

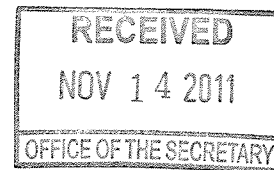
**UNITED STATES OF AMERICA**  
**before the**  
**SECURITIES AND EXCHANGE COMMISSION**

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

**In the Matter of**

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

**Respondents.**



**DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT**  
**GORDON BRENT PIERCE'S OPENING BRIEF ON HIS**  
**PETITION FOR REVIEW OF INITIAL DECISION**

MARC J. FAGEL  
MICHAEL S. DICKE  
JOHN S. YUN  
JUDITH L. ANDERSON  
STEVEN D. BUCHHOLZ  
44 Montgomery Street, Suite 2600  
San Francisco, CA 94104  
Tel: (415) 705-2500  
Fax: (415) 705-2501  
Attorneys for  
DIVISION OF ENFORCEMENT

**TABLE OF CONTENTS**

**I. INTRODUCTION AND SUMMARY OF ARGUMENT .....1**

**II. THE PERTINENT FACTUAL BACKGROUND.....3**

**A. The Division’s Investigation Of Trading In Lexington Resources Stock.....3**

**B. The First Proceeding Against Pierce .....6**

**C. The Present Proceeding And The Initial Decision Against Pierce.....9**

**III. LEGAL ARGUMENT.....10**

**A. The Initial Decision Properly Found That Res Judicata Did Not Apply Because Pierce Wrongfully Concealed Evidence.....10**

**1. The Legal Standard.....10**

**2. The Initial Decision Properly Found That Pierce Wrongfully Concealed Evidence.....11**

**a. Ample Evidence Supports Upholding Application of the Concealment Exception To Bar Res Judicata Here.....11**

**b. The Division Acted Diligently To Obtain Evidence Concerning Sales Of Lexington Stock During Its Investigation.....13**

**3. The Fact That Evidence Concerning the Newport And Jenirob Sales Was Admitted In The First Proceeding Does Not Affect Application Of The Concealment Exception To Res Judicata.....17**

**4. Because The Claims In Each Proceeding Are Different, Res Judicata Does Not Apply And Pierce’s Section 5 Liability May Be Upheld Without Reaching The Concealment Exception .....20**

**B. Pierce Had No Protected Due Process Interest That Would Preclude The Division’s Present Section 5 Claim Against Him .....21**

**C. The Initial Decision Properly Rejected Pierce’s Equitable Estoppel Defense .....24**

**D. The Initial Decision Properly Rejected Pierce’s Judicial Estoppel Defense...27**  
**E. The Initial Decision Properly Rejected Pierce’s Waiver Defense .....27**  
**F. Disgorgement Was Properly Ordered Against Pierce .....28**  
**IV. CONCLUSION.....30**

## TABLE OF AUTHORITIES

### Cases

<i>Browning v. Levy</i> , 283 F.3d 761 (6th Cir. 2002) .....	11
<i>Computer Assocs. Int'l, Inc. v. Altai</i> , 126 F.3d 365 (2nd Cir. 1997) .....	18, 20
<i>Dichter-Mad Family Partnerships, LLP v. U.S.</i> , 707 F. Supp. 2d 1016 (C.D. Cal. 2010).....	15
<i>Dilley v. Alexander</i> , 603 F.2d 914 (D.C. Cir. 1979) .....	22
<i>Doe v. Allied-Signal, Inc.</i> , 985 F.2d 908 (7th Cir. 1993).....	10
<i>FDIC v. Hulsey</i> , 22 F.3d 1472 (10th Cir. 1994) .....	25
<i>Flaim v. Medical Coll. of Ohio</i> , 418 F.3d 629 (6th Cir. 2005).....	22
<i>Greenberg v. Board of Governors of the Fed. Reserve Sys.</i> , 968 F.2d 164 (2d Cir. 1992) .....	20
<i>Guerro v. Katzen</i> , 774 F.2d 506 (D.C. Cir. 1985) .....	19
<i>Hamilton v. Atlas Turner, Inc.</i> , 197 F.3d 58 (2d Cir. 1999) .....	28
<i>Harnett v. Billman</i> , 800 F.2d 1308 (4th Cir. 1986).....	10
<i>Harris v. Jacobs</i> , 621 F.2d 341 (9th Cir. 1980).....	20
<i>Hately v. SEC</i> , 8 F.3d 653 (9th Cir. 1993).....	29
<i>Heckler v. Community Health Serv. of Crawford County, Inc.</i> , 467 U.S. 51 (1984).....	24, 25
<i>In re Barlow</i> , Exchange Act Release No. 42109, 199 SEC LEXIS 2357 (Nov. 5, 1999) .....	23
<i>Konn v. Laird</i> , 460 F.2d 1318 (7th Cir. 1972) .....	22
<i>Magnus Elec., Inc. v. La Republica Argentina</i> , 830 F.2d 1396 (7th Cir. 1987).....	19
<i>McCarty v. First of Georgia Ins. Co.</i> , 713 F.2d 609 (10th Cir. 1983).....	10
<i>Montgomery v. NLR Co.</i> , 2007 WL 3243838 (D. Vt. Nov. 2, 2007).....	11
<i>Mpoyo v. Litton Electro-Optical Sys.</i> , 430 F.3d 985 (9th Cir. 2005).....	11, 20
<i>Mukherjee v. INS</i> , 793 F.2d 1006 (9th Cir. 1986).....	25
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....	27
<i>Qualcomm, Inc. v. Broadcom Corp.</i> , 548 F.3d 1004 (Fed. Cir. 2008) .....	28

<i>Rissetto v. Plumbers &amp; Steamfitters Local 343</i> , 94 F.3d 597 (9th Cir. 1996) .....	27
<i>Sameena Inc. v. U.S. Air Force</i> , 147 F.3d 1148 (9th Cir. 1998).....	22
<i>SEC v. Cavanagh</i> , 155 F.3d 129 (2d Cir. 1998) .....	16, 19
<i>SEC v. First Jersey Secs.</i> , 101 F.3d 1450 (2d Cir. 1996).....	20
<i>SEC v. First Pacific Bancorp</i> , 142 F.3d 1186 (9th Cir. 1980).....	16, 29, 30
<i>SEC v. O'Brien</i> , 467 U.S. 735 (1984).....	15
<i>SEC v. Platform Wireless Int'l Corp.</i> , 617 F.3d 1072 (9th Cir. 2010) .....	29, 30
<i>Sekaquaptewa v. MacDonald</i> , 575 F.2d 239 (9th Cir. 1978) .....	19
<i>Shamrock Assoc. v. Sloane</i> , 738 F. Supp. 109 (S.D.N.Y. 1990).....	20
<i>Texas Employer's Ins. Assoc. v. Jackson</i> , 862 F.2d 491 (5th Cir. 1988).....	18
<i>Webster v. Doe</i> , 486 U.S. 592 (1988) .....	22

**Statutes**

28 U.S.C. § 1781(a) .....	14
---------------------------	----

**Rules**

Federal Rule of Civil Procedure 53 .....	23
SEC Rule of Practice 161 .....	15
SEC Rule of Practice 200(d).....	23
SEC Rules of Practice 230-234 .....	15
SEC Rule of Practice 360 .....	15
SEC Rule of Practice 400(a).....	24
SEC Rule of Practice 411(c).....	24
SEC Rule of Practice 452 .....	24

**Other Authorities**

*Restatement (Second) Judgments § 24(a)*..... 18

*Restatement (Second) Judgments § 24, comment a*..... 15

*Restatement (Second) Judgments § 26(1)(c)*..... 18, 19

*Restatement (Second) Judgments § 83, comment g*..... 18

*Restatement Second (Judgments) § 26, comments a, j*..... 10

Wright Miller & Cooper §4412 ..... 18

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

In seeking review of the Initial Decision, Respondent Gordon Brent Pierce (“Pierce”), a Vancouver stock promoter, does not dispute his liability for violating Section 5 of the Securities Act of 1933 by his unregistered sales of the stock of Lexington Resources, Inc. (“Lexington”), a company he controlled. He argues instead that the Initial Decision wrongly rejected his affirmative defenses, failed to recognize that his due process rights had allegedly been violated and incorrectly ordered him to disgorge the ill-gotten gains from the illegal stock sales.

