SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 9555/ March 7, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 71664 / March 7, 2014

Admin. Proc. File No. 3-13927

In the Matter of

GORDON BRENT PIERCE
c/o William F. Alderman
Shireen Qaru
Orrick, Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105

OPINION OF THE COMMISSION

SECURITIES ACT PROCEEDING

Grounds for Remedial Action

Sale of Unregistered Securities

Individual found in an earlier proceeding to have violated §§ 5(a) and 5(c) of the Securities Act of 1933 by offering to sell and selling unregistered securities from a personal account contended that res judicata, equitable estoppel, judicial estoppel, and waiver barred a second proceeding charging him with having violated those same sections by offering to sell and selling unregistered securities from corporate accounts. *Held*, the asserted defenses did not preclude the bringing of a second proceeding, and the record supports a finding that respondent committed the violations charged.

APPEARANCES:

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

Marc J. Fagel, Michael S. Dicke, John S. Yun, Judith L. Anderson, and *Steven D. Buchholz*, for the Division of Enforcement.

Appeal filed: August 17, 2011
Last brief received: November 10, 2011
Oral argument: October 8, 2013

I.

Gordon Brent Pierce appeals an administrative law judge's decision. The law judge found, on summary disposition, that Pierce violated §§ 5(a) and 5(c) of the Securities Act of 1933 in connection with unregistered offerings and sales of stock of Lexington Resources, Inc. ("Lexington") through accounts in the names of two offshore companies he controlled. The law judge further ordered Pierce to disgorge ill-gotten gains of $7,247,635.75, plus prejudgment interest.

The law judge found that res judicata ordinarily would have precluded the bringing of this proceeding (the "Second Proceeding") against Pierce, who was previously found to have traded unregistered shares of Lexington in a personal account. But the law judge found that this proceeding could nonetheless go forward because Pierce had concealed evidence that would have enabled the Division of Enforcement to have included the charges of unregistered sales through the corporate accounts in the earlier proceeding (the "First Proceeding"). Based on facts established in the First Proceeding and facts admitted by Pierce, the law judge entered the findings and order described above. The Division cross-appeals, asking us to find that even absent Pierce's concealment of the evidence in question, res judicata would not have precluded bringing the Second Proceeding against him. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

A. Lexington Resources, Inc. was created in 2003 and liquidated in 2008.

Both the First Proceeding and the Second Proceeding concern the unregistered distribution of Lexington stock.[1] The background facts are largely undisputed, either because they were found by the law judge in the First Proceeding or because Pierce admits them.

Lexington came into being in 2003 as the result of a reverse merger between a Nevada corporation named Intergold, Inc. ("Intergold") and Lexington Oil & Gas LLC, an Oklahoma limited liability company ("Lexington Oil & Gas"). Lexington issued three million restricted common shares to Lexington Oil & Gas's shareholders, and its stock began trading on the over-the-counter market on November 20, 2003.

Lexington billed itself as being "engaged in the acquisition and development of oil and gas properties in the United States." The company had no full-time employees; its day-to-day

[1] The First Proceeding also concerned Pierce's failure to make certain reports about his ownership of Lexington shares.

operations were carried out by Grant Atkins, its Chief Executive Officer, and Douglas Humphries, a director.[2] Consultants performed other necessary functions. Lexington employed the consulting firm International Market Trend ("IMT") to provide administrative and other services. Lexington did not have its own offices, but was managed out of IMT's offices in Blaine, Washington. During 2003 and 2004, Lexington held no shareholder meetings, nor did its board of directors meet on a regular basis. Important matters were resolved by consent resolution.

Lexington filed a Chapter 11 bankruptcy petition on March 4, 2008. The petition was converted to Chapter 7 liquidation on April 22, 2008.

B. Pierce received Lexington shares and sold them in unregistered transactions.

Between 2002 and 2007, Pierce, a Canadian citizen residing in British Columbia, provided Intergold and Lexington with stock promotion, capital raising, and other services through various consulting firms.[3] Intergold and Lexington, in turn, compensated Pierce's companies for their services with stock or stock options. The consulting companies then allocated shares to Pierce and others. Pierce ultimately controlled Lexington through his ownership of Lexington stock, together with his influence over Atkins and his control over consultants assigned to work for Lexington, among other things.[4]

In allocating shares, the consulting companies purposely structured allocations so that Pierce would not exceed the ten percent beneficial ownership threshold that would require reporting under § 16 of the Exchange Act.[5] On Pierce's instructions, many of the shares so

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[2] Atkins and Lexington were charged in the First Proceeding with violations of Securities Act §§ 5(a) and 5(c). The First Proceeding concluded as to them on November 26, 2008. *See Lexington Res., Inc.*, Securities Act Release No. 8987 (Nov. 26, 2008) (finding that Lexington and Atkins violated Securities Act §§ 5(a) and 5(c) and ordering them to cease and desist from committing or causing any violations or future violations of those provisions).

[3] Pierce was sanctioned by the British Columbia Securities Commission ("BSSC") in 1993 for conduct involving improper payments by a publicly traded British Columbia company to an entity of which Pierce was a control person. During the BSSC's investigation, Pierce provided documents that were not genuine. The BSSC barred him for fifteen years from using certain exemptions available under the British Columbia Securities Act and from serving as an officer or director of any reporting issuer or any issuer that provides management, administrative, promotional, or consulting services to a reporting issuer. It also fined Pierce $15,000.

[4] When Pierce gave investigative testimony to the Division in 2006, he was serving as an officer or director of IMT and at least five other firms.

[5] 15 U.S.C. § 78p. Section 16 requires beneficial owners of more than ten percent of certain equity securities to file with the Commission initial statements disclosing the amount of all equity securities of the issuer they beneficially own as well as follow-on statements disclosing changes in such ownership.

allocated were subsequently issued to two corporations: Newport Capital Corporation ("Newport"), a privately held company organized under the laws of Belize of which Pierce formerly served as president and a director, and Jenirob Company Ltd. ("Jenirob"), a privately held company organized under the laws of the British Virgin Islands. On Pierce's further instructions, some shares assigned to Newport were thereafter issued to individuals. No registration statements were filed relating to any resales of Lexington stock by Pierce, Newport, or Jenirob.

In 2003, Pierce opened a personal brokerage account (the "Personal Account") at Hypo-Alpe Adria Bank of Liechtenstein ("Hypo Bank"). Hypo Bank, in turn, opened an omnibus account (the "Hypo Omnibus Account") at vFinance Investments, Inc., a U.S. broker-dealer ("vFinance"). Newport and Jenirob also had brokerage accounts with Hypo Bank (respectively, the "Newport Account" and the "Jenirob Account"; together, the "Corporate Accounts"). Pierce was the beneficial owner of the assets in the Corporate Accounts. Through the Hypo Omnibus Account, Hypo Bank could trade securities for any of these customers without disclosing the identity of the owner of the securities in any particular trade.

In late February 2004, Pierce and an associate began actively promoting Lexington by sending millions of spam e-mails and newsletters through a publishing company Pierce controlled. At the same time, Lexington issued a flurry of optimistic press releases about its current and potential operations. During this promotional campaign, Pierce personally met with potential Lexington investors and distributed folders containing promotional materials and press releases. 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. Trading volume reached a peak of more than one million shares per day in late June 2004.

As of April 30, 2004, Pierce held a total of 446,683 Lexington shares in the Personal Account. The majority of these shares, 325,000 in all (the "Option Shares"), had been issued pursuant to a Stock Option Plan that provided for common share options to be issued to officers, directors, employees, and consultants to whom Lexington owed money. The recipients of these options were allowed to use the debt that Lexington owed them to cover their exercise price. When consultants exercised the options, they were required to represent to Lexington 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." Lexington had filed a "Form S-8 for Registration Under the Securities Act of 1933 for Securities to be Offered to Employees Pursuant to Employee Benefit Plan," registering one million shares of Lexington common stock. The Form S-8 did not contain a reoffering prospectus. Pierce sold the 121,683 non-Option Shares in the Personal Account between May 2004 and June 24, 2004. He sold the 325,000 Option Shares between June 2004 and September 2004. His total profit from the sales of the Option Shares was $2,043,362.33.[6]

[6] The proceeds from the sales of the non-Option shares were not at issue in the First Proceeding. *See infra* note 13.

As of February 2, 2004, Newport held 1,935,589 shares of Lexington stock. In May 2004, 435,000 Lexington shares were issued to Jenirob. Pierce sold approximately 1.6 million Lexington shares from the Corporate Accounts, through the Hypo Omnibus Account at vFinance, between February 2004 and December 2004. The Division calculated the profits from these sales to be $7,247,635.75.

Pierce had been a five-percent beneficial owner of Intergold before it merged with Lexington Oil & Gas, and he became a beneficial owner of more than five percent of Lexington's stock in November 2003. But he did not, as required, file a Form 13D reporting the five percent interest with the Commission until July 2006, nor did he file forms updating his status as he sold his Lexington stock.[7] Moreover, during at least the period between November 23, 2003 and January 26, 2004, Pierce was a beneficial owner of more than ten percent of Lexington's stock. But he did not file an initial report of that ownership with the Commission. Nor did he report that he held more than ten percent of Lexington's outstanding stock on December 31, 2003, or that he acquired more than one percent of Lexington's outstanding stock on January 26, 2004.[8]

C. The Division conducted an investigation.

The Division began its investigation into trading in Lexington stock on May 4, 2006. During sworn testimony taken by the Division in July 2006, Pierce stated that he had no ownership stake of any kind, either directly or through other entities, in Newport. Pierce further stated that he had "an interest" in the Newport Account, but he denied that he had any such interest in the Jenirob Account. When asked whether he had traded Lexington securities in any brokerage accounts for any individuals or entities other than five enumerated entities (which included Newport but did not include Jenirob), Pierce answered that he had not, effectively denying that he had traded Lexington securities for Jenirob.

The Division's investigative subpoena required Pierce to produce, among other things, "[a]ll DOCUMENTS reflecting or relating to . . . transactions by YOU" in Lexington stock. "YOU" was defined to include "any person or entity acting on [Pierce's] behalf." In response, Pierce did not produce any records reflecting the trading of Lexington stock through the Corporate

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[7] Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d), requires (with certain exceptions not applicable here) any person who becomes, directly or indirectly, the beneficial owner of more than five percent of any class of equity securities registered under the Exchange Act to file a statement with the Commission within ten days of becoming such an owner, and to file another statement if material changes occur in the facts set forth in the prior filing. Rules promulgated under § 13(d) generally require that statements be made on a Schedule 13D.

[8] Exchange Act Rule 16a-3, 17 C.F.R. § 240.16a-3, requires that initial statements of beneficial ownership of securities required by Exchange Act § 16(a) be filed on Form 3, that statements of changes in beneficial ownership required by that section be filed on Form 4, and that annual statements be filed on Form 5. Pierce filed none of these.

Accounts.[9] But he did produce a Schedule 13D, which he characterized as "a new Schedule 13D report of the trading in Lexington stock by persons/entities described in this request." The Schedule 13D stated that Pierce and Newport were beneficial owners of Lexington shares in 2003 and 2004, but it did not reflect that Jenirob owned any Lexington shares during this time. Although the Schedule 13D showed some sales of Lexington shares by Newport, it did not reflect trading activity in Lexington shares through the Newport Account.

