INITIAL DECISION RELEASE NO. 425
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13927

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	INITIAL DECISION AS TO
GORDON BRENT PIERCE,	:	GORDON BRENT PIERCE
NEWPORT CAPITAL CORP., and	:	July 27, 2011
JENIROB COMPANY LTD.	:	

APPEARANCES: Marc J. Fagel, Michael S. Dicke, John S. Yun, Judith L. Anderson, and Steven D. Buchholz for the Division of Enforcement, Securities and Exchange Commission

William F. Alderman, Shireen Qaru, Russell D. Duncan, and Justin Bagdady, Orrick, Herrington & Sutcliffe LLP, and Christopher B. Wells and David C. Spellman, Lane Powell PC, for Respondent Gordon Brent Pierce

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision concludes that Gordon Brent Pierce (Pierce) violated Sections 5(a) and 5(c) of the Securities Act of 1933 (Securities Act) in connection with sales of stock of Lexington Resources, Inc. (Lexington), and orders Pierce to disgorge ill-gotten gains of $7,247,635.75, plus prejudgment interest.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on June 8, 2010, pursuant to Section 8A of the Securities Act. This proceeding has ended as to Respondents Newport Capital Corp. (Newport) and Jenirob Company Ltd. (Jenirob). See Gordon Brent Pierce, Securities Act Release No. 9205 (May 11, 2011).

Pierce was previously a respondent in Lexington Resources, Inc., et al., Administrative Proceeding File No. 3-13109 (First Proceeding), in which Administrative Law Judge (ALJ)

Carol Fox Foelak found that Pierce had violated Securities Act Sections 5(a) and 5(c) in connection with unregistered sales of Lexington stock from his personal account. Initial Decision Release No. 379 (June 5, 2009), 96 SEC Docket 17651 (First Proceeding ID). The instant proceeding was previously assigned to ALJ Foelak, who held a prehearing conference on November 19, 2010. The parties consented at the prehearing conference to an initial decision based on motions for summary disposition. The Division of Enforcement (Division) and Pierce filed simultaneous cross Motions for Summary Disposition on March 22, 2011, followed by simultaneous Oppositions and simultaneous Replies.

The parties orally argued their Motions at SEC Headquarters in Washington, D.C. on June 8, 2011. At the argument, the parties again consented to an initial decision based on motions for summary disposition. Oral Argument Transcript, pp. 4-6, 83. The parties thereafter filed supplements to their Motions, which included both briefs and exhibits.

B. Summary of Allegations of the Parties

The instant proceeding, like its predecessor, concerns alleged unregistered sales of Lexington stock. The OIP alleges that Pierce violated Securities Act Sections 5(a) and 5(c) by selling shares in Lexington, a now defunct oil and gas company, through accounts in the name of Newport and Jenirob, two offshore companies controlled by Pierce, without a valid registration statement or exemption from registration. OIP at ¶ 1. Pierce allegedly obtained approximately $7 million in unlawful profits through sales of 1.6 million shares of Lexington stock between February 2004 and December 2004. OIP at ¶ 25. The Division seeks a cease-and-desist order and disgorgement.

Pierce admits many of the facts and allegations set forth in the OIP, "solely because they were already adjudicated in the First [Proceeding]." Answer, p. 5. Pierce contends, however, that the instant proceeding is barred by res judicata, equitable estoppel, judicial estoppel, and waiver. Respondent G. Brent Pierce's Opening Brief in Support of Motion for Summary Disposition (Pierce's Motion); Respondent G. Brent Pierce's Opposition to Division's Motion for Summary Disposition (Pierce's Opposition). Respondent G. Brent Pierce's Reply in Support of his Motion for Summary Disposition (Pierce's Reply).

C. Standard for Summary Disposition

After a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. See 17 C.F.R. § 201.250(a). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noticed pursuant to 17 C.F.R. § 201.323. Id. A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the

party making the motion is entitled to a summary disposition as a matter of law. See 17 C.F.R. § 201.250(b).[1]

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to 17 C.F.R. § 201.323. In particular, I have taken official notice of the First Proceeding ID.

The parties' motion papers, and indeed, all documents and exhibits of record, have been fully reviewed and carefully considered. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-104 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

II. FINDINGS OF FACT

The findings of fact in this Initial Decision are based largely on the admissions contained in Pierce's Answer and on the Findings of Fact in the First Proceeding ID.

A. Respondent and Other Relevant Individuals and Entities

1. Gordon Brent Pierce

Pierce was age 53 as of July 9, 2010, and is a Canadian citizen residing in Vancouver, British Columbia. Answer at ¶ 4. Pierce controlled Lexington through, among other things, his influence over Lexington's CEO, his ownership of Lexington stock, and his control over consultants assigned to work for Lexington. First Proceeding ID, p. 17. He was formerly president and a director of Newport. Answer at ¶ 4; First Proceeding ID, p. 5. In 2003 Pierce opened a personal brokerage account at Hypo Bank in Leichtenstein. First Proceeding ID, p. 6. Newport and Jenirob also had brokerage accounts at Hypo Bank, and Pierce was the beneficial owner of the assets in those accounts. Declaration of Steven D. Buchholz in Further Support of Division of Enforcement's Motion for Summary Disposition Against Respondent Pierce (Buchholz Decl. II), Exs. V and W; OIP at ¶ 25; Answer, p. 5.[2] Hypo Bank, in turn, opened an "omnibus" account at

[1] I find that the parties knowingly and intelligently waived their right to a hearing in this matter. Oral Argument Transcript, pp. 6, 83. Because the parties consented to summary disposition, the cross-motions have been treated as a case stated. See Jewelers Mutual Insurance Co. v. N. Barquet, Inc., 410 F.3d 2, 9 (1st Cir. 2005); Kavanaugh v. City of Phoenix, 25 Fed.Appx. 516, 517-18 (9th Cir. 2001). In accordance with this procedure, to the extent the evidence presents genuine issues of material fact, I have resolved them. Kavanaugh, 25 Fed.Appx. at 517.

[2] The First Proceeding ID, citing Buchholz Decl. II, Exs. V and W, states that Pierce was the beneficial owner of both Newport and Jenirob, that is, of the corporations themselves. First Proceeding ID, p. 5. Pierce contends that the statement is inaccurate and alleges that the Division has argued for its truth until only recently. Respondent Pierce's Post-Oral Argument Brief in Support of his Motion for Summary Disposition and in Opposition to the Division's Motion for

vFinance, Inc. (vFinance). First Proceeding ID, p. 6. Such an omnibus account permitted Hypo Bank to trade securities for many of its own customers without disclosing the identity of the owner of the securities in any particular trade. Oral Argument Transcript, pp. 14-15.

2. Lexington

Lexington was a Nevada corporation that was a public shell company known as Intergold Corp. (Intergold) 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. OIP at ¶ 6; Answer, p. 5; First Proceeding ID, p. 4. 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. OIP at ¶ 6; Answer, p. 5. From 2003 to 2007, Lexington stock was quoted on the over-the-counter bulletin board under the symbol "LXRS." OIP at ¶ 6; Answer, p. 5. In 2008, Lexington's only operating subsidiaries entered Chapter 7 bankruptcy. OIP at ¶ 6; Answer, p. 5.

