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' REPLY TO DIVISION OF ENFORCEMENT'S 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 reply to The Division Of Enforcement's Post-Hearing Brief ("Division's Brief").

In the aftermath of an historic election, which undoubtedly will see a reconstitution of the Commission before an appeal is completed in this matter, the Division asks Your Honor to legislate from the bench. First, it asks Your Honor to ignore the plain language of Section 12(g), in favor of a Commission Staff's Q & A statement, so that it can capture stale Section 13 violations over a company that has not had shares registered with the SEC ever (under BioElectronics' view), or since early 2011 (under the Division's view). There is absolutely no regulatory purpose served by doing so. Next, and far more importantly, it asks that the Court impose new uncertainty and unforeseen limitations on the number of times and shares that are entitled to the safe harbor provisions of Rule 144, despite that Rule 144 includes no such provisions, and ignoring that the the Supreme Court in *SEC v. Ralston Purina*, 346 U.S. 119, 125; 73 S.Ct. 981, 984 (1953) made clear that "there is no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation."

While there is no compelling reason to stretch these statutes to the Division's will, the relief sought by the Division would only cause harm to the public interests. The Division's relief requested would annihilate a promising medical device development company and the family who has dedicated their lives and substantially all of their financial resources to bringing an innovative and inexpensive drug free pain relief device to consumers.

For the reasons stated below, in the Respondents' Post-Hearing Brief, and at the hearing on this matter, Respondents urge the Court to deny the Division's claims, and all of them.

II.

LEGAL ARGUMENT

A. Section 12(g) Does Not Impose Automatic Registration On Voluntary Filers

A plain reading of Section 12(g), as applied to the 2006 and 2007 formal withdrawals of registration by BioElectronics, requires a finding that such withdrawals were effective. Instead of explaining to the Court why that plain reading should somehow be read consistently with its position, the Division relies on *ipse dixit* -- a Commission Staff Q and A answer published on its web site. See Division's brief, pp. 66-67. That Staff's comment obviously does not have the equivalent weight of the law as enacted by Congress. The post-trial briefs leave no doubt that BioElectronics was not a mandatory filer because it never had the number of shareholders required to be required to register its shares. As such, its shares were never automatically registered, and its voluntary withdrawals filed with the SEC in 2006 and 2007 relieved it of any obligation to file its financial statements with the Commission, to maintain sufficient internal controls, or to make any of the other filings that would have been required of a company with a class of shares registered with the SEC. BioElectronics, in fact, never had a class of shares registered with the Commission, and thus could not have violated Section 13, which applies only to those companies with a class of shares registered with the Commission. Accordingly, the Division's Section 13 claims, and all of them, should be adjudicated and dismissed in favor of Respondents.

The entire Question and Answer upon which the Division relies is as follows:

> **Question:** Can a company that files a Section 12(g) registration statement on Form 10, Form 20-F, or Form 8-A delay the effectiveness of the registration statement to a date after the 60-day period specified in Section 12(g)?
>
> **Answer:** No. A registration statement on Form 10, Form 20-F, or Form 8-A to register a class of equity securities under Section 12(g) becomes automatically effective 60 days after the date of filing. A company cannot seek to delay the automatic effectiveness of such registration statement. The only way to delay or prevent effectiveness is to withdraw the Section 12(g) registration statement before the effective date. Such a withdrawal, however, is not permitted for a company that is required to register a class of equity securities under Section 12(g). [September 30, 2008]

Available at https://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm. See Compliance and Disclosure Interpretations at Question 116.06.

Notably absent from the Division's citation at page 66 of the Division's Brief is the date of the SEC Staff's inaccurate guidance, September 30, 2008. That date is critical in this case because this Q and A Staff comment was published more than a year after BioElectronics's last withdrawal in 2007. BioElectronics and its securities law experts from the law firm now known as K&L Gates, withdrew their registration, which they were allowed to do on the face of Section 12(g), on which they relied, without the benefit of the Commission's comment misreading that statute. It would be outrageously unjust to allow a single Staff comment published more than a year after such lawful withdrawals to retroactively create burdens on BioElectronics who correctly and reasonably relied on its securities lawyers and the plain meaning of Section 12(g) to withdraw from the voluntary registration process upon which they had embarked.

The Division spent $100,000 on Mr. Vondra's testimony (RT p. 678), plus fees paid for Mr. Sach's testimony, and multiple times those resources in legal work of three lawyers and paralegals, all to endeavor to establish that BioElectronics misclassified and prematurely reported a modest $366,000 in revenue in BioElectronics' 2009 10K and that such misstatement was material to investors (although not a single investor testified that this information was material to him or her). Incredibly, the Division spent more money litigating the debatable

accounting for the modest amount of funds received than the entire amount of those funds. Such a waste of resources is outrageous, particularly given that BioElectronics was not obligated to file the Form 10K at issue in the first place.

It is not disputed that the funds were received and retained by BioElectronics. BioElectronics' shareholders undisputedly received every penny that was reported. It is not as if BioElectronics falsified the funds, which might have justified the Division's attack. Instead, the issues are whether the funds should have been recorded as "other income" or "revenue", and the year in which such funds should have been reported. Dr. Linsley's testimony and report indicated that BioElectronics reported the revenue in the correct year, 2009. He agreed with the advice and auditor's opinion of Mr. Bedwell and his accounting firm, the auditors who signed off on the presentation in the 2009 10K after a thorough audit. And, Mr. Hills explained that the disclosure was not material to the market for BioElectronics' stock. BioElectronics' management, for their part, did not care one way or the other, how these funds were recorded. They just wanted it done right. BioElectronics was entitled to rely on their professionals with respect to the financial presentation, which BioElectronics maintains was done correctly. If any errors were made, they are immaterial. Whether revenue is recorded under the bill and hold rules, or as sales revenue or other income, would not be material to shareholders, as explained at trial and in the Respondents' Post-Hearing Brief.