In late 2006, the Division asked the securities regulator in Liechtenstein, the Finanzmarktaufsicht (the "FMA"), for records of Hypo Bank that would identify, among other things, the customers for which Hypo Bank was selling Lexington stock.[10] The FMA informed the Division that it could not obtain the requested documents for the Division. But in late 2007, the Division learned that the FMA was working to amend Liechtenstein law to provide the FMA additional powers that could potentially allow it to obtain documents for the Division. The Division therefore sent the FMA an additional request for documents on February 20, 2008.

D. The Commission issued an Order Instituting Proceedings, and a hearing was held as efforts to obtain documents continued.

The Order Instituting Proceedings in the First Proceeding (the "First OIP") was issued on July 31, 2008. The First OIP alleged, among other things, that Pierce violated §§ 5(a) and 5(c) of the Securities Act in that he "personally sold at least $2.7 million in Lexington stock" through an offshore bank "in June 2004 alone" in sales that were not registered with the Commission. The First OIP further alleged that Pierce violated Exchange Act §§ 13(d) and 16(a) and Rules 13d-1, 13d-2, and 16a-3 thereunder, in that:

> 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. But Pierce did not file the required Schedule 13D until July 25, 2006.
>
> 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 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.

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[9] The investigative subpoena also required Pierce to produce "[a]ll statements from securities brokerage accounts… in which YOU have a beneficial interest or exercise discretionary control, or in whose profits and/or losses YOU share." Pierce objected "as to brokerage account statements of entities that have authorized discretionary trading of Lexington stock but have not authorized Mr. Pierce to produce their records."

[10] Pierce does not dispute the Division's assertions regarding its efforts to obtain documents from Hypo Bank. These efforts are set forth in a declaration filed in support of the Division's Motion for Summary Disposition filed in the Second Proceeding and attachments to that declaration.

> 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.[11]

The First OIP stated that issuance of cease-and-desist orders and the payment of disgorgement would be considered if the allegations were established and Pierce had no defenses to those allegations.

When the First OIP was issued, the Division had not received any materials in response to the requests directed to the FMA, nor had it received assurances from the FMA that such materials would be provided. But on December 10, 2008, the Division received a partial production of documents responsive to its February 20, 2008 request (the "First FMA Production"). The First FMA Production did not include documents for all of the Hypo Bank accounts that had traded in Lexington stock because certain unidentified account holders had filed appeals in Liechtenstein to prevent the FMA from providing such information to the Division. The FMA informed the Division that it would not produce additional documents until those appeals were resolved.

Thus, at the time of the First FMA Production, the Division did not know whether there were other accounts through which Pierce had traded Lexington shares. The Division accordingly clarified, before the administrative hearing began, that it sought disgorgement of only the proceeds of Pierce's unregistered sales through the Personal Account, a total of approximately $2 million. With only this amount at stake, the law judge held a hearing in February 2009, and closed the record of evidence on March 6, 2009.

Also on March 6, the Division learned that some of the appeals in Liechtenstein regarding the production of account documents had been resolved and that the FMA would make another partial production of documents for additional Hypo Bank accounts. The Division received these documents (the "Second FMA Production") on March 10, 2009. The Second FMA Production included documents related to the Personal and Corporate Accounts. Those documents showed trading activity in Lexington stock in all of these accounts and identified Pierce as the beneficial owner of the assets in the Corporate Accounts**.**

E. The law judge admitted new evidence for a limited purpose.

The Division moved to admit certain documents included in the Second FMA Production that related to the Personal and Corporate Accounts, and documents that showed trading activity in Lexington stock in those accounts (the "New Evidence"). The Division contended that the New Evidence was "material to [Pierce's] liability and the amount of disgorgement Pierce should be ordered to pay," and argued that "disgorgement far in excess of $2.1 million is warranted against Pierce in these proceedings."

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[11] The First OIP also contained charges against Lexington and Atkins that are not at issue in this proceeding. *See supra* note 2 (discussing resolution of charges against Lexington and Atkins).

In ruling on the Division's motion, the law judge found that she lacked the authority to amend the First OIP by adding a §5 charge against Pierce based on his sales of Lexington stock in the Newport and Jenirob Accounts, and that ordering disgorgement based on sales from those accounts would be outside the scope of the First OIP. The law judge therefore admitted 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."

F. The law judge issued an initial decision.

In the initial decision issued after the conclusion of the First Proceeding (the "First ID"),[12] the law judge found that Pierce violated Securities Act §§ 5(a) and 5(c) by offering and selling the 325,000 Option Shares of Lexington from the Personal Account.[13] She further found that Pierce violated Exchange Act §§ 13(d) and 16(a) and Rules 13d-1, 13d-2, and 16a-3[14] thereunder by failing to report certain levels of beneficial ownership of Lexington shares, basing her calculations on shares in the Corporate Accounts as well as the Personal Account.

In reaching her conclusion as to the § 5 violations, the law judge rejected Pierce's assertion that his Lexington sales were exempt under § 4(1) of the Securities Act,[15] which exempts from the registration requirements "transactions by any person other than an issuer, underwriter, or dealer." The intent of § 4(1), she found, 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."[16] She found that the Division "adduced a significant amount of evidence" supporting its assertion that Pierce's control of Lexington made him an affiliate of Lexington, which brought him within the statutory definition of an issuer,[17] and that he therefore could not

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[12] *Lexington Res., Inc.*, Initial Decision Release No. 379, 2009 SEC LEXIS 2099 (June 5, 2009).

[13] The law judge did not base her findings of a § 5 violation on the sales of the 121,683 non-Option Shares from the Personal Account, though she did consider those shares in calculating Pierce's beneficial ownership of Lexington.

[14] 15 U.S.C. §§ 77m(d), 78p(a); 17 C.F.R. §§ 240.13d-1, 240.13d-2, 240.16a-3. Exchange Act Rule 16a-3, 17 C.F.R. § 240.16a-3, provides that statements of changes in beneficial ownership required by Exchange Act § 16(a) shall be filed on Form 4.

[15] 15 U.S.C. § 77(d)(1).

[16] 2009 SEC LEXIS 2099, at *44 (quoting *Owen V. Kane*, 48 S.E.C. 617, 619 (1986), *aff'd*, 842 F.2d 194 (8th Cir. 1988)).

[17] *Id.* at *45. *See SEC v. Cavanaugh*, 155 F.3d 129, 134 (2d Cir. 1998) ("A control person . . . is an affiliate of an issuer and is treated as an issuer when there is a distribution of securities."); Securities Act § 2(a)(11), 15 U.S.C.§ 77(b)(a)(11) (defining "issuer" to include "any person directly or indirectly controlling or controlled by the issuer"); Securities Act Rule 144(a)(1), 17 C.F.R.§ 230.144(a)(1) (defining "affiliate of an issuer" as, among other things, "a person that directly, or indirectly through one or more of its intermediaries, controls . . . such issuer").

take advantage of the § 4(1) exemption with respect to sales from the Personal Account. The law judge also rejected Pierce's reliance on the Form S-8 filed by Lexington, calling that reliance "misplaced" and noting that "that registration statement did not contain a reoffer prospectus to cover Pierce's subsequent trades. . . . [H]is subsequent transactions must be registered, or he must present a valid exemption."[18]

The law judge ordered Pierce to cease and desist from violations of the provisions in question and to disgorge ill-gotten gains of $2,043,362.33 based on trading in Lexington stock in the Personal Account. She made no findings of liability regarding § 5 violations based on trading in the Corporate Accounts, and she did not order disgorgement of trading proceeds from transactions in those accounts.

Neither party sought review of the First ID, and the Commission did not call the matter for review. The First ID thus became the final decision of the Commission; a notice to that effect was entered on July 8, 2009, and the orders contained in the First ID were declared effective.[19]

G. The Commission initiated a second proceeding.

On June 8, 2010, the Commission issued an OIP against Pierce, Newport, and Jenirob (the "Second OIP").[20] In the Second OIP, the Division alleged that Pierce had violated Securities Act §§ 5(a) and 5(c) by selling unregistered shares of Lexington stock through Newport and Jenirob for profits of approximately $7.7 million. In his answer, Pierce admitted many of the facts and allegations set forth in the Second OIP, including facts related to (i) Lexington's corporate history and Pierce's control of Lexington, (ii) Lexington's issuance of millions of shares to Pierce and his associates, (iii) Pierce's promotional campaign touting Lexington stock, (iv) Pierce's beneficial ownership of the Corporate Accounts and his distribution of Lexington stock through Newport and Jenirob, and (v) the findings in the First ID that Pierce violated the Securities Act and the Exchange Act through unregistered sales of Lexington shares from the Personal Account. Pierce also admitted that as a result of conduct alleged in the Second OIP, he violated §§ 5(a) and 5(c) of the Securities Act. But Pierce stated that he admitted many of these facts and violations "solely because they were already adjudicated in the [First Proceeding], along with the request that [Pierce] 'should be ordered to pay disgorgement pursuant to Section 8A of the Securities Act.'" Pierce then contended that the Second Proceeding was barred by res judicata, equitable estoppel, judicial estoppel, and waiver. Both parties moved for summary disposition.

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[18] 2009 SEC LEXIS 2099, at *42-43.

[19] *Gordon Brent Pierce*, Securities Act Release No. 9050, 2009 SEC LEXIS 2270, at *1 (July 8, 2009). *See* Rule of Practice 360(d)(2), 17 C.F.R. § 201.360(d)(2) (providing for issuance of finality orders).

[20] *Lexington Res., Inc.*, Securities Act Release No. 9125, 2010 SEC LEXIS 1917 (June 8, 2010). On the same day, the Division applied in the United States District Court for the Northern District of California for a court order enforcing the monetary relief awarded in the First Proceeding, which Pierce had not yet paid. Pierce subsequently paid what was owed.

"[B]ased largely on the admissions contained in Pierce's Answer and on the Findings of Fact in the First [ID]," the law judge found that Pierce violated Securities Act §§ 5(a) and 5(c) as charged "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."[21] He specifically found that Pierce admitted that he sold approximately 1.6 million Lexington shares through the Corporate Accounts at Hypo Bank between February 2004 and December 2004, and that no registration statements were filed relating to any resales of Lexington stock by Pierce, Newport, or Jenirob. The law judge then found that these admissions established the elements of a § 5 violation and that, together with the fact that Pierce was the beneficial owner of the assets in the Corporate Accounts, they establish that Pierce was liable as a necessary participant whose activities were also a substantial factor in the illegal sales. Pierce did not contend that he was entitled to an exemption. The law judge therefore found Pierce "presumptively liable" for violating § 5.[22]

The law judge rejected Pierce's assertions of equitable estoppel, judicial estoppel, and waiver as defenses to the proceeding. However, the law judge found that Pierce established that res judicata would have acted as a bar to the Second Proceeding, absent Pierce's efforts to hide his trading. Because those efforts kept the Division from knowing the full extent of Pierce's trading when the First Proceeding was instituted, the law judge held that an exception operated to avoid the res judicata bar.[23] Applying the fraudulent concealment exception, the law judge concluded that res judicata did not bar the Division from seeking disgorgement for the sales of unregistered shares from the Corporate Accounts that were not adjudicated in the First Proceeding.

Having found that the Division established that Pierce was liable for § 5 violations based on trading in the Corporate Accounts, and that res judicata did not preclude an order of disgorgement for the trading proceeds, the law judge imposed a cease-and-desist order against Pierce and ordered him to disgorge his profits from unregistered sales of Lexington shares in the Corporate Accounts, a total of $7,247,635.75.[24] This appeal followed.

