, but it is a matter of public record that Mr. Pierce has trading authority for the entities mentioned in the 13D report. It is not a matter of record where those entities

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have chosen to locate their -- the accounts referenced or any other details about those accounts.
MR. BUCHHOLZ: My concern is that it seems like it's Mr. Pierce's privacy. I'm only asking if he himself trades. I asked whether he has authority to trade, but I'll ask him again, and you can object again if you feel it's necessary.
BY MR. BUCHHOLZ:
Q Do you conduct trades?
MR. WELLS: Yes. If you change the question, and maybe that was the problem, that -- my concern about the form of the question was that it included within the question where the other entity's bank account was located.
For example, I think you asked "do you have authority to trade for any other entity in a Hypo Bank account somewhere." Even whether it was a Hypo Bank account or not, it could be a problematic disclosure in another jurisdiction.
MS. DAVIS: I guess I don't understand the -- reask the question about him trading.
BY MR. BUCHHOLZ:
Q Do you conduct trades at Hypo Bank for other accounts other than the one you've identify in your name?
MR. WELLS: That is precisely the -- oh, the interpretation of the question of your last question that I

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was worried about because if he answers that question, then he discloses whether or not other entities like the ones mentioned in the 13D have accounts at Hypo Bank, as opposed to some other bank, and that could be a problematic disclosure under Swiss or Liechtenstein or some other law.

MS. DAVIS: Right. The fact that whether not he has the authority to trade in anyone else's name --

MR. WELLS: That's a problem.

MS. DAVIS: Is not -- it's not an issue. I think your concern is asking him whose name.

MR. WELLS: No. My concern is asking which bank these other entities use and that --

MS. DAVIS: We haven't even gotten to the other entity. We were simply asking does he trade or have the authority to trade in the name of anyone else.

MR. WELLS: But that's fine as long as you don't restrict it to Hypo Bank.

MR. BUCHHOLZ: Okay. So your objection is identifying whether or not their accounts are at Hypo Bank?

MR. WELLS: Correct. I'm scared of Swiss law, I have to tell you. It's counterintuitive to our understanding.

MS. DAVIS: Right, though we're talking about US laws here, any trading that he's conducted on behalf of foreign securities that trade on the US markets.

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MR. WELLS: That's fine.

MS. DAVIS: So we are concerned about any trading that he does on behalf other individuals in US securities, US-traded securities. And so whether it's in Liechtenstein or Belize or wherever it is, if he's trading in the securities of a stock that's traded on the US stock market, and that is -- and that's registered with the Securities and Exchange Commission, we're entitled to know that information, and that's what we're asking.

So to the extent it has to do with just random trading, we're not asking that, but I think we're entitled to ask you, first of all, do you trade on behalf of any other individuals or have the authority to trade on behalf of any other individuals?

MR. WELLS: That's fine. No objection.

THE WITNESS: Individuals, I don't believe so.

MS. DAVIS: Okay.

BY MR. BUCHHOLZ:

Q What about entities?

A Yes.

Q Where do you currently hold bank accounts?

A The Hypo Bank, the Bank of America, the Bank of Montreal in Canada. I have a joint account at the Bank of Commerce in Canada. I have a bank account in the Cayman Islands at Cayman National Bank, and I have a bank account in

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Switzerland, at a bank that I wouldn't be able to pronounce or even get close to, and I can't remember the name of it. I never use it for anything. More than happy to get you the information.

Q The CIBC account, is that joint with your wife?

A Correct, yeah.

Q Are the other ones all in your name?

A I think the Bank of Montreal is a joint account, but I'm not sure. She has her own account, so I just don't know if she's on my account. And the other ones I'm on, myself. Other than the Cayman Bank, she's on that, as well. Sorry.

Q So your name is on all of them and the -- for a few of them your wife may also be?

A Yes.

Q Okay. Are there any other bank accounts that you have had that closed in the last three years?

A Oh, actually I have a US bank account at US Bank, but I don't use it, but I still get statements though, and that's US Bank in Blaine, Washington. I just can't think of anything else. Oh, I had a line -- well, I don't know whether it's the same thing, but I mean I have an account, I guess, with the Toronto Dominion Bank in Canada, but it's -- it's a line of credit account. So it's kinds of different, so, and that's joint.

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Q Do you use that currently?

A I have a line of credit, yes.

Q Any other accounts in the last three years?

A I think that covers it.

Q Are there any other accounts where you're a custodian for anyone else or anything like that?

MR. WOODALL: Custodian issue, phrased as broadly as you have, raises the confidentiality issues that we're concerned about.

MS. DAVIS: Okay. Well, can you answer the question "yes" or "no"? If answer's "no" then --

THE WITNESS: I guess I'm not understanding what "custodian" means. Sorry, but what do you mean by custodian?

BY MR. BUCHHOLZ:

Q Do you have authorization to conduct transactions on any other accounts?

A Like on corporations, you mean?

Q Yes, or other individuals?

A Nobody. No other individuals.

Q Okay. But corporations?

A Yeah, yes.

Q Are you the beneficiary of a trust in any jurisdiction that holds ownership interest and assets?

A No.

Q Have you ever been?

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A Not to my knowledge.
MR. BUCHHOLZ: I think now is probably a pretty good time for a short break. Why don't we take a ten-minute break and go off the record at 9:55 a.m.
(Recess 9:55 to 10:05 a.m.)
BY MR. BUCHHOLZ:
Q Back on the record at 10:05 a.m. And this is something we confirm everyone time we go off the record: Mr. Pierce, is it correct that the staff did not discuss this case with you, other than discussing potential time for breaks later today while we were off the record?
A I'm sorry. I must have --
Q Just to make sure that we confirm that we didn't have substantive discussions while we were off the record.
A Correct, yes.
Q We had a discussion about when we might take breaks, but we didn't have any other substantive discussions about the case; is that correct?
A Correct, yes.
Q Okay. Thank you. All right. Earlier you said that one of the companies that you are, I believe, president and director for is International Market Trend AG; is that right?
A Correct.
Q What does International Market Trend AG do?

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A Provides investor relation services, telephone answering, and other services for public companies in Europe.
Q What other services, other than telephone answering, would be included in investor relations services to your understanding?
A Sending out materials to investors that call in that are provided by the company.
Q Does it include sending materials to potential investors?
A Correct.
Q Anything else that you consider to be included in investor relation services?
A It arranges road shows, presentations for the company.
Q What is your understanding of road shows in that context?
A Setting up a luncheon, for instance, where potential investors and banks and other people attend.
Q Anything else that you would consider to be included in investor relations?
A Pretty much the primary function.
MS. DAVIS: And you said that was for Europe, right, for IMT AG?
THE WITNESS: That's the Swiss company, yes.
BY MR. BUCHHOLZ:

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Q How long have you been affiliated with IMT AG?
A Since its incorporation.
Q About when was that?
A I believe three years ago, four years ago. Again, I don't have the dates in my head.
Q Were you a founder of IMT AG?
A I was instrumental in setting up the company.
Q Was anyone else involved with you in terms of the founding of the company?
MR. WELLS: If you can answer, again --
BY MR. BUCHHOLZ:
Q If you can answer without giving names first, and the question was anyone else?
A I guess I don't really understand the question because it's a little bit broad. So I mean when you -- what do you -- what do you really -- what are you really asking, I guess?
Q Well, you said you were instrumental in setting it up?
A Yes.
Q So I'm just trying to find out if there --
(Simultaneous discussion.)
A -- discussions with people and that sort of thing, is that what you mean? Or I -- that's what I'm saying I don't really understand.

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Q Well, I guess by "instrumental," it was primarily you?
A Correct. So that's why I get confused a little bit.
Q All right. That's fine.
Had you previously been involved in a company that provided investor relation services in Europe?
A Well, Newport, Newport Capital. There is an overlap. It does provide services, as well.
Q What about other than Newport Capital?
A In Europe, not that I can think of in Europe, other than Newport Capital, so.
Q What was the reason for setting up IMT AG as a different entity from Newport Capital?
A Because IMT has direct relationships via its subsidiary with public companies in the US.
BY MS. DAVIS:
Q What does that mean?
A Well, through its -- IMT AG through its subsidiary, International Market Trend, it has consulting agreements and agreements with public companies. Whereas prior to that, Newport didn't have direct relationships with the public companies. If any of that makes sense.
BY MR. BUCHHOLZ:
Q This subsidiary you're referring to is IMT, Inc.?

