INITIAL DECISION RELEASE NO. 379
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13109

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

In the Matter of	:	
	:	
LEXINGTON RESOURCES, INC.,	:	INITIAL DECISION
GRANT ATKINS, and	:	June 5, 2009
GORDON BRENT PIERCE	:	

APPEARANCES: John S. Yun and Steven D. Buchholz for the Division of Enforcement, Securities and Exchange Commission

Christopher B. Wells for Gordon Brent Pierce

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision orders Gordon Brent Pierce (Pierce) to cease and desist from violations of Sections 5(a) and 5(c) of the Securities Act of 1933 (Securities Act) and of Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 (Exchange Act) and Rules 13d-1, 13d-2, and 16a-3 thereunder, and to disgorge ill-gotten gains of $2,043,362.33.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on July 31, 2008, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act. The proceeding has ended as to Respondents Lexington Resources, Inc. (Lexington), and Grant Atkins (Atkins). Lexington Res., Inc., Securities Act Release No. 8987 (Nov. 26, 2008).

The undersigned held a three-day hearing in Seattle, Washington, on February 2 through 4, 2009. The Division of Enforcement (Division) called three witnesses from whom testimony was taken, and Pierce called an additional three witnesses, including an expert witness. Pierce himself, who was called as a witness by the Division, did not appear in person at the hearing and thus did not testify.[1] Numerous exhibits were admitted into evidence.[2]

The findings and conclusions in this Initial Decision are based on the record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the following post-hearing pleadings were considered: (1) the Division's March 23, 2009, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief; (2) Respondent's April 6, 2009, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief; and (3) the Division's April 27, 2009, Reply. All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

B. Allegations and Arguments of the Parties

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

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

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[1] Pierce's failure to appear in person at the hearing was unexpected. At the September 29, 2008, prehearing conference, Pierce's counsel urged that the hearing not be scheduled during December as Pierce would not be available during that month. See Prehearing Tr. 7 (Sept. 29, 2008). Pierce was listed as a witness on his December 15, 2008, filing, "Designation of Witnesses," for his case in chief. However, at the hearing, Pierce's counsel represented that Pierce is a target of a federal criminal investigation involving CellCyte Genetics Corporation and was concerned that he might be arrested if his whereabouts became known in the United States Courthouse in Seattle, where the hearing was held and where the United States Attorney's Office is located. Tr. 5-7.

[2] Citations to the transcript will be noted as "Tr. __." Citations to exhibits offered by the Division and Pierce will be noted as "Div. Ex. __" and "Resp. Ex. __" respectively.

and thus denies that he filed an inaccurate Schedule 13D or that he violated Exchange Act Section 16(a) and Rule 16a-3. The Division is seeking a cease-and-desist order for the alleged reporting violations.

C. Procedural Issues

1. Adverse Inference from Refusal to Testify

By not appearing in person at the hearing, Pierce declined to testify on his own behalf or as a witness called by the Division. An adverse inference may be drawn from a respondent's refusal to testify in a Commission administrative proceeding. See Pagel, Inc. v. SEC, 803 F.2d 942, 946-47 (8th Cir. 1986); N. Sims Organ & Co. v. SEC, 293 F.2d 78, 80-81 (2d Cir. 1961); see also Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (Fifth Amendment privilege against self-incrimination does not forbid drawing adverse inferences from an inmate's failure to testify at his own disciplinary proceedings). Therefore, Pierce's silence may be considered along with other relevant evidence in assessing the evidence against him. See Pagel, Inc., 803 F.2d at 947.

Pierce argues that his failure to appear at the hearing results from the Division's violation of his due process rights, and that the Division is acting with unclean hands. Tr. 5-11; Resp. G. Brent Pierce's Motion for Dismissal for Violation of Due Process, Estoppel, and Unclean Hands (Due Process Motion). Pierce claims that the Division used "unfair and deceptive means . . . to accomplish service of the OIP on [him]." Answer at 8. As a basis for his claims, Pierce says that he agreed to give testimony in the CellCyte Genetics Corporation matter at his office building in Vancouver, British Columbia, on July 31, 2008. Decl. of Christopher B. Wells at 2 (Sept. 29, 2008). Pierce's counsel stated on the record that Pierce would not be served "as a result of documents handed to him in the course of his testimony." Id. at 4. The Division effected service of the Lexington OIP on Pierce, in the lobby of his building, after his testimony had concluded. Id. For relief, Pierce requests dismissal of the OIP, or in the alternative, a stay of this proceeding.

Pierce's arguments set out in the Due Process Motion fail as a matter of law. First, he cannot invoke estoppel or unclean hands claims against the Division while it is pursuing an enforcement matter in the public interest. See SEC v. Blavin, 557 F. Supp. 1304, 1310 (E.D. Mich. 1983), aff'd, 760 F.2d 706 (6th Cir. 1985); SEC v. Gulf & W. Indus., Inc., 502 F. Supp. 343, 348 (D.D.C. 1980) (citations omitted). Next, Pierce's due process claim fails because he does not articulate any particular constitutional violation, and only refers to a vague risk of being served with pleadings relating to another investigation. See United States v. Stringer, 535 F.3d 929, 940 (9th Cir. 2008) (SEC's duty is to refrain from misleading about the existence of a parallel investigation). Neither continuing with the instant civil administrative proceeding, nor the facts surrounding service of the OIP, in light of Pierce's nebulous fear of receiving service of process in another matter, are "so shocking to due process values that it must be dismissed."[3] United States v. Doe, 125 F.3d 1249, 1254 (9th Cir. 1997). Indeed, maintenance of parallel criminal and civil proceedings does not violate due process. See SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980), cert. denied, 449 U.S. 933 (1980).

[3] Accordingly, Pierce's Due Process Motion is denied.

2. Investigative Testimony

The Division took investigative testimony concerning the events at issue from Pierce on July 27 and 28, 2006. Because of his refusal to testify at the hearing concerning the events at issue, the undersigned admitted excerpts of the investigative testimony as Div. Exs. 62, 76, and 77, and Resp. Ex. 57. Excerpts rather than the entire transcripts were admitted in order to avoid burdening the record. See Del Mar Fin. Servs., Inc., 56 S.E.C. 1332, 1350-51 (2003). Fairness to Pierce was ensured through admitting Resp. Ex. 57, consisting of excerpts designated by him.

II. FINDINGS OF FACT

A. Relevant Parties

1. Lexington

Lexington was a Nevada corporation located in Las Vegas, Nevada. It was formed in 1996 under the name All Wrapped Up, Inc., and changed its name to Intergold, Inc. (Intergold), in 1997, when it began the business of exploration of gold and precious metals in the United States. Div. Ex. 55 at SEC 103234. Intergold subsequently acquired Lexington Oil & Gas Co. Ltd. (Lexington Oil & Gas), an Oklahoma limited liability company, and changed its name to Lexington Resources, Inc. Id.; Resp. Ex. 5. It exited the gold exploration business, and billed itself as being "engaged in the acquisition and development of oil and gas properties in the United States." Div. Ex. 55 at SEC 103235. Lexington had no full time employees; instead, the day-to-day operations were carried out by Atkins and one of the directors, Douglas Humphries (Humphries). Tr. 338-39; Div. Ex. 55 at SEC 103239. Other necessary functions were performed by outside consultants. Div. Ex. 55 at SEC 103239. Lexington employed the consulting firm International Market Trend AG (IMT) to provide administrative support and various other services. Tr. 311-13; Resp. Ex. 4. Lexington did not have its own offices; instead, the company was managed out of IMT's offices in Blaine, Washington. Tr. 457-58.