3. Newport

Newport was a privately-held company organized under the laws of Belize and domiciled in Switzerland. OIP at ¶ 4; Answer at ¶ 4; First Proceeding ID, p. 7. Newport invested in public companies, helped them raise capital, provided investor relations services, and aided companies in finding suitable acquisition opportunities. First Proceeding ID, p. 7. Newport had no employees, only consultants. Id. As of February 2, 2004, Newport held 1,935,589 shares of Lexington stock. Id. at 14. Newport had brokerage accounts at Hypo Bank and vFinance, among other institutions. Id. at 6.

4. Jenirob

Jenirob was a privately-held company organized under the laws of the British Virgin Islands. OIP at ¶ 5; Answer at ¶ 5. As of May 2004, Jenirob held 435,000 shares of Lexington stock. First Proceeding ID, p. 12. Jenirob had a brokerage account at Hypo Bank. First Proceeding ID, p. 13.

Summary Disposition (Pierce's Post-Argument Brief). The most reasonable interpretation of the source documents is that Pierce was the beneficial owner of the assets in the accounts, rather than of the corporations themselves, and Pierce admitted as much in his Answer. Buchholz Decl. II, Exs. V and W; OIP at ¶ 25; Answer, p. 5. There is ambiguous language in the Division's Motion for the Admission of New Evidence and the associated Declaration of Steven D. Buchholz, language which could be interpreted as asserting either that Pierce was the beneficial owner of Newport and Jenirob or that he was merely the beneficial owner of their Hypo Bank accounts. Buchholz Decl. II, Ex. E at 4; Buchholz Decl. II, Ex. F at ¶ 21. I find no other evidence that the Division ever asserted, prior to the issuance of the First Proceeding ID, that Pierce beneficially owned Newport and Jenirob.

B. Pierce's Relationship with Lexington

Between 2002 and 2007, Pierce provided Lexington and its predecessor, Intergold, with operating funds, stock promotion services, and capital raising services through at least three different consulting companies controlled by Pierce, including Newport. OIP at ¶ 7; Answer, p. 5; First Proceeding ID, pp. 7-9, 17. Pierce provided his services to Lexington and Intergold through the consulting companies in order to conceal his role and to avoid being identified by name in Commission filings. OIP at ¶ 7; Answer, p. 5.

Lexington had neither full time employees nor offices of its own. First Proceeding ID, p. 4. Instead, Lexington employed one of Pierce's consulting companies, International Market Trend AG (IMT), to provide administrative support and various other services; indeed, Lexington was managed out of IMT's offices in Blaine, Washington. OIP at ¶ 9; Answer, p. 5; First Proceeding ID, p. 4. Between 2002 and 2004, the CEO and Chairman of Intergold and Lexington was Grant Atkins (Atkins), a consultant whose activities were directed by Pierce. OIP at ¶ 8; Answer, p. 5; First Proceeding ID, passim.

Pierce's consulting companies were at times compensated for their services to Lexington or Intergold by stock or stock options in Lexington or Intergold. On October 13, 2003, Intergold issued 10,000 shares of restricted common stock to Parc Place Investments, AG, for partial payment of a debt. First Proceeding ID, p. 8. On October 15, 2003, Intergold issued 100,000 shares of restricted common stock to Investor Communications International, Inc. (ICI) for payment of a debt. First Proceeding ID, p. 10. On November 18, 2003, Intergold agreed to grant IMT 950,000 common share stock options, having a $0.50 per share exercise price, as partial payment of its debt to IMT. OIP at ¶ 10; Answer, p. 5; First Proceeding ID, p. 9.

C. Issuance of Lexington Securities to Pierce and Associates

On November 24, 2003, a few days after the Intergold/IMT stock option agreement, IMT allocated 350,000 option shares to Pierce. First Proceeding ID, p. 11; see OIP at ¶ 14 and Answer, p. 5. The same day, Atkins, at Pierce's direction, instructed one of Lexington's transfer agents to reissue the 350,000 share block to Newport, based on a private sale between Pierce and Newport. First Proceeding ID, p. 11. The following day, November 25, 2003, Atkins, at Pierce's direction, instructed Lexington's transfer agent to cancel the previous day's order regarding the 350,000 share block, and to instead issue most of the shares to various entities, based on private sales between those entities and Newport. First Proceeding ID, p. 11. Newport retained 41,700 shares out of the 350,000 share block. Id.

Also on November 25, 2003, IMT allocated an additional 150,000 option shares to Pierce. First Proceeding ID, p. 11. The purpose of the allocations on these two days was to avoid pushing Pierce over the ten percent beneficial ownership threshold. First Proceeding ID, p. 11.

Over the course of the next several months, Lexington shares were distributed to various individuals and entities, including Pierce, Newport, ICI, and IMT. First Proceeding ID, pp. 11-12. On January 26, 2004, Lexington effectuated a three-for-one stock split. First Proceeding ID,

p. 12. On May 19, 2004, Atkins instructed Lexington's transfer agent to issue two share blocks to Jenirob of 400,000 and 35,000 shares, respectively. First Proceeding ID, p. 12.

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" (S-8). First Proceeding ID, pp. 10-11. The S-8 did not contain a reoffering prospectus and did not cover subsequent resales of Lexington stock by Pierce and his associates. OIP at ¶ 16; Answer, p. 5; First Proceeding ID, p. 11. The option exercise agreements signed by Pierce provided that all shares were to be acquired for investment purposes only, with no view to resale or other distribution. OIP at ¶ 20; Answer, p. 5. No registration statements were filed relating to any resales of Lexington stock by Pierce. OIP at ¶ 20; Answer, p. 5. No registration statements were filed relating to any resales of Lexington stock by Newport or Jenirob. OIP at ¶ 16; Answer, p. 5; see also Declaration of Steven D. Buchholz in Support of Division of Enforcement's Motion for Sanctions and Entry of Default Judgment Against Respondents Newport Capital Corp. and Jenirob Company Ltd. and Anticipated Motion for Summary Disposition Against Respondent Pierce (Buchholz Decl. I), Ex. B.

D. Promotional Campaign Touting Lexington Stock

In late February 2004, Pierce began actively promoting Lexington stock by sending millions of spam emails and newsletters through a publishing company that Pierce controlled. OIP at ¶ 17; Answer, p. 5. At the same time, Lexington issued a flurry of optimistic press releases about its current and potential operations. OIP at ¶ 17; Answer, p. 5. During the promotional campaign, Pierce personally met with potential Lexington investors and distributed folders with promotional materials and press releases. OIP at ¶ 18; Answer, p. 5. Between February and 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 one million shares per day in late June 2004. OIP at ¶ 19; Answer, p. 5.