Pierce’s argument rests upon the flawed premise that the Division’s present claim against him was previously adjudicated in his favor in an earlier proceeding in 2008. Not only does this premise depend upon a skewed depiction of the procedural record, but Pierce also improperly conflates the distinct Section 5 claims against him, which involve different sets of unregistered stock sales in each proceeding, into one omnibus claim. As explained below, once the faulty premise of his argument is corrected, the grounds he asserts for overturning the Initial Decision’s rulings against him disappear. Pierce’s attempt to overturn the Initial Decision’s order that he disgorge approximately \$7.2 million in ill-gotten gains is similarly unavailing.

The earlier proceeding adjudicated the Division’s allegation that Pierce violated Section 5 by his unregistered sales of Lexington stock through his personal account at a Liechtenstein bank. The Division sought disgorgement from Pierce of approximately \$2.1 million in net proceeds from those sales. More than a month after the hearing, the Division received evidence from a Liechtenstein regulator that Pierce had previously concealed. This evidence showed that Pierce had made unregistered sales of additional Lexington shares through the accounts of Newport Capital Corp. and Jenirob Company Ltd. of which he was the beneficial owner.

The Division immediately filed a motion to admit the new evidence and sought adjudication of a Section 5 claim against Pierce for the concealed unregistered sales and to obtain additional disgorgement of Pierce's ill-gotten gains from those sales. Pierce objected on due process grounds. The Hearing Officer admitted the evidence, but ruled that a claim for the Newport and Jenirob sales was beyond the scope of the proceeding. In the Initial Decision, the Hearing Officer analyzed Pierce's Section 5 liability only for the sales from his personal account, and did not analyze Pierce's liability for the Newport and Jenirob sales. She held Pierce liable for violating Section 5 through his sales from his personal account and ordered him to disgorge approximately \$2.1 million in ill-gotten gains and to cease and desist from further violations.

Because the Division was barred by the Hearing Officer's procedural ruling from litigating Pierce's liability for his violation of Section 5 through the unregistered Newport and Jenirob sales, Pierce's liability for those sales was not adjudicated on the merits in the earlier proceeding. The Division therefore pursued this claim in the present proceeding and sought a cease and desist order and disgorgement of Pierce's ill-gotten gains from the Newport and Jenirob sales. Pierce admitted the violation, but raised a number of affirmative defenses, including the res judicata, equitable and judicial estoppel, and waiver defenses at issue on this appeal. The Initial Decision rejected the res judicata and other affirmative defenses, but found that res judicata would have applied absent Pierce's concealment of evidence, and therefore. Pierce was held liable for violating Section 5 by his sales through the Newport and Jenirob accounts and was ordered to disgorge approximately \$7.2 million in ill-gotten gains, plus prejudgment interest, and to cease and desist from further violations.

As discussed below, all of Pierce's arguments on appeal are without merit. There was ample evidence in the record from which the Initial Decision properly applied the concealment



exception to res judicata, correctly finding that Pierce's concealment had prevented the Division from asserting its present Section 5 claim for Pierce's sales through the Newport and Jenirob accounts in the first proceeding. Pierce's due process argument fails, as it is a thinly disguised attempt to bootstrap his res judicata defense into a Constitutional violation and, in any event, Pierce was accorded notice and a full opportunity to be heard on the claim in the present proceeding. The Initial Decision also correctly found that Pierce had failed to establish the elements of his equitable and judicial estoppel and waiver defenses. Finally, the Initial Decision properly ordered Pierce, the admitted beneficial owner of the assets in the Newport and Jenirob accounts, to disgorge the ill-gotten gains from his illegal sales stock through these accounts.

## **II. THE PERTINENT FACTUAL BACKGROUND**

The Division relies primarily on the factual findings in the Initial Decision, which are summarized below and which Pierce has not contested. *See* ID at 3-9. The Division additionally relies upon certain other documents in the record below, including the Initial Decision in the First Proceeding, which Pierce did not appeal.<sup>1</sup>

### **A. The Division's Investigation Of Trading In Lexington Resources Stock**

The Division initiated a formal investigation into trading in Lexington stock on May 4, 2006. ID at 7; Wells Decl. Ex. 1. The areas for investigation included the possible violation of Sections 5(a) and 5(c) of the Securities Act by persons or entities who made unregistered sales of

---

<sup>1</sup> In support of this brief, the Division relies on evidence specified below that was submitted in exhibits to the Declaration of Christopher Wells In Support Of Respondent Pierce's related Motion For Summary Disposition ("Wells Decl."), as well as on the declarations of Steven Buchholz in further support of the Division of Enforcement's motion for summary disposition against Respondent Pierce ("Buchholz Decl. II"), the Division's opposition to Pierce's motion for summary disposition ("Buchholz Decl. III"); and the Division's Post-Argument Brief ("Buchholz Decl. IV"); and on the Declaration of Jeffrey Lytle in support of the Division's default judgment motion against Newport and Jenirob and motion for summary disposition against Pierce.

Lexington stock without a valid exemption. Wells Decl. Ex. 1 at 1.

On May 17, 2006, the Division issued an investigatory subpoena to Pierce requiring production of specific categories of documents pertinent to this investigation. Buchholz Decl. III Ex. B. On July 21, 2006, Pierce's counsel submitted a written response to the investigatory subpoena on Pierce's behalf. *See* Buchholz Decl. IV Ex. A. Categories 3, 4, 9 and 20 requested, respectively, that Pierce produce statements from securities brokerage accounts in his name or in which he had a beneficial interest or exercised discretionary control, or in whose profits and/or losses he shared; communications concerning Lexington; and documents reflecting or relating to transactions in Lexington stock. *Id.* Ex. A.

Pierce objected to Nos. 3 and 4, on grounds including personal privacy "as well as the privacy of persons involved in his financial transactions *who have had nothing to do with Lexington*" (emphasis added); and that he allegedly was not authorized to produce brokerage statements for certain unnamed entities. *See id.* Ex. A. With regard to the requests specific to Lexington communications and stock sales, Pierce did not raise any objections, but claimed to be producing all responsive records in his possession, custody or control. As to No. 20, Pierce stated that he "is producing his responsive records (Schedule 13D report) of trades in Lexington stock." *Id.* With the exception of this Schedule 13D, which he filed on July 25, 2006 on behalf of himself, Newport Capital, and certain other entities (also produced in response to No. 4), the only documents Pierce produced in response to the subpoena relating to his trading of Lexington stock concerned trading in his personal account. *See id.* ¶ 3.

Pierce never produced any records reflecting his trading of Lexington stock through the Newport and Jenirob accounts at the Liechtenstein bank or revealing that he was the beneficial owner of those accounts. *See id.* The Schedule 13D that Pierce told the Division in 2006

included all of his trading in Lexington stock – for himself and for entities – did not even mention Jenirob and did not include the vast majority of Pierce’s Lexington sales through the Newport account in Liechtenstein, which were concealed from the Division until March 2009. *See* Wells Decl. Ex. 5; Lyttle Decl. Ex. A.

