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. 3-13927

In the Matter of **GORDON BRENT PIERCE, NEWPORT CAPITAL CORP., and JENIROB COMPANY LTD.,** **Respondents.**	**ANSWER OF GORDON BRENT PIERCE**

Without prejudice to vindicating his rights in the proper forum, Respondent G. Brent Pierce submits this Answer to the Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 (the "Securities Act") issued on June 8, 2010 as Administrative Proceeding File No. 3-13927 (the "Second OIP") and pertaining to trading in the securities of Lexington Resources, Inc. ("Lexington") (the "Second Action").

Mr. Pierce denies that any further relief against him is permissible. The relief sought in this proceeding is no different than the relief that was to be determined *In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109) (the "First OIP") issued on July 31, 2008 in the "First Action" and considered but rejected by the Commission prior to its Notice of Final Decision in Administrative Proceeding No. 3-13109 on July 8, 2009 (the "Final Decision").

Mr. Pierce denies that the Commission has the authority to issue the Second OIP under Section 8A of the Securities Act and thereby prejudge its own prior actions. Mr. Pierce denies that the Commission has jurisdiction over this proceeding and denies that the Commission any longer has the authority to require him to answer the allegations in the Second OIP, because they were fully adjudicated in the First Action.

Mr. Pierce further objects to the Division's inconsistent legal positions. The Division contended implicitly that an order disgorging from Mr. Pierce $7.5 million in Lexington stock trading profits from resale by Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob") was covered by the First OIP, because the Division made no motion to amend under Rule of Practice 200(d) when it submitted that claim along with supporting evidence in the First Action. The Division now contradicts itself by contending that the First OIP did not cover its $7.5 million disgorgement claim against Mr. Pierce.

Mr. Pierce objects to the Commission's inconsistent legal positions as well. This Second Action contradicts the Commission's Application for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce filed on June 8, 2010 – the same day this action was commenced -- in the United States District Court for the Northern District of California in Misc. No. CV-10-80129-Misc (JSW).

Mr. Pierce has instituted stay and injunction proceedings in the same court to bar this Second Action and any others using the term "associates" as a device to relitigate facts, claims and issues adjudicated in the First Action. Mr. Pierce hereby incorporates by reference his court pleadings, attached as Exhibit A hereto, in support of his affirmative defenses barring this Second Action.

Subject to the foregoing, and additional objections below, Mr. Pierce answers allegations in the numbered paragraphs of the OIP:

Nature of the Proceeding

1. Because Mr. Pierce and the Commission are equally barred from relitigating the allegations in the Second OIP, Mr. Pierce is precluded from denying the allegations of paragraph 1, just as the Commission is precluded from bringing them. Mr. Pierce would have denied that he controlled Jenirob, except that it was litigated to conclusion on evidence submitted with the Division's related and rejected request for disgorgement, which was never appealed by the Division or altered by the Commission before all rights of appeal had expired.

2. Regarding the allegations in paragraph 2, Mr. Pierce denies that he ever held the majority of Lexington's stock, and asserts that the Commission has already ruled that he did not. *(See* the Initial Decision of June 5, 2009 in the First Action at 14, ruling that Pierce's control over Lexington stock peaked at 23.9%: "Including the unexercised options granted to IMT, over which Pierce had dispositive power, he had 23.9% interest in Lexington on February 2, 2004.") Consequently, the Commission is barred from taking an inconsistent position in the Second Action through the Division's allegations herein. Consistent with the First Decision, in late 2003 and early 2004 Lexington issued a number of shares registered under Form S-8 to Mr. Pierce and persons described in the First Action as Mr. Pierce's "associates." To the extent the remaining allegations in paragraph 2 conform to the Final

Decision in the First Action, Mr. Pierce is admittedly barred from denying them; and to the extent the allegations are inconsistent, the Commission is barred from bringing them. The Commission is also barred from bringing consistent allegations to commence an action for relief that has already been adjudicated. That includes all of the relief that applies to Mr. Pierce in this Second Action.

Further, Mr. Pierce objects to the Commission's use of the term "associates" in paragraph 2 of the Second OIP, and throughout, because the Commission has already used the terms "associate" and "offshore company" as a pretext to distort the scope of the First Action and relitigate remedial relief derived from transactions covered by the Final Decision. The Commission now contends implicitly and inconsistently with the First Action that the "associate" of Mr. Pierce described in the Second OIP was not "named" in the First OIP, or in the pleadings, evidence and orders in the First Action, and incorporated into the relief as to Mr. Pierce in the Final Decision. This tactic violates res judicata and due process principles by exposing Mr. Pierce to a series of newly minted administrative proceedings based on the same 2004 transactions, violations and remedies covered by the Final Decision. This practice abuses the Commission's statutory powers under Section 8A of the Securities Act by employing a pretense that Mr. Pierce remains exposed to further disgorgement orders based on his liability for Lexington stock trading profits by "associates" not named in a previous OIP.

Respondents

3. Mr. Pierce admits that he lawfully provided capital raising services to Lexington through a private company that was compensated by means other than S-8 registered stock option awards, as the Division conceded in the First Action. Mr. Pierce admits that he was a party to the First Action. Mr. Pierce admits that he is 53 and is a Canadian citizen residing in Vancouver, British Columbia.

4. Mr. Pierce admits that Newport was a privately-held company organized under the laws of Belize, admits that he has served as a president and a director of Newport in the past and that Newport was obviously the company that the First OIP referred to as an "associate" and "his offshore company," which held Lexington securities as described in Schedule 13Ds filed by Mr. Pierce in 2006 and which was integral to Mr. Pierce's registration violations according the pleadings of the Division in the First Action and the Initial Decision therein, and which received part of the $13 million in stock sale proceeds alleged in the First OIP (¶¶ 14-16), and which was covered by the Division's post-hearing evidence and $7.5 million additional disgorgement request in the First Action.

5. Mr. Pierce lacks knowledge sufficient to admit the allegations in paragraph 5 about Jenirob's registered agent. Mr. Pierce admits that Lexington records reflect that Jenirob was a privately held BVI company that was one of the "associates" generating a portion of the over $13 million in proceeds from the sale of Lexington S-8 shares described in the First OIP (¶¶ 14-16) and that Jenirob is the same company that was referenced in the Division's pleadings and the Initial Decision in the First Action.

Fact Allegations and Alleged Violations

Answering paragraphs 6-31 in the Second OIP, Mr. Pierce admits the facts and the violations alleged against him solely because they were already adjudicated in the First Action along with the Division's request that Mr. Pierce "should be ordered to pay disgorgement pursuant to Section 8A of the Securities Act." Mr. Pierce lacks knowledge to address the violations alleged and relief requested against respondents Newport and Jenirob and therefore denies the same.

Relief Sought By Division

The relief to be determined in Section III of the Second OIP is identical to the relief that was to be determined pursuant to Section III of the First OIP, and which ultimately was

determined pursuant to the Final Decision in the First Action. Mr. Pierce therefore denies that he "should be ordered to pay disgorgement" of $7.7 million or any amount beyond the disgorgement ordered in the Final Decision in the First Action. For the foregoing reasons, Mr. Pierce denies that any relief against him in this Second Action is appropriate.

Affirmative Defenses

The claims and relief sought against Mr. Pierce are barred by principles of res judicata -- including issue and claim preclusion, and collateral, equitable and judicial estoppel – and by waiver, ratification, acquiescence, the expiration of applicable limitation periods, laches, and unclean hands.

Relief Requested By Pierce

Mr. Pierce requests that the Commission immediately dismiss this action with prejudice and refrain from bringing any further proceedings concerning transactions in Lexington stock described in any of the pleadings, hearings, evidence, orders or decisions in the First Action, and that all claims for relief sought by the Enforcement Division be denied. Mr. Pierce requests an award of his attorney fees, pursuant to 5 U.S.C. § 504(a) (the Equal Access to Justice Act) and 17 CFR § 201.31. *E.g., In the matter of Russo Securities, Inc.*, Exchange Act Release No. 42121 (Nov. 10, 1999) and other applicable law.

DATED this 9th day of July, 2010.

LANE POWELL PC

By _____
Christopher B. Wells, WSBA No. 08302
Attorneys for Respondent G. Brent Pierce

EXHIBIT A

COPY

CHRISTOPHER B. WELLS (WSBA NO. 08302)
DAVID C. SPELLMAN (WSBA NO. 15884)
RYAN P. MCBRIDE (WSBA NO. 33280)
LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
Telephone: (206) 223-7084
Facsimile: (206) 223-7109
Email: wellsc@lanepowell.com
Email: spellmand@lanepowell.com
Email: mcbrider@lanepowell.com

WILLIAM F. ALDERMAN (STATE BAR NO. 47381)
ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: (415) 773-5700
Facsimile: (415) 773-5759
Email: walderman@orrick.com

Attorneys for Plaintiff
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. <u>The Second Action</u>

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

CHRISTOPHER B. WELLS (WSBA NO. 08302)
DAVID C. SPELLMAN (WSBA NO. 15884)
RYAN P. MCBRIDE (WSBA NO. 33280)
LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
Telephone: (206) 223-7084
Facsimile: (206) 223-7109
Email: wellsc@lanepowell.com
Email: spellmand@lanepowell.com
Email: mcbrider@lanepowell.com

WILLIAM F. ALDERMAN (STATE BAR NO. 47381)
ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: (415) 773-5700
Facsimile: (415) 773-5759
Email: walderman@orrick.com

Attorneys for Plaintiff
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.

PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER, ORDER TO SHOW CAUSE, AND STAY

Date: None set
Courtroom: B
Judge: Chief Magistrate Judge Maria-Elena James

TO: DEFENDANT AND ITS ATTORNEYS

Please take notice that, at a time to be set by the Court, Plaintiff Gordon Brent Pierce ("Pierce"), in the courtroom of Hon. _____, United States Court House, 450 Golden Gate Avenue, San Francisco, California, will and hereby does apply pursuant to Rule 65 of the Federal Rules of Civil Procedure for (1) a temporary restraining order and order to show cause why a preliminary injunction should not be issued against defendant Securities and Exchange Commission ("SEC"), enjoining it from proceeding in an administrative proceeding entitled *In the Matter of Gordon Brent Pierce, Newport Capital Corp. and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 (the "Second Action"), and (2) a temporary stay of the matter entitled *Securities and Exchange Commission v. Gordon Brent Pierce*, No. CV-10-80-129 MISC in this Court (the "Administrative Enforcement Action") in which the SEC has applied for an order enforcing a prior administrative order in a proceeding entitled *In the Matter of Lexington Resources, Inc., Grant Atkins and Gordon Brent Pierce, Admin.* Proc. File No. 3-13109 (the "First Action").

This application is made on the grounds that (1) Pierce is likely to succeed on the merits in establishing that the Second Action is barred by res judicata, estoppel and the Due Process Clause of the United States Constitution because it seeks to re-litigate a matter previously decided in favor of Pierce and against the SEC in the First Action; (2) immediate and irreparable injury to Pierce may result unless the Second Action is enjoined pending trial in this action, the balance of hardships tips in favor of Pierce, and the public interest supports the issuance of a TRO and order to show cause why a preliminary injunction should not be entered; and (3) a temporary stay of the Administrative Enforcement Action is warranted pending determination of the merits of the issues raised in this action.

This application is based on the accompanying Complaint for Declaratory and Injunctive Relief; Plaintiff's Memorandum in Support of Motion for TRO, Preliminary Injunction and Stay; Declaration of Christopher B. Wells; Declaration of Gordon Brent Pierce; (Proposed) Temporary Restraining Order and Order to Show Cause; Order for Temporary Stay; (Proposed) Order for Preliminary Injunction; and on such argument and evidence as may be presented at the

hearing.

Notice of this application has been given to the SEC by (1) telephonic communication from plaintiff's counsel William F. Alderman to SEC attorney John Yun at 3:35 p.m. on July 9, 2010 and (2) hand delivery of this application and all supporting papers to Mr. Yun that will be made on July 9, 2010 immediately upon the signing of this application.

Plaintiff will promptly present to the Court applications for the admission pro hac vice in this case of his attorneys Christopher B. Wells, David C. Spellman and Ryan P. McBride of Lane Powell PC.

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
Attorneys for Plaintiff
GORDON BRENT PIERCE

CHRISTOPHER B. WELLS (WSBA NO. 08302)
DAVID C. SPELLMAN (WSBA NO. 15884)
RYAN P. MCBRIDE (WSBA NO. 33280)
LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
Telephone: (206) 223-7084
Facsimile: (206) 223-7109
Email: wellsc@lanepowell.com
Email: spellmand@lanepowell.com
Email: mcbrider@lanepowell.com

WILLIAM F. ALDERMAN (STATE BAR NO. 47381)
ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: (415) 773-5700
Facsimile: (415) 773-5759
Email: walderman@orrick.com

Attorneys for Plaintiff
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. 10-1036

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR TRO, PRELIMINARY INJUNCTION AND STAY

Date: **None Set**
Courtroom:
Judge:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATE CASES

FEDERAL STATUTES AND RULES

I. INTRODUCTION

This motion is made necessary by the commencement of a duplicative administrative proceeding that is barred by fundamental principles of res judicata and due process, inasmuch as it attempts to re-litigate a claim that the agency argued and lost in a prior administrative proceeding from which it did not appeal.

Plaintiff Gordon Brent Pierce ("Pierce") moves for a stay and TRO regarding two proceedings that defendant Securities and Exchange Commission ("Commission" or "SEC") filed on June 8, 2010. Pierce requests a temporary stay of the Commission's application to this Court in Case No. CV-10-80-129 MISC for a summary order (the "Administrative Enforcement Action") enforcing the remedy in the prior administrative action (*In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109), which Pierce refers to as the "First Action." Pierce also requests a TRO and order to show cause why the Order Initiating Proceedings *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 which Pierce refers to as the "Second Action," should not be preliminarily enjoined.

The Administrative Procedure Act's "Relief Pending Review" provision and other powers authorize this Court to issue "all necessary and appropriate process to postpone the effective date of an agency action or to preserve status and rights pending conclusion of the review proceedings." 5 U.S.C. § 705 (Relief Pending Review). A stay suspending the Administrative Enforcement Action and enjoining the Second Action is necessary to permit the judicial review of Pierce's claim that res judicata, equitable estoppel and fundamental principles of due process bar the Commission from relitigating the remedy resulting from the First Action.

The Second Action seeks to relitigate one of the claims the SEC had brought against Pierce in the First Action. On the same day it commenced the Second Action, the Commission filed the Administrative Enforcement Action in this Court to enforce the remedy in the First Action. Having elected to enforce the benefits of the First Action as a final order, the Commission is bound by the burdens of that same final order.

In the First Action, the Commission's Division of Enforcement ("Division") claimed Pierce was liable for approximately $9.6 million in profits as a result of alleged registration violations in the resale of Lexington Resources shares. At the hearing, the Division submitted evidence that roughly $2.1 million derived from Pierce's personal account. After the hearing, the Division moved to admit new evidence of violations and add to the disgorgement claim against Pierce about $7.5 million from the sale of Lexington stock by two "offshore company" "associates" Pierce allegedly controlled – Newport Capital Corp. ("Newport") and Jenirob Company Ltd. ("Jenirob"). Although the ALJ admitted the Division's evidence and relied on it to hold Pierce liable for registration violations, the ALJ's initial decision refused to grant the Division all of the disgorgement relief it sought regarding the sales by Newport and Jenirob.

Before the ALJ rendered the initial decision, the Division never moved the Commission to amend the Order Instituting Proceedings ("OIP") in the First Action. The Division's inaction confirmed its belief that Pierce's liability for the trading profits of Newport and Jenirob as his alleged "associates" was already covered by the OIP.

The Division did not appeal the ALJ's initial decision denying disgorgement of the Newport and Jenirob profits. Nevertheless, the Commission on its own initiative could have modified the initial decision or notified Pierce that disgorgement was still to be adjudicated. The Commission instead entered an order of finality that adopted the ALJ's decision. When it entered that final order, the Commission avoided the risk that by altering the initial decision or requiring further hearings on the Division's $7.5 million disgorgement request, the Commission might induce Pierce to appeal and potentially avoid liability altogether on the registration claims. The Commission availed itself of the ALJ's questionable findings and conclusions on liability but balanced the scales by limiting the disgorgement remedy to $2.1 million.

Eleven months after the final decision and after Pierce's rights of appeal had expired, the Commission commenced the Second Action raising the same $7.5 million claim that had been extinguished in the First Action. The Commission does not get a second bite at the apple. Nor does it get a third or fourth. The Commission's Second Action again references unnamed "associates," a pleading device that threatens still more administrative proceedings based on facts

and claims litigated in the First Action. Pierce brings this action to immediately forestall further unlawful, costly and vexatious litigation in which the Commission had previously persuaded Pierce it had no further remedial interest.

II. STATEMENT OF ISSUES TO BE DECIDED

Whether the Commission should be preliminarily enjoined from prosecuting a second administrative enforcement proceeding seeking relief from Pierce that was before the Commission in an earlier administrative proceeding involving the same transactions and claims but which relief the Commission denied in its "final decision."

Whether the Commission's application in this court for an order enforcing the "final decision" in its first administrative proceeding should be temporarily stayed pending resolution of the question whether the Commission is barred from prosecuting Pierce in the new enforcement action.

III. STATEMENT OF FACTS

A. The First Action Requested Disgorgement of Profits from over $13 million in Stock Sale Proceeds Generated By Pierce and his Associates

Beginning sometime in 2005, the Commission initiated an investigation of trading in Lexington Resources, Inc. (Lexington) common stock. On July 31, 2008, the Commission brought the First Action by filing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") against Pierce, a Canadian citizen, and others. Decl. of Christopher B. Wells ("Wells Decl."), Ex. A. The Commission claimed that Pierce violated the registration provisions of the Securities Act, Sections 5(a) 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). No antifraud claims were brought against any of the respondents, including Pierce.[1]

The First OIP was broad and malleable. It alleged that Pierce violated the registration provisions through resale by Pierce and others in 2004 of shares he had purchased from

[1] The other Respondents, Lexington and Grant Atkins, separately settled registration claims with the Commission in consent orders. 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.

Lexington under a stock option plan registered on Form S-8. The First OIP 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," *id.* Section III, 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).

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 indicated that the "offshore company" was Newport, and that Jenirob was another one of the "associates" whose Lexington stock sales collectively generated $13 million.[2] 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 "determin[ing]" whether Mr. Pierce committed registration violations, and "[w]hether Respondent Pierce should be ordered to pay disgorgement."

A three-day hearing was held before Administrative Law Judge Foelak in February 2009. The hearing was closed on February 4 and the record of evidence was closed on March 6, 2009. Wells Decl. Ex. H (ALJ Order dated March 6, 2009).

[2] Wells Decl. Ex. B (Division Hearing Exs. 43, at SEC -2702, and 51). Wells Decl., Exs. C, D, E and F (Pierce's Mot. for a More Definite Statement, the Division's Opp., Pierce's Reply and excerpt of Tr. of 9/29/08 pre-hearing teleconference at 14:16-27:6). The Division told Pierce and the ALJ that the scope of the OIP necessarily included the "associates" and "offshore company" to hold respondents Atkins and Lexington accountable for their registration violations (*id.*, Tr. at 19:25-21:10). Without moving to amend the OIP under the Commission's Rule of Practice 200(d), the Division revised its theory that Pierce was liable as a result of providing ineligible services, *id.* at 24:5-25:2 and abandoned any claim that Pierce's registration liability derived from control of Lexington, *id.* at 23:8-23 – if any was even included in the OIP, which did not explicitly allege that Pierce controlled Lexington or was an "affiliate" of Lexington. Based on the unamended OIP, the Division later argued that Pierce was liable because he controlled Lexington. Wells Decl. Ex. G (Division's Post-Hearing Br. at 7-10 and 18-20).

B. The ALJ Granted a Post-Hearing Order that Admitted New Evidence For Liability Purposes But Restricted the Disgorgement Remedy to $2.1 Million

Twelve days after the close of the evidence, the Division moved for the admission of new evidence (the "New Evidence"). Wells Decl., Ex. I (Division's Mot. for the Admission of New Evidence at 1-2). The Commission had induced a foreign regulator to produce the New Evidence by representing in February 2008 that the Commission was investigating antifraud claims against Pierce. *Id.* at 1-4. But no antifraud claims were included in the OIP.