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A Yes.
Q **Does IMT AG have any other subsidiaries?**
A No.
Q **Was IMT, Inc., set up shortly after IMT AG was formed?**
A Within a short period of time.
Q **Just to clarify, did you say that Newport Capital did not directly contract with US public companies to provide services?**
A I don't believe it had like a consulting agreement directly with public companies. Now, I could be wrong about that, but I don't think so. It had a consulting agreement with a prior company, prior investor relations company, so.
Q **Which company was that?**
A ICI.
Q **What does that stand for?**
A Investor Communications International, Inc.
Q **So before IMT, Inc., ICI, I think, was the company that Newport Capital would contract with for services to public companies in the US?**
A Correct. It was ICI that had the contract with the public companies.
Q **Did you hold positions with ICI?**
A Somewhere along the line I did. I wouldn't be able to give you the time frame, but I did.

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Q **What positions did you hold with ICI?**
A I'm not really sure, but I believe I might have been president for a short period of time during a lawsuit that was going on. I was either president or director. I just don't remember.
Q **ICI was a US company?**
A Yeah, I believe.
Q **Who were the other officers and directors of ICI?**
A The only one that comes to mind is Markus Johnson, and there could have been others. I just don't remember.
Q **Did you form ICI, Inc.?**
A I don't remember. It is possible. I just don't remember. Just being --
Q **Returning to IMT, Inc. -- well, let's actually go with IMT AG first.**
Do you provide services to public companies in Europe through IMT AG?
A Yes.
Q **You personally?**
A Yes.
Q **Do you have an employment agreement or consulting agreement with IMT AG?**
A No.
Q **Do you have any type of agreement that documents the services you provide for IMT AG?**

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A No.
Q **What services do you provide to public companies in Europe through IMT AG?**
A All of the services I described that IMT AG does, plus financing, plus project development looking for new activities for the company, that type of thing.
Q **How many people approximately provide services to public companies in Europe through IMT AG?**
A Are you looking for a number, or are you --
Q **Yes, approximately.**
A As far as employees or consultants, or what are you looking for?
Q **Right. Whichever they are.**
A Currently there's only one employee. Starting in September, I should say. We used to have one employee that hasn't worked for the company for about, I don't know, a year. She was basically the office manager. We have a new office manager in September. So that's the only employee of the company. The rest are consultants like Newport Capital.
Q **About how many consultants provide services to companies through IMT AG?**
A I really -- I mean three or four probably on a continual basis.
Q **Do you have an ownership interest in IMT AG?**
MR. WELLS: Object to the form of the question to

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the extent it calls for a legal conclusion, but I'll ask Mr. Pierce to give you his best understanding of that.
THE WITNESS: No.
BY MR. BUCHHOLZ:
Q **Do you receive a salary from IMT AG?**
A No.
Q **Do you receive any compensation for your services to IMT AG?**
A Through Newport Capital.
Q **Who owns IMT AG?**
MR. WOODALL: It's an area where confidentiality concerns, and again, perhaps I'm entrenching on Mr. Wells's ground here, but it also strikes me as at least questionable whether it's within -- whether it's relevant to the investigation.
What you're talking about here is trading in US securities, which is a different thing than ownership of a company in a foreign jurisdiction, which he -- you know that Mr. Pierce is not the owner. He's already told you that. So you're talking about other owners, other people's business interests, and that's of concern, but I leave that to Mr. Wells.
MR. WELLS: And I join in the objection as it relates to potentially encroaching on foreign law to identify an owner of a business that's already been identified as one

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subject to foreign laws.
BY MR. BUCHHOLZ:
Q Mr. Pierce, did IMT AG contract with Lexington Resources to provide consulting services when Lexington was a public company in the US?
A I believe so. It's either IMT AG or IMT, Inc. So just my --
(SEC Exhibit No. 66 marked for identification.)
Q I'm handing you what's been marked as Exhibit 66. The pages are labeled at the lower right corner IMT 54 through 58. The top of the first page says "Financial Consulting Services Agreement," and it appears to be dated November 10, 2003, between International Market Trend AG and Lexington Resources, Inc.
If you can take a moment to look through Exhibit 66 and let know if you recognize it or not?
A Yes.
Q If you can say that again?
A Yes, I recognize this.
Q What is Exhibit 66?
A It's a consulting services agreement between IMT AG and Lexington.
Q It appears to be signed on behalf of IMT AG by Richard Elliot-Square on the last page?

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A Correct.
Q Do you recognize that as his signature on Page IMT 58?
A I've seen it before. So I assume that's his signature.
Q Who is Richard Elliot-Square?
A Business associate of mine.
Q How long have you known him?
A Eight to ten years, I believe.
Q How did you meet him?
A I believe I met him through getting a Frankfurt listing for a public company eight or ten years ago. And time frames, I'm just not sure. Quite a while ago.
Q Getting a Frankfurt listing for a US --
A For getting a US public company listed on the Frankfurt exchange.
Q What's the name of that company?
A I believe it was Vega-Atlantic Corporation. I could be wrong.
Q V-E-G-A?
A Yes.
Q Did someone introduce you or put you in touch with Mr. Elliot-Square?
A Yes, but I couldn't begin to remember who that would have been.

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Q Is Mr. Elliot-Square a director or officer of IMT AG?
A I don't believe so.
Q As of November 10, 2003, were you the president and a director of IMT AG?
A I do believe so, yes.
Q Why did Mr. Elliot-Square sign this consulting services agreement between IMT AG and Lexington Resources?
A He was providing services to IMT at the time, and he was probably present, and I wasn't at the time. So I'm sure that's the reason.
Q Did he have approval to sign this agreement on behalf of IMT AG?
A Yes.
Q Is he an officer or director of IMT, Inc.?
A No.
BY MS. DAVIS:
Q Has Mr. Elliot-Square ever been an officer or director of IMT, Inc.?
A Not to my recollection.
BY MR. BUCHHOLZ:
Q Has Mr. Elliot-Square provided services to Lexington Resources pursuant to the financial consulting services agreement that is Exhibit 66?
A Back in the very beginning stages, I believe he

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did, yes.
Q So what would that time frame be roughly?
A Probably around when this agreement was signed. He was consulting to IMT AG at the time.
Q And did he provide services to Lexington Resources through IMT AG?
A Yes.
Q You are the president and a director of IMT, Inc., right?
A I believe so, yes.
Q Did you found IMT, Inc.?
A It was a subsidiary of AG. Yeah.
Q Did you instruct someone to set it up?
A Yes.
Q Who did you instruct?
A I don't know who incorporated it, what law firm incorporated it. I don't remember.
Q Were the -- who are the other officers and directors of IMT, Inc.?
A I'm not sure. I think Stephanie Ebert is a secretary of the company. But other than that, I'm really not sure.
Q By "secretary," you mean a corporate secretary?
A Yes.
BY MS. DAVIS:

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of America.
Q **Do you have a computer that you use at IMT's offices?**
A I have never used a computer in IMT's offices.
Q **Does IMT have an IT consultant or someone that helps them with computers?**
A I believe so, yes. I don't know the guy's name. Stephanie would be able to tell you.
Q **Have any documents that we requested in the subpoena been withheld, aside from objections your counsel has raised, or privilege assertions by your counsel?**
A Other than what's outlined in here, for example?
Q **Yes.**
A No.
Q **And again, other than --**
A Concerning myself. I want to be clear about that. I mean as I didn't -- as I said earlier, I haven't provided documents for Newport, so.
Q **Right.**
A So if we're talking about Brent --
Q **We should --**
A Yeah.
Q **-- we should set out -- set out Newport is an exception, as well. Okay.**
Other than that, you're not aware of any documents

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that have been produced?
A No. There's nothing.
Q **Have any documents that we requested been lost, altered, or disposed of in any fashion?**
A Not to my knowledge.
Q **Did anyone help you search your personal files for responsive documents?**
A No. There is one exception to that, which is my Daytimer, which I had mentioned to my counsel, for the first six months of this year, when I moved, I only have the -- from -- I take out the front pages because the book's too thick otherwise. And when I moved, I haven't been able to find them, but I think they're around somewhere. I just haven't got there yet.
But other than that, that might be the only thing that has notations as far as meetings and things like that, but that's the extent of it. It's not a very detailed Daytimer. I work pretty much out of my head, so.
Q **And if you find -- or when you find those you'll --**
A I'll be more than happy to present them.
Q **Appreciate that.**
Now, returning to some of the other companies that you said earlier that you serve as director or officer of, what is Sparten Asset Group?
A It's a Belize corporation.