On November 19, 2003, the shareholders of Intergold and Lexington Oil & Gas entered into a share exchange agreement whereby Intergold acquired all of the outstanding stock of Lexington Oil & Gas. Div. Ex. 55 at SEC 103237; Resp. Ex. 5. The newly merged company, Lexington, issued three million restricted common shares to Lexington Oil & Gas's shareholders. Tr. 321; Div. Ex. 55 at SEC 103237; Resp. Ex. 5-6. The new capital structure left Lexington Oil & Gas's shareholders owning eighty-five percent of the new company's shares. Div. Ex. 55 at SEC 103278. Orient Explorations Ltd. (Orient) owned sixty-four percent of Lexington. Resp. Ex. 5. Humphries was a significant shareholder after the acquisition, holding twenty-two percent of Lexington's stock. Id. Lexington's new ticker symbol was LXRS, and it began trading on the over-the-counter market under that symbol on November 20, 2003. Resp. Ex. 8.

During 2003 and 2004, Lexington never held a shareholder meeting. Tr. 457. Lexington's Board of Directors did not meet regularly during this period either. Tr. 457-58. Instead, important matters were resolved via consent resolutions on an ongoing basis. Tr. at 457-58.

On March 4, 2008, Lexington filed a Chapter 11 bankruptcy petition. Answer at 3. The petition was converted to Chapter 7 liquidation on April 22, 2008. Id.; Div. Ex. 52.

2. Pierce

Pierce was born in 1957 and is a citizen of Canada. Div. Ex. 62 at 10-11. He attended the University of British Columbia for a short time. Id. at 158. He has no academic training in accounting or finance. Id. At the time he gave his investigative testimony, he resided in Vancouver, British Columbia. Resp. Ex. 57 at SEC-2329. Pierce is the beneficial owner of, and works as president and director for Newport Capital Corporation (Newport), an entity based in Switzerland.[4] Div. Exs. 62 at 20, 80. He is also the beneficial owner of Jenirob Company Ltd. (Jenirob). Div. Ex. 84. At the time of his investigative testimony, he had worked for Newport for more than seven years. Div. Ex. 62 at 21. He received a salary of $800,000 to $900,000 from Newport in 2005. Id. at 66. Prior to his affiliation with Newport, Pierce was self-employed. Id. at 158-59. He worked with start-up companies in many different industries, helping take them public. Id. at 159. Pierce first met Atkins in the early 1990's, when he hired Atkins to write the business plan for a company he founded. Id. He and Atkins have worked together at approximately ten companies, most of them publicly traded. Id. at 160. Atkins consulted Pierce in the restructuring of Intergold into Lexington. Tr. 339-41. Atkins continued to consult Pierce about Lexington, speaking to him multiple times every week during 2003 and 2004. Tr. 455-56.

Pierce was sanctioned by the British Columbia Securities Commission (BCSC) in 1993 for conduct that occurred in 1989. Div. Exs. 47, 62 at 167. He settled a proceeding with the BCSC in which he agreed the following facts were true. He was a control person behind an entity called Valet Video and Pizza Services Ltd. (Valet), and his nominee served as president and sole director of Valet. Div. Ex. 47. Bu-Max Gold Corp. (Bu-Max), a publicly traded British Columbia company, circulated a prospectus and made a securities offering that garnered proceeds for an exploration program. Id. Almost half the proceeds were paid by Bu-Max's directors to Valet for purposes that did not benefit Bu-Max; instead, those monies benefitted Pierce and his nominee at Valet. Id. During the BCSC's investigation, Pierce provided documents that "were not genuine." Id. As a sanction, Pierce was barred from using certain exemptions available under the British Columbia Securities Act for fifteen years. Id. Additionally, he was barred from serving as an officer or director of any reporting issuer, or serving as the officer or director for any issuer that provides management, administrative, promotional, or consulting services to a reporting issuer for fifteen years. Id. Finally, he was fined $15,000. Id.

During his investigative testimony, and in his Answer, Pierce admitted he violated the reporting requirements under Section 13 of the Exchange Act. Answer at 7; Div. Ex. 62 at 31-33.

At the time of his investigative testimony, Pierce served as an officer or director of the following entities: Newport, IMT, Parc Place Investments, AG (Parc Place), Sparten Asset

[4] Pierce testified that he did not have an ownership stake of any kind in Newport. Div. Ex. 62 at 197.

Group (Sparten), Waterside Developments [Cayman], Inc., Palm Tree Properties [Cayman] Ltd., and Pierco Petroleum. Id. at 35-36. Pierce negotiated with consultants on behalf of Investor Communications International, Inc. (ICI) and IMT, and generally entered into oral contracts with these consultants for the services they would provide to the clients. Id. at 91. Pierce never served as an officer or a director of Lexington. Tr. 372. Newport provided Pierce with a revolving line of credit. Div. Ex. 62 at 107. Pierce used draws on the line of credit to pay the exercise price on his Lexington options, and he sometimes transferred Lexington shares to Newport to pay down the loan. Tr. 107, 109, 122.

Pierce had brokerage accounts with Piper Jaffrey and Hypo Bank in Liechtenstein. Piper Jaffrey closed his account when the Commission began its investigation of the Lexington matter. Id. at 38-39. He opened the brokerage account at Hypo Bank in 2003. Id. at 40, Div. Ex. 87. Pierce testified that these were the only accounts in which he held Lexington stock. Div. Ex. 62 at 210-11. Hypo Bank, in turn, opened an omnibus account with Nicholas Thompson (Thompson)[5] at vFinance, Inc., (vFinance) (Hypo account). Div. Ex. 21. Newport also had brokerage accounts with Hypo Bank, Thompson at vFinance,[6] Craig Sommers at Peacock Hislop Staley & Givens, Inc. (Peacock Hislop), and Rich Fredericks at SG Martin, LLC. Div. Exs. 25, 29, 62 at 114, 71, 80. Pierce traded Lexington stock on behalf of Newport in all these accounts. Div. Ex. 62 at 215-16. Thompson was given discretionary power to trade Newport's account at one point. Id. at 224-25. Pierce did not have a personal account with Thompson at vFinance. Id. at 115. Pierce also traded Lexington stock on behalf of Sparten in Sparten's account with Peacock Hislop. Id. at 180, 182.

At the end of Intergold's fiscal year 2002, Pierce held the rights to 1.35 million common shares of Intergold through options granted to him by Intergold's Board of Directors. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003) (official notice).