Enough has been said on the topic. The positions are clear. If BioElectronics had a class of shares registered with the Commission from 2006 through 2011 (which it did not), there would be undisputed violations of Section 13 in that it admittedly did not file numerous 10Qs and 10Ks during that period. The bill and hold transaction issue makes little difference. If not, which BioElectronics submits is the case, then there are no violations of Section 13, whether the funds reported as bill and hold sales revenue should have been recorded as bill and hold sales

revenue in 2009; regular sales revenue in 2009, or were prematurely recorded revenue, "other income" or any combination thereof. In the end, despite the hundreds of thousands of dollars in government resources thrown at the issue, the issue should not weigh on the substance of the award in this case. After all, BioElectronics, by the Division's own admission, has not had a class of shares registered with the Commission since 2011 (if ever), and there is no threat whatsoever of repeating another error of this nature. Accordingly, without remotely conceding the dramatically overcooked presentation of the Division on the bill and hold issue, and unfair critique of Dr. Linsley, Respondents submit on the discussion set forth in the Respondents' Post-Trial Brief.

B. Section 4 Exempts IBEX and St. John's Sales Of Securities After Lengthy Holding Periods; Reinvestments Exceeding Sales Proceeds By A Million Dollars Did Not Create A Violation Of Otherwise Exempt Transactions

Section 4 of the Securities Exchange Act encourages investments in companies in exchange for unregistered securities to promote job growth and tax revenues. As detailed in the Respondents' Post-Hearing Brief, the Respondents utilized those exemptions exactly as they were intended. As a result, BioElectronics employed its staff and professionals to pursue the development of its medical device. This was exactly what Congress intended in allowing for transactions in unregistered shares.

The Division is antagonistic to Section 4. It rails against sales of unregistered securities, self-servingly designating them as "illegal unregistered transactions" (Division's Brief, p. 1), as if transactions in unregistered shares are necessarily illegal. That is simply not the case. If it was, Congress need not have enacted Section 4. Congress intended to incentivize long term investors, like IBEX, to invest in companies like BioElectronics who lacked the means to register their securities, by giving them an exemption to the registration requirements of Section 5. In the

absence of such Congressional authority, the Commission and this Court are not empowered to eliminate or create limitations on Section 4 exemptions.

The Division's Section 5 claims fail because no underwriter or dealer would hold securities for years, and then, when the securities are sold, invest a million dollars more in the company than the amount of money received from such sales. That is precisely what IBEX did in this case.

The Division ascribes all kinds of bad motives and deceptions to the patently honest witnesses presented by the Respondents. The Court is urged to draw its own conclusions. Respondents are confident that the Court, reflecting on the evidence presented at the hearing, will conclude that the Respondents' witnesses were uniformly honest and honorable. If Mr. Whelan was not honest, he would have signed the YesDTC Distribution Agreement and claimed to have "found" it at trial, rather than give the Division the argument that it was never signed by BioElectronics, as support for their contention that the revenue on that contract should not have been recognized in BioElectronics' 2009 10K. Instead, Mr. Whelan turned over whatever was in his files, which was only the unsigned version. When asked if he remembered signing it, he honestly testified that he did not remember.

Q I note that the agreement is signed by one party, but is the agreement signed by BioElectronics?
A No. I didn't -- to the best of my knowledge, I never signed that agreement.
Q Why not?
A I don't know. It came up a long time ago, and just never -- he never asked for the signed copy back, but --

RT p. 936, referring to DX 67.

Perhaps even more telling than the Respondents' open and honest communications with the Commission's investigative staff during its investigation, was the Respondents' extensive voluntary disclosures of BioElectronics' relationship with IBEX and transactions with IBEX in each quarterly and annual publication of its financial statements. See RX 171C-171R; RX 211. There can be no serious doubt that investors were told that Kelly Whelan was the daughter of Andrew Whelan, the CEO of BioElectronics, that she owned IBEX, that IBEX was at times BioElectronics' primary lender, and that IBEX had not only acquired significant new debt during each relevant period, but had also sold or converted that debt, resulting in substantial increases in the number of outstanding shares of BioElectronics. These statements were clearly and honestly published in every report to ensure an honest and full presentation of these facts to the shareholders.

One typical disclosure of IBEX's transactions with BioElectronics can be found at RX 211, p. 002762, which discloses:

> **NOTE 7 – RELATED PARTY NOTES PAYABLE**
> On January 1, 2005, the Company entered into an unsecured revolving convertible promissory note agreement ("the Revolver") with IBEX, LLC ("IBEX") a related party, for a maximum limit of $2,000,000, with interest at the Prime Rate plus 2%, and all accrued interest and principal due on or before January 1, 2015, whether by the payment of cash or by conversion into shares of the Company's common stock. The Revolver is convertible at various conversion prices based on the VWAP for the 10 trading days preceding the date of conversion. IBEX, LLC is a limited liability company, **whose President is the daughter of the President of the Company.** During the year ended December 31, 2007, **IBEX converted $910,000 of the Revolver's outstanding balance and received 26,000,000 shares of the Company's common stock at conversion prices ranging from $.02 to $.10 per share.**
>
> During the year ended December 31, 2008, **IBEX converted $722,400 of the Revolver's outstanding balance and received 57,000,000 shares of the Company's common stock at conversion prices ranging from less than $.01 to $.02 per share.** At December 31, 2008, the balance of the Revolver was

$1,099,722.

During the year ended December 31, 2009, **IBEX converted $529,100 of the Revolver's outstanding balance and received 439,500,000 shares of the Company's common stock at conversion prices at less than $.01 per share.** At December 31, 2009, the balance of the Revolver was $1,287,954.

In addition to the Revolver as described above, on August 1, 2009, the Company entered into a convertible promissory note agreement with IBEX, for $519,920, with simple interest at 8% per annum. All accrued interest and principal are due on or before August 31, 2011, whether by the payment of cash or by conversion into shares of the Company's common stock. The promissory note is convertible equal to the quotient of (i) a sum equal to the entire outstanding principal and interest, divided by (ii) the conversion price of $.019 per share. According to the Security Agreement dated August 1, 2009, the Company grants IBEX a security interest in, all of the right, title, and interest of the Company, in and to all of the Company's personal property and intellectual property, and all proceeds or replacements as collaterals.

