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

Administrative Proceedings Rulings
Release No. 5591 / February 14, 2018

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

Order Ratifying in Part and Revising in Part Prior Actions

The Securities and Exchange Commission remanded this case to me following the issuance of an initial decision. *See Pending Admin. Proc.*, Securities Act of 1933 Release No. 10440, 2017 WL 5969234 (Nov. 30, 2017). Consistent with the Commission's remand order, the parties were given the opportunity to submit by January 12, 2018, new evidence that they deemed relevant to my reexamination of the record, as well as opening and responsive briefs. *BioElectronics Corp.*, Admin. Proc. Rulings Release Nos. 5296, 2017 SEC LEXIS 3899 (ALJ Dec. 6, 2017); 5425, 2017 SEC LEXIS 4222 (ALJ Dec. 27, 2017). Respondents filed an opening brief with eleven exhibits—which were briefs, declarations, and orders previously filed in this proceeding—and a supplemental brief. The Division filed an opening letter brief and a responsive brief.

Respondents raise a number of points that they previously raised in their post-hearing briefs and in their motion to correct manifest errors of fact. *See, e.g.*, Respondents Br. Sections F, G, I. As instructed by the Commission, I have reconsidered these points in light of the entire record, and I find them as unpersuasive now as they were originally. Respondents also raise new issues, but many of these lack merit and do not warrant discussion. *See, e.g.*, *id.* Sections H, I.2, I.6.

Four points raised by Respondents do require additional discussion, though.

1. Respondents argue that the briefing schedule for this reconsideration on remand "stymied" due process by not permitting an "adequate time" or "reasonable length" for their reconsideration brief. Respondents Br. 3. Respondents had forty-three days from December 6, 2017, to January 12, 2018, to submit their new evidence and brief. Respondents were also permitted to incorporate by reference any relevant portions of previous filings, and they submitted eleven prior filings totaling 415 pages, including the entirety of their briefing to the Commission appealing the initial decision. The Commission directed me to reconsider the entire record, which includes the week-long hearing and the parties' extensive briefing, and I have done so. Respondents do not explain how they were prejudiced because I did not grant them thirty additional days to file a fifty page brief, and Respondents' ability to submit new evidence was not limited at all. The briefing schedule, which was more generous than what the Commission originally ordered, plainly did not violate the Due Process Clause. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))); *Jonathan Feins*, Exchange Act Release No. 41943, 1999 SEC LEXIS 2039, at *25-26 (Sept. 29, 1999) ("Administrative due process is satisfied where the party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding.").

2. Respondents also assert that the Commission's ratification of my appointment as a Commission administrative law judge was invalid. Respondents Br. 4-5. This argument is unavailing. The Commission's ratification order "put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause." *Pending Admin. Proc.*, 2017 SEC LEXIS 3724, at *1 (Nov. 30, 2017). Respondents' contention that the Commission "could not and did not make a 'detached affirmation'" of the appointment of its administrative law judges is unsupported by any evidence, and is inconsistent with the ratification order itself, which was obviously the result of careful deliberation. Respondents Br. 5. And even if it were "nothing more than a rubberstamp," the Commission's ratification still resolved any Appointments Clause deficiencies. *CFPB v. Gordon*, 819 F.3d 1179, 1191-92 (9th Cir. 2016) (quoting *FEC v. Legi-Tech*, 75 F.3d 704, 709 (D.C. Cir. 1996)); *see Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017).

Respondents' argument that the Commission "could not ratify any ALJ's appointment unilaterally" because the Office of Personnel Management

(OPM) administers the administrative law judge merit-selection process is similarly baseless. The fact that OPM conducts an examination and provides a list of eligible administrative law judge candidates to an agency is irrelevant. By law, the appointment authority is vested in the Commission, not in OPM. 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."). Previously, the Commission delegated this authority to its staff, and the Commission has now ratified its staff's decision, which resolves any Appointments Clause challenge.

3. After I issued the initial decision, the Supreme Court decided *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which held that "any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued." *Id.* at 1645; *see* 28 U.S.C. § 2462. The parties agree that some of the disgorgement ordered in the initial decision was based on conduct that occurred outside the statute of limitations period.

In the initial decision, the measure of disgorgement was the value of the securities sold minus their cost of acquisition. *BioElectronics Corp.*, Initial Decision Release No. 1089, at 55, 2016 SEC LEXIS 4597 (ALJ Dec. 13, 2016) (Initial Decision). With respect to IBEX, the aggregate proceeds were $4,296,266, the aggregate cost of acquisition was $2,715,673, and disgorgement was set at $1,580,593.[1] *Id.* Although the parties have presented arguments for alternative ways to calculate disgorgement (Respondents believe disgorgement should be zero and the Division argues for the entire proceeds to be disgorged without discounting the cost of acquisition), upon reconsideration I continue to find that the method used in the initial decision is the best means for determining disgorgement.