3. Atkins

Atkins is a resident of Vancouver, British Columbia. Tr. 288. He attended the University of British Columbia and graduated with a degree in commerce and business. Tr. 288-89. He has worked primarily as a start-up and small business consultant. Tr. 289. He became an officer and director of Intergold in the late 1990s. Tr. 291. At the end of 2002, he was the sole officer and director of Intergold. Tr. 292-93. His compensation as president of Intergold/Lexington for 2003 was $19,625, and $60,000 as president of Lexington in 2004. Tr. 452-53; Div. Ex. 55 at SEC 103258, Div. Ex. 56 at SEC 101304. Though he regularly consulted Pierce on the management of Lexington, Atkins was unaware of who the representatives for Lexington's largest shareholder, Orient, were. Tr. 455-56. In addition to working as a consultant for ICI, he also consulted for Newport, and Pierce controlled his assignments there. Tr. 371-72; 453-54. Pierce and Newport also arranged for loans for Atkins from time to time. Tr. 372-73; 453-54. Newport's banking records show payments to Atkins totaling $268,000 for the period from December 2003 to November 2004. Div. Ex. 70. At one point, Newport's loans to Atkins may have totaled $400,000. Tr. 453. According to Atkins, the loans were eventually

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[5] Thompson was also a market-maker for Lexington's stock. Div. Ex. 62 at 114.

[6] Pierce opened Newport's vFinance account on July 11, 2002. Div. Ex. 25.

repaid. Tr. 453. Atkins testified that despite his financial relationship with Newport, it did not control any of his decision-making as head of Lexington. Tr. 373.

4. Newport

Newport is incorporated in Belize and domiciled in Switzerland. Div. Ex. 29 at SEC 142764, 142774. Newport invests in public companies and helps them raise capital, provides investor relation services, and aids companies in finding suitably-matched acquisition opportunities. Div. Ex. 62 at 20. Newport invested $718,000 in Lexington in a private placement in April 2004. Tr. 410; Resp. Ex. 41. Newport has no employees, only consultants. Div. Ex. 62 at 27. It does not contract directly with publicly traded U.S. companies for providing its services, but uses other entities to enter into direct relationships with its clients. Id. at 53. At the time of the Intergold/Lexington Oil & Gas merger, Newport owned 2.6% of Intergold's stock. Resp. Ex. 5. As noted above, Pierce is the beneficial owner of Newport.

5. ICI

ICI was a consulting company that provided many services to its clients. It provided services such as merger and acquisition and joint venture recruitment. Tr. 239-40. ICI helped companies become listed on different stock exchanges around the world. Tr. 239-40. ICI was the vehicle used by Newport to contract with client companies in the United States. Div. Ex. 62 at 53. Pierce was either a president or director of ICI, and the driving force behind it. Id. at 54. Consultants affiliated with ICI included Pierce, Atkins, Richard Elliot-Square (Elliot-Square), Len Braumberger, Marcus Johnson (Johnson), Vaughn Barbon (Barbon), and Alexander Cox (Cox). Tr. 306-07. Intergold had a consulting agreement with ICI, which it signed January 1, 1999. Div. Ex. 55 at SEC 103239. ICI provided a variety of services to Intergold, including strategy development, investor relations, bookkeeping and other backoffice functions, and litigation management. Id. Atkins provided his services as President/Chief Executive Officer, and Barbon provided his services as Chief Financial Officer, to Intergold through ICI. Id. at SEC 103293, 103301. Those two were the only ICI consultants that provided corporate officer or director services to Intergold. Tr. 310-11. ICI provided Atkins and Barbon with their salaries. Div. Ex. 56 at SEC 101304. ICI did not provide Intergold with invoices that tracked the hours its consultants spent working for Intergold. Tr. 493. ICI consultant Elliot-Square reported to Pierce, and not Atkins, when he provided services to Intergold/Lexington. Tr. 393.

On September 27, 1999, Intergold filed suit against AuRIC Metallurgical Laboratories, LLC (AuRIC), and Dames & Moore Group (Dames & Moore) (collectively, defendants) in district court in Utah for breach of contract and related claims. Tr. 291-92; Resp. Ex. 56. The defendants filed several counterclaims against Intergold. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003). Pierce was a named party in the defendants' counterclaims. Id. Intergold entered into a funds sharing agreement with Tristar Financials Services, Inc. (Tristar), and Cox, in which Tristar and Cox agreed to fund the litigation for Intergold in exchange for a share of any proceeds obtained by Intergold from the litigation. Id.[7] The parties engaged in extensive discovery, but the matter settled in September 2001 before trial. Resp. Ex. 56;

[7] Cox owned seventeen percent of Intergold's common stock. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003).

Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003). In 2000, Dames & Moore filed suit against Intergold in Idaho to foreclose on property against which it had liens. Id. That litigation was settled in conjunction with the litigation occurring in Utah. Id.

Pierce, Atkins, and Johnson worked on behalf of Intergold to manage the litigation. Tr. 296-97. All three provided their services to Intergold through ICI as consultants. Tr. 298-99. Intergold did not pay any of the three directly for their services; Atkins received payment from ICI, if he was compensated with cash at all. Tr. 299. Pierce never submitted an invoice or an expense statement for his work on the litigation. Tr. 493-94. The settled litigation yielded $798,000 in cash for Intergold, but it all went to cover the costs of the litigation incurred by Intergold's counsel and Tristar. Intergold, Annual Report (Form 10-KSB) (Mar. 14, 2003).

At the end of 2002, ICI owned over nine percent of Intergold's stock. Id. At the time of the Intergold/Lexington Oil & Gas merger, ICI owned 4.5% of Intergold's stock. Resp. Ex. 5.

6. Parc Place

Parc Place provided capital raising services to Lexington in at least one instance, and was compensated with a finder's fee. Tr. 343-47; Resp. Ex. 57 at SEC-02467-69. Pierce represented Parc Place in its dealing with Lexington. Tr. 346. On November 20, 2003, Lexington entered into a consulting agreement with Parc Place, in which Parc Place contracted to aid Lexington in securing a private placement of capital for a twenty percent finder's fee.[8] Div. Ex. 55 at SEC 103257; Resp. Ex. 9. On November 26, 2003, James Dow invested $250,000 with Lexington through Parc Place, and received 100,000 shares of restricted common stock. Tr. 343-45. Parc Place received $25,000 for a finder's fee on December 1, 2003. Tr. 347-49. Earlier in the year, on October 13, 2003, Intergold issued 10,000 shares of restricted common stock to Parc Place for partial payment of a prior debt. Div. Ex. 55 at SEC 103257.

7. IMT

IMT provided services similar to Newport and ICI, including sending client company material to potential investors. Div. Ex. 62 at 37, 49-50, 97-98. Pierce was instrumental in the formation of the company, which occurred three to four years prior to his investigative testimony. Id. at 51. For consultants who submitted invoices to IMT, Pierce reviewed and approved payment of those invoices. Id. at 104-05. IMT borrowed money from Newport to cover expenses, with Pierce approving the loan on behalf of Newport. Id. at 257.

IMT took over when ICI ceased its services to Lexington in 2003. Tr. 244, 312-13, 316-17, 339. Most of the consultants who had served Lexington through ICI continued to serve Lexington through IMT. Id. at 308-09, 312-13. On November 10, 2003, Lexington entered into a Financial Consulting Services Agreement with IMT (IMT Agreement)[9] under which IMT

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[8] The finder's fee was payable in ten percent cash and ten percent restricted stock. Resp. Ex. 9.

