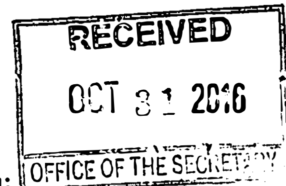
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of BIOELECTRONICS CORP., IBEX, LLC, ST. JOHN'S, LLC, ANDREW J. WHELAN, KELLY A. WHELAN, and ROBERT P. BEDWELL, CPA Respondents.	Administrative Proceeding File No. 3-17104 Hon. Judge Cameron Elliot

RESPONDENTS' POST-HEARING BRIEF

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I.

INTRODUCTION

BioElectronics Corp ("BioElectronics" or "BIEL"), IBEX, LLC ("IBEX"), St. John's, LLC ("St. John's"), Andrew J. Whelan and Kelly A. Whelan, collectively all respondents excluding only Robert P. Bedwell (hereafter, the "Respondents"), respectfully submit the following post-hearing brief.

This case presents three determinative issues: (1) were IBEX's transactions exempt from the registration requirements of Section 5; (2) were St. John's transactions exempt from the registration requirements of Section 5; and (3) were BioElectronics' withdrawal of its registration statement filings in 2006-2007 effective, such that it owed no reporting duties to the Commission? As detailed below, the answer to each question is: YES. Accordingly, this Court should rule for the Respondents on all counts.

The hearing on this matter occurred September 19 through 26, 2016. At the hearing, the parties presented the testimony of three of Respondents' experts, Brian Flood (re IBEX holding periods between acquisition of securities – date IBEX went at risk for such investment --and disposition in private party transactions), Dr. Linsley (GAAP revenue recognition) and Robert Hills (events study); against testimony of the Division's experts, William Park (holding periods by IBEX of cash after disposition of long-held securities and its reinvestment in new BioElectronics convertible note), Albert Vondra (GAAP revenue recognition); and Benjamin Sacks (criticisms of Hills' events study). In response to the Division's motion *in limine*, the Court decided before the hearing that it would not strike, but also would put no weight, on the Respondents' expert reports of Richard Cutler (re compliance with securities laws); Richard Staelin (re IBEX had no power over BIEL and vice versa) and David Robinson (IBEX had strong profit incentives on the face of the BIEL convertible notes to make such investments

without a scheme to evade securities laws), and directed that such witnesses not attend the hearing (except Richard Staelin as to factual issues). Mr. Staelin and Mr. Flood offered character testimony in favor of Andrew Whelan, but the Court rejected and struck such testimony on the grounds that a single witness may not offer both factual or expert testimony, as well as character testimony. [1]

In addition, Respondents offered the testimony of Andrew Whelan, Kelly Whelan, Richard Staelin and Mary Whelan on all factual issues pertinent to the case.

The Section 5 (17 USC §77e) charges hinge on whether the transactions were exempt from registration under Section 4 of the Act (15 USC §77d). The applicable exemptions are Section 4(a)(1), (2) and (7) of the Securities Act. Section 4(a)(1) implicates the safe harbor provisions of Rule 144 (17 CFR 230.144).

Chronologically, the analysis starts with the issuance of unregistered convertible notes and stock by BioElectronics to IBEX and St. John's. Section 4(a)(2) of the Securities Act exempts "transactions by an issuer not involving any public offering." The uncontroverted testimony of Andrew Whelan, Kelly Whelan, Mary Whelan and Richard Staelin unanimously supports a finding that IBEX and St. John's were private parties to whom such securities were issued. Thus, transactions in which BioElectronics issued securities in the form of convertible notes and stock to IBEX and St. John's, each private parties, were exempt under Section 4(a)(2). The fact that those parties then held such securities for well over a year before such notes were sold privately then converted into stock, or converted into stock and sold privately, reflects that Section 4(a)(2) was intended to apply to exactly these types of transactions.

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[1] Respondents found no legal precedent or support for such rulings and contend that such rulings constituted an abuse of discretion. Other rulings by the Court striking and precluding Respondents' evidence are noted in the record.

The next set of transactions chronologically are St. John's and IBEX's sales of such securities, after holding periods of over one year, and averaging more than 30 months. These transactions were exempt from registration under Section 4(a)(1). Section 4(a)(1) of the Securities Act exempts from registration "transactions by any person, other than an issuer, underwriter or dealer." The Division does not and cannot contend that IBEX and St. John's were issuers (BIEL is the issuer) or dealers.

The uncontroverted testimony of Brian Flood and Kelly Whelan established that IBEX was at risk for its investments in BioElectronics for more than one year, in every case, and more than two years and three years in most cases, before those securities were sold to third party purchasers in arms-length private transactions. Indeed, the average period that IBEX held its BioElectronics securities before resale exceeded 30 months. RX 1A, RX 206; RT 1112 et seq., RT 1202 et seq. St. John's sales at issue in this case occurred nearly three years after it became at risk for such loans. DX 1. Because of such long holding periods and continuing long term investments in BIEL, the Court should find that St. John's and IBEX clearly were fully committed long term private investors, not underwriters or dealers.

Even the testimony of Mr. Park, the Division's expert witness on the issue, concedes that a person in the business of an underwriter or dealer would not normally remain at risk for the investments for which it was engaged to underwrite or deal, much less do so consistently over the lengthy holding periods for which IBEX and St. John's held their securities. Underwriters and dealers do not remain at risk for the securities underwritten and dealt by them.

This Court should find that IBEX and St. John's were not underwriters or dealers. It is axiomatic that IBEX and St. John's did not intend to be part of a distribution of securities to the public when they acquired such securities from BIEL years earlier. Thus, the IBEX and St. John's transactions were exempt under Section 4(a)(1).

Such conclusion is not dependent on compliance with Rule 144, a non-exclusive Rule which definitively provides a safe harbor for those in compliance. Indeed, Respondents concede that St. John's, an affiliate of BioElectronics, did not technically comply with Rule 144, as it did not timely file its Form 144. Nevertheless, St. John's did not remotely act like an underwriter or dealer. It acquired its debt in private transactions, through loans and accrued salary of Andrew Whelan (who accrued but was not paid a modest salary of $150,000 per year). St. John's converted and sold conversion shares, after holding such convertible notes and shares, collectively, for over 34 months. When St. John's finally did sell the shares, it did so through a registered broker dealer. St. John's was clearly not conducting the business of an underwriter or dealer. DX 1.

IBEX, on the other hand, did comply with Rule 144 and, as such, is entitled to the safe harbor protection that it shall not be construed by the Court as an underwriter. As a non-affiliate, the lengthy holding periods of IBEX's securities easily comply with Rule 144.

The Division hopes to invite a hurricane of uncertainty onto Rule 144's safe harbor. The Division contends that BIEL controlled IBEX or was under common control. Andrew Whelan, Kelly Whelan, Richard Staelin and Mary Whelan emphatically and uniformly testified that IBEX did not control BIEL, and vice versa. K Whelan RT 430 et seq. and RT 444, A Whelan RT 644 et seq.; A Whelan RT 878 et seq.; R. Staelin RT 1258-1259.

If the Court were to find that IBEX was an affiliate of BIEL during some portion of time, then IBEX transactions during that time would not satisfy Rule 144 due to the fact that IBEX did not file Form 144's for such transactions. Nevertheless, even if the Court were to find that IBEX did not meet its burden of establishing its compliance with Rule 144 (which it should not do), the Court should nevertheless find that IBEX was not in the business of an underwriter or dealer

(based on its lengthy holding periods, among other things), and thus is entitled to the exemption from registration set forth in section 4(a)(1).

Recently enacted section 4(a)(7) exempts all of St. John's and IBEX's sales as well, reflecting Congressional intent to expand exemption from registration requirements to stimulate economic growth through encouraging investments.

Turning to the alleged reporting violations under Sections 12 and 13, the Division has not and cannot establish that BioElectronics owed such reporting obligations, much less violated them. The Division alleges at footnote 2 of its OIP that "BioElectronics' Section 12 reporting obligation arose as a result of its filing a Form 8A-12g on February 12, 2006 in conjunction with a registration statement on Form SB-2. The Form 8A-12g went effective by operation of law under Section 12(g) 60 days after filing, even though the Form SB-2 was subsequently withdrawn." The Division misreads the law.

BioElectronics filed a Form 8A-12g and SB-2 in February 2006 which were formerly withdrawn by BioElectronics in July 2006. Kirkpatrick Lockhart (now KL Gates), a prominent securities law firm, represented BioElectronics and assisted it through the registration and withdrawal process. RX 188, RX 189, RX 190; RT 91 et seq. The Division's contention that Kirkpatrick Lockhart incorrectly guided BioElectronics' withdrawal is simply mistaken. The withdrawal complied with all applicable laws and was completed competently.

As detailed below, any fair reading of Section 12(g) makes clear that the automatic 60-day registration provision on which the Division relies would apply only where registration was mandatory under Section 12(g) and does not apply where, as with BioElectronics, such registration statement was not required. BioElectronics always had less than 300 shareholders of record and thus was never required to register a class of shares. Because registration was not automatic, BioElectronics' withdrawal under Rule 477 went effective in 2006. Accordingly,

BioElectronics never had a class of registered securities and thus never owed reporting obligations upon which the Division's claims are based. Thus, the Division's claims based on such reporting obligations fail as a matter of law.

Even if the Court were to accept the Division's invitation to misread section 12(g) to automatically register BioElectronics' securities and on that basis find that BioElectronics' withdrawal was ineffective, the Division failed to establish at trial that the YesDTC and eMarkets sales transaction revenue was falsely or prematurely reported. As Dr. Linsley testified, the revenue from such transactions, which was indisputably received, was properly reported in BioElectronics' 2009 Form 10-K. RX 203, RT 1309-10; 1312, 1315, 1316, 1339-40. Dr. Linsley also opined that the two transactions were immaterial. RT 1349-50; RT 203. BioElectronics received every bit as much from such immaterial one-time transactions as disclosed, and no revenue therefrom has ever been refunded. Any accounting differences in the reports of such receipts would be immaterial to investors in the context of a company in which a dire going concern warning was openly and regularly disclosed in their financial statements.

The Division's claims, in their entirety, lack merit. Judgment should be issued in favor of the Respondents. In the event the Court is inclined to award a monetary judgment, Respondents ask the Court to limit its disgorgement order against IBEX and St. John's to any unjust profits. IBEX sold stock at a 50% discount to its public market price. There is no evidence that such price overpaid IBEX the true value of such shares. IBEX sold notes for the face value of the debt. There is no evidence that the notes were not collectible in fall or that the value of such notes on the date sold was less than the face value of the debt. Therefore, there is no proof of an unjust enrichment. At the same time, BioElectronics did not profit, unjustly or otherwise, when borrowed money from IBEX and issued notes in the face amount borrowed. It took on a lawful

obligation to repay every penny borrowed with interest. There was no enrichment, much less unjust enrichment. There is no equitable basis to disgorge profits that never were received.

Next, the Court should consider each Respondent's inability to pay. BioElectronics and the individual Respondents are fully invested in the business of BioElectronics, including its ongoing efforts to secure FDA approval of its product. Any judgment against BioElectronics or the other Respondents likely would deprive BioElectronics of its ability to complete its FDA approval process, thereby causing the termination of its business, the cessation of progress, and the termination of all of its employees. Balancing the equities, Respondents pray for a just and modest judgment, even if the Court finds inadvertent violations of the securities laws (which it should not.)

In deciding the disgorgement award, if any, Respondents urge the Court to conduct its analysis on a transaction by transaction basis. For example, if the theory upon which disgorgement is ordered is that there was a scheme to evade the registration requirements, the Court should limit the disgorgement to those transactions made during such scheme. Mr. Park, the Division's expert, limited his testimony as to the existence of a scheme to the transactions in 2013 and 2014. RT 155 and 201. Although Respondents strongly deny that any such scheme existed at any time, if the Court disagrees, at the very most, the Court should base its disgorgement on the transactions during the purported scheme – those during 2013 and 2014.

II.

STATEMENT OF FACTS

The Whelan Family

1. Andrew Whelan is the founder, Chief Executive Officer, President, and Chief Financial Officer of BioElectronics Corporation ("BIEL"). DX 1, ¶1.

2. BIEL is a medical device company founded in 2000 and headquartered in Frederick, Maryland. DX 1, ¶2.

3. Patricia Whelan is Andrew Whelan's wife. DX 1, ¶3.

4. Mary Whelan is Andrew Whelan's sister. DX 1, ¶4.

5. Mary Whelan is Kelly Whelan's aunt. DX 1, ¶5.

6. Kelly Whelan is Andrew and Patricia Whelan's daughter. DX 1, ¶7.

7. Kelly Whelan is a certified public accountant. DX 1, ¶8.

BIEL's Board of Directors

8. From 2009 to present, BIEL has had a three-person Board of Directors, comprised of Andrew Whelan, Richard Staelin, and Mary Whelan. DX 1, ¶11

9. BIEL's Board previously included four additional members: Dr. Brian M. Kinney, Ashton Perry, Charles Conway and Douglas Watson. DX 1, ¶12

10. Mary Whelan has been a member of the Board of Directors of BIEL from April 2002 to present. DX 1, ¶13.

11. Richard Staelin has been a member of BIEL's Board of Directors from April 2005 to present. DX 1, ¶16-20.

12. Since 2008, Richard Staelin has served as the sole member of BIEL's Audit Committee. DX 1, ¶19.

13. From approximately 2009 to present, Mr. Staelin has served as the Chairman of BIEL's Board of Directors. DX 1, ¶20.

IBEX, LLC

14. Kelly Whelan formed IBEX, LLC ("IBEX") in 2005 and is its sole member. DX 1, ¶21. IBEX is not an operating company. RT 148-49. As Kelly Whelan explained, "It is where I sometimes hold investments." RT 148.

15. IBEX is one of BIEL's lenders. DX 1, ¶24,

16. Attached as DX 1, Exhibit A, is a chronology of certain IBEX loans to BIEL between January 1, 2008 and November 27, 2014. DX 1, ¶27, Exh. A.

17. Attached as DX 1, Exhibit B, is a chronology of certain IBEX sales of BIEL convertible promissory notes and/or stock. DX 1, ¶28, Exh. B.

18. The testimony of Kelly Whelan and Brian Flood, Brian Flood's expert report, and Exhibit 1A, which is based on BioElectronics' account statements and documents at Exhibits 1-167, establishes that with respect to each loan sold, IBEX had been at risk for such loan for more than one year, and for an average of approximately 30 months. RX 1A, RX 206; RT 1112 et seq., RT 1202 et seq. In addition, such testimony reflects that IBEX loaned more to BioElectronics during the relevant period than it received in proceeds from all of its securities sales.

St. John's LLC

19. Patricia Whelan formed St. John's LLC ("St. John's") in 2009. DX 1, ¶29.

20. St. John's is one of BIEL's lenders. DX 1, ¶30.

21. From 2009 to present, St. John's has loaned BIEL approximately $2.9 million, and has received in exchange convertible notes. DX 1, ¶31.

22. BIEL issued convertible notes to St. John's on June 30, 2010 ($95,794.67) and August 31, 2010 ($61,108.82). DX 1, ¶32.