During his sworn July 2006 investigative testimony, Pierce denied directing Lexington trades for entities through brokerage accounts outside the United States. He also denied that he had a direct or indirect ownership interest in Newport and Jenirob and objected to providing information regarding Newport’s ultimate individual beneficial owner. *See* Buchholz Decl. IV Ex. B at 197:8-200:11; Ex. C at 303:23-304:5, 367:24-369:12; *see also* Buchholz Decl. III Exs. C & D. Pierce’s counsel objected to questions that might have led to discovery of the Newport and Jenirob trades, such as which Hypo Bank<sup>2</sup> accounts bought or sold Lexington stock in the open market and who had an ownership interest in the foreign entities involved in trading Lexington stock. *See* Buchholz Decl. IV Ex. B at 42:18-45:22, 46:2-20, 48:5-24, 215:7-23, 232:11-15, 242:15-243:6; Ex. C at 286:12-311:4. Pierce’s counsel stated that the objections to providing information about non-U.S. based entities that may have conducted business or traded in the U.S. were based on potential foreign privacy concerns, as well as concerns that Pierce could be subject to potential foreign civil or criminal liability.<sup>3</sup> *E.g., id.* Ex. C at 286:12-311:4.

Given Pierce’s assertion that he had produced all of his Lexington-related records and that his only sales were the ones made through his personal account, the Division requested

---

<sup>2</sup> Hypo Bank was the Liechtenstein bank in which Pierce, Newport and Jenirob maintained accounts through which they traded Lexington stock

<sup>3</sup> During oral argument, Pierce’s counsel conceded that producing the documents would not have been illegal under Liechtenstein law, but stated that “Liechtenstein law at the time created an *inviolable right of privacy* in those documents,” and that Pierce “didn’t have unilateral authority from Newport or Jenirob . . . to turn over records that Liechtenstein law at the time protected from disclosure.” *See* Buchholz Decl. IV Ex. G at 42:6-16 (emphasis added).

records through the Liechtenstein regulator relating to other sales of Lexington stock through the Liechtenstein bank's omnibus brokerage account. *See* Buchholz Decl. II Ex. F ¶ 5.

**B. The First Proceeding Against Pierce**

Pierce was a respondent in an earlier administrative proceeding in which the Commission issued its Order Instituting Proceedings ("First OIP") on July 31, 2008 in a matter entitled *Lexington Resources, Inc., et al.*, Administrative Proceeding File No. 3-13109 (the "First Proceeding"). *See* Initial Decision ("ID") at 1, Buchholz Decl. II Ex. A. The Division alleged that Pierce, Lexington, and Lexington's CEO each violated Sections 5(a) and 5(c) of the Securities Act through illegal sales of Lexington shares, and that Pierce also violated the Securities Exchange Act of 1934 ("Exchange Act") by failing to accurately report his Lexington stock ownership and transactions. *See* Buchholz Decl. II Ex. A. The Division sought a cease and desist order and disgorgement from Pierce *Id.* ¶ 16. The Division later clarified in its motion for summary disposition that it was seeking disgorgement of the net proceeds of Pierce's unregistered sales of 300,000 Lexington shares through his personal account at the Liechtenstein bank. *See* Buchholz Decl. II Ex. B at 9-10. This was the only Section 5 violation expressly alleged against Pierce in the First OIP against Pierce and the only Section 5 violation for which the Division then had evidence. *See* Wells Decl. Ex. 2 ¶ 16, Ex. 3 at 10-12. A hearing was held in the First Proceeding between February 2-4, 2009. *Id.*

Over a month after the hearing, on March 10, 2009, the regulator produced a number of documents to the Division. *Id.* The production included documents showing that accounts at the Liechtenstein bank in the names of Newport and Jenirob (in addition to other accounts, including Pierce's personal account) had sold Lexington stock into the public market during 2004 and that Pierce was the beneficial owner of the assets in the Newport and Jenirob accounts. *Id.* Pierce

had concealed these documents during the Division's investigation, and the documents showed that Pierce had not in fact produced all records relating to his Lexington stock sales and had omitted the vast majority of his sales from his Schedule 13D. *See* Buchholz Decl. II Ex. E at 2-3. Until that production, the Division did not have evidence showing which specific Liechtenstein accounts made these unregistered sales, including the sale dates and the volume of shares sold on each date, nor did it know of Pierce's beneficial ownership of the Newport and Jenirob account assets and that Pierce therefore personally received more than \$7 million in proceeds from Lexington stock sales through those accounts.<sup>4</sup> *See* Buchholz Decl. III, ¶¶ 8-9.

Shortly thereafter, on March 18, 2009, the Division filed a motion to admit the new evidence, arguing that Pierce should be liable for a larger amount of disgorgement than the \$2 million previously requested in connection with Pierce's sales from his personal account. ID at 8; *see* Buchholz Decl. II Exs. E, F. Pierce opposed admission of the evidence, as well as the adjudication of claims relating to his stock sales through the Newport and Jenirob accounts. *See id.* Ex. G. He argued that re-opening the evidence would deny his "due process rights to notice of the claims" and "the reasonable opportunity to respond," including the right to discovery and to a hearing on the new evidence. *Id.* Ex. G at 2-9. In an Order issued on April 7, 2009, the Hearing Officer admitted the new evidence as it pertained to Pierce's liability, but held that a claim based on the Newport and Jenirob sales was beyond the scope of that proceeding. *See id.* Ex. I.

On March 20, 2009, just two days after the Division's motion to admit new evidence and before issuance of the ruling on that motion, the Division filed its Post-Hearing Brief in the First

---

<sup>4</sup> Pierce admitted in his Answer to the present OIP that he was the beneficial owner of the assets in the Newport and Jenirob accounts at the Liechtenstein bank. *See* Buchholz Decl. II Ex. M at ¶ 25 & Ex. U at 5. Pierce continues to deny direct or indirect ownership of the entities themselves, but has never explained how someone who allegedly had no direct or indirect ownership interest in an entity would nonetheless beneficially own the assets in the entity's account.

Proceeding. *See* Wells Decl. Ex. 12. The Division argued that, in addition to Pierce's violation of Section 5 for the unregistered sales of 300,000 shares of Lexington stock from his personal account, Pierce violated Section 5 by his unregistered sales of 1.6 million shares of Lexington stock through the Newport and Jenirob accounts. *Id.* at 17. The Division therefore requested disgorgement not only of the approximately \$2 million in net proceeds of Pierce's unregistered sales through his personal Liechtenstein account, but also of the net proceeds of his sales through the Newport and Jenirob accounts. *Id.* at 24-25.

The Initial Decision in the First Proceeding ("First Initial Decision" or "First ID"), issued June 5, 2009, found, among other things, that Pierce violated Sections 5(a) and 5(c) of the Securities Act without an exemption from registration. Buchholz Decl. II Ex. J at 17 (First Initial Decision). Specifically, the First Initial Decision analyzed Pierce's violation of Section 5 *only* in connection with the sales of Lexington stock from his personal account. First ID at 15. The new evidence of Pierce's sales through the Newport and Jenirob accounts was used, in part, as further support for rejecting Pierce's affirmative defense of an exemption from registration and in part as further support for finding Pierce liable for the Exchange Act violations. First ID at 17-18. Pierce was ordered to cease and desist from such violations and to disgorge \$2,043,362.33, which the First Initial Decision described as "the actual profits Pierce obtained from his wrongdoing charged in the OIP." ID at 8 & First ID at 20. The First Initial Decision ruled, as it had previously, that the Division's request for additional disgorgement for the Newport and Jenirob sales was beyond the scope of the First OIP; it did not analyze whether Pierce had also violated Section 5 by his Newport and Jenirob sales. First ID at 20-21. Neither party appealed the First Initial Decision and it became the final decision of the Commission on July 8, 2009. Buchholz Decl. II Ex. K.