The foregoing disclosures are similarly contained in each and every quarterly and annual report at the referenced exhibits. No one was trying to hide these transactions. They were openly disclosed by honest people, after receiving professional advice, as is reflected from their regular, consistent and extremely public disclosures over the Internet, with the Commission and on the OTC Markets web site.

If Kelly Whelan had for a second considered that she wanted to secure the benefits of registration, she would have simply added a registration rights agreement, as LH Capital had, and included her securities in the LH Capital SB-2. See RT pp. 510; 1040. Indeed, Mr. Park, the Division's expert, conceded that the absence of a registration rights agreement in this situation was unusual if IBEX thought registering its securities was important.[1] As the testimony of both

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[1] **RT 149:**

17 **Q Have you seen a registration rights**
18 **agreement in this case?**
19 A Not in this case.

Kelly Whelan and Andrew Whelan made clear, the focus of BioElectronics, its management and lender, IBEX and Kelly Whelan, was not on the technicalities of the benefits of registration of securities, as perhaps the securities law specialists at the Division would presume, but, instead, their focus was to realize a return on the years of investment into its innovative medical device. As part of that effort, IBEX and BioElectronics were mutually motivated to ensure that BioElectronics had the cash it needed to complete its development of its medical device, which involved science based product development, a series of applications with the FDA and other regulatory authorities, and the development of an international distribution channel to establish the product's marketability and to create the template from which, once approved, the device could be marketed and sold promptly within and outside the United States in every major consumer market. They tried to do that lawfully, supported by purported experts in applicable accounting regulations and securities laws.

These are not dishonest people, as the Division suggests. They are not people who understood the nuances of Rule 144, Section 4 or Section 5, much less sat around concocting sophisticated schemes to evade the securities laws, or to develop secret channels through which to distribute unregistered shares into the public market. These were people who thought they were complying with Rule 144's holding periods. RT 510; 643-644; 665; 912-913; 926-927; 1029-1030; 1256. IBEX sold securities because it wanted to generate cash, and by reinvesting some of that cash, improve the conversion rates of its notes. IBEX did that because lawyers for BioElectronics and the purchaser said that it was lawful; and because people were willing to pay

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20 **Q Would you expect to see a registration**
21 **rights agreement with somebody who thought**
22 **registering their shares was important?**
23 A Yes.

cash for them, at a time when that cash was needed by IBEX for other purposes, including to fund Kelly Whelan's lifestyle, and to reinvest cash into cash strapped BioElectronics. Their goal was to generate substantial wealth for themselves and their shareholders by maximizing the value of BioElectronics, while leaving as their legacy a drug free pain relief device that revolutionizes pain relief throughout the world, offering relief from pain inexpensively and without the catastrophic consequences of addiction to pharmaceuticals too often suffered by patients and their families.

The Division hopes the Court will buy into the contention that the Whelans are dishonest people, because only through that distorted prism could the Division win its core contention. At the core of the Division's case is the false contention that the Whelans, working with Redwood Management and other so-called Liquidating Entities, knowingly orchestrated a chain of distribution of BioElectronics' unregistered shares into the public market. The contention reflects baseless hyperbole and cannot be squared with the patently honest demeanor of Andrew and Kelly Whelan, the forthright conduct of these individuals throughout the investigation, including the voluntary production of the voluminous materials used in this proceeding, pre-trial proceedings and hearing in this proceeding, the steadfast dedication of all available resources to the development of BioElectronics' product, the multi-year holding periods of the securities sold by IBEX or the fact that IBEX invested a million dollars more than it received in proceeds during the relevant period. "IBEX received approximately $4 million from Liquidating Entities and sent approximately $5 million to BIEL." Division's Post-Trial Brief at p. 12. Underwriters and dealers do not hold securities for over two years, sell them privately, and then invest more than a million dollars more than the sales proceeds. These are clearly actions of a private investor with a long term view of the issuer, not the actions of a person who can fairly be characterized as an underwriter or dealer.

The transactions, however, do square with Andrew Whelan's explanation for them – that BioElectronics borrowed money in as small amounts as possible, believing all the while that FDA approval was right around the corner and that the cost of capital today would be far more expensive than the cost of capital the moment after BioElectronics secured that FDA approval and the price of its stock skyrocketed. RT 868-876. Such actions also square with Kelly Whelan's explanation – that she was long on the stock, and only sold stock generally in order to reinvest the proceeds so that she could improve her conversion feature (thereby securing more shares upon conversion), believing that FDA approval would be secured and that the more shares she would be able to convert into and sell when that happened, the richer she would become. RT 1064-1065; RT 1242.

There is no evidence that any of the buyers of IBEX securities is in the business of liquidating securities. Indeed, Mr. Park, the author of that term, testified that his characterization of such buyers as "Liquidating Entities" had nothing to do with the businesses in which such entities were involved. RT 219-220. More importantly, there is no evidence that Kelly Whelan knew what IBEX's buyers' intentions were with respect to how long they would re-sell the same securities. But, since Kelly Whelan herself could have converted and sold the shares directly into the public market, as she had held the security for well over the year required by Rule 144, she, understandably, was not concerned with whether or not the particular purchaser intended to hold the security for an additional time before doing so.

IBEX and BioElectronics complied with all applicable laws, as written. They did not even consider, much less concoct, a chain of distribution into the public market. In Kelly Whelan's mind, she was simply utilizing Rule 144's safe harbor to sell long-held securities in BioElectronics for cash. She understood that she could convert the notes and sell the shares into the public market, which she did earlier. But, due to the DTC Chill, she sold to private buyers,

such as Redwood Management as well as other entities argumentatively defined as "Liquidating Entities" by the Division. RT 863.

In many instances, Kelly Whelan did so because she wanted to make new loans to BioElectronics to allow it to move forward with its mission. In other words, she did precisely what Section 4 was designed to encourage – she invested on a long term basis in a start-up company. In doing so, she advanced innovation, preserved jobs and created a business to generate future tax revenues.