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[21] *Gordon Brent Pierce*, Initial Decision Release No. 425, 2011 SEC LEXIS 2564, at *5 & 20 (July 27, 2011).

[22] *Id.* at *23.

[23] *Id*. at *43 (citing, among other authority, RESTATEMENT (SECOND) OF JUDGMENTS § 26, comment j (1981); *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1203 n.12 (9th Cir. 1982); *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005)).

[24] Pierce did not specifically dispute the Division's calculation of trading profits. The law judge also ordered Pierce to pay prejudgment interest.

Unlike in the First Proceeding, Newport and Jenirob were also respondents in this Second Proceeding. Judgment was entered by default against Jenirob and Newport. *Gordon Brent Pierce*, Securities Act Release No. 9205, 2011 SEC LEXIS 1669, at *1 (May 11, 2011). Cease-and-desist orders were entered against both, Newport was ordered to disgorge $5,264,466.64, and Jenirob was ordered to disgorge $1,983,169.11. *Id.* at *15-17. *See infra* note 100 and accompanying text

(continued…)

III.

A. Pierce violated § 5 through unregistered offers and sales of Lexington shares from the Corporate Accounts.

To establish a prima facie case for a § 5 violation against Pierce, the Division was required to show that (i) Pierce directly or indirectly sold or offered to sell the securities at issue; (ii) no registration statement was in effect or filed as to the transactions in which the securities were sold; and (iii) the sale or offer to sell was made through the use of interstate facilities or the mails.[25] The purpose behind the registration requirements is "to protect investors by promoting full disclosure of information thought necessary to informed investment decisions,"[26] and we have found this policy "equally applicable to the distribution of a new issue and to a redistribution of outstanding securities which 'takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering.'"[27]

The Second OIP alleged that Pierce deposited 1.6 million Lexington shares into the Corporate Accounts at Hypo Bank, that Pierce was the beneficial owner of the Corporate Accounts, and that Pierce sold the 1.6 million shares from the Corporate Accounts between February and December 2004 for net proceeds of more than $7 million. The Division introduced evidence in the form of bank and brokerage statements to support these assertions. It introduced Hypo Bank records showing that Pierce was the beneficial owner of the assets in the Newport and Jenirob Accounts at Hypo Bank. It introduced additional records showing that between February and September 2004, Newport realized gains of $5,264.466.64 from sales or deliveries of 1,308,400 Lexington shares and Jenirob realized gains of $1,983,169.11 from sales or deliveries of 435,000 Lexington shares, for a total of $7,247,635.75. Evidence introduced by the Division shows that these shares were sold from the Corporate Accounts through the Hypo Omnibus Account at vFinance.

The Second OIP further alleged that no registration statements were filed relating to any resales of Lexington stock by Pierce, Newport, or Jenirob.[28] Pierce points to no registration

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(finding that Pierce should be held jointly and severally liable with Newport and Jenirob respectively for disgorgement of these amounts).

[25] *E.g.*, *World Trade Fin. Corp.*, Securities Exchange Act Release No. 66114, 2012 SEC LEXIS 56, at *23-24 (Jan. 6, 2012).

[26] *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953).

[27] *Ira Haupt & Co.*, 23 S.E.C. 589, 1946 SEC LEXIS 1359, at *13 (Aug. 20, 1946) (quoting *Report of Committee on Interstate & Foreign Commerce*, 73D CONG., 1ST SESS., H.R. Rep. No. 85, at 592 (1933)).

[28] The Second OIP alleged that the registration statements on Form S-8 that purported to cover the issuance of the shares to Pierce and others under the stock option agreements "only purported
(continued…)

statements that allegedly cover those resales, and no such documents can be found on the Commission's EDGAR database. Pierce does not contend that he is entitled to an exemption from the registration requirements of § 5.[29] Thus, Pierce violated § 5 through his unregistered sales of Lexington from the Corporate Accounts, and unless he successfully asserts an affirmative defense, we would find him liable as charged.

B. Res judicata does not bar the Second Proceeding.

Pierce relies primarily on the affirmative defense of res judicata, under which a judgment on the merits in a prior suit bars a second suit based on the same cause of action that involves the same parties or their privies.[30] Res judicata "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication."[31] In appropriate circumstances, res judicata applies to adjudicative decisions by administrative agencies.[32] But application of the doctrine may be different in an administrative context because of restrictions on the jurisdiction of the administrative forum or differences between the procedural systems in federal courts and administrative agencies.[33]

(…continued)
to cover issuances by Lexington, not any subsequent resales by Pierce . . . ." Pierce does not appear to be relying on the Forms S-8, but in any event, we find that those registration statements did not cover Pierce's resales of the Lexington shares through the Corporate Accounts.

[29] Exemptions from the registration requirements are affirmative defenses that must be established by the person claiming the exemption, and such exemptions "are construed strictly to promote full disclosure of information for the protection of the investing public." *SEC v. Cavanaugh*, 445 F.3d 105, 115 (2d Cir. 2006).

[30] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.5 (1979).

[31] *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. 322, 327 n.5 (1979)).

[32] *See, e.g., Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997) ("'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.'" (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (superseded by statute on other grounds)).

[33] *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS §§ 24(a) (stating that "[e]quating claim with transaction is justified only when the parties have ample procedural means for fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily entitled"), 83 cmt. g (stating that "[t]he qualifications and exceptions to the rule of claim preclusion have particular importance with respect to administrative agencies" because, in contrast to Article III courts, the jurisdiction of agencies is more limited).

Moreover, "in the context of administrative proceedings, res judicata is not automatically and rigidly applied in the face of contrary public policy."[34]

To successfully assert a res judicata defense, a party must show "'(1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits.'"[35] Res judicata "'bars litigation of any claim for relief that was available in a prior suit between parties or their privies, whether or not the claim was actually litigated.'"[36] The party asserting res judicata has the burden of proof in establishing the defense.[37]

As concerns this appeal, we find (and the Division does not dispute) an identity of parties in the two cases for purposes of res judicata: Pierce, who asserts res judicata, and the Division, against whom res judicata is asserted, were parties to both the First Proceeding and the Second Proceeding.[38] We also find that the First Proceeding ended in a final judgment on the merits. Neither party sought review of the First Proceeding; the Commission did not call the matter for review; the First ID became the final decision of the Commission; and Pierce paid the monetary relief ordered.[39] But we find that the cause of action in the First Proceeding and the cause of action in the Second Proceeding are not identical.

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[34] *Candelario v. Postmaster Gen. of U.S.*, 906 F.2d 798, 801 (1st Cir. 1990) (citations omitted).

[35] *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *56 (Feb. 13, 2009) (citing *Jones*, 115 F.3d at 1178), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

[36] *Id.* at *55 (quoting *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998)).

[37] *E.g.*, *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 572 (6th Cir. 2008); *Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 n.4 (9th Cir. 1988); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984); *Bryson v. Guaranteed Reserve Life Ins. Co.*, 520 F.2d 563, 566 (8th Cir. 1975).

[38] Although the First OIP and the Second OIP contained charges against other parties, the proceedings had been concluded as to those parties before the ID in each proceeding was entered. *See supra* notes 2 (discussing disposition of First Proceeding as to Atkins and Lexington), 24 (discussing disposition of Second Proceeding as to Jenirob and Newport). *See Bethesda Lutheran Homes & Servs. v. Born*, 238 F.3d 853, 857 (7th Cir. 2001) (Posner, J.) (citing *Dreyfus v. First Nat'l Bank*, 424 F.2d 1171, 1175 (7th Cir. 1990) ("[I]t is no objection that the former action included parties not joined in the present action, or vice versa, so long as the judgment was rendered on the merits, the cause of action was the same, and the party against whom the doctrine is asserted was a party to the former litigation."); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 249 (9th Cir. 1992) (same)).

[39] *See supra* note 19 and accompanying text (discussing issuance of finality order in First Proceeding), note 20 (discussing Pierce's payment of relief ordered in First Proceeding).

1. The proceedings do not involve the same cause of action.

The First Proceeding's causes of action included §5 claims against Pierce for his $2.7 million in unlawful sales through the Personal Account. The Second Proceeding's §5 claims related to the unlawful sales through the Corporate Accounts. These two distinct sets of claims gave rise to distinct violations of §5.

The question whether two proceedings involve the same cause of action is highly fact specific. "What constitutes a 'cause of action' for purposes of res judicata 'cannot be defined with precision,'"[40] nor can it be "'determined precisely by mechanistic application of a simple test.'"[41] Although the courts of appeals "have disavowed attempts to create a simple test for determining what constitutes a cause of action for res judicata purposes," they agree that the "focus of the inquiry is the 'essential similarity of the underlying events giving rise to the various legal claims.'"[42] "Factors relevant to this determination include: (1) whether the acts complained of were the same; (2) whether the material facts alleged in each suit were the same; and (3) whether the witnesses and the documentation required to prove such allegations were the same."[43] "The mere existence of common elements of fact between two claims does not establish the same cause of action if the critical acts and the necessary documentation were different for the two claims."[44] As one court has explained:

> With respect to the determination of whether a second suit is barred by res judicata, the fact that both suits involved essentially the same course of wrongful conduct is not decisive; nor is it dispositive that the two proceedings involved the same parties, similar or overlapping facts, and similar legal issues. A first judgment will generally have preclusive effect only where the transaction or connected series of transactions is the same, that is, "where the same evidence is needed to support both claims . . . .[45]

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[40] *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980) (quoting 1B MOORE'S FEDERAL PRACTICE & PROCEDURE, ¶ 0.410(1) at 1154).

[41] *Id.* at 343 (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 206 (9th Cir. 1979)).

[42] *Marmon Coal Co. v. Dir., Office of Workers' Comp. Programs*, 726 F.3d 387, 394 (3d Cir. 2013) (quoting *Duhaney v. Att'y Gen.*, 621 F.3d 340, 347 (3d Cir. 2010)).

[43] *Id.* at 394-95.

[44] *Id.* at 395.

[45] *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1463-64 (2d Cir. 1996) (internal citations omitted; quoting *NLRB v. United Techs. Corp.*, 706 F2d 1254, 1260 (2d Cir. 1983)); *see also, e.g., Harris*, 621 F.2d at 343 (stating that "'[t]he crucial element underlying all of the standards [for determining whether the same cause of action is involved in two suits] is the factual predicate of the several claims asserted. For it is the facts surrounding the transaction or occurrence which

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In both the First Proceeding and the Second Proceeding, Pierce was charged with violating § 5 of the Securities Act by selling shares of Lexington stock in transactions for which there was no registration statement in effect and for which there was no applicable exemption. But the § 5 cause of action in the First Proceeding did not embrace the unlawful transactions charged in the Second Proceeding. "Registration of a security is transaction-specific, in that the requirement of registration applies to each act of offering or sale; proper registration of a security at one stage does not necessarily suffice to register subsequent offers or sales of that security."[46] Because registration is transaction-specific, whether an offer or sale of securities violates § 5 requires an inquiry into whether those securities have been registered, or whether an exemption applies, with respect to that *particular* offer or sale.[47] Similarly, when an OIP charges violations of § 5, those charges must be framed in terms of particular transactions, not merely in terms of the securities themselves.