### **C. The Present Proceeding And The Initial Decision Against Pierce**

On June 8, 2010, the Commission issued its OIP in the present proceeding, pursuant to Section 8A of the Securities Act, against respondents Gordon Brent Pierce, Newport Capital Corp. and Jenirob Company Ltd. ID at 1; Buchholz Decl. II Ex. M. The Division alleged that Pierce, Newport and Jenirob violated Sections 5(a) and 5(c) of the Securities Act by their sales of Lexington stock through accounts of Newport and Jenirob at the Liechtenstein bank without an exemption from registration. In an Answer filed on July 9, 2010, Pierce admitted the facts indicating his liability for the Section 5 violations alleged by the Division and further admitted that he was the beneficial owner of the assets in the Newport and Jenirob accounts. Buchholz Decl. II, Ex. U at 5. Pierce additionally raised a number of affirmative defenses, including res judicata, equitable and judicial estoppel and waiver. *Id.* at 6.

The Initial Decision found that Pierce violated Sections 5(a) and 5(c) of the Securities Act in connection with his Lexington stock sales through the Newport and Jenirob accounts. ID at 9-10. Ruling on Pierce's affirmative defenses, the Initial Decision determined that Pierce's equitable and judicial estoppel and waiver defenses were inapplicable, but found that all three elements of the res judicata test were met and that, "in the absence of any additional considerations, res judicata would bar the present proceeding."<sup>5</sup> ID at 10-13, 16 (citation omitted). The Initial Decision held, however, that res judicata did not apply because Pierce had "fraudulently concealed" evidence concerning the Newport and Jenirob sales from the Division before the First Proceeding was instituted. ID at 18-20. As sanctions for Pierce's violations, the Hearing Officer issued a cease-and-desist order against Pierce and ordered him to disgorge a total of \$7,427,635.75 in ill-gotten gains plus prejudgment interest. ID at 20-22. Pierce

---

<sup>5</sup> The Division believes this ruling is incorrect, as explained more fully in its opening brief in support of its cross-petition for review.

concedes his liability for the Section 5 violation, but has petitioned the Commission to review the Initial Decision's rulings rejecting his affirmative defenses and its disgorgement order.

### **III. LEGAL ARGUMENT**

#### **A. The Initial Decision Properly Found That Res Judicata Did Not Apply Because Pierce Wrongfully Concealed Evidence**

##### **1. The Legal Standard**

Courts have recognized an exception to the application of res judicata when “fraud, concealment or misrepresentation have caused the plaintiff to fail to include a claim in a former action.” *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986); *McCarty v. First of Georgia Ins. Co.*, 713 F.2d 609, 612 (10th Cir. 1983). Contrary to Pierce’s argument, the *Restatement Second (Judgments)* does not require that the concealment exception apply only if the new evidence is discovered after entry of a final judgment on the same claim in the first action. Rather, as the *Restatement* recognized, fairness dictates such an exception, which balances a plaintiff’s ability to bring a previously unknown claim concealed by the defendant with a defendant’s interest in avoiding “repetitive actions based on the same claim.” *See Restatement Second (Judgments)* § 26, comments a, j. Hence, there is no inflexible rule regarding when a plaintiff must discover concealed information to defeat a claim for res judicata; instead, the central issue is whether the defendant’s concealment of information has deprived the plaintiff of the fair opportunity to resolve his claims in the first proceeding. As the *McCarty* court observed: “The rule against splitting causes of action serves no purpose if a plaintiff cannot reasonably be expected to include all claims in the first action.” *McCarty*, 713 F.2d at 612.

Numerous courts have applied the concealment exception to deny a res judicata defense. *See, e.g., Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 910-11, 914 (7th Cir. 1993) (no amount of diligence could have alerted plaintiff that her employer had “blatantly lied about her employment



status;” this was a “critical piece of the puzzle” necessary to assert her later claims); *Montgomery v. NLR Co.*, 2007 WL 3243838 (D. Vt. Nov. 2, 2007) at \*3-4 (defendants’ affidavits concealed facts that could have alerted plaintiff to existence of claim and prevented him from obtaining discovery that might have revealed it). Other cases, while not applying the concealment exception, recognize that it could be appropriate under other facts. *See, e.g., Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005) (party’s ignorance does not avoid res judicata bar unless the ignorance was caused by the misrepresentation or concealment of the opposing party).

**2. The Initial Decision Properly Found That Pierce Wrongfully Concealed Evidence**

**a. Ample Evidence Supports Upholding Application of the Concealment Exception To Bar Res Judicata Here**

Although there is ample evidence to uphold the Initial Decision’s ruling that the concealment exception bars Pierce’s res judicata defense, Pierce nonetheless makes a number of arguments in an attempt to overcome the exception. These include his contention, citing *Browning v. Levy*, 283 F.3d 761, 770 (6th Cir. 2002), that “the Commission [sic] had ample information even at the time of the first OIP to include disgorgement claims against Pierce for Lexington trading profits comprising the \$13 million allegedly obtained by ‘Pierce and his associates’” or that it could have obtained this evidence in the exercise of due diligence. Pierce Opening Brief at 9, 11. Pierce also argues that his investigative testimony was not false and that he never concealed or misled the Division about the existence of the Newport, Jenirob or other “associate” records in question, but rather openly acknowledged their existence and objected to producing such records. Finally, backtracking a bit, he argues that even if he supplied misleading testimony on “some aspect of his association with Newport or Jenirob,” that did not

affect the Division's knowledge of the existence and location of the foreign financial records that support the \$7.5 million claim. *Id.* All of these arguments are meritless, as discussed below.

The Initial Decision carefully analyzed the evidence of Pierce's concealment of pertinent evidence that prevented the Division from learning about his Lexington stock sales through the Newport and Jenirob accounts during the Division's investigation. As to Jenirob, the Initial Decision cited four statements or acts by Pierce that it found misleading and that supported the concealment exception. These facts were that Pierce: (1) denied having an interest in Jenirob's [Liechtenstein] Bank account; (2) denied trading in Lexington securities in any U.S. account on behalf of Jenirob, (3) omitted Jenirob's shares from his 2006 Schedule 13D, and (4) produced the Schedule 13D and represented that it constituted "responsive records . . . of trades in Lexington stock by him or on his behalf, without objection, qualification or indication that it was incomplete or false." ID at 17. Accordingly, the Initial Decision found that Pierce's "misconduct caused the Division's ignorance regarding sales from Jenirob's [Liechtenstein] bank account." *Id.* Pierce has pointed to no evidence disputing these findings, nor can he.

As to Newport, the Initial Decision correctly found that Pierce's concealment of Newport's Lexington trading activity through its Liechtenstein account prevented the Division from learning about his stock sales through that account during its investigation and caused the Division's failure to include a claim for Pierce's unregistered sales of Lexington stock through Newport in the First Proceeding. ID at 19-20. The Initial Decision cited Pierce's Schedule 13D, which admits that he and Newport were beneficial owners of Lexington shares during 2003-2004, but lacked any information about Pierce's trading through Newport's Liechtenstein account. ID at 7, 19-20. Again, Pierce has not pointed to any specific evidence to counter the Initial Decision's findings and there is none. Indeed, the Division submitted evidence in support

of its motion for summary disposition showing that Pierce had denied directing Lexington trades for entities through brokerage accounts outside the United States, denied having a direct or indirect ownership interest in Newport and objected to providing information regarding Newport's ultimate individual beneficial owner. *See* Buchholz Decl. IV Ex. B at 197:8-200:11; Ex. C at 303:23-304:5, 367:24-369:12; *see also* Buchholz Decl. III Exs. C & D.