The question of whether IBEX or St. John's was acting as an underwriter for BioElectronics turns on whether IBEX was at risk and whether or not the securities came to rest in its hands. As detailed in Respondents' opening brief, IBEX held its notes for well over a year and for more than 30 months on average. See RX 1A. St. John's held its notes and stock for even longer. See DX 1. Given the standards of six months and one year in Rule 144 to determine whether securities have come to rest in the hands of the investor, there can be no serious question that the securities at issue in this case came to rest in the hands of IBEX and St. John's. Thus, transactions in these securities, after such lengthy holding periods, were not the transactions of an underwriter or dealer.

The Division attacks these uncontestable lengthy holding periods and investments far above sales proceeds on several fronts, none of which is remotely persuasive.

The Division contends that "[o]ther than her initial (undocumented and nominal) investment, Kelly Whelan never took on any additional investment risk; She simply took the proceeds of sales of BIEL securities and immediately reinvested them in BIEL, effectively replacing the shares sold, with an ability to obtain shares in the future." Footnote omitted. Division's Brief, p. 18. The Division simply ignores that, at any and every time, IBEX and Kelly Whelan simply could have kept the money, bought a boat, sailed around the world, or otherwise

invested or spent the money in any way it or she chose. Instead, IBEX and Kelly Whelan, each time a reinvestment was made, independently decided with respect to that investment, that it or she would be better off making a new two year investment of capital into BioElectronics in exchange for a new Convertible Promissory Note. What IBEX did prior to each new investment decision is simply not relevant to each decision about whether or not to put its cash at risk. The Division's logic suffers from what is known as the sunk cost fallicy. Each decision is made at the time of each decision, and not based on prior events not relevant to such analysis. In making each and every reinvestment, IBEX went at risk for the new investment with unencumbered cash at its disposal. The fact that the proceeds may or may not have been generated from the sales of earlier held securities issued by BioElectronics does not in any way encumber the cash held by IBEX or the proceeds of any such sale and does not negate the fact that IBEX went at risk when it transferred funds owned by it to BioElectronics.

Moreover, a review of RX 1A and RX 210 reflect the cash holdings and investments by IBEX throughout the relevant period. IBEX held its own cash totaling over $3.8 million in the beginning of 2010, and invested those proceeds over time through 2013. Clearly, IBEX could have done anything it wanted to do with that $3.8 million in cash and it chose to go at risk with loans to BioElectronics in each of the loans at issue in this case with that cash and more.

The Division claims that "Since there are no promissory notes relating to these payments by IBEX to BIEL before the fall 2009, IBEX and Kelly Whelan cannot prove, by a preponderance of the evidence, that they obtained a 'security' at the time they made the original loans" Division Brief at P. 22. The Division is mistaken. Given the extremely broad definition of the term "security" adopted by the Supreme Court (and regularly advanced by the Division, itself), there can be no doubt that even the undocumented convertible debt agreement between BioElectronics and IBEX constitutes a security.

The seminal case for determining if an investment is a security is *Securities and Exchange Commission v. W. J. Howey Co.*, 328 U.S. 293 (1946). In *Howey*, the Supreme Court of the United States held that the offer of a land sales and service contract was an "investment contract" within the meaning of the Securities Act of 1933. 15 U.S.C. § 77b. Justice Murphy, writing for the majority, identified the major legal issue in this case as whether or not the contracts that Howey was selling (which were basically leaseback agreements) constituted an "investment contract" within the meaning of § 2(a)(1) of the Securities Act of 1933. Murphy reasoned that while the term "investment contract" was left undefined by the Act, it had been used in state blue sky laws to cover a broad array of contracts and other schemes to raise capital in a way to secure some income or profit from the use thereof. Thus, the Court concluded that Congress had written the term into the statute in recognition of its previously adopted common law meaning.

Murphy then formulated one of the US Supreme Court's earliest tests to determine whether an instrument qualifies as an "investment contract" for the purposes of the Securities Act (which later came to be referred to as the "Howey test"): investment of money with an expectation of profits arising from a common enterprise depending solely on the efforts of a promoter or third party.

As in *Howey*, here all four prongs of this test are met. The revolver loans were not evidenced by an instrument until the Revolving Convertible Promissory Note evidencing loans made (net of repayments and conversions) between 2005 and 2009, was created in August 2009. See RX 1A, 1C, 1D, 1F; and RT 1108 *et seq.*

A security need not be in writing under the Howie test, discussed above. Indeed, the Division, which regularly insists on the broadest construction of the Howie definition of a security, cannot seriously be advocating for new law that restricts the definition of security to

only documented investments. Doing so would open investors to massive fraud in undocumented securities transactions.

The Division is also wrong based on overwhelming and uncontroverted evidence of the relevant holding periods. The testimony of Andrew Whelan, Kelly Whelan, Mary Whelan, Richard Staelin and Brian Flood, as well as RX 1-RX 167, and, in particular, exhibits RX 1A and 1F, unanimously establish the relevant holding periods.

The delay in executing the Revolving Convertible Promissory Note was the Board's reluctance to fix terms of conversion in a manner that would be unfair to the shareholders. Accordingly, the Board and Andrew Whelan, as BioElectronics' Chief Executive Officer, agreed with IBEX that its loans, and those of several Whelan family members and Board Members, Richard Staelin and Mary Whelan, and St. John's, would apply to their loans the same terms to which third party unrelated investor, LH Capital, would enjoy. LH Capital was used as the model independent third party investor, whose terms were then applied with some modifications to the benefit of BioElectronics with respect to the Board Members, IBEX, St. John's and other Whelan Family loans. See RT 1248-1250. While the Revolving Convertible Promissory Note originally included loans made as early as 2005, by the time the relevant period started for the transactions in this case, the loans remaining to be paid under that Revolving Convertible Note dated back only to 2008. See RX 1A. There is no question that the loans made by IBEX in 2008 and 2009, preceding the execution of the Revolving Convertible Promissory Note, constituted securities, whose holding periods began when the funds were transferred to BioElectronics.[2]

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[2] At page 20 of the Division's Brief, the Division criticizes Brian Flood for omitting the $519,000 secured convertible promissory note from his calculation of the holding periods of the notes sold. The purpose of the holding period analysis was to calculate how long each note sold had been held. Because the $519,000 secured promissory note is still held, and was never sold, it would have been an obvious error to have allocated it to any of the notes that were sold. Thus, Brian Flood's omission of that note shows competence, not bias. See discussion at Reporter's Transcript, pp. 578-579; 890-891; 1216.

