

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13109

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 29, 2008

In the Matter of :
:
LEXINGTON RESOURCES, INC., : ORDER
GRANT ATKINS, and :
GORDON BRENT PIERCE :

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on July 31, 2008. The proceeding has ended as to Respondents Lexington Resources, Inc. (Lexington), and Grant Atkins (Atkins). Lexington Res., Inc., Securities Act Release No. 8987 (Nov. 26, 2008). The hearing as to Respondent Gordon Brent Pierce (Pierce) is set to commence on February 2, 2009. Lexington Res., Inc., Admin. Proc. No. 3-13109 (A.L.J. Sept. 29, 2008) (unpublished). The Division of Enforcement (Division) and Pierce have filed their prehearing briefs and exhibit and witness lists.

Under consideration are the Division's Motion for Summary Disposition and Pierce's Reply (in which he also asks for summary disposition), timely filed pursuant to leave granted pursuant to 17 C.F.R. § 201.250.¹ The Division and Pierce filed additional pleadings on December 22 and 23, 2008, respectively. These pleadings have not resolved any of the issues to be addressed at the hearing and, thus, summary disposition will be denied.

The OIP concerns the alleged unregistered distribution of stock in Lexington, of which Atkins was CEO and Chairman. As discussed at the September 29, 2008, prehearing conference at Tr. 16-27, the allegations against Pierce are that he violated the registration provisions of the Securities Act of 1933 (Securities Act), Sections 5(a) and 5(c), and reporting provisions of the Securities Exchange Act of 1934 (Exchange Act), Sections 13(d) and 16(a) and Rules 13d-1, 13d-2, and 16a-3 thereunder. Specifically, the OIP alleges that Pierce violated Securities Act Sections 5(a) and 5(c) by reselling shares he received from Lexington without a valid registration statement or exemption from registration, having obtained at least \$2.7 million in proceeds from such sales in June 2004. Pierce's Answer to the OIP admits the June 2004 sales for proceeds of at least \$2.7 million but states that the sales were not registered with the Commission because the shares sold were already registered and freely trading in the open market. The Division is seeking a cease-and-desist order and disgorgement of \$2,077,969 plus prejudgment interest for this alleged violation.

¹ See Lexington Res., Inc., Admin. Proc. No. 3-13109 (A.L.J. Nov. 7, 2008) (unpublished).

As to the alleged reporting violations, Exchange Act Section 13(d) applies to those who own or control more than five percent of any class of equity security registered under Exchange Act Section 12, while Exchange Act Section 16(a) applies to those who own or control more than ten percent. The OIP alleges that Pierce late-filed, on July 25, 2006, a Schedule 13D, as required by Exchange Act Section 13(d) and Rules 13d-1 and 13d-2, concerning his ownership or control of Lexington stock during the period from November 2003 to May 2004. Pierce's Answer to the OIP admits the late filing. The OIP also alleges that Pierce owned or controlled and traded in more than ten percent of Lexington stock during that period but that the Schedule 13D stated that he owned or controlled less than that amount and that he did not file Forms 3, 4, or 5, as required by Exchange Act Section 16(a) and Rule 16a-3 thereunder. Pierce denies that he owned or controlled more than ten percent. Thus, he denies that he filed an inaccurate Schedule 13D or that he violated Exchange Act Section 16(a) and Rule 16a-3.

Pierce previously admitted violating Exchange Act Section 13(d) and Rules 13d-1 and 13d-2 insofar as his late filing of Schedule 13D constituted such violation. No additional issue is resolved by the summary disposition pleadings. For example, whether or not Pierce was a promoter or underwriter within the meaning of the registration provisions of the Securities Act is a question of fact that remains. Additionally, Pierce intends to present evidence bearing on the amount of any possible disgorgement.

Pierce urges that the proceeding should be dismissed. He argues that, contrary to its representation at the prehearing conference, the Division plans to introduce evidence concerning the circumstances under which he received the shares at issue, and that, in referencing Securities Act Section 4, it is adopting a new legal theory. These arguments are unavailing. At the prehearing conference the Division represented that it was charging Pierce with alleged violations arising out of his resale of the shares he received from Lexington, not with violations committed by Lexington in issuing shares. It is, however, necessary to determine the circumstances under which he received the shares he resold in order to determine whether his resale violated Securities Act Sections 5(a) and 5(c). Reference to Securities Act Section 4 does not indicate that the Division is adopting a new legal theory not contemplated by the Commission in adopting the OIP as Section 4 lists transactions that are exempted from Section 5, which commences, "The provisions of section 5 shall not apply to -."

Concerning the witness designations, the Division is reminded that live testimony is preferable to written testimony, especially where credibility is at issue. Cf. 17 C.F.R. § 201.235(a)(5). Likewise, Pierce is reminded of the provisions of 17 C.F.R. § 201.310 (a respondent who fails to appear at a hearing may be deemed to be in default).

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

Chaudhuri and Dills each invoked his Fifth Amendment right against self-incrimination when called by the Division to testify at the hearing. Tr. 35-43, 353-57, 358-60. An adverse inference may be drawn from a respondent's refusal to testify in a Commission administrative proceeding. See Pagel, Inc. v. SEC, 803 F.2d 942, 946-47 (8th Cir. 1986); N. Sims Organ & Co., Inc. v. SEC, 293 F.2d 78, 80-81 (2d Cir. 1961); see also Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (Fifth Amendment privilege against self-incrimination does not forbid drawing adverse inferences from an inmate's failure to testify at his own disciplinary proceedings). Therefore Chaudhuri's and Dills's silence may be considered along with other relevant evidence in assessing the evidence against them. See Pagel, Inc., 803 F.2d at 947.

Additionally, live testimony is preferable to written testimony, especially where credibility is at issue. Cf. 17 C.F.R. § 201.235(a)(5).

The Division lists Pierce and describes excerpts of his investigative testimony of July 27 and 28, 2006. The understands this to mean that the Division intends to conduct a live direct examination of Pierce and possibly use his investigative testimony for purposes of impeachment.²

² The Commission has ruled that specific statements in investigative testimony may be admitted as evidence.