E. Sales of Lexington Stock by Pierce, Newport, and Jenirob

As of April 30, 2004, Pierce held a total of 446,683 (post-split) Lexington shares in his personal Hypo Bank account, which included 325,000 shares received under the November 18, 2003 IMT stock option agreement. First Proceeding ID, p. 13. Using a first-in, first-out method, his total profit from selling shares under the IMT agreement was $2,043,362.33. First Proceeding ID, p. 13; OIP at ¶ 30; Answer, p. 5.

Pierce sold approximately 1.6 million Lexington shares through the Newport and Jenirob accounts at Hypo Bank between February 2004 and December 2004. OIP at ¶ 25; Answer, p. 5. Between February 20, 2004 and September 29, 2004, Newport realized gains of $5,264,466.64 from sales or deliveries of 1,308,400 Lexington shares subject to the First S-8. Declaration of Jeffrey A. Lyttle in Support of Division of Enforcement's Motion for Sanctions and Entry of Default Judgment Against Respondents Newport Capital Corp. and Jenirob Company Ltd. and Anticipated Motion for Summary Disposition Against Respondent Pierce (Lyttle Decl.) at ¶ 6 and Ex. A. Between June 10, 2004 and June 30, 2004, Jenirob realized gains of $1,983,169.11

from sales or deliveries of 435,000 Lexington shares subject to the First S-8. Id. at ¶ 7 and Ex. B.

F. The First Proceeding

The Division initiated its investigation into trading in Lexington stock on May 4, 2006. Declaration of Christopher B. Wells in Support of Respondent G. Brent Pierce's Motion for Summary Disposition (Wells Decl.), Ex. 1. As part of its investigation, the Division took Pierce's sworn testimony beginning on July 27, 2006, in which he denied any ownership stake of any kind, either directly or indirectly, in Newport. Buchholz Decl. II at ¶ 5 and Ex. D. Pierce admitted that he had an interest in Newport's Hypo Bank account, but denied having an interest in Jenirob's. Supplemental Declaration of Christopher B. Wells in Support of Respondent Pierce's Post-Oral Argument Brief (Wells Supp. Decl.), Ex. C at pp. 395-96. He denied trading in Lexington securities in any U.S. account on behalf of Jenirob. Declaration of Steven Buchholz in Support of Division of Enforcement's Post-Argument Brief (Buchholz Supp. Decl.), Ex. C at p. 368. Pierce produced a Schedule 13D dated July 25, 2006, which states that he and Newport were beneficial owners of a number of Lexington shares in 2003 and 2004, but which omits any reference to Jenirob's ownership of Lexington stock during the same time period. Wells Decl., Ex. 5. He otherwise failed to produce, or objected to producing, any account records or other documents pertaining to Newport or Jenirob in response to the Division's document request and investigatory subpoena. Buchholz Decl. II at ¶ 7.

In response to the Division's document request for all statements from accounts in which he had a beneficial interest, Pierce either failed to produce, or objected to producing, any brokerage account statements other than for his personal accounts. Buchholz Supp. Decl., Ex. A at ¶ 4. He also stated that the Schedule 13D was a "report of the trading in Lexington stock by persons/entities described in this request." Id. In response to a request for "[a]ll DOCUMENTS reflecting or relating to . . . transactions by YOU" in Lexington stock, Pierce stated, without objection: "Mr. Pierce is producing his responsive records (Schedule 13D report) of trades in Lexington stock. Id. at ¶ 20 (emphasis in original). "YOU," as defined in the document request, included any person or entity acting on Pierce's behalf. Id. at SEC 04433.

In late 2006, the Division requested records of Hypo Bank through a diplomatic request to the Liechtenstein securities regulator, the Finanzmarktaufsicht (FMA). Buchholz Decl. II, Ex. F at ¶¶ 5-6. Initially, the FMA provided no documents. Id. at ¶ 6. In late 2007, the Division learned that the FMA was working to amend Liechtenstein law in such a way that it might be able to produce the documents sought by the Division. Id. at ¶ 7. The Division therefore sent another request to the FMA in February 2008, but did not receive any documents until after July 31, 2008. Id. at ¶¶ 7-9.

On July 31, 2008, the Commission issued an Order Instituting Cease-and-Desist Proceedings (First OIP). Wells Decl., Ex. 2. The First OIP charged Pierce, Lexington, and Atkins with violations of Securities Act Sections 5(a) and 5(c) and, as to Pierce only, violations of Exchange Act Sections 13(d) and 16(a), in connection with unregistered sales of Lexington stock. Id., p. 4. The relief sought included a cease-and-desist order and disgorgement. Id., p. 5.

In connection with cross motions for summary disposition, which were denied in December 2008, the Division clarified that it sought disgorgement only of the proceeds of Pierce's unregistered sales through his personal account, totaling $2,077,969. First Proceeding ID, p. 20; Buchholz Decl. II, Ex. B, p. 10.

Also in December 2008, the FMA produced to the Division some Hypo Bank records responsive to the Division's February 2008 evidence request. Buchholz Decl. II, Ex. F at ¶ 9. The FMA indicated that other responsive documents could not be released until the resolution of appeals by certain Hypo Bank account holders who objected to disclosure of the records to the Division. Id. at ¶ 10. One such objecting account holder was Pierce, whose personal account records were not included in the December 2008 production. Id. at ¶ 11; Buchholz Decl. II, Ex. H.

ALJ Foelak held a hearing in Seattle, Washington between February 2 and 4, 2009. First Proceeding ID, p. 1. Pierce, although listed as a witness in his own witness list, did not appear. Id., pp. 1-2.

On March 10, 2009, the FMA produced to the Division a number of documents responsive to its evidence request (collectively, the "Liechtenstein Documents"). Buchholz Decl. II, Ex. F at pp. 2-3. The production included documents showing that Pierce was the beneficial owner of the assets in the accounts held by Newport and Jenirob. Buchholz Decl. II, Exs. V and W.[3] The Division moved for admission of these documents in a post-hearing motion, and argued that Pierce should be liable for a larger amount of disgorgement than previously requested. Buchholz Decl. II, Ex. E. ALJ Foelak noted that Newport and Jenirob were not mentioned in the First OIP and that disgorgement of the proceeds of sales by those entities would be outside the scope of the First OIP, and accordingly ruled that the new evidence would be admitted on the issue of liability but not on the issue of calculating disgorgement. First Proceeding ID, p. 20; Buchholz Decl. II, Ex. I.

Pierce was found to have violated Securities Act Sections 5(a) and 5(c) and Exchange Act Sections 13(d) and 16(a), and was ordered to cease and desist such violations and to disgorge $2,043,362.33, representing the gains realized through trades in Lexington stock from his personal Hypo Bank account. First Proceeding ID. Neither party appealed the First Proceeding ID and it became the final decision of the Commission on July 8, 2009. OIP at ¶ 30; Answer, p. 5; Buchholz Decl. II, Ex. K.