Finally, even if August 2009, when the Revolving Convertible Promissory Note was executed, marked the first day the security was held (which it should not), the holding periods remained well over a year for nearly all loans sold during the relevant period. At page 10 of the Division's Brief, the Division contends that 95 percent of the sales at issue in the case occurred between January 2013 and November 2014, at least two years and four months after the Revolving Convertible Promissory Note was executed. Thus, nearly all securities sales at issue in this case of portions of that Revolving Convertible Promissory Note had been held well beyond the statutory holding periods of 6 months and 1 year stated in Rule 144. The failure to document these loans when made in 2008 and the first seven months of 2009 had absolutely no bearing on whether IBEX held such loans for more than one year as to more than 95% of all securities sales at issue in this case. Thus, the Division's position is both wrong, and irrelevant to all or at least 95% of all transactions at issue in the case.

The Division contends at page 23 that the holding period should be judged based on the time that IBEX held the cash after selling the previously held security and before reinvesting it. Division's Brief, p. 23. Illogically, the Division contends that the period that IBEX held cash was the period it was at risk. The Division turns on its head the concept of being at risk. Indeed, the brief period of time during which IBEX held cash after selling a security and before reinvesting the proceeds of the sale (in those instances where that occurred) was the only period of time during which IBEX was not at risk with any investment. One holding its own cash is definitially not at risk. As detailed in Respondents' Post-Hearing Brief, the time that IBEX was at risk, by definition under Rule 144(d), is the time after its purchase of a note and before its sale of the note. That is the only fair application and interpretation of Rule 144(d).

The Division argues that Brian Flood is biased because of his relationship with Andrew Whelan and thus did not provide the Court with an accurate account of the applicable holding

periods. Division Post-Trial Brief, p. 21. What was undoubtedly clear to the Court was that Brian Flood was an honest person who had done his best to provide an accurate account of holding periods at RX 1A. It is difficult to imagine a straighter arrow than Brian Flood. The fact that he had become familiar with the accounting records of BioElectronics as its outside accountant for the past several years only added to his credibility in testifying as to the loans in question.

Brian Flood did volunteer after his fact testimony concluded that he wanted to offer that Andrew Whelan was a person of the highest moral character.[3] But, the statement was made with

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[3] Page 1194

15 I just wanted to share with you that in
16 going back to when I first started, and in my
17 capacity I've been CFO for many different
18 organizations, I have worked with a lot of different
19 presidents over my career, and, you know, my
20 experience with Andy -- you know, I've now done 15
21 straight quarters of financial statements, and I
22 just wanted -- I thought it was important to say
23 that never once in any of these -- in the generation
24 of any of these financials has he asked me to do
25 anything that's inappropriate.
Page 1195
1 And on the contrary, he has -- whenever
2 I've recommended any adjustments to be made to those
3 financials, that may be an adjustment that added
4 expense to his financials, he's never objected.
5 He's always agreed to record those transactions.
6 And so that's certainly my experience.
7 I think it was -- I think it's fair to
8 say, and I wanted to share that with you, that I've
9 certainly observed that in my dealings with him,
10 he's always been -- he's always demonstrated high
11 integrity. He's always accepted whatever
12 recommendations I've made when it comes to his
13 financial statements that he has to then share and
14 disclose and publish. And I thought that was
15 important to be able to communicate that.

reference to Mr. Whelan's military service, and compassionate attentiveness to Mr. Flood's son, who was presently serving in the military. This testimony was stricken by the Court as improper character testimony from a fact and expert witness. It should not be selectively considered only to undercut Mr. Flood's testimony, and, even if it had not been stricken, does not remotely establish the type of close relationship that might begin to establish bias.

Perhaps most telling was that the Division did not present any evidence, whatsoever, that the loans were not made when Brian Flood, Andrew Whelan and Kelly Whelan unanimously testified that they were made, and that the securities were not held for precisely the length of time established by such testimony, as reflected in RX 1A and the documents at RX 1C, 1D and 1F reflect. In sum, notwithstanding the Division's unsupported distrust of Mr. Flood, the overwhelming weight of the evidence establishes exactly the holding periods computed by him.

The Division's brief relies on *SEC v. Culpepper,* 270 F.2d 241 (2d Cir. 1959), arguing that Respondents "consciously engaged in steps necessary to the consummation of the public distribution of shares by the issuer" and thus cannot invoke the exemption provided by Section 4(a)(1). But, the Division takes the Culpepper decision way too far. Under the Division's view,

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16 MS. CONCANNON: Your Honor --
17 JUDGE ELLIOT: Hold on.
18 THE WITNESS: I also want to add that, you
19 know, when I come to his offices, the first thing he
20 always asks me is how my son is doing. My son is a
21 helicopter pilot in the Navy. I know Andy served,
22 and I think that speaks to his character. My
23 observation is that he certainly is a high character
24 individual, and I just ask that you consider these
25 factors based on my experience in any judgment you
Page 1196
1 make from this. [Brian Flood Testimony, at RT pp. 1195-1196.]

Rule 144 would require the holder of unregistered securities held beyond the requisite six month or twelve month period to prevent such shares from reaching the public. Instead, Rule 144 and Section 4(a)(1) and (a)(2) expressly contemplate sales of stock without restrictive legend into the public market.

The problem with the Defendant in *Culpepper* was that he was part of an underwriting scheme in which he, a recently resigned president and major stockholder in the issuer, had received a promissory note, free of charge, from the issuer, then converted the free note into unregistered unlegended shares, and then sold those shares into the public market. Here, IBEX, never was an officer of BioElectronics. There was no evidence of a free loan or immediate conversion and sale here. IBEX made real loans of cash and held convertible notes for an average of 30 months. Culpepper was involved in a scheme for immediate realization of free trading shares and immediate sales into the public markets. Thus, Culpepper, by way of distinguishing its facts from these, supports the Respondents, not the Division.

