

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3761/April 4, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17104

In the Matter of

BIOELECTRONICS CORP.,
IBEX, LLC,
ST. JOHN'S, LLC,
ANDREW J. WHELAN,
KELLY A. WHELAN, CPA, and
ROBERT P. BEDWELL, CPA

OMNIBUS ORDER GRANTING IN
PART MOTION FOR MORE
DEFINITE STATEMENT

On February 5, 2016, the Securities and Exchange Commission issued an order instituting proceedings (OIP) against Respondents pursuant to Section 8A of the Securities Act of 1933, Sections 4C, 15(b), and 21C of the Securities Exchange Act of 1934, and Rule 102(e) of the Commission's Rules of Practice.

On March 14, 2016, two motions for a more definite statement were filed—one by Robert P. Bedwell, CPA, and the second by BioElectronics Corp., IBEX, LLC, St. John's, LLC, Andrew J. Whelan, and Kelly A. Whelan, CPA (the five Respondents). The Division of Enforcement responded on March 21, 2016, and the five Respondents replied on March 24, 2016. Bedwell did not file a reply.

In his motion, Bedwell argues that “[t]he OIP fails to state the standard for the determination of the state of mind of Mr. Bedwell in conducting the single audit which forms the basis of the charges against him.” Bedwell Mot. at 2. In its response, the Division alleges that “Bedwell’s professional misconduct represents . . . both reckless and negligent conduct as provided in [Commission] Rule [of Practice] 102(e)(iv)(A) and (B),” and that “the Division will demonstrate . . . both a ‘single instance of highly unreasonable conduct in violation of professional standards in circumstances in which [he] [knew] or [should have known], that heightened scrutiny was warranted,’ and ‘repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.’” Div. Resp. at 5 (last three alterations in original). Because the Division has adequately clarified its allegations as to Bedwell’s state of mind, Bedwell’s motion is DENIED AS MOOT.

The five Respondents assert four arguments in their motion, which I address below.

1. Securities Act Section 5 claims

The five Respondents argue that “[t]he OIP is unclear as to whether a Section 5 claim is asserted and on what factual allegations it is based,” noting that “[n]o mention, whatsoever, is made of a claim based on Section 5 of the Securities Act until Paragraph 38 of the OIP.” Mot. at 2. The five Respondents request that the Division “be compelled to either strike any mention of Section 5, or, alternatively, provide a clear statement in the title and introductory paragraph that it is pursuing a claim under Section 5,” and “allege, with particularity, the factual basis upon which such claim is made and the specific respondents against whom such claim is asserted.” *Id.*

Respondents in administrative proceedings are entitled to know the charges against them and to have access to documents in the Division’s investigative file so they may adequately prepare their defense; however, respondents are not entitled to a disclosure in the OIP of what evidence the Division intends to rely on at the hearing. See *David F. Bandimere*, Securities Act Release No. 9972, 2015 SEC LEXIS 4472, at *55 (Oct. 29, 2015) (“[T]he OIP need not allege all of the evidence on which the Division intends to rely.” (internal quotation marks omitted)); *Rita J. McConville*, 58 S.E.C. 596, 627 (June 30, 2005) (“The OIP must inform the respondent of the charges in enough detail to allow the respondent to prepare a defense, but it need not disclose to the respondent the evidence upon which the Division intends to rely.”), *pet. denied*, 465 F.3d 780 (7th Cir. 2006). Rule of Practice 200(b) requires that the OIP “set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto.” 17 C.F.R. § 201.200(b). In determining whether the OIP provides adequate notice of the charges, “the question is whether the respondent understood the issue and was afforded full opportunity to justify [his or her] conduct during the course of the proceeding.” *David F. Bandimere*, 2015 SEC LEXIS 4472, at *55 (internal quotation marks omitted; alterations in original).

The OIP alleges that from at least August 2009 to November 2014, the five Respondents violated Section 5 by “distribut[ing] hundreds of millions of unrestricted [Bioelectronics] shares in a series of unregistered transactions.” See OIP ¶¶ 1, 10-18, 37-38. The OIP describes the alleged distribution scheme in detail, and provides examples of the different capacities in which the five Respondents participated. *Id.* ¶¶ 11-16. That the caption and introductory paragraph of the OIP make no mention of Section 5 is immaterial; the five Respondents identify no requirement that the alleged statutory violation must be recited in the caption or introductory paragraph, nor am I aware of any such requirement. Except as discussed below, the OIP sufficiently informs the five Respondents of the factual and legal basis for the Section 5 claims, allowing them to present a defense and respond to the allegations. This request is therefore DENIED.

2. Securities transactions at issue

The five Respondents argue that “[t]he OIP fails to provide any notice of the specific transactions to which the claims are aimed, by date, amount, specific securities purchased or sold, the relief sought with respect to each transaction and the person or persons as to which such relief is sought with respect to each transaction.” Mot. at 2-3. In its response, the Division

argues that the OIP adequately alleged the factual and legal basis supporting the Section 5 claims, and notes that it has produced to Respondents “all non-privileged documents that it received from Respondents and third parties during the investigation,” including a chart prepared by the five Respondents “purporting to identify the ‘loans’ that IBEX made to [BioElectronics], and the unregistered [BioElectronics] stock transactions giving rise to the OIP.” Div. Resp. at 6-7. In their reply, the five Respondents argue that due process of law and fairness require disclosure of the specific transactions at issue, and additionally request that the Division identify “the manner of sale (private or public)” for each transaction. Reply at 2, 3.

The five Respondents’ request is GRANTED IN PART. In its opposition, the Division first suggests that the chart the five Respondents prepared comprises the universe of the transactions supporting the OIP, but then, in the next paragraph, it implies that not all of those transactions may be at issue. *See* Div. Resp. at 7. This is sufficiently confusing that the five Respondents may not be able to properly respond to the OIP and prepare a defense. Therefore, the Division shall identify, in the form of a spreadsheet, if appropriate, each transaction it believes supports its Section 5 claims by the date of the transaction and the buyer and seller. If more than one sale of stock occurred on one day between the same parties, the Division shall identify each separate transaction. I decline to order the Division to include the amount of each transaction, the manner of sale, or the relief it seeks for each transaction and from which Respondent, because that information is unnecessary to properly respond to the OIP. However, I encourage the Division to furnish this information to the five Respondents because it may facilitate settlement. The Division shall file the more definite statement by April 15, 2016.

3. Andrew Whelan and BioElectronics Corp.’s control over Kelly Whelan and IBEX, LLC

The five Respondents request “a statement with particularity of the facts upon which the Division concludes that Andrew Whelan and [BioElectronics], as borrower, controlled Kelly Whelan and IBEX.” Mot. at 4.

The OIP sufficiently alleges control by Andrew Whelan and BioElectronics over Kelly Whelan and IBEX, and additionally provides examples illustrating the control. *See* OIP ¶¶ 1, 3, 10-11, 13-16. The five Respondents’ request is transparently one for evidence upon which the Division intends to rely at the hearing, which the Division need not provide at this stage. *David F. Bandimere*, 2015 SEC LEXIS 4472, at *55. This request is therefore DENIED.

4. Defining Andrew Whelan as “Whelan”

Finally, the five Respondents request that Andrew J. Whelan be defined as “A. Whelan,” rather than “Whelan,” which they argue “intentionally conflates the Whelan Respondents.” Mot. at 3. The OIP adequately differentiates between the Whelan Respondents, and there is no confusion as to which Whelan Respondent is referred to in the OIP. This request is therefore DENIED.

Cameron Elliot
Administrative Law Judge