[3] These documents appear to qualify as foreign business records under Fed.R.Evid. 803(6) and 902(3), and are admissible under the Commission's Rules of Practice in any event. 17 C.F.R. § 201.320. Pierce notes that his signature appears on Newport's "beneficial owner" form, but not on Jenirob's. There is nothing in the record to suggest that this was not an ordinary business practice, and Pierce has otherwise not made a sufficient showing to call into question either document's accuracy or authenticity.

G. The Present Proceeding

The Commission issued its OIP in the present proceeding on June 8, 2010. Buchholz Decl. II, Ex. M. On the same day, the Division applied in the U.S. District Court for the Northern District of California for an order enforcing the First Proceeding's disgorgement order, because up to that date Pierce had not paid the order. Buchholz Decl. II, Ex. L. Pierce opposed this application, and additionally filed a civil action the following day, seeking an injunction against the present proceeding. Buchholz Decl. II, Ex. R. On September 2, 2010 Pierce's civil action was dismissed, and the Division's application for an enforcement order was granted. Wells Decl., Ex. 23. Pierce thereafter filed a notice of appeal, but later paid the disgorgement order. Buchholz Decl. II at ¶ 15 and Ex. S; Wells Decl., Ex. 24.

III. CONCLUSIONS OF LAW

The OIP charges that Pierce violated Sections 5(a) and 5(c) of the Securities Act. As discussed below, I find that he violated those provisions.

A. Pierce Violated Section 5 of the Securities Act

The Division contends that Pierce violated Sections 5(a) and 5(c) of the Securities Act by selling and offering to sell Lexington stock to the public through accounts held by Newport and Jenirob, when no registration statement had been filed or was in effect and with no exemption from registration. Division of Enforcement's Motion for Summary Disposition Against Respondent Pierce (Division's Motion), pp. 10-12.

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) (2010). Section 5(c) of the Securities Act provides, in pertinent part:

> 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.

15 U.S.C. § 77e(c) (2010).

A prima facie case for a violation of Section 5 is established by showing that: (1) the defendant directly or indirectly sold or offered to sell securities (2) through the use of interstate facilities or mail (3) when no registration statement was in effect. SEC v. Calvo, 378 F.3d 1211, 1214 (11th Cir. 2004) (citing SEC v. Continental Tobacco Co. of South Carolina, 463 F.2d 137, 155 (5th Cir. 1972)). Proof of scienter is not required. Calvo, 378 F.3d at 1215; SEC v. Universal Major Industries Corp., 546 F.2d 1044, 1047 (2d Cir. 1976); SEC v. Softpoint, Inc., 958 F.Supp. 846, 859-60 (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. 1998). Liability under Section 5, including liability for disgorgement of profits, may be found for persons who are "necessary participants" or whose activities were a "substantial factor" in the illicit sale. Calvo, 378 F.3d at 1215-16; see SEC v. Cavanagh, 155 F.3d 129, 134 (2d Cir. 1998); see generally SEC v. Murphy, 626 F.2d 633, 649-52 (9th Cir. 1980) (summarizing cases). Once the Division has made out a prima facie case, the burden shifts to the respondent to prove entitlement to an exemption. SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953); Murphy, 626 F.2d at 641.

As noted, Pierce's Answer concedes most of the OIP's allegations.[4] Pierce sold approximately 1.6 million Lexington shares through the Newport and Jenirob accounts between February 2004 and December 2004. OIP at ¶ 25; Answer, p. 5. No registration statements were filed relating to any resales of Lexington stock by Pierce, Newport, or Jenirob. OIP at ¶ 20; Answer, p. 5. The sales through the Newport and Jenirob accounts used an account at a Liechtenstein bank (Hypo Bank). OIP at ¶ 25; Answer, p. 5. These undisputed facts establish all three elements of a Section 5 violation, and, bolstered by the fact that Pierce was the beneficial owner of the assets in the Newport and Jenirob accounts at Hypo Bank, demonstrate that Pierce is liable as a necessary participant whose activities were also a substantial factor in the illegal sales. Pierce, in opposition, does not contend that he is entitled to an exemption. Pierce's Opposition. Accordingly, Pierce is presumptively liable for violating Section 5.

B. Pierce's Affirmative Defenses

Although Pierce raised a large number of affirmative defenses in his Answer, the only ones asserted in his Motion, Opposition, and Reply are equitable estoppel, judicial estoppel, waiver, and, most significantly, res judicata.

1. Equitable Estoppel

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

[4] Because Pierce's Answer is alone sufficient to find that he presumptively violated Section 5, I do not reach the Division's argument that he is collaterally estopped from denying the truth of the OIP's allegations.

going beyond mere negligence, that the government's act will cause a serious injustice, and that the imposition of estoppel will not unduly harm the public interest. Id. The party asserting estoppel bears the burden of proving it. See id.

This defense fails because Pierce has not proven the second and fourth elements required for equitable estoppel, and has not shown that the government's act will cause a serious injustice. Pierce argues that he detrimentally relied on the Division's failure to appeal the First Proceeding ID: the Division's "failure to pursue to completion the claim for disgorgement of Newport and Jenirob profits it had put into play in the First Proceeding legally constituted a representation that it had abandoned that claim." Pierce's Reply, p. 14. But it is undisputed that the Division made no representations regarding its intention to appeal. Declaration of Steven D. Buchholz in Support of Division of Enforcement's Opposition to Motion for Summary Disposition by Respondent Pierce (Buchholz Decl. in Opposition) at ¶ 14. There is no persuasive evidence that the Division's failure to appeal was intended to lull Pierce into similarly failing to appeal. Pierce also points to no legal authority stating that he had the "right" to believe that the Division's inaction was intended to lull him, or that the Division had a duty to inform him of its intentions.

Moreover, although Pierce explains at length how he relied on the Division's inaction and silence (Wells Decl., Ex. 16), his reliance was not reasonable. Detrimental reliance in the equitable estoppel context must be reasonable. Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 59 (1984). A party's failure to appeal may result from any number of considerations, including cost, likelihood of prevailing, and the availability of other remedies. One reasonable explanation, among others, for the Division's failure to appeal is that it interpreted the First Proceeding ID as holding that the Newport and Jenirob sales should be the subject of a separate OIP. First Proceeding ID, p. 20. That is apparently exactly how the Division interpreted the First Proceeding ID. It is not reasonable to assume from mere silence that the Division had entirely given up on its claim for an additional $7 million in disgorgement.

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

2. Judicial Estoppel

Judicial estoppel precludes a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001). There is no rigid test for judicial estoppel. Id. Instead, there are three non-exhaustive factors to consider: (1) whether the two arguments are clearly inconsistent; (2) whether the party was successful in asserting the earlier position; and (3) whether the party seeking to assert the position would derive an unfair advantage or impose an unfair detriment upon the opposing party. Id.; United Steelworkers of America v. Retirement Income Plan for Hourly-

Rated Employees of ASARCO, Inc., 512 F.3d 555, 563 (9th Cir. 2008). The second factor is based on the concern that "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" New Hampshire, 532 U.S. at 750; United Steelworkers, 512 F.3d at 563. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations and thus poses little threat to judicial integrity. New Hampshire, 532 U.S. at 750-51 (citation and quotations omitted).[5]

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

Most significant, though, is the fact that Pierce prevailed in the First Proceeding on the issue of whether disgorgement of Newport and Jenirob profits was part of the case. The Division's current position, although inconsistent with its previous position, is entirely consistent with the conclusions of the First Proceeding ID. There is thus no risk of inconsistent determinations and no threat to administrative or judicial integrity posed by the Division's present contentions.[6] Taking into account all three New Hampshire factors, and placing the greatest weight on the second factor, I conclude that judicial estoppel is inapplicable.