[9] Atkins is listed in the Agreement as the agent of notice for Lexington and executed the agreement on behalf of Lexington; Elliot-Square is listed as the agent of notice for IMT and executed the agreement on behalf of IMT. Resp. Ex. 4 at IMT 57-58.

contracted to provide financial and business development services to Lexington. Div. Ex. 55 at SEC 103239; Resp. Ex. 4. The IMT Agreement specifically excluded capital raising activities from IMT's functions. Resp. Ex. 4 at IMT 54-55. IMT had not provided any services to Lexington prior to the signing of the IMT Agreement. Tr. 313. On November 18, 2003, Lexington and IMT entered into a Stock Option Plan Agreement (IMT Option Plan). Tr. 317-18; Resp. Ex. 7. The IMT Option Plan granted IMT 950,000 Lexington vested common stock option shares with an exercise price of $0.50 per share. Id. The IMT Option Plan did not specifically limit the stock option grant to shares registered on a Form S-8. Tr. 481-82; Resp. Ex. 7. Pierce testified that the exercise price and the number of shares were set by Atkins and Lexington without input from him, while Atkins testified the number of shares and the exercise price were resolved in negotiations with Pierce and Johnson. Tr. 463-64; Resp. Ex. 57 at SEC-02392-94. Pierce, as the president and a director of IMT as of November 10, 2003, agreed to those terms on behalf of IMT. Div. Ex. 62 at 59; Resp. Ex. 57 at SEC-2395. Pierce testified that in addition to the stock option compensation, Lexington paid IMT $10,000 per month in cash. Id. at SEC-02396.

Pierce provided his services to IMT through Newport, and he was compensated for his services through Newport. Div. Ex. 62 at 64-65. In the Lexington matter, he was never compensated by IMT for services he provided to Lexington. Id. Pierce claims he provided a wide range of services to Lexington, including sourcing oil and gas company properties, setting up drilling activities, engaging in financing activities, and providing investor relation services. Id. at 66-68, 70. He provided the same services to Lexington through ICI. Id. at 72. Other consultants provided similar investor relation services to Lexington through IMT, and were compensated, at Pierce's direction, with Lexington options. Id. at 102-03.

8. Global Securities Transfer, Inc.

Global Securities Transfer, Inc. (a/k/a X-Clearing Corp.) (Global) served as Intergold's, and subsequently Lexington's, transfer agent. Tr. 80-81, 360-61. Robert Stevens (Stevens) was the head of Global. Id. at 80. Newport owned approximately twenty-five percent of the transfer agent. Div. Ex. 62 at 336-37. Whenever Stevens had trouble getting paid by Lexington in a timely manner, he went to Pierce to rectify the situation. Tr. 104-05.

B. Lexington's Stock-For-Debt Program with Pierce and ICI/IMT

At the time of the Intergold/Lexington Oil & Gas merger, Intergold owed ICI approximately $1.3 million (ICI debt).[10] Div. Ex. 55 at SEC 103287; Resp. Exs. 2, 15b at IMT 87. The debt owed by Intergold to ICI consisted of both outstanding payments due for services and advances made by ICI on Intergold's behalf, incurred before the acquisition of Lexington Oil

[10] The debt amounts owed ICI as of November 19, 2003, were: $672,805 in accrued management fees, loans of $356,998, and accrued interest of $282,477. Div. Ex. 55 at SEC 103287.

& Gas. Div. Ex. 55 at SEC 103255. A substantial amount of the tally had accrued during the pendency of the Dames & Moore/AuRIC litigation. Tr. 299-306.

Intergold and ICI agreed, as part of the reorganization of Intergold into Lexington, that stock would be issued to settle the debts to ICI and its consultants. Tr. 302-04, 315. The agreement called for an allocation of stock directly to ICI to cover part of the debt, with the remainder of the debt being assigned to ICI's consultants. Tr. 304, 311. The newly created Lexington would then issue stock options to the consultants, and allow the consultants to use the debt to cover the exercise price of the options. Tr. 304. In anticipation of this plan, on August 7, 2003, Intergold's Board of Directors approved an employee stock option plan (Stock Option Plan).[11] Div. Ex. 55 at SEC 103249. Officers, directors, employees, and consultants were all eligible beneficiaries of the Stock Option Plan. Id. at SEC 103249. The Stock Option Plan authorized the Board to issue up to one million common share options, to set the options' exercise price, and to determine acceptable forms of consideration for exercising the options. Id. at SEC 103249-50.

Under the IMT Agreement, Lexington agreed to grant 950,000 common share stock options, pursuant to the Stock Option Plan, with an exercise price of $0.50 per share to IMT.[12] Tr. 315-17; Div. Ex. 55 at SEC 103239, 103251; Resp. Ex. 4 at IMT 55. As part of the IMT Agreement, Lexington contracted to issue the stock to IMT's designees, consultants, and employees who had performed services for it. Id. It promised to issue the securities "with a mutually acceptable plan of issuance as to relieve securities or [IMT] from restrictions upon transferability of shares in compliance with applicable registration provisions or exemptions." Id. The consultants wanted free trading shares, and Lexington intended to accommodate them. Tr. 351-52, 355-56. However, the IMT Option Plan specifically required the consultants to represent to Lexington, when they exercised options, that "all Option Shares shall be acquired solely . . . for investment purposes only and with no view to their resale or other distribution of any kind." Resp. Ex. 7 at IMT 62. The shares were to be denoted "Clearstream eligible" so that the transfer agent could make the shares tradable in street name in Europe. Tr. 366-67. Pierce directed Atkins to have the shares so marked. Resp. Ex. 57 at SEC-02450-51.

Intergold/Lexington began to enact its reorganization plan. On October 15, 2003, Intergold issued 100,000 shares of restricted common stock to ICI, and ICI accepted those shares as payment for $250,000 of the ICI debt. Div. Ex. 55 at SEC 103255, 103285; Resp. Exs. 2-3. The effective date of the restricted stock settlement was November 30, 2003. Tr. 379-80; Resp. Ex. 2. As noted above, Lexington and IMT entered into the IMT Option Plan on November 18, 2003, which granted IMT 950,000 common share options of Lexington. Resp. Ex. 7. On November 19, 2003, Lexington had 4,521,184 shares outstanding as of this date, and thus the grant made under the IMT Option Plan represented twenty-one percent of Lexington's float. Resp. Exs. 5-6. On November 21, 2003, Lexington filed a "Form S-8 For Registration Under the Securities Act of 1933 of Securities to be Offered to Employees Pursuant to Employee Benefit

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[11] In a Form 8-K filed on November 20, 2003, Lexington notes the Board of Directors approved the Stock Option Plan on March 15, 2003, and that the shareholders ratified it on August 7, 2003. Resp. Ex. 8. This discrepancy does not affect the findings of fact in this Initial Decision.

[12] Humphries received the remaining 50,000 option shares approved in the Stock Option Plan. Div. Ex. 55 at SEC 103251.

Plans" (First S-8). Div. Ex. 55 at SEC 103250. The First S-8 did not contain a reoffering prospectus. Tr. 60; Div. Ex. 6. It registered one million shares of Lexington common stock. Tr. 314-15. On November 20, 2003, Lexington filed a Form 8-K, covering issues in its change of control, and listed IMT as a beneficial owner of 21.25% of its common stock. Resp. Ex. 8.