In paragraph 16 of the First OIP, the Division alleged that "Pierce personally sold at least $2.7 million in Lexington stock through the offshore bank [*i.e.*, Hypo Bank] in June 2004 alone. Pierce's sales were not registered with the Commission." As a result of this conduct, the OIP charged, Pierce violated § 5. The evidence needed to support this claim thus related only to the specific transactions charged: Pierce's unregistered sales of Lexington stock through the Personal Account.

(…continued)
operate to constitute the cause of action . . . .'" (quoting *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir. 1977)).

In addition to requiring that the same evidence be used to support the claims in both proceedings if the first proceeding is to have preclusive effect, *First Jersey* additionally requires that "the facts essential to the second [proceeding] were present in the first." 101 F.3d at 1464. We discuss below Pierce's argument that facts essential to the Second Proceeding were "present" in the First Proceeding.

[46] *SEC v. Universal Express, Inc.*, 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007), *aff'd sub nom. SEC v. Altomare*, 300 F. App'x 70 (2d Cir. 2008); *see also* Eddy J. Rogers Jr. & Jason Weeden, *Resales of Securities Under the Securities Act*, 1012 PLI/Corp. 285, 297 (Sept. 1997) (because "[i]t is really the offering or sale of the particular security that is registered and not the security itself," each sale of a security must either be made pursuant to a registration statement or fall under a registration exemption).

[47] *See, e.g.*, *Cavanaugh*, 155 F.3d at 133 (rejecting contention that because issuance of shares had been registered on Form S-8 before shares were issued in 1996, registration was not required for subsequent sales of those shares in 1997 and recognizing "the long-standing reading of Section 5," under which "[a] registration statement permits an issuer, or other persons, to make only the offers and sales described in the registration statement" (citation omitted)); *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, 648 (7th Cir. 1990) ("Section 5 (the registration requirement) applies to transactions; each sale must be registered or exempt.").

Pierce contends that numerous facts about Newport and Jenirob were alleged in the First OIP, that the "predicate allegations" for the Division's request for disgorgement in the First Proceeding "included trading by 'his associates' and 'his offshore company,'" and that the Division "consistently maintained that Newport and Jenirob were among the 'associates' and 'offshore companies' through which Pierce had committed violations of the securities laws." Pierce further contends that the Division, in its post-hearing briefing, urged the law judge to award disgorgement based on trading proceeds in the Corporate Accounts. Therefore, he contends, liability for § 5 violations based on trading in the Corporate Accounts was at issue in the First Proceeding. Moreover, he contends, the First ID included findings "that on multiple occasions, Pierce sold Lexington shares through Hypo Bank's omnibus account at vFinance from different accounts that Pierce controlled."

We are not persuaded. As noted above, res judicata is not necessarily implicated when two proceedings involve "essentially the same course of wrongful conduct," or when they involve "the same parties, similar or overlapping facts, and similar legal issues."[48] The First OIP alleged additional facts regarding Lexington sales, *e.g.*, that "[b]etween 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." But the First OIP did not identify a seller or sellers of those 2.5 million Lexington shares, nor did it allege that no registration statement was in effect or filed with respect to those sales. Although the First OIP alleged that Lexington shares were transferred to Newport or Jenirob and referred to sales from the Hypo Omnibus Account, that was not enough to state a claim against Pierce based on unregistered sales from the Corporate Accounts, or to calculate the potential disgorgement from those sales. Thus, the only § 5 violations put at issue by the First OIP were Pierce's $2.7 million in unlawful sales through the Personal Account.

The law judge's admission of the New Evidence did not add new charges to the First Proceeding. In ruling on the Division's motion, the law judge recognized that the Commission has not delegated authority to law judges to expand the scope of matters set down for hearing beyond the framework of an original OIP.[49] For that reason, she admitted the New Evidence for the

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[48] *First Jersey*, 101 F.3d at 1463.

[49] *See* Rule of Practice 200(d)(2), 17 C.F.R. § 201.200(d)(2) (providing that a hearing officer, upon motion by a party, "may . . . amend an order instituting proceedings to include new matters of fact or law that are within the scope of the original order instituting proceedings"); *J. Stephen Stout*, 52 S.E.C. 1162, 1996 SEC LEXIS 3557, at *2 n.2 (Dec. 10, 1996) (holding that a hearing officer correctly denied a motion to include a request for civil money penalties that was unintentionally omitted from the order instituting proceedings and citing comment (d) to Rule 200 of the Rules of Practice, because, "since the Commission has not delegated its authority to authorize orders instituting proceedings, hearing officers do not have authority to initiate new charges or to expand the scope of matters set down for hearing beyond the framework of the original order instituting proceedings"). The law judge additionally noted that Pierce had opposed

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limited purpose of liability as to the charges contained in the First OIP—§ 5 violations based on Pierce's sales from the Personal Account, plus the Exchange Act violations charged—and not for purposes of deciding liability for sales not included in the First OIP, *i.e.*, sales from the Corporate Accounts.

We also reject Pierce's argument that the Division's request for disgorgement of trading proceeds from the Corporate Accounts in its post-hearing brief placed § 5 liability for sales from those accounts at issue in the First Proceeding. The Division sought that result, but the law judge refused to allow it because the § 5 liability for those sales was beyond the scope of that proceeding. The Division filed its post-hearing brief after it had moved to admit the New Evidence, but before the law judge admitted the New Evidence for limited purposes. So when the Division filed its post-hearing brief, it was not clear how the law judge would rule on its motion to admit the New Evidence. Subsequently, as discussed above, she ruled that no request for additional disgorgement would be entertained because disgorgement based on sales from the Corporate Accounts would be outside the scope of the First OIP. Thus, despite the Division's attempts to obtain disgorgement for the trading proceeds from the Corporate Accounts in the First Proceeding, the law judge ruled against the Division on the grounds that such a request was not part of that proceeding and that she did not have authorization to add it.[50]

Nor do the law judge's findings related to sales from the Corporate Accounts in the First ID establish that liability under § 5 for those sales was at issue in the First Proceeding. The law judge made clear, both in her order disposing of the motion to admit the New Evidence and in the First ID, that she was operating within the constraints on her authority established by the parameters of the First OIP, which did not include §5 claims against Pierce based on the trades in the Corporate Accounts. The law judge's factual findings regarding transactions in Lexington shares related only to issues properly within those parameters. Some of her findings with respect to the Lexington shares show that Pierce was involved in a distribution of Lexington shares; they thus support her rejection of Pierce's affirmative defense that he was entitled to take advantage of the § 4(1) exemption with respect to sales from the Personal Account. Additionally, her findings related to sales of Lexington shares support her legal conclusions that Pierce's beneficial ownership of Lexington shares attained levels that required reporting under the Exchange Act provisions charged. But her findings concerning specific § 5 violations are limited to the transactions in the Personal Account. Consistent with those findings, and with her order disposing of the motion to admit the New Evidence, the disgorgement ordered was limited to the illegal, unregistered transactions out of the Personal Account.

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the admission of the New Evidence, arguing that admitting the evidence after the hearing had been closed would violate due process.

[50] *See, e.g., SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1980) (finding that disgorgement of ill-gotten gains "is designed [in part] to deprive a wrongdoer of unjust enrichment" resulting from a violation of the securities laws).

Pierce mischaracterizes the nature of the claim at issue in the Second Proceeding as "disgorgement claims against Pierce for Lexington stock trading profits comprising the $13 million" that the Division alleged in the First OIP were earned by "Pierce and his associates." The claim that is the basis of the Second Proceeding is that Pierce violated § 5 through his sales of Lexington stock in the Newport and Jenirob Accounts. Disgorgement is a remedy for successfully establishing this claim, not the claim itself.

Accordingly, we find that the First Proceeding and the Second Proceeding did not involve the same cause of action and that therefore res judicata does not bar this proceeding.[51]

2. Pierce's fraudulent concealment would defeat any application of res judicata.

Courts have consistently held that res judicata does not apply where facts are fraudulently concealed and could not have been discovered with due diligence.[52] Here, even if the cause of action in the First Proceeding, based on the transactions in the Personal Account, and the cause of action in the Second Proceeding, based on the transactions in the Corporate Accounts, could be considered the same, we find that res judicata still would not apply because Pierce fraudulently concealed the transactions in the Corporate Accounts and the Division exercised due diligence in attempting to uncover them. To find otherwise would reward Pierce for his duplicitous conduct.

Pierce successfully concealed his involvement in the unregistered Lexington sales from the Corporate Accounts until after the Division had filed the First OIP: he failed to disclose the trades made on his behalf through the Newport Account that are at issue here, failed to disclose any of the trades made on his behalf in the Jenirob Account, and denied having an interest in the Jenirob

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[51] *See Greenberg v. Bd. of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 168-70 (2d Cir. 1992) (finding that because "preclusion is limited to the transaction at issue in the first action" and thus "[l]itigation over other transactions, though involving the same parties and similar facts and legal issues, is not precluded," prior enforcement actions concerning "functionally similar" transactions did not bar subsequent enforcement action); *Proctor v. LeClaire*, 715 F.3d 402, 412-13 (2d Cir. 2013) (finding that prisoner's first action challenging his initial confinement to a Special Housing Unit did not bar his subsequent action challenging his continued confinement in the Special Housing Unit, despite facts that some of the periodic reviews leading to his continued confinement had occurred at the time he commenced his first action challenging the initial confinement and that the court in the first action discussed the periodic reviews in rejecting his challenge to his initial confinement, because "the initial authorization for confinement and the subsequent decisions to continue confinement—although plainly involving considerations that overlap—are not, and could not reasonably be expected to be, the 'same transaction'").

[52] *See, e.g.*, *Mpoyo*, 430 F.3d at 988; *Haefner v. N. Cornwall Twp.*, 40 F. App'x 656, 658 (3d Cir. 2002); *L-Tec Elecs. Corp. v. Cougar Elec. Org., Inc.*, 198 F.3d 85, 88 (2d Cir. 1999); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 914 (7th Cir. 1993); *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986); *Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 26, comment j.

Account. Lacking knowledge of the full extent of Pierce's unregistered sales, the Division was unable to allege elements of the § 5 violation based on sales in the Corporate Accounts when the Commission instituted the First Proceeding.

Pierce contends that the fraudulent concealment exception is not available to the Division because the Division had enough evidence to include a request that Pierce disgorge "Lexington stock trading profits comprising the $13 million allegedly obtained by 'Pierce and his associates'" in the First Proceeding. He notes that the Division alleged in the First OIP that Pierce and his associates earned $13 million and contends that the Division thus "represented to the public in effect that it had sufficient information to allege elements of joint and several liability for $13 million against Pierce at the outset." Pierce further contends that the Division had additional evidence of Pierce's beneficial ownership of Lexington stock through Newport from the Schedule 13D he filed in July 2006. Additionally, Pierce contends that "a fair reading" of the record establishes that he did not lie about his ownership of Newport and Jenirob, and that he did not "conceal" the existence of the Hypo Bank records, about which the Division clearly knew in 2006 when it asked the FMA for those records.

The record does not support Pierce's interpretation of the evidence he provided to the Division in connection with the First Proceeding.[53] When Pierce produced the Schedule 13D in July 2006, he did so in response to an investigative subpoena that required him to produce "[a]ll statements from securities brokerage accounts . . . in which YOU have a beneficial interest or exercise discretionary control, or in whose profits and/or losses YOU share," and "[a]ll DOCUMENTS reflecting or relating to . . . transactions by YOU" in Lexington stock, with "YOU" defined to include "any person or entity acting on [Pierce's] behalf." By producing the Schedule 13D in response to the subpoena, Pierce implicitly represented that it constituted all "responsive records . . . of trades in Lexington stock" by him or on anyone acting on his behalf. But the Schedule 13D did not list all the trades Pierce made through the Newport Account—in fact, it did not list any of the Newport trades at issue in this proceeding—and it did not reveal Pierce's beneficial ownership of assets in the Jenirob Account at all. Moreover, in his investigative testimony Pierce falsely denied having an interest in the Jenirob Account and denied trading in Lexington securities in any U.S. account on behalf of Jenirob. Furthermore, although Pierce did not conceal the existence of the Hypo Bank records from the Division, Liechtenstein laws governing secrecy of bank accounts are well known; indeed, Pierce took advantage of them to delay the FMA's production of documents to the Division by filing an appeal. He was thus aware that it was unlikely that the Division would obtain trading records that would allow it to determine which accounts (within the framework of the Hypo Omnibus Account) were trading in Lexington shares and who owned, or beneficially owned, those accounts. By providing the Schedule 13D as

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[53] We reject Pierce's characterization of the effect of the allegation in the First OIP that Pierce and his associates earned $13 million. It does not follow that because the Division had evidence to support the allegation concerning the $13 million, it had evidence to support the elements of a prima facie case as to transactions other than those in the Personal Account. For the reasons discussed above, the Division did not have such evidence.

an incomplete and misleading response to the Division's investigative subpoena, omitting from the Schedule 13D all of the relevant trades from the Newport Account, denying any interest in the Jenirob Account, denying having traded in the Jenirob Account, and taking advantage of the Liechtenstein bank secrecy laws, Pierce contrived to make it difficult, if not impossible, for the Division to learn of his concealment in time to include allegations regarding trades in the Corporate Accounts in the First Proceeding. We find that Pierce's provision of false and misleading information to the Division was purposeful, and that this dishonest conduct, together with his taking advantage of Liechtenstein's secrecy laws, constituted a fraudulent effort to conceal Pierce's trading in the Corporate Accounts from the Division.

Because of lies and omissions in the Schedule 13D and in Pierce's investigative testimony, the Division could not support the allegations necessary to establish its prima facie case that the sales at issue were made through the Corporate Accounts, that Pierce made the unregistered sales in the Corporate Accounts, or that Pierce was the beneficial owner of the assets in those accounts, nor could it have adduced the evidence necessary to support the remedy of disgorgement of the trading proceeds, until it obtained the documents in the Second FMA Production, which provided the Division, for the first time, with evidence of the specific transactions that were later put at issue in the Second Proceeding. Thus, the Division could not have included in the First OIP the claim of a § 5 violation based on trading in the Corporate Accounts, and therefore could not have sought disgorgement of any such trading profits.

Pierce contends that the Division failed to make diligent efforts to obtain records relevant to trading in the Corporate Accounts. He contends that the Division could have subpoenaed Hypo Bank, Newport, or Jenirob, and/or it could have filed a motion to compel Pierce to produce documents. Had the Division taken these steps, Pierce contends, either it would have obtained the documents, enabling it to assert the additional § 5 claims in the First Proceeding, or it would have obtained a ruling "that Pierce's objections were proper," in which case, he argues, the Division would have no claim of "fraudulent" concealment.

We find that the Division acted with appropriate diligence in pursuing information about Pierce's trading through accounts other than the Personal Account. Pierce responded untruthfully to questions asked during investigative testimony and misleadingly to the Division's subpoena. The Division was not required to assume that Pierce's responses were false or misleading and to subpoena other potential sources of information; rather, it was entitled to take Pierce at his word. And besides, given that Pierce lied under oath during his investigative testimony and filed misleadingly incomplete responses to the subpoena, we see no reason to believe that Pierce's responses to any additional subpoenas would have been more forthcoming. Moreover, Pierce's deceptive conduct failed to put the Division on notice that any documents that might have been produced by Lexington, Newport, or Jenirob would have contained relevant information about additional Lexington trades. Finally, the Division requested records from the FMA, and when it learned in late 2007 that changes in the law might make it possible to get documents that had previously been unavailable, it promptly submitted a renewed request. Given the bank secrecy laws in effect in Liechtenstein, any notion that a subpoena to Hypo Bank would have been more productive is speculative. We find no lack of diligence that would preclude the application of the fraudulent concealment exception.

Pierce contends that the Division "may have prematurely initiated the First Case, before it had acquired every last document tracing Lexington share proceeds in the distribution. But the res judicata doctrine requires that it now be bound by the consequences." Those "consequences," Pierce argues, include the loss of the right to seek disgorgement of the trading proceeds in the Corporate Accounts in a second proceeding.

We disagree. The First Proceeding was brought in part to obtain cease-and-desist orders pursuant to Securities Act § 8A and Exchange Act § 21C against Pierce to stop any further violations of § 5, as well as of Exchange Act §§ 13(d) and 16(a). The legislative history of §§ 8A and 21C shows that Congress intended the cease-and-desist authority to be an expeditious means of addressing ongoing violations of the federal securities laws. A Senate Report noted that, in view of the "extremely congested nature of federal court dockets, which often results in considerable delays in cases being heard, the authority to issue an administrative cease-and-desist order will enable the SEC to respond in a more timely fashion to [violative] conduct or practices."[54] Thus, Congress intended the Commission to use its new authority to quickly prevent further wrongdoing and injury to the markets and the investing public. Requiring the Division to identify every possible violation of § 5 perpetrated by a particular respondent before instituting such a proceeding—especially when those engaging in violative conduct are doing their best to thwart the Division's efforts—would run counter to this objective and disserve the investing public.[55] Further, adopting such a requirement could encourage wrongdoers to take additional steps to cover their tracks: for example, they might arrange to trade through accounts in multiple foreign jurisdictions, hoping that res judicata would protect the proceeds of such trades if they remained undiscovered long enough.

Moreover, the Division could not have accurately predicted how long it would take to get adequate information about sales from the Corporate Accounts. As set forth above, the FMA initially refused to provide any documents in response to the Division's request and could not provide such documents absent legislative change in Liechtenstein, a process over which the Division had no control and the duration of which the Division could not predict. Even after the legislative changes were made, the FMA notified the Division that it would not comply completely with the Division's requests at least until the pending appeals were concluded.[56] Because of Pierce's dishonest conduct, the Division could not have known whether any Hypo Bank materials it might ultimately obtain would have provided evidence of additional § 5 violations against Pierce. The Division may have suspected that there was evidence of value in the Hypo Bank records. But even if it thought the records might show transactions in the Corporate Accounts, the Division had no reason to suspect that those trades could give rise to charges against Pierce in light of his denials regarding his relationship to those entities. For these reasons, delaying the issuance

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[54] S. Rep. No. 101-337, at 18 (1990), 1990 WL 263550.

[55] *See supra* note 34 and accompanying text.

[56] If the appeals had succeeded, the release of the documents to the Division would presumably have been even further delayed, perhaps indefinitely.

of the First OIP while awaiting the receipt of hypothetical information would not have been in the public interest. Although avoiding piecemeal litigation is one of the purposes of res judicata, that objective does not override the objective of initiating cease-and-desist proceedings expeditiously. The Division therefore acted appropriately in proceeding with the § 5 claims based on sales from the Personal Account and the Exchange Act claims.

3. The Division was not required to ask the Commission to amend the OIP.

Pierce contends that the fraudulent concealment exception to res judicata applies only when the concealed evidence and the resulting claims are not discovered until after a final judgment has been issued, suggesting that the Division was limited to bringing the new claim concerning the sales from the Corporate Accounts as an amendment to the First Proceeding. Pierce also contends that, in this case, the New Evidence was not only discovered during the First Proceeding, it was also submitted to the law judge, asserted as the basis for a request for disgorgement, and even relied on by the law judge in the First ID as evidence for the claims asserted in that proceeding. Therefore, Pierce argues, the Division was limited to using the evidence in the First Proceeding, or in an appeal from the First Proceeding, and was barred from using that evidence as a basis for a second action.

Pierce cites no cases in support of such a limitation on the availability of the fraudulent concealment exception to res judicata. To the contrary, the *Second Restatement of Judgments*, on which he relies, suggests that the fraudulent concealment exception applies to any concealment that, as in this case, continues beyond the time the first action is brought:

> [W]hen the plaintiff brings an action against the defendant for cancellation of a contract made between them, alleging that the plaintiff was mentally incompetent at the time of the making of the contract, and a verdict and judgment are given for the defendant, the plaintiff is not precluded from maintaining a second action for the cancellation of the contract on the ground of a misrepresentation the defendant concealed from the plaintiff at the time when the first action was brought.[57]

Another line of res judicata cases similarly indicates that discovery of a fraudulent concealment after initiation of a lawsuit but before a final judgment is rendered does not preclude the use of the exception. In cases where additional misconduct occurs after a suit is filed but is discovered before a final judgment is issued, the courts have held that there is no obligation to amend the complaint to add claims based on the additional misconduct.[58] The courts have

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[57] RESTATEMENT (SECOND) OF JUDGMENTS § 26, comment j.

[58] *See, e.g.*, *Morgan v. Covington Twp.*, 648 F.3d 172, 177-78 (3d Cir. 2011) ("Five other Courts of Appeals have already adopted a bright-line rule that res judicata does not apply to events post-dating the filing of the initial complaint. . . . We see no reason to part with our sister Circuit Courts." (citations omitted)); *First Jersey*, 101 F.3d at 1465; *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 739 & n.9 (9th Cir. 1984).

declined "to impose a potentially unworkable requirement that every claim arising prior to entry of a final decree must be brought into the pending litigation or lost."[59] "A contrary rule would only invite disputes about whether plaintiffs could have amended their initial complaints to assert claims based on later-occurring events."[60]

> The notion that the agency must either perpetually expand its charges to pursue new unlawful acts in an ongoing proceeding or lose the ability to pursue the persistent violator for misdeeds between the start and conclusion of the proceeding would in effect confer on the miscreant a partial immunity from liability for future violations. Such a notion is both antithetical to the regulatory scheme and inconsistent with the doctrine of res judicata.[61]

We believe that the reasoning in these cases is equally applicable in cases where, as here, additional misconduct occurs before a suit is filed but is not discovered until after the suit is commenced, "at least where the plaintiff contends the [additional misconduct] was unknown due to [the] defendant's fraud."[62] This is because the impact on the plaintiff in both circumstances is the same, *i.e.*, the plaintiff, through no fault of its own and due to circumstances solely within the control of the defendant, is unaware of the evidence necessary to establish the defendant's additional misconduct until after the initiation of the first lawsuit. Such a rule neither penalizes the plaintiff nor rewards the defendant for the defendant's wrongdoing. Rather, it "puts the focus properly on whether plaintiff was diligent in pursuing its claims, not on whether the discovery was made in time to permit an amendment to the complaint."[63]

Pierce's argument also fails to recognize that special considerations apply in an administrative forum such as this one. In a federal court of general jurisdiction, the judge in whose court the action is pending has considerable latitude to permit pleadings to be amended, even to the extent of adding new claims.[64] In our administrative proceedings, in contrast, a law judge lacks the authority to amend an OIP to include matters outside its original scope; expanding the scope of the OIP requires action by the Commission.[65] Thus, the law judge in the First Proceeding lacked the authority to amend the First OIP to include charges based on transactions in the Corporate

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59 *Los Angeles Branch NAACP*, 750 F.2d at 739 n.9.

60 *Morgan*, 648 F.3d at 178.

61 *First Jersey*, 101 F.3d at 1465.

62 *Allied Fire Prot. v. Diede Constr., Inc.*, 25 Cal. Rptr. 3d 195, 2005 Cal. App. LEXIS 296, at *14 (Cal. Dist. Ct. App. 2005).

63 *Id.*

64 *See generally* FED. R. CIV. PROC. 15.

65 *See* Rules of Practice 200(d)(1) and (2); *see also supra* note 49 (discussing Rule of Practice 200(d)(2)).

Accounts and correctly declined to do so, and those charges were not put at issue when the Division received the Second FMA Production and introduced the New Evidence in March 2009.

Nor, in the circumstances presented here, was the Division required to make additional attempts to incorporate the claims of § 5 violations based on trading in the Corporate Accounts into the First Proceeding. Although the Division could have petitioned for interlocutory review of the law judge's order disposing of the motion to admit the New Evidence,[66] the outcome of such a petition would have been uncertain: such petitions are disfavored, and proceedings are not automatically stayed pending the Commission's determination.[67] Failure to stay the proceeding at such an advanced, post-hearing stage could have meant that the Commission reached no determination on any interlocutory motion before the law judge issued an initial decision. On the other hand, staying the proceeding at such a late stage would have further delayed the resolution of claims that had already been litigated to their conclusion in the First Proceeding, and consequently delayed the imposition of any remedial sanctions.[68] Moreover, had the Commission determined to permit the amendment of the OIP, whether in response to an interlocutory appeal or to any appeal that might have been filed after issuance of the First ID, this would also have led to re-opening the hearing and allowing new post-hearing briefs, further delaying the resolution of the First Proceeding and the implementation of any remedial sanctions.[69] Thus, the negative consequences of requiring the Division to take such steps would have outweighed any potential marginal savings in costs to the parties and conservation of judicial resources.[70]

Res judicata based on the Division's inability to seek disgorgement of the profits from the transactions in the Corporate Accounts without amending the OIP would be particularly inappropriate in this administrative proceeding. As noted above, res judicata applies "more

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[66] *See* Rule of Practice 400, 17 C.F.R. § 201.400.

[67] *See id.*, Rules 400 (a) and (d).

[68] Alternatively, the Division could have filed a motion with the Commission to amend the OIP; such a motion would have been fraught with similar difficulties concerning the possibility of a stay of the underlying proceeding.

[69] If a party timely files a petition for review of an initial decision, the initial decision does not become final as to that party. Rule of Practice § 201.360(d)(1), 17 C.F.R. § 201.360(d)(1). Thus, any sanctions imposed in the First Proceeding would have been put on hold while the Commission considered the appeal.

[70] *See Thompson v. Schweiker*, 665 F.2d 936, 940, 1982 U.S. App. LEXIS 22742, at *12 (9th Cir. 1982) (finding that enforcement of administrative res judicata should be tempered by fairness and equity and that administrative res judicata "does not acquire the rigid finality of judicial proceedings"); *Cartier v. Secretary*, 506 F.2d 191, 196, 1974 U.S. App. LEXIS 6300, at *14 (D.C. Cir. 1974) (finding that administrative res judicata should not be blindly applied in every context, and should be rejected when the reasons against applying it outweigh those that favor it).

flexibly in the administrative context"[71] and is "qualified or rejected" when its application "would contravene an overriding public policy."[72] As one court explained,

> "[t]he entire purpose and thrust of a [Commission] enforcement action is to expeditiously safeguard the public interest by enjoining securities violations. The claims asserted in such an action stem from, and are colored by, the intense public interest in [Commission] enforcement of these laws. ". . . Disgorgement plays a central role in the enforcement of the securities laws. "The effective enforcement of the federal securities laws requires that the [Commission] be able to make violations unprofitable. The deterrent effect of [a Commission] enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." By deterring violations of the securities laws, disgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets.[73]

At least in the context of an administrative proceeding seeking disgorgement for fraudulently concealed securities law violations, res judicata should not apply to frustrate the public policy goal of making securities law violations unprofitable.[74]

C. The Commission is not equitably estopped from bringing the Second Proceeding.

Pierce contends that the Commission is equitably estopped from bringing the current proceeding because the Division failed to appeal the law judge's initial decision in the First Proceeding. This defense fails for several reasons. As the Supreme Court has stated, "equitable estoppel will not lie against the Government as it lies against private litigants."[75] To the extent

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[71] *Maldonado v. U.S. Att'y Gen.*, 664 F.3d 1369, 1377 (11th Cir. 2011).

[72] *Martin v. Donovan*, 731 F.2d 1415, 1416 (9th Cir. 1984) (citation omitted).

[73] *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) (quoting *SEC v. Asset Mgmt Corp.*, 465 F. Supp. 998, 1000 (S.D. Ind. 1978) and *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972)).

[74] *Cf. Duhaney v. Att'y Gen. of the U.S.*, 621 F.3d 340, 351 (3d. Cir. 2010) (finding that Congress's intent "to facilitate the removal of aliens who have committed aggravated felonies counsels against an overly rigid application of the res judicata doctrine" because the doctrine "should not be applied so as to frustrate clearly expressed congressional intent.").

[75] *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 420 (1990).

equitable estoppel is available at all,[76] "[a] party attempting to apply equitable estoppel against the government must show that '(1) there was a definite representation to the party claiming estoppel, (2) the party relied on its adversary's conduct in such a manner as to change his position for the worse, (3) the party's reliance was reasonable[,] and (4) the government engaged in affirmative misconduct.'"[77]

The Division's decision not to appeal from the First ID was not a "definite representation" that it was abandoning a claim for disgorgement related to Pierce's trading in the Corporate Accounts. The decision represented at most an acceptance of the law judge's conclusion that the question of § 5 liability for the Lexington stock transactions through the Corporate Accounts went beyond the scope of the First OIP. By not appealing, the Division did not represent that further disgorgement from Pierce was unavailable; the Division had other options, including the one it pursued, *i.e.*, asking the Commission to institute a new proceeding alleging separate violations related to trading in the Corporate Accounts. And the Division's conduct gave Pierce no reason to believe that the Division would *not* initiate such a proceeding, thereby lulling him into forgoing an appeal of his own.

In any event, Pierce cannot rightfully claim that he relied on the Division's decision not to appeal in making his own determination not to appeal. The period for filing an appeal ran concurrently for the parties.[78] Pierce could not have known for certain that the Division would not appeal the First ID until after the period for filing his own appeal had already lapsed. He could not,

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[76] *Id.* at 422–23 (noting that the Supreme Court has "reversed every finding of estoppel that [it has] reviewed" and that the arguments for a rule that estoppel would never lie against the government were "substantial," but nevertheless deciding to leave "for another day whether an estoppel claim could ever succeed against the Government"); *Savoury v. U.S. Att'y Gen.*, 449 F.3d 1307, 1318 (11th Cir. 2006) ("[I]t is far from clear that the doctrine of equitable estoppel may even be applied against a government agency.").

[77] *Keating v. FERC*, 569 F.3d 427, 434 (D.C. Cir. 2009) (quoting *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191-92 (D.C. Cir. 2009)); *see also Dickow v. United States*, 654 F.3d 144, 152 (1st Cir. 2011); *Mich. Express, Inc. v. United States*, 374 F.3d 424, 427 (6th Cir. 2004). The parties, the law judge, and some courts of appeals have used a test that is consistent with *Keating*, although they have articulated the basic requirements for equitable estoppel somewhat differently, requiring that (i) the party to be estopped knows the facts; (ii) 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; (iii) the party invoking estoppel is ignorant of the true facts; and (iv) he detrimentally relies on the former's conduct. *See Pierce*, 2011 SEC LEXIS 2564, at *24 (citing *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007)); *see also FDIC v. Hulsey*, 22 F.3d 1472, 1489–90 (10th Cir. 1994). Under either version of the test, Pierce has failed to show that equitable estoppel is appropriate here.

[78] *See* Rule of Practice 410(b), 17 C.F.R. § 201.410(b) (setting forth procedures for filing petitions and cross-petitions for review of initial decisions by hearing officers).

therefore, have relied on the Division's decision not to appeal in making his own determination not to appeal.

Moreover, even if it could be argued that Pierce somehow relied upon the Division's decision not to appeal, that reliance was not reasonable. Pierce contends that it was reasonable to assume that the Division would have filed a petition to review the $2.1 million disgorgement order in order to "preserve the $7.5 million claim through the application of the Commission's own rules for the amendment, review, and modification of the disgorgement order for $2.1 million." But this argument again rests upon the faulty premise that seeking Commission review of the First ID was the sole option for pursuing disgorgement related to trading in the Corporate Accounts. As already discussed, asking the Commission to amend, review, or modify the disgorgement ordered in the First ID was not the only (or even the most appropriate) avenue available to the Division to pursue additional disgorgement, and it was reasonable for the Division to interpret the First ID as suggesting that a separate action related to the Corporate Accounts transactions was appropriate. Pierce, on the other hand, asserts that it was reasonable for him to rely "on the longstanding doctrine of res judicata" to bar the Division from bringing a separate action, making it also reasonable for him to interpret the Division's failure to appeal as an indication that it did not intend to seek additional disgorgement. But even if Pierce planned to assert res judicata as a defense in any subsequent proceeding, it is speculation on Pierce's part that the prospect of his raising such a defense would cause the Division to conclude that its only hope of obtaining the additional $7.5 million in profits would be to appeal the First ID. It was thus unreasonable for Pierce to simply assume that, if the Division did not appeal, it would not pursue additional disgorgement through a separate action.

Further, there is no evidence of any "affirmative misconduct" by the Division. Affirmative misconduct involves "more than mere negligence, delay, [or] inaction" by a government agency;[79] it requires "an affirmative misrepresentation or affirmative concealment of a material fact."[80] There is no basis to conclude that the Division's decision not to appeal constituted an affirmative misrepresentation or an affirmative concealment of a material fact. For this reason alone, Pierce's equitable estoppel argument must fail.

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[79] *Robertson-Dewar v. Holder*, 646 F.3d 226, 229 (5th Cir. 2011); *see also Premo v. United States*, 599 F.3d 540, 547 (6th Cir. 2010) ("Affirmative conduct 'is more than mere negligence. It is an act by the government that either intentionally or recklessly misleads the claimant.'" (quoting *Mich. Express*, 374 F.3d at 427)).

[80] *Dickow*, 654 F.3d at 152; *Robertson-Dewar*, 646 F.3d at 230; *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989) (en banc); *see also GAO v. Gen. Accounting Office Pers. Appeals Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983) ("Estoppel generally requires that government agents engage—by commission or omission—in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that have [caused] or will cause an egregiously unfair result.").

Finally, "estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage."[81] This requirement is grounded in the recognition that "[w]hen the government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."[82] The Division's pursuit of a separate action based on unregistered sales in the Corporate Accounts is by no means unjust, especially since, as the law judge in the current proceeding noted, Pierce has had the opportunity to vigorously defend himself in this separate action, including by challenging the Commission's ability to bring it. On the other hand, the public interest would be seriously undermined if Pierce's misplaced reliance on the Division's decision not to appeal the decision in the First Proceeding prevented the Commission from pursuing the disgorgement of millions of dollars of ill-gotten gains. For all of the above reasons, we reject Pierce's equitable estoppel defense.

D. The Commission is not judicially estopped from bringing the Second Proceeding.

Pierce's judicial estoppel defense fares no better. The doctrine of judicial estoppel "applies when, among other things, a 'party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.'"[83] Accordingly, the Supreme Court has identified three factors relevant to whether the doctrine of judicial estoppel will apply in a particular case: (i) whether "a party's later position [is] 'clearly inconsistent' with its earlier position"; (ii) "whether the party has succeeded in persuading a court to accept that party's earlier position"; and (iii) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[84] Pierce argues that the Division should be estopped in this proceeding from seeking disgorgement related to his trading in the Corporate Accounts because the Division had argued in the First Proceeding for the additional $7.5 million in disgorgement. We conclude that the doctrine of judicial estoppel is inapplicable in this case.

First, we are not convinced that the Division's positions are "clearly inconsistent." By arguing that disgorgement related to trading in the Corporate Accounts was available in the First Proceeding, the Division was not contending that it could not alternatively pursue a separate action. The Division argued in the First Proceeding that the New Evidence showed that Pierce sold

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[81] *Morgan v. Gonzales*, 495 F.3d 1084, 1092 (9th Cir. 2007); *see also Hulsey*, 22 F.3d at 1489 (equitable estoppel against the government applies "only when it does not frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws").

[82] *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).

[83] *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)).

[84] *New Hampshire*, 532 U.S. at 750–51.

Lexington shares through the Corporate Accounts and that he should therefore be required to disgorge the total net proceeds he received from the Lexington trades. But the Division never took the position before the law judge in the First Proceeding that disgorgement related to trading in the Corporate Accounts would be available *only* in that proceeding. When the law judge in the First Proceeding found that allegations regarding Pierce's unregistered trades in the Corporate Accounts went beyond the scope of the First OIP, it was not inconsistent for the Division to pursue additional disgorgement through the available alternative of bringing a separate action.

Furthermore, even if the Division's positions were clearly inconsistent, judicial estoppel is inapplicable because the Division failed to persuade the law judge in the First Proceeding to accept its position.[85] The First ID declined the Division's request to order disgorgement related to Pierce's trading in the Corporate Accounts because the law judge concluded that the Corporate Account transactions were beyond the scope of the First OIP. There is no threat to the integrity of the adjudication process, therefore, for the Division to leave unchallenged the law judge's decision in the First Proceeding while pursuing an alternative route to disgorgement in the current proceeding.[86] Accordingly, the doctrine of judicial estoppel is simply inapplicable here.

E. The Division did not waive its claim to additional disgorgement.

Pierce's waiver defense is likewise without merit. Pierce insists that the Division has waived its claim to additional disgorgement by failing to appeal the First ID. "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'"[87] The party asserting waiver bears

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[85] *Reed Elsevier, Inc.*, 559 U.S. at 170 (concluding that judicial estoppel did not apply because the district court did not adopt the party's jurisdictional argument and accepting that party's arguments "thus cannot create inconsistent court determinations in their favor" (internal quotation marks omitted)); *New Hampshire*, 532 U.S. at 750-751 ("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." (internal citations and quotation marks omitted)); *see also Pakovich v. Broadspire Servs., Inc.*, 535 F.3d 601, 605 n.2 (7th Cir. 2008) ("[O]ne of the requirements for judicial estoppel to apply is that the party to be estopped must have prevailed upon the first court to adopt the position." (internal quotation marks omitted)); *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1242 n.16 (10th Cir. 1998) ("[O]ne of the elements of this doctrine is that the party against whom estoppel is asserted must have prevailed on the basis of his contradictory position in the prior proceeding."); *Gens v. Resolution Trust Corp.*, 112 F.3d 569, 572 (1st Cir. 1997) ("Judicial estoppel is not implicated unless the first forum *accepted* the legal or factual assertion alleged to be at odds with the position advanced in the current forum.").

[86] *See Stevens Technical Servs., Inc. v. SS Brooklyn*, 885 F.2d 584, 588–89 (9th Cir. 1989) (holding that judicial estoppel was inapplicable when the plaintiff asserted one position in good faith, lost, and abided by that decision in bringing the second action).

[87] *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

the burden of showing that a waiver has occurred.[88] Pierce has failed to show that, by not appealing the First ID, the Division intentionally gave up its claim to additional disgorgement. As already discussed, because the Division had the option of pursuing the disgorgement of the profits related to the Corporate Account transactions by bringing a separate action, the mere failure of the Division to appeal the First ID does not evince an intent to abandon its claim to additional disgorgement.

F. Allowing the Second Proceeding does not violate Pierce's right to due process.

There is no merit to Pierce's argument that the Commission violated his due process rights by failing to pursue alternative paths under its Rules of Practice in the First Proceeding for the claims based on unregistered trading in the Corporate Accounts. Pierce contends that, under the Rules of Practice, the Division "could have asked the Commission to review and reverse or modify" the First ID, or it could have "moved the first hearing officer or the Commission to amend the [First] OIP to explicitly include the Newport/Jenirob disgorgement claim."[89] Alternatively, Pierce asserts, the Commission could have, on its own initiative, taken up the matter for review, or accepted and considered the New Evidence for any purpose, or ordered further consideration of the request for disgorgement based on trading in the Corporate Accounts. Because the Division and the Commission failed to do any of these things, Pierce asserts, the First ID became the final decision of the Commission, and he has a protected interest in its finality that would be denied if the Commission allowed a second proceeding against him based on the § 5 charges related to trading in the Corporate Accounts.

We find no due process violation here. Pierce's due process argument is simply a repackaging of his erroneous argument that estoppel or res judicata bars the Second Proceeding because the Division did not appeal the law judge's ruling that the OIP in the First Proceeding did not extend to claims based on illegal unregistered trading in the Corporate Accounts or seek leave to amend the OIP to include such charges. As we explained in rejecting those arguments, although Commission rules would have permitted the Division to appeal or request amendment of the OIP, the Division was not required to pursue either course, and its decision not to do so does not give Pierce any protected interest in not facing the § 5 charges based on the Corporate Accounts in the Second Proceeding.

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[88] 31 C.J.S. *Estoppel and Waiver* § 287.

[89] Pierce acknowledges that, by its motion to admit the New Evidence, the Division "did effectively move to amend under Rule [of Practice] 200(d)(2), without labeling the motion precisely as such." Because the law judge cited the limitations on her authority to amend the First OIP in her ruling on the motion, there is no reason to think a motion made explicitly under Rule 200(d)(2) would have had a different outcome. *See supra* note 49 (discussing Rule of Practice 200(d)(2)).

IV.

A. Cease-and-desist relief is warranted in the public interest.

Section 8A(a) 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" that Act or any rule thereunder.[90] In determining whether a cease-and-desist order is warranted, we consider a wide variety of factors: whether there is a reasonable likelihood of future violations,[91] how serious the violations are, whether the violations are isolated or recurrent, what state of mind the respondent had in committing the violations, to what extent the respondent recognizes the wrongful nature of his or her conduct, how recent the violations are, whether the violations caused harm to investors or the marketplace, whether the respondent will have the opportunity to commit future violations, and what remedial function the cease-and-desist order would serve in the overall context of any other sanctions sought in the same proceeding.[92] Our inquiry is flexible, and no single factor is dispositive.[93]

Pierce's violations were very serious. He reaped millions of dollars in profits by selling shares of stock without registration, causing harm to investors and the marketplace by depriving investors of the full disclosure that would have allowed them to make informed investment decisions.[94] The misconduct was both recurrent and long-lasting, consisting of numerous sales made over an eight-month period. Pierce's concealment of his involvement in these sales shows a high degree of scienter, and he shows no recognition that his conduct was wrongful. Based on Pierce's disciplinary history, the § 5 violations at issue, and Pierce's lack of contrition, we find there is a significant likelihood of future violations. We recognize that Pierce is already subject to the cease-and-desist order against violations of § 5 issued in the First Proceeding,[95] and this

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[90] 15 U.S.C. § 77h-1(a).

[91] The required showing of a risk of future violations is significantly less than that required for an injunction, and "in the ordinary case, a finding of a past violation is sufficient to demonstrate a risk of future ones." *KPMG Peat Marwick, LLP*, 54 S.E.C. 1135, 2001 SEC LEXIS 98, at *114 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

[92] *Id.* at *100-17.

[93] *Id*. at *116. Pierce does not specifically challenge the imposition of the cease-and-desist order in this case.

[94] *See supra* text accompanying note 26 (quoting *SEC v. Ralston Purina Co.*, 346 U.S. at 124).

[95] We also recognize that the misconduct at issue in this proceeding occurred before the cease-and-desist order had been issued in the First Proceeding.

lessens the remedial impact of another such order. Nonetheless, taking all these factors together, we find that a cease-and-desist order is in the public interest.[96]

B. Pierce is jointly and severally liable for disgorgement of the trading proceeds at issue.

Section 8A(e) of the Securities Act authorizes the Commission to order disgorgement in cease-and-desist proceedings brought under the Securities Act.[97] Disgorgement is an equitable remedy designed to deprive a violator of wrongfully obtained profits and to deter others from engaging in similar misconduct.[98] The Division must make a reasonable approximation of the amount of unjust enrichment that results from the violations in question, but the burden then shifts to the respondent to show that the Division's figure is unreasonable.[99]

The Division's calculation shows the trading profits from the sales of unregistered Lexington shares in the Corporate Accounts at issue to be $7,247,635.75. These proceeds are attributable as ill-gotten gains to Pierce, as the beneficial owner of the assets in those accounts. We find this a reasonable approximation of Pierce's ill-gotten gains, and that Pierce should be held jointly and severally liable for $5,264,466.64 of this amount with Newport and for $1,983,169.11 of this amount with Jenirob, based on the respective trading proceeds of each entity.[100]

Pierce does not deny that he is the beneficial owner of the assets of Newport, nor does he contend that Newport's receipt of Lexington trading profits was of no benefit to him.[101] The Hypo

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[96] *See Hunter Adams*, 58 S.E.C. 937, 2005 SEC LEXIS 225, at *4 (Feb. 1, 2005) (noting that "if violations of the same statutory provisions are based on different conduct in each proceeding, then awarding relief in each proceeding would not necessarily be duplicative.").

[97] 15 U.S.C. § 77h-1(e).

[98] *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *see also, e.g., SEC v. M&A West, Inc.*, 538 F.3d 1043, 1054 (9th Cir. 2008) (affirming disgorgement ordered by district court "to ensure that [§ 5 violator] is not allowed to benefit from his unlawful conduct").

[99] *See, e.g., SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) (citing and quoting *First City Fin. Corp.*, 890 F.3d at 1232); *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 2006) (where disgorgement calculations cannot be exact, risk of uncertainty "'should fall on the wrongdoer whose illegal conduct created that uncertainty'" (quoting *SEC v. Patel*, 61 F.3d 167, 140 (2d Cir. 1995)).

[100] The law judge ordered disgorgement of this amount solely as to Pierce, without accounting for the fact that Newport and Jenirob have already been held liable for their respective amounts of the trading proceeds. *See supra* note 24. Our decision here corrects that error.