**b. The Division Acted Diligently To Obtain Evidence Concerning Sales Of Lexington Stock During Its Investigation**

Pierce's argument that the concealment exception is unavailable because the Division did not act sufficiently diligently to acquire the documents during its investigation fails for a number of reasons. First, Pierce's contention that the Division could have obtained the necessary documents from him directly is based upon the questionable premise that Pierce would have readily produced information showing the Newport and Jenirob sales and his beneficial ownership of those accounts in a subpoena enforcement action after he had failed to produce it when demanded by the subpoena itself. Moreover, Pierce (inconsistently) has asserted that he could not have produced the information because he allegedly had an "inviolable right" not to disclose it or because he allegedly did not have it. *See* Buchholz Decl. IV Ex. G at 42:6-19.

Further, in continuing its investigation in 2006, the Division was faced with Pierce's representations that he was not the beneficial owner of the off-shore entities selling Lexington shares into the public market through the Liechtenstein bank, that he did not sell Lexington stock outside the U.S. through such entities, and that his Schedule 13D included information about all of his Lexington stock sales for himself and for entities as called for by the Division's subpoena. Pierce's counsel had objected to production of account records pertaining to the off-shore entities and had further objected to questions seeking information about off-shore entities during Pierce's testimony. Hence, because the Division did not know that Pierce was the beneficial owner of the

assets in the Liechtenstein accounts of entities such as Newport and Jenirob that traded through the omnibus brokerage account, there was no basis for the Division to file a subpoena enforcement action to try to compel production of such records from Pierce. The Initial Decision properly dismissed Pierce's assertion that the Division could have obtained evidence earlier if it had acted more diligently, holding that there is "no evidence the Division knew (as opposed to being skeptical)" that certain of Pierce's responses were "evasive or incomplete," and that under the Restatement, it was entirely reasonable for the Division to take Pierce's discovery responses as true, even if they later turned out to be false and misleading. ID at 18-19.

In this context, the Division pursued information through the Liechtenstein regulator about other off-shore sellers of Lexington stock, rather than from Pierce himself. The Division sought information including the specific sales of Lexington stock made into the public market by entities holding accounts at the Liechtenstein bank through the omnibus vFinance account, as well as the identities of the beneficial owners of the accounts – all of which was critical information for a Section 5 analysis. Although Pierce posits that the Division was dilatory in requesting records from the foreign regulator once the law changed in 2007, the Division acted promptly once it learned in late 2007 that there might be a change in the law. *See* Buchholz Decl. II Ex. F ¶¶ 5-13. Pierce's assertion that the Division could have subpoenaed the relevant records from the foreign bank is also incorrect. This option was not available to the Division during its investigation. Letters rogatory, the primary mechanism to obtain foreign evidentiary documents, generally can only be used during litigation. *See* 28 U.S.C. § 1781(a) (requiring request directly from a tribunal in the United States & included text of Convention, which specifies that the "judicial authority" of a contracting state may request a competent authority of another state to obtain evidence "in civil or commercial matters").

Moreover, the *Restatement* suggests that Pierce's diligence argument is not applicable procedurally because it is premised on the existence of ongoing litigation in which there are ample procedural mechanisms to compel discovery that would permit developing evidence of the entire transaction within one action on the merits. *See Restatement (Second) Judgments* § 24, comment a. Pierce's concealment of evidence occurred during the Division's investigation of possible wrongdoing in the sale of Lexington stock, not in a litigated action to redress a specific wrong arising out of a defined transaction. In contrast to the procedural rules governing parties' discovery in litigated actions, there was no analogous requirement that the Division file a subpoena enforcement action during its investigation on pain of forfeiting a later-discovered claim. Such a rule could raise significant policy issues for future investigations. The Commission has been accorded "considerable discretion in determining when and how to investigate possible violations of the statutes [it] administer[s]." *SEC v. O'Brien*, 467 U.S. 735 745 (1984); *see Dichter-Mad Family Partnerships, LLP v. U.S.*, 707 F. Supp. 2d 1016, 1035 (C.D. Cal. 2010) (same, on "manner and scope of how to investigate any facts, conditions, practices or matters"). Nor can an analogy be drawn to the procedure available during an administrative proceeding under the Commission's Rules of Practice, inasmuch as discovery is severely limited, the Hearing Officer lacks authority to expand the scope of the OIP, extensions of the 60 day hearing deadline are disfavored; and the time period for issuing an Initial Decision is at most 300 days from service of the OIP. *See SEC Rules of Practice* 161, 230-234, & 360.

Finally, Pierce is incorrect that the Division had sufficient information when the First OIP was instituted to include "disgorgement claims" against him for Lexington trading profits that he and "his associates," including Newport and Jenirob, allegedly obtained. The Division could not have obtained disgorgement without alleging sales in violation of Section 5 because

disgorgement is not an independent claim, but rather a remedy “designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable.” *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1191-92 (9th Cir. 1980). To bring a Section 5 claim, which is transaction specific, *see, e.g., SEC v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998), the Division needed core evidence of who sold the shares into the public market through the accounts at the Liechtenstein bank, the sale dates and volume of shares sold on each date by each seller, and the identity of the owner or beneficial owner of the accounts. These facts were necessary to establish a prima facie Section 5 violation and to ascertain whether there were arguably any applicable exemptions from registration.

Until the Division received the Liechtenstein documents, it could not have brought a Section 5 claim against Pierce for the Newport and Jenirob sales, as it did not have specific evidence of the unregistered sales through these accounts into the public market and did not know that Pierce beneficially owned the Newport and Jenirob accounts. Pierce’s distribution of Lexington stock through private stock transfers showed only that he was not entitled to an exemption. Nor was the Schedule 13D enough: Pierce disclaimed beneficial ownership of Newport, did not mention Jenirob, and did not disclose the vast majority of the 1.6 million shares held in the Newport account or his sales through the Jenirob account. Moreover, while the Division knew that sales of Lexington stock had been made through the Liechtenstein bank’s omnibus account, the Division did not know which accounts owned by which entities actually made the sales into the public market on specific dates and in specific quantities. Hence, the Division could not have calculated the amount of the ill-gotten gains Pierce obtained from his illegal sales until it received the records from the Liechtenstein regulator. Once the Division obtained the necessary evidence, however, it moved expeditiously to admit it.

**3. The Fact That Evidence Concerning the Newport And Jenirob Sales Was Admitted In The First Proceeding Does Not Affect Application Of The Concealment Exception To Res Judicata**

Pierce argues that the Initial Decision erred in applying the concealment exception on the ground that the evidence concerning the Newport and Jenirob sales was admitted and considered in the First Proceeding. This argument ignores the fact that, owing to Pierce's concealment of evidence, the Division's additional claim against Pierce for the stock sales through Newport and Jenirob neither was, nor could have been, adjudicated in the First Proceeding. Hence, Pierce's argument is wrong both factually and procedurally.

Factually, the First Initial Decision cannot credibly be read as having adjudicated on the merits in the First Proceeding a claim for Pierce's violation of Section 5 based on the new evidence of his unregistered Newport and Jenirob sales. As explained above, owing to Pierce's wrongful concealment, the Division lacked evidence of his unregistered sales of Lexington stock through Newport and Jenirob until after the hearing in the First Proceeding. Although the Division moved successfully for admission of the evidence and sought to adjudicate an additional claim against Pierce based on that evidence, the Hearing Officer ruled that adjudication of a claim for the Newport and Jenirob sales was beyond the scope of the First OIP and that she had no authority to expand the scope of the First OIP. Buchholz Decl. II Ex.I. The First Initial Decision reiterated the ruling on the Division's evidentiary motion and considered only a *prima facie* case for Pierce's violation of Section 5 by his sales of Lexington stock from his *personal* account at the Liechtenstein bank, ordering disgorgement only of his \$2.1 million in ill-gotten gains from those sales. The Hearing Officer used the Newport and Jenirob evidence as further support for rejecting Pierce's *affirmative defense* that he was entitled to an exemption from registration of the sales from his personal account and for holding Pierce liable for the Exchange Act violations – nothing more. Buchholz Decl. II Ex. J at 15-18, 20-21.