IMT served as a placeholder for distribution of stock option shares to the ICI/IMT consultants, but IMT did not exercise the options. Tr. 318-19. Pierce, Atkins, and to a lesser extent, Johnson, decided how to allocate the 950,000 stock options among the consultants. Tr. 326; Div. Ex. 62 at 80, 112, 133-34, 146. On November 24, 2003, Braumberger was allocated 25,000 option shares. Tr. 357; Resp. Ex. 11a. Concurrent with the allocation of option shares by IMT to Braumberger, ICI allocated $12,500 in debt owed it by Lexington to Braumberger. Tr. 357; Res. Ex. 11b. Braumberger then assigned the debt to Lexington, in consideration of the $0.50 per share option exercise price. Tr. 357; Resp. Ex. 11c. The process was repeated as to Stevens, who also received 25,000 option shares and $12,500 in ICI debt, which he assigned to Lexington. Tr. 358-59; Resp. Ex. 14a-c. Pierce received 350,000 option shares and $209,435.08 in ICI debt. Tr. 359-60; Resp. Ex 15a-c. The next day, November 25, 2003, Pierce received another 150,000 option shares and $34,435.08 in ICI debt, which he again assigned to Lexington. Tr. 360-61; Resp. Ex. 18a-c. The two allocations to Pierce were attempts by him and Atkins to avoid pushing Pierce over the ten percent beneficial ownership threshold. Tr. 360-61. Pierce, while giving his investigative testimony, claimed that he did not remember why he executed two options grants on back-to-back days. Resp. Ex. 57 at SEC-2441-42.

Several Lexington share blocks were immediately assigned to Newport, and then other individuals and entities, at Pierce's direction. On November 24, 2003, Atkins, at Pierce's direction, sent a letter to Stevens directing him to cancel the issuance of Pierce's 350,000 share block and issue those shares to Newport, based on a November 24, 2003, private sale between Pierce and Newport. Tr. 370-373; Resp. Ex. 13. Pierce testified that he transferred 350,000 shares to Newport to satisfy some of his debt to Newport; Atkins testified that the transfer was to enable Pierce to avoid having a ten percent beneficial ownership in Lexington. Tr. 360-61; Div. Ex. 62 at 107, 133, 206; Resp. Ex. 57 at SEC-2445. The next day, Atkins, at Pierce's direction, sent a letter to Stevens, cancelling the previous day's order regarding the 350,000 share block, and, instead, directing him to issue shares to various individuals and entities, based on private sale agreements between those entities and Newport dated November 25, 2003. Tr. 378-79; Div. Ex. 62 at 200; Resp. Ex. 16. Newport retained 41,700 shares out of the 350,000 share block. Resp. Ex. 16.

On November 30, 2003, Atkins sent Stevens a letter, instructing him to issue 100,000 restricted shares to ICI, pursuant to the restricted stock settlement agreement executed on October 15, 2003. Tr. 379-81; Resp. Ex. 19. Atkins recognized that these shares were not registered. Tr. 381-83. On December 1, 2003, Atkins sent Stevens a letter requesting that he issue the 100,000 restricted shares allocated to ICI on October 15, 2003, to Newport pursuant to a private share sale between ICI and Newport dated the same day. Id. at 381-82; Resp. Ex. 20. The same day, Atkins sent Stevens a letter, instructing him to issue 66,667 shares of the 100,000 restricted share block to an individual and an entity, based on a private share sale between them and Newport. Newport retained 33,333 restricted shares. Tr. 383-84; Resp. Ex. 21. It is found that all the restricted stock distributions were made at Pierce's behest, as he was the beneficial owner, agent, and officer for Newport. Tr. 371-73.

On December 2, 2003, Atkins sent Stevens a letter, at Pierce's direction, instructing him to issue 50,000 shares of the 150,000 share block exercised by Pierce on November 25, 2003, to Newport, based on a private sale between Pierce and Newport. Tr. 383-84; Resp. Ex. 22. That same day Atkins sent Stevens a letter, at Pierce's direction, instructing him to issue the 50,000 shares just assigned to Newport, to two individuals based on a private sale between Newport and those individuals. Tr. 385-86; Resp. Ex. 23. Those individuals were already investors in Lexington. Tr. 385-86.

On December 31, 2003, Lexington's Board of Directors amended the Stock Option Plan to allow it to issue up to four million common share options. Div. Ex. 55 at SEC 103250. On January 14, 2004, Lexington's Board of Directors approved a forward stock split of three-for-one of the issued and outstanding common shares. Id. at SEC at 103247. The forward stock split was effectuated on January 26, 2004. Id. at SEC 103249. At that time, Lexington's issued and outstanding common shares increased from 4,281,184 to 12,843,552. Id. at SEC 103258.

On January 22, 2004, Elliot-Square exercised 300,000 Lexington option shares in the manner described above. Tr. 392-93; Resp. Ex. 26a-c. That same day, Atkins sent Stevens a letter directing those shares be issued to Elliot-Square. Resp. Ex. 27. On January 26, 2004, Atkins sent Stevens a letter, at Elliot-Square's request, instructing him to cancel the 300,000 shares issued to Elliot-Square, and, instead, to issue those shares to Newport because a private sale had occurred between Newport and Elliot-Square. Tr. 393; Resp. Ex. 28.

On February 2, 2004, Lexington and IMT entered into a second Stock Option Plan Agreement (Second IMT Option Plan). Tr. 394-95; Resp. Ex. 31. Lexington agreed to allocate 895,000 common share options to IMT, with 495,000 options shares having an exercise price of $1.00 and the other 400,000 shares having an exercise price of $3.00. Tr. 394-95; Resp. Ex. 31.

On May 18, 2004, IMT directed 495,000 option shares and assigned $495,000 in ICI debt to Elliot-Square, and Elliot-Square assigned the debt to Lexington as consideration for his exercise price for the options. Tr. 395-96; Resp. Ex. 32a-c. The assignment of ICI debt to Elliot-Square represented the last of the debt Lexington owed ICI and its consultants. Tr. 405. On May 19, 2004, Atkins sent Stevens a series of letters directing him how to issue Elliot-Square's Lexington shares. Resp. Exs. 33-35. The first letter directed Stevens to issue 495,000 shares to Elliot-Square. Resp. Ex. 33. The second letter instructed Stevens to cancel that certificate, and to issue the shares in two certificates of 10,000 shares and 485,000 shares to Kingsbridge SA, based on a private sale agreement between Elliot-Square and Kingsbridge SA. Resp. Ex. 34. The third letter directed Stevens to cancel the issuance to Kingsbridge SA for the 485,000 share certificate, and, instead, to issue 50,000 shares to Eiger East Finance Ltd. and two share blocks to Jenirob of 400,000 and 35,000. Resp. Ex. 35.