23. On June 20, 2012, St. John's converted the convertible notes issued on June 30, 2010 and August 31, 2010 (referenced in paragraph 22), and BIEL issued 91,808,086 shares to St. John's. DX 1, ¶33.

24. Between March 26, 2013 and March 6, 2014, St. John's liquidated 81,808,086 of the 91,808,086 shares issued by BIEL to St. John's through an SEC registered broker-dealer. DX 1, ¶34.

25. The following chart shows the dates and amounts of BIEL shares liquidated by St. John's between March 26, 2013 and March 6, 2014:

	Date	Shares	Trade Amount
1.	3/26/2013	505,858	$2,322.40
2.	3/26/2013	2,092,650	$9,748.41
3.	12/27/2013	4,228,212	$1,931.70
4.	2/25/2014	20,981,356	$98,041.11
5.	3/3/2014	1,000,000	$5,564.94
6.	3/3/2014	17,000,000	$94,568.40
7.	3/4/2014	3,000,000	$15,382.26
8.	3/4/2014	1,000,000	$4,910.45
9.	3/4/2014	1,000,000	$5,022.65
10.	3/4/2014	3,000,000	$15,662.75
11.	3/4/2014	1,000,000	$5,471.44
12.	3/4/2014	5,000,000	$30,809.47
13.	3/4/2014	2,000,000	$12,109.82
14.	3/5/2014	5,000,000	$25,662.07
15.	3/6/2014	5,000,000	$23,329.61
16.	3/6/2014	5,000,000	$23,329.61
17.	3/6/2014	5,000,000	$23,329.61
	TOTAL	81,808,076	$397,196.70

DX 1, ¶35.

26. St. John's filed a Form 144 with respect to the March 26, 2013, December 27, 2013, February 25, 2014, March 3, 2014, and March 4, 2014 sales on May 26, 2016. DX 1, ¶36

eMarkets LLC

27. Mary Whelan formed eMarkets LLC ("eMarkets") in 2001 and is the President and Managing Director of eMarkets. DX 1, ¶37.

28. eMarkets is a Nevada LLC and has its offices in North Caldwell, New Jersey. DX 1, ¶38.

29. In February 2009, eMarkets entered into a distribution agreement with BIEL. DX 1, ¶39.

YesDTC Holdings, Inc.

30. Joseph Noel is the former Chief Executive Officer of YesDTC Holdings, Inc. ("YesDTC"). DX 1, ¶40.

31. On behalf of YesDTC, Mr. Noel signed a distribution agreement with BIEL in December 2009. DX 1., ¶42.

32. YesDTC attempted to obtain approval to sell BIEL product in Japan, but was not successful. DX 1, ¶43.

33. BIEL recognized $366,000 in revenue on its FY2009 Form 10-K from transactions with YesDTC and eMarkets. DX 1, ¶44.

BioElectronics' Issuance of Securities to IBEX and St. John's Were Exempt under Section 4(a)(2) – Not a Public Offering.

34. As detailed above, IBEX and St. John's are private entities formed by Kelly Whelan, to hold her BioElectronics investments, and Patricia Whelan, to hold debt and securities of BioElectronics, respectively. The transactions between BioElectronics, headed by Andrew

Whelan, on the one hand, and IBEX and St. John's, owned by Andrew Whelan's daughter and wife, are quintessentially private. See RT 1048-1049.

35. IBEX's transactions with BioElectronics were negotiated and executed between Kelly Whelan, on behalf of IBEX, and Andrew Whelan, as CEO, and BioElectronics' Board of Directors, on behalf of BioElectronics.

36. St. John's transactions started with investments of cash and assignments of accrued salaries and other debt obligations owed to Andrew Whelan by BioElectronics. RT 901. The securities issued by BioElectronics on account of such investments, accrued salaries and other debt obligations started with convertible notes, which notes were converted years later into BioElectronics stock.

37. There was no public offering and, indeed, such transactions were unique to Andrew Whelan, his wife, Patricia Whelan, and her company, St. John's.

BioElectronics and Andrew Whelan, on one hand, were not in control of IBEX and Kelly Whelan, on the other hand, and IBEX and BioElectronics Were Not In Common Control At the Time of Any of the Transactions At Issue In This Action.

38. Richard Staelin, Mary Whelan, Andrew Whelan and Kelly Whelan unanimously and consistently stated, under oath, that BioElectronics and Andrew Whelan, on one hand, were not in control of IBEX and Kelly Whelan, on the other hand, and IBEX and BioElectronics were not in common control at the time of any of the transactions at issue. K Whelan RT 430 et seq. and RT 444, A Whelan RT 644 et seq.; A Whelan RT 878 et seq.; R. Staelin RT 1258-1259.

There Was Never A Scheme To Evade The Registration Requirements Under The Securities Laws.

39. There was no scheme to evade the registration requirements. M. Whelan RT 643 et seq.; 644-667; R. Staelin RT 1256; A. Whelan RT 926. Indeed, there is not a shred of evidence

that Kelly Whelan ever understood that registration of her shares would benefit her. RT 149. There was no registration rights agreement. RT 149. And, there was no provision in her loan documents discussing a right to register IBEX's notes and stock. RX 1-167. If there had been a scheme to secure the benefits of registering IBEX shares, the documents would bear a discussion about the need to register IBEX's notes and stock. Instead, BioElectronics' CEO testified that IBEX never asked, and, if it had asked, he "would probably have said no." RT 1040. It is also telling that the 2006 and 2007 Registration Statements filed by BioElectronics on account of the LH Capital transactions did not register IBEX, St. John's, or any of the Director's Notes, reflecting that all were long term investors committed with holding their shares. RX 188; RT 912 et seq. Registration of securities was attempted by BioElectronics in 2006, when an investor, LH Capital, LLC, required that such registration statement be filed. RX 188, 189, 190. It was withdrawn, amended, withdrawn, amended and withdrawn again, such that by the end of March 2007, the registration efforts by BioElectronics to facilitate its deal with LH Capital, LLC had been exhausted. RX 189, 190. BioElectronics paid LH Capital, LLC a $78,000 penalty for BioElectronics' failure to successfully register the securities sold to LH Capital. RT 675; RX 189, 190. Although LH Capital insisted on registration rights, IBEX never did so. Kelly Whelan admitted feeling like an idiot because she didn't even know about registration rights agreements until this litigation started. RT 510.

40. Importantly, even though Mary Whelan, St. John's, IBEX and other family members of the Whelans held unregistered convertible notes at the time, and even though BioElectronics had hired a reputable law firm specializing in securities law, there is no indication whatsoever that at that time or at any time thereafter, the Whelans or Mr. Staelin ever discussed registration of their BioElectronics securities, much less that some illicit scheme to avoid registration. RX 189, 190; RT 912 et seq. The most obvious signs that they did not contemplate

registration was that they did not seek to include their unregistered securities when they filed their registration statement for LH Capital's securities. They never even included a registration rights provision or agreement in their convertible loan documents. RX 1-167. If they intended to get the benefits of registration, it would have been all too easy to simply add their securities to an existing registration statement. The truth is that they saw no need for registration because they intended to be long term investors, and were informed by their securities compliance attorney, Lex Kuhne, rightly or wrongly, that long term investors could generally sell their securities into the public market, after holding them for a year, without registering such securities. Notably, there is not a single email in which IBEX demanded, requested or even hinted at the need to register its securities, much less any indication of some agreement with BioElectronics or Andrew Whelan to engage in a scheme to evade such registration requirements.

41. The Division's own expert, Mr. Parks, strained to find evidence of such a scheme. RT 136 et seq. One of the principal badges of a scheme to evade is concealment of that scheme. RT 153. But, the OTC Market filings by BioElectronics fully disclosed the conversions and increased lending by IBEX, countermanding any concealment. RT 153-154. RX 1710-5. 191-194C. In the end, Mr. Park conceded that the period of activities upon which his opinion was based was limited to the 2013-2014 period, "So 2013 and 2014 is the period." RT 155 and 201.

42. Finally, during the entire period upon which the Division has brought its case, 2010-2015, IBEX invested a million dollars more into BioElectronics than the total amount of its sales revenue from all the transactions at issue in their case. RT 202. No underwriter or dealer would do that. RT 202-203. And, no one who knowingly perpetuated an evasive scheme would have put a million more into the company than the proceeds of such scheme. The facts do not

support the Division speculation because clearly no such scheme was ever concocted by the Respondents.

III.

LEGAL ARGUMENTS

A. BioElectronics' Issuance of Convertible Notes to IBEX and St. John's Were Exempt from Registration under Section 4(a)(2) Because They Did Not Constitute a Public Offering.

Section 4(a)(2) of the Securities Act exempts "transactions by an issuer not involving any public offering." Transactions in which BioElectronics issued securities in the form of convertible notes and stock to IBEX and St. John's, each private parties, who were the daughter and wife of BioElectronics' CEO, were not a public offering, and were therefore exempt. The fact that those parties then held such securities for well over a year before such notes were sold and converted into stock, or converted into stock and sold, reflects that such private party transactions fall squarely within the intended exemption under Section 4(a)(2). The Court should find that all such issuances were exempt under Section 4(a)(2).

B. The IBEX Private Sales Transactions Were Exempt Under Section 4(a)(1).

Section 4(a)(1) of the Securities Act exempts from registration "transactions by any person, other than an issuer, underwriter or dealer." The Division does not and cannot contend that IBEX was an issuer.

The testimony of Brian Flood and Kelly Whelan established that IBEX was at risk for its investments in BioElectronics for more than one year, in every case, and an average of over 30 months, before those securities were sold to third party purchasers in arms-length private transactions. Over the five years analyzed, 2010-2015, Mr. Park confirmed that IBEX invested into BIEL over a million dollars more than it generated from sales of its BioElectronics

securities. RT 202. Because of such long holding periods and continuing and growing long term investments in BIEL, the Court should find that St. John's and IBEX clearly were not acting as underwriters or dealers, but instead as exactly the type of long term private investors to whom Rule 144 affords a safe harbor.

Even the testimony of Mr. Park, the Division's expert witness on the issue, concedes that underwriters and dealers do not remain at risk for the securities underwritten and dealt by them, much less for years at a time, and do not reinvest on a long term basis in the same issuers. RT 201-203. Indeed, no entity in the business of an underwriter or dealer would do so. Only a legitimate long term investor, like IBEX and St. John's, would do so.

IBEX was not acting as an underwriter or dealer at the moment of acquisition of such securities when its capital was placed at risk years earlier. Thus, IBEX's transactions were exempt under Section 4(a)(1).

Such conclusion is not dependent on compliance with Rule 144, a non-exclusive Rule which definitively provides a safe harbor for those in compliance. Nevertheless, IBEX did comply with Rule 144 and, as such, is entitled to the safe harbor protection that it shall not be construed by the Court as an underwriter.

Rule 144 explains: "Section 4(1) of the Securities Act provides one such exemption for a transaction 'by a person other than an issuer, underwriter, or dealer.' Therefore, an understanding of the term 'underwriter' is important in determining whether or not the Section 4(1) exemption from registration is available for the sale of the securities." *Id.* An underwriter is a person who purchases with a view to distribution, offers or sells for an issuer in connection with a distribution, or participates in any distribution or underwriting. 15 USC §77b(a)(11).

> The Commission adopted Rule 144 to establish specific criteria for determining whether a person is not engaged in a distribution. **Rule 144 creates a safe harbor** from the Section 2(a)(11) definition of "underwriter."

> A person satisfying the applicable conditions of the Rule 144 safe harbor **is deemed not to be engaged in a distribution of the securities** and therefore not an underwriter of the securities for purposes of Section 2(a)(11). Therefore, **such a person is deemed not to be an underwriter** when determining whether a sale is eligible for the Section 4(1) exemption for "transactions by any person other than an issuer, underwriter, or dealer."

Emphasis added. Rule 144 preamble.

The language chosen by the Commission in the preamble was intentional, clear and decisive – not open to the Division's misinterpretation. If the Court finds that IBEX has complied with Rule 144, the Court must find (absent a showing of a scheme to evade the registration requirements) in favor of IBEX.

The Division, through its expert witness, Mr. Park, invites this Court to flip this safe harbor language on its head. Mr. Park opined, incorrectly, that the Rule 144 "safe harbor cannot be relied upon by underwriters." DX 137, ¶17. If the Court finds IBEX satisfied Rule 144, absent a finding of a scheme to evade the registration requirements, it must then find that IBEX is not an underwriter. Only if the Court finds that IBEX did not satisfy Rule 144 need it broach the legal question of what is an underwriter and the factual question of whether IBEX purchased the convertible notes with a view to distribution, or constituted an offer or sale for BioElectronics in connection with a distribution, or constitutes a participation in any distribution or underwriting. See Section 2(a)(1); 15 USC §77b(a)(11).

The flexibility comes into play only in Respondents' favor. If the Court finds that IBEX did not comply with the safe harbor provisions of Rule 144, the preamble expressly instructs that Rule 144 is not exclusive. The Court, if Rule 144 is not met, must then determine whether, based on the facts and circumstances presented, IBEX was acting as an underwriter. In that case, the very lengthy holding periods (some in excess of three years) in which IBEX remained at full

risk of economic loss, weigh definitively against the Division's characterization of their acts as those of an underwriter.

1. Rule 144 Applies Different Standards For Affiliates (St. John's) And Non-Affiliates (IBEX).

The SEC Web site at https://www.sec.gov/info/smallbus/secg/rules144-145-secg.htm reflects different rules under Rule 144 for affiliates and non-affiliates, as follows:

"The following chart summarizes the revised conditions applicable to affiliates and non-affiliates selling restricted securities under Rule 144:

	Affiliate or Person Selling on Behalf of an Affiliate	**Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)**
Restricted Securities of Reporting Issuers	During six-month holding period — no resales under Rule 144 permitted. After six-month holding period — may resell in accordance with all Rule 144 requirements including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	During six-month holding period — no resales under Rule 144 permitted. After six-month holding period but before one year — unlimited public resales under Rule 144 except that the current public information requirement still applies. After one-year holding period — unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.
Restricted Securities of Non-Reporting Issuers	During one-year holding period — no resales under Rule 144 permitted. After one-year holding period — may resell in accordance with all Rule 144 requirements, including: • Current public information,	During one-year holding period — no resales under Rule 144 permitted. After one-year holding period — unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements."

	• Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	

IBEX is not an affiliate, and St. John's is an affiliate. Accordingly, IBEX need only comply with the requirements in the right hand column of the foregoing chart, while St. John's must prove compliance with the requirements in the middle column. Critically, the most onerous and only applicable requirement for IBEX was that it not resell its securities for one year. IBEX "need not comply with any other Rule 144 requirements." *Id.* Based on the testimony of Kelly Whelan and Brian Flood, the expert report of Mr. Flood and the documentation at RX 1-167, including, in particular Exhibit 1A, IBEX held every convertible note for over a year and, in doing so, satisfied Rule 144 with respect to each and every sale of its BioElectronics' stock and notes. RX 1A, RX 206; RT 1112 et seq., RT 1202 et seq.