Procedurally, the concealment exception applies because the res judicata principles barring piecemeal litigation in a modern procedural system, as under the Federal Rules of Civil Procedure, must allow for exceptions where, as here, jurisdiction is more limited and procedural rules are narrower. *See Restatement (Second) Judgments* §§ 24(a), *Restatement (Second) Judgments* § 26(1)(c). Section 26(1)(c) of the *Restatement* states that res judicata does not apply in a second action when the plaintiff was unable to obtain certain relief in the first action because of limitations on the court's jurisdiction or restrictions on the court's authority. Further, Section 83, comment *g*, of the *Restatement* cautions that “[t]he qualifications and exceptions to the rule of claim preclusion have particular importance with respect to adjudications by administrative agencies” because, in contrast to Article III courts, the jurisdiction of administrative agencies is more limited.

In the context of adjudications by administrative agencies, “limitations on the authority of the tribunal should carry corresponding limitations on the scope of ‘claim’ for purposes of the rule of claim preclusion.” *See Texas Employer’s Ins. Assoc. v. Jackson*, 862 F.2d 491, 502-03 (5th Cir. 1988) (denying application of res judicata where administrative proceeding was without jurisdiction to hear matters asserted in the plaintiff’s state suit and citing *Wright Miller & Cooper* § 4412 at 93, explaining “[i]t is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding, and even clearer that no penalty should be inflicted if a deliberate attempt to combine such matters has been expressly rejected”); *see also Computer Assocs. Int’l, Inc. v. Altai*, 126 F.3d 365, 370 (2nd Cir. 1997) (“res judicata is inapplicable if formal jurisdictional or statutory barriers precluded the plaintiff from asserting its claims in the first Action,” citing *Restatement*



§ 26(1)(c)); *Sekaquaptewa v. MacDonald*, 575 F.2d 239, 246-47 (9th Cir. 1978) (claims could not have been asserted in prior action because court was not given jurisdiction to decide them).

Given the clear procedural limitations of administrative proceedings, the concealment exception should apply. The Hearing Officer held that a new claim for the Newport and Jenirob sales based on evidence received after the hearing could not be adjudicated in the First Proceeding, as it was beyond the scope of the First OIP. Thereafter, the expedited procedures of the Commission's Rules of Practice greatly limited the procedural alternatives available to the Division. Contrary to Pierce's assertion, neither amendment of the First OIP nor appeal of the First Initial Decision was feasible or required, as discussed in Section III.B below.

In this context, the cases upon which Pierce relies are inapt. In *Guerro v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985), a case involving dissolution of a business partnership, the court applied res judicata where the plaintiff had litigated the same claim in an earlier state court action, but then discovered new evidence pertinent to the same claim after a judgment was entered and failed to seek a rehearing or to reopen the record. In *Magnus Elec., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1401-03 (7th Cir. 1987), a case alleging wrongful conversion by Argentina, the court applied res judicata where the plaintiff was aware of jurisdictional facts when it filed its complaint on the same claim in the first action, but failed to assert the facts or to appeal the denial of his motion for relief from the judgment to consider the facts. Both *Guerro* and *Magnus* are distinguishable. Critically, in those cases, the same claims were at issue in the first and subsequent actions. Here, as explained below and in the Division's opening brief in support of its petition for review, the claims alleged against Pierce in each proceeding constituted different violations of Section 5, which is transaction specific. See *SEC v. Cavanagh*, 155 F.3d at 133. *Magnus* is also distinguishable because the plaintiff was aware of

the key facts when he filed his first complaint – not the case here. Further, in both cases, more expansive procedural rules were available that might have permitted reopening those cases after judgment was entered to admit the new evidence – again, not true here.

**4. Because The Claims In Each Proceeding Are Different, Res Judicata Does Not Apply And Pierce’s Section 5 Liability May Be Upheld Without Reaching The Concealment Exception**

The Commission may not need to reach the concealment exception to uphold Pierce’s liability for violating Section 5 through the Newport and Jenirob sales. Although the res judicata defense serves to bar piecemeal litigation of the same claim arising from the same operative transaction, *see, e.g., Mpooyo* at 988, where, as here, the claims in the two proceedings are different, res judicata does not apply. Rather, res judicata preclusion is limited “to the transaction at issue in the first action. Litigation over other transactions, though involving the same parties and similar facts and legal issues, is not precluded” by res judicata. *Greenberg v. Board of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 168 (2d Cir. 1992); *accord Computer Assocs.*, 126 F.3d at 369. A first judgment will generally have preclusive effect where the transaction at issue in both suits is the same, that is “where the same evidence is needed to support both claims and where the facts essential to the second were present in the first.” *SEC v. First Jersey Secs.*, 101 F.3d 1450, 1463-64 (2d Cir. 1996); *accord Computer Assocs.*, 126 F.3d at 369; *see Shamrock Assoc. v. Sloane*, 738 F. Supp. 109, 116 (S.D.N.Y. 1990) (distinct acts of fraud in two suits were not identical simply because they were in connection with some of same stock purchases inasmuch as actions were founded on allegations of different facts and types of conduct by defendants and different effects of defendants’ acts); *see also Harris v. Jacobs*, 621 F.2d 341, 344 (9th Cir. 1980) (res judicata inapplicable where relevant evidentiary facts differ).

As explained in the Division’s opening brief in support of its cross-petition for review, the operative transactions underlying the Section 5 claims against Pierce in each proceeding are

different. In the First Proceeding, the Hearing Officer adjudicated Pierce's liability for violating Section 5 by his unregistered sales of Lexington stock through his personal account. By contrast, the present proceeding adjudicated Pierce's liability for violating Section 5 by his unregistered sales of Lexington stock through the Newport and Jenirob accounts. Thus, on this ground alone, res judicata should not apply, notwithstanding the applicability of the concealment exception.

**B. Pierce Had No Protected Due Process Interest That Would Preclude The Division's Present Section 5 Claim Against Him**

While admitting liability for the Section 5 violations, Pierce asserts that due process bars adjudication of the present claim for his unregistered sales through Newport and Jenirob on the ground that he had a "protected interest" in the finality of the Initial Decision in the First Proceeding.<sup>6</sup> In essence, Pierce is attempting to escalate, without any authority, his res judicata argument into a Constitutional violation. This attempt is groundless and should be rejected.

Pierce previously raised a due process objection to adjudication of the present Section 5 claim in the First Proceeding, arguing that re-opening the evidence after the hearing had concluded and adjudicating a claim based on the new evidence would deny his "due process rights to notice of the claims" and "the reasonable opportunity to respond," including the right to discovery and to a hearing on the new evidence. *See* Buchholz Decl. II Ex. J at 2-9. The Hearing Officer admitted the new evidence and applied it to the existing claims in the First OIP, but held that adjudication of a claim based on this evidence was beyond the scope of the proceeding. Adjudicating the claim for the Newport and Jenirob sales in this proceeding therefore afforded Pierce exactly the notice and opportunity to be heard that he had demanded.

---

<sup>6</sup> Pierce's newly raised due process issue may not be properly before the Commission for review. Pierce did not characterize the Division's failure to pursue the Hearing Officer's ruling in the First Proceeding as a due process violation either in the briefing on the parties' cross-motions for summary disposition or as an issue in his Petition for Review of the Initial Decision.

Pierce's present due process allegation rests (inconsistently) on his assertion that the First Initial Decision definitively considered and rejected ordering disgorgement of the ill-gotten gains from the Newport and Jenirob sales. This is patently false, as the first Initial Decision expressly stated that it would not adjudicate this issue. Pierce nonetheless asserts that his due process rights in the "finality" of this purported ruling were violated by the Division's failure to avail itself of the opportunity to move for leave to amend to include disgorgement for the Newport and Jenirob sales in the first Proceeding or to appeal the First Initial Decision.