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Q **What does it do?**
A Primarily invests in different public companies.
Q **Who are the other directors of Sparten Asset Group?**
MR. WELLS: Are we going to run into a problem? I think the -- Mr. Pierce just testified it's a Belize company, and I think we've come across that problem before. We don't know the law of Belize any more than we do Liechtenstein or Switzerland or Turks and Caicos and Cayman.
And so I think I would defer to counsel from Vancouver that some sort of study be undertaken before Mr. Pierce risks disclosing that information and violating some foreign law.
MR. BUCHHOLZ: But I thought -- I mean he's already disclosed with regard to Newport, which is a Belize company, right, who the directors are? Is there any problem with doing that?
THE WITNESS: I put it in my 13D.
MR. WOODALL: Just check, make sure what's been disclosed. Keep it a safe disclosure.
MR. WELLS: Well, to the extent it's been disclosed, obviously I withdraw the objection.
MR. WOODALL: I don't think the --
MR. WELLS: If the director is not the problem and the owners are a problem, maybe that's where we have to begin to raise this concern.

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THE WITNESS: As far as in the 13D, basically this states that I share dispositive power of Sparten.
BY MR. BUCHHOLZ:
Q **Did the board of Sparten grant you dispositive power over the shares?**
A No.
Q **How did you get it?**
MR. WOODALL: This I think is in the area of concern about foreign disclosure laws. It wasn't the board. The question is obviously how -- who was it, and that leads into areas that I'm concerned we are not fully able to advise Mr. Pierce about concerning the applicable foreign confidentiality. And again, not to say that we won't answer the question, we just need to know what the questions are so we can determine what he can answer.
BY MR. BUCHHOLZ:
Q **So you said that Sparten Asset Group specifically invests in US public companies?**
A Correct, yes.
Q **Have you traded US public company securities on behalf of Sparten Asset Group?**
A Yes.
MR. BUCHHOLZ: It's our position that a company that trades US securities, and that he's traded US public securities for, needs to be identified to the Securities and

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Exchange Commission, and I guess if you want to instruct him not to answer, I think what -- we're going to need you to do that.

MR. WELLS: What I think might cure the problem is if Mr. Pierce first simply disclosed generically the source of his authority without disclosing the identity of any person or that person's status of an owner, if that person were an owner and that were the source.

I'm just sitting here thinking. I don't want to coach, so I have to be careful, but if he's on officer or director of Sparten, which I think is disclosed, then perhaps the authority simply came from natural corporate powers to act. But I would ask Mr. Pierce to answer the question starting with, at this point at least, starting with the basis for his authority as he understands it, not speaking as a whole -- or licensed in a foreign jurisdiction.

Did you follow that? I'm just asking you to go ahead and disclose to the SEC to the extent you think you're allowed to why you thought you were allowed by Sparten to trade Lexington securities for Sparten's account without identifying any individual.

In other words, what was the source of your power? Was it because you were a clerk, was it because you were an officer or director? Or what was -- what was the reason that you were allowed to trade Lexington stock for Sparten's

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account?

THE WITNESS: Because I was an officer and director.

BY MR. BUCHHOLZ:

Q Did you trade Lexington stock for Sparten accounts in the US at brokerages in the US?

A Yes.

Q At which brokerages?

A Only one. Trying to think of the name. Peacock Hislop.

MR. WELLS: It's got to be from the Southeast.

BY MR. BUCHHOLZ:

Q Can you spell it to the best of your --

A Well, Peacock, and then Hislop I believe is H-I-S-L-O-P. And there's more to the name, but we wouldn't want to try to remember the rest.

Q Okay. Now, not just Lexington, but other US public company securities, have you traded for the accounts of Sparten at any other brokerage accounts in the US?

MR. WELLS: Well, I hate to confer with the witness while there's a question pending, and I won't do it, but otherwise I would object to the scope of the question apparently going beyond the formal authority and the limited purposes for which Mr. Pierce has consented to the jurisdiction of the SEC subpoena, but I can confer with him.

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I mean if the answer is going to be no, then the problem goes away.

MR. BUCHHOLZ: Well -- and our position definitely would be that -- I'll allow you to confer with him definitely, but I do want to make it clear, and if you need to confer with him, as well, I mean we view investigative testimony as quite broad.

MR. WELLS: I'm one step premature because if the answer is "yes" or "no," he should go ahead and answer that question before I raise this objection.

THE WITNESS: Can you reask the question?

BY MR. BUCHHOLZ:

Q Yes. Have you traded US public company securities for the accounts of Sparten Asset Group at any other brokerage accounts in the US other than Peacock Hislop?

MR. WELLS: I misunderstood the question. Sorry.

THE WITNESS: Not to my knowledge. I don't remember anything else.

BY MR. BUCHHOLZ:

Q And I don't know if this will garner an objection or not, but have you traded US public company securities for the accounts of Sparten Asset Group at brokerages or with brokerage accounts outside the US? And that's just a "yes" or "no" question.

A Are you asking me?

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Q Yes.

A No.

Q Were you involved in forming Sparten Asset Group?

MR. WELLS: That's a "yes" or "no" question, so I would have no objection to that.

THE WITNESS: Yes.

BY MR. BUCHHOLZ:

Q Were others involved in forming Sparten Asset Group?

A Yes.

Q When was it formed?

A I'm not really sure. Seven or eight years, I think. Just not really sure.

Q Are there other individuals or entities that you are willing to identify as being involved in forming Sparten Asset Group?

A Not at this point.

Q How many others are there, entities or individuals?

MR. WELLS: That could be tricky, as well. I mean we run into the same problem. We don't know if identifying the number of principals in some foreign jurisdiction violates that foreign jurisdiction's confidentiality laws.

MR. WOODALL: I'm going to make the same point.

MR. BUCHHOLZ: I think we may need to get Belize on the phone.

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Q So how much of Pierco, then Oak Hills Energy, did Newport own?
A I believe over 50 percent, but I'm not 100 percent sure.
Q Other than that, are any of the Newport subsidiaries in the US?
A No.
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 Are there any individuals or entities who have ownership stakes in Newport Capital Corp. that you are willing to disclose?
A Not at this time.
Q No US citizens or Canadian citizens?
MR. WOODALL: Well, I'm just -- I think the question at this time is as far as he can go at this time.
MR. BUCHHOLZ: I'm just having trouble getting my hands how around a US entity or a US citizen would -- how there wouldn't be any type of issue with you disclosing their ownership in a company that's obviously owning US securities and disclosing its ownership now in a 13D?

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MR. WOODALL: Well, we just don't know. That's the problem. I mean under -- the fact that a US or any national owns a portion of a company under foreign laws doesn't automatically trump the confidentiality provisions of that foreign law. It might. To my mind, I don't see that the nationality of the owner would automatic -- automatically the case that the nationality of the owner would trump the confidentiality of the foreign jurisdiction.
MR. WELLS: If I could confer with the witness as to any US resident persons, perhaps the disclosure could be made after gaining the consent of that person.
MR. BUCHHOLZ: Well, our position would that we are entitled to know US citizens, and possibly even people from other countries. I understand that there's the standing objection on that, but I guess a US citizen who obviously has an ownership interest, a beneficial interest in an entity that's purchasing US public company securities, I think we -- if you want to instruct him not to answer, but I think we want to make that request. We think we're entitled to that information.
MR. WELLS: I would only instruct him not to answer provisionally until I could ascertain whether, number one, there was a US citizen that might come within the scope of the response. And number two, if so, whether we could, Mr. Pierce through counsel, could contact that person and obtain

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consent before you complete your testimony taking today or tomorrow.
MR. BUCHHOLZ: Okay. I'd appreciate it. If you could do that, That would be helpful.
MR. WELLS: Could you give me just a second to confer with the witness?
MR. BUCHHOLZ: Yes, or if when we take a break, if you -- or this evening, since we're coming back tomorrow morning.
MR. WELLS: If we could take a break now, it might be a good time because we're at 4:00. We've been going for an hour and a half --
MR. BUCHHOLZ: That sounds good.
MR. WELLS: -- and we may come back on the record and say, whoops, there isn't anybody.
MR. BUCHHOLZ: Okay. Let's take a break and go off the record at 4:00 p.m.
(Recess 4:00 to 4:14 p.m.)
BY MR. BUCHHOLZ:
Q Back on the record at 4:14 p.m.
Mr. Pierce, did we discuss this case while we were off the record?
A No.
MR. WELLS: Well, we did -- off the record I did mention very briefly that when we came back on the record Mr.

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Pierce would make a statement about the ownership of Newport that, as I understand it, derives from a public filing.
THE WITNESS: I believe there's been public filings as to the shareholder of Newport Capital, which is Emerald Trust. So I believe it's in the court of public filings, and there is no Americans involved in the company, as far as ownership.
BY MR. BUCHHOLZ:
Q And by Americans, you mean companies or individuals?
A Correct, directly or indirectly or anyone.
Q If you could find Exhibit 74 that we marked earlier, so this was the series of letters with instructions between Mr. Atkins and Mr. Stevens in connection with a grant between Lexington and IMT AG, and it looks like the second page, IMT 96, is an instruction to take the 350,000 shares that were issued to you and transfer them to Newport; is that right?
A Yes.
Q And then the next two pages appear to be a letter, this is dated a day later, November 25, 2003, where Mr. Atkins is instructing Mr. Stevens to cancel the 350,000 shares certificate for Newport and issue the shares to a variety of people, do you see that, people or companies?
A Yes.