[101] Pierce has not explained why it would matter for purposes of this case whether he was the beneficial owner of Newport and Jenirob, as the law judge found in the First ID, or whether, as the Hypo Bank records show, he was the beneficial owner of the assets in the Newport and Jenirob Accounts.

(continued…)

Bank records show that Pierce was the beneficial owner of the assets of Jenirob, so Jenirob's receipt of Lexington trading profits also benefitted him. But he argues that it is not enough for the Division to show that he benefitted from the presence of the Lexington proceeds in the Corporate Accounts. Instead, he contends, the Division must show that he, rather than Newport and Jenirob, actually received those proceeds—that is, that Newport or Jenirob paid some or all of their sale proceeds to him.

The law does not support Pierce's position. For purposes of disgorgement there is no meaningful distinction between receiving funds outright and having funds paid into an account one controls. As beneficial owner of the assets in the Corporate Accounts, Pierce could have ordered the sales proceeds paid to himself at any time. Whether he did so or not does not affect the disgorgement analysis.

The court's reasoning in *SEC v. Warde* is instructive.[102] Warde argued that he should not be required to disgorge trading profits "attributable to third parties."[103] The court rejected his argument, finding that a trust (of which he was the sole present beneficiary) and Warde's wife (over whose account Warde "exercised complete control") were not "truly third parties."[104] Here, similarly, Pierce's beneficial ownership of the assets in the Corporate Accounts establishes that Pierce is not "truly a third party" for purposes of disgorgement; the trading profits in the Corporate Accounts are already Pierce's money, and he should be required to disgorge them.

Moreover, even if the assets in the Corporate Accounts were not already Pierce's money, his argument would fail because in cases involving joint and several liability, individuals may be

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(…continued)

On November 14, 2011, the Division sought to introduce additional evidence in the form of four documents. The Division contends that three of these documents concern the interests of Pierce, his wife, and his daughter in two trusts that beneficially owned Newport, and that the fourth document constitutes an admission by Pierce that he received a personal financial benefit from assets held by Newport. Pierce opposes the Division's motion, arguing that this new evidence "is neither new nor probative of any issue in the case."

Commission Rule of Practice 452 permits the Commission to allow the submission of additional evidence on appeal if the moving party shows with particularity both (a) that the new evidence is "material" and (b) that there were "reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. § 201.452. The new documents submitted by the Division are duplicative of other materials already in the record, and we therefore decline to accept them as evidence. *See, e.g.*, *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at * 27-28 (Oct. 20, 2011) (declining to admit additional evidence that "merely duplicates" the substance of evidence already in the record).

[102] 151 F.3d 42 (2d Cir. 1998).

[103] *Id*. at 49.

[104] *Id*.

ordered to disgorge the entire amount of ill-gotten gains whether or not they received any of those gains. As the court observed in *SEC v. Platforms Wireless International Corp.*, "'[w]here two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws, they have been held jointly and severally liable for the disgorgement of illegally obtained proceeds.'"[105]

Here, the relationship between Pierce and the two companies, Newport and Jenirob, with respect to the § 5 violations could hardly have been closer: Pierce directed the violative trades from the Newport and Jenirob Accounts. And where joint and several liability is found, courts routinely order disgorgement of the entire amount of ill-gotten gains jointly and severally from individuals who received only part of the proceeds of the wrongdoing, or did not receive any of the proceeds at all. In *SEC v. First Pacific Bancorp*, for example, a company's chief executive officer who collaborated in fraudulent misconduct was held jointly and severally liable with the company for proceeds obtained by the company despite his argument that he did not receive the proceeds himself.[106] In *SEC v. Platforms Wireless International Corp.*, the court held the chairman and chief executive officer of a company, who "orchestrated the unlawful transactions" and "had control of the proceeds" of sales that violated § 5, jointly and severally liable with the company for disgorgement of one hundred percent of the sale proceeds notwithstanding the officer's argument that he did not "personally benefit" from the violations by receiving money or other remuneration

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[105] 617 F.3d 1072, 1098 (9th Cir. 2010) (quoting *First Pac. Bancorp*, 142 F.3d at 1191); *see also, e.g., SEC v. Whittemore*, 659 F.3d 1, 10-11 (D.C. Cir. 2011) (imposing joint and several liability on one who closely collaborated in fraudulent scheme); *SEC v. Universal Express, Inc.*, 438 F. App'x 23, 26 (2d Cir. 2011) (imposing joint and several liability based on collaboration in violative conduct); *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455-56 (3d Cir. 1997) (imposing joint and several liability on defendants who "all collaborated in a single scheme to defraud" and who "enjoyed a 'close relationship' with each other").

Pierce relies on *M&A West*, 538 F.3d at 1054, and *VanCook v. SEC*, 653 F.3d 130 (2d Cir. Aug. 8, 2011), arguing that, in both cases, the disgorgement ordered was for less than the entire proceeds of the wrongful conduct. But those cases do not involve joint and several liability for the disgorgement in question; they are therefore inapposite. *Compare SEC v. Global Express Capital Real Estate Inv. Fund I, LLC*, 289 F. App'x 183, 190 (9th Cir. 2008) (holding that an individual could not be ordered to disgorge ill-gotten gains retained by certain entities because the funds retained by the entities could not be considered her personal ill-gotten gains and the entities had not been held jointly and severally liable for disgorgement with the individual).

[106] 142 F.3d at 1191-92. Pierce argues that *First Pacific Bancorp* is distinguishable because the defendant in that case received substantial personal benefit, including but not limited to excessive compensation. Although the CEO in *First Pacific Bancorp* personally received payment of some of the ill-gotten gains, the Ninth Circuit does not require a showing of personal receipt of any of the ill-gotten gains as a prerequisite for joint and several liability for all such gains. *See Platforms Wireless*, 617 F.3d at 1098 & n.15.

as a result of the misconduct.[107] The court reasoned that it was "not inequitable to require [the respondent] jointly to share the burden of restoring the illegally obtained monies, even if he did not allocate them to himself."[108] And in *SEC v. Hughes Capital Corp.*, the court ordered a defendant who collaborated with others in a scheme to inflate the price of stock jointly and severally liable for disgorgement of all the proceeds obtained in the scheme even though the defendant argued that she received only a portion of the proceeds.[109]

Pierce's argument in his petition for review that disgorgement is *"**limited to actual profits obtained by wrongdoing***" (emphasis in original) is simply another way of phrasing his contention that he cannot be forced to disgorge money that he did not personally receive. But the cases he cites do not focus on whether someone "obtained" ill-gotten gains, in the sense of having those gains paid directly into one's bank account rather than (as here) having the gains in accounts over which one exercises control. Instead, they stand for the proposition that the total amount of disgorgement ordered in a proceeding may equal, but may not exceed, the amount of ill-gotten gains generated by the wrongful conduct. In *SEC v. Blatt*, for example, the court held that the defendants could be ordered to disgorge the amount by which they profited from wrongdoing (plus interest), but that they could not additionally be ordered to pay as "disgorgement" amounts required for the compensation and expenses of a trustee in collecting and distributing the disgorged funds.[110] In a similar vein, the court in *SEC v. Manor Nursing Centers, Inc*. held that the proceeds of violative activity were subject to disgorgement, but the income earned by investing those proceeds was not (because ordering payment to the court of the latter would be an impermissible penalty assessment).[111] And in *SEC v. Hateley*, the court held that where an agent of a broker-dealer had already been ordered to disgorge sales commissions that he received as a result of wrongful conduct, officers and directors of the firm could not be separately required to disgorge those same commissions, since that would result in disgorgement exceeding the amount of ill-gotten gains.[112] Here, on the other hand, we order disgorgement only of the proceeds of the unregistered Lexington sales. And because liability is to be joint and several, the amount disgorged will not exceed the ill-gotten gains.

Although Pierce acknowledges that where antifraud violations are at issue, a violator may be required to disgorge ill-gotten proceeds that the violator did not personally receive, he characterizes this as an exception to the alleged rule on which he relies, and argues that it has been applied "particularly when in the absence of vicarious (joint and several) liability for disgorgement, wrongdoers would escape liability altogether." But § 5 violators have been held

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[107] 617 F.3d at 1096-99.

[108] *Id*. at 1098.

[109] 124 F.3d at 455-56.

[110] 583 F.2d 1325, 1335-36 (5th Cir. 1978).

[111] 458 F.2d at 1104-05.

[112] 8 F.3d 653, 655-56 (9th Cir. 1993).

jointly and severally liable for disgorgement of the proceeds of the unregistered transactions where none of the defendants were found to have committed antifraud violations.[113]

Finally, relying principally on *SEC v. First City Financial Corp.*,[114] Pierce argues that disgorgement may not be used punitively.[115] But the court's observation in that case that disgorgement may not be used punitively was made in the context of supporting the court's conclusion there that the equitable power of disgorgement may be exercised "only over property causally related to the wrongdoing."[116] The trading profits in the Corporate Accounts are unquestionably related to the § 5 violations at issue here.

An appropriate order will issue.[117]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Elizabeth M. Murphy
Secretary

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[113] *See, e.g., SEC v. Friendly Power Co. LLC*, 49 F. Supp. 2d 1363, 1373 (S.D. Fla. 1999); *see also SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (imposing joint and several liability for disgorgement of proceeds of § 5 violations on defendant who was found to have committed only § 5 violations, even though other defendant was found to have committed both antifraud violations and § 5 violations, and finding that the principle that joint and several liability in securities cases is appropriate where parties have a close relationship or collaborate in the violations "holds true even where one defendant is more culpable than another").

[114] 890 F.2d 1215.

[115] Pierce also cites *M&A West*, in which the court required defendant Medley to disgorge the cash payments and profits he received as a result of § 5 violations rather than the entire proceeds. 538 F.2d at 1054. But as noted above, *M&A West* is distinguishable because disgorgement in that case was not ordered jointly and severally.

[116] 890 F.2d at 1231.

[117] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9555 / March 7, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 71664 / March 7, 2014

Admin. Proc. File No. 3-13927

In the Matter of

GORDON BRENT PIERCE
c/o William F. Alderman
Shireen Qaru
Orrick, Herrington & Sutliffe LLP
San Francisco, CA 94105

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Gordon Brent Pierce cease and desist from committing or being a cause of any violations or future violations of §§ 5(a) and 5(c) of the Securities Act of 1933; and it is further

ORDERED that Gordon Brent Pierce disgorge $5,264,466.64, jointly and severally with Newport Capital Corporation, plus prejudgment interest of $3,034,239.55, such prejudgment interest calculated beginning from October 1, 2004, with such interest continuing to accrue on all funds owed until they are paid, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Gordon Brent Pierce disgorge $1,983,169.11, jointly and severally with Jenirob Company Ltd., plus prejudgment interest of $1,176,869.27, such prejudgment interest calculated beginning from July 1, 2004, with such interest continuing to accrue on all funds owed until they are paid, in accordance with Commission Rule of Practice 600.

Payment of the disgorgement and prejudgment interest shall be made not later than twenty-one days after service of this order. Payment shall be made by United States postal money order, certified check, 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 mailed or delivered by hand to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South

MacArthur Bld., Oklahoma City, OK 73169. A copy of the cover letter and instrument of payment shall be sent to Steven D. Buchholz, counsel for the Division of Enforcement, San Francisco Regional Office, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104.

By the Commission.

Elizabeth M. Murphy
Secretary