In support of his due process argument, Pierce cites several cases standing for the principle that "an agency's failure to abide by its own regulations and rules may constitute a violation of due process." These cases, which concern rules or statutes that *mandated* government conduct, are inapplicable here. *See Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153-55 (9th Cir. 1998) (reversing summary judgment for failure to follow binding Federal Acquisition Regulations requiring that federal contractor facing debarment "shall" be afforded evidentiary hearing if genuine factual disputes arise); *Dilley v. Alexander*, 603 F.2d 914, 915, 920, 922-24 (D.C. Cir. 1979) (plaintiff reserve officers entitled to reinstatement and reconsideration of their promotion because U.S. Army violated mandatory language of applicable regulation by failing to include appropriate number of Reserve officers on promotion boards); *Konn v. Laird*, 460 F.2d 1318, 1319-20 (7th Cir. 1972) (expunging unexcused absences from plaintiff reservist's record because U.S. Army failed to comply with mandatory regulation requiring that it advise him that action returning him to active duty had been initiated).<sup>7</sup>

---

<sup>7</sup> The other cases Pierce cites are similarly inapt. *Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988), stands for the unremarkable proposition that the Government must obey its own laws. *Flaim v. Medical Coll. of Ohio*, 418 F.3d 629 (6th Cir. 2005), held that the basic requirements of procedural due process, notice and an opportunity to be heard, were met by granting the plaintiff a hearing and that federal courts should intervene only when an agency's disregard of its own

Pierce has not pointed to a single *mandatory* rule or regulation that the Division failed to follow, unlike the above cases. Rather, as the present Initial Decision correctly held, the Division was not required to pursue the avenues of review Pierce posits under the Commission's Rules of Practice. By their terms, the rules Pierce cites set forth procedures for amendment or review that were available to the Division in the exercise of its discretion. As the Initial Decision recognized, nowhere do they mandate the Division to act. *See* ID at 13.

The Initial Decision's rejection of Pierce's contention that the Division was required to seek leave from the Commission, pursuant to Rule of Practice 200(d), to amend the OIP in the prior proceeding should be upheld. Nothing in Rule 200(d) *required* the Division to move for leave to amend. Moreover, as the Initial Decision explained, amendment of an OIP is subject to the consideration that "other parties not be surprised or their rights prejudiced." ID at 13 (citations omitted); *see also In re Barlow*, Exchange Act Release No. 42109, 199 SEC LEXIS 2357 (Nov. 5, 1999) at \*2-3 (allowing amendment within scope of original order to conform relief requested to charges alleged by Commission where hearing was not scheduled to begin for several months). Filing a motion for leave to amend the First OIP was not a viable option in light of the fact that the hearing had been concluded before the new evidence was even received, the 300-day deadline for issuance of an initial decision was near, Newport and Jenirob were not parties (and thus would need to be served with notice in foreign jurisdictions), and a new hearing would likely have been required, thereby causing significant delay. *See* Buchholz Decl. II Ex. J

---

rules results in a procedure which itself impinges on due process rights. Neither case is of any assistance to Pierce's due process argument. There is no question that he received notice and an opportunity to be heard on the present Section 5 claim. Further, as discussed in this section, Pierce's allegation that the Division (or the Commission) failed to follow the agency's own rules is wholly meritless. Pierce's attempted comparison of the Initial Decision to a "subordinate ruling" by a special master under Rule 53 of the Federal Rules of Civil Procedure, is also meritless, as Pierce ignores the very different procedural structure of Commission administrative proceedings under the Administrative Procedures Act and the Commission's Rules of Practice.

at 20; Buchholz Decl. III Ex. J at 2-9. As the Initial Decision correctly found, a motion for leave to amend the First OIP to assert a new claim for the Newport and Jenirob sales at that stage was not required and likely would have been futile. ID at 13.

Further, the Initial Decision correctly found that Pierce did not identify any legal authority that required the Division to appeal the procedural ruling in the First Initial Decision, on pain of losing the right to pursue the Newport and Jenirob claim in the present proceeding. ID at 13. An appeal would have amounted to a request that the Commission grant leave to amend the First OIP and re-open the prior proceeding to litigate a new claim for a separate Section 5 violation through notice and a new hearing. There was no requirement to adjudicate this separate claim within a proceeding that had already concluded, nor would it have been efficient under the Commission's expedited procedural rules to do so.<sup>8</sup>

**C. The Initial Decision Properly Rejected Pierce's Equitable Estoppel Defense**

The Initial Decision properly rejected Pierce's equitable estoppel defense. A party seeking to estop another must show that he or she relied reasonably and detrimentally on another party's clear representation of fact. *Heckler v. Community Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984) (declining to find reasonable reliance on ground party was presumed to know the law or to find detrimental reliance even where party might be adversely affected by Government's recoupment of funds party had already spent). The "traditional" elements of equitable estoppel include: (1) the party to be estopped must have known the facts; (2) that party

---

<sup>8</sup> Pierce also contends the Division was required to act under Rules of Practice 400(a) and 452. Rule 400(a), which concerns interlocutory review of the Hearing Officer's evidentiary rulings, is disfavored, applies only in extraordinary circumstances and requires certification by the Hearing Officer of conditions not at issue here. Rule of Practice 452 pertains to proceedings already pending for review before the Commission and was therefore inapplicable. In addition, although Pierce did not raise this in his motion for summary disposition, he now argues that the Commission's failure to exercise its plenary authority under Rule of Practice 411(c) to review the Initial Decision also violated his due process rights. Again, by its terms, this Rule is discretionary and therefore inapplicable.

must have intended that its conduct would be acted on or must have acted such that the party asserting estoppel had a right to believe it was so intended; (3) the asserting party must have been ignorant of the true facts; and (4) the asserting party must have relied on the other party's conduct to his injury. *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994).

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

The Initial Decision correctly held that estoppel was unavailable because Pierce did not prove the second and fourth elements required for equitable estoppel and had not shown that any act by the government will cause a serious injustice. ID at 11. It found that it is undisputed that the Division made no affirmative factual representation of any kind to Pierce or his counsel concerning its appellate intentions upon which Pierce could have relied, much less relied reasonably and detrimentally. *See* ID at 11; *see* Buchholz Decl. II ¶ 14. It further found that "it was not reasonable to assume from mere silence that the Division had entirely given up on its claim for an additional \$7 million in disgorgement." ID at 11.

Pierce nonetheless argues that the Division's failure to appeal somehow constitutes a representation upon which he reasonably relied in failing to file his own appeal or cross-appeal. As the Initial Decision found, inasmuch as the appellate deadline for both parties expired simultaneously, Pierce could not possibly have relied on any conduct by the Division in making

his own decision not to appeal. ID at 11. Pierce also contends that the fourth estoppel element of detrimental reliance was satisfied because he refrained from a cross-appeal. This, too, fails, as a cross-appeal was not possible because the Division did not appeal. Pierce may have made a tactical decision that he would not appeal initially and would cross-appeal if the Division appealed, but this choice does not constitute reasonable reliance, much less detrimental reliance.

Pierce's argument also fails to overcome the Initial Decision's finding that the "detriment to Pierce falls short of a serious injustice." ID at 11. As the Initial Decision explained, Pierce could have filed a protective appeal that he could have dismissed if the Division failed to appeal and he waived none of his defenses to a second action, which he "has asserted [ ] with vigor."

*Id.* Pierce was represented by able legal counsel when he elected not to appeal and he had the opportunity to litigate fairly and fully the claims asserted against him in the present proceeding.