C. Pierce's Sales of Lexington Stock

As of December 31, 2003, Pierce had 142,561 shares of Lexington deposited in the Hypo account. Div. Ex. 16 at SEC 106712. Of those, 100,000 shares were granted under the IMT Option Plan. Div. Ex. 50. Pierce forwarded the stock certificate for those 100,000 shares to Hypo Bank on December 3, 2003. Div. Ex. 88 at SEC 159213. In turn, Hypo Bank sent the stock certificate to Brown Brothers Harriman and Co. in New York so that the shares could be held in street name. Id. at SEC 159214. Pierce sold 2,000 shares January 26, 2004, leaving his account holding 40,561 pre-split Lexington shares that were not granted under the IMT Option Plan. Id. at 159204. On February 2, 2004, Stevens directed 25,000 post-split shares that he had received from Lexington, as part of the First S-8 issuance, to be deposited in Pierce's Hypo brokerage account.[13] Id. at SEC 159221. After the stock splint, as of April 30, 2004, Pierce held 446,683 shares of Lexington in the Hypo brokerage account, of which 325,000 shares were distributed from the IMT Option Plan. Div. Ex. 18 at SEC 106679. During May 2004, Pierce sold 5,000 shares of Lexington from his Hypo brokerage account. Id. at SEC 106676. During June 2004, Pierce sold 395,675 Lexington shares from his Hypo brokerage account. Id. at SEC 106668-69. Using a first-in, first-out method, he exhausted his holdings of Lexington stock acquired prior to the IMT Option Plan shares on June 24, 2004. Id. at SEC 106668. In July 2004, Pierce sold 3,500 Lexington shares for $13,348.90; in September 2004, Pierce sold the remaining 42,508 shares of Lexington for a total of $111,048.60. Div. Ex. 19 at SEC 106661, 106647. Thus, Pierce's gross sales in his personal Hypo brokerage account from Lexington stock granted under the IMT Option Plan were $2,113,362.33. Div. Ex. 18. His cost basis for the 300,000 IMT Option Plan shares was $50,000 and $20,000 for the shares transferred by Stevens; his total profit for selling shares acquired under the IMT Option Plan was $2,043,362.33. Id.; Div. Ex. 88.

vFinance statements from the Hypo Bank omnibus account reflect many trades in Lexington shares during this period. Div. Ex. 24. While no one trade perfectly matches the trades that Pierce ordered from his personal account, several trades appear to be blocks of Lexington shares that were sold through Hypo Bank's omnibus vFinance account from different accounts that Pierce controlled. On June 24, 2004, Pierce sold 50,000 Lexington shares from his personal account, 50,000 shares from the Jenirob account, and 10,052 shares from the Newport account, and all transactions had a settlement date of June 29, 2004. Div. Exs. 82 at SEC 159071, 86 at SEC 158581, 88 at SEC 159204. The account statement for the Hypo Bank omnibus account shows a block of 153,052 Lexington shares sold, with a settlement date of June 29, 2004. Div. Ex. 24 at SEC 9409.42. On June 25, 2004, Pierce sold 73,432 Lexington shares from his personal account, 30,000 shares from the Jenirob account, and 22,000 shares from the Newport account, and all transactions had a settlement date of June 30, 2004. Div. Exs. 82 at SEC 159071, 86 at SEC 158581, 88 at SEC 159204. The account statement for the Hypo Bank omnibus account shows a block of 170,432 Lexington shares sold, with a settlement date of June 30, 2004. Div. Ex. 24 at SEC 9409.43.

D. Pierce's Ownership of Lexington

[13] Stevens directed 25,000 shares be deposited in Newport's and Pierce's account. The share deposits were repayment for a $40,000 note owed to Pierce. Div. Ex. 88 at SEC 159221. Thus, Pierce's cost basis for the 25,000 shares deposited in his personal account is $0.80 per share, or $20,000.

As of December 31, 2003, Newport held 11,833 shares of Lexington stock in its vFinance account. Div. Ex. 26 at SEC 9409.125. As noted above, Newport retained 75,033 shares of Lexington stock after distributing part of the allocations Pierce made to third parties. Newport also owned 250,000 shares of Lexington restricted stock transferred to it by ICI. Pierce held 142,561 shares personally. Pierce also retained control over 400,000 Lexington shares granted to IMT that were as yet unassigned. Lexington had 4,281,184 common shares outstanding on December 31, 2004, giving Pierce an 11.2% direct interest in Lexington through his personal shares and the shares owned by Newport. Including the unexercised options granted to IMT, over which Pierce had dispositive power, he had a 20.5% interest in the company.

As noted above, Elliot-Square transferred 400,000 shares to Newport on January 26, 2004. Resp. Ex. 28. On February 2, 2004, Lexington and IMT agreed to the Second IMT Option Plan, which granted IMT 895,000 shares. That same day, Stevens transferred 25,000 shares to both Newport and Pierce. Div. Ex. 88 at SEC 159221. This left Pierce personally holding 446,683 post-split Lexington shares, with Newport holding 1,935,589 post-split Lexington shares. Lexington's stock split increased outstanding common shares to 12,843,552, giving Pierce an 18.5% beneficial interest in Lexington. The execution of the Second IMT Option Agreement added 895,000 shares to the common shares, for a total of 13,738,552 shares. Div. Ex. 55 at SEC 103258. Including the unexercised options granted to IMT, over which Pierce had dispositive power, he had 23.9% interest in Lexington on February 2, 2004.

III. CONCLUSIONS OF LAW

It is concluded that Pierce violated Sections 5(a) and 5(c) of the Securities Act and Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder.[14]

A. <u>Pierce's Violations of Section 5 of the Securities Act</u>

The OIP alleges that Pierce violated Sections 5(a) and 5(c) of the Securities Act by offering to sell, selling, and delivering after sale to members of the public, Lexington stock when no registration statement was filed or in effect and no exemption from registration was available.

Section 5(a) of the Securities Act provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

[14] On February 2, 2009, at the conclusion of the Division's direct case, Pierce moved for summary disposition dismissing the charges against him. Tr. 211-19. The undersigned deferred ruling on the motion. Tr. 219. In light of the decision herein, Pierce's motion for summary disposition is denied.

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. § 77e(a) (2008). Section 5(c) of the Securities Act provides:

> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

15 U.S.C. § 77e(c) (2008). The purpose of the registration requirement, and the Securities Act as a whole, is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions." SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953).

A prima facie case for a violation of Section 5 of the Securities Act is established by showing that: (1) no registration statement was in effect or filed as to the securities; (2) a person, directly or indirectly, sold or offered to sell the securities; and (3) the sale was made through the use of interstate facilities or the mails. See SEC v. Cont'l Tobacco Co., 463 F.2d 137, 155 (5th Cir. 1972). A showing of scienter is not required. See SEC v. Universal Major Indus. Corp., 546 F.2d 1044, 1047 (2d Cir. 1976).

The Division argues that it has presented a prima facie case against Pierce for the sales from his personal account of Lexington stock that he acquired from the First S-8. Pierce argues, however, that he did not violate Section 5 of the Securities Act because the shares were registered on Form S-8, and he provided legitimate services to receive those shares.

The Division has shown that Pierce committed a prima facie violation of Section 5 of the Securities Act. Section 5 of the Securities Act is transaction specific, and, thus, the prima facie inquiry focus is on Pierce's transactions, not Lexington's filing of a Form S-8. SEC v. Cavanagh, 155 F.3d 129, 133 (2nd Cir. 1998); see Allison v. Ticor Title Ins. Co., 907 F.2d 645, 648 (7th Cir. 1990). Pierce admits he relied on Lexington's filing of a Form S-8, though that registration statement did not contain a reoffer prospectus to cover Pierce's subsequent trades. Pierce's reliance on the Form S-8 filed by Lexington is misplaced; his subsequent transactions must be registered, or he must present a valid exemption. The instructions accompanying Form S-8 say as much. See General Instructions C.1 and C.2 to Form S-8. The Division has shown Pierce sold the stock while it was held in street name at Brown Brothers Harriman and Co. in New York, through the Hypo Bank omnibus account at vFinance, satisfying the second and third prongs of the prima facie case.