3. Waiver

A legal right may be waived by intentionally relinquishing or abandoning it. United States v. Olano, 507 U.S. 725, 733 (1993); Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 61 (2d Cir. 1999). A waiver is intentional, in contrast to a forfeiture, which is unintentional. United States v. Burke, 633 F.3d 984, 990 (10th Cir. 2011) (citing Olano, 507 U.S. at 733). The Federal Circuit, in considering a waiver defense to a claim of patent infringement, cited the following test with

[5] Pierce relies in part on Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 601 (9th Cir. 1996), which expressly declined to decide for the Ninth Circuit whether judicial estoppel requires success by a party in asserting the earlier position. Rissetto was decided before the Supreme Court's decision in New Hampshire, and to the extent Rissetto is inconsistent with New Hampshire and its progeny, including the Ninth Circuit decision in United Steelworkers, it is no longer good law.

[6] Virtually all of Pierce's case is based on a central contention – namely, that disgorgement of Newport and Jenirob's profits was part of the First Proceeding – which is the opposite of the contention it successfully argued in the First Proceeding, and which may itself be barred by judicial estoppel. The Division has not specifically asserted judicial estoppel, however, which bolsters the conclusion that Pierce has not been unfairly prejudiced by the Division's inconsistent arguments. Division's Motion, p. 31 at n.12.

approval: the party asserting waiver must prove that its opponent, "with full knowledge of the material facts, intentionally relinquished its rights to [bring suit] or that its conduct was so inconsistent with an intent to enforce its rights as to induce a reasonable belief that such right has been relinquished." Qualcomm, Inc. v. Broadcom Corp., 548 F.3d 1004, 1020 (Fed. Cir. 2008) (emphasis omitted).

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

Pierce argues that the Division should have filed a motion with the Commission to amend the OIP, and that the First Proceeding ID provided a "clear signal" to follow that course. Pierce's Motion, pp. 19-20. But the cited language of the First Proceeding ID does not state, either explicitly or implicitly, that the only course of action available to the Division was to move to amend the OIP. First Proceeding ID, p. 20. A motion to amend the OIP is allowed by the Commission Rules of Practice and such a motion may be made "at any time." 17 C.F.R. § 201.200(d). Although such motions should be "freely granted," they are subject to the consideration that other parties "should not be surprised, nor their rights prejudiced." 60 Fed.Reg. 32738, 32757 (June 23, 1995) (citing Carl L. Shipley, 45 SEC 589, 595 (1974)); see also Horning v. SEC, 570 F.3d 337, 347 (D.C. Cir. 2009) (mid-hearing change in requested sanction held not a due process violation because no prejudice was shown). As the Division correctly notes, Pierce argued against admission of the Liechtenstein Documents precisely on the basis that their admission would result in surprise and prejudice, and possibly necessitate a supplemental hearing. Buchholz Decl. in Opposition, Ex. J. Moreover, at the summary disposition stage, the Division put Pierce on notice regarding how much disgorgement it was seeking so that Pierce could adequately present evidence of his ability to pay. Moving to amend the OIP would likely have been futile, given the surprise and prejudice that would have resulted from a new, much larger, disgorgement request presented for the first time only after the hearing.

Additionally, as explained above, Pierce's belief that the Division had entirely abandoned its claim for disgorgement of the Newport and Jenirob profits was not reasonable. The Division did not waive its claim for disgorgement for the Newport and Jenirob sales.

C. Res Judicata

Pierce's principal argument is that this entire proceeding is barred by res judicata. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5 (1979). Res judicata precludes parties from relitigating issues that were or could

have been raised in the prior action.[7] San Remo Hotel, L.P. v. City and County of San Francisco, California, 545 U.S. 323, 336 n.16 (2005); Allen v. McCurry, 449 U.S. 90, 94 (1980). The party asserting res judicata has the burden of proving it. In re Brawders, 503 F.3d 856, 867 (9th Cir. 2007). Three elements must be proven to establish res judicata: the earlier suit (1) involved the same claim or cause of action as the later suit; (2) reached a final judgment on the merits; and (3) involved identical parties or privies. Mpoyo v. Litton Electro-Optical Systems, 430 F.3d 985, 987 (9th Cir. 2005).

The Division argues that Pierce has not demonstrated the second element of the res judicata test. This contention lacks merit. A final judgment generally resolves all claims at issue as to all parties. See American States Insurance Co. v. Dastar Corp., 318 F.3d 881, 889 (9th Cir. 2003). That some but not all issues are adjudicated on the merits "is simply irrelevant." See Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982); Mpoyo, 430 F.3d at 987-88. Under this test, the First Proceeding clearly resulted in a final judgment on the merits. Buchholz Decl. II, Exs. J and K. That liability for the additional disgorgement suggested by the Liechtenstein Documents was not adjudicated makes no difference under Costantino and Mpoyo. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064 (9th Cir. 2003), on which the Division relies, is not to the contrary. In Tahoe-Sierra, the Ninth Circuit noted that a prior case in the Eastern District of California resulted in dismissal of all claims, and held that such a judgment was one on the merits. 322 F.3d at 1081 (citing Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 992 F.Supp. 1218, 1221 (D.Nev. 1998)). Tahoe-Sierra is silent on the issue of whether the existence of issues left unadjudicated, because they were found not part of the first action, undermines the finality of the first judgment.

The Division also argues that Pierce has not demonstrated the third element of the res judicata test. This contention also lacks merit. Both the Division and Pierce were parties in the First Proceeding and both are bound by the prior judgment. Res judicata cannot be avoided as to Pierce simply by joinder of additional parties in the second action. Bethesda Lutheran Homes and Services, Inc. v. Born, 238 F.3d 853, 857 (7th Cir. 2001) (citing United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 249 (9th Cir. 1992)). The Division cites Facchiano Construction Co., Inc. v. United States Department of Labor, 987 F.2d 206, 212 (3d Cir. 1993), in support of its argument that because Newport and Jenirob were not parties to the First Proceeding, res judicata does not apply to the Division. In Facchiano, a federal contractor was the subject of debarment proceedings, first by HUD and then by the Department of Labor. Id. at 209. The contractor argued that the Department of Labor's proceeding was barred by res judicata, on the basis that HUD and the Department of Labor, as cabinet departments of the U.S. government, were in privity. Id. at 211. The Third Circuit ruled only that HUD and Department of Labor were not in privity. Id. at 211-12. Facchiano does not address the res judicata effect on the original parties resulting from adding new parties in the second action.