2. Andrew Whelan Did Not Control IBEX And Was Never In Common Control Of BIEL and IBEX With Kelly Whelan.

The Division argues that IBEX is an affiliate of BIEL because BIEL and IBEX were "under common control of [Andrew] Whelan, or, at the least, the common control of [Andrew] Whelan and Kelly Whelan." OIP, ¶15. The Division is wrong. Its allegation purposefully conflates two separate companies with two separate and distinct principals.

Andrew Whelan, at the direction of the board, controlled BIEL, only, and Kelly Whelan controlled IBEX, only. K Whelan RT 430 et seq. and RT 444, A Whelan RT 644 et seq.; A Whelan RT 878 et seq.; R. Staelin RT 1258-1259.

Footnote 3 to paragraph 15 of the OIP explains:

> Rule 144 defines 'affiliate' as '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). Although the rule does not define 'control,' courts borrow the definition from Rule 405, which defines it 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.

Emphasis added. *See also, Pennaluna & Co. v. SEC*, 410 F.2d 861, 864 (9th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970); *SEC v. Micro-Moisture Controls, Inc.*, 148 F. Supp. 558, 562 (S.D.N.Y. 1957). Control persons are generally officers, directors and/or larger shareholders of the issuer. *U.S. v. Wolfson*, 269 F. Supp. 621, 626 (1967). Courts do not find persons to be "control" when they do not have the ***power*** to control the issuer. *U.S. v. Sherwood*, 175 F. Supp. 480, 483 (S.D.N.Y. 1959) (8% stockholder did not have the power to control the issuer).

Mr. Staelin, an expert in the area of business management, offered his expert report regarding the issue of control, as well as his factual opinion that no such control existed. RX 202; RT 1258-1259. In short, because neither BioElectronics nor IBEX had any power to force the other to take terms not agreeable to the other, there was no actual power at play.

The Division hangs its case on the fact that Kelly Whelan never refused a BIEL loan. Rather than proving control, that proves only that Kelly Whelan believed each loan offered by BIEL would be profitable for IBEX. RX 452, 485. See also expert report of David Robinson at RX 201. A server selling Starbucks coffee does not refuse a customer's coffee order. That is not because the customer has the power to control Starbucks or its servers. It is because Starbucks makes a profit each time it sells a cup of coffee. American Express does not refuse to honor a credit worthy customer's charge. That is not because the customer controls American Express, but because American Express has decided that it would make a profit every charge it honors for that customer. A retailer does not refuse to purchase more of a manufacturer's product if it is offered a quantity discount, not because the manufacturer has the power to make the retailer

purchase more, but because the retailer believes by purchasing the extra product at a lower cost, it can make more profit. All of these transactions are incentive compatible, i.e., the exchange terms are agreeable to both parties and thus the transaction occurs. Such transactions are not evidence of control or power.

Andrew Whelan controlled BioElectronics, subject to its Board of Directors and shareholders. DX 1. Kelly Whelan, the sole member of IBEX LLC, exclusively controlled IBEX. DX 1; RT 444. Kelly Whelan owned IBEX and retained, at all times, plenary and exclusive power to decide its activities. DX 1. Andrew Whelan did not control and had no power to control IBEX or his daughter, Kelly Whelan. RT 430 et seq. 444; 644 et seq. 878; RT 1258-1259. Andrew Whelan could only ask Kelly Whelan (or any other potential investor) if she would be willing to loan BIEL money at an acceptable rate and conditions. Kelly Whelan had the exclusive decision-making power to invest or not invest. RT 430 et seq. 444; 644 et seq. 878; RT 1258-1259.

A father/daughter relationship, standing alone, is not enough to establish control. Rule 144(a)(2) explains that under Rule 144 a person includes "[a]ny relative or spouse of such person, or any relative of such spouse, any one of whom **<u>has the same home as such person.</u>**" Emphasis added. 17 CFR 230.144(a)(2). Notably, if the Commission had intended that all immediate relatives would be affiliates, it could easily have stated such a rule. By way of contrast, see the Bankruptcy Code's definition of insiders, which expressly includes any "relative of the debtor." 11 USC §101(31)(A)(i). Thus, it is clear that Rule 144 was not intended to treat fathers and daughters as affiliates for purposes of Rule 144 <u>unless they lived in the same home</u>. Andrew and Kelly Whelan had not lived in the same home for more than 30 years! Kelly Whelan is a 48 year old CPA and independent investor in BIEL through her company IBEX who has not lived with her father since she was 17 years old. The Division's self-serving and baseless

conclusion that Andrew Whelan controlled Kelly Whelan is belied by the plain language of the applicable statutes, smacks of sexism, and is without evidentiary support.

The Division contends that because Kelly Whelan did some accounting work as an independent contractor for BioElectronics, they were under common control. But, the Division has not established that, at the time of the trades at issue, Ms. Whelan was working with BioElectronics, much less that her limited role with BioElectronics constituted control over her.

The Division points to the fact that one loan for $519,200 made August 1, 2009, which was secured by BioElectronics' assets, proved common control. But, the security interest did not give IBEX anything like control. First, any power to enforce such security interest would only arise upon default. RT 638, 1255. No default existed during most, if not all, of the transactions at issue. Thus, there was no right to enforce such security interest during such non-default term transactions. Second, the note was subordinated to the senior secured lien in favor of the United States' XM Bank loan. RT 891. Because the liquid assets of BioElectronics would have been exhausted to pay the XM Bank loan, and because the XM Bank loan was senior to IBEX's loan, IBEX effectively had no power to enforce such security interest to its benefit. Third, IBEX never had any intention of enforcing such security interest. [RT 580; 1255]. And finally, BioElectronics had multiple solutions to respond to any such foreclosure by IBEX, including paying such debt off with outside finances or Whelan family investments. RT 890-891, 1255-1256. Thus, the mere fact of such security interest did not establish control.

Because Andrew Whelan did not have the power to control Kelly Whelan, and Kelly Whelan did not have the power to control BIEL, Kelly Whelan and IBEX are not affiliates of BIEL. The consequence of that determination is that IBEX's transactions must comply with the right column above, applicable to non-affiliates, rather than the left column, applicable to affiliates, in order to enjoy the safe harbor provisions of Rule 144.

3. IBEX Satisfied Rule 144 Holding Period Requirements.

Rule 144(d) provides, in pertinent part: "[i]f the **securities sold** are restricted securities, the following provisions apply:

> (1) General rule. (i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of six months must elapse between the later of **the date of the acquisition of the securities from the issuer**, or from an affiliate of the issuer, **and any resale of such securities** in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.
> (ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of one year must elapse between the later of **the date of the acquisition of the securities from the issuer**, or from an affiliate of the issuer, **and any resale of such securities** in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.

Emphasis added. 17 CFR 230.144(d).

Thus, Rule 144(d) expressly applies to the "securities sold". It requires the Court to compare the "date of the acquisition of the securities" to the date of "any resale of such securities." To calculate correctly an investor's holding period, it is necessary to ascertain precisely when the period begins. The SEC has interpreted "date of acquisition" to start when the full risk of economic loss was assumed by the transferee. See SEC Rel. 33-6099 (1979) (Question 23). The drafters clearly intended the court to look to the securities involved in the sale, not the holding period of the proceeds of such sale.

As detailed above, and in RX 1A, the Flood Expert Report at RX 206; the testimony of Kelly Whelan and RX 1-167, IBEX held all securities sold for a period exceeding one year and for an average period of approximately 30 months. RX 1A, RX 206; RT 1112 et seq., RT 1202 et seq.

Prior to August 2009, IBEX loaned to BioElectronics under the terms of convertible notes issued to third parties, but without formal execution of separate notes between IBEX and BioElectronics. After August 2009, formal convertible note agreements were executed with respect to each IBEX loan. In the fall of 2009, IBEX and BioElectronics executed a single note reflecting all loans made prior to August 2009. RX 1C, 1D; RT 1109. Many of these securities sold that are at issue in this case were acquired from BioElectronics solely in exchange for other securities (pre-existing notes) issued by BioElectronics. For purposes of computing the holding period, the newly acquired securities were "deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms." Rule 144(d)(3)(ii). Thus, the holding periods included in Mr. Flood's analysis at RX 1A and described in both Mr. Flood's and Kelly Whelan's testimony are based on the date that IBEX made such loans and became at risk for such investment, and not based on the date the notes were replaced and/or date conversion shares were issued in exchange for such original notes. RX 1-167, RX 206; RT 1112 et seq., RT 1202 et seq.

The Division, through Mr. Park, ignores the text of Rule 144 and the undisputed multi-year holding periods of the securities sold by IBEX, and instead focuses its analysis on the *holding period of sales proceeds* -- the time that IBEX held the cash after selling its BioElectronics' securities, and before IBEX reinvested the proceeds of that sale in BioElectronics. DX 137. There is no support for that approach in the applicable statutes or rules, and it defies the purposes of Section 4 and Rule 144. The drafters did not restrict the use of proceeds, did not preclude reinvestment into the issuers of securities, and did not look beyond the sale of the securities. As the law is written, and as BioElectronics and IBEX were informed by their counsel at the time of the transactions, investors are free, and indeed encouraged by the

safe harbor provisions of Rule 144, to reinvest sales proceeds into the same issuer, as IBEX did with BioElectronics. In fact, the Division's unsupportable and illogical approach would undermine the purpose of the safe harbor provision – to encourage capital investment in start-up companies -- upon which economic growth and prosperity rely.

If the enforcement Division's baseless approach is adopted into law by this Court entering a judgment against the Respondents, investors would be punished for reinvesting funds into an issuer, potentially with a judgment requiring them to disgorge the proceeds of their investments, plus penalties and injunctive relief. In the future, risk-averse investors would avoid such potential devastating consequences by abandoning start-up companies after a single investment. The absence of reinvestments would send the cost of such capital skyrocketing, and drive microcap companies that are supporting the American economy out of business. If Congress or the Commission wanted to kill start-up companies, the Division has crafted a great recipe for that. But, Congress did not intend to kill start-up companies. Just the opposite. Congress wanted to encourage, not discourage, reinvestment into developing companies, which is precisely why the Section 4 exemptions were enacted to the Section 5 registration requirements in the first place, and why the history of Rule 144 and Section 4 reflects an ever shrinking holding period and ever expanding exemptions to the registration requirements.

While the Division's win at all cost approach to this case is, in some ways, laudable, the Court needs to be an effective check on such short-sighted and unbridled advocacy. The Court should reject the Division's invitation to make catastrophically bad law through enforcement, and should, instead, follow existing law and leave the lawmaking to the lawmakers, not the enforcement staff. The lawmakers are far better informed and equipped to consider such massive changes of existing law with a proper perspective after dutifully considering the economic consequences of such law and the underlying purposes of such law. At the very least,

when the Division seeks to override Rule 144 and defy its purpose through enforcement proceedings, it should be forced to do so in the federal district court, rather than impose the burden of its overly aggressive tactics on this Court in an administrative proceeding.

C. Newly Enacted Section 4(a)(7) Provides An Exemption For All IBEX Resales of BioElectronics' Securities.

Section 4(a)(7) exempts from the registration requirements of Section 5 "transactions meeting the requirements of subsection (d)." 15 USC 77d(a)(7). Subsection (d) provides:

> (d) Certain accredited investor transactions. The transactions referred to in subsection (a)(7) are transactions meeting the following requirements:
>
> (1) Accredited investor requirement. Each purchaser is an accredited investor, as that term is defined in section 230.501(a) of title 17, Code of Federal Regulations (or any successor regulation).
>
> (2) Prohibition on general solicitation or advertising. Neither the seller, nor any person acting on the seller's behalf, offers or sells securities by any form of general solicitation or general advertising.
>
> (3) Information requirement. In the case of a transaction involving the securities of an issuer that is neither subject to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m; 78o(d)), nor exempt from reporting pursuant to section 240.12g3-2(b) of title 17, Code of Federal Regulations, nor a foreign government (as defined in section 230.405 of title 17, Code of Federal Regulations) eligible to register securities under Schedule B, the seller and a prospective purchaser designated by the seller obtain from the issuer, upon request of the seller, and the seller in all cases makes available to a prospective purchaser, the following information (which shall be reasonably current in relation to the date of resale under this section):
>
> (A) The exact name of the issuer and the issuer's predecessor (if any).
>
> (B) The address of the issuer's principal executive offices.
>
> (C) The exact title and class of the security.
>
> (D) The par or stated value of the security.
>
> (E) The number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year.
>
> (F) The name and address of the transfer agent, corporate secretary, or other person responsible for transferring shares and stock certificates.
>
> (G) A statement of the nature of the business of the issuer and the products and services it offers, which shall be presumed reasonably current if the statement is as of 12 months before the transaction date.
>
> (H) The names of the officers and directors of the issuer.

(I) The names of any persons registered as a broker, dealer, or agent that shall be paid or given, directly or indirectly, any commission or remuneration for such person's participation in the offer or sale of the securities.

(J) The issuer's most recent balance sheet and profit and loss statement and similar financial statements, which shall--

(i) be for such part of the 2 preceding fiscal years as the issuer has been in operation;

(ii) be prepared in accordance with generally accepted accounting principles or, in the case of a foreign private issuer, be prepared in accordance with generally accepted accounting principles or the International Financial Re-porting Standards issued by the International Accounting Standards Board;

(iii) be presumed reasonably current if--

(I) with respect to the balance sheet, the balance sheet is as of a date less than 16 months before the transaction date; and

(II) with respect to the profit and loss statement, such statement is for the 12 months preceding the date of the issuer's balance sheet; and

(iv) if the balance sheet is not as of a date less than 6 months before the transaction date, be accompanied by additional statements of profit and loss for the period from the date of such balance sheet to a date less than 6 months before the transaction date.

(K) To the extent that the seller is a control person with respect to the issuer, a brief statement regarding the nature of the affiliation, and a statement certified by such seller that they have no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations.

(4) Issuers disqualified. The transaction is not for the sale of a security where the seller is an issuer or a subsidiary, either directly or indirectly, of the issuer.

(5) Bad actor prohibition. Neither the seller, nor any person that has been or will be paid (directly or indirectly) remuneration or a commission for their participation in the offer or sale of the securities, including solicitation of purchasers for the seller is subject to an event that would disqualify an issuer or other covered person under Rule 506(d)(1) of Regulation D (17 CFR 230.506(d)(1)) or is subject to a statutory disqualification described under section 3(a)(39) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(39)].

(6) Business requirement. The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that the issuer's primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person.

(7) Underwriter prohibition. The transaction is not with respect to a security that constitutes the whole or part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the security or a redistribution.

(8) Outstanding class requirement. The transaction is with respect to a security of a class that has been authorized and outstanding for at least 90 days prior to the date of the transaction.

With respect to the resales by IBEX of notes and stock, the bulk of such resales were to a single purchaser, Redwood Management, LLC. See RX 1A. Redwood represented and warranted that it was an accredited investor. RX 1A, pp. 3-7; RX 120, pp. 812 (¶7) and 822 (¶4); RX 136, pp. 941h (¶7) and 941r (¶4); RX 167, pp. 1234 (¶7) and 1250 (¶4). Similarly, all of the other investors purchasing IBEX's stock and convertible notes issued by BioElectronics were accredited investors, some of which made express representations and warranties as to their sophistication in the contracts with IBEX. See, for example, representations made by Tangiers Investments at RX 160, p. 1145 (¶F); RX 166, p. 1208 (¶F). Such representation is consistent with the sheer volume and dollar amounts of their purchases of IBEX's securities Redwood Management, LLC's purchases. See RX 1A. The fact that the Division refers to these entities as the "Liquidating Entities" underscores that such persons and businesses were sophisticated traders in securities, at the very least.[2]

The reporting arguments of Section (a)(7) above, are clearly satisfied by the SEC and OTC filings by BioElectronics. See Rx 190-194c and 171C-171S; Park Test. at RT 175.

D. St. John's Stock Sales Transactions Through its Broker Were Exempt Under Section 4(a)(1).

1. St. John's Holding Period: 34 months.

[2] Mr. Park, the Division's expert, confessed that the argumentative term "Liquidating Entities" had nothing to do with the business of the buyers in these transactions. RT 191-192. There is no evidence whatsoever that any of the purchasers of IBEX shares were in the business of liquidating securities, much less that they had held themselves out to be liquidators of securities to IBEX or anyone else or that IBEX or BioElectronics knew when and in what volumes BioElectronics stock had been sold by the so-called Liquidating Entities, although this information was uniquely available to securities regulators upon request, such as the Division and its staff.

St. John's shortest holding period was 34 months, **22 months longer than** Rule 144(d) requires. DX 1, ¶¶32-35. St. John's held convertible notes from June and August 2010 through June 2012, then converted and remained in possession of the securities until March 26, 2013, when it began trickling out conversion shares (note, in the first 9 months after conversion, less than 3% of the shares had been sold.) *Id*.

The Court should compute the holding period from the time the convertible notes were purchased, not from the date of conversion. Rule 144(d)(3)(ii).

2. BIEL's Issuer Information Satisfied Rule 144.

Rule 144 imposes a public information requirement on affiliate transactions. If the issuer of the securities to be resold is an Exchange Act reporting company, its periodic reports and required Interactive Data Files must be current for the preceding 12 months. Rule 144(c)(1).[3] According to Rule 144(c)(2) and the SEC's Web Site, current public information "[f]or non-reporting companies, …means that certain company information, including information regarding the nature of its business, the identity of its officers and directors, and its financial statements, is publicly available." BIEL and St. John's satisfied the issuer information requirement. See RX 190-194C; 191C-191S. BIEL had either SEC annual and periodic statements on file with the Commission and/or 15c211 information with the Pink Sheets OTC Exchange. *Id.*

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[3] The reporting requirement under Rule 144(c) do not apply to non-affiliate, IBEX, who had held securities for more than one year. Rule 144(b)(1): "The requirements of paragraph (c)(1) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of one year has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer."

3. St. John's Complied With Rule 144's Manner of Sale Requirements.

Under Rule 144(f)(3)(ii), St. John's Rule 144 transactions must be executed in a permissible manner, including through "brokers' transactions" pursuant to Section 4(a)(4) of the Securities Act. St. John's complied with the manner of sale requirement. Each sale was executed through a registered broker-dealer. DX 1, ¶34.

4. St. John's Complied With Rule 144's Volume Limitation Except With Respect to Two Trading Days, March 3, 2014 and March 4, 2014.

Rule 144(e)(1) requires that St. John's sales of BIEL shares, when taken together with all of St. John's sales of BIEL stock within the preceding three months, not exceed the greatest of:

> (i) One percent of the shares … as shown by the most recent report or statement published by the issuer, or (ii) The average weekly reported volume of trading in such securities on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the four calendar weeks preceding the filing of notice required by paragraph (h), or if no such notice is required the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker…."

St. John's complied with such volume limitations through March 2, 2014 (less than 1% of outstanding shares of 3,859,893,093), but exceeded such volume limitations with respect to certain sales exceeding that volume on March 3 and 4, 2014. See DX 1, ¶35, RX 171I, p. 1554; and RX 171J, p. 1576.

5. Form 144 Filings.

St. John's belatedly filed its Form 144 with respect to each of the sales referenced in the More Definite Statement. DX 1, ¶36, RX 176.

E. Imperfect Compliance With Rule 144 Does Not Void Section 4(a)(1) Exemption – Rule 144 is a Non-Exclusive Safe Harbor.

Rule 144 is a "nonexclusive safe harbor provision" for unregistered securities. *SEC v. Cavanagh*, 445 F.3d 105, 114 (2d Cir. 2006). Although Rule 144 was intended to provide a safe harbor, a person who falls short of Rule 144 may nevertheless be entitled to the exemption of Section 4(a)(1). See 17 C.F.R. § 230.144(j); Adoption of Rule 144, *supra,* at 591-92; Resales of Securities, Securities Act Release No. 5980, 1978 WL 195944, at *2 n.8 (Sept. 20, 1978).

As noted above, Section 2(a)(11) defines an "underwriter" as any person who purchases with a view to distribution, offers or sells for an issuer in connection with a distribution, or participates in any distribution or underwriting. 15 U.S.C. §77b(a)(11). Given the statutory definition of "underwriter," the exemption is available if: (1) the acquisition of the securities was not made "with a view to" distribution; and (2) the sale was not made “for an issuer in connection with” a distribution. See 15 U.S.C. § 77b(11) (1988); ABA Report, The Section "4(1 1/2)" Phenomenon: Private Resales of "Restricted" Securities, 34 Bus. Law 1961, 1975 (July 1979); Hazen, The Law of Securities Regulation at § 4.23, at 138. Relevant to both inquiries are (1) whether the securities have come to rest in the hands of the security holder; and (2) whether the sale involves a public offering. The best objective evidence of whether a sale is "for an issuer" is whether the shares have come to rest. See ABA Report, 34 Bus.Law. at 1975. While this determination would at first seem to be a fact-specific inquiry into the security holder's subjective intent at the time of acquisition, courts have considered the more objective criterion of whether the securities have come to rest. That is, courts look to whether the security holder has held the securities long enough to negate any inference that his intention at the time of acquisition was to distribute them to the public.

Decades ago, courts accepted a two-year rule of thumb to determine whether the securities have come to rest. *See United States v. Sherwood*, 175 F. Supp. 480, 483 (S.D.N.Y. 1959) ("The passage of two years before the commencement of distribution of any of these

shares is an insuperable obstacle to my finding that Sherwood took these shares with a view to distribution thereof."). This two-year rule was reflected in early versions of Rule 144, and then later reduced to the six month and one year periods discussed above. 17 C.F.R. § 230.144(b)(1).

Here, St. John's holding period was at least 34 months. The holding periods for IBEX were all in excess of one year and averaged 30 months. The lengthy holding periods establish beyond any rational doubt that the notes came to rest in the hands of IBEX and St. John's long before they were sold. Neither acquired the securities "'with a view to' distribution", because no one who had a view to distribution of a security would hold that security consistently for years and years after acquisition. Those are the actions of a long-term investor. Also, no one with a view toward distribution would continue to invest and reinvest in the same issuer, only to hold the new notes for years at a time again, as IBEX did here. The IBEX acquisitions made with cash years before the securities were resold were not made for an issuer in connection with a distribution or with a view toward distribution at the time of acquisition.

The intent at acquisition was always to become wealthy once BioElectronics obtained FDA approval of its medical device for general retail sale without prescription in the United States. RT 482, 506. The investors in BioElectronics, including IBEX and St. John's, steadfastly believed in the product and in the prospect of securing FDA approval in the near term. Id. See also RT 861-862. Thus, it is not surprising that BioElectronics, equally convinced that FDA approval was around the corner, borrowed funds sparingly at a cost of dilution reflective of the high risks inherent in such investments, firmly believing that the cost of capital would be far less once FDA approval was achieved and the stock price rose to better reflect BioElectronics' true intrinsic value. [RT 869-873, 1047.] Consistently, IBEX and St. John's held their securities on a long term basis in the hope of getting a huge run-up in market value upon securing FDA approval. The fact that FDA approval was achieved only for prescription use on

isolated applications, and that FDA approval for broader prescription use and non-prescription use of BioElectronics' products has not yet been achieved, does not negate the obvious long-term investment mindset of the investors in BioElectronics, St. John's and IBEX.

To the extent IBEX or BIEL did fall short of Rule 144's requirements, such was an honest mistake, made after dutiful engagement of professionals and reliance on their advice. Each and every IBEX sale transaction was made pursuant to written documents, fully disclosed by BIEL in its public filings, in reliance on formal written opinions of counsel. See RX 1-167; RX 171B-171R. Every St. John's transaction was executed through a SEC registered broker-dealer. DX 1, ¶34.

Under these circumstances, the Court should find that both IBEX and St. John's transactions are exempt under Section 4(a)(1) of the Securities Act, whether or not the Court finds strict compliance with Rule 144.

F. Serial Compliance Does Not Constitute A Scheme To Evade.

Serial compliance of law does not establish a plan to evade that law. Just as driving to work every day under the speed limit does not prove a plan to evade that speed limit, the fact that IBEX complied with Rule 144 in dozens of transactions does not establish a plan to evade the registration requirements. Instead, IBEX's steadfast compliance with applicable safe harbor provisions, designed to provide IBEX the certainty it relied on to make such loans, reflects a careful, lawful and honest effort to comply with the letter of the law. Just as there is no limit to the number of times one can drive under the speed limit, Section 4(a)(1) and Rule 144 do not limit the number of times an investor can sell securities using those exemptions, reinvest the proceeds, wait the statutory period, then do that again. The Court should not accept the Division's invitation to legislate such a limit through the enforcement action.

The Division complains that there are billions of shares in the public market, without any such shares ever having been registered. First, there is no limitation to the number of shares that can be sold using the safe harbor provisions of Rule 144 or exemptions available under Section 4. The argument is purely emotional and undercuts the intended safe harbor of Rule 144. Rule 144 was intended to provide certainty with respect to the sale and resale of unregistered shares and its limits have been steadily reduced in order to promote an active and reliable marketplace for both registered and unregistered shares. New exemptions, such as Section 4(a)(7), make it easier than ever to sell unregistered securities. The intent has been consistently to expand the exemptions to encourage such investments, to create jobs and taxable companies, not restrict investments as the Division hopes to do by this action. If the Commission intended a limitation not already incorporated into Rule 144, it could have revised Rule 144. The Division's role is not to make such law through enforcement proceedings. A patrolman is not free to change the speed limit after the driver passes by, to manufacture the basis for issuing a ticket, simply because the driver drove by many times under the posted speed limit.

Second, the number of shares is reflective of its price, often below .001 per share. $1 buys more than 1000 shares at that price. So, 3 billion shares, which sounds like a huge number, results in market capitalization of only $3 million dollars. Only 4000 shares of Google's common stock, trading at $800 per share, generates a larger market cap. Mr. Whelan testified that over $27 million had been invested in this company on a long term basis. The value of the number of shares in the public market is a small fraction of the total investment in BioElectronics, which itself is a relatively small sum in terms of capital investments made into medical device development companies competing with BioElectronics. [RT 858-859; 869-871]. A simple reverse split would eliminate the exaggeration offered by the Division.

The transactions were exempt under Section 4(a)(1) and, as to IBEX, steadfastly compliant with Rule 144. The sum of those exempt and compliant transactions is not evasion.

G. Private Sales By IBEX Were Required By The DTC Chill.

The Court expressed concern at the hearing about why there were so many transactions with IBEX, and why IBEX was selling to private parties, rather than directly into the market place. Neither fact supports a finding of evasion.

There were so many transactions simply because Andrew Whelan was watching out for his shareholders. He always felt that FDA approval would follow shortly, and that the current stock prices and conversion rates on notes would be unduly dilutive in comparison to the market prices of the shares once FDA approval was secured. So, he limited his borrowings from IBEX to relatively small amounts that he needed to get through a short period of time. RT 858-859; 869-871.

The reason for the private sales by IBEX was simply that IBEX was unable to sell its shares through its broker due to a DTC Chill[4] on the stock that started in 2009 and was not lifted until 2014. RT 461 et seq.; RT 491 et seq.; RT 512 et seq.; RT 862 et seq.; RT 1057 et seq.

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[4] DTC is a wholly owned subsidiary of The Depository Trust & Clearing Corporation, a non-regulated holding company. DTC, as a registered clearing agency, falls within the definition of a self-regulatory organization ("SRO"). 15 U.S.C. § 78c(a)(26). DTC provides clearance, and settlement services, among others, for a substantial portion of all equities and corporate debt securities available for trading in the United States. In 2010, DTC processed 295,000,000 book-entry transfers of securities worth $ 273.8 trillion. See, *International Power Group Ltd* Admin. Proc. File No. 3-13687; Securities Exchange Act of 1934 Release No. 66611.

"A Deposit Chill blocks the further deposit of securities of the issuer at DTC, but other DTC services, including book-entry transfer services, continue to be provided with respect to securities of the issuer deposited at DTC before the Deposit Chill". See, *In the Matter of the Application of Atlantis Internet Group Corporation* Admin. Proc. File No. 3-15432 (2015).

Thus, the reasons for the many transactions between BIEL and IBEX were based on the practical circumstances facing these parties, not having anything whatsoever to do with evading the registration requirements – the farthest thing from either party's mind.

H. Section 13 Violations

1. The Reporting and Internal Control Obligations Upon Which The Division's Claims Are Based Do Not Apply to BioElectronics As A Matter of Law.

The reporting requirements upon which the OIP is based arise under Section 13(a) and apply only to issuers with a class of securities registered under Section 12. 15 USC §78m. BioElectronics never had class of securities registered under Section 12, and thus owed no such reporting obligations.

The Division at footnote 2 argues that "BioElectronics' Section 12 reporting obligation arose as a result of its filing a Form 8A-12g on February 12, 2006 in conjunction with a registration statement on Form SB-2. The Form 8A-12g went effective by operation of law under Section 12(g) 60 days after filing, even though the Form SB-2 was subsequently withdrawn."

It is true that BIEL filed a Form 8A-12g and SB-2 in February 2006. RX 188, 190. It is also true that that registration effort was withdrawn in July 2006. RX 189, 190.

Under Rule 477, BIEL had the right to apply to withdraw its registration before the registration went effective, provided it had the SEC's consent. Such consent is presumed unless the SEC objected within 15 days. It did not object, so the withdrawal was effective, provided it was made before the registration went effective automatically. RX 190. BioElectronics, and its counsel who was representing it in connection with such withdrawal, Kirkpatrick, Lockhart, et al. (now KL Gates), believed the withdrawal had been effective. RT 190; 192 et seq. For years thereafter, the SEC staff appeared to concur, as they issued no notices of deficiency to

BioElectronics, despite the fact that it was not filing any 10Qs or 10Ks in 2006, 2007, 2008 and 2009. Indeed, during all of that time, the SEC never notified BioElectronics that it had a class of shares registered with the SEC or that it owed any reporting obligations. See RX 190.

BioElectronics, in 2010, voluntarily filed its first 10K with the SEC, hoping such voluntary reporting would help it generate institutional investors. RT 926. Only after that filing did the SEC contend, for the first time, that BioElectronics' and KL Gates' 2006 and 2007 withdrawals were ineffective, on the basis that the registration automatically went effective 60 days after the February 2006 filing, and thus had gone effective before the 2006-2007 withdrawals had occurred.

While there is a great deal of litigation and evidence introduced at trial as to whether or not two isolated bill and hold transactions reported in the 2009 10K filed March 31, 2010 were correctly disclosed, the issue is a *red herring*. *Assuming, arguendo, the Section 13(a) reporting obligations applied to BioElectronics in 2006-2010, which they did not,* then BioElectronics concedes that it would be unintentionally in violation of such reporting requirements, as it clearly did not file with the SEC the quarterly and annual statements with the SEC that it would have been required to file. But, the fact that the SEC never notified it of any deficiencies, together with the fact that KL Gates, a reputable securities law firm, oversaw the effective withdrawal, should give the Court serious pause for concern that the SEC's belated position is simply wrong. If BioElectronics and KL Gates were correct, (as well as the SEC staff overseeing the registration efforts at the time and failed to notify BioElectronics of any deficiencies in filings for all of 2006-2009), that the 2006 and 2007 withdrawals were effective, then all of Division's claims for reporting and internal control violations, premised on such mistake, should be dismissed.

That brings us to Section 12(g), which states:

(g)(1) Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce shall—

> (A) within one hundred and twenty days after the last day of its first fiscal year ended after the effective date of this subsection on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more persons; and
>
> (B) within one hundred and twenty days after the last day of its first fiscal year ended after two years from the effective date of this subsection on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons,

register **such security** by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to **such security** containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. **Each such registration statement shall become effective sixty days after filing with the Commission** or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 18 of this title. … [Emphasis added.]

The sixty day automatic registration in section 12(g), upon which the Division expressly relies in footnote 2 of the OIP, only applies to "such registration statement" -- "such registration statement" means only the mandatory registration statements registering "such security" set forth in the specific situations described in subparagraphs (A) and (B). BIEL never had a class of equity securities held of record by more than three hundred, much less five hundred persons. RT 910-911. Thus, the automatic registration is not applicable to BIEL because it did not have enough shareholders.

This interpretation not only enjoys the support of the plain meaning of the applicable statute, but is entirely consistent with Rule 12g-4, which provides, in relevant part:

> **§ 240.12g-4 Certifications of termination of registration under section 12(g).**
>
> Link to an amendment published at 81 FR 28706, May 10, 2016.
>
> (a) Termination of registration of a class of securities under section 12(g) of the Act (15 U.S.C. 78l(g)) shall take effect 90 days, or such shorter period as the Commission may determine, after the issuer certifies to the Commission on Form 15 (17 CFR 249.323) that the class of securities is held of record by:
>
> (1) Less than 300 persons; or
>
> (2) Less than 500 persons, where the total assets of the issuer have not exceeded $10 million on the last day of each of the issuer's most recent three fiscal years.
>
> (b) The issuer's duty to file any reports required under section 13(a) shall be suspended immediately upon filing a certification on Form 15; Provided, however, that if the certification on Form 15 is subsequently withdrawn or denied, the issuer shall, within 60 days after the date of such withdrawal or denial, file with the Commission all reports which would have been required had the

> certification on Form 15 not been filed. If the suspension resulted from the issuer's merger into, or consolidation with, another issuer or issuers, the certification shall be filed by the successor issuer.

BioElectronics did, in fact, file a Form 15 in April 2011. RX 208. Indeed, the Division admits at paragraph 17 of its OIP, that the reporting requirements of Section 12(g) ended when BioElectronics withdrew its registration in April 2011. In essence, Rule 12g-4 provides that where *mandatory* registration is no longer required, one can withdraw without the consent of the Commission. Similarly, section 12(g)(1) does not impose automatic registration unless registration is *mandatory*. Clearly, Congress wanted to be sure that companies whose registration was mandatory were captured automatically and could withdraw only after the SEC's review while voluntary filers would not be captured automatically and could withdraw easily without such review. Thus, the plain language of the statute, a holistic view of related statutes and common sense agree with BioElectronics' management, the Kirkpatrick, Lockhart securities lawyers working on the withdrawal, and even the SEC staff members whose silence for three years indicates their agreement, that BioElectronics' withdrawal of its registration filings in 2006 and 2007 were effective. Thus, the reporting and internal control obligations upon which the Division brings its claims in this case are inapplicable to BioElectronics and fail as a matter of law.

2. The Division Has Not Met Its Burden Of Proving A Material Misstatement Or Omission.

The Ninth Circuit has stated that in order to prove a violation of section 13, "the SEC must establish that the alleged misstatement or omission was material." *SEC v. Gillespie,* 349 Fed. App'x 129, 131 (9th Cir. 2009); *see also*, e.g., *SEC v. Yuen*, No. CV 03-4376 MRP, 2006 WL 1390828, at *41 (C.D. Cal. Mar. 16, 2006).

The Supreme Court in *Basic Inc. v. Levinson,* 485 U.S. 224 (1988) rejected the use of numerical formula to determine materiality:

> A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.

Id. at 236, n. 14; and *Ganino v. Citizens Utilities Company* 228 F. 3d 154, 162 (2nd Cir. 2000).

> Under the governing principles, an assessment of materiality requires that one views the facts in the context of the "surrounding circumstances," as the accounting literature puts it, or the "total mix" of information, in the words of the Supreme Court. In the context of a misstatement of a financial statement item, while the "total mix" includes the size in numerical or percentage terms of the misstatement, it also includes the factual context in which the user of financial statements would view the financial statement item. The shorthand in the accounting and auditing literature for this analysis is that financial management and the auditor must consider both "quantitative" and "qualitative" factors in assessing an item's materiality.[fn omitted] Court decisions, Commission rules and enforcement actions, and accounting and auditing literature [footnote omitted] have all considered "qualitative" factors in various contexts.

SEC Staff Accounting Bulletin, No. 99.

The Division claims that because the bill and hold transaction revenue was 47% of the gross revenues of BIEL in 2009, it must have been material. Such a bright-line rule is inconsistent with the *Basic* and *Ganino* decisions.

Even assuming, *arguendo*, some portion of that $366,000 revenue is determined to have been prematurely reported in 2009, and instead belonged in later years, the first question that the Court would need to address is: how much? That number would then have to be compared to the massive cash flow shortfalls and sustained eight figure losses suffered by BIEL, and the

detailed disclosures in the same 2009 Form 10-K warning about BIEL's uncertain viability as a going concern. RX 171B-171R; RT 1349. In light of all of the circumstances, this Court should find that such sum, if any, would be immaterial.

3. The eMarkets and YesDTC Transactions Were Recorded Accurately And, In Any Event, Were Immaterial.

The expert report and testimony of Dr. Linsley establishes that BioElectronics properly recorded and disclosed the eMarkets and YesDTC transactions. RX 203; RT 1350 et seq.

The Division does not dispute that the cash received and retained by BioElectronics should be recognized, but instead contends that the $150,000 of YesDTC receipts is properly characterized as other income, and that the eMarkets revenue is properly recognized once shipments of products are made. RT 717. This is precisely the corrective restatement made by BioElectronics on May 16, 2011. RX 171R. Thus, the issues in dispute are only timing and categorization, not the existence of the cash receipts themselves.

The Division has not and cannot establish, through stock price movement or common sense, with a perspective of the total mix of facts, that the mere timing and categorization of these fully disclosed isolated transactions would be material to an objective investor. Indeed, Respondents' expert, Robert Hills, opined that no material changes in the stock sales of BioElectronics stock price resulted from such disclosure. RX 204; RX 207. Mr. Sachs agreed: "I think it's probably likely that on ---- really, if you'd do it right, that you wouldn't get substantive significance on April 1st." RT 843.

4. YesDTC.

YesDTC entered into a Distribution Agreement with BioElectronics on December 30, 2009 (the "Distribution Agreement"). RX 169B. The Distribution Agreement obligated YesDTC to pay $100,000 to BioElectronics upon signing, and $50,000 within 90 days. *Id.* On

December 30, 2009, YesDTC paid BIEL $100,000 and on March 31, 2010 YesDTC paid $50,000 to Jarenz LLC, a factor of BioElectronics' receivables, at BioElectronics' instruction. RX 169C; RT 940.

YesDTC asked BIEL to have the product stored at BIEL's facility until delivery was requested by YesDTC. RX 169D.

YesDTC paid $150,000 for (1) the initial product purchased; and (2) an exclusive license fee for the territorial rights to sell the product into Japan. RX169B; 169C; RT 940. If product was not purchased in sufficient levels, then YesDTC would lose its license rights. RX 169B. In any event, the $150,000 would not be refundable. RX 169B, RT 942. YesDTC had no expectation that monies for the products purchased under the Distribution Agreement would be refundable if YesDTC proved to be unsuccessful. RX 169B; RT 942; DX 52; RX 197. Instead, YesDTC understood and agreed that if it did not maintain the levels of purchases outlined in the agreement, YesDTC would lose its license to market the product into Japan in the future and that its investment in that license and unsold inventory would be lost. RX 169B. Section 9.4 outlined procedures relating to YesDTC recovering funds should the Agreement be terminated. RX 169B.

YesDTC attempted to obtain approval from Japan to sell BIEL's product in Japan, but was unsuccessful. DX 52; RX 197. Notwithstanding YesDTC's failure to sell the product in Japan, BIEL and YesDTC understood and agreed that YesDTC was not entitled to a refund of any part of its initial purchase order for $150,000. RX 197; DX 52.[5]

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[5] At the hearing, the Division made much of a March 31, 2010 email exchange between Mr. Noel and Mr. Whelan in which they agreed that BioElectronics would refund $50,000 if BioElectronics terminated the Agreement. Both the Division's accounting expert, Mr. Vondra, and the Respondents' expert accountant, Dr. Linsley, concurred that the refund would only be due if BioElectronics terminated the agreement. RT 712 (Vondra: "I would read that to say, if we, meaning BioElectronics, terminate the agreement.") Dr. Linsley: RT 1331-1332. Because BioElectronics had all the power and had no intention of doing so, the amendment did not call for a change in the manner of accounting for the transaction. *Id.*

Thus, in the end, and to this day, BioElectronics retained all of the $150,000 paid to it by YesDTC and recorded as revenue in the original Form 10K filed by BioElectronics for the year ended December 31, 2009. RX 171C; 211. Dr. Linsley explains that such revenue recognition was proper under the circumstances. RX 203, RT 1306 et seq. Thus, although, at the SEC's urging, BioElectronics restated its 2009 financial statements in an abundance of caution, to this day its management and expert witness Dr. Linsley believe that its accountants and auditors were entirely correct in recording such revenue on the books of BioElectronics December 31, 2009 Form 10K. RX 171C, 203, 211; RT 360, 361, 362, 1306 et seq.

a. Agreement to Fixed Delivery Schedule.

In an email to Esther Ko, Joe Noel, YesDTC's President, confirmed that YesDTC anticipated taking possession of the inventory as needed after approval to sell in Japan was secured, which was expected to be easily obtained within 4 months. RX 169B; 169D.

b. The Distribution Agreement with YesDTC Is A Binding Contract.

The YesDTC Distributorship Agreement dated December 30, 2009 is a written agreement governed by the laws of Maryland. RX 169B; RT 936.

Under Maryland law, the Distributorship Agreement constitutes a valid binding contract. Title 2, Sales, Maryland Commercial Code §2-106, provides:

> (1) In this title unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (§ 2-401). A "present sale" means a sale which is accomplished by the making of the contract.
>
> (2) …
>
> (3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.
>
> (4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling

> party also retains any remedy for breach of the whole contract or any unperformed balance.

Maryland Commercial Code section 2-204 provides:

> (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
> (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

The Distributorship Agreement is clearly "sufficient to show agreement" between YesDTC and BIEL. Paragraph 19.1 makes clear that if any provision of the contract would render it unenforceable, a court is directed to amend the contract to achieve an enforceable contract. RX 169B. That Joe Noel signed the agreement for YesDTC; recorded the transaction on YesDTC's books and records; and followed up that agreement with full performance, emails with Esther Ko and Andrew Whelan confirming such agreement, and a formal termination letter agreement, more than adequately manifests his intention to bind YesDTC. That BioElectronics cashed the YesDTC check, issued a contemporaneous invoice for the product purchased, recorded such transaction on its books, specifically discussed it in its Form 10K, performed the agreement and confirmed Mr. Noel's commitment in emails from outside accountant, Esther Ko, to Joe Noel, reflects that BioElectronics also manifested its intention to be bound. RX 169B-169E, 171C, 185-187, 197; DX 52, 67, 86.

Maryland UCC section 2-204(1) states: "conduct by both parties which recognizes the existence of such a contract" is "sufficient to show agreement." Here, both YesDTC's and BioElectronics' conduct recognized the existence of such contract, which evidence is sufficient

to show the agreement under applicable Maryland law. RX 169B-169E, RX 171C, RX 185-187, RX 197; DX 52, DX 67, DX 86. There is no valid argument to the contrary.

Section 5.2 of the Distributorship Agreement, titled Minimum Initial Purchase, provides: "The Distributor shall be required to purchase from the Company, as its initial purchase, no less than 15,000 units at the below specified prices." That purchase closed concurrently with signing the Distribution Agreement. The purchase price per unit, stated on Schedule A of the Distributorship Agreement, is $10. Thus, $150,000 became payable for the initial purchase under section 5.2 and section 7.2, $100,000 of which was payable immediately and $50,000 to be paid within 90 days. RX 169B, RX 171C, RX 197. Those payments were actually made. RX 169C.

Moreover, Maryland UCC section 3-402 establishes that the sale occurred not upon shipment, as the Division contends, but when the contract was made ("A 'present sale' means a sale which is accomplished by the making of the contract.")

The Distribution Agreement contemplated that YesDTC would seek and obtain approval to sell such product in Japan. See last sentence of paragraph 1 of the Distribution Agreement: "Should Distributor be unable to gain regulatory clearance within six months of contract execution, this agreement is voidable at the option of the Distributor." RX 169B.

The Division contends, based on paragraph 1, that no revenue should have ever been recognized on this contract because the entire agreement was void unless YesDTC secured Japan's approval. That is not true. It was "voidable", not void *ab initio*. Moreover, because the contract itself reflects the parties' agreement that "regulatory clearance to sell the Company's products in Japan can be relatively easily obtained", as of December 31, 2009, it is beyond dispute that the likelihood that YesDTC would ever be in a position to void the Distribution Agreement and would actually do so, appeared unlikely.

As Dr. Linsley explained, the possibility of lost revenue resulting from a condition subsequent (the inability to secure Japan approval), would only give rise to a reporting obligation if such contingency was both reasonably likely and quantifiable. Here, the parties agreed in the plain text of the applicable provision that the contingency was unlikely. Accordingly, no recordation of such contingent loss was warranted. RT 1312, 1313.

The Distributorship Agreement is silent as to whether or not the $150,000 that YesDTC paid for the initial purchase would be refunded by BIEL to YesDTC in the event YesDTC was unable to secure the "relatively easily obtained" license from Japan and thereafter exercised its right to void the contract. Where the contract is silent, we look to the parties' intentions and, if that cannot be proven, to applicable law to determine the intent of the parties.