The Division claimed that the New Evidence proved Pierce's violations and showed that—in addition to the $2.1 million Pierce allegedly made from the sale of Lexington shares in 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. *Id.* at 6-8. This allegation was consistent with the Division's earlier construction of the First OIP in response to Pierce's request for a more definite statement. The First OIP expressly included the "associates" as to respondents' alleged registration liability, and the First OIP expressly covered "[w]hether Pierce should be ordered to pay disgorgement" regarding sales of Lexington shares by Pierce involving "his associates" and "offshore company," "generating sales proceeds of over $13 million." As a result of its consistent position, the Division did not move the ALJ or the Commission to expand the First OIP in any respect, as it was permitted to do. *See* 17 C.F.R. § 201.200(d)(1) - (d)(2) ("Amendment of Order Instituting Proceeding").

Several days later, the Division filed its post-hearing brief. The Division repeatedly relied on the New Evidence to support its claim that Pierce violated registration provisions of the Securities Act and reaped alleged profits from the sale of unregistered Lexington stock by his associates, Newport and Jenirob. Wells Decl., Ex. G (Division's Post-Hearing Br.). Specifically, in addition to the $2.1 million Pierce allegedly made on his personal account, the Division requested disgorgement of an additional $7.5 million, which reflected alleged net proceeds from the sale of Lexington shares by Newport and Jenirob in 2004.

The Division's Proposed Findings of Fact and Conclusions of Law 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 1,6,34,400 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.

Wells Decl., Ex. J (Division's Proposed Findings of Fact 32, 50 & 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. (Division's Proposed Conclusions of Law 21-28, 46, 50-51).

Pierce opposed the Division's motion to admit the New Evidence. Among other things, Pierce pointed out that 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. Wells Decl., Ex. K (Resp't Pierce's Opp'n to Division's Mot. for the Admission of New Evidence at 3-9). Pierce also argued that the New Evidence did not support the Division's theories of liability and disgorgement in any event. *Id.* at 9-18.

On April 7, 2009, the ALJ issued an order granting the Division's motion. The ALJ 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." Wells Decl., Ex. L.

Having admitted the New Evidence as material to the issue of liability, the ALJ'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. 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."

In response to the ALJ's ruling, the Division did not move to amend, seek interlocutory review, 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) (Amendment of OIP); § 201.400 ("Interlocutory Review"). The Division's acquiescence confirmed to Pierce that the Division, like the ALJ, had determined that, to the extent remedial relief were granted, the approximately $2.1 million figure would be adequate. Indeed, as discussed below, the Division never took any steps to appeal or otherwise reverse any of the ALJ's rulings.

C. The Initial Decision Granted a Disgorgement Remedy

On June 5, 2009, the ALJ issued an Initial Decision in the First Action, Release No. 379 (the "Initial Decision"). Wells Decl., Ex. M. The Initial Decision accepted the Division's new 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 the ALJ concluded was the amount of profit Pierce allegedly made from the sale of Lexington stock from his personal account.

With respect to the New Evidence, the Initial Decision incorporated the ALJ'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 request the ALJ to reconsider or the Commission to grant immediate discretionary review of the Initial Decision that "determined" that the cease and desist orders and the amount "Respondent Pierce should be ordered to pay disgorgement" were adequate to serve the remedial interests of the public.

D. The Initial Decision Became a Final Decision After the Commission Elected Not to Modify or Take Other Action Regarding the Initial Decision

The Initial Decision and the Commission's Rules of Practice granted both parties 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 seek review. Instead, the Division accepted the benefits and burdens of the ALJ's decision to deny the Division's claim 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 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.

Although Pierce believed that the Initial Decision (including the ruling that registration violations had occurred) was erroneous, Pierce did not seek review by the Commission. In electing not to seek review and challenge the Initial Decision with the Commission, Pierce specifically relied on the prior decisions by the Division not to (a) seek interlocutory review of the ALJ's disgorgement ruling by the Commission or (b) request the Commission to amend the OIP to further confirm that it included a claim for an order that Pierce pay disgorgement of the

alleged Newport and Jenirob profits. Pierce desired finality with respect to the Division's approximately $9.6 million disgorgement claim against him.

There was good reason for the Division not to appeal the Initial Decision. Although the Division had taken the position, contrary to the ALJ's ruling, that the First OIP did not require amendment – because Newport and Jenirob were "offshore companies" and "associates" of Pierce within the use of that term in the First OIP and, thus, sufficiently "mentioned in the OIP" – the Division also understood that, if it were to appeal the Initial Decision, 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.

Indeed, had the Division appealed or sought any other relief from the Commission, Pierce would have filed a petition for cross-review and vigorously contested both the liability determination in the Initial Decision as well as any effort to increase the disgorgement order beyond the $2.1 million. *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"). Decl. of G. Brent Pierce ("Pierce Decl.) ¶¶ 3-4. Because he relied 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 since "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." *See* 17 C.F.R. §201.410(e) ("Prerequisite to Judicial Review").

Even though neither party filed a petition for review, the Commission still had plenary authority "on its own initiative" to review, reverse, modify, set aside or remand any or all of the Initial Decision, including the ALJ's prior 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). 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. *See* 17 C.F.R. § 201.452.

The Commission, however, decided not to modify the Initial Decision or order further proceedings in the First Action. Rather, on July 8, 2009, the Commission issued a finality order 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 entire 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 or his associates.

E. The Second Action Relitigates the Disgorgement Remedy

Some months later, 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. Pierce Decl. ¶ 5.

Only after Pierce had increased his offer, to an amount the Division had represented would be acceptable, did the Division staff inform Pierce that the Commission intended to initiate a new action against him to re-litigate the disgorgement remedy for 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 finally decided as unnecessary to the remedial relief ordered against him in the First Action, and believing that Commission staff had not been dealing with him in good faith, Pierce immediately broke off further negotiations for payment under the Final Decision. *Id.*

In an effort to avoid the Commission's threatened action, in February 2010, Pierce delivered a Wells Committee Submission arguing, among other things, that the Commission was

barred by res judicata and estopped from re-litigating a remedy extinguished in the First Action. Wells Decl., Ex. N (Wells Submission without exhibits). Pierce specifically reminded the Commission that the Division did not appeal the rejected $7.5 million disgorgement claim, 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. *Id.* The Commission rejected Pierce's Wells Submission arguments.

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. Wells Decl. Ex. O. As in the First Action, the Division claims that Pierce violated the registration provisions of the Securities Act, Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c) in connection with the unregistered sale of Lexington stock in 2004. The Commission again chose to prosecute claims in its own internal forum before an ALJ, when it could have brought them in a federal district court before an independent Article III judge with legal and equitable powers.

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 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 the Division proffered, but which the ALJ 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).

Just as important, in the Second Action, the Division seeks the more than $7.5 million disgorgement award (now $7.7 million) that the ALJ 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.***

Id. (Second OIP ¶¶ 27, 29 & 30 (emphasis added)). In short, the Commission hopes to benefit from the preclusive effect of the Final Decision to establish Pierce's liability in the Second Action, while escaping the preclusive effect of the Final Decision on the Commission's ability to re-litigate the amount to be disgorged from Pierce. 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 in the First Action, at least as to Pierce.

There is another troublesome aspect of the Second OIP. The Commission again uses the term "associates." Through this pleading device, the Commission threatens another round of repetitive litigation if it does not achieve all it wants in the Second Action against Pierce. This threat of future administrative actions against Pierce and "associates" will become a reality if, as the Commission apparently hopes, reference to "associates" in the body of the OIP allows it to escape established principles of res judicata.

F. The Commission Has Brought in this Court A Summary Enforcement Proceeding Based on the Final Decision in the First Action

The Commission's intention to have it both ways is manifested further by its simultaneous application to enforce the Final Decision in the First Action. On the same day it filed the Second Action, the Commission filed the Administrative Enforcement Action in this Court, to enforce the disgorgement remedy imposed by the Final Decision. Wells Decl. Ex. P. By filing its application, the Commission seeks an equitable writ of mandamus remedy (the entry of a court order enforcing its Final Decision) in a "summary proceeding" that does not necessarily include or trigger "the full array of legal, procedural and evidentiary rules governing" an "action" in federal court[3] while the Commission is inequitably abusing its power to act in a quasi-judicial capacity. The Commission's application in the Administrative Enforcement Action did not disclose to this court that the Commission had commenced the Second Action on the same day. *Id.*

Notwithstanding the unprecedented nature of the Second Action, the ALJ has denied a motion by Pierce to strike the July 19, 2010 hearing date, even though the motion was not opposed by the Division. Wells Decl. Exs. Q (June 23 Motion) and R (June 24 Order).

IV. ARGUMENT

A. Pierce Is Not Required To Exhaust Administrative Remedies In The Second Action Before Seeking Relief In This Court

This Court has jurisdiction over Pierce's claims for a stay, declaratory and injunctive relief.[4] Ordinarily, a party must exhaust its administrative remedies before seeking judicial relief,

---

[3] *SEC v. McCarthy*, 332 F.3d 650, 656-59 (9th Cir. 2003) (distinguishing an "action" in federal court from a summary proceeding to enforce commission orders).

[4] 5 U.S.C. § 705 ("Relief pending review"). The Court also has inherent authority to control its docket including the power to stay pending litigation. When granting a stay, the court must weigh the equities, taking into account: (1) the possible damage caused by a stay, (2) the hardships of proceeding without a stay, and (3) "the orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 269 (9th Cir. 1962); *cf. Adams v. St. of Cal. Dep't of Health Servs.*, 487 F.3d 684, 688-89 (9th Cir. 2007) (court may consider claim splitting in the context of staying or enjoining duplicative later-filed action). The Court further has ancillary authority under the Declaratory Judgment Act and the All Writs Act to stay proceedings and restrain parties to secure the benefits and preserve and protect the rights of the parties. 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act) and 28 U.S.C. § 1651 (the All Writs Act). *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685 (9th Cir. 1981) ("We have interpreted § 1651 as authorizing a district court to enjoin a party from attempting to relitigate a cause of action relating to the same subject matter of an earlier action.").

but "other factors occasionally outweigh the preference for a preliminary agency determination." *Casey v. FTC*, 578 F.2d 793, 796 (9th Cir. 1978); *see also S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 n. 4 (9th Cir. 1981) (exhaustion not required "where administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury would result, or the administrative proceedings would be void"). When deciding whether to stay and enjoin ongoing agency action, as here, a court must consider: (1) the extent of the injury from pursuing an administrative remedy; (2) the degree of doubt about agency jurisdiction; and (3) the involvement of agency expertise in the question of jurisdiction. *Casey*, 578 F.2d at 796; *California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1323 (9th Cir. 1977). These factors should be weighed on a case-by-case basis. *G.C. George*, 637 F.2d at 688 n. 4. All three factors weigh strongly in favor enjoining the Commission from continued prosecution of the Second Action.

Extent of Injury. Where agency action exposes a party to irreparable injury, judicial intervention is permitted. *Casey*, 578 F.2d at 796. The very initiation of the Second Action has already exposed Pierce to irreparable injury that, unless enjoined, will continue and increase. As discussed in greater detail below, the Second Action is causing damage to Pierce's reputation and depriving him of valuable business opportunities as an investment consultant and securities trader. Pierce Decl. ¶¶ 7-10. This ongoing injury to Pierce's reputation and business cannot be undone, or compensated for, if Pierce is forced to wait until the Second Action is concluded before getting judicial review of the fact that the Second Action is barred and should not have been brought at all.

Courts have recognized that enjoining unlawful agency action plainly barred by res judicata is a sound justification for bypassing the exhaustion requirement. In *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979), the Seventh Circuit affirmed the district court's injunction of pending and future OSHA citations on the grounds of res judicata. The court held that the plaintiff was not required to exhaust administrative remedies, reasoning:

> The present case provides a classic situation for deviating from the exhaustion rule. Exhaustion is not required if the established administrative procedures would prove unavailing or futile. The essence of Continental's due process claim is that

> the Secretary's duplicative prosecutions are vexatious and harassing. Exhaustion of the administrative remedy causes the unconstitutional injury. If Continental is forced to defend the numerous prosecutions on the merits before the Commission prior to seeking a judicial determination that the prosecutions were unwarranted, the injury will have already been complete and uncorrectable. For these reasons exhaustion would not serve the purposes for which it was intended.

Id. at 597; *also Safir v. Gibson*, 432 F.2d 137, 143 (2d 1970) ("the reason for applying res judicata to administrative agencies is ... to protect a successful party from being vexed with needlessly duplicitous proceedings. If [that] interest is not protected at the outset, it will be lost irreparably"). This case is no different. Unwarranted prosecution is the cause of Pierce's injury. He should not be forced to re-litigate issues in the Second Action, thereby incurring even more irreparable injury, before finally obtaining judicial review. Even if fully vindicated in the Second Action, Pierce's "injury will have already been complete and uncorrectable."

Agency Jurisdiction. For the reasons discussed below, the Commission has no authority in the Second Action to prosecute the same disgorgement claim it raised, litigated, lost and elected not to appeal in the First Action. This is not a case where the Commission's jurisdiction should be determined by the agency in the first instance, for the Commission's authority to proceed with the Second Action does not turn on any factual determination or statutory interpretation. *Cf. Safir*, 432 F.2d at 143 ("In this respect, a claim of res judicata differs from a claim that an administrative agency has no jurisdiction over the subject matter of the investigation ... an issue which Congress meant to be decided in the first instance by the agency itself."). By ignoring Pierce's Wells Committee submission, and then initiating proceedings in its own tribunal, rather than court, the Commission demonstrated that it will not apply res judicata to itself. Nor will the Commission apply the doctrines of judicial and equitable estoppel, since its very commencement of the Second Action is part and parcel of the "affirmative misconduct" underlying Pierce's equitable estoppel claim. Since only a court will decide these matters, "there is nothing to be gained and much to be lost by waiting for the agency to finish its deliberations" before Pierce can obtain judicial review. *Id.* at 144-45.

Agency Expertise. Where it applies, administrative exhaustion "makes sense in terms of both judicial economy and agency efficiency ... because it permits an administrative agency to

perform functions within its special competence to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Marshall v. Burlington N., Inc.*, 595 F.2d 511, 513 (9th Cir. 1979) (citations and internal quotation marks omitted). None of these factors apply here; there is no need for or benefit from agency fact-finding or expertise. Res judicata is a ***question of law***, and judicial and equitable estoppel must be a question of ***judicial*** discretion where, as here, the agency is both the trier of fact and the party accused of wrongdoing. Indeed, as discussed above, the Commission has already refused to consider Pierce's arguments when it initiated the Second Action over Pierce's objection, and it is clear that it will continue to do so until a court intervenes. It would be a futile act to request the Commission to stay the Second OIP and Second Action.[5] Meanwhile, the ALJ has denied a postponement of the rushed hearing in mid-July in the Second Action. The result is that Pierce must, on short notice, address in two fora the relitigation that the Commission is attempting to pursue. Requiring Pierce to exhaust administrative remedies is both unnecessary and futile in this instance.

B. Pierce Is Entitled to a Temporary and Preliminary Injunction Prohibiting the Commission from Prosecuting the Second Action And a Stay of the Administrative Enforcement Action

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F.Supp. 1320, 1323 (N.D. Cal. 1995). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (*quoting Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ---, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008)). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Indep. Liv. Cntr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009)

[5] 17 C.F.R. § 201.401 (Consideration of Stays); *see also* § 201.401(c) ("Stay of Commission Order"). Moreover, this rule and its subsections fail to set forth any standards for the consideration of stays and thus fail to provide parties like Pierce fair notice and due process.

(*quoting Winter*, 129 S.Ct. at 376) (internal quotation marks omitted). Pierce satisfies the requirements for a TRO and preliminary injunction.

1. Pierce is Likely to Succeed on the Merits

a. The Second Action is Barred by Res Judicata

"Where an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S. Ct. 1545, 1560, 16 L. Ed. 2d 642 (1966). "The doctrine of res judicata 'is motivated primarily by the interest in avoiding repetitive litigation, conserving judicial resources, and preventing the moral force of court judgments from being undermined.' For this reason, res judicata bars not only all claims that were actually litigated, but also all claims that "could have been asserted" in the prior action." *Int'l Union of Operating Engineers-Employers Constr. Indus. Pension, Welfare & Training Trust*, 994 F.2d 1426, 1431 (9th Cir. 1993) (citation omitted).

"[T]he criteria most often stressed" in Ninth Circuit decisions are whether the claim "arises out of the same transactional nucleus of facts ...." *Id.* at 1430. Here, the successive claims arise from the same transactional nucleus of facts, involve substantially the same evidence, the same rights and interests. *Id.* at 1429 (setting forth four-part test for determining whether successive claims constitute the same cause of action). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Nevada v. United States*, 463 U.S. 110, 130, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983).

The doctrine against claim splitting is one application of the general doctrine of res judicata. *Sutcliff Storage & Warehouse Co. v. United States*, 162 F.2d 849, 852 (1st Cir. 1947). Even when a party brings a claim in a court which could grant it only limited relief, the party cannot insist upon maintaining another action on the same claim. *Id.* (affirming dismissal of claims). Here, there was no statutory restriction on the SEC's adjudicatory powers to grant the disgorgement remedy and the Final Decision did not expressly reserve a right by the SEC to maintain a second action and split the disgorgement remedy.

The First Action was clearly an adjudicatory proceeding where the Commission exercised the equitable remedy of disgorgement. Ten months later the Commission has elected to file in this Court a summary proceeding (one reserved for a writ of mandamus, injunctions, similar orders) as the means to enforce the Final Decision granting limited equitable relief. By applying for the kind of summary relief reserved for enforcement of final judgments, the Commission has accepted the benefits of the First Action and avoided bringing "a full blown civil action under the Federal Rules...."[6] The Commission must accept the restrictions inherent in the adjudicated remedy in the First Action.

The First Action extinguished all other rights of the Commission to a disgorgement remedy against Pierce with respect to the sale of Lexington shares – at least as to transactions described in the First OIP and issues of remedial relief raised to address those transactions before the Final Decision. Other courts have precluded similar attempts to re-litigate. *SEC v. Crofters, Inc.* 351 F. Supp. 236, 257-58 (S.D. Ohio 1972) (granting summary judgment on the basis of *res judicata* barring SEC's second suit for injunction against deception in the offer or sale of "any security" and for "other or further relief..." because earlier SEC injunction action against same defendant had enjoined it from deception in the offer of sale of "its own securities"), *rev'd on other grounds sub nom., SEC v. Coffey*, 493 F.2d 1304, 1309 (6th Cir. 1994) (stating SEC had not appealed the dismissal of company on the basis of res judicata), *cert. denied*, 420 U.S. 908 (1975) [7]

---

[6] *McCarthy*, 322 F.3d at 656-60 (holding the § 21(e) of the Exchange Act authorizes the Commission to use summary proceedings to enforce its orders in district court, which differ from a full blown civil action; also ruling fairness and due process require an opportunity to respond, but declining to rule on whether affirmative defenses were potentially valid).