[7] Pierce argues that the issue of the quantum of disgorgement arising from the Newport and Jenirob sales was actually litigated in the First Proceeding. Pierce's Opposition, pp. 1, 6. This contention lacks merit. First Proceeding ID, p. 20. The question presented is instead whether the Division could have brought claims for disgorgement involving sales by Newport and Jenirob.

D. Identity of Claims

This leaves the first element of the res judicata test, identity of claims. This element is evaluated in light of four factors, which are not applied mechanically: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether the two suits involve infringement of the same right; (3) whether substantially the same evidence is presented in the two actions; and (4) whether the two suits arise from the same transactional nucleus of facts. Mpoyo, 430 F.3d at 987; Costantini, 681 F.2d at 1201-02; Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980). The last criterion is the most significant, and indeed, is sufficient by itself to resolve the question of identity of claims. Costantini, 681 F.2d at 1202; Ho v. San Francisco Unified School District, 965 F.Supp. 1316, 1322 (N.D.Cal. 1997) (citing International Union of Operating Engineers-Employers Construction Industry Pension, Welfare & Training Trust Funds v. Karr, 994 F.2d 1426, 1429 (9th Cir. 1993)); see also United States v. Tohono O'Odham Nation, 131 S.Ct. 1723, 1730 (2011) ("The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap, barring 'claims arising from the same transaction.'" (citations omitted)).

The first element weighs against application of res judicata. In Chao v. A-One Medical Services, Inc., 346 F.3d 908, 921-22 (9th Cir. 2003), an employment dispute, the employer-defendant won "the 'right' not to pay the [employee's alleged] overtime wages" in the first action, and in the second action a party in privity with the employee sued for unpaid overtime. The Court held that the second element weighed in favor of application of res judicata, apparently because the second action placed at risk the employer's right not to pay overtime. In the instant case, the prevailing plaintiff established certain interests in the first action (i.e., the Division established that Pierce violated Section 5, resulting in sanctions), which are the same ones alleged by the same party in the present action. Under Chao, Pierce has no interests to be impaired, but the Division's interests would be impaired by application of res judicata. This factor weighs against application of the doctrine.

As for the second element, the two proceedings involve the same right – the right to sanctions for violation of Section 5 of the Securities Act – with the same requested form of relief – disgorgement and a cease-and-desist order. The Division argues that its claim in the present case, for sales through Newport and Jenirob, is sufficiently different from its claim in the First Proceeding to constitute an entirely separate violation. In International Union, 994 F.2d at 1430, the Court found that the second element weighed in favor of applying res judicata because the right under a contract to have pension contributions "accurately computed and timely paid" constituted a single right, as opposed to two different rights, one to accurate payments and another to timely payments. In the instant case, the right sought to be vindicated is even more similar to the one in the First Proceeding than were the two allegedly different rights in International Union. That the specific amount of disgorgement, the specific sales transactions, and the specific "alter-ego" corporations involved are different is not a sufficient distinction; the second element weighs in favor of res judicata.

The third and fourth elements present a somewhat closer question. Whether two events are part of the same transaction or series of transactions, within the meaning of the "transactional

nucleus" test, depends on whether they are related to the same set of facts and whether they could conveniently be tried together. Mpoyo, 430 F.3d at 987; Western Systems, Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992). The material facts in the two proceedings are strikingly similar. For example, the facts are the same in the following respects, among others:

1. The company whose shares were sold (Lexington).
2. The contract under which the Lexington shares and options were distributed (the IMT agreement).
3. The Lexington officer who gave instructions to the transfer agent (Atkins).
4. The U.S. brokerage which sold Lexington shares in the U.S. (vFinance).
5. The Liechtenstein brokerage which opened an account at vFinance (Hypo Bank).
6. The person who controlled the sale of Newport and Jenirob shares via Hypo Bank and vFinance (Pierce).
7. The time frame of the transfers and sales (late 2003 and early 2004).
8. The reason the Lexington shares rose in price so that a profit could be made by selling them (promotion by Pierce).

Some of these facts were not necessary to prove the Division's prima facie Section 5 case in the First Proceeding. Nonetheless, they were part of the First Proceeding both because they bore upon the Exchange Act violations and because they were relevant to Pierce's defense that he was exempt from registration under Section 5. First Proceeding ID, pp. 16-17. For instance, the IMT agreement, Atkins' role, Pierce's control over Newport and Jenirob share sales, and Pierce's promotion of Lexington stock were likely not strictly necessary to prove a prima facie Section 5 violation. But these facts were all cited either in the First Proceeding ID or in the Division's post-hearing brief as proof that Pierce was an affiliate of Lexington. Wells Decl., Ex. 12, pp. 19-22.

In both proceedings, the evidence is substantially the same, the facts are closely related, and the issue of the legality of the Newport and Jenirob sales could have conveniently been tried in the First Proceeding. Three of the four res judicata factors, including the most important one, thus weigh in favor of its application. In the absence of any additional considerations, res judicata would bar the present proceeding.

E. Fraudulent Concealment

1. Legal Standard

The Division, however, contends that the "fraudulent concealment" exception applies. This exception avoids the res judicata bar when "the plaintiff does not know the full extent of [its] injuries" during the pendency of the first proceeding, it omits to claim relief for the full extent of its injuries, and its ignorance of its injuries results from fraud, concealment, or misrepresentation by the defendant. Restatement of Judgments 2d § 26, comment j (1981). This principle has been adopted by the Ninth Circuit. Costantini, 681 F.2d at 1203 n.12 (the fraudulent

concealment exception applies "where defendant's misconduct prevented plaintiff from knowing, at the time of the first suit, . . . the extent of his injury"); Mpoyo, 430 F.3d at 988.[8]

2. Discussion

Pierce denies fraudulent concealment and correctly notes that the Division was on notice as of June 2008, when the Commission issued the First OIP, that the Newport and Jenirob sales might have violated Section 5. E.g., Wells Decl., Exs. 8-9. Indeed, this possibility was one of the reasons the Division used formal diplomatic procedures to obtain the Liechtenstein Documents. Wells Decl., Ex. 10, p. 3. Based on this, Pierce argues that the Division should have waited to seek the First OIP until after it received the Liechtenstein Documents, moved to compel testimony and document production as to discovery to which Pierce objected, or included the present claims in the First OIP anyway. Because the evidence is substantially different for Newport than for Jenirob, the two companies are analyzed separately.

a. Jenirob

During the investigation, Pierce: (1) denied having an interest in Jenirob's Hypo Bank account, (2) denied trading in Lexington securities in any U.S. account on behalf of Jenirob, (3) omitted Jenirob's shares from his July 2006 Schedule 13D, and (4) produced the Schedule 13D and represented it constituted "responsive records . . . of trades in Lexington stock" by him or on his behalf, without objection, qualification, or indication that it was incomplete or false. Item (1) is a falsehood, because Pierce was the beneficial owner of Jenirob's Hypo Bank account, as demonstrated by Jenirob's Hypo Bank records. Buchholz Decl. II, Ex. W. Item (2) is at least misleading, because Jenirob traded Lexington shares through the vFinance omnibus account, and the funds from those trades would have gone into Jenirob's account, as to which Pierce was the

[8] Pierce cites a number of cases on this and related issues, most of which are not pertinent. Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 715 (9th Cir. 2001), and Aunyx Corp. v. Canon USA, Inc., 978 F.2d 3, 8 (1st Cir. 1992), do not address fraudulent concealment at all. Ahmed v. INS, 1995 WL 489710, at *5 (S.D.N.Y. 1995) and Cox v. Tennessee Valley Authority, 16 F.3d 1218, 1994 WL 43433, at *4 (6th Cir. 1994), in addition to being unpublished and non-precedential, also fail to address fraudulent concealment. In Johnson v. Ashcroft, 445 F.Supp.2d 45, 49 (D.D.C. 2006), and Theodore v. District of Columbia, __F.Supp.2d__, 2011 WL 1113372, at *5 (D.D.C. 2011), the court found no evidence of fraudulent concealment and so did not reach the appropriate legal standard. In Guerrero v. Katzen, 774 F.2d 506, 508 (D.C. Cir. 1985), the plaintiff discovered new, allegedly concealed evidence at some point prior to entry of final judgment in his first action, but made no effort at that time to seek rehearing or otherwise reopen the record. Similarly, in Harnett v. Billman, 800 F.2d 1308, 1311-13 (4th Cir. 1986), the defendant produced during discovery evidence supporting an additional cause of action for fraud, but the plaintiff apparently made no effort to amend his complaint. In the instant case, by contrast, when the Division discovered new evidence prior to entry of final judgment, it immediately moved to reopen the evidence to modify the prayer for relief, but without success.

beneficial owner. Id. Item (3) constitutes fraudulent concealment, because Jenirob possessed 435,000 Lexington shares in June 2004, and for purposes of calculating beneficial ownership, Pierce was under a duty to disclose his interest in Jenirob's account, an interest not disclosed on the Schedule 13D. Wells Decl., Ex. 5. Item (4) is at least misleading, because the Schedule 13D was not a complete listing of trades in Lexington stock by or on behalf of Pierce, although he represented, without objection or qualification, that the Schedule 13D was a record of trades in Lexington stock responsive to the Division's request for "all" documents relating to transactions by or on behalf of Pierce. Buchholz Supp. Decl., Ex. A at ¶ 20.

This misconduct caused the Division's ignorance regarding sales from Jenirob's Hypo Bank account. A review of the Division's Proposed Findings of Fact in the First Proceeding reveals that Jenirob appears in only five proposed findings. Wells Decl., Ex. 11 at ¶¶ 32, 50, 55, 56. Each proposed finding cites only to the Liechtenstein Documents. Id.; Wells Decl., Ex. 10. The only non-Liechtenstein Documents evidence Pierce points to regarding Jenirob, construed liberally, establishes at most that Jenirob received 435,000 shares of Lexington stock in May 2004, sold 15,000 of those shares in October 2004, at Pierce's direction, and transferred approximately $1.75 million into a Newport account (not a Hypo Bank account) between June and November 2004. Wells Decl., Exs. 7-9; see generally Pierce's Motion, p. 5. The non-Liechtenstein Documents evidence makes no reference to the June 2004 sales of 435,000 shares, and indeed, the fact that Jenirob held no Lexington shares at the end of June 2004 suggests that the 15,000 shares sold in October 2004 came from an entirely different stock grant. Lyttle Decl., Ex. B. Such evidence is insufficient to make a reasonable approximation of Jenirob's ill-gotten gains, or even to establish that its gains were ill-gotten at all. The Division could not have sought disgorgement of profits from the June 2004 sales of Jenirob shares prior to March 2009 because it did not know about them.

The evidence apart from the Liechtenstein Documents apparently put the Division on notice that Pierce's testimony and document production was, overall, incomplete. Nevertheless, the Division would have had no basis to move to compel answers that Pierce had already given, on the ground that he should provide different, more truthful answers, unless it could prove that those answers were also evasive or incomplete. See Fed.R.Civ.P. 37(a)(4). There is no evidence suggesting that the Division knew (as opposed to being skeptical) that the four specific items above (as opposed to other discovery responses) were evasive or incomplete. That Pierce objected to numerous questions other than those relating to the four items above, that the Division could have moved to compel answers to such objected-to questions, and that the Division was generally skeptical of Pierce's testimony and document production, do not change the fact that the four specific items above were false and misleading.

Pierce argues that the Division nonetheless could have included claims for disgorgement of profits from the Jenirob account sales in the First OIP, even without enough evidence to prove its case, or waited to bring its case until after receiving the Liechtenstein Documents. Oral Argument Transcript, p. 79. Pierce's fraudulent concealment of the operative facts trumps these arguments. The Restatement provides a closely analogous example:

> Thus, when the defendant takes several articles at one time and on being asked by the plaintiff fraudulently denies taking some of them and suit is brought for the

> remainder, a judgment in that action does not bar the plaintiff from subsequently maintaining an action for those articles not included in the first action.

Restatement of Judgments 2d § 26, comment j; see also McCarty v. First of Georgia Insurance Co., 713 F.2d 609, 612 (10th Cir. 1983) ("The rule against splitting causes of action serves no purpose if a plaintiff cannot reasonably be expected to include all claims in the first action."); Wright, Miller & Cooper, § 4415, pp. 362-63 ("[C]ircumstances may show [a] reasonable excuse for failure to discover knowledge controlled by the adversary."). Comment j has been cited with approval by the Ninth Circuit. Western Systems, 958 F.2d at 871-72.

There is no qualification or contingency in the Restatement regarding skepticism about an adversary's discovery response, nor is there a requirement of diligence above and beyond normal discovery. Under the Restatement, it is entirely reasonable to take an opponent's unqualified, un-objected to, apparently complete and non-evasive discovery response as true, even if it later turns to be false and misleading. Here, the Division asked Pierce about his Lexington stock transactions, including those conducted through Jenirob, he fraudulently denied (under oath) conducting them or failed to disclose them while misrepresenting (under oath) that he had fully disclosed them, and the Division proceeded against him based on the evidence available to it at the time. The Division is not barred from seeking disgorgement for the Jenirob transactions not included in the First Proceeding.

b. Newport

Pierce argues, correctly, that without the Liechtenstein Documents the record in the First Proceeding still contained considerable evidence of Pierce's control of Newport (see generally Wells Decl., Ex. 11) and Pierce's control over disposition of Lexington shares held by Newport (Wells Decl., Ex. 4, pp. 64-65, and Ex. 5). For example, the evidence as to Newport included: (1) an admission that Pierce had an interest in Newport's Hypo Bank account, (2) the Schedule 13D, showing ownership of Lexington shares by Newport over which Pierce had disposition authority, and (3) an admission that Pierce was an officer and director of Newport. There was also considerable evidence of an interstate commerce nexus and lack of registration, the two other elements of a prima facie Section 5 violation. Had Newport been named as a respondent, such evidence may well have been sufficient to establish Newport's liability in the First Proceeding, at least as to relief in the form of a cease and desist order.