C. IBEX Was Not Controlled By BIEL or Andrew Whelan; and Was Never Under Common Control

The Division whipsaws BioElectronics and IBEX in an effort to establish that they are under joint control. Where IBEX is perceived to have gained some advantage, the Division exclaims: Ahaa!! BioElectronics is controlled by IBEX. With equal enthusiasm, where BioElectronics is perceived to have gained some advantage, the Division exclaims: Ahaa!! IBEX is controlled by BioElectronics. There is no conceivable transaction that could escape the Division's whipsaw tactics to achieving a finding of mutual control. Unfortunately for the Division, there was no such control that could be found based on the evidence offered at the hearing. Except one transaction in August 2009 that would have resulted in an unfair conversion term to BioElectronics, IBEX received the same terms as any other person willing to invest. As

discussed above, in order to ensure fairness to BioElectronics' shareholders, the Board of BioElectronics agreed that as to all loans made directly or indirectly by the Whelan family members, and Board Members, BioElectronics would use the terms of its loans with independent third party lender, LH Capital, as a guide to the terms of such loans. The same terms were applied to the loans of St. John's, Richard Staelin and Mary Whelan, among others.

The Division asks the Court to find that Kelly Whelan's attendance at a board meeting for BioElectronics proves that control. Division's Brief, p. 10. But, Kelly Whelan understandably was included in that meeting to discuss with BioElectronics' Board Members directly the rational for the terms of the loans with IBEX being discussed. She was not there to control BIEL, or to generally discuss the business of BIEL, but instead was there to negotiate with the members of BIEL's board that would vote whether or not to approve the terms of her company's loans on behalf of her company, IBEX.

D. The Division Grossly Exaggerates And Distorts In The Hope of An Emotional and Unfair Award.

Faced with overwhelming evidence of multi-year holding periods, the Division mischaracterizes facts for their emotional impact. For example, the Division claims that BioElectronics "lost over 10 and a half million dollars" and "accumulated losses of 27 million dollars." Division's Brief, p. 1. Lost? Well, perhaps that is one way of characterizing it. Indeed, BioElectronics' financial statements disclose such "losses." But, in the context of a medical device development company in the start-up phase of its history, these so-called losses are more fairly characterized as the investments of cash necessary to develop the technology, secure patents, FDA and other regulatory approvals, obtain a federal government sponsored loan, and to generate an international distribution channel for its products. These investments have already generated substantial benefits to BioElectronics, including that BioElectronics generated

$2.5 million in international sales within the last year. BioElectronics' plan is to use the same sunken investment as a base from which to create massive prospective value for its shareholders, including the Board Members and Whelan family investors. Ironically, the characterization of these investments in BioElectronics' future success as "losses" would only be accurate if the Division is successful in killing this company and the prospects of its future success.

The Division also seeks an emotional benefit from the number of shares outstanding, "going from 750 million shares authorized in June 2009, to 7 billion shares authorized at the end of 2014, and 15 billion shares authorized today (11 billion outstanding)", without referencing the current market price of such shares (one-twentieth of one cent). Division's Brief, p. 1. BioElectronics' management is confident that if it is allowed to survive this case, it can achieve a market capital valuation of many times the original investments, but needs time and further investment to obtain the FDA approvals that would make that prospect a reality. Either way, with a current market price of $.0005, the Court should not be unduly impressed with the fact that there are 11 billion of outstanding shares.

E. The Division's Hyperbole, Exaggerations and Distortions of Trial Testimony Should Not Be Considered by the Court.

Throughout the Division's Brief, the Division asserts as fact its self-serving mischaracterizations of testimony. It is impossible and perhaps counterproductive to identify and correct every instance. Some examples are discussed below for illustrative purposes. Given the Division's tendency toward hyperbole and distortions through omissions of explanatory testimony, Respondents simply ask that the Court refer to the original record, rather than the Division's characterization of that record, in deciding this case.

The Division's Brief at page 1 claims that Respondents "dumped billions of shares of stock into the market." But, the record does not reflect that any of the Respondents sold "billions

of shares into the market." See DX 1. The record reflects that St. John's sold 81 million shares into the market. The record reflects that IBEX sold shares to private purchasers. See RX 1A. The hyperbole and exaggeration contained in the Division's Brief busts the bounds of legitimate advocacy.

The Division's Brief at page 1 states that BioElectronics "falsely record[ed] $366,0000 in revenue...." There was no false recordation of revenue. The funds were received and retained by BioElectronics. The only question was the proper accounting for such funds. Again, the hyperbole and exaggeration contained in the Division's Brief is outside the limits of permissible advocacy and unnecessary to the case.

The Division's Brief at page 2 claims that Respondents conceded that IBEX was "responsible for 'keeping the lights on' and BIEL's ability to make payroll, and that without IBEX's financing, BIEL may well have gone out of business." Not true. No one testified that IBEX had the responsibility to pay those bills. The testimony was that, at times, IBEX's funding has been critical to the payment of those bills, or made the payment of those bills possible. See, for example, Mary Whelan's testimony at RT 538; RT 638. But, at no time did anyone testify, and it is simply not true, that IBEX ever became responsible to pay any BioElectronics bill. IBEX agreed to make loans to BioElectronics when it determined, in its sole and absolute discretion, to do so.

Also on Page 2, the Division claims that Respondents "admit that IBEX, under Kelly Whelan's control, had the ultimate power to bankrupt BIEL when its loans came due." Instead, at RT page 337, Andrew Whelan responds to the question on point as follows:

Page 337

Q And if Kelly Whelan, rather than agreeing to this conversion term, had called her note and asked for principal and interest, it would have bankrupted BioElectronics?