Pierce's argument that he suffered detriment because he allegedly prevailed on the merits in limiting the disgorgement amount in the prior proceeding is simply wrong because, as a procedural matter, the Initial Decision did not adjudicate a claim for Pierce's violation of Section 5 through the Newport and Jenirob sales for which disgorgement could have been ordered. Further, as the Initial Decision correctly found, a requirement that Pierce defend himself in the present proceeding is not a detriment that rises to the level of a serious injustice.

*Id.* Again, Pierce cites no legal authority to the contrary and there is none.

Finally, although not reached in the Initial Decision, given the Commission's mandate to enforce the federal securities laws and Pierce's admission of the Section 5 violation alleged against him, Pierce cannot show that the public's interest will not suffer undue damage by imposition of an estoppel barring this proceeding. Rather, it is in the public interest to adjudicate the securities law violations he is alleged (and found) to have committed.



#### **D. The Initial Decision Properly Rejected Pierce's Judicial Estoppel Defense**

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

*New Hampshire* clarifies that success on the earlier position in the prior proceeding is one of the elements of judicial estoppel.<sup>9</sup> See *New Hampshire*, 532 U.S. 742 at 749. Pierce's argument fails on this element alone because, as the Initial Decision held, Pierce cannot show that the Division prevailed on the Newport and Jenirob claim in the First Proceeding. ID at 12. Further, as the Initial Decision recognized, litigating this claim in a new proceeding thus presents no risk of inconsistent judicial determinations. *Id.*

#### **E. The Initial Decision Properly Rejected Pierce's Waiver Defense**

Pierce's argument that the Initial Decision erred in rejected his waiver defense is a variant of his prior due process and estoppel arguments and should be rejected for the same reasons.

Waiver is the "intentional relinquishment of a known right." *Hamilton v. Atlas Turner, Inc.*, 197

---

<sup>9</sup> Pierce chose to ignore the Supreme Court's controlling *New Hampshire* case and continues to rely on a case decided prior to *New Hampshire*, *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600-01 (9th Cir. 1996). As the Initial Decision points out, *Rissetto* declined to decide whether judicial estoppel requires success by a party in asserting the earlier position and to the extent it is inconsistent with *New Hampshire*, it is no longer good law. ID at 12 n.5.

F.3d 58, 61 (2d Cir. 1999). As the Initial Decision held, “the party asserting waiver must prove that its opponent, ‘with full knowledge of the material facts, intentionally relinquished its rights [to bring suit] or that its conduct was so inconsistent with an intent to enforce its rights as to induce a reasonable belief that such right has been relinquished. ID at 13 (*citing Qualcomm, Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1020 (Fed. Cir. 2008)).

Pierce essentially asserts that by failing to move for leave to amend the first OIP or to appeal the First Initial Decision, the Division “consciously decided to forego all options whatsoever” and abandon its right to bring a claim for Pierce’s violation of Section 5 for the Newport and Jenirob sales. Not only is there no evidence to support this argument, the Division’s assertion of the claim in the present proceeding indicates that it had no intention of abandoning this claim. As explained in Section III.B above, the Commission’s Rules of Practice did not *require* that the Division undertake either course of action, nor has Pierce cited any other legal authority that so required. Pierce further points to no affirmative representation or other conduct by the Division reasonably suggesting that it would forego the claim. As the Initial Decision correctly held, Pierce’s interpretation of the Division’s intentions was purely speculative and his supposed belief that the Division had entirely abandoned its Newport and Jenirob claim was unreasonable. As Pierce did not meet his burden to show a knowing waiver, the Initial Decision’s ruling denying this defense should be upheld.

**F. Disgorgement Was Properly Ordered Against Pierce**

Pierce’s argument against award of disgorgement can be disposed of quickly. Pierce contends that disgorgement is improper because there is no evidence showing that he received the \$7.2 million in profits from the illegal sales through the Newport and Jenirob accounts. In fact, Pierce’s own admissions provide sufficient evidence to counter his argument. Paragraph 25 of the OIP in the present proceeding alleges that:

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.

Buchholz Decl. II Ex. M ¶ 25. Pierce *admitted* the facts alleged in Paragraph 25 in his Answer to the OIP, *see id.* Ex. U at 5, and documents from the Liechtenstein bank show that Pierce was the sole beneficial owner of the assets in the Newport and Jenirob accounts. *See id.* at Exs. V & W.

There is ample legal authority to uphold the disgorgement order against Pierce based on the above facts. *See, e.g., SEC v. Platform Wireless Int'l Corp.*, 617 F.3d 1072, 1096-99 (9th Cir. 2010); *SEC v. First Pacific Bancorp*, 142 F.3d at 1191-92. In *First Pacific Bancorp*; the court upheld disgorgement by a controlling individual defendant jointly and severally with corporate codefendants, stating that “where two or more individuals or entities collaborate or have a close relationship in engaging in the violation of the securities laws, they have been held jointly and severally liable for the disgorgement of illegally obtained proceeds.” 142 F.3d at 1191-92. In *Platform Wireless*, the court rejected an argument similar to the one Pierce makes here. Citing the defendant’s control over his corporate codefendant as a ground for upholding disgorgement, the court stated: “We have never held that a personal financial benefit is a prerequisite for joint and several liability.” 617 F.3d at 1097-98 (following *First Pacific Bancorp* and distinguishing *Hately v. SEC*, 8 F.3d 653 (9th Cir. 1993), upon which Pierce relies, as it involved preexisting agreement limiting defendants’ share of ill-gotten gains).

So it is here. Pierce admitted that he was the beneficial owner of the assets in the Newport and Jenirob accounts, was the President and a director of Newport, controlled Jenirob; and sold a total of 1.6 million Lexington shares through the Newport and Jenirob accounts when no registration statement had been filed or was in effect and with no exemption from registration. Buchholz Decl. II Ex. M ¶¶ 4, 20, 25, Ex. U at 3, 5; *see ID* at 10. Pierce has conceded the Initial

Decision's ruling that his sales violated Section 5. *See* ID at 9-10. Under these facts, as in *Platform Wireless* and *First Pacific Bancorp*, Pierce's disgorgement of \$7,247,635.75 plus prejudgment interest should be upheld.

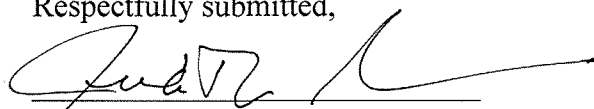
In addition, the Division has filed concurrently a motion requesting that the Commission admit additional evidence it recently received from a foreign regulator. *See* Division's Motion to Admit New Evidence and supporting Declaration of Steven Buchholz, with attached exhibits. This evidence, while unnecessary to uphold the Initial Decision's disgorgement order, calls into question the validity of Pierce's argument that he did not receive any personal benefit from Newport's stock sales. The evidence shows that Pierce's wife and daughter were each beneficial owners of Newport during the relevant period, that Pierce exercised control over the trusts and that Pierce received personal financial benefit from Newport. Under the above authorities, whether Pierce may have chosen to transfer the illegal proceeds from Newport's account in Liechtenstein, of which he undisputedly owned the account assets, to other Newport accounts that were beneficially owned by his wife or daughter, does not disturb the Initial Decision's determination that Pierce is jointly and severally liable with Newport for the disgorgement.

#### **IV. CONCLUSION**

For all the foregoing reasons, the Division requests that the Commission deny Pierce's petition for review and correction of the Initial Decision in its entirety and instead issue a Final Decision upholding the Initial Decision's ruling that Pierce violated Section 5 of the Securities Act, as well as the sanctions the Initial Decision imposed against Pierce for this violation.

Dated: November 10, 2011

Respectfully submitted,



Judith L. Anderson  
Attorney for DIVISION OF ENFORCEMENT