[7] *Harnett v. Billman*, 800 F.2d 1308, 1314-15 (4th Cir. 1986) (holding prior adjudication barred a claim that arose out of the same transactions and that could have been raised in the prior suit; claims arising out of corporate spin-offs and freeze-out mergers formed the basis for a prior action and were precluded under the doctrine of res judicata; barred claims included those under the 1933 and 1934 Acts; stating rule that 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); *Mack v. Utah State Dep't of Commerce*, 221 P.3d 194, Blue Sky L. Rep. ¶ 74,782 (Utah 2009) (upholding an injunction against the Utah Division of Securities where the Division had initially opted to bring action in state court against the branch manager of a securities firm and successfully obtained a civil fine and suspension in that action, and then subsequently sought the additional remedy of restitution in an administrative action; holding that (i) injunction was warranted and that the administrative remedy of going through the entire administrative action was not necessary, and (ii) the Division's claims were barred by res judicata); *Doherty v. Cuomo*, 76 A.D.2d 14, 430 N.Y.S.2d 168 (1980) (holding the New York Secretary of State was barred from bringing a second proceeding against a real estate broker where the two actions brought against the broker resulted from acts in nearly the identical

This is not a case where after the First OIP was initiated subsequent events and acts occurred that are the basis for a bona fide new second action. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1462-65 (2nd Cir. 1996) (rejecting res judicata defense where new action was based on ***subsequent*** acts that occurred after the commencement of the first action). Rather, since "the transaction or connected series of transactions at issue . . . is the same, that is 'whe[re] the same evidence is needed to support both claims, and whe[re] the facts essential to the second were present in the first,'" the Final Decision has preclusive effect on the Second Action. *Id.* at 1464. Claim preclusion means that "[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 n. 4, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (citation omitted). The disgorgement claims here arose from the same nucleus of operative facts – resale of Lexington shares in 2004 by Pierce through "offshore company" "associates" Newport and Jenirob, "generating" a substantial portion of the "sales proceeds of over $13 million." The facts are so interwoven as to constitute a single claim and cannot be "dressed up" to look different and to support a separate new claim.[8]

In addition to requesting disgorgement of profits from Pierce due to Lexington stock sales by Newport and Jenirob in the First Action, 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 (registration). *See, e.g.*, Wells Decl. Ex. G (Div. Of Enforcement's Post-Hearing Br. at 1) ("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

---

time frame, the statutory violations were virtually identical, and the penalty, legal theory, hearing office and basic violations were identical, and holding that the second proceeding merged into the final judgment obtained in the first proceeding).

[8] *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.").

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. Compare the foregoing examples of factual and legal arguments the Division litigated in the First Action to the facts and violations alleged in the Second OIP ¶¶ 6-31 and Section III (Wells Decl. Ex. O). They are identical. And the ALJ relied on the New Evidence underpinning the $7.5 million disgorgement claim to rule that Mr. Pierce had committed registration violations. The twenty-one page Initial Decision (Wells Decl. Ex. M) ***refers to Newport over sixty-five times and Jenirob six times***.

b. The Second Action is Barred by Equitable Estoppel

Pierce is also entitled to injunctive relief under the doctrines of equitable and judicial estoppel. *See Syngenta Crop Protection, Inc. v. E.P.A.*, 444 F. Supp. 2d 435, 454-55 (M.D. N.C. 2006) (plaintiff stated valid cause of action for injunctive relief against agency for equitable estoppel). Equitable estoppel is available against the Commission. *SEC v. Sands*, 902 F. Supp. 1149, 1166 (C.D. Cal. 1995) The four traditional 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 belief 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). 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 imposition of estoppel will not unduly harm the public interest." *Id.* (citation and internal quotation marks omitted).

Pierce satisfies all these elements. Judicial estoppel applies as well, given the summary proceeding that the Commission filed and the Division's statements in the First Action. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (holding

that judicial estoppel may be warranted if, among other things, a party's later position is "clearly inconsistent" with its earlier position).[9]

When the ALJ rejected the Division's $7.5 million disgorgement claim regarding the Newport and Jenirob sales—both in her ruling admitting the New Evidence and in the Initial Decision—the Division could have (a) petitioned the Commission to consider the ALJ's ruling on an interlocutory basis, 17 C.F.R. § 201.400(b) moved the Commission to amend the First OIP to expressly specify that it included Newport and Jenirob, 17 C.F.R. § 201.200, and/or (c) appealed the Initial Decision to the Commission, 17 C.F.R. § 201.410. The Division did none of these things, confirming that it agreed that the Initial Decision's $2.1 million disgorgement order was adequate to redress all the conduct litigated in the First Action. Further, the Commission could have reviewed the Initial Decision "on its own initiative," 17 C.F.R. § 201.411, but did not, choosing instead to make the Initial Decision its own. In refusing to appeal or review the Initial Decision, the Commission manifested its election to avail itself of the ALJ's rulings on Pierce's liability in exchange for the ALJ's disgorgement order.

The Commission's apparent acquiescence in the Initial Decision was strategic and intended to induce Pierce to sacrifice his right to appeal the ALJ's rulings. It worked. Had the Division appealed, Pierce would have filed for cross-review and vigorously contested liability and disgorgement. Likewise, had the Commission reviewed and affirmed the Initial Decision, Pierce would have appealed that ruling to the Court of Appeals. Pierce Decl. ¶¶ 3, 4. But Pierce wanted finality. In specific reliance on the Commission's acceptance in the Initial Decision, including its $2.1 million disgorgement order, Pierce declined to challenge the decision. *Id.* The Commission further induced Pierce to rely on the finality of the Initial Decision over the next several months, as the parties negotiated Pierce's obligation to satisfy the "final" disgorgement order; only after

[9] While courts do not apply a specific "concrete formula" to determine the appropriateness of the doctrine's applicability, courts "typically apply judicial estoppel where (1) a party's later position is *clearly* inconsistent with its earlier position, (2) the party has succeeded in persuading a court to accept its earlier position and judicial acceptance of the later position would create the perception that either court was misled, and (3) 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." 532 U.S. at 750 (emphasis in original).

Pierce had made an offer the Commission was prepared to accept did it reveal its plans to file a Second Action to seek the same $7.5 million that it had been denied in the First Action. *Id.*, ¶ 5.

Courts have applied equitable estoppel in similar situations. In *Gamboa-Cardenas*, for example, the defendant chose to waive his right to testify at trial based on the government's assurances that his pre-trial statements would qualify him for a reduction in sentence. After trial, the government reversed itself, and argued that no reduction in sentence was warranted. In estopping the government from reversing course, the Court held that "the government's abrupt change of position in this case ... goes beyond 'mere negligence' and would cause a 'serious injustice'[.]" 508 F.3d at 503-504.

The same is true here. The Initial Decision ordered Pierce to disgorge $2.1 million and rejected the Division's claim for an additional $7.5 million. The Commission accepted the finality of the Initial Decision's disgorgement award when it adopted the remedial relief. Neither the Division nor the Commission sought to further press the Division's contention that Pierce should be ordered to pay additional disgorgement of $7.5 million. Notwithstanding that Pierce was already a respondent in a proceeding in which the Commission was assessing disgorgement of $9.6 million from Pierce resulting in part from stock trading by Newport and Jenirob that was included in the First OIP, neither the Division nor the Commission sought to appeal or alter the ALJ's adverse determination – instead allowing it to become final.

Pierce detrimentally relied on the Commission's conduct when he waived his own right to appeal. Like *Gamboa-Cardenas*, the Commission's repudiation of the finality of the Initial Decision is an "abrupt change of position" that cannot be ascribed to mere negligence. Because Pierce's right to appeal the Initial Decision cannot be revived, the Commission must be equitably estopped from arguing that the Initial Decision does not preclude its efforts to re-litigate the $7.5 million disgorgement claim. Put simply, the Commission cannot have its cake and eat it too.

2. Pierce Will Suffer Irreparable Harm Absent Injunctive Relief

Courts have repeatedly recognized that forcing a party to re-litigate claims and issues previously decided in an earlier proceeding, in and of itself, constitutes an irreparable harm. *See, e.g., Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425, 1428-29 (9th Cir. 1986); *In re SDDS, Inc.*,

97 F.3d 1030, 1041 (8th Cir. 1996). And, as noted above, this principle applies equally to justify enjoining ongoing administrative proceedings on the basis of res judicata. *SEC v. Crofters, supra, Continental Can*, 603 F.2d at 597 ("If Continental is forced to defend numerous prosecutions on the merits ... prior to seeking a judicial determination that the prosecutions were unwarranted, the injury will have already been complete and uncorrectable"); *Safir*, 432 F.2d at 143-144 (if the right of "a successful party from being vexed with needlessly duplicitous proceedings" "is not protected at the outset of the second proceeding, it will be lost irreparably").

This is particularly true where, as here, re-litigation of claims and unwarranted duplicitous proceedings damage the reputation of the defendant. The Commission's commencement of the Second Action has damaged Pierce's business reputation, and has and will continue to deprive him of business opportunities. Pierce Decl. ¶ 7. Specifically, articles in publications frequently read by private and institutional investors, stock brokers, investment firms, bankers and financial intermediaries, and others erroneously imply that Pierce has engaged in improper conduct different than, or subsequent to, that litigated and finally decided in the First Action. *Id.* ¶ 8. The Second Action thus threatens Pierce's business and will damage his efforts to re-establish valuable financial relationships that were lost following his decision, induced by the Commission's conduct, not to challenge liability in the First Action. *Id.* ¶¶ 9, 10. Such damage cannot be measured monetarily and cannot be remedied *post hoc*, even if the defendant ultimately prevails in the second proceeding. Pierce has shown a likelihood of irreparable harm.

3. The Balance of Equities and the Public Interest Favor An Injunction

A temporary stay to permit judicial review harms no one. The facts supporting waiver and estoppel weigh in favor of a stay and injunction, as do the Commission's unclean hands.[10] In the First Action, the Commission surrendered its claim for an additional $7.5 million in order to

[10] *SEC v. Sands*, 902 F. Supp. at 1166 (citing decisions declining to strike affirmative defense of unclean hands; but granting summary judgment dismissing defense after discovery was completed); *SEC v. Elecs. Warehouse Inc.*, 689 F. Supp. 53, 73 (D. Conn. 1988), *aff'd* 891 F.2d 457 (2d Cir. 1989); *See Jacobs v. United States*, 239 F.2d 459, 461–62 (4th Cir. 1956), *cert den.* 353 U.S. 904, 77 S.Ct. 666, 1 L. Ed. 2d 666 (1967) ("[H]e who seeks equity must do equity, a principle binding upon the government, as well as upon individuals"); *see also Sierra Club v. Hickel*, 467 F.2d 1048, 1052 (6th Cir. 1972) ("Equitable principles apply to the Government as well as to private individuals except when limited by statutory provisions."); *City of Fredericksburg v. Bopp*, 126 S.W.3d 218, 223 (Tex. App. 2003) ("[A] governmental entity, like any litigant, must do equity when seeking equitable relief").

assure finality of the $2.1 million disgorgement order. By commencing the Second Action, the Commission is now proceeding as if the First Action were not yet final. At the very same time, the Commission is telling this court that the First Action *was* final – in the Commission's Administrative Enforcement Action. Such duplicity cannot afford Pierce due process in the Commission's forum or support assistance from this court under such unusual circumstances. Consequently, until the *res judicata* and estoppel issues raised by the Second Action have been resolved, the Commission's application for enforcement should be stayed.

C. Pierce Should Not Be Required to Post a Bond

This Court should waive the bond requirement or set the bond at a nominal amount. "Despite the seemingly mandatory language, Rule 65(c) invests the district court with discretion as to the amount of security required, if any. In particular, the district court may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (citation and internal quotation marks omitted). This is particularly true in cases against the government, where, if the injunction is later vacated, the harm to the government is nominal. *Cf. Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (affirming on basis of lack of evidence of costs to the government). This principle applies here. Pierce will likely succeed on the merits, but even if he does not, the Commission will not be harmed by an injunction pending a decision on the merits.

At most, a preliminary injunction will temporarily delay the Commission's ability to prosecute its duplicative $7.5 million disgorgement claim in the Second Action. But the profits the Commission seeks to disgorge in the Second Action were realized over six years ago, and the Commission will be unable to show how a further delay of a few months will prejudice its ability to establish liability or a disgorgement remedy in the Second Action. A temporary delay as a result of a preliminary injunction will not harm the government.

V. CONCLUSION

The Second Action violates principles of res judicata (claim preclusion), equitable and judicial estoppel, laches and waiver and must be preliminarily enjoined pending assessment of

permanent declaratory and injunctive relief. Meanwhile, until permanent relief is determined, the Commission should be estopped from treating as a final order a decision that it improperly treats as incomplete. Pending the final determination whether the Second Action is barred by the First Action, the Court should temporarily stay the prosecution of the Administrative Enforcement Action.

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
Attorneys for Plaintiff
GORDON BRENT PIERCE

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

William F. Alderman, Esq.
ORRICK, HERRINGTON& SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco CA 94105
Telephone: 415-773-5944
Email: walderman@orrick.com

Attorneys for G. Brent Pierce

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GORDON BRENT PIERCE, Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION, Defendant.	Civil No. **DECLARATION OF CHRISTOPHER B. WELLS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Upon penalty of perjury under the laws of the United States, the undersigned declares that the following is true.

1. I am the attorney for plaintiff Gordon Brent Pierce with regard to the filing of a Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunction and

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

Temporary Restraining Order against the Defendant Securities and Exchange Commission in the above-described captioned case.

2. Attached as Exhibit A is a true and correct copy of the Order Instituting Cease-and-Desist Proceedings against Pierce and others on July 31, 2008 in a proceeding captioned In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce, Admin. Proc. File No. 3-13109.

3. Attached as Exhibit B are true and correct copies of the Division's Hearing Exhibits 43, at SEC 2702, and 51.

4. Attached as Exhibit C is a true and correct copy of Pierce's Motion for a More Definite Statement.

5. Attached as Exhibit D is a true and correct copy of the Division's Opposition to Pierce's Motion for a More Definite Statement.

6. Attached as Exhibit E is a true and correct copy of Pierce's Reply in Support of Motion for a More Definite Statement.

7. Attached as Exhibit F is a true and correct copy of excerpts of the transcript for the September 29, 2008 pre-hearing teleconference.

8. Attached as Exhibit G is a true and correct copy of the Division's Post-Hearing Brief.

9. Attached as Exhibit H is a true and correct copy of the Order closing the record of evidence issued by Administrative Law Judge Foelak on March 6, 2009.

10. Attached as Exhibit I is a true and correct copy of the Division's Motion for the Admission of New Evidence.

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

11. Attached as Exhibit J is a true and correct copy of the Division's Proposed Findings of Fact and Conclusions of Law.

12. Attached as Exhibit K is a true and correct copy of Respondent Pierce's Opposition to Division's Motion for the Admission of New Evidence.

13. Attached as Exhibit L is a true and correct copy of Administrative Law Judge Foelak's Order granting the Division's Motion to Admit New Evidence.

14. Attached as Exhibit M is a true and correct copy of the Initial Decision dated June 5, 2009 in the First Action, Release No. 379.

15. Attached as Exhibit N is a true and correct copy of the February 11, 2010 Wells Submission of G. Brent Pierce without exhibits.

16. Attached as Exhibit O is a true and correct copy of the Order Instituting Cease-and-Desist Proceedings 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.

17. Attached as Exhibit P is a true and correct copy of the SEC's Application for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce.

18. Attached as Exhibit Q is a true and correct copy of the Motion to Extend Deadline for Answer of Respondent Gordon Brent Pierce and Strike Pre-Set Hearing Date as to Pierce.

19. Attached as Exhibit R is a true and correct copy of the June 24, 2010 Order issued by Administrative Law Judge Kelly.

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

DATED: this 8th day of July, 2010 at Seattle, Washington.

Christopher B. Wells

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

EXHIBIT A

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

By: Jill M. Peterson
Assistant Secretary

EXHIBIT B

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.
Jenirob Company Ltd. Landstrausse 126 Schaan 9494 Lichtenstein	400,000 Free Trading Common Shares in Lexington Resources, Inc.
Jenirob Company Ltd. Landstrausse 126 Schaan 9494 Lichtenstein	35,000 Free Trading Common Shares in Lexington Resources, Inc.

Yours sincerely,
LEXINGTON RESOURCES, LTD.

Grant Atkins, *Director*

US Offices: 435 Martin Street, Suite 2000, Blaine, WA U.S.A. 98230
Toll Free: (888) 848-7377 Tel: (719) 476-3611 Fax: (800) 786-7827
Internet: Lexingtonoilandgas.com E-Mail: investor@intergoldcorp.com

Date	Description of Share Ownership and Transfer Activity	Additions/ (Subtractions) to Balance	Cumulative Share Balance	Additions/ (Subtractions) to Balance	Cumulative Share Balance	Additions/ (Subtractions) to Balance	Cumulative Share Balance	and Parc Place Investments Additions/ (Subtractions) to Balance	and Parc Place Investments Cumulative Share Balance	Total Number of Shares Owned by Pierce and Pierce-Controlled Entities	Ownership Percentage	Additions/ (Subtractions) to Balance	Cumulative Balance of LXRS Shares Outstanding	Source Document (and Bates Reference)
[redacted]														

EXHIBIT C

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.

LANE POWELL PC
SUITE 4100
1420 FIFTH AVENUE
SEATTLE, WA 98101
(206) 223-7000

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 D

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.

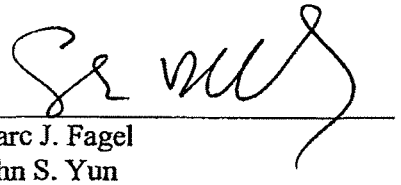
Paragraphs 20 and 21 of the OIP plainly state the specific securities statutes and rules that the Division alleges Pierce violated through his conduct. No more definite statement of the law, or of any facts, is needed to permit Pierce to respond to the allegations against him in the OIP, as he already 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

EXHIBIT E

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.**	**RESPONDENT PIERCE'S REPLY SUPPORTING MOTION FOR A MORE DEFINITE STATEMENT**

Summary

The Division's Response to Pierce's Motion for More Definite Statement is helpful. Some vague allegations remain.

Further Clarification Needed

1. The term "associates" appearing in paragraphs 1, 7 and 15 -- throughout the OIP -- remains undefined. Are these the entities included in Mr. Pierce's Schedule 13D

filing? Are they other recipients of S-8 shares? Are they other contractors who served Lexington through International Market Trend AG ("IMT")?

2. The Division explains that Mr. Pierce violated Section 5 because he purchased with a view to distribution. Response pp. 2-3. But is that because Mr. Pierce was involved in S-8 issuances that were the primary financing vehicle for Lexington, as in the administrative cases cited in Mr. Pierce's Wells Committee submission to juxtapose against Lexington's much smaller percentage of capital raised through S-8 exercises? Or is that because Mr. Pierce really had no interest in investing in Lexington and sold his S-8 shares into the open markets at the earliest opportunity? The Division has identified every issuance of S-8 shares to Mr. Pierce in its Response, so does that mean that the Division alleges that every exercise and every subsequent sale by Mr. Pierce of every S-8 share he received violated Section 5? If not, which share purchases and which sales were illegal?

3. Regarding paragraph 6 of the OIP, the Response does not identify the "offshore entity" that "owned" Lexington Oil and Gas. Mr. Pierce believes that there were several owners of Lexington Oil and Gas. Does the Division contend that any such corporate structuring amounts to capital raising and promotion of a market for Lexington stock and does not amount to acquisition and merger services eligible for S-8 (in spite of SEC Releases to the contrary)?

4. The Response still does not identify which S-8 share issuance was awarded to Mr. Pierce for raising capital provided by which particular contributors of capital at what time. Nor does it identify what particular stock promotion actions were compensated by a particular S-8 award. No amount of review of the Division's investigative documents will pin down these elusive allegations.

5. The Response attempts to clarify the allegations of paragraph 17 – that Mr. Pierce owned between 10 and 60 percent of Lexington's outstanding stock from November 2003 to May 2004 – to explain the additional allegation in paragraph 18 that the Schedule 13D was defective. But the response does not identify which Schedule 13D entities' Lexington shares were not included, at what time and how many. Apparently, the Division now contends that International Market Trend held shares of Lexington that should have been included in Mr. Pierce's 13D. But the Division does not identify the amount of shares that should have been included and when they were owned by IMT. (This is not surprising, because IMT was simply a conduit (only human beings may receive S-8 shares) of shares awarded to IMT contractors who assisted Intergold/Lexington. If IMT S-8 allocations had been included in Mr. Pierce's 13D, the actual human beings who received those S-8 shares would have to ignored.)

Conclusion

The Division's Response clarifies some allegations. The allegations listed above, however, remain too indefinite to foster a sharply focused hearing. The relief requested in Mr. Pierce's Motion for a More Definite Statement should be granted as to the items listed above.

DATED this 23rd day of September, 2008.