13 A I don't think so.

P. 890
25 **Q If the loan was in default and the lender**
Page 891
1 **sought to enforce its security interest, would that**
2 **be the end of BioElectronics?**
3 A No.
4 **Q Why not?**
5 A Because we can get it paid. I mean, we
6 can go to, you know, Rick; I have other daughters
7 that have substantial assets, a son. And we would
8 probably first go out and look on the street and see
9 if we could increase -- find another lender.
10 **Q So you would pay off the loan in cash, is**
11 **that your answer?**
12 A If there is no second choice.

In addition, Mr. Staelin testified:

6 **Q Have you ever been concerned that IBEX**
7 **would foreclose on the assets of BioElectronics?**
8 A No.
9 **Q And why not?**
10 A Well -- why not? First of all, the notes
11 were rarely in default. I think there was a three-
12 or four-month period where due to poor bookkeeping
13 more than anything else, we didn't have a new note
14 signed. So the board really was never faced with
15 that decision.
16 Second of all, we viewed IBEX as a
17 friendly investor, one who believed in the firm, had
18 a long-term vision for the firm. And any sort of
19 foreclosure would foreclose all sorts of future
20 growth.
21 And third, if for some reason or another
22 it became an adversarial arrangement, we believed
23 that the foreclosure amount would be nowheres near
24 the value of the firm, and we could go out and raise
25 funds from some other third party who would see that
Page 1256
1 this firm was valuable and would put the money in.
2 So it just was never any concern.

Again, even giving the Division the most generous interpretation of these answers by the only BioElectronics executive to speak on the issue, Andrew Whelan, there was certainly no admission by BioElectronics that IBEX had the power to bankrupt BioElectronics.

Mary Whelan, testifying poorly too eager to accommodate the Division's counsel by assuming the truth of the questioner's false contentions, did lend some support to the Division's contentions, as follows:

RT 569:
Q She had the right to call in or foreclose the note, correct?
A Yes, I assume that.
Q And she could have exercised that right at any time.
A Yes, she could.
Q But she did not foreclose on the note.
A No, she did not.
Q And the result, if she had done that, would have been devastating for the company.
A Absolutely.
Q It would have bankrupted the company.
Page 570
A Probably.
Q Well, the company --
A I'm going to assume that that is true.
Q Sorry. The company did not have $618,000 at the time that it could have used to pay back the note.
A No

First, Mary Whelan is a director of BioElectronics, without authority to make admissions on its behalf. Second, there is no foundation as to her knowledge of the facts that she testified that she was willing to assume. The fact that a director, with no apparent knowledge of the loan terms of the relevant $519,820 loan of August 2009, was willing to assume the truth of the questioner's false statements of fact does not constitute an admission by BioElectronics or IBEX

that IBEX could have bankrupted BioElectronics. Third, and most importantly, there is nothing whatsoever in IBEX's loan documents that gives IBEX the right to any remedy, absent a default, and no right whatsoever in the applicable loan documents that suggests the power to bankruptcy BioElectronics. DX 68. Finally, Andrew Whelan, the only person with knowledge of BioElectronics' financing alternatives to buy out the note, testified that he believed he could do so. RT 337; 890-891.

The Division's Brief at page 3 falsely contends that "IBEX's sole business has been to finance BioElectronics through sales of BIEL convertible notes and shares to third parties." But, IBEX did not conduct business. As Ms. Whelan testified. "IBEX is not anything. It is where I sometimes hold investments." RT 1048. At RT 1049, Kelly Whelan added: "IBEX doesn't do anything in the securities market. IBEX doesn't do anything." The fact that Kelly Whelan testified that IBEX conducted no business but held her investments "sometimes" does not grant the Division license to self-servingly mischaracterize IBEX's as a company in the business of financing BioElectronics through sales of BIEL convertible notes and shares to third parties. The Division's mischaracterization of such testimony exceeds the bounds of permissible advocacy.

The Division's Brief at page 9 contends that "BIEL understood that Kelly Whelan was a 'friendly investor' who could be trusted not to exercise her power to foreclose on the assets of BioElectronics, even though BIEL did not have sufficient cash to pay IBEX's notes if called." By omission of the balance of Mr. Staelin's testimony, the Division hopes the Court will assume from its mischaracterization that Mr. Staelin testified that it was only out of friendliness that IBEX would not foreclose. Instead, Mr. Staelin explained:

Q Have you ever been concerned that IBEX would foreclose on the assets of BioElectronics?
A No.
Q And why not?

A Well -- why not? First of all, the notes were rarely in default. I think there was a three- or four-month period where due to poor bookkeeping more than anything else, we didn't have a new note signed. So the board really was never faced with that decision.
Second of all, we viewed IBEX as a friendly investor, one who believed in the firm, had a long-term vision for the firm. And any sort of foreclosure would foreclose all sorts of future growth.
And third, if for some reason or another it became an adversarial arrangement, we believed that the foreclosure amount would be nowheres near the value of the firm, and we could go out and raise funds from some other third party who would see that
Page 1256
this firm was valuable and would put the money in.
So it just was never any concern.

RT 1255-1256. Emphasis added.

Thus, while the Division urges the Court to take two words within this answer out of context, a fair interpretation of this answer is not that the company relied on the friendliness of IBEX, as suggested, but that there were three independent reasons that BioElectronics did not fear foreclosure. First, because the note was rarely in default. IBEX only could foreclose during a default. Thus, IBEX rarely had the ability to foreclose. Second, because IBEX was a long term investor in BioElectronics with substantial investments beyond that secured debt, Mr. Staelin never thought IBEX would foreclose because doing so would wipe out its other substantial long term investments. Third, Mr. Staelin opined that BioElectronics could go out and raise the funds necessary to pay off IBEX's secured loan, if necessary, because investors would see that BioElectronics was far more valuable than the amount of the secured debt.

The Division's Brief at page 10 asserts that Kelly Whelan "received both cash and securities as compensation for her work at BIEL." While technically accurate, the omission of

several facts makes it misleading. First, the relevant period for the OIP starts in 2009. Ms. Whelan testified that she had not been compensated at all by BioElectronics since 2009.