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Q Did you give Mr. Atkins the instructions as to this breakdown of the 350,000 shares of the further issuance to others?
A Yes.
Q How were the amounts determined?
A By myself.
Q Mr. Atkins wasn't involved in the determination of who got these shares?
A No.
Q Was anyone else at Newport involved in the determination of who would get which shares from this, from this 350,000?
A No.
MR. WELLS: Well, the -- just -- never mind. Sorry.
BY MR. BUCHHOLZ:
Q What did you base your determination on in terms of how to break this down?
A Just -- it's a series of private transactions.
Q Looking at the second page, which was the transfer from you to Newport, it says there's a private sale share agreement between you and Newport; is that the case?
A Yes.
Q Is that filed at Newport, or do you have a copy of that?

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A If I haven't produced it, I don't have a copy of it, but that's not that I can't get one. I would have produced it if I had a copy of it. I don't know whether we did or not, so.
Q I don't believe so, but if you --
A Okay.
Q Yeah. We would request any share sale agreements pertaining to Lexington stock that you have either in your custody or have the ability to obtain.
And they were similar agreements for the sales from the Newport block breaking down further these other individuals and entities?
A Yes.
Q Did Newport receive compensation from these other individuals and entities?
A In some cases.
Q So let's start -- it looks like Newport retains 41,700 of the shares, right?
A Yeah.
Q Who is Victor Meira, M-E-I-R-A?
A Just a private investor.
Q So he purchased 50,000 of the shares from Newport?
A Again, I would have to go back and look at the records to determine which ones were purchases and if there were other reasons Newport transferred the shares. So --

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Q Did Mr. --
A I don't remember off the top of my head. That's the problem. A series of transactions here, and I wouldn't want to guess.
Q So if they weren't sale agreements or purchase agreements, what other consideration would be provided to Newport by these individuals for the shares?
A Could be in relation to services provided.
Q Did Mr. Meira provide any services to Lexington Resources?
A No.
Q So did -- well, we see -- I see a couple names, Alexander Cox and Kelly Kellner, who you've identified as --
A Sure.
Q -- people who did?
A Yeah.
Q Other than them, did Mr. Boffo, Ottavio Boffo, B-O-F-F-O, provide any resource services to Lexington?
A Not as far as I know.
Q What about Vincenzo Aballini?
A No.
Q A-B-A-L-L-I-N-I.
Is Mr. Boffo a private investor, to your understanding?
A Yes.

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Q Did he sometimes provide consulting services to Newport?
A No.
Q Did Mr. Meira sometimes provide consulting services to Newport?
A No.
Q Did Mr. Aballini sometimes provide consulting services to Newport?
A No.
Q Regarding the issuance to Mr. Cox, was that a sale agreement or was that for services?
A That's what I'm not sure about.
Q And the records at Newport would show that?
A Absolutely, yes.
Q What about Mr. Kellner, was that a sale agreement or for services?
A I believe for services. Again, I'm not 100 percent sure, but I believe it was for services.
Q Do you believe it was for services to Lexington?
A It would have been in relation to Lexington.
Q Why wouldn't the 125,000 shares have been issued directly to Mr. Kellner?
A Because the option grant was already done at that point in time. So the options were granted to me, and I transferred them to Newport, so.

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was one, I mean I'm not saying there was one. I just – I don't know.

Q Okay. So as you sit here today, you're not sure if there were any –

A Yeah, I mean –

Q – private sales that you made?

A Yeah. I'm not sure.

Q All right. So if there wasn't, and it was stock that you held –

A Yes.

Q – you deposited it in one of the two brokerage accounts?

A Correct.

Q And transactions, deposits of the stock or sales of the stock at Hypo would be reflected in the Hypo statements?

A Absolutely, yes.

Q And at Piper in the Piper statements?

A Correct.

Q Okay. There was a three-for-one stock split at Lexington in 2004, correct?

A Yes.

Q Did you have some shares at that point that were actually split, so you received two additional shares for one?

A I don't remember. If I did, it would have got

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split in the accounts, or it would have been on the shareholder list at the time, corporate shareholder list, and I just don't remember.

Q Did you also sometimes buy Lexington stock or receive Lexington stock aside from the stock option grants?

A I certainly did purchase, yes.

Q Did you purchase in the open market?

A Yes.

Q Did you also purchase private sale share agreements?

A Again, that's what I'm not sure about. And if I did, there should be a document. So – but I believe that most of it was done if – in the open market. I don't remember offhand any private transactions.

Q Did you say you sometimes you purchased Lexington stock in the open market for your own accounts?

A Correct.

Q Did you purchase Lexington stock in the open market for Newport accounts?

A Yes.

Q Did you purchase Lexington stock in the open market for Sparten accounts?

A Don't remember.

Q What about Pacific Rim?

A It's the same. I don't remember. I know there was

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transactions, but I don't know whether there was buying – buys and sells or just sells. Just don't remember.

Q And if you did for accounts of Sparten and Pacific Rim, it would be through Peacock Hislop?

A That's correct, yes.

Q Did Newport have – well, I'll start again.

For which accounts of Newport did you buy or sell Lexington stock in the open market?

MR. WELLS: Well, I think we're back to the problem of identifying the bank, a foreign bank perhaps, of a non US citizen. I forget where Newport is domiciled. Belize.

BY MR. BUCHHOLZ:

Q Okay. Let's start with the US then.

Did you purchase or sell Lexington stock in the open market for any accounts of Newport Capital Corp. in the US?

A Yes.

Q Which accounts?

A Let's see. vfinance, Peacock Hislop, SG Martin.

Q Capital S, capital G is that?

A Yes.

Q Any others?

A I think that's it.

Q Did you have a broker that you worked with in particular at Peacock?

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A His first name is Craig, and his last name is failing me. That's terrible.

Q Craig?

A Craig Sommers. Sorry. My memory is faltering at this point in time.

Q Like the season summers?

A I think it's S-O-M-M-E-R-S, I believe.

Q What office or branch?

A I'm sorry. Just totally gone blank. It's on the statements, but I just – I can't. I can find out for you. I just can't remember. It would be on – I'm just trying to remember the area code, and I can't.

Q Did you have a particular broker at SG Martin?

A That account is still open, by the way.

Q Peacock –

A Peacock Hislop with Craig. So he's currently the broker on that account. So I – just to clarify that. At SG Martin it's Rich Fredericks, and that account is still open, and then of course vFinance was Nicholas Thompson, and that account is not open.

Q The Newport account with vFinance is closed?

A Yes, that's correct.

Q Since when?

A Again, it's quite a while. Sometime last year. I just don't remember when.

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)
) File No. SF-02989-A
LEXINGTON RESOURCES, INC.)

WITNESS: Brent Pierce
PAGES: 247 through 410
PLACE: Lane Powell
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
DATE: Friday, July 28, 2006

The above-titled matter came on for hearing, pursuant to notice, at 8:18 a.m.

APPEARANCES:

On behalf of the Securities and Exchange Commission:
STEVEN D. BUCHHOLZ
TRACY L. DAVIS (via telephone)
Division of Enforcement
Securities and Exchange Commission
44 Montgomery Street, Suite 2600
San Francisco, CA 94104

On behalf of the witness:
CHRISTOPHER B. WELLS
Lane Powell
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C O N T E N T S

EXHIBITS (Continued)

PREVIOUSLY INTRODUCED EXHIBITS

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Q Do you know of any other officers or directors of that entity?
A I know there are others, but I don't know who they are.
Q Have you ever been a director or an officer of the ANP entity in the UK?
A No.
Q Have you ever been an officer or a director of the ANP entity in the US?
A No.
Q Has any entity in which you have any beneficial ownership interest ever been a director or officer of either ANP entity?
A No.
Q How do you know that there are other officers or directors in the UK at ANP?
A I just believe that to be the case.
Q Based on what?
A I just think there is another officer or director. I believe there's a corporate secretary, but I don't know who it is.
Q Did Mr. Elliot-Square tell you that?
A Yes.
Q Has Ms. Ebert ever been a director or officer or corporate secretary or anything in connection with ANP in the

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US or the UK?
A If she is, it would only be in the US, and I don't know.
Q Do you have any kind of ownership interest in ANP in the UK?
A No.
Q Do any entities in which you have a beneficial interest of any kind have an ownership interest in ANP in the UK?
A No.
BY MS. DAVIS:
Q Mr. Pierce, did you provide any of the financing for ANP in the USA at any time?
A No.
Q Did Newport provide any of the financing for ANP in the US?
A I don't remember.
Q Is it possible?
A Anything is possible.
Q Well, some things are more likely.
Is it possible that Newport provided some of the financing for ANP in the US?
A Like you say, it's possible. I just don't know.
Q Did IMT provide any financing for ANP in the US?
A Again, it's possible, but I just don't know without