LANE POWELL PC

By _____
Christopher B. Wells, WSBA No. 08302
Attorneys for Respondent G. Brent Pierce

EXHIBIT F

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	) Administrative Law Judge
	) Carol Fox Foelak
Lexington Resources, Inc.,	)
Grant Atkins, and Gordon Brent	)
Pierce,	)
	)
Respondents.	)
	)

PREHEARING CONFERENCE

SAN FRANCISCO, CALIFORNIA

SEPTEMBER 29, 2008

REPORTED BY: MICHAEL CUNDY, CSR 12271

PREHEARING CONFERENCE, taken at 44 Montgomery Street, 26th Floor, San Francisco, California, on Monday, September 29, 2008, at 10:02 A.M., before Michael Cundy, Certified Shorthand Reporter, in and for the State of California.

APPEARANCES:

FOR THE SECURITIES AND EXCHANGE COMMISSION:

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
BY: JOHN YUN, ESQ.
STEVEN BUCHHOLZ, ESQ.
44 Montgomery Street, 26th Floor
San Francisco, California 94104
(415) 705-2500

FOR LEXINGTON RESOURCES, INC. (TELEPHONICALLY):

SCHLUETER & ASSOCIATES, P.C.
BY: HENRY SCHLUETER, ESQ.
1050 17th Street, Suite 1750
Denver, Colorado 80265
(303) 292-3883

FOR GRANT ATKINS (TELEPHONICALLY):

WILSON SONSINI GOODRICH & ROSATI
BY: JARED KOPEL, ESQ.
1301 Avenue of the Americas, 39th Floor
New York, New York 10019-6022
(650) 493-9300

FOR GORDON PEIRCE (TELEPHONICALLY):

LANE POWELL
BY: CHRISTOPHER B. WELLS, ESQ.
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
(206) 223-7084

ALSO PRESENT: JUDGE CAROL FOX FOELAK

SAN FRANCISCO, CALIFORNIA; MONDAY, SEPTEMBER 29, 2008
10:02 O'CLOCK A.M.
-oOo-

JUDGE FOELAK: This is a prehearing conference in the matter of Lexington Resources, Inc., and others, administrative proceeding number 3-13109, and this prehearing conference is being held by telephone on September 29, 2008 at 1:00 P.M. Eastern time, and I am Judge Foelak.

And can I have your appearances now for the record, starting with the division?

MR. YUN: Yes. Good afternoon, Your Honor. This is John Yun, appearing for the division. I'm in the San Francisco office.

With me is Steven Buchholz, also in the San Francisco office.

JUDGE FOELAK: Okay. Thank you. Mr. Schleuter?

MR. SCHLEUTER: Yes. This is Henry Schleuter, appearing on behalf of Lexington Resources, Inc.

JUDGE FOELAK: Okay. Mr. Kopel?

MR. KOPEL: Yes. It's Jared Kopel --

JUDGE FOELAK: Okay.

MR. KOPEL: -- K-o-p-e-l, appearing on behalf of Grant Atkins.

MR. WELLS: And this is Chris -- Christopher Wells, of Lane Powell, P.C., in Seattle, appearing for respondent Brent Pierce.

JUDGE FOELAK: Okay. Thank you, everyone. Okay. First, are there any settlements that I should be apprised of?

MR. YUN: Yes, Your Honor. This is John Yun. On behalf of Division of Enforcement, we believe we have settlement terms in principal with Respondents Lexington Resources and Grant Atkins.

We believe we have agreed to the language of the proposed orders that would be attached to the consents, and so we anticipate moving, probably in the next couple of days, for a stay of proceedings as to those two respondents so that we can make sure we've got the consents finalized and then go to the next stage of submitting it to the secretary's office for eventual commission approval.

Right now, if things go as they should, we believe we should be able to have the matter submitted to the commission by the end of October in terms of getting it to the secretary's office, and we would like to have a decision by the commission by the end of November.

JUDGE FOELAK: Okay. Mr. Yun, actually, you and those two respondents can request a stay, you know, right now, if you made an agreement in principal, you know, on

all of the terms, actually.

MR. YUN: That's fine, Your Honor. We thought you might want to have a formal joint motion, but if you are willing to accept it orally, the division is agreeable, if the two respondents are agreeable.

MR. SCHLEUTER: Lexington Resources is agreeable.

MR. KOPEL: As is Grant Atkins.

JUDGE FOELAK: Okay, very good, and the time line that Mr. Yun, you know, mentioned is certainly within the stay time line. Okay.

Let me just ask you two gentlemen -- this is just for the purpose of running the clock on this time line for ending the proceeding. I know that you counsel received the OIP on behalf of your clients, like, around August 8th. Do you know when your actual clients, like, namely, Mr. Atkins, you know, personally received it perhaps from you?

MR. KOPEL: Well, you know, it went up on the SEC's website, so -- and it -- I would say that we became generally aware of it in early August, even though we didn't receive, I think, the formal service until on or about August 4th.

JUDGE FOELAK: When did your client receive it, is what I was wondering? Probably from you or maybe you just told him to look at the website, or --

Page 14

don't know probably whether you are going to call expert witnesses and so on and so forth.

I would suggest, rather than trying to hash it out over the phone now, that the division and Mr. Wells agree upon a mutually agreeable prehearing schedule, which they will submit to me, that will take into account exchange of witness and exhibit lists, and if you intend to have any sort of expert testimony in writing, a date for that or else a date for making experts available to the other side, to talk with them.

MR. YUN: Okay.

MR. WELLS: Very well, Your Honor.

JUDGE FOELAK: Okay. Does anyone have anything else?

MR. YUN: Yes. There were two motions pending.

JUDGE FOELAK: Okay. The two motions, okay, very good.

Firstly, Mr. Wells, you put in a motion for more definite statements, and the division in their responsive pleading did provide specificity, you know, instead of saying offshore bank, gave the name of it, and that sort of thing. It did appear as if it theoretically answered your questions.

MR. WELLS: Well, Your Honor, if you read our reply supporting that very motion for a more definite

Page 15

statement, you will notice that we did acknowledge indeed that the division had added specificity as to some of the vague allegations that we were complaining about and specifically listed.

However, under the heading "further clarification needed," we've identified some items that still remain vague, and it would certainly sharpen the focus of the parties on the issues at the hearing and help ensure that the hearing does not exceed four, five days, for the division to add the specificity that we've identified in our reply.

For example, fair reps one, seven, and 15, and really, I think throughout the OIP, still contain the undefined term of associates of Mr. Pierce.

We're not sure who they mean by associates, and that makes it difficult to prepare a defense when the term appears repeatedly in allegations throughout the OIP.

Then, again, regarding section five in the S-8 violations, the division has alleged a plan of distribution that the S-8 was abused, the S-8 registration process was abused. It hasn't identified one particular issuance or two particular issuances of S-8 shares that violate section five, so presumably, after its clarification or opposition to the motion, the division still contends that all of the S-8 share issuances violated the registration provisions.

Page 16

As we state in the reply, we don't know if this means that the S-8 -- that the division is saying as follows: Lexington used S-8 to capitalize itself, and we supplied to you in an attached Wells committee submission of Mr. Pierce a number of administrative proceeding citations about the abuse of S-8 in which companies had used S-8 share grants, phased most of their capital, and we showed in contrast here, the S-8s were used to raise only a small fraction of the capital. I think it was under 20 percent or thereabouts, and much of the other funds came from elite venture capitalists, et cetera.

So we don't know if there's this generalized allegation of an S-8 in which Mr. Pierce participated in an illegal distribution because the S-8 process itself was abused or if the division is contending that Mr. Pierce never intended to hold shares of particular S-8 grants to him individually, so that makes it difficult to narrow the issues for the hearing.

The other one is there's a reference to an offshore entity in paragraph six that owned Lexington Oil & Gas, and we thought there were four owners of Lexington Oil & Gas, and we don't understand the purpose of that reference to the offshore entity.

The division seems to be contradicting itself by alleging that Mr. Pierce helped with the corporate

Page 17

structuring of this entity, but in fact, that would be an eligible service for an S-8 grant as compensation for Mr. Pierce's structuring of an entity that was involved in converting Intergold, a failed gold-mining company that was suing its engineers successfully, through the efforts of Mr. Pierce and others, into Lexington, an oil and gas company, that was funded by sophisticated venture capitalists over the years before it failed. So we're not sure what they mean by that allegation.

And then, finally -- well, we have two other items -- in our paragraph four and five in the reply, we pointed out that the division's response still does not identify which particular S-8 share grant Mr. Pierce received as compensation for what particular capital-raising or stock-market promotion activities that is alleged. That is absolutely critical because, right now, we just have a morass of claims and the burden is on us, apparently, according to the division's philosophy or theory, that Mr. Pierce has to justify every single S-8 grant and all the commission has to do is allege that the services were ineligible only because --

THE REPORTER: Excuse me. I need to go off the record one minute.

(A short recess was taken.)

JUDGE FOELAK: During the brief intermission,

Page 18

everyone was silent.
Please continue, Mr. Wells.
MR. WELLS: And I'm nearly finished. I have one other item besides this.
And I was making the point that, under the division's theory that its allegations need not be sharpened or further refined, they simply generally allege that Mr. Pierce received stock compensation in S-8 grants in connection with capital-raising or stock-market promotional activities and without tying particular grants into or connecting them to particular services that were ineligible but supplied by Mr. Pierce, such as capital-raising and stock-market promotional services.
We really may waste a lot of time and effort and expense contesting S-8 grants that perhaps the division is not contesting. That's not at all clear; that is, the scope of the division's allegations about ineligible services is not at all clear.
And then finally, in number five in our reply, we point out that the division has alleged that Mr. Pierce owned between 10 and 60 percent of Lexington's outstanding stock, and as best we can tell, the reason the division has alleged this bloated number, for lack of a better term, the 60 percent, is because the division is now tagging Mr. Pierce with beneficial ownership of all shares that

Page 19

were allocated through International Market Trend.
And this is baffling to us because it presumes that the attorneys for Lexington were numbskulls, and Mr. Schlueter is hardly a numbskull. He is a very capable lawyer.
And we thought that the rules prohibited companies or fictitional entities, fictitious entities, from receiving S-8 stock, and so we never saw IMT receiving any S-8 stock, but rather it was involved in the process allocating grants of S-8 stocks to various of its independent contractors, who had indeed provided services to Lexington and who had indeed received S-8 share grants, and these were human beings rather than fictitious entities.
So it seems as though the division is now alleging that Mr. Pierce owned and had to report beneficial ownership of shares that indeed other individuals owned and theoretically would have been obligated to report beneficial ownership of if they hit the five- or ten-percent threshold.
So we're baffled by this IMT addition without further details about why Mr. Pierce was obligated to include IMT holdings, which we thought were ephemeral, in his 13-D and 16-A reports.
JUDGE FOELAK: Okay. Backing up a little bit in

Page 20

reference to the various things that Mr. Wells summarized in his reply for his motion for a more definite statement, do you have any comment, Mr. Yun, you know, such as, for example, that the term "associates" remains undefined?
MR. BUCHHOLZ: Sure, your Honor. This is Steve Buchholz for the division. I would be happy to address --
JUDGE FOELAK: Okay.
MR. BUCHHOLZ: -- those comments.
The terms "associates" is not relevant to the specific claims against Mr. Pierce, the identity of those associates, and it's our practice not to name individuals in that instance, and the allegations against Mr. Pierce are strictly after the fact of the issuances of the stock, so even though other individuals may have received S-8 stock and may have provided capital-raising or promotional services, the identity of those individuals has no impact on our claims against Mr. Pierce. That's why we haven't listed their names.
And it's similar to, I guess, the identity of the one offshore entity that we have not named. It has no relevance whatsoever what the name of that offshore entity is to the claims against Mr. Pierce.
MR. YUN: Why not?
MR. BUCHHOLZ: And that's because the relevance of that would be to the claims against the company and

Page 21

Mr. Atkins and the different types of services that Mr. Pierce might have been providing, but the services are not relevant to the claims against Mr. Pierce because, once Mr. Pierce received the stock that he received, he was required to either file a registration statement or qualify for an exemption for his subsequent distribution of the stock, and that is why the identity is not relevant, because he was required to do that regardless of whether or not the company might have properly or improperly used form S-8 registration statements.
I guess, very briefly, with regard to the specific S-8 issuances, we have provided the exact dates of the five different S-8 issuances or the S-8 registration statements that were filed and had subsequent issuances to Mr. Pierce; so I don't think there's any other additional information we can provide. It's been provided.
And we're claiming that each of those issuances, all of the stock was improperly granted to him and part of his subsequent distribution that he made, but again, the claims against him specifically are for his subsequent transfers or sales of those shares, and those are separate claims than the claims against the company and Mr. Atkins for the issuance to Mr. Pierce, initially.
But since they requested the specifics, we did provide the specifics of exactly which S-8 registration

Page 22

statements had issuances to Mr. Pierce, and we are claiming that all of those shares were part of the illegal distribution. Let's see.

I guess the other thing that was mentioned was the claims for 13-D and 16-A and the identity of IMT, this additional consulting entity. It sounds like, and based on other conversations that I have had with Mr. Wells, he understands what our claim is. He may dispute it or disagree with it, but it's a fairly simple claim that Mr. Pierce controlled and had beneficial ownership of those shares, vested stock options that IMT received; so there may be a difference as to whether or not that qualifies as something that should have been included in the report, but that's what the claim is.

In addition to that, as we said in our response to the motion, we are also claiming that the numbers that he included in the 13-D that he filed are incorrect; so for entities that he actually did include, the numbers are also incorrect, so it's not just this IMT entity but also errors with regard to the number of shares for other entities, but the specifics have already been provided.

JUDGE FOELAK: Okay. Well, I guess, Mr. Wells would not be satisfied with that reply?

MR. WELLS: Not entirely, Your Honor. Unless we somehow refine the claims against Mr. Pierce to a very,

Page 23

very narrow point, which the division has not done in writing, and of course, it's very difficult to prepare a defense when your client is being asked to pay $2.7 million and the term "associates" appears a number of times in the OIP.

I heard Mr. Buchholz say that it's not relevant to claims against Mr. Pierce who the associates were.

I therefore surmise -- but that's all I can do right now -- that the division is not asserting that Mr. Pierce aided and abetted or partnered with or controlled Lexington such that Lexington issued S-8 shares to people besides Mr. Pierce for services that were not eligible for S-8, but that's not clear.

I would certainly like for that to be clear because, if other people might have received S-8 shares for ineligible services, but not Mr. Pierce, then I don't have to worry about defending Mr. Pierce of those allegations at the hearing, and we can avoid a huge amount of evidence that might be irrelevant.

MR. BUCHHOLZ: Definitely, Your Honor. This is Mr. Buchholz for the division. There's no allegation, and we do not intend to argue that Mr. Pierce has liability somehow for Lexington's issuances of the stock, no.

MR. WELLS: So the allegations are confined to assertions that Mr. Pierce received S-8 shares in each of

Page 24

the Lexington grants for services that were capital-raising or stock-market promotional services, as I understand it; is that correct?

MR. YUN: What we're saying is it doesn't matter whether or not those qualified as S-8 shares. What we are charging him with is selling those shares without a valid registration statement or exemption from registration. It is about his sales.

MR. WELLS: All right. Now, maybe we're making some progress. Your Honor, now as I understand it, and Mr. Yun and Mr. Buchholz, as I understand the allegations, the division is no -- is not contending that Mr. Pierce received S-8 shares in compensation for services that were not eligible under the S-8 requirements; correct?

MR. BUCHHOLZ: Well, we want to be clear about this. We maintain that the shares that he received were not eligible for registration on form S-8, but the registration on form S-8 and the issuance to him was done by Lexington and Mr. Atkins, so his -- the claims against Mr. Pierce don't pick up until after he already had the shares.

We're not alleging that he is liable for some sort of violation based on Lexington's issuance of shares to him.

Now, we do maintain that he was providing those

Page 25

services, but that's part of the claims against Lexington and Mr. Atkins.

JUDGE FOELAK: Okay. So just to -- you know, I'm looking at Mr. Wells' paragraph one and so on, and it keeps talking about Pierce's associates, okay, but anyway.

You are saying that you are making -- you are making these allegations in order to show that Lexington improperly issued the shares, and of course, all three respondents are in the OIP. However, what you are alleging against Mr. Pierce individually only has to do with his reselling of the shares and not as to Lexington's activities in issuing them to him; is that correct?

MR. BUCHHOLZ: That's correct, Your Honor.

JUDGE FOELAK: Is that a satisfactory clarification, Mr. Wells?

MR. WELLS: Yes, Your Honor. I'm not sure exactly what that means with respect to going into a hearing, because we have these allegations now, and they hint at all sorts of misconduct, like market manipulation and pump and dump and participating in capital-raising, et cetera, and only now orally, rather than in writing, we hear these are not relevant to Mr. Pierce now that the other two parties are settling.

So I guess I would feel much more comfortable if the division would put this position in writing so that

Page 26

it's clear that, if the other two parties indeed do settle, Lexington and Grant Atkins, and there's no longer any hearing or any evidence presented against them at the hearing and given that their settlements would have no effect on the proof required against Mr. Pierce, I guess I would feel much more comfortable if we had that in writing so that I would know that I'm not committing malpractice by defending Mr. Pierce in such a way that in effect we say at the hearing in opening statement, So Mr. Pierce hasn't done -- with respect to the registration violation, Mr. Pierce hasn't done a darn thing wrong except he allegedly resold his shares without a proper registration statement in effect or a proper exemption available.

JUDGE FOELAK: Well, they have said this on the record, which is one of the points of having a court reporter.

So looking at paragraph 20 insofar as they are talking about Mr. Pierce violating the registration requirements, it merely has to do with him reselling the securities without a registration statement, is that correct, and it doesn't have to do with -- it's not having anything to do with whatever services he provided in order to receive these securities, is that correct?

MR. BUCHHOLZ: That is correct, Your Honor. Mr. Pierce, his liability for section five that we're

Page 27

alleging is based on his role in a distribution of the stock, and we're not alleging any liability by him for any improper use of form S-8 by Lexington.

JUDGE FOELAK: Okay. That seems to cast a light on the motion for -- point a bit of light on the motion for a more definite statement.

I just wanted to make one comment about the cross-motion to dismiss the affirmative defense as well. Okay. Of course, a motion for summary disposition couldn't be made to begin with without my permission, but I did want to comment that the division is correct that there is no need for a proof of scienter as to the type of violations that are alleged against Mr. Pierce.

You know, Mr. Wells has kind of -- has kind of referenced market manipulation and pump and dump, but there isn't any allegation of violations in the OIP of any antifraud provisions, so the proof of my answer is not necessary.

MR. WELLS: Your Honor, this is Chris Wells. It may not be necessary to prove a violation. There may, by the way, be exemptions for some, if not all, of the sales or resales, I should say, by Mr. Pierce of S-8 shares. However, the relief being sought is a cease and desist order, which we're told in the divisions reply brief on its cross motion, which we believe is not authorized by the

Page 28

rule they cited, that we're told that this -- I'm sorry. I had a more important point to make, and that is, not only is the motion unauthorized, but there is well-established authority that, in order to obtain a cease -- an injunction or disgorgement, ancillary relief such as disgorgement, the division has to show scienter or something certainly akin to it.

We cited well-established legal authority, like Aaron v. SEC, Pros International, SEC v. Steadman, and by the way, those involve, at a minimum, section 17 of the 1933 act, subdivisions B and C are the second and third parts, which do not require scienter.

You can accidentally make false statements to investors and still be liable under those two prongs of the antifraud statute, and that was a point that was made in Aaron, and yet accidentally relying on a lawyer or a CPA or president of the company or whomever, some authoritative source, for inadvertently making a false statement or inadvertently reselling securities that you were told for free trading would not subject you necessarily to preliminary injunction, and then, of course, that would include ancillary relief such as disgorgement.

We are told in the reply brief that this is a cease and desist order that's being sought rather than an injunction.

Page 29

I'm not sure if the division is trying to make the point that a cease and desist order can be violated without regard and without recourse by the commission in contrast to an injunction, which has significant consequences if someone violates it, but I have a hard time separating the two in my mind because my understanding is that the commission would seek to enforce its cease and desist order if it were violated, just as it would go to court to seek sanctions for somebody violating a preliminary injunction.