At RT 439:

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10 A I have been compensated as a consultant at
11 times in the past by BioElectronics Corporation. I
12 don't believe I've received any compensation since
13 2009 for anything that I've done for the company
14 since that time.
```

In addition, Ms. Whelan explains that even during the pre-2009 period in which she was compensated, the total compensation was less than $60,000 and the only reason that she ever received securities for her work was when BioElectronics did not have the cash to pay her, so it converted the obligation to a note.

RT 440:

```
13 A Well, I think that's a complicated -- I
14 don't think that's a straight yes-or-no answer. At
15 a time when I had agreed to do some work for the
16 company and be paid as a consultant, and the company
17 did not have the cash to pay me, and -- or if I were
18 traveling on behalf of the company like going to a
19 trade show and paying expenses for doing that, I
20 would turn an expense report in, not get paid
21 because the company didn't have cash, and would
22 eventually convert that into a note, yes.
```

The Division at page 19 misrepresents that Kelly Whelan knew that Redwood Management "was in the business of buying debt, converting it into shares, and immediately selling to the public market." They cite at footnote 93 exactly what Kelly Whelan said. She did say that she was aware that Redwood Mortgage bought and converted debt. She did not say that she was aware that Redwood Mortgage immediately sold the converted stock into the public

market. RT 490:11-14 (K. Whelan: "I sold primarily to Redwood Management. They are an accredited investor and this is what they do. They buy debt and they convert it.").

The Division at page 29 misrepresents that "[i] In an email dated March 31, 2010—right before Mr. Noel made his second payment of $50,000—Mr. Noel confirmed his understanding that the funds that YesDTC paid to BIEL were refundable if he was unable to receive Japanese regulatory clearance." Citing DX 112. But, DX 112 does not include any such confirmation. First, it only relates to the $50,000 payment, not the first $100,000 paid. Second, both Mr. Vondra and Dr. Linsley confirmed their reading of the response by Andrew Whelan to mean that only if BioElectronics elected to terminate the Distribution Agreement would the $50,000 payment be refunded to YesDTC, a circumstance that Dr. Linsley explained was too improbable to warrant an adjustment in the treatment of such revenue.

Specifically, at RT 712, Mr. Vondra testified:

2 A Well, it's -- I mean, it's we agreed to
3 refund the 50 if we terminate the agreement. Since
4 it's written by Mr. Whelan, **I would read that to**
5 say, if we, meaning BioElectronics, terminate the
6 agreement. [Emphasis added.]

Dr. Linsley concurred: "It referred to that it would be refunded if BioElectronics terminated." RT 1332, lns 10-11. The email exchange at DX 112 does not reflect a confirmation of Mr. Noel's email. Mr. Whelan agreed, instead, "We agreed to refund the $50,000 if we terminate the Agreement. This is a change to our original Agreement for the record." As Dr. Linsley explained, this agreement is limited to the $50,000 payment. It does not apply to the $100,000 payment. And, as Mr. Whelan made clear, this email exchange constituted a "change to our original Agreement" made after the close of the audit for 2009. The Division's representation appears to misrepresent that the parties agreed to a full refund of the $150,000 upon termination by YesDTC, which it clearly does not.

At page 30, the Division contends that Andrew Whelan testified that he would not deliver the goods to YesDTC without approval in Japan. But, that does not mean that title has not passed to YesDTC. Mr. Whelan's response is consistent with his duty to BioElectronics to preserve its intellectual property and oversee its licenses. Because YesDTC's only territory in which BioElectronics had licensed it the right to sell its product, unless YesDTC obtained regulatory approval in Japan, BioElectronics would refuse to deliver product for resale to YesDTC anywhere in the world. However, Mr. Whelan also did testify that YesDTC could set fire to its purchased products, provided it did so safely, indicating clearly that title had passed to YesDTC – and thus delivery had occurred for accounting purposes.

RT 944:

Q Did YesDTC have the right to set its product on fire if it wanted to?
A As long as they didn't do it in our warehouse, yes.
Q Why do you say in your warehouse?
A Well, I mean if they set it on fire in our warehouse where it was stored, it would have burned down the warehouse. But they could have taken delivery and destroyed the product. The -- let me clarify. The restriction on it is they only had the right to sell the product in Japan. We don't -- all of our agreements are restrictive. They say you cannot sell outside of your territory, which precludes price fighting.

The foregoing attempts to shade the truth reveals the weakness of the Division's case. If the Division believed it was truly entitled to the relief sought, it would not have presented a brief chock full of tricks, half-truths and mischaracterizations to win it. The Court should view with heightened skepticism the facts, arguments and conclusions drawn by the Division, as they are overwrought with zealous advocacy and short on plain and easily understood statements of true facts.

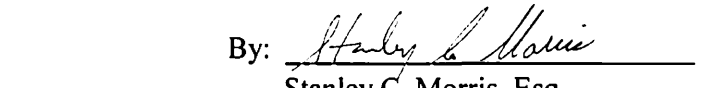
III.

CONCLUSION

This Court should reject the Division's invitation to legislate from the bench, to revise Sections 4 and 12(g), and to introduce uncertainties undermining the safety of the safe harbor provisions of Rule 144. Congress intended that these laws encourage investment in start-up companies, and to diminish ever growing burdens placed on American innovation through excessive regulations. The Division seeks more regulations and new limitations, while Congress is very clearly and in plain language demanding less. For the reasons stated herein, at the hearing and in the Respondents' Post-Hearing Brief, judgment should be issued in favor of the Respondents. If the Court were to decide to award any relief, the relief rewarded should reflect the benefits to society of allowing BioElectronics and the Whelans to continue to survive financially while they invest their life's savings and endless sweat equity into completing their mission of bringing their drug free pain relief medical device to the world's aching population.

November 18, 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.

Securities and Exchange Commission
Office of the Secretary
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Washington, D.C. 20549
Fax: (202) 772-9324
(By electronic mail at alj@sec.gov on 11/18/16; and original and three copies via overnight mail on 11/17/16)

The Honorable Cameron Elliot
Office of the Administrative Law Judges
U.S. Securities and Exchange Commission
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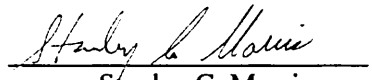

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