Section 2-106(3) and (4) of Maryland's UCC are entirely consistent with the parties' mutual intent that no refund of the initial purchase would be made. Those provisions state that upon termination or cancellation of an agreement, "all obligations which are still executory on both sides are discharged **but any right based on prior breach or performance survives**." *Id.* Emphasis added. Because the initial purchase was no longer executory as to YesDTC (paid in full before YesDTC abandoned its inventory),[6] BIEL's rights in such initial sale (entitlement to keep the purchase price) survive as a matter of law. The termination applied only to future sales obligations of YesDTC. Consistently, the parties' mutual letter agreement to terminate the transaction required no refund of the proceeds of such initial sale. RX 197.

c. Delivery Occurred, Although Not Shipped.

[6] YesDTC never exercised its right to void the Distributorship Agreement. YesDTC simply abandoned its inventory and the parties understood, due to YesDTC's inability to secure approval to sell the inventory in its sole license territory, Japan, that YesDTC would not fulfill the remainder of its obligations under that contract. RX 197.

Although the product was delivered to YesDTC by BIEL, it was maintained at BIEL's warehouse for YesDTC's benefit. It is true that the product sold to YesDTC never **shipped** (although the product sold to eMarkets has been and continues to be shipped to this day). That is because YesDTC never obtained approval from Japan, its sole licensed territory, to sell the product in Japan, and abandoned the product at BIEL. But, YesDTC had every right to burn such inventory at any time, and assumed all risks of ownership. RT 943-944.

Delivery did occur on December 31, 2009, because the transfer of title and risk from BIEL to YesDTC occurred on December 31, 2009; the Distributorship Agreement was signed December 30, 2009, BioElectronics' invoice for the product was dated December 31, 2009, YesDTC had paid $100,000 on December 31, 2009, and promised to pay the remaining $50,000 within 90 days under the terms of the Distributorship Agreement, both parties recorded such transaction as completed on their books as of December 31, 2009, and Joe Noel confirmed the same in an email to BioElectronics' accountant in connection with its audit. The revenue recognized was actually received, as reported, and is retained to this day by BIEL. Recognition of such sale in the 2009 Form 10K filed by BIEL was appropriate, as Dr. Linsley testified and opined in his expert report to the Court. RX 169B; RX 169C; RX 169D; RX 169E; RX 171C, RX 203, RX 211; RT 360-362, RT 1306 et seq.

d. The Goods Sold Were Finished.

The goods sold to YesDTC were finished. RT 382. The Division has conflated the issue with issues pertaining to eMarkets' purchase, discussed below. There is no evidence, whatsoever, that the goods sold to YesDTC were unfinished.

5. eMarkets

In February 2009, eMarkets entered into a definitive written distribution agreement with BIEL, and made an initial purchase of 1,500 squares for a cost of $15,750, paid for by wire from eMarkets Group's bank on February 13, 2009. DX 18, DX 21-22, 93, RX 170B-170C, RX 181.

eMarkets stored the product eMarkets purchased from BIEL in a discrete segregated section of BIEL's warehouse. RT 606-607, RT 654-655, RT 955-956. The product was maintained at BIEL because under FDA regulations, eMarkets believed at the time it was obligated to store the product at an FDA approved warehouse; and because eMarkets requested that BIEL do so. RT 653. eMarkets took exclusive ownership of the inventory, booked it as inventory, sold it, and shipped it to customers. RT 586-596. At eMarkets' direction, BIEL processed the shipping to the end-user and consolidated the shipment of both the eMarkets inventory items (squares and crescents) with loop products that are "drop-shipped" to avoid multiple shipment expense to the customer. Id. The loop is used by veterinarians for applications such as hoof treatments. Id.

When BIEL decided to stop making the plastic encased squares and crescents, Mary Whelan decided to purchase as many of the devices as she could to meet the anticipated needs of her customers. RT 623 et seq. At that time, eMarkets Group was in discussions with retail outlets (PetSmart, QVC, Hartz Mountain, Emson, etc.) all of whom require guarantees of sufficient inventory before considering placing an order. eMarkets Group purchased the following inventory. RT 630 et seq. eMarkets ordered and paid for the following purchases in the chart below:

Date Purchased	Product Purchased	Date Paid	Amount
2/4/2009	1,500 Squares	2/13/2009	$15,750
6/24/2009	502 Squares	various	$940.

6/30/2009	12,200 Crescents	9/30/2009	$91,500
12/15/2009	10,000 Squares	6/23/2010	$75,000
12/15/2009	4,778 Crescents	6/23/2010	$35,835
Total	12,002 – Squares 16,978 - Crescents		$219,025[7]

RX 181. eMarkets agreed to accept the risk of advance purchase of the product based on eMarkets' belief that demand existed and its desire to control the market pricing. RT 623 et seq.

a. There Was A Fixed Delivery Schedule.

Delivery from BIEL to eMarkets was made to eMarkets throughout 2009, and all such deliveries were completed on or before December 31, 2009. RX 170C. Delivery occurred when title and risk of loss passed, and the finished product was segregated in BIEL's inventory subject to eMarkets' instructions for shipment. RT 607, RT 654-656. As Mary Whelan attested, and told Esther Ko at the time, eMarkets expected to have BIEL ship its product to customers before the end of 2010. RT 607, RT 654-656, RX 170C.

b. Sales Were Based On A Binding Contract Between BIEL and eMarkets.

eMarkets and BIEL entered into a written Distribution Agreement in February 2009. RT RX 170B. Paragraph 19 states that Maryland law applies. RX 170B. The Distribution Agreement manifests, unequivocally, an intent to be bound. Included in that Distribution Agreement is a license to sell BIEL products, with minimum sales standards. RX 170B. Specifically, sections 2.3 and 2.4 provide that eMarkets must purchase 10,000 units the first year, 25,000 units the second year, 50,000 units the third year and 75,000 units the fourth year; and that failure to do so would permit BIEL to terminate the license to sell such products. RX 170B.

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[7] **This total is slightly greater than the $216,000 disclosed in BIEL's 2009 Form 10K by $3025.**

As detailed above, Maryland's UCC does not require a written agreement in order to create a binding agreement. "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Maryland UCC, §2-204(1). "A 'present sale' means a sale which is accomplished by the making of the contract." Maryland UCC, §2-106(1).

Here, the parties' course of action, against the backdrop of their written Distribution Agreement, unequivocally manifests the existence of a binding contract. eMarkets purchased the product in 2009, and title passed to eMarkets in such products upon such purchase. RT 590-592; RT 959; RT 607-608; RT 1338-1346; RX 170B. eMarkets took all the risks associated with such product, and accepted delivery of such product at BIEL's warehouse. *Id.* The purchase price promised was paid in full. RX 181. Approximately $107,000 was paid before the end of 2009 and the remainder was paid within six months. RX 181. There is no legitimate doubt that a binding contract existed under Maryland law as of December 31, 2009. eMarkets Group entered the inventory into its own accounting system and declared the inventory in its 2009 federal income tax Form 1065. RT 607-608.

At no time did eMarkets or BIEL have any expectation that funds paid were refundable. RX 170B, RT 953. Under Maryland law, the foregoing facts establish a binding contract to sell BIEL's product to eMarkets.

c. The Product Was Delivered In 2009; and Shipped in 2009 And Thereafter.

It is important, when discussing "delivery", to separate the concepts of "delivery" and "shipment." Delivery occurs when title to the goods, along with risk of ownership, transfers. Delivery occurred when the parties had agreed to the terms of the sale and BIEL tendered

finished product to eMarkets at BIEL's warehouse, as requested by eMarkets. Delivery was complete in 2009. RT 590-592; RT 959; RT 607-608; RT 1338-1349; RX 170B.

Shipment occurred when BIEL sent the products stored in its warehouse to eMarkets' customers or otherwise at eMarkets' direction (eMarkets reimbursed BIEL for all related shipping costs and handling fees). RT 590-592; RT 959; RT 607-608.

Emarkets anticipated that the inventory purchased and delivered throughout 2009 would be shipped by the end of 2010. RX 170C. Email exchanges from between Esther Ko and Mary Whelan confirmed such shipment schedule. RX 170C.

The Division conflates delivery and shipment to make its case. The Division's contention that the products were "never" delivered is false. BIEL delivered the product to eMarkets and eMarkets accepted delivery in 2009 and has been shipping it ever since. RT 590-592; RT 959; RT 607-608; RT 1338-1349; RX 170B.

After delivery by BIEL to eMarkets, eMarkets' product was warehoused in a separate section of BIEL's warehouse. RT 607, RT 654-656. That does not render the contract invalid or the delivery ineffective. Indeed, such facts were fully disclosed to BIEL's auditor, Robert Bedwell, and BIEL's attorneys, and BIEL relied on such professionals in making such disclosures. RT 1288.

d. eMarkets purchased finished product.

The products sold by BIEL and purchased by eMarkets in 2009 were in finished form. RT 382; RT 586 et seq.; RT 955. To the extent additional product components, shipping services and shipping costs were added to such finished products in connection with shipping them to particular eMarkets customers, per each customer's specifications, BIEL separately charged eMarkets and eMarkets separately compensated BIEL on case by case basis. RT 586 et seq. These additional sales and charges are not included in the revenues recorded in the 2009

financial statements. RT 586 et seq. Although confusion arose when the Division's counsel examined Andrew Whelan over adding adhesive components (used in some human products), such discussion would never apply to eMarkets' veterinary products. RT 586 et seq. Because eMarkets' customers intended to use such products on animals with fur or hair, adhesives were never added to the eMarkets product that had been purchased from BIEL and was segregated in BIEL's warehouse. RT 607, RT 654-656.

e. All Revenues Recognized in 2009 Were Received, Never Refunded, and Fully Complied with GAAP.

There is no dispute that BIEL actually received and kept the $366,000. Only the timing of when BIEL should have recognized that revenue is disputed. RX 181.

The eMarkets payments totaling slightly more than the $216,000 reported are detailed in the chart above. The last of such payments was June 23, 2010. RX 181.

Thus, as to the entire $366,000 bill and hold transactions revenue at issue, over $207,000 was received in 2009, and the balance was received on or before June 23, 2010. Neither of these transactions was cancelled, voided or terminated and no refunds have been requested or paid.

Dr. Linsley opined that BIEL complied with GAAP. RT 1338-1349; RX 203.

SEC Staff Accounting Bulletin: No. 101 – Revenue Recognition Financial Statements revenue recognition conditions are:

- Persuasive evidence of an arrangement exists. [Both the YesDTC and eMarkets transactions were reflected in formal distribution agreements; checks were delivered to BioElectronics and deposited; invoices were issued by BioElectronics; and each entity accounted for the transaction as having been consummated in 2009].

- Delivery has occurred or services have been rendered. [All parties agree that distributors, YesDTC and eMarkets, made non-refundable purchases and

accepted beneficial and legal title to the goods and all risks associated with such goods, but that YesDTC and eMarkets requested that BIEL store their purchased inventory in BIEL's warehouse as a convenience to YesDTC and eMarkets. In addition, both YesDTC and eMarkets made initial purchases as a condition of the license rights secured pursuant to the terms of its distribution agreement.]

- The seller's price to the buyer is fixed or determinable. [The selling prices were fixed and paid.]

- Collectability is reasonably assured. [More than $207,000 of the $366,000 contract price had already been paid, and each buyer had sufficient assets to pay.]

Notably, both methods ended with the same result – recordation of all revenue in 2009. BIEL's auditors were well aware of these transactions and confirmed independently the terms thereof with eMarkets and YesDTC. DX 19. Audited financial statements, certified by BIEL's qualified certified public accountant as being in compliance with GAAP, were filed by BIEL with the SEC in its 2009 Form 10K on March 31, 2010. RX 171C.

6. Books and Records And Internal Controls Claims.

Section 13(b)(2), upon which the Division's claims are based, applies only to "Every issuer which has a class of securities registered pursuant to section 12 [15 USC §78l] of this Act and every issuer which is required to file reports pursuant to section 15(d) [15 USC §78o(d)] of this Act." 15 U.S.C. §78m. Because BIEL does not have a class of securities registered pursuant to section 12 of the Act and is not required to file reports pursuant to section 15(d) of the Act, Section 13(b)(2) does not apply.

Moreover, the Division presented no evidence at trial to meet its burden of establishing that BioElectronics did not have adequate internal controls in light of the size and financial simplicity of its operations. In a start-up company of this size and with its limited financial transactions and business operations, it is not the least bit out of the ordinary to see non-

compliance with standards applicable to large multi-national companies. The standards for internal controls should be viewed in that context and, in that light, were adequate.

I. The Division's Prayers For Remedies Are Unsupported By The Facts and Not Warranted By The Equities of the Case.

The Division seeks extraordinary equitable relief against the Respondents without justification. If and to the extent the Respondents are deemed to have violated the securities laws, they did so unwittingly, in good-faith reliance on advice of qualified accountants and lawyers and in substantial compliance with the same securities laws. The paucity of any evidence of bad-faith conduct militates against the need for relief. *SEC v. Manor Nursing Centers, Inc., supra,* 458 F. 2d at 1101, *SEC v. Senex Corp.,* 399 F. Supp. 497, 507 (E.D. Key. 1975); *United States v. Hill,* 298 F. Supp. 1221, 1235 (D. Conn. 1969).

1. Permanent Cease and Desist Order and an Officer and Director Bar is Unwarranted

The Division failed to adduce any evidence to carry its burden to demonstrate that permanent injunctive release is warranted against each of the Respondents. *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978); *see also Aaron v. SEC*, 446 U.S. 680, 701 (1980) (Burger, C.J., concurring) (holding that "the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur . . . . Moreover, as the Commission recognizes, a district court may consider *scienter* or lack of it as one of the aggravating or mitigating factors to be taken into account in exercising its equitable discretion in deciding whether or not to grant injunctive relief."). There is no evidence of willful violations in this action. Instead, it is more than reasonable that the respondents relied in good faith on their auditors, accountants and lawyers in every aspect of the facts in this case and there is nothing in the facts of this case that warrants a cease and desist order. Specifically,

- The Division failed to present any evidence that the Respondents acted fraudulently or to manipulate, or deliberately with reckless disregard, notwithstanding its massive three-year investigation in which it desperately engaged in an amorphous fishing expedition to find fraud it could not;
- It is undisputed that the Respondents were not aware of any of the violations alleged;
- There is no evidence of identifiable harm to investors because this case does not involve worthless, or lightly traded securities, nor a failure to disclose, indeed a registration statement would not have disclosed any material information not already voluntarily disclosed in BioElectronics' filings;
- None of the securities transactions at issue were concealed from the SEC or investors, but, instead, were fully disclosed in detail to the SEC and the investors;
- There is no risk of future violations.

2. BioElectronics Has Not Been A Company Required To Report To The SEC Since 2011, If Ever.

As explained above, BioElectronics has never been a company with a class of shares registered with the SEC, and as such has never had Section 13 reporting obligations. Even if the Court adopts the Division's view of Section 12(g) (which it should not), the Division nevertheless concedes at paragraph 17 of the OIP that BioElectronics was not required to comply with such reporting requirements after its Form 15 was filed on April 8, 2011. Accordingly, there is no rational justification for enjoining further violations of Section 13, since Section 13 has not applied to BioElectronics in more than four years, if ever. There is no likelihood that BioElectronics, absent such an injunction, would violate the law in the future, and thus no justification for the entry of an injunction preventing it from doing so.