So I don't see how the division can seriously argue that the defenses of bad faith -- I mean, defenses of good faith and due care are irrelevant.

The only way they could make that argument is if they acknowledge that, as part of their burden of proof to obtain the equitable relief they seek, they have to satisfy those elements of proof necessary to obtain a cease and desist order and disgorgement, which would include proof of scienter and proof of lack of due care.

JUDGE FOELAK: Well, Mr. Wells, perhaps lack of due care, i.e., negligence, you know, might be relevant, but the idea that scienter would be needed to have a cease and desist order or a nonscienter-based violation does strike me as somewhat unusual.

MR. WELLS: Your Honor, may I suggest that you read the cases that we have cited, Pros International and

EXHIBIT G

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

MARC J. FAGEL
JOHN S. YUN
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

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

---

[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.

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

---

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

---

4
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

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

---

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

---

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 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 should consider the egregiousness

EXHIBIT H

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13109

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 6, 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, but the record was held open pending receipt of exhibits from the Division of Enforcement (Division) and Pierce consisting of excerpts from Pierce's investigative testimony. Those exhibits, Division Exhibits 76 and 77 and Respondent Exhibit 57, have now been submitted.

Accordingly, Division Exhibits 76 and 77 and Respondent Exhibit 57 will be admitted into evidence, and the record of evidence will be closed.

IT IS SO ORDERED.

Carol Fox Foelak

Carol Fox Foelak
Administrative Law Judge

[1] The proceeding had ended previously as to Respondents Lexington Resources, Inc., and Grant Atkins. Lexington Res., Inc., Securities Act Release No. 8987 (Nov. 26, 2008).

EXHIBIT I

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.

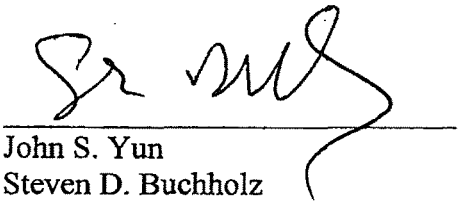
of offshore companies that he controlled. For example, through the Newport account at Hypo Bank, Pierce sold approximately 1.2 million shares between February and June 2004. Most of these shares had been issued by Lexington purportedly pursuant to registration statements on Form S-8, like the shares 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,



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

EXHIBIT J

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

MARC J. FAGEL
JOHN S. YUN
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

In accordance with Rule 340 of 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 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).

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 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).

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 from 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 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.

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 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.

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 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.

62. 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:

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 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).

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

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)).

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 (9th Cir. 2008); *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 Thomas J. Dudchik and Rodney R. Schoemann*, Initial Decision at 14-15 (Admin. Proc. File No. 3-12943 Dec. 5, 2008) (ALJ 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 (10th Cri. 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.*

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 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.

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 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 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 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).

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, ¶ 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.

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. 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).

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) (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," 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 IMT 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 13D 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 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).

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

Respectfully submitted,

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

EXHIBIT K

Administrative Law Judge Carol Fox Foelak

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. 3-13109

In the Matter of **LEXINGTON RESOURCES, INC., GRANT ATKINS, and GORDON BRENT PIERCE,** **Respondents.**	**RESPONDENT PIERCE'S OPPOSITION TO DIVISION'S MOTION FOR THE ADMISSION OF NEW EVIDENCE**

I.

Summary of Opposition

The motion for the admission of the new evidence should be denied. Pierce is being denied basic due process, and the Division's latest ploy does not hold water. After investigating Pierce for almost three years, the Division elected last summer not to continue the investigation and await the outcome of its requests to a foreign securities regulator for the records of a foreign bank. Instead, the Division elected to commence this proceeding and impose substantial expense upon Pierce. Now, months after the close of the evidence, the

Division submits "new evidence" consisting of unauthenticated foreign bank records in a testimonial vacuum, conceals investigative testimony directly on point, and then makes speculative inferences about the ownership of Orient Explorations.

The Division has likewise elected to use the new documents before confirming that they were produced in compliance with local law. The March 25, 2009 letter from Lichtenstein attorney Oliver Nesensohn (Wells Decl., Ex. A) reflects that Mr. Nesensohn is prosecuting an appeal of a very novel action under a brand new act that appears to have been applied retroactively and otherwise in violation of Liechtenstein law. The Commission is not in the business of inducing foreign regulators to violate local laws.

As a result, Pierce is being denied his due process rights to notice of the claims, the reasonable opportunity to respond -- which ordinarily includes discovery and is much more than five days -- and a hearing where witnesses present testimony about documents lawfully procured. Pierce is further prejudiced because the Division relies on speculative inferences about the new evidence to seek disgorgement of many more millions of dollars.

Despite the prejudice and within a severely compressed time period (including, the week during which the Division had notice for two months that Pierce's primary counsel would be unavailable), Pierce has marshaled and is continuing to marshal evidence that refutes the Division's wild speculations. For example, the declarations of Alexander (Sandy) Cox and Grant Atkins; Affid. of Paul Dempsey, Lexington filings and investigative testimony of Lexington's former CFO, Vaughn Barbon, were available during the short response time to this motion, and are submitted with the Declaration of Christopher B. Wells.

Disturbingly, the Division has ignored public filings and prior investigative testimony to exploit a patent clerical error in a transparent attempt to overcome the shortcomings of its legal theories and proof at the hearing.

Pierce's opposition consists of two parts: first, an argument that acceptance of the new evidence would be a violation of the Rules of Practice and denial of due process; second, a response to the Division's substantive argument.

II.

The acceptance of new evidence after the hearing has been closed violates the Rules of Practice that afford Pierce the right to a fair hearing and to present evidence. It also violates Due Process.

The Division has twice rested its case. On February 2, 2009, the Division rested its case-in-chief:

> Mr. Yun: "With that, your Honor, unless I have forgotten something, and I don't think I have, the Division rests, again subject to the fact that it has called Mr. Pierce, so if he comes walking in tomorrow, we want to have first crack."[1]

Two days later, the Division rested its rebuttal case:

> Mr. Yun: "I am sorry, with the other two exhibits, the Division rests. Our case is submitted, your Honor, subject to briefing, and I guess if anyone wants closing statements."[2]

The record remained open for those two exhibits until the March 6, 2009 order closed the record completely. There is no basis under the rules to reopen the evidence, and for that reason alone the Division's motion should be denied.

A hearing is "for the purpose of taking evidence" and must "be conducted in a fair . . . and orderly manner."[3] Due process, the Administrative Procedure Act,[4] and Rule of Practice

---

[1] Feb. 2, 2009 Tr. at 210:20:24; *see also id.* at 211:3-10 (the court: "So the Division is resting").
[2] Feb. 4, 2009 Tr. at 582:230-583:1.

326[5] grant to Pierce the right to present a defense, present evidence and to conduct a cross-examination "for *a full and true disclosure of the facts.*" Irrelevant and immaterial evidence must be excluded.[6] In addition to the right to a fair hearing, the Administrative Procedure Act and the Rules of Practice permit Pierce to conduct discovery to obtain both documentary and testimonial evidence.[7]

By filing this motion at this time, the Division has willfully violated the Commission's own rules. The Division readily admits "the rules do not specifically provide for the acceptance of evidence after the hearing is concluded." Division's Motion for the Admission of New Evidence at 2. Furthermore, the Division has failed to identify any precedent in which a hearing officer permitted the Division to reopen a hearing after the close of the evidence. The Division argues by analogy, however, that because the Commission on appeal has the power to consider new evidence, "the same showing should permit the hearing officer to admit additional evidence before an Initial Decision." *Id. at footnote 1.*

The fundamental flaw with the argument by analogy is that a hearing officer is not the Commission. The hearing officer must follow the rules -- not rewrite the rules. Rule of Practice 452 does grant the Commission the power to allow the submission of additional

---

[3] **Rule 300. Hearings.** ("Hearings for the purpose of taking evidence shall be held only upon order of the Commission. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.").
[4] 5 U.S.C. § 556(d) ("party is entitled to present his [or her] case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.").
[5] **Rule 326. Evidence: Presentation, Rebuttal and Cross-examination** ("In any proceeding in which a hearing is required to be conducted on the record after opportunity for hearing in accord with 5 U.S.C. 556(a), a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Commission or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, in any other proceeding shall be determined by the Commission or the hearing officer in each proceeding.")
[6] **Rule 320. Evidence:** Admissibility. ("The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.").
[7] **Rule 232 (Subpoenas), Rule 233 (Depositions).**

evidence – but not until after an initial decision and an appeal of that decision to the Commission. Rule 410. 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.

The cannon of construction, "express mention, implied exclusion," applies. Because the Rules of Practice expressly grant to the Commission the power to consider new evidence, the hearing officer necessarily does not have a similar power to "accept or hear additional evidence." Rule 452.

The Division's motion for the admission of new evidence is nothing more than a "Trojan Horse" designed to sneak in front of the hearing officer by pretext unreliable and even misleading evidence that it knows cannot be brought forward until an appeal of the initial decision, but which it knows will taint the hearing officer's initial decision whether the evidence is admitted or not. The Division has presumed that the hearing officer will grant its motion. The Division has peppered its post-hearing brief and proposed findings, conclusions and relief with the new evidence. This is a fiendishly clever – too clever – means to subvert a hearing that had gone badly for the Division under the rules.

Playing by the rules, the Division's recourse – after an initial decision and its appeal -- is to ask the Commission to "refer the proceeding to a hearing officer for the *taking* of additional evidence, as appropriate." Rule 452. Even if the hearing officer were to seize the

Commission's powers, the alternatives are "accept[ing] additional evidence, . . . or . . . the taking of additional evidence, as appropriate." In this case, accepting the evidence at this point would deny Pierce's due process right to a fair hearing. The so-called evidence is unauthenticated and even misleading. As explained below, any relevance is substantially outweighed by "unfair prejudice," ER 403.

Furthermore, the policy of finality militates against re-opening the record and including new evidence. *See In the Matter of the Application of Scott Epstein for Review of Disciplinary Action Taken by FINRA*, Exchange Act Release No. 59328, ___ SEC Docket ___ (Jan. 30, 2009) (finding that "public policy considerations favor the expeditious disposition of litigation," and parties cannot simply try "one course of action and, upon an unfavorable decision, to try another course of action" by seeking to introduce new evidence).[8] The Division cannot close and reopen the evidence like a spigot. Even if the Division could, its theory does not hold water.

The Division's intent is patently improper. All it had to do was follow the rules, Rule 452 in particular. Instead, the Division has knowingly filed an unauthorized motion to admit new evidence, and presumed it will be granted. By doing so, the Division has "poisoned the well." It is now inconceivable that the hearing officer can remain untainted by the "new evidence," which should not have been presented before an appeal. But now, in the inadequate amount of time allowed "under the rules," Rule 154(b), Pierce can do nothing

[8] Even if the hearing officer were to assume the powers granted to the Commission in Rule 452, the Division would be required to prove the materiality of the evidence and that there were reasonable grounds for the failure to adduce the evidence previously. If the information sought to be introduced is not material, then it should not be allowed in. *See In the Matter of the Application of CMG Institutional Trading, LLC and Shawn D. Baldwin for Review of Disciplinary Action Taken By NASD*, Exchange Act Release No. 59325, ___ SEC Docket ___ (Jan. 30, 2009); *see also In the Matter of IMPAX Laboratories, Inc.*, Exchange Act Release No. 57864, 93 S.E.C. Docket 853, *11, n.27 (May 23, 2008). The new evidence is not material, because it merely corroborates Pierce's testimony about the mistakes and confusion regarding Orient records.

more than "die trying," and reveal as best he can the Division's pretext concerning the overarching issue -- Orient Explorations.

Due process principles require that a party must be afforded a reasonable opportunity to challenge, through confrontation and cross-examination, the reliability of adverse evidence.[9]

Generally, an agency is required to follow its own regulations and rules. *Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988). Here, the Division must abide by its own rules, and "the 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 failure to abide by its own rules and regulations constitutes a violation of procedural due process. *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).

The hearing officer must follow the rules and cannot rewrite the rules. Indeed, "[t]o meet the basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or 'gut feeling' [and an] agency must not act in a totally subjective manner without any guidelines or criteria."[10] Especially "where individual interests are

---

[9] *Goldberg v. Kelly*, 397 U.S. 254, 267–68, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

[10] *Board of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W. 3d 1, 11 (Mo. 2008). *See also Flaim v. Medical College of Ohio*, 418 F.3d 629, 640 (6th Cir. 2005) (noting that a due process violation occurs "when the agency's disregard of its rules or assurances results in a procedure which itself impinges upon due process rights").

implicated, the Due Process clause requires that an executive agency adhere to the standards by which it professes its action to be judged."[11]

In this case, accepting the new evidence violates Pierce's right to due process to a hearing. A fundamental premise of due process is that a tribunal cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved and to present evidence in rebuttal of the adverse material.[12]

The Division's so-called evidence is unauthenticated and misleading. As demonstrated below, any purported relevance is substantially outweighed by "unfair prejudice," Fed. Rule of Evid. 403. The Division's motion is also an attempt to end-run and thus avoid the requirements for authenticating documentary evidence. Under the Federal Rules of Evidence, business records must be authenticated and shown to be a business record.[13] The mere presence of a document in the files of a business entity does not qualify that document as a record of regularly conducted activity; there must be proof, either by testimony from the record custodian or through certification, satisfying the foundational requirements of the rule. Here, the bank's "business record" actually is multiple records that include separate records created by persons outside the bank. There is hearsay within hearsay, and each layer should conform to a recognized exception or have some guarantees of trustworthiness and reliability. Fed. Rule of Evid. 805. Even without application of the

---

[11] *Bonitto v. Bureau of Immigration and Customs Enforcement*, 547 F. Supp. 2d 747, 756 (S.D. Tex. 2008) (*citing Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959)).

[12] *See Morgera v. Chiappardi*, 74 Conn. App. 442, 813 A.2d 89, 98 (Conn. App. 2003); *see also Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 211, 227 (2d Cir. 2003).

[13] Fed. R. Evid 803(6); *See United States v. Jarvara*, 474 F.3d 565, 584–85 (9th Cir. 2007) (finding that the proffered Gambian school examination records were properly admitted under the standard of Fed. R. Evid. 803(6) because they were accompanied by a high school principal's certification, confirming accuracy of the records); *see also Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1020 (9th Cir. 2004) (upholding the admission of business records after being authenticated by a records custodian).

referenced formal rules of evidence, these same general principles of due process apply in this proceeding. Furthermore, in addition to having illegible signatures on some records, the records also have both "intrinsic" and "extrinsic" ambiguities that amplify the prejudice resulting from the Division'send-run. *Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, 69 F.3d 785, 789-90 (7th Cir.1995) (describing the test for extrinsic ambiguity as "that the agreement itself is a perfectly lucid and apparently complete specimen of English prose, anyone familiar with the real-world context of the agreement would wonder what it meant with respect to the particular question that has arisen.").

III.

The new records corroborate Pierce's testimony that the Orient records were a mess. Other public reports and evidence already in the record undermine the Division's new theory about Orient. The new declarations by Cox, Atkins and Dempsey further undermine the Division's theory.

The Division contends that in November 2003, Orient was indirectly owned by Dana Pierce and [redacted] (Brent's wife and daughter), rather than by Alexander (Sandy) Cox, Wolfgang Raubal and Armando Ulrich.[14] The Division relies upon a newly produced Hypo Bank, Liechtenstein, account opening document dated June 25, 2005, which bears the document stamps SEC 158416-17.[15] That document indicates the Orient account is managed by Fitzroy Holdings, Ltd. ("Fitzroy"), a management company at 1 Caribbean Place, Leeward

[14] There is insufficient time to submit more evidence about Orient, and there is no time to address other aspects of the Division's motion. But evidence that Orient was not beneficially owned by any member of the Pierce family returns the record to the *status quo ante*. There is ample evidence to that effect.

[15] Lexington's two public reports in November 2003, Pierce Hearing Exhibits 5 and 8, filed on November 18 and November 20, 2003, both contained footnotes disclosing that the "sole shareholder of Orient" was "Meridian Trust" with an office at the Dempsey law firm address on Turks and Caicos. Consequently, the Division has misapplied a June 2005 unauthenticated document and jumped to the conclusion that Dana and [redacted] Pierce were beneficiaries of the Meridian Trust in November 2003, but there is no evidence of that. In fact, other evidence overwhelmingly contradicts that supposition.

Highway, Providenciales Turks and Caicos Islands, British West Indies. That is the address of the Dempsey Law Firm, where Barry Dempsey is one of the attorneys.[16] The same document item no. 2 identifies the "sole shareholder of Orient as Canopus TCI Ltd. as Trustee of Meridian Trust—Beneficiaries: Dana Marie Pierce; [redacted]." None of these documents is signed by Pierce, and the document erroneously listing Dana and [redacted] Pierce is not even signed by one of the Dempseys. (Div. Ex. 79, SEC 158416-17.)

The Division uses the Hypo Bank records in its new Exhibit 79 to contend in its motion:

> 1. Brent Pierce lied under oath when he denied that he or his wife "ever had any ownership interest whatsoever in any of the stock that's referenced in the filing [by Lexington reflecting Orient shareholdings], the 2,250,000 shares [for Lexington's reports of Orient's shareholdings, see Pierce Hearing Exhibits 5 and 8, for example]; and
>
> 2. Brent Pierce (through Dana and [redacted] owned and controlled Orient's shares and therefore owned the 64% of Lexington stock held by Orient after November 19, 2003, so that when Brent received S-8 grants he was an affiliate of Lexington and could not take free trading shares.[17]

But the fact that the public records for Orient were "messed up" had been established over two years earlier during the investigation. And Brent Pierce stands by his testimony. On July 28, 2006, Pierce explained that there was a series of mistakes in the filings concerning Orient:

> There is a series of public filings on that account that are all messed up.
>
> . . ..
>
> Well, I heard just as of recently that Barry Dempsey, who was on the company, had contacted Mr. Atkins because of all of the filings are incorrect, some of which put him down as the shareholder and some of which use my post office box.
>
> . . ..

[16] Dempsey is a lawyer with Dempsey and Company in the Turks and Caicos. (Wells Decl., Ex. G, Affid. of Paul Dempsey.)

> I don't know what he [Dempsey] does, but basically it says in the filing that it's a trust, and he is, I believe, the trustee from the filing that I read, which was the first filing.
>
> . . ..
>
> like I said, there's four or five filings on Orient that are wrong, and they have since been corrected.[18]

Accordingly, it should not have surprised the Division that Orient bank records would reflect the same confusion.

New testimony by Cox and Atkins submitted with this opposition demonstrates why the Division's theory does not make sense. To add the final word, attorney Paul Dempsey has provided an Affidavit to address the ownership of the referenced trusts. (Wells Decl., Ex. G.) Mr. Dempsey confirms that [redacted] and Dana Pierce were never beneficial owners of the Meridian Trust, nor did Brent Pierce ever have any interest in the Meridian Trust or its assets. *Id.*

At the hearing, Grant Atkins testified that around mid-2003, Intergold's management and consultants began to consider a reorganization of the failing mining company into a new oil and gas company. (Feb. 3, 2009 Tr. at 291:1-23, 311:13-312:16, 333:2-338:8 (Atkins Test.), Wells Decl., Ex. C.) One of the new Hypo Bank documents, SEC 158418, shows that the Meridian Trust was "created July 25, 2003."[19] (Orient reportedly had been created on March 8, 2000, see SEC 158414.) The late July 2003 formation date of Meridian Trust correlates with early steps to create the reorganization vehicle described by Atkins and Vaughn Barbon in their testimony. (Feb. 3, 2009 Tr. at 291:1-23, 311:13-312:16, 333:2-

[18] July 28, 2006 Tr. at 403:8-9, 404:7-11, 404:19-22, 405:22-25 (Pierce Test.) (Wells Decl., Ex. B).

[19] In contrast to SEC 158416-417, 158418 was actually signed by one of the Dempseys.

338:8 (Atkins Test. describing the reorganization and Humphreys returning his shares to Orient), Wells Decl., Ex. C.)

