

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GORDON BRENT PIERCE,

Plaintiff,

v.

SECURITIES AND EXCHANGE
COMMISSION,

Defendant.
_____ /

No. C 10-3026 SI

**ORDER DENYING PLAINTIFF'S
MOTION FOR A PRELIMINARY
INJUNCTION, DISMISSING 10-3026 SI
FOR LACK OF JURISDICTION; AND
GRANTING APPLICATION FOR
ENFORCEMENT OF DISGORGEMENT
ORDER IN 10-80129 MISC**

SECURITIES AND EXCHANGE
COMMISSION,

Applicant,

v.

GORDON BRENT PIERCE,

Respondent.
_____ /

No. C 10-80129 MISC

On August 13, 2010, the Court held a hearing on Gordon Brent Pierce's motion for a temporary restraining order, preliminary injunction and a stay, and the SEC's application for an order enforcing an administrative disgorgement order. For the reasons set forth below, the Court DENIES Pierce's motion and GRANTS the SEC's application.

BACKGROUND

These related cases arise out of two separate administrative enforcement proceedings brought by the Securities and Exchange Commission (SEC) against Gordon Brent Pierce, a Canadian citizen.

1 The SEC initiated the first proceeding on July 31, 2008 by filing an Order Instituting Cease-and-Desist
2 Proceedings (“First OIP”) against Pierce, Lexington Resources, Inc., and Lexington’s CEO Grant
3 Atkins. The SEC claimed that Pierce violated the registration provisions of the Securities Act of 1933,
4 Sections 5(a) and 5(c), 15 U.S.C. § 77e(a) & (c), and the reporting provisions of the Exchange Act of
5 1934, Section 13(d) and 16(a), 15 U.S.C. §§ 78m(d) & 78p(a). Wells Decl. Ex. A (C 10-3046).

6 The First OIP charged, *inter alia*, that Pierce transferred or sold Lexington Resources stock
7 “through his offshore company,” OIP ¶ 14, and that “Pierce and his associates” deposited shares in
8 accounts at an offshore bank. *Id.* ¶ 15. Pierce moved for a more definite statement, and in response the
9 SEC took the position that transaction documents with which Pierce was familiar identified the
10 “associates” and the “offshore company”; those documents indicated that the “offshore company” was
11 Newport Capital Corp. (Newport) , and that Jenirob Company, Ltd. (Jenirob) was one of the
12 “associates.” Pierce asserts that “as a result of this informal amendment process, without ever actually
13 moving to amend the First OIP, the Commission itself specifically claimed that, to the extent Newport
14 and Jenirob were involved in the resale of Lexington stock by Pierce, the OIP included both for purposes
15 of ‘determining’ whether Mr. Pierce committed registration violations, and ‘whether Respondent Pierce
16 should be ordered to pay disgorgement.’” Motion at 4:12-16.

17 Administrative Law Judge Foelak held a three day hearing in February 2009. After the close
18 of evidence, the SEC moved for the admission of new evidence obtained from a foreign regulator which
19 purportedly showed that in addition to Pierce’s sales through his personal account, Pierce had illegally
20 sold 1.6 million shares of Lexington stock for \$7.7 million through two Liechtenstein accounts that
21 Pierce controlled in the names of Newport and Jenirob. Pierce opposed the admission of the new
22 evidence. In an order dated April 7, 2009, the ALJ held that the new evidence would be admitted for
23 purposes of liability, but not for disgorgement:

24 The Order Instituting Proceedings (OIP) authorizes disgorgement. At the
25 October 10, 2008 prehearing conference, the undersigned advised that the disgorgement
26 figure must be fixed so that Pierce could evaluate whether he wanted to present evidence
27 concerning his ability to pay at the hearing, as required by the Securities and Exchange
28 Commission rules; the Division stated that it was seeking \$2.7 million in disgorgement.
Tr. 8-9. The Division refined this figure in its December 5, 2008, Motion for Summary
Disposition to \$2,077,969 plus prejudgment interest, which it alleged are ill-gotten gains
from Pierce’s sale of allegedly unregistered stock.