3. The Division's Request for "Equitable" Disgorgement, Plus Prejudgment Interest, is Unwarranted and Not Supported By the Evidence

The SEC may only obtain disgorgement where granting such a remedy would be equitable. *See, e.g., In re Adelphia Commc'ns,* 367 B.R. 84, 96 (S.D.N.Y. 2007) (denying a claim for disgorgement where granting such a remedy would have resulted in inequity).

The Court should deny this equitable remedy for at least four reasons: (1) disgorgement would not be equitable; (2) there is no proof of a causal connection between the violations and the profits to be disgorged; (3) there is no evidence on a transaction by transaction basis of the alleged unjust enrichment; (4) there is no proof distinguishing between legitimate and allegedly illegitimate gains.

This Court is not required to issue a disgorgement award, but may do so only to the extent, in exercising sound discretion, it finds that the relief it is awarding is justified and equitable. As BioElectronics' financial statements show, the money it borrowed from IBEX has been spent almost as quickly as it was invested over the years such investments were made. Ordering disgorgement of money spent long ago would not magically cause such money to reappear. Instead, such a judgment would impose a financial death sentence on BioElectronics, prevent it from realizing upon the long term investments made and the only hope that investors have to recover and profit on their investment -- FDA approval. Indeed, a substantial disgorgement order of already expended cash proceeds of loans would cause a forfeiture of investments, including the substantial investments by IBEX, and the United States Import Export Bank loan. Query how "equitable" that result would be for the company's shareholders and the American taxpayers.

Disgorgement against St. John's would unjustly punish Patricia and Andrew Whelan by denying them the relatively modest proceeds of an investment of cash and salary ($150,000 per year) made years before the sales in question. DX 1, ¶32 et seq. Andrew Whelan earned such salary through years of dedicated service, obtaining patents and FDA approvals. *Id.*; and RT 901. In light of the technical nature of the violations, if any, and the lack of any accusation that St. John's violated the anti-fraud provisions, no injunction is warranted and any disgorgement should be nominal. See *SEC v. Universal Major Industries Corp., supra*, 546 F. 2d at 1048.

Similarly, a disgorgement order against IBEX would be wholly inappropriate. IBEX invested and remains at risk to BIEL for over $5 million. During the limited relevant time period selected by the Division, IBEX loaned more than $4 million, and hundreds of thousands of dollars more than it received in the transactions identified in the More Definitive Statement. See RX 1A and Division's More Definitive Statement; Stip., Exhibits A and B. Much of that debt remains owed. RX 171Q. If the Division is successful against BIEL and issues a substantial monetary judgment against it, whether in the form of penalties or disgorgement, the likelihood of BioElectronics' survival to repay IBEX would be wiped out. IBEX has suffered more than enough from this action.

Disgorgement is not to be used punitively. *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)("Since disgorgement primarily serves to prevent unjust enrichment, the court may exercise its equitable power only over property that is causally related to the wrongdoing. The remedy may well be a key to the SEC's efforts to deter others from violating the securities laws, but disgorgement may not be used punitively."). Disgorgement "is a remedy that gives courts flexibility" to determine the appropriate remedy to fit the wrongful conduct. *SEC. v World Gambling Corp.*, 555 F. Supp. 930, 934 (S.D.N.Y. 1983).

In this context, if used at all, it would have to be punitively imposed. Disgorgement against BIEL would end the company. The case centers around investments made over many years into a company who used such investments, as intended by the investors, to advance its marketing and technology. Its focus was on proving the marketability of its product in foreign countries that allowed its sale (now generating over $2 million annually); improving its product technology, complying with its legal and accounting responsibilities and, most importantly, seeking broad FDA approval to distribute its products in the United States on both a prescription and non-prescription basis. BioElectronics continues to operate at substantial cash flow deficits, as it has done since its inception. It relies on new investments of capital to continue its operations and to bring to fruition its substantial investment of time, effort and capital.

As indicated by the published financial statements at RX 171C-171S, BioElectronics has no ability to pay anything but a modest judgment. No new investor is going to be willing to fund BioElectronics, if the invested funds are to be dedicated to an SEC money judgment. Thus, any judgment would not only cutoff the life's blood of BioElectronics' funding, but would sap BioElectronics of the funds in its operations that are being fully utilized to fund such operations.

The purpose of the Section 5 registration requirement is "to protect investors by promoting full disclosure of information necessary to make an informed investment decision." *SEC v. Ralston Purina*, 346 U.S.119, 124 (1953). Here, IBEX and St. John's purchased securities from BioElectronics in a private transaction exempt under Section 4(a)(2). St. John's held the convertible notes for years and then converted and sold its stock pursuant to Section 4(a)(1). IBEX, on the other hand, held the convertible notes it purchased for many years and then resold those securities under Sections 4(a)(1) and/or 4(a)(7) to a highly sophisticated accredited investor in private transactions. An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering." *Ralston Purina, 346 U.S. at 125*. Stated another

way, a limited distribution to highly sophisticated investors, rather than a general distribution to the public, is not a public offering.

There is no evidence that registration of the securities purchased by IBEX or St. John's would have served the purpose of informing investors. Indeed, both were accredited investors and had access to an abundance of information from the company, including its capitalization, officer and directors, and profitability through the OTC website.

Second, there is evidence the primary buyer of IBEX's notes and shares at issue, Redwood Management LLC, was also a highly sophisticated *accredited investor*. RX 1A, pp. 3-7; RX 120, pp. 812 (¶7) and 822 (¶4); RX 136, pp. 941h (¶7) and 941r (¶4); RX 167, pp. 1234 (¶7) and 1250 (¶4). As discussed above, had IBEX or BioElectronics registered the convertible notes prior to selling them, Redwood Management LLC would not have received any additional information about the investment beyond what was disclosed in BioElectronics' filings with the SEC and the OTC exchange. The amount of convertible notes owned and the duration of such notes was disclosed to Redwood and other investors. In addition to disclosing the ownership of BioElectronics' convertible notes by IBEX, BioElectronics provided detailed disclosure about its finances, shares and notes issued and outstanding. RX 171C-171R; RX 211. It can hardly be argued that investor Redwood Management, or any other buyer of IBEX's notes, was kept in the dark.

Further, had BioElectronics registered the shares that Redwood Management met received as a result of conversion or the shares St. John's received at conversion of the notes, the same information would have been disclosed that was already disclosed to investors in BioElectronics' securities. The unidentified market investors would have received no new information because they had been told in every published financial statement for every quarter and every year that: the convertible notes had been issued, those notes were convertible into

stock, IBEX was owned by the CEO's daughter, held millions of dollars in convertible notes and was its primary lender, that IBEX was selling those convertible notes, and that shares issued by BioElectronics had been substantially increasing as result of conversion of such notes. See RX 171C-RX 171R; RX 211. The investors were also aware that IBEX's notes were in fact regularly being converted. Thus, this case involved neither worthless risky, or lightly traded shares (the "blue sheet" information produced by the SEC in support of Mr. Park's testimony included 805,000 lines reflecting a trade on each line), or the failure to disclose material pieces of information required by regulations. The shares sold into the market by Redwood Management and St. John's during the relevant period were identical to the other shares that were already trading in the market at the same time and could be resold at the same price as the other shares. Investors were aware of their issuance or at least potential issuance by full disclosure of the issuance of convertible notes. The Division also failed to present evidence showing the public was harmed in any way or the extent to which IBEX and St. John's received a benefit based on the alleged failure to register the notes or stock sold.

4. Disgorgement May Not Exceed the Profits Obtain Through the Alleged Wrongdoing

"The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing." *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978). Plaintiff must show a causal relationship between the alleged wrongdoing and the amount to be disgorged and, at least, a "reasonable approximation" of the ill-gotten profits. *Allstate Ins. Co. v. Receivable Fin. Co., L.L.C.*, 501 F.3d 398, 413 (5th Cir. 2007) (citation omitted).

Because disgorgement does not serve a punitive function, the disgorgement may not exceed the *profit* obtained through the wrongdoing. *SEC v. Wyly*, No. 10-cv-5760, 2014 WL 3739415 (SDNY 2014). The outer bounds of the appropriate measure of disgorgement is the

total value of the securities sold, minus the direct transaction costs of acquiring such securities. See, e.g. *SEC .v Universal Exp. Inc.* 438 Fed App'x 23, 26 (2d Cir 2011); *SEC v. Cavanagh* No. 98 Civ. 1818 2004 WL 1594818 at 30 (S.D.N. Y. 2004), aff'd by *Cavanagh* 445 F.3d at 116-17. In addition, "where benefits result from both lawful and unlawful conduct, the party seeking disgorgement must distinguish between the legally and illegally derived profits." *Id*. In other words, the SEC must establish both a reasonable approximation of the profits and the causal connection between its approximation and the violations.

This case was not like those in which the unlawful conduct is insider trading or purposeful market manipulation; rather, here, there was no evidence that the defendants' conduct resulted in any undisclosed market distortion, price impact, or profit tied to the violation or that the defendants were motivated by the expectation of such profits. Without such proof, the impact of the unlawful conduct is speculative.

Regardless of how the Division wishes to label Respondents' business practices, there is no changing the fact that Respondents were charged with failing to register securities. Thus, the Division is obliged to show that any disgorgement figure is, in fact, causally connected to the failure to register. Stated differently, the Division must establish an amount of profit that, but for Respondent's Section 5 violation, each Respondent would not have received. There is no evidence supporting such a conclusion.

Although disgorgement may be ordered if there is a reasonable approximation of ill-gotten gains, the amount and its causal link to the wrongdoing cannot be speculative.

Here, IBEX acquired the convertible notes in a private transaction at face value of the note, plus interest. Convertible notes are, in effect, two contracts: (1) a cash repayment obligation; and (2) an option to convert debt into shares in the issuer. IBEX sold the notes years later for the face value of the repayment obligation (essentially selling the conversion option for

nothing). Where it sold the note without the interest accrued, IBEX received the principal amount of the debt. Where it sold the note with interest, IBEX received the principal amount of debt plus the amount of the accrued interest. In short, IBEX sold the debt and threw in the conversion option for no additional consideration. RX 1A, RX 206; RT 1112 et seq., RT 1202 et seq.

To determine whether IBEX received an unjust profit, the Division would have to have proven a profit, which it did not do and could not have done, because there was none. The Court would have to compare the value of what IBEX gave in the transaction (the convertible debt) to the purchase price (the face value of that debt). In doing so, the Court may borrow from Bankruptcy Code section 548(d)(2)(A). Bankruptcy courts are often called upon to analyze whether a transaction constitutes a fraudulent transfer for less than adequate consideration – essentially doing what this Court is asked to do in determining whether a disgorgement award is appropriate – compare the value of what was given against the value of what was received. Section 548(d)(2)(A) says that satisfaction of antecedent debt is value. In essence, the Bankruptcy Code values debt at 100%, when discharged in exchange for a transfer of property. Here, where debt of a going concern entity, such as BioElectronics, is exchanged at full face value, there would be no fraudulent transfer because the values of the exchange would be equal on both sides of the transaction. Similarly, this Court should not find a disparity in the value of the exchanges, and thus no profits, much less ill-gotten profits, were received by IBEX. Accordingly, IBEX should not suffer any disgorgement award.

Even if IBEX received a profit, which it did not, there is no evidence that such profit was causally connected to its purported violation of Section 5 of the Exchange Act.

Even in the limited circumstances in which IBEX sold shares of stock that were issued to it as a result of converting a note, it did so in a private transaction, not in the market place.

IBEX's sale of stock was made to a private party at a substantial discount to the market. In fact, the discount at which IBEX sold those shares to Redwood was consistent with the discount that would be applied if a party was selling restricted securities, approximately 50%. RT 184-185. Unregistered shares placed privately are typically sold at a discount. There are several economic factors that contribute to this discount, including the decreased marketability. Academic studies have found that the "[a]verage discounts on unregistered shares are sizable, ranging from 20% to 35%." Mukesh Bajaj et al., *Firm Value and Marketability Discounts*, 27 Journal of Corporate Law 89, 97 (2001) (collecting and summarizing studies). Thus, IBEX did not profit from such sales, and even if there were profits, there is no evidence that such profits were causally related to the alleged Section 5 violation in selling its shares to private party Redwood Management.

Because IBEX did not profit, unjustly or otherwise, from the transactions at issue in this case, any attempt by the Division or this Court to award disgorgement would constitutes an impermissible penalty. *SEC v. Wash. Cnty. Util. Dist.,* 676 F.2d 218, 220-27 (6th Cir. 1982) (holding that a defendant who received kickbacks for aiding and abetting a co-defendant's profitable violation should disgorge the value of the kickbacks); *Hateley v. SEC*, 8 F.3d 653, 654-56 (9th Cir. 1993) (holding that a brokerage firm and its principals could only be required to disgorge 10% of the commissions generated by an unregistered broker because they paid that broker the other 90%).

Turning to BioElectronics, it also did not unjustly profit from its transactions. It simply borrowed money from IBEX. It received cash in exchange for convertible notes – a promise to repay the same amount of cash, plus interest at 8%, plus a conversion option. BioElectronics, having an obligation to repay every penny it borrowed, with interest, did not profit from the loan transaction. Again, borrowing from Bankruptcy Code section 548(d)(2), the value of debt is the face value of that debt. Even if there had been profits, which there were not,

there is no evidence of a causal connection to the alleged Section 5 violation. Accordingly, no disgorgement award is justified based on the record before the Court.

5. The Court Must Identify on a Transaction by Transaction Basis the Appropriate Disgorgement, If Any.

The Division's own expert admitted that the securities transactions upon which he based his conclusion that a scheme to evade existed were limited to the years 2013 and 2014. RT 155 and 201. The Respondents strongly dispute that any scheme to evade the registration requirements existed. But, if the Court is persuaded by Mr. Park's analysis and conclusions, it should limit any relief granted to the transactions executed during 2013-2014.

The SEC seeks to portray its request for disgorgement of total profits as a remedy for the Section 5 violation as a garden-variety application of settled disgorgement principles. Not so. The facts of each case determine the extent of such equitable relief.

In stark contrast to the facts of this case, other SEC enforcement actions under Section 5 typically involve fraud. See, e.g., *SEC v. Cavanagh*, 98 CIV. 1818 DLC, 2004 WL 1594818 (S.D.N.Y. July 16, 2004) (awarding full disgorgement for Section 5 violation where defendants "drove the stock price north of $5 in a 'pump and dump' scheme from which they and their associates pocketed millions of dollars"), aff'd, 445 F.3d 105 (2d Cir. 2006).