Indeed, the beginnings of the Meridian Trust's creation are manifest in the Form 8-K report filed by Intergold on March 28, 2003. (Wells Decl., Ex. D.) Note that attached to that report – just four months before the Meridian Trust was formed – is an agreement between Intergold and "Sonanini Holdings, Ltd." under which Sonanini forgave indebtedness of about $660,000 in exchange for nearly 33 million shares of Intergold common stock. The signer for Sonanini was – Wolfgang Rauball.

Also attached to Intergold's March 28, 2003 8-K was a settlement agreement with Tristar Financial (Marcus Johnson) to which was attached a letter to the transfer agent regarding "restructuring initiatives." Sonanini's address was shown as "Kartnerring 5-7/ Top 3D, A, 1010 Vienna, Austria." *Id.* Another company, EuroGas GmbH, was listed at "Kartner Ring 5-7, Top 4d, 1010 Wien [Vienna], Austria." *Id.*[20]

Intergold's March 28, 2003 8-K also reflected large shareholdings by Alexander Cox, McCallan Oil & Gas GesmbH and Oxbridge Ltd. Armando Ulrich represented McCallan and Oxbridge. (Wells Decl., Ex. E (Atkins Decl. dated March 25, 2009) and Ex. F (Cox Decl. dated March 25, 2009).) Orient's relation to Cox, Rauball and Ulrich was explained by Vaughn Barbon, who structured the transactions to provide these three critical investors a sufficiently large stake in the reorganized company to gain their cooperation.

During the investigation, Vaughn Barbon, Lexington's CFO, testified that the shareholders of Intergold involved in Orient were Sandy Cox, Wolfgang Rauball, and Armando Ulrich. *See generally*, Wells Decl., Ex. H (Barbon investigative transcript dated

[20] An amendment to this 8-K report of the same date provided a West Vancouver BC address for Sonanini.

09/28/06 at pp. 65-96.)[21] Barbon proposed setting up an off-shore company to provide what was initially to be a 75% stake in Lexington Oil & Gas because the three owners were all non-residents of the U.S. (*Id.* at 73:23-74:14.) Brent Pierce referred Barbon to Barry Dempsey to set up the off shore company. (*Id.* at 74:22-75:11.) Barbon talked to Sandy Cox about setting up the company through Barry Dempsey, who already had established Orient, and formed the trust that held Orient's shares on July 25, 2003.[22] Barbon further testified that he learned Cox transferred his shares in Orient to Longfellow Industries. (*Id.* at 92:9-17.)

At the hearing, Atkins testified that to his knowledge, Brent Pierce was "not an owner or manager of Orient . . ." (Feb. 3, 2009 Tr. at 324:3-5 (Atkins Test.), Wells Decl., Ex. C.) Atkins testified that Mr. Cox was involved with Orient: "He was one of the old investors in the Intergold that lost a lot of money. There were two others, Wolfgang Rubbell [Rauball] and Amando Allridge [Ulrich] of Austria, that were also large investors in Intergold that lost a lot of money." (*Id.* at 376:20-377:9.) The gist of Barbon's testimony was that information

---

[21] Initially, Barbon set up Lexington Oil & Gas (which became a subsidiary of the reporting company upon the November 19, 2003 reorganization), and the initial owners were Doug Humphreys and Orient. *Id.* at 69-72. Because the three individuals who were to be the beneficial owners of Orient's Lexington shareholdings "were not happy" with only 2,250,000, while 750,000 shares were to be allocated to Humphreys, Humphreys reversed his contribution of several oil and gas properties, leaving only three indirect owners of Orient by January 2004. *Id.* at 80:10-23 and more generally at 80-84. Lexington's reports corroborate the testimony about Humphreys' initial interest and Cox's ultimate interest in Orient during the reorganization. (Supplement No. 1, Oct. 12, 2005 to the Prospectus dated Jan. 19, 2005 of Lexington Resources at 47, Wells Decl., Ex. I) states that through Paluca Petroleum, Humphreys initially owned part of Orient by vending in several properties, which Orient transferred into Lexington in exchange for Lexington stock, 2.25 million shares initially to Orient and 750,000 shares initially to Humphreys. Then, in January 2004, Orient and Humphreys agreed to transfer Humphreys' 750,000 Lexington shares to Orient (raising its total to 3,000,000) and Lexington assigned several oil and gas interests back to Humphreys. Humphreys had contributed several oil and gas interests to Orient in exchange for 25% of Orient, which had been exchanged for 750,000 Lexington shares that show on the November 2003 SEC filings. This was reversed in the January 2004 transactions. This is also what Barbon testified to. (Sept. 28, 2006 Tr. at 70:21-73:21, 76:2-4, 76:23-77:3; 80:3-81:25, 83:19-84:13 (Barbon), Wells Decl., Ex. H.)

[22] This July 25, 2003 Meridian Trust establishment date was about four months after the debt restructuring agreements described in the March 28, 2003 8-K and four months before the November 19, 2003 reorganization effective date. But note also that the July 25, 2003 date identified as the date the Meridian Trust was created according to Div. Ex. 79 at SEC 158418 is the date the "Emerald Trust" was "settled" according to the Affidavit of Paul Dempsey (Wells Decl., Ex. G), while the "Meridian Trust" was "settled" on July 26, 2003 – yet another mix-up.

about the identities of the key investors identified by Atkins derived from Pierce, who was concerned about them. Atkins also acknowledged that he was not involved in "dealings among those three Orient Explorations people . . ." (*id.* at 377:10-13), although Atkins had met with them concerning Intergold/Lexington.

In response to the Division's latest contention, Grant Atkins has testified that Alexander (Sandy) Cox, Wolfgang Rauball and Armando Ulrich were three Intergold investors, that Atkins had met with Rauball and Ulrich in British Columbia and Austria, and associated Rauball with Sonanini and EuroGas, and Ulrich with McCallan Oil and Oxbridge. (Atkins Decl., Wells Decl., Ex. E.) Atkins learned those three were indeed the beneficiaries of Orient's stock, when Atkins assisted Cox with a Schedule 13D beneficial ownership report filed in 2005, when Cox's one third share in Lexington was transferred to Longfellow Industries, a Cox family entity. (*Id.*, see also Wells Decl., Ex. K (13D Schedule).) Those three investors had been referred to Intergold by Pierce, Wells Decl., Ex. H, Barbon testimony at 73:9-22, and Pierce had been told by Cox that they were not pleased with Intergold, but decided to back the reorganization in keeping with their allocation of shares in the new oil and gas company through Orient. (Wells Decl., Ex. F, Cox Decl.)

Also in response to the Division's latest contention, Cox has testified that in 2003, Rauball, Ulrich and he became, as part of the reorganization, the sole beneficiaries of the trust that owned Orient. (*Id.*) He also testified about his transfer of shares to Longfellow and the 13D report filed by Longfellow in 2006. (*Id.*) His family still owns the shares. (*Id.*) Cox also confirms: "the two other groupings of Lexington shares transferred into Orient as of the date of the reorganization were for the future benefit of Ulrich and Rauball, not Dana and [redacted]." (*Id.*)

Other records corroborate this scenario and flatly contradict the Division's manufactured theory. (Wells Decl., Ex. J at 28 and 29 of the Form SB-2 Registration Statement filed by Lexington on October 14, 2005.)

At page 29 of the Form SB-2, a change in the beneficial ownership of Orient Explorations is disclosed. *(Id.)* First, though, recall that Lexington had a 3 to 1 stock split at the end of January 2004, so that by February 2004, Orient held 9 million shares, rather than 3 million. The Form SB-2 excerpt shows that as of October 14, 2005, Orient was the beneficial owner of 6 million shares of Lexington, not 9 million. It also shows that Longfellow Industries (B.C.) Ltd. owned 3 million shares (totaling with Orient, 9 million). Footnote 6 shows that the sole shareholder of Orient remained Canopus for Meridian Trust. Footnote 7 states that the "sole shareholder of Longfellow Industries (B.C.) Ltd. is Irene V. Cox." This distribution of 3 million shares from Orient was reported in a Schedule 13D filing by Longfellow Industries on February 18, 2005. (*Id.*)

Irene Cox is the wife of Sandy Cox, and the directors of Longfellow Industries included Sandy and Irene Cox's children. (Wells Decl., Ex. K, Schedule 13D filed by Longfellow Industries and Alexander Cox on August 24, 2006; and Wells Decl., Ex. F, Cox Decl. dated March 25, 2009.) Sandy Cox was irrefutably one of the Orient beneficiaries. Note that 3 million shares out of 9 million is exactly 1/3 of the former shareholdings of Orient.[23]

---

[23] According to the investigative testimony of Barbon at p. 72 and Cox's Declaration, that he had sunk about $3 million into Intergold/Lexington and held one third of the interest in Orient, the total value of Orient's holdings targeted by the allotment of 3 million shares around November 2003 was in the $9 million dollar range. According to Pierce Hearing Exhibit 6, which tracked Lexington's stock price in a document Grant Atkins prepared, Lexington's stock price was about $1.27 per share in early November, and jumped to $2.50 - $3.00 per share upon the late November reorganization. But this was a very thinly traded security. Consequently, assuming a market price of roughly $1.00 to $3 per share, 3 million shares of Lexington stock, if placed in trust through Orient for the benefit of Cox, Rauball and Ulrich, would have had a rough market value of about $3-9 million in late 2003. That correlates to Barbon's testimony.

The current shareholder list for Lexington reflects that Orient still holds six certificates of one million shares each, for a total of six million shares. (Wells Decl., Ex. L.) These six certificates were issued on November 24, 2004. *(Id.)* The Division contends that Pierce trades like a whirlwind, not just for his own account, but for others as well. Yet, it cannot explain why Orient continued to hold six million shares and Cox continued to hold another three million, when it now contends that one document in June 2005 not signed by Pierce reveals that his wife and daughter were the beneficial owners of these shares since 2003. Indeed, the Division did not disclose Orient's retention of these shares to the hearing officer in its motion. But Cox has explained that he held on to his three million share block and another two million shares because he thought Lexington's prospects would improve. Cox Decl. (Wells Decl., Ex. F.)[24]

Curiously, the Division has not submitted any Orient Hypo Bank account records reflecting Orient's transactions in or current holdings of Lexington. According to the Division's contentions, those 6 million shares would have been transferred into the Hypo Bank account for Orient in June 2005 (or earlier) and sold soon thereafter. That did not happen.

The evidence most destructive to the Division's thesis, however, is the beneficial ownership report filed by Longfellow Industries on February 18, 2005. It disclosed a 17.04% ownership of Lexington. No person in his or her right mind would willingly file a 10% beneficial ownership report unless he or she truly was the beneficial owner of the securities.

---

[24] The Division's email inquiry by Pierce of Maste in mid-2006 about "copies" of Rule 144 documents regarding Orient's shareholdings shows nothing more than concern for Cox and the other two investors for whom Pierce felt responsible, Rauball and Ulrich. If anything, it confirms what the lack of Pierce's signature on any documents in Div. Ex. 79 shows – that Pierce had no access to the Orient records at Hypo Bank or at Dempsey's office.

For example, exposure to liability for short swing profits under 1934 Act Section 16(b) arises with beneficial ownership in excess of 10%. Yet Cox filed. It is irrefutable that Cox or his family business had 1/3 of Orient's Lexington shares after the reorganization in November 2003 (after the Humphreys share reversal).

Brent Pierce's SEC investigative testimony was true: neither he nor his wife "ever had any ownership interest whatsoever in any of the stock that's referenced in the filing, the 2,250,000 shares." Pierce stands by that testimony and has no control over errors in documents he has not seen or signed.[25]

Not only are the Division's new documents offered in violation of the Commission's own rules and due process requirements, they do not alter the pivotal evidence that Brent Pierce was not a controlling person of Lexington at the time his S-8 stock option grants were awarded or the shares were issued upon exercise. Consequently, all resales of Brent's S-8 shares were unrestricted and not in violation of Section 5. Moreover, all trading profits of purchasers of Pierce's S-8 shares, whether in private transactions or in public markets, were lawful and not in violation of Section 5, as Herrick Lidstone observed at the hearing. (Wells Decl., Ex. M, Tr. at 536:18-538:2 and 540:15-543:2.)

---

[25] In fact, while not relevant to the key issues at this point, it would not surprisingly be a common practice for foreign nationals not fluent in German to sign European banking documents in blank, leaving bank personnel to complete the forms afterward. Any Lexington shares the Division disingenuously attributes to Brent Pierce after June 2005 as a result of [redacted] and Dana Pierce erroneously, unwittingly and inadvertently becoming beneficiaries of Meridian Trust at a time when Orient opened a Hypo Bank account would only affect Brent Pierce's status as a control person for purposes of S-8 option awards for option grants during or after June 2005. (See Pierce Hearing Exhibit 40, which recaps his S-8 grants, and shows a grant on May 23, 2005 that would not be affected, then four grants in 2006 that would be affected.)
Similarly, if the Division has not filed its motion in good faith, and Orient Hypo Bank account records reflect no transfer of the 6 million shares of Lexington stock (in six certificates of one million shares each since November 24, 2004) into the Orient Hypo Bank account opened in June 2005, then that missing evidence would strengthen the overwhelming circumstantial evidence that the Division's proposed Ex. 79 contains a clerical error.

The evidence of trading profits by entities lawfully permitted to make the sales, which the Division also plans to submit, is irrelevant. In other words, even attributing sales by Newport Capital and other companies listed in Pierce's Schedule 13D, the resulting profits of those lawful resales leave a result no different than if Pierce had directly resold from his own account to those who subsequently purchased through Newport or other entities. For purposes of the allegations of registration and reporting violations on which a hearing was conducted, Pierce has already treated Newport Capital and the other companies included in his 13D report as if they were his own resales.

IV.

Conclusion.

The documents submitted by the Division as new exhibits are unauthenticated – except as to newly submitted testimony by Paul Dempsey that the featured record is not accurate. Apparently, a clerk at the Dempsey law firm confused beneficiaries of the Meridian Trust with beneficiaries of another trust.

The Division seeks to "have its cake and eat it too." The Division chose to go forward and institute these proceedings on July 31, 2008, rather than to wait for a response from the FMA in Liechtenstein, verify its legality and continue taking investigative testimony about any documents produced. Having made that choice, the Division represented to Mr. Pierce, the hearing officer, the Commission and the public that it had completed its submission of evidence. It is grossly unfair to Pierce to force him within the confines of a 5-day response time to gather and submit new evidence to refute and impeach so many new documents. The Division's unauthorized ploy has also robbed Pierce of precious time available to prepare his

post-hearing brief and proposed findings and conclusions responsive to the Division's. The Division's motion to admit the new Hypo Bank account records should be denied.

DATED this 26th day of March , 2009.

LANE POWELL PC

By _____
Christopher B. Wells, WSBA No. 08302
Attorneys for Respondent G. Brent Pierce

EXHIBIT L

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 M

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

---

[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.

---

[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.

---

[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 N

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

---

[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

---

[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

---

[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 O

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]

[redacted]

EXHIBIT P

MARC J. FAGEL (Cal. Bar No. 154425)
JOHN S. YUN (Cal. Bar No. 112260)
yunj@sec.gov
STEVEN D. BUCHHOLZ (Cal. Bar No. 202638)
buchholzs@sec.gov

Attorneys for Applicant
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, Suite 2600
San Francisco, California 94104
Telephone: 415-705-2500
Facsimile: 415-705-2501

ORIGINAL

FILED
2010 JUN -8
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 Q

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. 3-13927

In the Matter of **GORDON BRENT PIERCE, NEWPORT CAPITAL CORP., and JENIROB COMPANY LTD.,** **Respondents.**	**MOTION TO EXTEND DEADLINE FOR ANSWER OF RESPONDENT GORDON BRENT PIERCE AND STRIKE PRE-SET HEARING DATE AS TO PIERCE**

Relief Requested.

Pierce Answer deadline. Without prejudice to any of his defenses, legal arguments and due process rights, Respondent Gordon Brent Pierce moves for an extension of the deadline for his Answer in this proceeding. He requests an extension from June 28, 2010, the deadline invoked by the Order Instituting Proceedings issued on June 8, 2010 (the "OIP"), to a new deadline of July 23, 2010.

Pierce hearing date. As it applies to him, Mr. Pierce moves to strike the hearing date of July 19, 2010 and the location of Washington, D.C. set in the Order Scheduling Hearing and Designating Presiding Judge issued on June 9, 2010. Mr. Pierce requests that his hearing date, time and location be set during a scheduling teleconference including counsel for all parties who have been served with the OIP and the Hearing Officer.

No opposition. Counsel for Mr. Pierce are informed that the Division of Enforcement does not oppose this motion and no counsel have appeared for any other party at this time.

DATED this 23d day of June, 2010.

LANE POWELL PC

By _____
Christopher B. Wells, WSBA No. 08302
Attorneys for Respondent G. Brent Pierce

EXHIBIT R

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13927

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
June 24, 2010

In the Matter of	:	
	:	ORDER
GORDON BRENT PIERCE,	:	
NEWPORT CAPITAL CORP., and	:	
JENIROB COMPANY LTD.	:	

Respondent Gordon Brent Pierce (Pierce) requests an enlargement of time of twenty-five days to file his Answer to the Order Instituting Proceedings (OIP). The request is granted in part and denied in part. Pierce's Answer will be considered timely if filed and served on or before July 9, 2010. Good cause for additional time after that date has not been established.

Under Rule 230(d) of the Rules of Practice of the Securities and Exchange Commission (Commission), the Division of Enforcement (Division) must commence making its investigative file available to Pierce for inspection and copying no later than seven days after service of the OIP. If the Division has not already done so, it must promptly notify Pierce in writing as to the size and location of its investigative file and the dates and times when the file is available for inspection and copying. The Division shall simultaneously file a copy of its written notice in the official docket.

The Division shall promptly identify the amount and categories of materials that it intends to withhold from inspection and copying on grounds of privilege. It shall also describe all privileges it intends to assert. See Rule 230(c) of the Commission's Rules of Practice. The need for a more detailed privilege log will be addressed in a separate Order after the Division has provided this written notice.

The Chief Administrative Law Judge scheduled a hearing in this matter for July 19, 2010, in Washington, D.C. Pierce's request to postpone the hearing is denied at this time. I will reconsider this ruling after I have reviewed the Division's response to my Order dated June 18, 2010, and Pierce's Answer.

Pierce's request to change the location of the hearing is also denied. If Pierce intends to renew that request in the future, he must specifically address the criteria of Rule 200(c) of the Commission's Rules of Practice in light of his decision not to attend the Seattle, Washington,

hearing held in Administrative Proceeding No. 3-13109. For these purposes, a sworn declaration from Pierce will be required. Argument of Pierce's counsel, standing alone, will be insufficient.

SO ORDERED.

James T. Kelly
Administrative Law Judge

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

William F. Alderman, SBN 47381
ORRICK, HERRINGTON& SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco CA 94105
Telephone: 415-773-5944
Email: walderman@orrick.com

Attorneys for G. Brent Pierce

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GORDON BRENT PIERCE, Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION, Defendant.	Civil No. **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

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

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

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

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

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

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

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

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

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 30th day of June, 2010, in Vancouver, British Columbia, Canada.

G. Brent Pierce, Declarant

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

EXHIBIT A

TRADING MARKETS .COM
Making Great Traders

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 $8 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. 3-13927)

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

U.S. Securities and Exchange Commission	
Symbol	*SEC
Shares Issued	n/a
Close	n/a
Recent Sedar Documents	

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

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 [redacted]. 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.

---

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

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

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 [redacted]. 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).