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the records.
Q What records would you look for?
A Accounting records.
Q Accounting records of what?
A Well, Newport or IMT. Those are the companies I'm involved in. So those are the records I can look at.
Q Okay. Would that be IMT, Inc., or IMT AG?
A Well, it depends which question you're asking. Both --
Q Well, my question is did IMT provide any financing for ANP in the US, and you said it's possible.
So my question is is it possible that IMT, Inc., provided financing for ANP in the US, or is it possible that IMT AG provided financing?
A I would have to look.
Q Okay, and you'd have to look at the records of both IMT, Inc., and IMT AG; is that right?
A That's correct.
Q And do you have access to the records of IMT, Inc., and IMT AG?
A I'm a director of the company.
Q So that means, yes, you have access to those records?
A Yes.
MR. WELLS: Ms. Davis, we may -- this is probably a

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premature objection, but we may have some problem or Mr. Pierce may have some problem actually retrieving records from IMT AG if it is one of these foreign domiciled companies, which I believe it is.
MS. DAVIS: Well, I guess it depends on where it --
BY MS. DAVIS:
Q Where is IMT AG domiciled? Did we establish that already?
A Switzerland.
Q I'm sorry?
A Switzerland.
Q Okay, and at what point -- we need a date certain in which you are going to get back to us on these issues about these foreign domiciled companies.
MR. WOODALL: Can't give it to you at this movement. There's been a number of questions that have been asked. If we can get the questions specified in writing, either by the transcript or by you providing them in writing, then we can answer them.
The first step I think is for us to find out exactly what questions you want us to pursue, and then we can give you an answer as to when we can get back to you. I understand your concern that it be sooner rather than later, but as I'm sitting here in the office today, I can't give you dates.

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MS. DAVIS: Well, the problem is we've asked a number of questions that really all relate to the same thing, which is whether or not Mr. Pierce has access to information of records about IMT AG, Newport Capital, and several things he was asked about yesterday. Those are all very basic questions.

MR. WOODALL: My concern is -- and without knowing completely the answer, my concern is that the answer may depend on the precise form -- or sorry, the precise nature of the information you're seeking.

So, for example, it is -- and I'm speaking hypothetically here -- it is possible that the identity of directors and officers of those companies may not be confidential whereas shareholder lists may be.

It may be that shareholder lists are not confidential, but transactions that the entities have engaged in may be. So that's why I say -- I don't believe that the answer is going to be so broad and simple as simply does he have access to records. And so I think Mr. Buchholz wants to interject here.

MR. BUCHHOLZ: Well, I don't want to interrupt you. Go ahead and finish.

MR. WOODALL: No, go ahead.

MR. BUCHHOLZ: But I think it's pretty obvious from the questioning and -- we are looking for the directors and

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officers and owners of these entities, including an entity that there's now been a 13D -- actually several entities that there's been a 13D filed for that does not disclose its beneficial owners.

So that should be very clear, and whether or not -- and we also are asking for financial records, but -- you know, we feel like the request basically puts it into Mr. Pierce's court in terms of -- the testimony definitely sets a basis for us, for the information being connected to US publicly-traded companies that Mr. Pierce was involved in trading the securities of and involved in providing services to.

So that's why we feel like it really is up to him to get back to us with information, and there either needs to be a direction from his counsel that he cannot provide the information, but we have made the request, and we just can't wait indefinitely. We have to pursue whatever means we need to to get the information.

MR. WOODALL: There seems to be three separate issues on the table here, and let's try and keep them separate. The first two issues are issues of process, and the third issue is one of substance.

The issue of process is are you going to tell us or give us a transcript so that we can determine the specific questions you are asking? It's no help to you, and it's no

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help to us to simply insist that we answer "the request" because there isn't a single request. There have been a number of requests about a number of companies involving a number of different types of information.

So the first question of process is are you going to ask -- give us the questions in writing or a copy of the relevant portions of the transcript so that I can be sure that we are asking -- we are answering the questions you have asked? I don't understand know why that's an issue. If you want us to answer the questions, make sure that we know -- make sure that we know the questions you want us to ask. There's no issue of confidentiality obviously because you have already asked the question.

MS. DAVIS: Well, Mr. --

MR. WOODALL: Can I just finish my --

MS. DAVIS: Sure.

MR. WOODALL: -- identifying the issues so that we can make sure that we are approaching this matter in a systematic way? Once we have the questions that we know that you wish to pursue -- and again, I don't understand why you're not prepared to give it to us, but you'll have an opportunity to address that in a moment.

The second question then is a matter of -- and also a matter of process which is when can we get back to you with the answer, and once we have the questions, we will be able

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to focus our attentions and hopefully get to an answer soon.

I'm not suggesting -- I understand very well that you have a desire to resolve this quickly. Obviously, to me, the way to resolve it quickly is to allow us to focus on what the issues are, which is to tell us what the questions are.

The third question then is one of substance, and that is the question that we will have to address, which is the advice that we give to Mr. Pierce about his ability to answer them.

So if your overall concern is to move on quickly with this, then it seems to me the obvious first step is for you to clarify precisely what it is that you want to answer. I have been taking general notes, and I understand generally the issues, generally the entities, but it's not going to help us to be able to get back to you unless we know precisely what is it you want.

And I don't know why getting a portion of the transcript, if you don't want to repeat the questions because of the effort that may take, or you write out the questions, is a big deal.

MS. DAVIS: Okay. Well, let me start with why we don't write out the questions. We don't do that for anyone because that's not our job at the Securities and Exchange Commission, sir. What we do is get information from witnesses at the time that we ask the questions. We don't

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provide anyone with questions in advance before we ask them because we want the witness's best recollection.

Now, if you have an objection, you'd like to instruct your client not to answer, then that's the process, and we understand that's a practical matter. We do want to get the information. And all I'm telling you is we can't sit down and write out a list of questions for your client to then decide whether or not he wants to answer.

And I think at this point what would be the most probably useful is to the extent that we ask a question, and you have the objection on the grounds of confidentiality, which by the way is not an objection that is useful for our process, but in any event, if you have an objection, then for us it would be useful for you to make the objections, then instruct your client not to answer, and get back to us on the information. But at this point in the process, we can't and don't provide questions in advance for witnesses to answer.

When Mr. Buchholz said that we provided the general parameters, I think it's pretty clear there are companies that Mr. Pierce has testified to over the course of a day now, that were involved in providing services to a US publicly-traded company, and have traded shares in that publicly-traded company. And we would like information regarding those entities. And if your objection is you cannot provide that information, then we would like that to

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be clear on the record so that we can then move forward from our own end as to what we do with that.

But at this point, we cannot provide questions in advance. Of course you can make a request for a copy of the transcript, we do do that, and we are not denying you the right to get a copy of the transcript. You can obviously do that, but we don't want you to misunderstand that only the specific questions that we have asked that are identified in the transcript are the ones that you are going to go and find the answer to.

What we generally want to know is can Mr. Pierce provide information about the identities of, the shareholders of, the directors of the various companies that we have talked about that were involved either directly or indirectly with Lexington Resources. That's the broad question.

Now, we can't sit down and write out every question because of course with any question, there are going to be follow-up questions depending on what the answer is, and that's why we don't provide questions in advance.

MR. WOODALL: Perhaps we are talking at cross purposes here. I wasn't expecting that you would provide in writing every question and every follow-up question that you want.

MS. DAVIS: Okay.

MR. WOODALL: What I was hoping that we would be

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able to get are the questions you've asked at, least to this point, because that allows us to focus our -- our assessment and analysis of his obligations. I would expect that our answer to the question of whether he's at liberty to provide the information you've asked on the questions you've asked so far, will also have apply to follow-up questions.

It is always possible, but probably not likely, that follow-up questions would engage a different set of analysis, but all I'm asking is that we have in writing, either by the transcript or by you writing them out, I don't really care, the questions you've asked to this point. And, you know, saying that it's not how you do the -- how you do things, I can appreciate that concern going forward because I understand the process.

But concerning the questions you've asked already, that's water under the bridge. You've asked the questions. The -- your legitimate concerns about being able to ask questions without telegraphing where you are going have already been met by the fact that you've asked the questions.

So to summarize then, we are not -- I'm not taking the position -- and I certainly agree with you that you don't have to write out every question and every follow-up question you might want to ask. All I'm asking for is the questions you have asked to this point.

MR. WELLS: And this is Chris Wells. I just want

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to make -- I'm identifying myself for the record and also for the benefit of counsel who is only present by telephone -- I think maybe our objection has been mischaracterized as one of confidentiality. I do not believe that is the basis of the objection.

The basis of the objection is that we, that is Mr. Pierce's Canadian counsel and we at Lane Powell in the US, do not want Mr. Pierce to violate the law of another country in the course of his attempts to assist the SEC in gathering information in this investigation.

So, for example, Mr. Pierce does a lot of business in Europe, as he has testified in this proceeding, and he does not want to risk being held civilly liable to various Swiss or Liechtenstein or foreign jurisdictions, and he doesn't want to risk criminal liability in those jurisdictions, as well.

So that requires some caution before giving him advice as to how to proceed and his Canadian counsel are going to be addressing that problem as soon as possible. Thanks.

MS. DAVIS: Okay. And I think the point that we are trying to make is, with respect to companies, I understand the issue about potential liability in another country when disclosing information that may or may not be confidential.

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Our concern is with respect to a US publicly-traded company, if there are entities on whose behalf Mr. Pierce is acting on, and we are seeking that information, then I'm not sure how that puts him in some kind of jeopardy to the extent that that is connected to business in the publicly-traded company.

But I understand your objection and, you know, our concern was mainly that not only that Mr. -- that Mr. Pierce's Canadian counsel would like time to I guess research the issue, but we need a time line. And we can do it from one week from the time you get the transcript. I mean the issues themselves are out there, and I think it's pretty clear what the issues are in terms of confidentiality. So that's why we don't understand why there can't be some kind of parameters on the time line.

MR. WOODALL: Well, I'm not saying we won't give you that soon. I mean it seems to me -- well, let me just go back and explain why we can't give you the parameters now. I am not a Liechtenstein lawyer or a Swiss lawyer. So what I'm going to have to do with Lane Powell is -- I would begin by analyzing the questions, not much differently than what you just did a moment ago.

There may be some questions that irrespective of the law of foreign jurisdiction, you're entitled to ask him. So we don't know to go to Switzerland or Liechtenstein to get

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the answer to that question, and the point that you made a moment ago about US traded companies may very well apply. I'm not disagreeing with that as a possible overriding principle.

But where there are questions that you've asked that do engage the confidentiality laws of a foreign jurisdiction, we are going to have to consult lawyers in those areas. My limited experience in the past has led me to understand that they will want to know what the question is and what the purpose of the -- is for the information. They may have derivative use immunity laws. They may have laws that allow information to be used for some purposes but not for others. I just don't know.

And so the difficulty I have today in giving you a time line is I haven't -- I don't have the advice yet from the lawyers in the foreign jurisdictions. This is the summer. They probably do the same thing we do, which is take vacation. So you can't phone somebody up and say I want an answer in 48 hours.

So if it was me researching Canadian law, I could commit to a time, but it's not me researching Canadian law. It's me engaging foreign counsel and asking opinions from them, and if you are concerned about getting the process moving quickly, the fastest way to get the process moving quickly is to give us something in writing, again, the

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transcript or from you, that we can take to the foreign counsel and say this is the specific question that we want answered. And again, I'm not resigning from the fact that that doesn't mean you can't ask follow-up questions and get an opinion.

So if you want the matter to move quickly, give us what you want in writing. Then we can approach the foreign counsel, and, you know, you'll just have to, at the moment, take it on good faith. And I understand your desire to have the matter move quickly, and we will take it forward quickly, but I can't give you a date.

MS. DAVIS: Okay. With respect to entities that are identified in public filings with the SEC, I don't understand why that's an issue with Mr. Pierce discussing or testifying about that information.

MR. WOODALL: Well, the question you've asked -- the concept you have asked is, at the moment is so broad, I'm not quite sure what you mean. You say "entities that are traded."

If you've got, for example, a company that owns or has a beneficial interest in securities of a US company traded in the US, perhaps the identity of the company that is doing the trading is a fairly obvious point. But when you get into questions about the activities of a company that owns that company or some other corporate organization or

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trust, for example, that owns it, now you are getting into some distance from the obvious point.

It may very well be that we are told that there are no issues, but the farther you get away from the precise entity that owns the shares and is directing their trading, the more difficult the question is to answer and the less obvious the answer is.

MS. DAVIS: And I think the reason we got into this area was that, if I'm not mistaken, Mr. Buchholz was asking about 13D filings.

MR. WOODALL: Well, we have -- we had a lot of questions yesterday about a lot of things, and that's why -- you understand your process better than I, and I would never suggest to you how to do your job, but all I'm saying is if we can get in writing what we want -- because you have already asked the questions, it's not like you're going to be -- you're going to be losing the legitimate element of surprise in an investigation. I don't doubt that that's an issue.

If we get them in writing, then we can move forward, and I'm telling you that I will look into the issue as quickly as I can. This investigation is taking some time, and it will take some more time, and we won't stand in the way of it proceeding quickly. But I can't give you a deadline today, and I can't answer the questions today.

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MS. DAVIS: Okay. Steve, correct me if I'm wrong, did we -- I thought we got into this area because we were asking about some of the entities in the 13D filing?

MR. BUCHHOLZ: Yeah. Well, it's come up in that connection, and it also, I think, may have been IMT AG that directly led to this, but I mean I can't -- I can ask a very specific question, which is -- and I may have asked it yesterday, but obviously Newport Capital has just filed a 13D disclosing transactions in Lexington, a US public company, who -- which entities, which individuals have ownership interests in Newport is the basic question, and I think we are entitled to that information. I don't actually remember at this point whether you instructed him not to answer or objected to that on these grounds.

MR. WELLS: I believe we did as to Newport, again subject to an inquiry about the law of foreign jurisdiction which Newport is domiciled and incorporated, founded, whatever it is. I think it's Belize and Switzerland.

MR. BUCHHOLZ: And I think the same thing happened with regard to Parc Place and Sparten and Pacific Rim, which are all identified as entities in the 13D that Mr. Pierce directs or has control over, is that right --

MR. WELLS: Well, hang on just a second.

MR. BUCHHOLZ: -- for the purpose of the shares of Lexington, and you are not providing that information today,

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is that right, Mr. Pierce?

THE WITNESS: That's correct, although I believe we did provide some information yesterday.

MR. WELLS: The ownership of Newport was disclosed in a public document, and we went as far as that, but we couldn't go beyond who owns the Emerald trusts or who's the beneficiary.

THE WITNESS: And we also said that it wasn't a US resident.

MR. BUCHHOLZ: Right.

THE WITNESS: I think that's as far as we got with it.

MR. WELLS: Yes. Very good.

MR. BUCHHOLZ: And I think just so that it's clear at this point, I want to -- I think there's other things that -- well, I just wanted to be clear that we have -- that there's a subpoena outstanding for this information, and we believe that some of this information, if not all of this information, is required to be provided. And that, you know, after we adjourn today, it's -- the information that we've requested and asked about has not yet been provided, and it's an open subpoena, the testimony will not have been completed, obviously.

And so I think the point about the time is that we understand right now you are not willing to give us a

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specific date, but we also are not willing to wait indefinitely to enforce the subpoena. So we obviously want to work with you, and we understand that there is going to be some time needed to get the information, but we just need it to move diligently.

And we will talk to you, I think, after the proceeding today and move forward as quickly as we possibly can. You understand we have to do what we need to do to get the information.

MR. WOODALL: I don't disagree with any of that.

MR. BUCHHOLZ: Okay. Do want to say anything else on that, Tracy?

MS. DAVIS: No.

BY MR. BUCHHOLZ:

Q So let me just cover this as well.

Mr. Pierce, do you know who the beneficial owners are of the Emerald Trust?

A Yes.

Q A "yes" or "no" question.

A Yes.

Q You do?

A Yes.

Q Okay. Are you willing to -- do you know how many there are, how many individuals or entities?

MR. WOODALL: I think at the moment -- I mean we're

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not going to be advancing your inquiry much today by knowing the number.

MR. BUCHHOLZ: I'm not asking the number. I asked him whether he knows the number.

MR. WOODALL: I'm sorry. I apologize.

THE WITNESS: Yes.

BY MR. BUCHHOLZ:

Q And if I were to go through all of these entities that are domiciled in foreign jurisdictions where you've indicated you are not willing to provide the information, do you know the information?

A Yes.

Q Okay. I just wanted to make that clear because I hadn't asked that question yesterday.

Do you as an individual have an ownership interest that is direct or indirect leading up to any of these entities in foreign jurisdictions?

A I don't understand the question. "Leading up to" confuses me.

Q What I'm trying to understand is whether or not you are taking the position or your counsel is taking the position that Mr. Pierce could be violating foreign laws to disclose his own personal beneficial interest in these companies?

MR. WELLS: No, I don't think that's the position

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we've taken at all.
MR. BUCHHOLZ: So I'm not sure that that question has been clearly asked, and I want to make sure that we do that, whether Mr. Pierce himself has a beneficial interest personally. And when I say "leading up to," I mean maybe through other entities or organizations, but ultimately whether Mr. Pierce himself has a beneficial interest in any of these entities in the foreign jurisdictions, and we can go through each one if we need to.
MR. WELLS: Well, instead of "leading up to," don't you usually use the term "directly" or "indirectly"?
BY MR. BUCHHOLZ:
Q Sure. We can use the term "directly" or "indirectly," as long as it is clear that that means whether it's through any number of companies but ultimately leading to you personally.
A Are we talking about the 13D now, or are we talking about every foreign company that we've discussed?
Q Let's start with Newport.
A Can you ask a full question just so I --
Q Yes, I'd be happy to.
A Okay. Sorry.
Q Do you hold an ownership interest, directly or indirectly, in Newport Capital Corp.?
A No.

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Q Do you hold an ownership interest directly or indirectly in any trust, any other legal entity or organization that ultimately holds an ownership interest in Newport?
A No.
Q Do any of your family members hold any beneficial ownership interests in any entities, trusts, other legal organizations that hold an ownership interest in Newport?
MR. WELLS: Well, now, I think unfortunately, although your intentions are good, we are running into the same problem of disclosing the identities of persons or entities other than Mr. Pierce himself regarding ownership of one of these foreign domiciled countries, and although it may make sense to us that he would have the power to identify a family member, I don't know that it does in some other jurisdiction. Mr. Woodall is shaking his head over here, too.
MR. WOODALL: I don't know whether it does either.
BY MR. BUCHHOLZ:
Q Do any of your family members in Canada or the US --
MR. WELLS: No, that doesn't change --
MR. BUCHHOLZ: Well, we have a US lawyer and a Canada lawyer right here.
MR. WELLS: But wherever the person lives, it may

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violate the laws of Switzerland where Newport Capital has an office if Mr. Pierce identifies an owner who resides in Seattle.
MR. WOODALL: Yeah, and his family members are separate individuals. Their rights are separate, their interests are separate, their privacy interests are separate. It may be at the end of the day that they are legitimate answerable questions, or they may not be.
MR. WELLS: Maybe we can address this at a break and take it up again.
MR. BUCHHOLZ: Okay. Are you instructing Mr. Pierce not to inform the Commission in response to our Commission -- in response to our question whether or not he has family members who have beneficial ownership interests in any entities or legal structures that hold interest in Newport?
MR. WELLS: I'm advising him that he should refrain from providing that answer until he has obtained the advice of the appropriate legal counsel in the appropriate jurisdiction.
BY MR. BUCHHOLZ:
Q Mr. Pierce, do you exercise any control whatsoever through discussions, instructions over family members who hold beneficial ownership interests through any other legal entities in Newport?

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MR. WELLS: Object to the term "control," particularly in the context of family relationships. It's vague and --
MR. BUCHHOLZ: Will you allow him to answer the question?
MR. WELLS: Certainly.
THE WITNESS: I guess I don't even understand the question. So maybe you can do it again.
BY MR. BUCHHOLZ:
Q The family members who may potentially hold beneficial ownership interest in Newport that I asked about before, do you exercise any control over them? And by "control," I mean through instructions of any kind related to Newport?
MR. WELLS: Where -- I think the question is regardless of Newport. I think the fairer question is do you exercise any control in -- within some sort of meaning of federal securities laws that I'm not sure this witness is capable of answering as a layperson over his wife and his daughter. Those are his family members.
MR. BUCHHOLZ: Well, I appreciate that. I wasn't -- I didn't know which family members we were talking about because he didn't answer that question.
MR. WELLS: I'm sorry. I thought he testified earlier that he had a current wife and one daughter.

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MR. BUCHHOLZ: Well, I don't know whether he has parents or siblings or anyone else.

BY MR. BUCHHOLZ:

Q But regardless, and I added the "regarding Newport" just to be more specific. I didn't want to it be -- and I'm not asking whether or not you tell your daughter to go buy groceries or something thing like that. This is specifically regarding these companies we have been talking about.

And what I'm trying to figure out is whether or not the ownership interest is held in a name or held by someone, but that you are involved with the activities in connection with these entities. That's what I want to understand.

So with regard to Newport --

A I'm obviously involved in activities. I mean I'm a director and officer in the company. So I'm getting very confused here as to -- if you understand what I'm saying.

Q Well, but let me just get back to the specific question. And if the answer is "no" or "yes," or if there's an objection and instruction not to answer, let it be the case.

But with regard to Newport, do you give instructions of any kind to family members regarding Newport who have an ownership interest of any kind in Newport?

MR. WELLS: Well, now I'm going to have to give him the same advice as to that particular question because the

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question necessarily requires him to answer -- to identify a family member if a family member is an owner.

MR. BUCHHOLZ: Regardless of whether the family member is an owner --

MR. WELLS: Well, it's a different question.

MR. WOODALL: If no family member is an owner, then the question is objectionable because it presupposes a family member is an owner. If the family member is not an owner, then the question makes no sense. So the only way the question can be answered is by him implicitly identifying whether a family member is directly or indirectly one of the -- involved in one of the foreign entities.

MR. WELLS: In other words, it's an extraordinarily good trick question. Again, if you want to move along, we could confer briefly during a break and maybe take this up again, if you would like.

BY MR. BUCHHOLZ:

Q Mr. Pierce, is your wife involved in the operations of Newport?

A No.

BY MS. DAVIS:

Q Mr. Pierce, I'm looking at Exhibit 64, 13D filing, Page 437.

A Hang on. I've got to find it. I'm on Page 37.

Q 437?

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A Yes.

Q Okay. There's a -- at the top it says little iii, "Shares held by Dana Pierce," ("Mrs. Pierce"), the wife of Mr. Pierce"; do you see that?

A Yes, I do.

Q And I believe reading the chart, it indicates that on January 23, 2006, and April 17, 2006, and May 26, 2006, Mrs. Pierce was the owner of 45,000 shares of Lexington Resources stock on each of those dates; do you see that?

A Yes.

Q Is that how you read that, as well?

A Yes.

Q All right. How did your wife become the owner of those 45,000 shares on each of those dates of Lexington Resources stock?

A I believe that she purchased stock through her brokerage account. And my recollection is that she purchased it before the stock split, and that's how she ended up with 45,000 shares.

Q And did you instruct your wife at all with respect to the purchase of those shares?

A She deals independently with her broker.

Q Okay, but did you have -- okay. Did you have any discussions with her wife about the purchase of those shares of Lexington Resources stock?

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MR. WELLS: Is that privileged?

MS. DAVIS: Whether he answers the question is not privileged. The time --

MR. WELLS: Sorry. I'm asking the Canadian lawyer sitting next to me. I'm not concerned about the US.

THE WITNESS: I may have suggested to her to purchase stock.

MS. DAVIS: Okay. Thank you.

BY MR. BUCHHOLZ:

Q Who is her broker?

A Canacord Capital. C-A-N-C-A-O-R-R-D, Capital, I believe. I might have spelled it wrong.

MR. WOODALL: I think it's C-A-N-A-C-O-R-D.

BY MR. BUCHHOLZ:

Q Does she work with a particular broker there?

A Yes.

Q Do you know his name?

A Michael Cassady.

Q How do you spell Cassady?

A C-A-S-S-A-D-Y.

Q Regarding the other foreign entities that we have talked about, Sparton, Parc Place, Pacific Rim, IMT AG, are you willing to tell us whether or not a family member of yours holds a beneficial ownership interest in those entities?

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MR. WELLS: I'm going to give Mr. Pierce the same advice we've been giving the questions along those very same lines, that he should obtain an opinion of legal counsel from the appropriate jurisdiction before answering.

BY MR. BUCHHOLZ:

Q I'm handing you a document, Mr. Pierce, that was previously marked as Exhibit 61. I'd like to ask you a question about one specific page of this. For the record, the pages are labeled TRON 4651 through 4670. It's a transfer agent file from X-Clearing related to issuance of 80,000 shares to you, but the page I want to ask about is actually a corporate resolution page related to Newport Capital, and it's Page TRON 4654.

Do you see that page?

A Not yet. I see the page.

Q Is that your signature where it states "Brent Pierce, president/treasurer"?

A Appears to be.

Q Do you recognize the signature at the bottom of the page for Cockburn Secretaries Limited?

A Not sure whose signature that is.

Q Is Cockburn Secretaries affiliated with Cockburn Directors that we spoke about yesterday?

A I wouldn't know to provide the answer to that.

Q Is it correct that as of 19th of March, 2004, as it

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states here; you were the only officer of Newport Capital Corp.?