The parties agree that under *Kokesh* no disgorgement may be imposed for claims that accrued before April 17, 2010.[2] Respondents Br. 6; Div. Suppl. Submission to Comm'n 4 (June 16, 2017). Therefore, the aggregate proceeds must be reduced by $813,000 to account for sales before that date. Joint

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[1] I found IBEX, BioElectronics, Andrew Whelan, and Kelly Whelan jointly and severally responsible for the $1,580,593. Separately, I ordered St. John's, BioElectronics, and Andrew Whelan to disgorge jointly and severally $240,293.21. All the proceeds from the St. John's transactions took place within the limitations period and do not need to be revised in light of *Kokesh*.

[2] Due to a tolling agreement, this is more than five years before the Commission issued the order instituting proceedings on February 5, 2016.

Stipulation of Facts, Exhibit B, at 1; *accord* Respondents Br. 6-7; Div. Suppl. Submission to Comm'n 5. The Division also suggests that the cost of acquisition should be reduced by $105,000. Div. Suppl. Submission to Comm'n 5. Respondents correctly point out, however, that this $105,000 was not originally included in the cost of acquisition and should not now be deducted from it. Respondents Br. 7; *see* Initial Decision at 55 (declining to deduct the $105,000 because "the record is insufficient to determine precisely how much of the original loan should be apportioned to what was sold in 2010"). In its response brief, the Division acknowledged that it may have made an error in reducing the costs of acquisition by the $105,000. Div. Resp. 5 n.2.

To comply with *Kokesh*, the disgorgement ordered for IBEX, jointly and severally with BioElectronics, Andrew Whelan, and Kelly Whelan, will be reduced by $813,000, to $767,593.

4. Respondents argue that disgorgement should be further reduced by "the amount of lawful interest earned on the debt." Respondents Br. 7. Respondents first raised this point in their motion to correct manifest errors of fact. I did not address it in my ruling on that motion, but since the Commission's remand order allows me to "revise in any respect all prior actions," I will consider it here. *Pending Admin. Procs.*, 2017 SEC LEXIS 3724, at *3.

Respondents' argument misses the point. As noted, the measure of disgorgement is the value of the securities sold minus their cost of acquisition. Accrued interest is not a cost of acquisition or a direct transaction cost that reduced IBEX's actual profit. *See SEC v. Universal Express, Inc.*, 438 F. App'x 23, 26 (2d Cir. 2011) ("Courts in this Circuit consistently hold that a court may, in its discretion, deduct from the disgorgement amount any direct transaction costs ... that plainly reduce the wrongdoer's actual profit." (quoting *SEC v. McCaskey*, No. 98 Civ. 6153, 2002 U.S. Dist. LEXIS 4915, at *14 (S.D.N.Y. Mar. 26, 2002))). Instead, it is the lender's gain from the loan. But every relevant IBEX loan was renegotiated, sold to third parties, or converted to stock; no loans were paid back in cash, and the accrued interest was simply capitalized. Tr. 246-49. It is therefore irrelevant whether any interest was "lawful" because the disposition of each loan was unlawful: IBEX either unlawfully converted more shares than it otherwise would have (because the unpaid interest was capitalized) or unlawfully sold the loan for a higher price than it otherwise would have (because the accrued interest made the loan more valuable to a third-party

purchaser).[3] Therefore, I will not deduct interest from the disgorgement ordered.

Order

The initial decision is REVISED to reduce the disgorgement ordered jointly and severally for BioElectronics Corp., IBEX, LLC, Andrew J. Whelan, and Kelly A. Whelan from $1,580,593 to $767,593. Prejudgment interest shall be calculated from the revised amount. In all other respects, I RATIFY the initial decision and all other prior actions taken by an administrative law judge in the proceeding.[4] The process contemplated by the Commission's November 30 order is complete.

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Cameron Elliot
Administrative Law Judge

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[3] In some cases IBEX sold notes without the accrued interest, which remained payable to IBEX. Tr. 1239. Respondents do not argue that this retained interest should be included in the cost of acquisition. *See* Mot. to Correct Manifest Errors of Fact Ex. 1.

[4] My designation as the presiding administrative law judge in this proceeding has already been ratified. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5247, 2017 SEC LEXIS 3780 (ALJ Dec. 4, 2017).