Print

CHRISTOPHER B. WELLS (WSBA NO. 08302)
DAVID C. SPELLMAN (WSBA NO. 15884)
RYAN P. MCBRIDE (WSBA NO. 33280)
LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
Telephone: (206) 223-7084
Facsimile: (206) 223-7109
Email: wellsc@lanepowell.com
Email: spellmand@lanepowell.com
Email: mcbrider@lanepowell.com

WILLIAM F. ALDERMAN (STATE BAR NO. 47381)
ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: (415) 773-5700
Facsimile: (415) 773-5759
Email: walderman@orrick.com

Attorneys for Plaintiff
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. 10-3026

[PROPOSED] ORDER FOR PRELIMINARY INJUNCTION

Date: None set
Courtroom:
Judge:

I. INTRODUCTION

Plaintiff Gordon Brent Pierce ("Pierce") has moved for a stay and preliminary injunction regarding two proceedings that defendant Securities and Exchange Commission ("Commission" or "SEC") filed on June 8, 2010. Pierce requested a temporary stay of the Commission's

application to this Court in Case No. CV-10-80-129 MISC for a summary order (the "Administrative Enforcement Action") to enforce the remedy in a prior administrative action (*In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109), which Pierce refers to as the "First Action." Pierce also requests a preliminary injunction and permanent declaratory relief enjoining the Order Initiating Proceedings *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 which Pierce refers to as the "Second Action."

The motion for a preliminary injunction is granted as explained below. The request for a temporary stay is addressed in a prior order.

II. PRELIMINARY FINDINGS OF FACT

1. Sometime in 2005, the Commission initiated an investigation of the trading of Lexington Resources, Inc. (Lexington) common stock. On July 31, 2008, the Commission brought the First Action by filing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") against Pierce, a Canadian citizen, and others in a proceeding captioned *In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce*. Decl. of Christopher B. Wells ("Wells Decl."), Ex. A.

2. The First OIP claimed that Pierce violated the registration provisions of the Securities Act, Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c), and the reporting provisions of the Securities Exchange Act, Sections 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a). The claims were based on the resale in 2004 by Pierce and others of shares he had purchased from Lexington under a stock option plan registered on Form S-8. No antifraud claims were brought against any of the respondents, including Pierce.[1]

3. The First OIP alleged that "Pierce and his associates" violated the registration provisions through shares "sold ... through ***his offshore company***" and "generating sales proceeds over $13 million ... " The First OIP. ¶¶ 14-16 (emphasis added). The Division took the position that transaction documents with which Pierce was familiar identified the "associates" and

[1] The other Respondents, Lexington and Grant Atkins, separately settled registration claims with the Commission in consent orders.

Pierce's "offshore company." Documents used in the First Action indicated 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.[2]

4. A three-day hearing was held before Administrative Law Judge Foelak in February 2009. The hearing was closed on February 4 and the record of evidence was closed on March 6, 2009. Wells Decl. Ex. H (ALJ Order dated Mar. 6, 2009).

5. Twelve days after the close of the evidence, the Division moved for the admission of new evidence (the "New Evidence"). Wells Decl., Ex. I (Division's Mot. for the Admission of New Evidence at 1-2). The Commission had induced a foreign regulator to produce the New Evidence by representing in February 2008 that the Commission was investigating antifraud claims by Pierce. *Id.* at 1-4. But no antifraud claims were included in the OIP.

6. The Division's motion claimed that the New Evidence showed that—in addition to the $2.1 million 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. *Id.* at 6-8.

7. This allegation was consistent with the Division's earlier position that the First OIP included Pierce's direct or vicarious liability for "associates" as to the alleged registration liability and 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," "generating sales proceeds of over $13 million." As a result of its consistent position, the Division did not move the ALJ or the Commission to expand the First OIP in any respect, as it

---

[2] Wells Decl. Ex. B (Division Hearing Exs. 43, at SEC -2702, and 51). Wells Decl., Exs. C, D, E and F (Pierce's Mot. for a More Definite Statement, the Division's Opp'n, Pierce's Reply and excerpt of Tr. of 9/29/08 pre-hearing teleconference at 14:16-27:6). The Division told Pierce and the ALJ that the scope of the OIP necessarily included the "associates" and "offshore company" to hold respondents Atkins and Lexington accountable for their registration violations (*id.*, Tr. at 19:25-21:10). Without moving to amend the OIP under the Commission's Rule of Practice 200(d), the Division revised its theory that Pierce was liable as a result of providing ineligible services, *id.* at 24:5-25:2 and abandoned any claim that Pierce's registration liability derived from control of Lexington, *id.* at 23:8-23 – if any was even included in the OIP, which did not explicitly allege that Pierce controlled Lexington or was an "affiliate" of Lexington. Based on the unamended OIP, the Division later argued that Pierce was liable because he controlled Lexington. Wells Decl. Ex. G (Division's Post-Hearing Br. at 7-10 and 18-20).

was permitted to do. *See* 17 C.F.R. § 201.200(d)(1) - (d)(2) ("Amendment of Order Instituting Proceeding").

8. The Division filed a post-hearing brief and proposed findings and conclusions that relied on the New Evidence to support the claim that Pierce reaped an additional $7.5 million alleged profits from the sale of unregistered Lexington stock by his associates, Newport and Jenirob. Wells Decl., Ex. G (Division's Post-Hearing Br.); Wells Decl., Ex. J (Division's Proposed Findings of Fact 32, 50 & 55, Conclusions of Law 21-28, 46, 50-51).

9. Pierce opposed the Division's motion to admit the New Evidence. Wells Decl., Ex. K (Resp't Pierce's Opp'n to Division's Mot. for the Admission of New Evidence at 3-9).

10. On April 7, 2009, the ALJ granted an order that 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." Wells Decl., Ex. L. The Division did not seek interlocutory review or other relief from the Commission to address the ALJ's ruling.

11. On June 5, 2009, the ALJ issued an Initial Decision in the First Action, Release No. 379 (the "Initial Decision"). Wells Decl., Ex. M. The Initial Decision accepted the Division's new 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 the ALJ concluded was the amount of profit Pierce allegedly made from the sale of Lexington stock from his personal account. The Initial Decision specifically noted that "[a]ll arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected."

12. The Division did not request reconsideration or immediate discretionary review of the Initial Decision. Neither party sought review of the Initial Decision with the Commission. *See* 17 C.F.R. §§ 201.360(b) and 410(a). The Commission did not exercise its authority "on its own initiative" to review, reverse, modify, set aside or remand any or all of the Initial Decision.

See 17 C.F.R. § 201.411(a) & (c); § 201.452.

13. On July 8, 2009, the Commission issued a finality order 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."

14. Some months later, Pierce and Commission staff negotiated terms upon which he could satisfy the $2,043,362.33 disgorgement remedy granted in the First Action. Only after Pierce had increased his offer to an amount the Division had represented would be acceptable, did the Division staff inform him that the Commission intended to initiate a new action against him to re-litigate the disgorgement remedy for the alleged $7.5 million in net proceeds received by Newport and Jenirob from the sale of Lexington stock in 2004.

15. In February 2010, Pierce delivered a Wells Committee Submission raising res judicata and estoppel as precluding the re-litigating of the remedy extinguished in the First Action. Wells Decl., Ex. N (Wells Submission without exhibits). The Commission rejected Pierce's defenses.

16. On June 8, 2010, the Commission brought the Second Action against Pierce. Wells Decl. Ex. O. As in the First Action, the Division claims that Pierce violated the registration provisions of the Securities Act, Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c) in connection with the unregistered sale of Lexington stock in 2004. 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 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 the Division proffered, but which the ALJ refused to adopt. (Second OIP ¶ 25). The Second Action seeks the more than $7.5 million disgorgement award (now $7.7 million) denied in the First Action. *Id.* (Second OIP ¶¶ 27, 29 & 30 (emphasis added)).

17. In the Second OIP, the Commission again uses the term "associates." Through this pleading device, the Commission threatens another round of repetitive litigation if it does not

achieve all it wants from Pierce in the Second Action.

18. On the same day it filed the Second Action, the Commission filed a Summary Enforcement Proceeding in this district court, Case No. 3:10-mc-80129, to enforce the disgorgement remedy imposed by the Final Decision.[3] Wells Decl. Ex. P (Securities and Exchange Commission's Application for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce). The Commission's Application did not disclose that it had commenced the Second Action addressing the same facts and transactions but seeking an order that Pierce pay disgorgement of a much higher amount than the "recommended sanctions" that "became final" on July 8, 2009, which were determined after a "full evidentiary hearing." *Id. at 4-5.* Nor did the Application disclose the Commission was seeking a cease and desist order against Pierce that had already been issued in the first action and was included in the Commission's Application. *Id.*

19. In the Second Action, the AJL has denied a motion by Pierce to strike the July 19, 2010 hearing date, even though the motion was not opposed by the Division. Wells Decl. Exs. Q (Jun. 23 Motion) and R (Jun. 24 Order).

20. When Pierce elected not to seek review and challenge the Initial Decision with the Commission, Pierce specifically relied on the prior decisions by the Division not to (a) seek interlocutory review of the ALJ'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. Decl. of G. Brent Pierce ("Perce Decl.) He also relied upon the Divisions' prior statements made during the First Action. He desired finality with respect to the Division's approximately $9.6 million disgorgement claim against him.

21. There was good reason for the Division not to appeal the Initial Decision because 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. Perce Decl.

[3] Pierce filed a notice that this action is related to the Summary Enforcement Proceeding, seeking assignment of both cases to the same judge.

¶¶ 3-4. Because he relied 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 since "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." *See* 17 C.F.R. § 410(e) ("Prerequisite to Judicial Review").

III. PRELIMINARY CONCLUSIONS OF LAW

1. When the SEC filed the Summary Proceeding, it invoked the jurisdiction of this Court under 15 U.S.C. § 77t(c) ("to issue writs of mandamus") and § 78u(e) "to issue writs of mandamus, injunctions, and orders commanding . . ." persons to comply with the securities acts). Application for Order Enforcing Administrative Disgorgement Order. The Commission has applied to enforce its July 8, 2009 order for Pierce "to pay $2,043,362 in disgorgement" plus "$867,495 in prejudgment and post-judgment interest." *Id.* The Commission contends the July 8, 2009 order is a final order.

2. The Court also has subject matter jurisdiction under the Administrative Procedure Act ("APA") and the due process clause of the Constitution. 5 U.S.C. § 702. The APA's § 704 ("Actions Reviewable") authorizes judicial review of "final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The APA's § 702 ("Right of Review") provides: "A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

3. In its Administrative Enforcement Action in this Court, the Commission seeks an equitable writ in a "summary proceeding" that does not necessarily include or trigger "the full array of legal, procedural and evidentiary rules governing" an "action" in federal court but which require compliance with fairness and due process constraints. *SEC v. McCarthy*, 332 F.3d 650 (9th Cir. 2003) (holding the § 21(e) of the Exchange Act authorizes the Commission to use summary proceedings to enforce its orders in district court, which differ from a full blown civil action; also ruling fairness and due process require an opportunity to respond, but declining to rule on whether affirmative defenses were potentially valid).

4. The APA's "Relief Pending Review" provision authorizes this Court to issue "all necessary and appropriate process to postpone the effective date of an agency action or to preserve status and rights pending conclusion of the review proceedings." 5 U.S.C. § 705 (Relief Pending Review). The Court further has ancillary authority under the Declaratory Judgment Act and the All Writs Act to stay proceedings and restrain parties to secure the benefits and preserve and protect the rights of the parties. 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act) and 28 U.S.C. § 1651 (the All Writs Act). "We have interpreted § 1651 as authorizing a district court to enjoin a party from attempting to relitigate a cause of action relating to the same subject matter of an earlier action." *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685 (9th Cir. 1981)

5. The Court also has inherent authority to control its docket including the power to stay pending litigation. When granting a stay, the court must weigh the equities, taking into account: (1) the possible damage caused by a stay, (2) the hardships of proceeding without a stay, and (3) "the orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 269 (9th Cir. 1962); *cf. Adams v. St. of Cal. Dep't of Health Servs.*, 487 F.3d 684, 688-89 (9th Cir. 2007) (court may consider claim splitting in the context of staying or enjoining duplicative later-filed action).

6. An order enjoining the Second Action and the Administrative Enforcement Action is necessary to permit the timely judicial review of Pierce's claim that preclusion, equitable and judicial estoppel and fundamental principles of due process bar the Commission from relitigating the remedy determined in the First Action.

7. Pierce has satisfied the three-part test for a stay and injunction against an agency. *Casey v. FTC*, 578 F.2d 793, 796 (9th Cir. 1978); *California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1323 (9th Cir. 1977). He has preliminarily shown that there is irreparable injury, the exhaustion of administrative remedies is futile, and agency expertise and authority is not necessary to assess the preclusionary claims. Pierce Decl. ¶¶ 7-10. *See S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 n. 4 (9th Cir. 1981); *Continental Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *Safir v. Gibson*, 432 F.2d 137, 143-45 (2d 1970); *Marshall v. Burlington*

Northern, Inc., 595 F.2d 511, 513 (9th Cir. 1979) (citations and internal quotation marks omitted). Courts have recognized that forcing a party to re-litigate claims and issues previously decided in an earlier proceeding, in and of itself, constitutes an irreparable harm. *See, e.g.*, *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425, 1428-29 (9th Cir. 1986); *In re SDDS, Inc.*, 97 F.3d 1030, 1041 (8th Cir. 1996).[4] Res judicata is a question of law, and judicial and equitable estoppel[5] must be a question of *judicial* discretion where, as here, the agency is both the trier of fact and the party accused of wrongdoing.[6]

8. Pierce has also satisfied the elements for a preliminary injunction,[7] including

---

[4] *Harnett v. Billman*, 800 F.2d 1308, 1314-15 (4th Cir. 1986) (holding prior adjudication barred a claim that arose out of the same transactions and that could have been raised in the prior suit; claims arising out of corporate spin-offs and freeze-out mergers formed the basis for a prior action were precluded under the doctrine of res judicata; barred claims included those under the 1933 and 1934 Acts; stating rule that 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); *Mack v. Utah State Dep't of Commerce*, 221 P.3d 194, Blue Sky L. Rep. ¶ 74,782 (Utah 2009) (upholding an injunction against the Utah Division of Securities where the Division had initially opted to bring action in state court against the branch manager of a securities firm and successfully obtained a civil fine and suspension in that action, and then subsequently sought the additional remedy of restitution in an administrative action; holding that (i) injunction was warranted and that the administrative remedy of going through the entire administrative action was not necessary, and (ii) the Division's claims were barred by res judicata); *Doherty v. Cuomo*, 76 A.D.2d 14, 430 N.Y.S.2d 168 (1980) (holding the New York Secretary of State was barred from bringing a second proceeding against a real estate broker where the two actions brought against the broker resulted from acts in nearly the identical time frame, the statutory violations were virtually identical, and the penalty, legal theory, hearing office and basic violations were identical, and holding that the second proceeding merged into the final judgment obtained in the first proceeding).

[5] *See Syngenta Crop Protection, Inc. v. E.P.A.*, 444 F. Supp. 2d 435, 454-55 (M.D.N.C. 2006) (plaintiff stated valid cause of action for injunctive relief against agency for equitable estoppel); *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 belief 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). 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 imposition of estoppel will not unduly harm the public interest." *Id.* (citation and internal quotation marks omitted). Pierce satisfies all these elements. Judicial estoppel applies as well given the summary proceeding that the Commission filed and the Division's statements in the First Action. *See* New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (holding that judicial estoppel may be warranted if, among other things, a party's later position is "clearly inconsistent" with its earlier position). While courts do not apply a specific "concrete formula" to determine the appropriateness of the doctrine's applicability, courts "typically apply judicial estoppel where (1) a party's later position is *clearly* inconsistent with its earlier position, (2) the party has succeeded in persuading a court to accept its earlier position and judicial acceptance of the later position would create the perception that either court was misled, and (3) 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." 532 U.S. at 750 (emphasis in original).

[6] 17 C.F.R. § 201.401 (Consideration of Stays); *see also* § 201.401(c) ("Stay of Commission Order"). Moreover, this rule and its subsections fail to set forth any standards for the consideration of stays and thus fail to provide parties like Pierce fair notice and due process.

[7] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an

likelihood of success on the merits and irreparable injury. The disgorgement remedy upon which the Commission's Second Action against Pierce is predicated arose from the same nucleus of operative facts – resale of Lexington shares in 2004 by Pierce through "offshore company" "associates" Newport and Jenirob, "generating" a substantial portion of the "sales proceeds of over $13 million." The facts are so interwoven as to constitute a single claim and cannot be "dressed up" to look different and to support a separate new claim.[8] The doctrine of res judicata (claim preclusion) including the prohibition against claim splitting applies against the SEC. *See, e.g., SEC v. Crofters, Inc.* 351 F. Supp. 236, 257-58 (S.D. Ohio 1972) (granting summary judgment on the basis of *res judicata* barring SEC's second suit for injunction against deception in the offer or sale of "any security" and for "other or further relief..." because earlier SEC injunction action against same defendant had enjoined it from deception in the offer of sale of "its own securities"), *rev'd on other grounds sub nom., SEC v. Coffey*, 493 F.2d 1304, 1309 (6th Cir. 1994 (stating SEC had not appealed the dismissal of company on the basis of res judicata), *cert. denied*, 420 U.S. 908 (1975).

9. At most, the stay and the preliminary injunction will temporarily delay the Commission's ability to prosecute its $7.5 million disgorgement claim in the Second Action and its application to enforce the earlier disgorgement pending before the Court. But the profits the

---

injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (*quoting Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ---, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Indep. Liv. Cntr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009) (*quoting Winter*, 129 S. Ct. at 376) (internal quotation marks omitted). Pierce satisfies the requirements for a TRO and preliminary injunction.

[8] Res judicata bars not only all claims that were actually litigated, but also all claims that "could have been asserted" in the prior action." *Int'l Union of Operating Engineers-Employers Constr. Indus. Pension, Welfare & Training Trust*, 994 F.2d 1426, 1431 (9th Cir. 1993) (citation omitted). "[T]he criteria most often stressed" in Ninth Circuit decisions are whether the claim "arises out of the same transactional nucleus of facts . . ." *Id.* at 1430. Here, the successive claims arise from the same transactional nucleus of facts, involve substantially the same evidence, the same rights and interests. *Id.* at 1429 (setting forth four-part test for determining successive claims constitute the same cause of action). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Nevada v. United States*, 463 U.S. 110, 130, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983). The doctrine against claim splitting is one application of the general doctrine of res judicata. *Sutcliff Storage & Warehouse Co. v. United States*, 162 F.2d 849, 852 (1st Cir. 1947); *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.").

Commission seeks to disgorge in the Second Action were realized over six years ago, and the Commission is unable to show how a further delay of a few months will prejudice its ability to establish liability or a disgorgement remedy in the Second Action. A temporary delay to facilitate judicial review will not harm the government.

IV. ORDER GRANTING STAY AND PRELIMINARY INJUNCTION

1. The Commission is preliminarily enjoined and barred from prosecuting claims of disgorgement or any other relief against Gordon Brent Pierce ("Pierce") in Administrative Proceeding File No. 3-13927 ("the Second Action") or any other legal action involving securities trading or any other aspect of Lexington, and the Second Action is hereby stayed until this Court determines whether this injunction shall become permanent, or be dissolved or otherwise revised.

2. The Commission is further barred from continuing to apply for, procure or use for the purpose of disgorging assets, the order proposed in this Court in Misc. No. CV-10-80129-MISC (the "Administrative Enforcement Action").

3. Upon entry of a permanent injunction in this case against the Commission prosecuting claims of disgorgement or any other relief against Pierce in the Second Action or any other legal action involving securities trading or any other aspect of Lexington, or upon the Commission's entering into a stipulated order of dismissal with prejudice of all claims previously before it or that it brought or could have brought against Pierce regarding Lexington, including claims for relief in the Second Action, but with the exception of the relief ordered in the First Action, the stay against the Commission's continuing to apply for or procuring the enforcement order in the Administrative Enforcement Action shall be lifted, and the Commission may at that time continue to seek an enforcement order regarding the First Action.

4. The Court waives the bond requirement [or sets the bond at $_____] due to the conclusion that there is no realistic likelihood of harm to the Commission from enjoining its conduct.

Dated: _____, 2010

_____
UNITED STATES DISTRICT JUDGE

CHRISTOPHER B. WELLS (WSBA NO. 08302)
DAVID C. SPELLMAN (WSBA NO. 15884)
RYAN P. MCBRIDE (WSBA NO. 33280)
LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
Telephone: (206) 223-7084
Facsimile: (206) 223-7109
Email: wellsc@lanepowell.com
Email: spellmand@lanepowell.com
Email: mcbrider@lanepowell.com

WILLIAM F. ALDERMAN (STATE BAR NO. 47381)
ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: (415) 773-5700
Facsimile: (415) 773-5759
Email: walderman@orrick.com

Attorneys for Plaintiff
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. 10-3026 **[PROPOSED] TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE; ORDER FOR TEMPORARY STAY** Date: None Set Courtroom: Judge:

I. INTRODUCTION

Plaintiff Gordon Brent Pierce ("Pierce") moves for a stay and TRO enjoining two proceedings that defendant Securities and Exchange Commission ("Commission" or "SEC") filed on June 8, 2010. Pierce requests a temporary stay of the Commission's application to this Court

in CV-10-80-129 MISC for a summary order (the "Administrative Enforcement Action") to enforce the remedy in a prior administrative action (*In the Matter of Lexington Resources, Inc. Grant Atkins, and Gordon Brent Pierce*, Admin. Proc. File No. 3-13109), which Pierce refers to as the "First Action." Pierce also requests a temporary stay, TRO, order to show cause and permanent declaratory relief enjoining the Order Initiating Proceedings *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 which Pierce refers to as the "Second Action."

The Motions for Temporary Restraining Order, Order to Show Cause and Order for Temporary Stay are granted as explained below.

II. PRELIMINARY FINDINGS OF FACT

1. Sometime in 2005, the Commission initiated an investigation of the trading of Lexington Resources, Inc. (Lexington) common stock. On July 31, 2008, the Commission brought the First Action by filing an Order Instituting Cease-and-Desist Proceedings (the "First OIP") against Pierce, a Canadian citizen, and others in a proceeding captioned *In the Matter of Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce.* Decl. of Christopher B. Wells ("Wells Decl."), Ex. A.

2. The First OIP claimed that Pierce violated the registration provisions of the Securities Act, Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c), and the reporting provisions of the Securities Exchange Act, Sections 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a). The claims were based on the resale in 2004 by Pierce and others of shares he had purchased from Lexington under a stock option plan registered on Form S-8. No antifraud claims were brought against any of the respondents, including Pierce.[1]

3. The First OIP alleged that "Pierce and his associates" violated the registration provisions through shares "sold ... through ***his offshore company***" and "generating sales proceeds over $13 million ... " The First OIP. ¶¶ 14-16 (emphasis added). The Division took the position that transaction documents with which Pierce was familiar identified the "associates" and

[1] The other Respondents, Lexington and Grant Atkins, separately settled registration claims with the Commission in consent orders.

Pierce's "offshore company." Documents used in the First Action indicated 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.[2]

4. A three-day hearing was held before Administrative Law Judge Foelak in February 2009. The hearing was closed on February 4 and the record of evidence was closed on March 6, 2009. Wells Decl. Ex. H (ALJ Order dated Mar. 6, 2009).

5. Twelve days after the close of the evidence, the Division moved for the admission of new evidence (the "New Evidence"). Wells Decl., Ex. I (Division's Mot. for the Admission of New Evidence at 1-2). The Commission had induced a foreign regulator to produce the New Evidence by representing in February 2008 that the Commission was investigating antifraud claims by Pierce. *Id.* at 1-4. But no antifraud claims were included in the OIP.

6. The Division's motion claimed that the New Evidence showed that—in addition to the $2.1 million 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. *Id.* at 6-8.

7. This allegation was consistent with the Division's earlier position that the First OIP included Pierce's direct or vicarious liability for "associates" as to the alleged registration liability and 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," "generating sales proceeds of over $13 million." As a result of its consistent position, the Division did not move the ALJ or the Commission to expand the First OIP in any respect, as it

---

[2] Wells Decl. Ex. B (Division Hearing Exs. 43, at SEC -2702, and 51). Wells Decl., Exs. C, D, E and F (Pierce's Mot. for a More Definite Statement, the Division's Opp'n, Pierce's Reply and excerpt of Tr. of 9/29/08 pre-hearing teleconference at 14:16-27:6). The Division told Pierce and the ALJ that the scope of the OIP necessarily included the "associates" and "offshore company" to hold respondents Atkins and Lexington accountable for their registration violations (*id.*, Tr. at 19:25-21:10). Without moving to amend the OIP under the Commission's Rule of Practice 200(d), the Division revised its theory that Pierce was liable as a result of providing ineligible services, *id.* at 24:5-25:2 and abandoned any claim that Pierce's registration liability derived from control of Lexington, *id.* at 23:8-23 – if any was even included in the OIP, which did not explicitly allege that Pierce controlled Lexington or was an "affiliate" of Lexington. Based on the unamended OIP, the Division later argued that Pierce was liable because he controlled Lexington. Wells Decl. Ex. G (Division's Post-Hearing Br. at 7-10 and 18-20).

was permitted to do. *See* 17 C.F.R. § 201.200(d)(1) - (d)(2) ("Amendment of Order Instituting Proceeding").

8. The Division filed a post-hearing brief and proposed findings and conclusions that relied on the New Evidence to support the claim that Pierce reaped an additional $7.5 million alleged profits from the sale of unregistered Lexington stock by his associates, Newport and Jenirob. Wells Decl., Ex. G (Division's Post-Hearing Br.); Wells Decl., Ex. J (Division's Proposed Findings of Fact 32, 50 & 55, Conclusions of Law 21-28, 46, 50-51).

9. Pierce opposed the Division's motion to admit the New Evidence. Wells Decl., Ex. K (Resp't Pierce's Opp'n to Division's Mot. for the Admission of New Evidence at 3-9).

10. On April 7, 2009, the ALJ granted an order that 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." Wells Decl., Ex. L. The Division did not seek interlocutory review or other relief from the Commission to address the ALJ's ruling.

11. On June 5, 2009, the ALJ issued an Initial Decision in the First Action, Release No. 379 (the "Initial Decision"). Wells Decl., Ex. M. The Initial Decision accepted the Division's new 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 the ALJ concluded was the amount of profit Pierce allegedly made from the sale of Lexington stock from his personal account. The Initial Decision specifically noted that "[a]ll arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected."

12. The Division did not request reconsideration or immediate discretionary review of the Initial Decision. Neither party sought review of the Initial Decision with the Commission. *See* 17 C.F.R. §§ 201.360(b) and 410(a). The Commission did not exercise its authority "on its

own initiative" to review, reverse, modify, set aside or remand any or all of the Initial Decision. *See* 17 C.F.R. § 201.411(a) & (c); § 201.452.

13. On July 8, 2009, the Commission issued a finality order 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."

14. Some months later, Pierce and Commission staff negotiated terms upon which he could satisfy the $2,043,362.33 disgorgement remedy granted in the First Action. Only after Pierce had increased his offer to an amount the Division had represented would be acceptable, did the Division staff inform him that the Commission intended to initiate a new action against him to re-litigate the disgorgement remedy for the alleged $7.5 million in net proceeds received by Newport and Jenirob from the sale of Lexington stock in 2004.

15. In February 2010, Pierce delivered a Wells Committee Submission raising res judicata and estoppel as precluding the re-litigating of the remedy extinguished in the First Action. Wells Decl., Ex. N (Wells Submission without exhibits). The Commission rejected Pierce's defenses.

16. On June 8, 2010, the Commission brought the Second Action against Pierce. Wells Decl. Ex. O. As in the First Action, the Division claims that Pierce violated the registration provisions of the Securities Act, Sections 5(a) and 5(c), 15 U.S.C.§ 77e(a) & (c) in connection with the unregistered sale of Lexington stock in 2004. 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 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 the Division proffered, but which the ALJ refused to adopt. (Second OIP ¶ 25). The Second Action seeks the more than $7.5 million disgorgement award (now $7.7 million) denied in the First Action. *Id.* (Second OIP ¶¶ 27, 29 & 30 (emphasis added)).

17. In the Second OIP, the Commission again uses the term "associates." Through this pleading device, the Commission threatens another round of repetitive litigation if it does not achieve all it wants from Pierce in the Second Action.

18. On the same day it filed the Second Action, the Commission filed a Summary Enforcement Proceeding in this district court, Case No. 3:10-mc-80129, to enforce the disgorgement remedy imposed by the Final Decision.[3] Wells Decl. Ex. P (Securities and Exchange Commission's Application for an Order Enforcing Administrative Disgorgement Order Against Respondent Gordon Brent Pierce). The Commission's Application did not disclose that it had commenced the Second Action addressing the same facts and transactions but seeking an order that Pierce pay disgorgement of a much higher amount than the "recommended sanctions" that "became final" on July 8, 2009, which were determined after a "full evidentiary hearing." *Id. at 4-5.* Nor did the Application disclose the Commission was seeking a cease and desist order against Pierce that had already been issued in the first action and was included in the Commission's Application. *Id.*

19. In the Second Action, the AJL has denied a motion by Pierce to strike the July 19, 2010 hearing date, even though the motion was not opposed by the Division. Wells Decl. Exs. Q (Jun. 23 Motion) and R (Jun. 24 Order).

20. When Pierce elected not to seek review and challenge the Initial Decision with the Commission, Pierce specifically relied on the prior decisions by the Division not to (a) seek interlocutory review of the ALJ'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. Decl. of G. Brent Pierce ("Perce Decl.) He also relied upon the Divisions' prior statements made during the First Action. He desired finality with respect to the Division's approximately $9.6 million disgorgement claim against him.

[3] Pierce filed a notice that this action is related to the Summary Enforcement Proceeding, seeking assignment of both cases to the same judge.

21. There was good reason for the Division not to appeal the Initial Decision because 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. Perce Decl. ¶¶ 3-4. Because he relied 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 since "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." *See* 17 C.F.R. § 410(e) ("Prerequisite to Judicial Review").

III. CONCLUSIONS OF LAW

1. When the SEC filed the Summary Proceeding, it invoked the jurisdiction of this Court under 15 U.S.C. § 77t(c) ("to issue writs of mandamus") and § 78u(e) "to issue writs of mandamus, injunctions, and orders commanding . . ." persons to comply with the securities acts). Application for Order Enforcing Administrative Disgorgement Order. The Commission has applied to enforce its July 8, 2009 order for Pierce "to pay $2,043,362 in disgorgement" plus "$867,495 in prejudgment and post-judgment interest." *Id.* The Commission contends the July 8, 2009 order is a final order.

2. The Court also has subject matter jurisdiction under the Administrative Procedure Act ("APA") and the due process clause of the Constitution. 5 U.S.C. § 702. The APA's § 704 ("Actions Reviewable") authorizes judicial review of "final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The APA's § 702 ("Right of Review") provides: "A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

3. In its Administrative Enforcement Action in this Court, the Commission seeks an equitable writ in a "summary proceeding" that does not necessarily include or trigger "the full array of legal, procedural and evidentiary rules governing" an "action" in federal court but which require compliance with fairness and due process constraints. *SEC v. McCarthy*, 332 F.3d 650 (9th Cir. 2003) (holding the § 21(e) of the Exchange Act authorizes the Commission to use

summary proceedings to enforce its orders in district court, which differ from a full blown civil action; also ruling fairness and due process require an opportunity to respond, but declining to rule on whether affirmative defenses were potentially valid).

4. The APA's "Relief Pending Review" provision authorizes this Court to issue "all necessary and appropriate process to postpone the effective date of an agency action or to preserve status and rights pending conclusion of the review proceedings." 5 U.S.C. § 705 (Relief Pending Review). The Court further has ancillary authority under the Declaratory Judgment Act and the All Writs Act to stay proceedings and restrain parties to secure the benefits and preserve and protect the rights of the parties. 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act) and 28 U.S.C. § 1651 (the All Writs Act) "We have interpreted § 1651 as authorizing a district court to enjoin a party from attempting to relitigate a cause of action relating to the same subject matter of an earlier action." *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685 (9th Cir. 1981)

5. The Court also has inherent authority to control its docket including the power to stay pending litigation. When granting a stay, the court must weigh the equities, taking into account: (1) the possible damage caused by a stay, (2) the hardships of proceeding without a stay, and (3) "the orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 269 (9th Cir. 1962); *cf. Adams v. St. of Cal. Dep't of Health Servs.*, 487 F.3d 684, 688-89 (9th Cir. 2007) (court may consider claim splitting in the context of staying or enjoining duplicative later-filed action).

6. An order staying the Administrative Enforcement Action and an order temporarily restraining prosecution of the Second Action are necessary to permit the timely judicial review of Pierce's claim that preclusion, equitable and judicial estoppel and fundamental principles of due process bar the Commission from relitigating the remedy determined in the First Action.

7. Pierce has satisfied the three-part test for a stay and injunction against an agency. *Casey v. FTC*, 578 F.2d 793, 796 (9th Cir. 1978); *California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1323 (9th Cir. 1977). He has preliminarily shown that there is irreparable injury, the exhaustion of administrative remedies is futile, and agency expertise and authority is not

necessary to assess the preclusionary claims. Pierce Decl. ¶¶ 7-10. *See S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 n. 4 (9th Cir. 1981); *Continental Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *Safir v. Gibson*, 432 F.2d 137, 143-45 (2d 1970); *Marshall v. Burlington Northern, Inc.*, 595 F.2d 511, 513 (9th Cir. 1979) (citations and internal quotation marks omitted). Courts have recognized that forcing a party to re-litigate claims and issues previously decided in an earlier proceeding, in and of itself, constitutes an irreparable harm. *See, e.g., Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425, 1428-29 (9th Cir. 1986); *In re SDDS, Inc.*, 97 F.3d 1030, 1041 (8th Cir. 1996).[4] Res judicata is a question of law, and judicial and equitable

[4] *Harnett v. Billman*, 800 F.2d 1308, 1314-15 (4th Cir. 1986) (holding prior adjudication barred a claim that arose out of the same transactions and that could have been raised in the prior suit; claims arising out of corporate spin-offs and freeze-out mergers formed the basis for a prior action were precluded under the doctrine of res judicata; barred claims included those under the 1933 and 1934 Acts; stating rule that 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); *Mack v. Utah State Dep't of Commerce*, 221 P.3d 194, Blue Sky L. Rep. ¶ 74,782 (Utah 2009) (upholding an injunction against the Utah Division of Securities where the Division had initially opted to bring action in state court against the branch manager of a securities firm and successfully obtained a civil fine and suspension in that action, and then subsequently sought the additional remedy of restitution in an administrative action; holding that (i) injunction was warranted and that the administrative remedy of going through the entire administrative action was not necessary, and (ii) the Division's claims were barred by res judicata); *Doherty v. Cuomo*, 76 A.D.2d 14, 430 N.Y.S.2d 168 (1980) (holding the New York Secretary of State was barred from bringing a second proceeding against a real estate broker where the two actions brought against the broker resulted from acts in nearly the identical time frame, the statutory violations were virtually identical, and the penalty, legal theory, hearing office and basic violations were identical, and holding that the second proceeding merged into the final judgment obtained in the first proceeding).

estoppel[5] must be a question of *judicial* discretion where, as here, the agency is both the trier of fact and the party accused of wrongdoing.[6]

8. Pierce has also satisfied the elements for a TRO,[7] including likelihood of success on the merits and irreparable injury. The disgorgement remedy upon which the Commission's Second Action against Pierce is predicated arose from the same nucleus of operative facts – resale of Lexington shares in 2004 by Pierce through "offshore company" "associates" Newport and Jenirob, "generating" a substantial portion of the "sales proceeds of over $13 million." The facts are so interwoven as to constitute a single claim and cannot be "dressed up" to look different and to support a separate new claim.[8] The doctrine of res judicata (claim preclusion) including the

---

[5] *See Syngenta Crop Protection, Inc. v. E.P.A.*, 444 F. Supp. 2d 435, 454-55 (M.D.N.C. 2006) (plaintiff stated valid cause of action for injunctive relief against agency for equitable estoppel); *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 belief 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). 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 imposition of estoppel will not unduly harm the public interest." *Id.* (citation and internal quotation marks omitted). Pierce satisfies all these elements. Judicial estoppel applies as well given the summary proceeding that the Commission filed and the Division's statements in the First Action. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (holding that judicial estoppel may be warranted if, among other things, a party's later position is "clearly inconsistent" with its earlier position). While courts do not apply a specific "concrete formula" to determine the appropriateness of the doctrine's applicability, courts "typically apply judicial estoppel where (1) a party's later position is *clearly* inconsistent with its earlier position, (2) the party has succeeded in persuading a court to accept its earlier position and judicial acceptance of the later position would create the perception that either court was misled, and (3) 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." 532 U.S. at 750 (emphasis in original).

[6] 17 C.F.R. § 201.401 (Consideration of Stays); *see also* § 201.401(c) ("Stay of Commission Order"). Moreover, this rule and its subsections fail to set forth any standards for the consideration of stays and thus fail to provide parties like Pierce fair notice and due process.

[7] *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D.Cal. 1995). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (*quoting Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ---, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Indep. Liv. Cntr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009) (*quoting Winter*, 129 S. Ct. at 376) (internal quotation marks omitted). Pierce satisfies the requirements for a TRO and preliminary injunction.

[8] Res judicata bars not only all claims that were actually litigated, but also all claims that "could have been asserted" in the prior action." *Int'l Union of Operating Engineers-Employers Constr. Indus. Pension, Welfare & Training Trust*, 994 F.2d 1426, 1431 (9th Cir. 1993) (citation omitted). "[T]he criteria most often stressed" in Ninth Circuit decisions are whether the claim "arises out of the same transactional nucleus of facts . . ." *Id.* at 1430. Here, the successive claims arise from the same transactional nucleus of facts, involve substantially the same evidence, the same rights and interests. *Id.* at 1429 (setting forth four-part test for determining successive claims constitute the

prohibition against claim splitting applies against the SEC. *See, e.g., SEC v. Crofters, Inc.* 351 F. Supp. 236, 257-58 (S.D. Ohio 1972) (granting summary judgment on the basis of *res judicata* barring SEC's second suit for injunction against deception in the offer or sale of "any security" and for "other or further relief..." because earlier SEC injunction action against same defendant had enjoined it from deception in the offer of sale of "its own securities"), *rev'd on other grounds sub nom., SEC v. Coffey*, 493 F.2d 1304, 1309 (6th Cir. 1994 (stating SEC had not appealed the dismissal of company on the basis of res judicata), *cert. denied*, 420 U.S. 908 (1975).

9. At most, the stay and TRO will temporarily delay the Commission's ability to prosecute its $7.5 million disgorgement claim in the Second Action and its application to enforce the earlier disgorgement pending before the Court. But the profits the Commission seeks to disgorge in the Second Action were realized over six years ago, and the Commission is unable to show how a further delay of a few months will prejudice its ability to establish liability or a disgorgement remedy in the Second Action. A temporary delay to facilitate judicial review will not harm the government.

IV. ORDER GRANTING TEMPORARY STAY, TRO, AND ORDER TO SHOW CAUSE

1. Further proceedings in Case No. CV-10-80-129 MISC (the "Administrative Enforcement Action") are temporarily stayed, and further proceedings in *In the Matter of Gordon Brent Pierce, Newport Capital Corp., and Jenirob Company Ltd.*, Admin. Proc. File No. 3-13927 (the "Second Action") are temporarily restrained.

2. The Court waives the bond requirement or sets the bond at $_____ due to the conclusion that there is no realistic likelihood of harm to the Commission from enjoining its conduct.

---

same cause of action). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Nevada v. United States*, 463 U.S. 110, 130, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983). The doctrine against claim splitting is one application of the general doctrine of res judicata. *Sutcliff Storage & Warehouse Co. v. United States*, 162 F.2d 849, 852 (1st Cir. 1947); 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.").

3. The temporary stay of the Administrative Enforcement Action will remain in place until further order of the Court.

4. The Commission is hereby ordered to show cause, at a hearing at _____ on _____, 2010, in the Courtroom of Hon. _____at the United States Court House, 450 Golden Gate Avenue, San Francisco, CA, why the Commission should not be preliminarily restrained and enjoined pending trial of this action from prosecuting the Second Action. The Commission shall file and serve via email any written response and supporting papers by the close of business on July __, 2010. Plaintiff shall file and serve via email any reply papers by the close of business on July ___, 2010.

Dated: _____, 2010

_____
UNITED STATES DISTRICT JUDGE