1 Under consideration is the Division's Motion for the Admission of New
2 Evidence, filed March 19, 2009, and responsive pleadings. The new evidence consists
3 of information that the Division received from a foreign securities regulator, the
4 Liechtenstein Finanzmarktaufsicht (FMA), on March 10, 2009. The Division argues that
5 the new material bears on the issue of liability and also shows that over \$7 million in
6 additional ill-gotten gains should be disgorged, representing alleged profits from the sale
7 of allegedly unregistered stock by two corporations that Pierce allegedly controlled,
8 Jenirob Company, Ltd. (Jenirob), and Newport Capital Corp. (Newport). Pierce argues
9 that admitting new evidence at this late date violates due process and provides additional
10 exhibits that contravene the Division's new exhibits or diminish their weight. In reply,
11 the Division states the delay in producing the new material to the Division was entirely
12 Pierce's fault, as he refused to supply it in response to a 2006 subpoena and actively
13 opposed its release to the Division by the FMA.

14 Under the circumstances the record of evidence will be reopened to admit
15 Division Exhibits 78 - 89 for use on the issue of liability, but not for the purpose of
16 disgorgement based on sales of stock by Newport and Jenirob. These entities are not
17 mentioned in the OIP, and such disgorgement would be outside the scope of the OIP.
18 To ensure fairness, Respondent Exhibits A - M will also be admitted, and Pierce may
19 offer additional exhibits and a supplement to his proposed findings of fact and
20 conclusions of law and post-hearing brief by April 17, 2009, if desired.

21 Wells Decl. Ex. L (footnotes omitted).

22 On June 5, 2009, ALJ Foelak issued an Initial Decision finding that Pierce violated the Securities
23 Act by offering and selling shares of Lexington Resources stock without the necessary registration for
24 those offers and sales, and that he violated the Exchange Act by failing to file the required forms with
25 the Securities and Exchange Commission to disclose his beneficial ownership of, and transactions in,
26 Lexington shares. The ALJ found that Pierce was unjustly enriched in the amount of \$2,043,362.33,
27 and she ordered Pierce to pay that amount in disgorgement, plus interest. The disgorgement amount was
28 based on evidence regarding sales of 300,000 shares made from Pierce's personal account.

29 The Initial Decision stated that the recommended sanctions were to take effect unless a party
30 filed an appeal within 21 days. No party filed an appeal, and on July 8, 2009, the SEC issued notice that
31 the Initial Decision was final. Buchholz Decl. Ex. B. Under the SEC's Rules of Practice, Pierce was
32 required to pay the disgorgement and interest by July 9, 2009, the first day after the Initial Decision
33 became final. 17 C.F.R. § 201.601(a). Pierce has not paid any amount of the disgorgement and interest.
34 On June 8, 2010, the SEC filed an Application for an Order Enforcing Administrative Disgorgement
35 Order Against Respondent Gordon Brent Pierce, *Securities and Exchange Commission v. Gordon Brent*
36 *Pierce*, C 10-80129 MISC.

37 Also on June 8, 2010, the SEC initiated an administrative enforcement proceeding against Pierce,

1 Jenirob and Newport. This proceeding alleges that Pierce reaped \$7.7 million in unlawful profits by
2 selling 1.6 million shares of stock through Jenirob and Newport. In the second proceeding, the SEC
3 alleges that Pierce controlled Lexington by holding a majority of its stock and by providing Lexington
4 a consultant CEO who was employed by Pierce, and that Pierce made the stock sales through Newport
5 and Jenirob while he directed a widespread scam and newsletter campaign touting Lexington's stock.
6 To date, no rulings have been made on these allegations.