Nonetheless, the same fraudulent concealment issue would have arisen once the truth was revealed by the Liechtenstein Documents. This is readily seen by comparing Lexington's Schedule 13D with the Newport transactions reflected in the Liechtenstein Documents and summarized by Lyttle (Lyttle's Chart). Lyttle Decl., Ex. A; Wells Decl., Ex. 5. For instance, Exhibit B to the Schedule 13D shows an increase in Newport's Lexington stock holdings of approximately 100,000 shares in February 2004. Lyttle's Chart, by contrast, shows four transactions attributable to Newport in February 2004, including two purchases totaling approximately 670,000 shares and two sales totaling 23,500 shares. As another example, Exhibit B to the Schedule 13D shows no changes in Newport's holdings at all between May 24, 2004 and 2006. Lyttle's Chart, however, shows 38 transactions after May 24 and before October 2004, including purchases of approximately 388,000

shares and sales of approximately 732,000 shares. In short, the Schedule 13D does not reflect Lexington share trading activity through Newport's Hypo Bank account.

Based on the totality of the evidence, rather than just the Schedule 13D, the Division offered at the hearing in the First Proceeding a chart (Exhibit 51) showing the various Lexington trades associated with Newport between November 2003 and May 2004. Wells Decl., Ex. 6. This chart was apparently the Division's best evidence pertaining to Newport.

A comparison of Exhibit 51 with Lyttle's Chart demonstrates that the Division's failure to include a claim for disgorgement of profits passing through Newport's Hypo Bank account resulted from Pierce's fraudulent concealment of Newport's Hypo Bank transactions. Exhibit 51 was created based on several sources, but it lacks any information from Newport's Hypo Bank account. Lyttle's Chart was created based on both Newport's Hypo Bank account records and vFinance records, and shows specific sales quantities, dates, and proceeds passing through Newport's Hypo Bank account. Exhibit 51 lists 29 transactions associated with Newport between November 2003 and May 2004; Lyttle's Chart lists approximately 96 such transactions between February 2004 and September 2004. Exhibit 51 documents sales on 15 dates; Lyttle's Chart documents sales on 82 dates. Most significantly, the sales dates and amounts are generally completely different in the two documents.[9] Plainly, the two documents record entirely different trading activity. Exhibit 51, like the Schedule 13D, misleadingly fails to reflect Lexington share trading activity through Newport's Hypo Bank account.

As with Jenirob, the only reasonable conclusion is that Pierce's fraudulent concealment caused the Division's ignorance of Newport's Hypo Bank trades and associated ill-gotten gains. The Division is not barred by res judicata from seeking disgorgement for the Newport transactions not adjudicated in the First Proceeding.

IV. SANCTIONS

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 (Marshall E.

[9] The one exception is a purchase of 643,400 shares on February 17, 2004 (Lyttle's Chart), which, oddly, corresponds to a sale of 643,400 shares five days before, on February 12, 2004 (Exhibit 51).

Melton, Adviser's Act Release No. 2151 (July 25, 2003), 56 S.E.C. 695, 698), the degree of harm to investors and the marketplace resulting from the violation (id. at 695), the extent to which the sanction will have a deterrent effect (see Schield Management Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46), whether there is a reasonable likelihood of such violations in the future (KPMG Peat Marwick LLP, Exchange Act Release No. 43862 (Jan. 19, 2001), 54 S.E.C. 1135, 1185), and the combination of sanctions against the respondent (id. at 1192). See also WHX Corp. v. SEC, 362 F.3d 854, 859-61 (D.C. Cir. 2004). The Commission weighs these factors in light of the entire record, and no one factor is dispositive. KPMG, 54 SEC at 1192.

1. Cease and Desist

Section 8A of the Securities Act authorizes 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 Securities Act or rules thereunder. The required showing is "significantly less than that required for an injunction." KPMG, 54 S.E.C. at 1183-91. Absent evidence to the contrary, a single past violation ordinarily suffices to establish a risk of future violations. Id. at 1191.

Pierce's conduct was relatively egregious, recurrent, and long lasting, his fraudulent concealment demonstrates a high degree of scienter, and the harm to investors and the marketplace was substantial. These factors weigh in favor of a cease-and-desist order. Pierce is already the subject of a cease-and-desist order from the First Proceeding, which suggests that an additional, identical order renders the combination of sanctions excessive. However, little weight should be placed on this factor. See Hunter Adams, Exchange Act Release No. 51117 (Feb. 1, 2005), 84 SEC Docket 2928, 2929 n.6 (listing reasons why duplicative injunctive relief may be warranted). Overall, a cease-and-desist order is in the public interest.

2. Disgorgement

Section 8A of the Securities Act authorizes disgorgement of ill-gotten gains from Pierce. 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 Financial 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. Zacharias v. SEC, 569 F.3d 458, 472 (D.C. Cir. 2009). Disgorgement is remedial and is limited to actual profits obtained by wrongdoing. SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978). Nonetheless, the amount of disgorgement need only be a reasonable approximation of the profits causally connected to the violation, and "the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty." Zacharias, 569 F.3d at 473.

Pierce argues that disgorgement is entirely inappropriate because there is insufficient evidence demonstrating that Pierce received any actual profits. Pierce's Post-Argument Brief, pp. 7-9. This contention lacks merit because the profits from Jenirob's sales passed through a Hypo Bank account beneficially owned by Pierce. Disgorgement by Pierce of the profits from Jenirob's and Newport's sales is therefore appropriate.

The Division requests disgorgement of $7,247,635.75 plus prejudgment interest. This represents the combination of Newport's profits, $5,264,466.64, and Jenirob's profits, $1,983,169.11. Lyttle Decl., ¶¶ 6-7. It is based on the analysis by Jeffrey Lyttle, who employed first-in, first-out accounting and took into account the cost basis of each tranche of shares. Lyttle Decl. Pierce does not specifically dispute this amount, and the Division has shown that it is a reasonable approximation of the combined illicit profits of Newport and Jenirob for which Pierce is responsible. Prejudgment interest will be ordered starting from October 1, 2004, the first day of the month following the cessation of illicit sales by Respondent. Lyttle Decl., Exs. A and B.

V. ORDER

IT IS ORDERED that, pursuant to Section 8A of the Securities Act of 1933, 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 any rules or regulations thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933, Gordon Brent Pierce DISGORGE $7,247,635.75 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 17 C.F.R. § 201.600(b). Pursuant to 17 C.F.R. § 201.600(a), prejudgment interest is due from October 1, 2004, through the last day of the month preceding which payment is made.

Payment of the disgorgement and prejudgment interest shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying Respondent and Administrative Proceeding No. 3-13927, shall be delivered to: Office of Financial Management, Accounts Receivable, 100 F Street, N.E., Mail Stop 6042, Washington, DC 20549. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

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(h) of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). 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.

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Cameron Elliot
Administrative Law Judge