A I don't remember. Where does it say that? I don't see that. I'm sorry.

Q Immediately above the list of officers in which you are the only one listed, it says: "I further certify that the authority hereby conferred is not inconsistent with the charter of any bylaws or special resolutions of the company, and that the following is a true and correct list of the officers of the company as of the present date."

A I believe the secretary is an officer. Is that not correct? I don't know.

Q Okay. So --

A So I'm a confused a little bit myself, so.

Q There's no other name on the list, but you mean that the signature for Cockburn Secretaries says "secretary"?

A Yes.

Q Okay. So as of this date, was it your understanding that you were the president and treasurer, and that Cockburn Secretaries was the secretary, and those were the only officers of Newport Capital?

A And what is the date of this?

Q It's signed March 19, 2004.

A Other than I think I previously testified that maybe Stephanie Ebert was an assistant secretary. So -- and

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I don't remember the time frame of that, so, but I did previously testify to that.

Q Okay. Other than that, you believe that to be a true statement --

A Yes.

Q -- that those are the officers?

A Uh-huh.

Q And do you see at the top where it says "Newport Capital Corp., a company organized and existing under and by virtue of the laws of the Turks and Caicos Islands"?

A I see that.

Q Didn't you say that there was no Newport Capital entity in the Turks and Caicos Islands in your testimony?

A I believe that's a typo because it should say Belize. So it's wrong.

Q Okay. Have you seen this corporate resolution before? I mean you signed it.

A Obviously I did. I mean I signed it, and it's -- notarized here, so.

Q Why didn't you -- did you just not notice --

A I just didn't notice.

Q That it said Turks and Caicos?

A You just pointed it out to me, and I noticed it. I signed a few of them, so.

Q Okay. If you turn to the third page of this

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exhibit, Exhibit 61, the page is labeled TRON 4653. It looks like this is a transfer from Newport which received the shares from you, now Newport passing the shares on to Pacific Rim.

Is that consistent with your recollection?

A I don't have a recollection, but that's what the transfer records say.

Q Do you have any reason to believe they are not accurate?

A No.

Q Okay. Mr. Pierce, is the 80,000 shares that were transferred on or about June 25, 2004, from Newport to Pacific Rim disclosed in your 13D filing? Feel free to refer to Exhibit 64.

A I would have to go look at my other records to really determine that.

Q Well, in the chart on Page BP 437 of Exhibit 64, which was the 13D filing --

A Sure.

Q -- Pacific Rim is never shown as having more than 4,000 shares at any point.

A Yeah, but there's gaps in there, so, dates, so --

Q So --

A There could have been a private transaction. I just can't tell you without going and looking at the records.

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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,

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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?

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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

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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.

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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:

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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.

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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.
Q You never gave instructions to either anyone at vFinance or Canacord for trading in those accounts?
A I clarified that earlier. I believe the only person that might have done that was Mr. Kellner.
Q I'll try to wrap up here pretty quickly.

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I'm handing you a document that's been labeled as Exhibit 21 previously. It's a one-page document labeled VHN 1062; do you recognize this document?
A I don't know. I don't know where it came from, so.
Q Are these individuals who are all connected to a Hypo or Mast account at vFinance to your understanding?
A Other than myself, and I don't know who Scott Marshal is, and I don't know who Zak Norwal is. I have no idea.
Q So other than those people --
A And I'm not associated with the Hypo Bank.
Q Okay.
A If that's what you were asking.
MR. WELLS: Yeah, Counsel, I think there is a potential problem with the question in that it's not clear whether you're asking Mr. Pierce to read from the document which is entitled "Hypo Phone List," or whether you are asking him to use his own memory. And it's easy to confuse the two when the document is sitting in front of you.
MR. BUCHHOLZ: Okay. BY MR. BUCHHOLZ:
Q So you don't recognize the phone list or the document in this format?
A No, no.
Q Right. Then you said earlier that Mr. Kellner may be authorized on the Hypo or Mast account with vFinance?

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

EXHIBIT G

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

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 FURTHER SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST 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 Motion for Summary Disposition Against Respondent Pierce.

2. Attached hereto as Exhibit A is a true and correct copy of the Commission's Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 ("OIP") in the prior proceeding, dated July 31, 2008.

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

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

5. Attached hereto as Exhibit D is a true and correct copy of an excerpt from the transcript of Pierce's 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.

6. Attached hereto as Exhibit E is a true and correct copy of the Division of Enforcement's Motion for the Admission of New Evidence in the prior proceeding, filed March 18, 2009.

7. Attached hereto as Exhibit F is a true and correct copy of my declaration in support of the Division of Enforcement's Motion for the Admission of New Evidence in the prior proceeding, filed March 18, 2009. As further described in Exhibit F, Pierce did not produce any account records or other documents of Newport Capital Corp. ("Newport") or Jenirob Company Ltd. ("Jenirob") (or any other offshore companies under his control) in response to the Division's document request and investigatory subpoena during the Lexington investigation. As a result, the Division first requested assistance from the securities regulator in Liechtenstein in obtaining documents relating to sales of Lexington stock through Hypo Alpe-Adria Bank of Liechtenstein ("Hypo Bank") in late 2006, but was informed at that time that the regulator could not obtain the documents for the Division. Because the Division did not have evidence relating to Pierce's beneficial ownership and 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.

8. Attached hereto as Exhibit G 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.

9. Attached hereto as Exhibit H 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 H, 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.

10. Attached hereto as Exhibit I is a true and correct copy of the Order granting the Division of Enforcement's Motion for the Admission of New Evidence in the prior proceeding, dated April 7, 2009.

11. Attached hereto as Exhibit J is a true and correct copy of the Initial Decision in the prior proceeding, dated June 5, 2009.

12. 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.

13. Attached hereto as Exhibit K is a true and correct copy of the Commission's Notice that Initial Decision Has Become Final in the prior proceeding, dated July 8, 2009.

14. 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.

15. Attached hereto as Exhibit L is a true and correct copy of the Commission's Application for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce, filed in the United States District Court for the Northern District of California on June 8, 2010. The Commission's Application was granted on September 2, 2010 and Pierce completed payment of the disgorgement and interest ordered in the prior proceeding on January 31, 2011.

16. Attached hereto as Exhibit M is a true and correct copy of the Commission's Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 Against Respondents Pierce, Newport Capital Corp. and Jenirob Company Ltd., dated June 8, 2010.

17. Attached hereto as Exhibit N is a true and correct copy of Pierce's Ex Parte Application for a Temporary Restraining Order, Order to Show Cause, and Stay, filed in the United States District Court for the Northern District of California on July 9, 2010.

18. Attached hereto as Exhibit O is a true and correct copy of Pierce's Memorandum in Support of Motion for TRO, Preliminary Injunction and Stay, filed in Pierce's district court action on July 9, 2010.

19. Attached hereto as Exhibit P is a true and correct copy of the Declaration of Christopher B. Wells in Support of Motion for Preliminary Injunction, filed in Pierce's district court action on July 9, 2010.

20. Attached hereto as Exhibit Q is a true and correct copy of the Declaration of G. Brent Pierce filed in Pierce's district court action on July 9, 2010.

21. Attached hereto as Exhibit R is a true and correct copy of Pierce's Complaint for Declaratory and Injunctive Relief, filed in Pierce's district court action on July 9, 2010.

22. Attached hereto as Exhibit S is a true and correct copy of the docket in case number 10-17218 of the United States Court of Appeals for the Ninth Circuit, accessed via the PACER electronic filing system on March 18, 2011, showing that Pierce appealed the district court's dismissal of his action on October 1, 2010 and that the appeal remains pending.

23. Attached hereto as Exhibit T is a true and correct copy of the Order denying Pierce's Motion for a Postponement or Stay of the Enforcement Proceeding in the present proceeding, dated March 11, 2011.

24. Attached hereto as Exhibit U is a true and correct copy of Pierce's Answer in the present proceeding, filed July 9, 2010.

25. Attached hereto as Exhibit V is a true and correct copy of documents relating to Newport's Hypo Bank account, identifying Pierce as the beneficial owner at page SEC 159008. Exhibit V was admitted into evidence as Division's Exhibit 80 in the prior proceeding.

26. Attached hereto as Exhibit W is a true and correct copy of documents relating to Jenirob's Hypo Bank account, identifying Pierce as the beneficial owner at page SEC 158546. Exhibit W was admitted into evidence as Division's Exhibit 84 in the prior proceeding.

27. 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 March 21, 2011, in San Francisco, California.

Steven D. Buchholz

EXHIBIT H

EXHIBIT A TO WELLS DECL.

LNR LORENZ NESENSOHN KABANSER, RECHTSANWALTE

LANDSTRASSE 33 POSTFACH 207 FL 9490 VADUZ

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