7 On July 9, 2010, Pierce filed a lawsuit in this Court, *Gordon Brent Pierce v. Securities and*
8 *Exchange Commission*, C 10-3026 SI. Pierce seeks to enjoin the SEC from prosecuting the second
9 administrative enforcement proceeding on the ground that it is barred by res judicata, collateral estoppel,
10 issue preclusion, equitable estoppel and due process. The complaint seeks declaratory and injunctive
11 relief, and alleges three claims: (1) declaratory/injunctive relief – res judicata; (2) declaratory/injunctive
12 relief – equitable estoppel; and (3) declaratory/injunctive relief – violation of Due Process.

13 Now before the Court are the SEC's application for an order enforcing the administrative
14 disgorgement order, and Pierce's motion for a temporary restraining order, preliminary injunction, and
15 stay. Pierce seeks (1) a temporary restraining order and an order to show cause why a preliminary
16 injunction should not be issued against the SEC enjoining it from proceeding with the second
17 administrative proceeding; and (2) a temporary stay of the SEC's application for an order enforcing the
18 disgorgement order pending a determination of the merits of the issues raised in the civil case filed by
19 Pierce (10-3026 SI).

20 21 DISCUSSION

22 I. *Pierce v. SEC, C 10-3026 SI*

23 A threshold question is whether the Court has jurisdiction over Pierce's complaint. The
24 complaint alleges that this case arises under the Securities and Exchange Acts, the Administrative
25 Procedure Act, and the Due Process Clause of the United States Constitution, and that the Court has
26 subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C.
27 § 702 (the Administrative Procedure Act). Compl. ¶¶ 4-5. The complaint also alleges that the Court
28 has the authority to grant the declaratory and injunctive relief sought pursuant to 28 U.S.C. §§ 2201 and

1 2202 (the Declaratory Judgment Act) and 28 U.S.C. § 1651 (the All Writs Act). *Id.* ¶ 5.

2 The SEC asserts that the Securities and Exchange Acts do not confer jurisdiction because Pierce
3 does not bring any claims under the Securities and Exchange Acts, and rather he brings this case to halt
4 the SEC’s enforcement of the federal securities laws against him. The three claims for declaratory and
5 injunctive relief alleged in the complaint do not arise under the Securities or Exchange Acts. Pierce
6 does not cite any authority for the proposition that an action seeking to enjoin an SEC administrative
7 proceeding arises under the federal securities laws, and in his briefing, Pierce appears to have abandoned
8 the assertion that this Court has jurisdiction based upon the federal securities laws. The Court agrees
9 with the SEC that the federal securities laws do not provide a basis for jurisdiction over Pierce’s
10 complaint.

11 The SEC also contends that the Administrative Procedure Act does not provide a basis for
12 jurisdiction. Pierce asserts that Section 705 of the APA provides a basis for jurisdiction. *See* Pl’s
13 Motion at 13 n.4. That section provides,

14 When an agency finds that justice so requires, it may postpone the effective date of
15 action taken by it, pending judicial review. On such conditions as may be required and
16 to the extent necessary to prevent irreparable injury, the reviewing court, including the
17 court to which a case may be taken on appeal from or on application for certiorari or
other writ to a reviewing court, may issue all necessary and appropriate process to
postpone the effective date of an agency action or to preserve status or rights pending
conclusion of the review proceedings.

18 5 U.S.C. § 705. However, as the SEC notes, Section 703 of the APA provides that “the form of
19 proceeding for judicial review is the special statutory review proceeding relevant to the subject matter
20 in a court specified by statute” 5 U.S.C. § 703. The federal securities laws provide that judicial
21 review of SEC orders is vested in the Court of Appeals. Section 25(a) of the Exchange Act states,

22 A person aggrieved by a final order of the Commission entered pursuant to this chapter
23 may obtain review of the order in the United States Court of Appeals for the circuit in
24 which he resides or has his principal place of business, or for the District of Columbia
Circuit, by filing in such court, within sixty days after the entry of the order, a written
petition requesting that the order be modified or be set aside in whole or in part.