Thus, the burden shifts to Pierce to prove the availability of any exemptions. See Ralston Purina, 346 U.S. at 126. Exemptions from registration are affirmative defenses that must be proved by the person claiming the exemptions. See Swenson v. Engelstad, 626 F.2d 421, 425

(5th Cir. 1980) (collecting cases); Lively v. Hirschfeld, 440 F.2d 631, 632 (10th Cir. 1971) (collecting cases). Claims of exemption from the registration provisions of the Securities Act are construed narrowly against the claimant. See SEC v. Murphy, 626 F.2d 633, 641 (9th Cir. 1980) (citing SEC v. Blazon Corp., 609 F.2d 960, 968 (9th Cir. 1979)); Quinn & Co. v. SEC, 452 F.2d 943, 946 (10th Cir. 1971) (citing United States v. Custer Channel Wing Corp., 376 F.2d 675, 678 (4th Cir. 1967)). "Evidence in support of an exemption must be explicit, exact, and not built on mere conclusory statements." Robert G. Weeks, 56 S.E.C. 1297, 1322 (2003) (citing V.F. Minton Securities, Inc., 51 S.E.C. 346, 352 (1993)).

Pierce claims that his sales of Lexington stock were exempt under Section 4(1) of the Securities Act. Section 4(1) exempts from the registration requirements "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1). The intent of Section 4(1) is "to exempt routine trading transactions between members of the investing public and not distributions by issuers or the acts of others who engage in steps necessary to those distributions." Owen V. Kane, 48 S.E.C. 617, 619 (1986), aff'd, 842 F.2d 194 (8th Cir. 1988). Pierce argues that the burden is not on him to prove the Section 4(1) exemption because the Lexington shares he sold were registered on Form S-8, and therefore not "restricted securities," but he cites no authority supporting his position. Indeed, the courts have held the contrary position. See, e.g., SEC v. Parnes, No. 01 CIV 0763 LLS THK, 2001 WL1658275, at *6 (S.D.N.Y. Dec. 26, 2001) ("[A] plaintiff need not plead the inapplicability of an exemption, as the party claiming exemption from registration requirements bears the burden of proving that the exemption applies."); SEC v. Tuchinsky, No. 89-6488-CIV 1-1 RYSKAMP, 1992 WL 226302, at *4 (S.D. Fla. June 29, 1992) (asserting that a defendant who sold stock that he collected as collateral for a loan bore the burden of proving he had an exemption from registration at trial). Thus, it is incumbent on Pierce to prove his claimed exemption.

Pierce has failed to prove his claimed exemption. Indeed, the Division has adduced a significant amount of evidence that disaffirms Pierce's position. The Division convincingly argues that Pierce was an affiliate and cannot avail himself of the Section 4(1) exemption. Section 2(a)(11) defines "issuer" to include "any person directly or indirectly controlling or controlled by the issuer . . . ." Id. "A control person, such as an officer, director, or controlling shareholder, is an affiliate of an issuer, and is treated as an issuer when there is a distribution of securities." Cavanagh, 155 F.3d at 134. An "affiliate of an issuer" is "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." 17 C.F.R. § 230.144(a)(1) (2008).

"Control" is defined as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405. "The affiliate inquiry is based on the totality of the circumstances, 'including an appraisal of the influence upon management and policies of a corporation by the person involved.' Affiliates are most often officers, directors, or majority shareholders—people who exercise control and influence over the company's policies or finances." SEC v. Freiberg, No. 2:05-CV-00233PGC, 2007 WL 2692041, *15 (D. Utah Sept. 12, 2007). Courts have looked to whether or not the person in question was capable of obtaining the required signatures of the issuer and its officers and directors on a registration statement. See SEC v. Lybrand, 200 F. Supp. 2d 384, 395 (S.D.N.Y. 2002) (quoting Cavanagh, 1 F. Supp. 2d 337, 366 (S.D.N.Y. 1998)).

As noted above, Atkins and Pierce were associates for many years. Atkins admitted that Pierce loaned him substantial sums of money and controlled his consulting assignments. Pierce, through Newport, provided Atkins with additional funds in 2003-04. Atkins' assertion that he could manage Lexington independently despite his relationship with Newport/Pierce is not consistent with this evidence. In fact, standing alone, Pierce's relationship with Atkins is sufficient to demonstrate his status as a control person.

Additionally, Pierce was a significant owner of Intergold stock, and after the acquisition, Lexington stock. He took measures to disguise his ownership of Lexington after he exercised his option shares. He and Atkins attempted to structure Pierce's first stock option exercise so that he would not cross the ten percent ownership threshold. He transferred the stock to Newport, in which Pierce testified he had no ownership interest, but the account documents he submitted to Hypo Bank demonstrate he was the beneficial owner. Pierce caused Newport to purchase Lexington stock in a private placement.

Other evidence points to Pierce's control of Lexington. Pierce controlled ICI and IMT, which provided consultants to Lexington, so Pierce determined who worked at Lexington. Elliot-Square, when he consulted for Lexington, reported to Pierce, not Atkins. Lexington operated out of the same office as IMT. Stevens knew that when he needed to get paid by Lexington, he should go to Pierce. Certainly, Pierce had the requisite power over Lexington to secure the signatures of its officers and directors on a registration statement.

The totality of the circumstances—Pierce's sway over Lexington's CEO, Atkins, his substantial ownership of Lexington stock, his control over the consultants assigned to work for Lexington—all point to Pierce's control of Lexington. His control of Lexington demonstrates that he was an affiliate, and thus cannot claim the Section 4(1) exemption. Thus, it is concluded that Pierce sold his Lexington stock without a valid registration statement or exemption from registration, violating Section 5 of the Securities Act.

B. Pierce's Violations of Sections 13(d) and 16(a) of the Exchange Act

The OIP alleges that Pierce violated Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder, by failing to make timely required filings disclosing his beneficial ownership of Lexington stock.

Section 13(d)(1) of the Exchange Act requires any person who acquires a direct or indirect beneficial ownership of five percent or more of an equity security registered under the Securities Act to file statements with the Commission within ten days of acquiring that interest. 15 U.S.C. § 78m(d)(1). Exchange Act Rule 13d-1 requires a person reporting his ownership to file a Form 13D with the Commission, and Exchange Act Rule 13d-2 requires reporting persons to update their Forms 13D if their holdings increase or decrease by one percent. 17 C.F.R. §§ 240.13d-1, .13d-2, .13d-101. Exchange Act Rule 13d-3 defines beneficial ownership to include any person who has the right to acquire ownership within sixty days via exercise of an option contract. 17 C.F.R. § 240.13d-3(d)(1)(A).