A defendant may certainly be ordered to disgorge salary payments when such payments are tied to unlawful acts. See *SEC v. Merch. Capital, LLC*, 486 F. App'x 93, 96 (11th Cir. 2012) ("We know of no authority . . . which holds that salaries received . . . cannot be considered ill-gotten gains."). But that such payments may be subject to disgorgement does not relieve the SEC of its burden to reasonably approximate profits and tie those profits to benefits received from the wrongful conduct. See, e.g., *SEC v. Chapman*, 826 F. Supp. 2d 847, 859 (D. Md. 2011) (rejecting SEC's request for disgorgement of salary where "[t]he SEC has not shown a causal

relationship between [defendant's] salary and bonuses and the fraud."); *SEC v. Resnick*, 604 F. Supp. 2d 773, 783 (D. Md. 2009) (rejecting disgorgement of chief marketing officer's salary where SEC failed to show salary was causally linked to the unlawful conduct); *SEC v. Church Extension of Church of Church, Inc.*, 429 F. Supp. 2d 1045, 1050 (S.D. Ind. 2005) (ordering disgorgement of one-half of senior officer's salary where, "[b]ut for the securities violations, [the organization] would have collapsed earlier, so the violations enabled the defendants to continue their employment" and receive salary payments); *SEC v. Hughes Capital Corp*., 917 F. Supp. 1080, 1087 (D.N.J. 1996) (same), aff'd, 124 F.3d 449 (3d Cir. 1997).

In *SEC v. E-Smart Techs., Inc*., 139 F. Supp. 3d 170, 188-190 (D.D.C. 2015), the Commission sought disgorgement of an executive's salary. However, the Court found that most of the salary appears to have been earned before the relevant time period. The SEC also contended that the executive benefited by receiving 125 million shares of e-Smart stock. But the Court found the issuer had issued the shares before the relevant period and noted that even if the "market value" of e-Smart shares increased during the relevant period, "the Commission has simply not shown that Saito received any benefit by virtue of holding that stock." The Court explained that the executive never realized any gains from those shares, as they remain unsold. Like the executive's salary, his possession of shares does not offer a reasonable basis for holding the executive jointly and severally liable for disgorging from the issuer, e-Smart. Citing, *SEC v. Wyly*, 71 F. Supp. 3d 399, 420 (S.D.N.Y. 2014) ("I cannot agree that including unrealized gains from securities that were never sold is a reasonable approximation of [defendants'] ill-gotten gains."); *SEC v. Todd*, No. 03-2230, 2007 U.S. Dist. LEXIS 38985, 2007 WL 1574756, at *18 (S.D. Cal. May 30, 2007) (concluding that SEC failed to establish a "nexus between the supposed ill-gotten gains and the requested disgorgement" where defendants "did not cash in [their] stock options"), aff'd in part, rev'd in part on other grounds, 642 F.3d 1207 (9th Cir.

2011). The Court thus declined to hold the executive jointly and severally liable for disgorging the $77 million in proceeds that e-Smart obtained by virtue of his misrepresentations. In fact, the court ordered no disgorgement from him the executive at all.

6. Joint and Several Liability is Unwarranted Because the Gains Can Be Reasonably Apportioned

When the gains and losses can be reasonably apportioned among the alleged violators, then joint and several liability is inequitable. *SEC .v Universal Exp.* 646 F. Supp. 2d. 552 at 563 (SDNY 2009), aff'd 438 Appx. 23 (2d Cir.2011). If the Respondent can prove apportionment, then the Respondent should only be held responsible for certain amounts from which she personally benefited. *SEC v. E-Smart Techs., Inc.*, 139 F. Supp. 3d 170, 188 (D.D.C. 2015). Here, the Court has ample evidence from which to calculate attribution of profit and loss to any alleged actor and, accordingly, joint and several liability would not be warranted. This is particularly so, where, as here, the actors are not being accused of knowing wrongdoing, but of a non-scienter based registration violation.

7. The Division's Request for Prejudgment Interest is Not Warranted.

Because prejudgment interest is also equitable relief, it is appropriate to consider issues of fairness. Here, depending on the date of the transaction, the SEC seeks prejudgment interest for a period as long as five years. However, the SEC is, at least in part, responsible for the delay. The Respondents are not responsible for the SEC taking more than three years to bring the case. Under these circumstances, any interest on the amount of alleged gains would be inequitable.

Finally, prejudgment interest must be based on a net number attributed to Defendants as ill-gotten funds. As discussed above, Plaintiff has not demonstrated what amount, if any, Defendants received or used in the form of ill-gotten gains. Accordingly, prejudgment interest on this unknown sum is not appropriate.

8. The Division's Request for Civil Penalties Should be Denied

For the same reasons that any disgorgement above a nominal disgorgement would be unjust, any penalty would as well. Courts can consider the other remedies already imposed in determining whether a penalty would be unduly harsh under the circumstances. This comes in a case where the Division did not even allege fraud against Respondents, and made no allegation Respondents acted with scienter. After viewing each Respondent giving his or her testimony, the Court undoubtedly came away from the trial believing them to be honest people who may or may not have inadvertently stepped over a yet unwritten rule in the complex securities laws applicable to transactions in unregistered shares. Under these circumstances, no penalty is warranted.

When considering whether an administrative sanction serves the public interest, the Commission considers the factors identified in *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981): the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations (Steadman factors). *Altman*, 666 F.3d at 1329; Gary M. Komman, Advisers Act Release No. 2840 (Feb. 13, 2009), 95 SEC Docket 14246, 14255, pet. denied, 592 F.3d 173 (D.C. Cir. 2010). Other factors the Commission has considered include the age of the violation (*Marshall E. Melton*, 56 S.E.C. 695, 698 (2003)), the degree of harm to investors and the marketplace resulting from the violation (*id.*), the extent to which the sanction will have a deterrent effect (see Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46), whether there is a reasonable likelihood of violations in the future *(KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1185 (2001), recon. denied, 55 S.E.C. 1, pet. denied, 289 F.3d 109 (D.C. Cir. 2002)), and the combination of sanctions

against the respondent (id. at 1192). See also *WHX Corp. v. SEC*, 362 F.3d 854, 859-61 (D.C. Cir. 2004). The Commission weighs these factors in light of the entire record, and no one factor is dispositive. *KPMG*, 54 S.E.C. at 1192; see Gary M. Komman, 95 SEC Docket at Section 21.

Here, the *Steadman* factors and public interest militate against any penalty, including: (1) no Respondent is alleged to have acted with **fraud, deceit, manipulation, or deliberate or reckless disregard** of a regulatory requirement; (2) no **harm to other** persons resulted either directly or indirectly from the act or omission alleged; (3) the alleged violation did not cause **unjust enrichment;** (4) the Whelans, IBEX and St. John's have never been found by the Commission or another regulatory agency to have **violated the securities laws**, or the rules of a self-regulatory organization; and (5) there is no further **need to deter** the Respondents and other persons from committing the acts or omissions. *See* 15 U.S.C. § 78u-2(c).

It is undisputed that the Respondents were unaware of the alleged violations at issue and believed all conduct was entirely legal. The Division failed to present evidence showing the public was harmed in any way or the extent to which IBEX received a benefit based on the undisputed fact that IBEX lent more money to BioElectronics than it received from the sale of BioElectronics' securities during the relevant period defined by the OIP.

Congress empowers the Court under 15 USCS §78u-2 to award limited civil remedies in the context of administrative proceedings. Such limitations are important, given the inherent imbalance in the proceedings favoring the government against its responding citizens. Among other things, the immense power and financial capacity of the government, the highly one-sided rules governing pre-trial discovery, pre-proceeding investigative powers, evidentiary rules, choice of its own judges, and lopsided proceedings, deprive the respondents of anything close to an even playing field in litigation and render the chance of an unjust runaway verdict all too likely, absent Congressional limits.

Thus, Congress made clear that in administrative proceedings, before the Court may award even the lowest level of penalty (Maximum of $5000 for natural persons; $50,000 per entity), the Court must find that a particular respondent has "willfully violated" the Securities Act, among other laws; willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person; willfully made or caused to be made a false or misleading statement of material fact; or failed to supervise another who commits such a violation, if such other person is subject to his supervision. See §78u-2 (a)(1)(A)-(D); and (b)(1). No such willful violations were even alleged in this case, much less proven. Thus, no penalties should be awarded.

Even more obviously, there are no grounds for second tier penalties (maximum amount of $25,000 for natural persons and $250,000 for others), which would require a showing necessary for first tier penalties, plus a showing of fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. §78u-2 (a)(1)(A)-(D); and (b)(2). There is simply no evidence to support such a penalty. In every instance, the Respondents hired reputable counsel and accountants and relied on their advice. If they were wrong, the mistake was neither reckless nor willful. No second tier penalties are warranted.

Finally, there are no grounds for third tier penalties (maximum of $100,000 for natural persons and $500,000 for others), which would require a showing of willfulness set forth in section (a)(1), plus fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, as required for second tier penalties in section (b)(2), plus a showing of harm to other persons resulting either directly or indirectly from such act or omission; and unjust enrichment by the bad actor. §78u-2 (a)(1)(A)-(D); and (b)(3). There is simply no evidence to support such an award in this case.

In addition, under limited circumstances not present here, the Court may require an accounting and disgorgement, but only in any proceeding in which the Court may impose a penalty under the same section. See §78u-2 (a)(1)(A)-(D); and (e). Here, there is no need for an accounting, as the accountings already part of the exhibits in this case amply detail all relevant transactions. See, e.g., RX 1A; and Stip., Exh. A, B. Moreover, as explained above, there is no basis for a penalty, and thus no basis for disgorgement, as the Court's authority to order disgorgement is conditioned on its finding of grounds to impose a penalty. *Id.*

9. The Divisions' Request for an Officer and Director Bar Is Unwarranted.

Andrew Whelan founded BioElectronics and has been operating it as its Chief Executive Officer and one of its directors for more than 16 years. DX 1, ¶¶1-2. He frequently works without taking a cash salary and has taken his pay in the form of convertible notes payable to St. John's for years. RT 901 et seq. He is an honest man who, despite spending extensively on professionals, finds himself faced with non-scienter claims alleged by the SEC. Inasmuch as there is no allegation of intentional wrongdoing or fraud, it would be wholly unjust, through an officer and director bar, to prevent Andrew Whelan from completing his effort to bring BioElectronics' medical devices to market in the United States and abroad, to the substantial profits of his family and his outside investors. An officer and director bar against Andrew Whelan is entirely unwarranted and would wreak a grave injustice on him, his family, his company and its shareholders.

Even more obviously, an officer and director bar against Kelly Whelan is entirely unwarranted. Kelly Whelan never served as an officer or director of any public company during the entire relevant time. Neither Kelly Whelan nor IBEX have ever been previously sanctioned by any regulator. The Division does not remotely contend that Kelly Whelan engaged in any

fraud. See OIP. There is no contention that she acted with scienter. *Id.* Instead, the record is replete with facts about how Kelly Whelan acted in good faith, in reliance of counsel and the plain language of Rule 144.

More than the effect of the injunction would be the implied sentence that Kelly Whelan is not to be entrusted with moneys invested by public investors. Such implication is a career death sentence and would impugn Kelly Whelan's credibility as a CPA in innumerable ways for the rest of her life. The danger to Kelly Whelan's career is illustrated by the fact that the California State Board of Accountancy recently (after the hearing in this matter had concluded) notified her that due to the pendency of this litigation, her right to practice accounting in California has been suspended.

Such a devastating result is normally reserved for individuals who have repeatedly and willfully violated the securities laws causing massive damages to investors. Kelly Whelan is not even accused of committing a fraud. Instead, the Division contends she committed a non-scienter based infraction of Section 5 of the Securities Act.

For the same reasons, as above, a permanent penny stock bar is unwarranted and exceeds any possible justifiable sanction.

10. Respondents' Inability to Pay.

The Respondents' inability to pay is a relevant factor for the Court's consideration in entering a Judgment in this case. Subsection (d) of 15 USC §78u-2 expressly provides that "a respondent may present evidence of the respondent's ability to pay such penalty." *See also, SEC v. Huffman*, 996 F.2d 800, 803 (5th Cir. 1993) (discussing inability to pay in context of disgorgement order); *SEC v. Harris*, 2012 U.S. Dist. LEXIS 31394, at *16 (N.D. Tex. March 7, 2012) (inability to pay is one factor to be considered in imposing a penalty). The Court should consider such evidence in determining whether such penalty is in the public interest. Such

evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

Here, BioElectronics' financial statements for the past 7 years are presented at RX 171C-171R. As detailed therein, there is a serious doubt about its ability to continue to operate as a going concern, because the company has consistently invested its cash investments and cash flow on its operations and development of its product and cannot survive without new infusions of capital. It has no binding contracts with any investor to provide such capital. If the Court issues a substantial penalty or disgorgement award, such undoubtedly would forever kill any possibility of generating such new investments. No new investor would be willing to put money into BioElectronics, knowing it could immediately be seized by the United States to collect on its judgment. Thus, a substantial award would, quite obviously, prevent BioElectronics from continuing in business.

Such an award would also likely render the same award uncollectible. While a modest award (say, $50,000), might be collectible, any substantial award would not. The Company already has a first lien in favor of the United States' XM Bank, securing a $500,000 loan. Any liquidation of its assets in a forced sale scenario would be unlikely to repay that lienholder. Thus, a runaway award would provide the least chance of recovery to the government.

Similarly, both St. John's and IBEX have all of their assets tied up in their long-term notes in BioElectronics. If this Court were to wipe out BioElectronics through its judgment against it, it would simultaneously, albeit indirectly, wipe out IBEX's and St. John's sole asset, as collection on its BioElectronics debt would become impossible.

Andrew Whelan and Kelly Whelan have also submitted personal financial records pursuant to a protective order, which Respondents request that the Court take into consideration in determining their inability to pay penalties and disgorgement in this case.

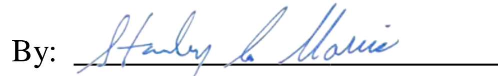
III.

CONCLUSION.

This Court should resolve this case in a manner which allows BioElectronics to continue to honestly pursue its goal of securing FDA approval and market its product worldwide for the benefit of its shareholders and the users of its innovative product. The Court presumably left the trial knowing that the parties involved were honest people whose departures from the securities laws, if any, were honest mistakes, after consultation with reputable accountants and lawyers. Although Respondents contend that they did comply with all applicable laws, in the event the Court disagrees, the Court should award the Division only that relief that constitutes ill-gotten profits, that reflects the Respondents' honest and good faith, and carefully consider the particular Respondents' ability to pay such an award. As Congress and the Commission understood in enacting Section 4 and Rule 144, it is important to encourage investment in start-up companies, especially those, such as BioElectronics, whose mission is to bring an innovative medical product to market. BioElectronics hopes to offer a pain relieving device that would compete favorably against drugs as the prevailing pain reliever in the United States. Because drug use for pain relief has led to chemical dependency and the devastation of many people and their families, the public has a compelling interest in allowing BioElectronics to complete its mission. It is in the best interests of shareholders and the public at large that the Court exercise due restraint in imposing any monetary or injunctive relief in this case.

October 28, 2016

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing was served on the following on the date and in the manner indicated below.

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(By electronic mail at alj@sec.gov on 10/28/16; and original and three copies via overnight mail

The Honorable Cameron Elliot
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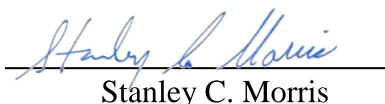

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