25 15 U.S.C. § 78y(a)(1); *see also* 15 U.S.C. § 77i(a) (similar language in Securities Act); *see also Public*
26 *Utility Comm’r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (“[W]here
27 a statute commits review of final agency action to the court of appeals, any suit seeking relief that might
28 affect the court’s future jurisdiction is subject to its exclusive review.”).

1 Pierce simply asserts that the APA confers jurisdiction, *see* PI’s Motion at 13:n. 4, and does not
2 address the authority cited by the SEC. Pierce’s reply does not mention the APA as a basis for
3 jurisdiction, and thus it appears that Pierce has abandoned this contention. The Court concludes that
4 because Congress has established a specific statutory system for judicial review of SEC actions by the
5 Court of Appeals, Pierce cannot rely on the APA’s general review provisions as a source of jurisdiction.

6 Pierce suggests that the Court has jurisdiction pursuant to the Declaratory Judgment Act, 28
7 U.S.C. § 2201 and 2202. However, “[t]he use of the declaratory judgment statute does not confer
8 jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint brought
9 without the use of 28 U.S.C. § 2201.” *Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985)
10 (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 15-16 (1983)).
11 Similarly, the All Writs Act is not an independent source of federal question jurisdiction. *See Stafford*
12 *v. Superior Ct.*, 272 F.2d 407, 409 (9th Cir. 1959) (“The All Writs Act . . . does not operate to confer
13 jurisdiction . . . since it may be invoked by a . . . court only in aid of jurisdiction which it already has.”).
14 As such, Pierce’s reliance on *SEC v. G.C. George Sec. Inc.*, 637 F.2d 685 (9th Cir. 1981), is unavailing.
15 There, the Ninth Circuit held that a district court had jurisdiction to enjoin an administrative proceeding
16 which allegedly violated a settlement agreement that the district court had approved, where the
17 settlement agreement expressly conferred jurisdiction on the court to enforce the terms of the settlement
18 agreement. *Id.* at 687-88. The Ninth Circuit held that the district court’s jurisdiction was based on the
19 court’s retained continuing jurisdiction, as well as the All Writs Act. *Id.* The Ninth Circuit remanded
20 to the district court to consider whether administrative exhaustion was required. *Id.* at 688-89.

21 Finally, Pierce asserts that the Court has jurisdiction based on his due process claim, and under
22 28 U.S.C. § 1337, which confers original jurisdiction in actions arising under acts regulating commerce.¹
23 Pierce relies on *Martin v. Hodel*, 692 F. Supp. 637 (W.D. Va. 1998). In *Martin*, a coal mine operator
24 brought suit to enjoin the government from prosecuting the operator in an administrative proceeding for

25
26 ¹ The complaint does not allege 28 U.S.C. § 1337 as a basis for jurisdiction, and Pierce did not
27 assert this argument until his reply papers. *See* Reply at 2:13-14. Nevertheless, the Court will consider
28 this ground because the analysis of whether 28 U.S.C. § 1337 provides a basis for jurisdiction is
essentially the same as whether the due process claim provides a basis for jurisdiction, namely whether
the administrative agency is acting unlawfully, and thus falls in a narrow exception where the court has
jurisdiction and a party is excused from exhausting administrative remedies.

1 a violation of the Surface Mining Control and Reclamation Act. The coal mine operator had previously
2 been charged with a violation of the Act, and had prevailed when an administrative law judge found that
3 the operator's mine was exempt from the Act. *Id.* at 638. Seven years later, the government charged
4 the operator with the same violation of the Act based upon the same site. The operator filed suit in
5 federal court to enjoin the administrative prosecution, arguing "since the ALJ found Martin's Dickenson
6 County mining operation within the Act's two acre exemption in 1981, OSM is barred from further
7 action for the same violation at the identical site when Martin has engaged in no further mining at the
8 site." *Id.* The government argued that the court lacked jurisdiction because the operator was required
9 to exhaust his administrative remedies before seeking judicial review. The district court held that while
10 administrative exhaustion is generally required, "Individuals are not required to exhaust administrative
11 remedies when the administrative agency is acting unlawfully." *Id.* at 639. The court held that
12 "although the Act affords no specific review procedure for the illegal action by the Secretary, the court
13 may rely on its general federal jurisdiction pursuant to 28 U.S.C.A. § 1337 (original jurisdiction for civil
14 actions arising under any Act of Congress regulating commerce) to adjudicate this dispute." *Id.* The
15 court relied on *Leedom v. Kyne*, 358 U.S. 184 (1958), in which the Supreme Court held that a district
16 court had jurisdiction under 28 U.S.C. § 1337 to enjoin a federal agency when the agency was acting
17 in excess of its delegated powers and contrary to a specific provision in its authorizing Act.

18 The exception recognized in *Leedom* is a narrow one. The Ninth Circuit recently addressed
19 *Leedom* in *AMERCO v. N.L.R.B.*, 458 F.3d 883 (9th Cir. 2006). Although *AMERCO* arose in the labor
20 context, as did *Leedom*, the Court finds *AMERCO* and its discussion of *Leedom* instructive. In
21 *AMERCO*, the NLRB brought an administrative complaint against AMERCO for alleged unfair labor
22 practices. After the administrative trial was underway, AMERCO filed suit in district court seeking an
23 injunction to stop the administrative proceeding on due process grounds. AMERCO alleged that the
24 NLRB "had tried them in absentia for the first three weeks of the hearing, in an effort to gain an unfair
25 advantage from their absence and lack of representation, and with full knowledge that a complaint
26 ultimately would be filed against them." *Id.* at 886. The district court dismissed AMERCO's lawsuit
27 for lack of jurisdiction, holding that AMERCO was required to exhaust its administrative remedies, and
28 ultimately seek judicial review in the Court of Appeals. *Id.*

1 The Ninth Circuit affirmed. The court held that “[r]egardless of the viability of AMERCO’s
2 constitutional claims, the district court lacked jurisdiction to remedy them” because Section 10 of the
3 National Labor Relations Act vests exclusive jurisdiction in the Court of Appeals to review errors
4 arising from unfair labor practice proceedings. *Id.* at 887. Section 10 of the NLRA provides,

5 Any person aggrieved by a final order of the Board granting or denying in whole or in
6 part the relief sought may obtain a review of such order in any United States court of
7 appeals in the circuit wherein the unfair labor practice in question was alleged to have
8 been engaged in . . . by filing in such a court a written petition praying that the order of
9 the Board be modified or set aside.

10 29 U.S.C. § 160(f). The Ninth Circuit noted that “Section 10 provides no separate process for obtaining
11 injunctive relief prior to the issuance of a final order.” *Id.* at 887. In addition, the court emphasized that
12 “the exception advanced by AMERCO is inconsistent with the doctrine of administrative exhaustion.
13 Exhaustion serves two vital purposes: first, to give the agency an initial opportunity to correct its
14 mistakes before courts intervene; and second, to enable the creation of a complete administrative record
15 should judicial review become necessary.” *Id.* at 888. The Ninth Circuit also rejected AMERCO’s
16 argument that the district court had jurisdiction under *Leedom*. The court noted that *Leedom* arose in
17 the context of a Section 9 representation proceeding, for which Congress has not provided any judicial
18 review. *Id.* at 888-89. “The exception[] of *Leedom* derive[s] from the inequity that would result if no
19 court could review claims that the NLRB acted unconstitutionally or contrary to statutory authority in
20 a Section 9 determination.” *Id.* at 889. “[W]e hold that the *Leedom* . . . exception[] does not apply
21 outside the context of Section 9 actions or other situations in which meaningful judicial review is
22 unavailable.” *Id.* at 889-90.

23 As in *AMERCO*, the federal securities laws provide for exclusive judicial review of SEC orders
24 in the Court of Appeals, and indeed the language of Section 10 of the NLRA is very similar to the
25 language of Section 25(a) of the Exchange Act and Section 9(a) of the Securities Act. Similarly, the
26 federal securities laws do not provide for a separate process for obtaining injunctive relief prior to the
27 issuance of a final order. *AMERCO* emphasized the importance of administrative exhaustion, and the
28 narrowness of the *Leedom* exception. Pierce contends that exhaustion should be excused because
pursuit of administrative remedies would be futile. Pierce states that when he first learned that the SEC
was contemplating a second enforcement action, he submitted a “Wells submission” to the SEC

1 asserting that a second administrative proceeding would be barred by res judicata, and that the SEC
2 nevertheless initiated the second proceeding. However, as the SEC notes, under Section 554(d)(2) of
3 the APA, the members of a body of an agency, such as the SEC, are expressly permitted to participate
4 both in the “investigative or prosecuting functions for an agency” and the agency’s review of any
5 recommended decision from that proceeding. *See* 5 U.S.C. § 554(d)(2)(c); *see also San Francisco*
6 *Mining Exch. v. SEC*, 378 F.2d 162, 167-68 (9th Cir. 1967) (holding that fact that Commission “had
7 considered the staff report in determining whether to authorize the proceeding” “does not tend to show
8 that any Commissioner had prejudged the case, or was biased and prejudiced concerning it”). The
9 pending administrative proceeding affords a full range of quasi-judicial review and protections to Pierce,
10 and Pierce has the opportunity to submit any relevant evidence and assert his defenses, including the
11 arguments that the proceeding is barred by res judicata and equitable estoppel. *See* 17 C.F.R. §
12 201.220(c) (providing that “[a] defense of res judicata, statute of limitations or any other matter
13 constituting an affirmative defense shall be asserted in the answer” to an Order Instituting Proceedings).

14 Numerous courts have rejected similar efforts to enjoin SEC administrative proceedings, and
15 held that parties must exhaust administrative remedies prior to seeking judicial review, including when
16 the party seeking the injunction claims that the administrative proceedings violate due process. *See SEC*
17 *v. R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir. 1963) (reversing district court order enjoining SEC
18 administrative proceeding because administrative remedies not exhausted; plaintiff claimed due process
19 violation and that SEC Commissioner should be disqualified); *Wolf Corporation v. SEC*, 317 F.2d 139,
20 142 (D.C. Cir. 1963) (upholding refusal to enjoin SEC’s stop order proceeding against issuer’s proposed
21 securities registration, and holding that claims relating to evidence allegedly seized in violation of the
22 Fourth Amendment and challenges to the Commission’s authority must first be made to the
23 Commission); *First Jersey Sec. Inc. v. SEC*, 553 F. Supp. 205, 208-09 (S.D.N.J. 1982) (refusing to
24 enjoin SEC administrative proceedings, where plaintiff alleged various constitutional and statutory
25 violations because Second Circuit precedent mandates that “the procedures established for review of
26 SEC actions deprive this court of jurisdiction over suits that seek to interrupt the agency proceedings”).

27 Pierce is correct that in exceptional circumstances courts have enjoined administrative
28 proceedings, such as *Martin v. Hodel*, 692 F. Supp. 637 (W.D. Va. 1998), where the court found the

1 administrative agency was acting ultra vires. Pierce also relies on *Continental Can Company, U.S.A.*
2 *v. Marshall*, 603 F.2d 590 (7th Cir. 1979), and *Safir v. Gibson*, 432 F.2d 137 (2d Cir. 1970). However,
3 *Martin*, *Continental Can*, and *Safir* are distinguishable because in those cases, the plaintiffs filed suit
4 in federal court after they had prevailed on the merits in administrative proceedings, and then were
5 subject to new administrative proceedings charging them with liability based on the precise conduct
6 adjudicated in the earlier proceedings. The courts enjoined the new administrative proceedings on the
7 ground that those proceedings were vexatious, harassing, and barred by res judicata. Here, in contrast,
8 in the first administrative proceeding Pierce was found liable and ordered to pay disgorgement based
9 on sales of stock from his personal account, while the second administrative proceeding names Pierce,
10 Newport and Jenirob, and seeks disgorgement based on sales of stock through Newport and Jenirob.
11 On the face of it, Pierce’s two administrative proceedings are not analogous to the circumstances
12 presented in *Martin*, *Continental Can*, and *Safir*.

13 Moreover, in *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 433 (7th Cir. 1991), the Seventh
14 Circuit questioned the continuing vitality of *Continental Can* in light of the Supreme Court’s decision
15 in *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980). In *R.R. Donnelley*, the court held that
16 even when the second administrative proceeding relitigates the issues raised in a prior action, federal
17 courts lack jurisdiction to intervene in the administrative process because there is no final administrative
18 order subject to judicial review. In *R.R. Donnelley*, a commercial printer filed a petition in the Court
19 of Appeals seeking review of the FTC’s denial of the printer’s motion to dismiss an administrative
20 complaint. The printer argued that the administrative complaint was barred by issue preclusion because
21 a district judge had previously found, in a separate proceeding and after a trial, in the printer’s favor.
22 The printer argued, as Pierce does here, that the injury it was suffering was being required to undergo
23 the costly and time-consuming administrative process. *Id.* at 430.

24 We may assume that the ALJ is mistaken, that the FTC will eventually hand Donnelley
25 the laurel. We may even assume that if the FTC does not do this, a court will set aside
26 its order. Still, this case is far from over. The long road ahead is precisely Donnelley’s
27 beef. [*FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980) (*Socal*),] held that
28 the filing of a complaint is not a final decision even though it finally determines that
there is reasonable cause to proceed. Resolution of an issue is one thing, resolution of
the case another.

Id. at 431. The court held that there is no civil “right not to be tried”: “An inadequate opportunity

1 (sometimes even an inadequate incentive) to present one’s case the first time may permit another shot
2 in civil litigation. Legal errors by the judge may be overturned and the case re-done. Preclusion in a
3 civil case creates a ‘right not to be tried’ only in the sense that it creates a right to win; but many legal
4 doctrines do that without also creating a right to interlocutory appellate review.” *Id.* at 432-33. With
5 regard to *Continental Can*, the Seventh Circuit noted that *Continental Can* did not discuss jurisdiction
6 or the final order rule, and “whether there is *any* life to *Continental Can* after *Socal* remains to be seen.”
7 *Id.* at 433 (emphasis in original).

8 This Court emphasizes that it is not ruling on the merits of Pierce’s res judicata defense, or any
9 other defense; those defenses should be made to the SEC, and ultimately the Court of Appeals if Pierce
10 does not prevail before the agency. However, the Court does find that on this record, Pierce has not
11 shown that shown that this case falls within the narrow class of cases where administrative exhaustion
12 is excused and federal court intervention in ongoing administrative proceedings is warranted.

13
14 **II. SEC v. Pierce, 10-80129 MISC**

15 The SEC has filed this application to enforce the disgorgement order pursuant to Section 20(c)
16 of the Securities Act and Section 21(e) of the Exchange Act. Those sections provide that “Upon
17 application of the Commission, the district courts of the United States . . . shall have jurisdiction to issue
18 writs of mandamus commanding any person to comply with the provisions of this chapter or any order
19 of the Commission made in pursuance thereof.” 15 U.S.C. § 77r(c) (Securities Act); *see also* 15 U.S.C.
20 § 78u(e) (similar provision regarding Exchange Act). Because they are initiated by an “application,”
21 a Section 20(c) proceeding and a Section 21(e) proceeding may be decided in a summary proceeding
22 rather than in a formal civil action under the Federal Rules of Civil Procedure. *SEC v. McCarthy*, 322
23 F.3d 650, 656 (9th Cir. 2003). The Ninth Circuit has explained,

24 Summary proceedings are particularly appropriate where the merits of the dispute have
25 already been litigated extensively before the NASD, the Commission, and on appeal to
26 a circuit court, where the only remedy sought is enforcement of the previously upheld
27 order. . . .

27 Section 21(e) is an enforcement mechanism; its purpose is to ensure that NASD
28 members comply with the Commission. There is no evidence in the statute or its
legislative history from which to infer that § 21(e) was enacted to create another layer
of adjudication. Rather, § 21(e) authorizes district courts to issue writs of mandamus,

1 injunctions, and orders commanding NASD members, who violate Commission orders,
2 to comply with the Commission or face federal contempt charges. The forcefulness of
3 § 21(e)'s language is further evidence that Congress intended to authorize a more
4 summary procedure. By the time a § 21(e) application is filed by the Commission, the
5 time and opportunity for adjudicating the merits of the claim have been exhausted; all
6 that is left to do is enforce the order. Appellants should not be permitted to exploit this
7 statutory provision to delay and prolong the enforcement of a duly issued order of the
8 Commission.

9 *Id.* at 657-58. In a summary proceeding, the respondent must be provided an opportunity to respond to
10 the application. *Id.* at 658-59. However, the respondent cannot relitigate the merits. *Id.* at 658.

11 Here, Pierce does not dispute that the administrative disgorgement order is final. Instead, Pierce
12 seeks a temporary stay of the enforcement proceeding until the propriety of the new administrative
13 action is litigated. As discussed *supra*, the Court concludes that Pierce must exhaust his administrative
14 remedies in the new action, and thus this Court lacks jurisdiction over his federal action. Further, the
15 new administrative action has no impact whatsoever on Pierce's obligation to pay the disgorgement
16 order. Pierce cannot and does not challenge the validity of the disgorgement order before this Court;
17 instead, he challenges the validity of the new administrative action. As the SEC argues, if Pierce is
18 found liable in the new administrative proceeding, Pierce must pay the current \$2 million disgorgement
19 amount plus any additional disgorgement ordered based on the second action. If, on the other hand,
20 Pierce is found not liable in the new administrative proceeding, Pierce must still pay the \$2 million
21 disgorgement order.

22 Accordingly, the Court GRANTS the SEC's application enforcing the administrative
23 disgorgement order. The Court orders that within 21 days from the date of this Order, respondent
24 Gordon Brent Pierce shall comply with the Commission's administrative disgorgement order by paying
25 the full amount of \$2,043,362 in disgorgement, plus pre-judgment and post-judgment interest at the rate
26 established by 26 U.S.C. § 6621(a)(2), beginning July 1, 2004 through the last day of the month
27 preceding the month in which payment is made, compounded quarterly. Through May 31, 2010, total
28 pre-judgment and post-judgment interest was \$867,495. Payment of disgorgement and interest shall be
made to the Commission, in accordance with Rule 601 of the Commission's Rules of Practice, 17 C.F.R.
§ 201.601, by United States postal money order, wire transfer, certified check, bank cashier's check, or
bank money order made payable to the Securities and Exchange Commission. Payment shall be

1 accompanied by a letter that identifies the name and number of the administrative proceeding against
2 Pierce and that identifies Pierce as the respondent making payment. A copy of the letter and the
3 instrument of payment shall be sent to counsel for the Division of Enforcement.

4
5 **CONCLUSION**

6 For the foregoing reasons, the Court DENIES Pierce's motion for a TRO, preliminary injunction
7 and stay (Docket No. 6 in C 10-3026 SI) and GRANTS the SEC's application for an order enforcing
8 administrative disgorgement order (Docket No. 1 in C 10-80129 MISC). The Court DISMISSES *Pierce*
9 *v. SEC*, C 10-3026 for lack of jurisdiction and failure to exhaust administrative remedies. The clerk
10 shall close both files.

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12 **IT IS SO ORDERED.**

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14 Dated: September 2, 2010

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17 SUSAN ILLSTON
18 United States District Judge
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