Section 16(a) of the Exchange Act places similar filing requirements on any person who acquires a direct or indirect beneficial interest in more than ten percent of any class of any equity security registered under the Securities Act. 15 U.S.C. § 78p(a). Exchange Act Rule 16a-3 requires beneficial owners to file an initial report of ownership on a Form 3, report changes in beneficial ownership by filing a Form 4, and annually file a Form 5. 17 C.F.R. § 240.16a-3(a). A finding of scienter is not required to demonstrate a violation of either section. See SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1167 (D.C. Cir. 1978) (holding scienter not required for violation of Section 13(d)(1) of the Exchange Act); SEC v. Blackwell, 291 F. Supp. 2d 673, 694-95 (S.D. Ohio 2003) (holding scienter not required for violation of Section 16(a) of the Exchange Act).

The Division argues that Pierce violated Section 13(d) of the Exchange Act during much of the time he owned Lexington stock, and he admits as much. He failed to file a Form 13D when he became a five percent beneficial owner in November 2003, and he did not make any filings to update his status as he sold his Lexington stock. He was also a five percent beneficial owner of Intergold, prior to the merger, through his control of Intergold shares owned by ICI and Newport. He first filed a Form 13D in July 2006.

The Division also argues that Pierce violated Section 16(a) of the Exchange Act between November 2003 and May 2004, by failing to file Forms 3, 4, or 5 disclosing his ten percent ownership interest in Lexington. Pierce counters that the Division's inclusion of the 950,000 option shares allocated to IMT in its calculation of his beneficial ownership is improper. However, Pierce's argument regarding the IMT options is irrelevant, as he passed the threshold for reporting under Section 16(a) of the Exchange Act through his holding Lexington stock in Newport's name. His acquisition of Lexington stock from his options exercise on November 23 and 24, 2003, took him over the ten percent reporting threshold. Because he is the beneficial owner of Newport, the attempt to evade reporting his beneficial ownership of Lexington by transferring Lexington stock to Newport was ineffectual. Pierce was required by Exchange Act Rule 16a-3 to file an initial report of ownership on a Form 3. He held more than ten percent of Lexington's outstanding stock on December 31, 2003, triggering a requirement to file a Form 5 under Exchange Act Rule 16a-3. Newport's acquisition of Elliot-Square's Lexington stock on January 26, 2004, represented an acquisition of more than one percent of Lexington outstanding stock, triggering the requirement to file a Form 4 under Exchange Act Rule 16a-3. Thus, on at least three occasions, Pierce violated Exchange Act Section 16(a) and Rule 16a-3 thereunder.

IV. SANCTIONS

The Division requests a cease-and-desist order and disgorgement of $9,601,347. As discussed below, Pierce will be ordered to cease and desist from violations of Sections 5(a) and 5(c) of the Securities Act and of Sections 13(d) and 16(a) of the Exchange Act, and Rules 13d-1, 13d-2, and 16a-3 thereunder, and to disgorge ill-gotten gains of $2,043,362.33.

A. <u>Sanction Considerations</u>

The Commission determines sanctions pursuant to a public interest standard. <u>See</u> 15 U.S.C. § 78ao(b)(6) of the Exchange Act. The Commission considers factors including:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

<u>Steadman v. SEC</u>, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting <u>SEC v. Blatt</u>, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. <u>Marshall E. Melton</u>, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. <u>See</u> <u>Schield Mgmt. Co.</u>, 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006).

B. <u>Sanctions</u>

1. Cease and Desist

Sections 8A of the Advisers Act and 21C of the Exchange Act authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of the Acts or rules thereunder. <u>KPMG Peat Marwick LLP</u>, 54 S.E.C. 1135 (2001), <u>reh'g denied</u>, 55 S.E.C. 1 (2001), <u>pet. denied</u>, 289 F.3d 109 (2002), <u>reh'g en banc denied</u>, 289 F.3d 109 (D.C. Cir. 2002).

Pierce's conduct was egregious and recurrent. He sold 325,000 shares of Lexington stock acquired from the IMT Option Plan over a period of four months without filing a registration statement to cover the transactions. As a control person making unregistered sales, he deprived the investing public of valuable information. He took measures to evade the beneficial ownership reporting requirements under Section 16(a) of the Exchange Act, and ignored the reporting requirements of Section 13(d) of the Exchange Act for more than two years. Pierce's failure to make disclosures regarding his beneficial ownership also deprived the investing public of valuable information. Pierce's failure to give assurances against future violations or to recognize the wrongful nature of his conduct is underscored by his failure to appear in person and give testimony on these or any other topics. Although a finding of scienter is not required to find any of the violations of Section 16(a) of the Exchange Act, the record is replete with evidence that Pierce acted with a high degree of scienter in attempting to conceal his ownership of Lexington stock.

Pierce's occupation will present opportunities for future violations. His violations are recent, and, in many ways, mirror the behavior for which the BCSC sanctioned him. The degree of harm to investors and the market place is quantified in his ill-gotten gains of at least $2,043,362.33. Further, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975).

2. Disgorgement

Sections 8A of the Securities Act and 21C of the Exchange Act authorize the Commission to order Pierce to disgorge ill-gotten gains. Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989); see also Hateley v. SEC, 8 F.3d 653, 655-56 (9th Cir. 1993). It returns the violator to where he would have been absent the violative activity. The amount of the disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation. See Laurie Jones Canady, 69 SEC Docket 1468, 1487 n.35 (April 5, 1999) (quoting SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996)); see also SEC v. First Pac. Bancorp, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998) (holding disgorgement amount only needs to be a reasonable approximation of ill-gotten gains); accord First City Fin. Corp., 890 F.2d at 1230-31.

The Division requests disgorgement of $9,601,347. The actual profits Pierce obtained from his wrongdoing charged in the OIP amount to $2,043,362.33. Pierce will be ordered to disgorge that amount, with prejudgment interest. This is roughly consistent with the sum that the Division represented, before the hearing, that it was seeking as ill-gotten gains from the sale of unregistered stock alleged in the OIP. At the September 29, 2008, prehearing conference, the undersigned advised that the disgorgement figure must be fixed so that Pierce could evaluate whether he wanted to present evidence concerning his ability to pay at the hearing, as required by the Commission's rules;[15] the Division stated that it was seeking $2.7 million in disgorgement. Prehearing Tr. 8-9 (Sept. 29, 2008). The Division refined this figure in its December 5, 2008, Motion for Summary Disposition to $2,077,969 plus prejudgment interest.

Subsequently, based on newly discovered evidence that the Division received after the hearing, the Division argued that over seven million dollars in additional ill-gotten gains should be disgorged, representing profits from the sale of unregistered stock by Jenirob and Newport. However, as the undersigned ruled previously, these entities are not mentioned in the OIP, and such disgorgement would be outside the scope of the OIP.[16] The Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing beyond the framework of the original OIP. See 17 C.F.R. §201.200(d); J. Stephen Stout, 52 S.E.C. 1162, 1163 n.2 (1996).

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on May 21, 2009.

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[15] See 17 C.F.R. §201.630; Terry T. Steen, 53 S.E.C. 618, 626-28 (1998).
[16] Lexington Res., Inc., Admin. Proc. No. 3-13109 (A.L.J. Apr. 7, 2009) (unpublished).

VI. ORDER

IT IS ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce CEASE AND DESIST from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 and of Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 and Rules 13d-1, 13d-2, and 16a-3 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Gordon Brent Pierce DISGORGE $2,043,362.33 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600. Pursuant to Rule 600(a), prejudgment interest is due from July 1, 2004, through the last day of the month preceding the month in which payment is made.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge