

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of:

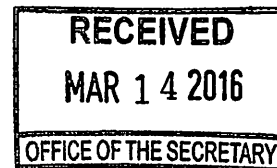
BioElectronics Corp.,  
IBEX, LLC,  
St. John's, LLC  
Andrew J. Whelan  
Kelly A. Whelan, CPA, and  
Robert P. Bedwell, CPA

Respondents.

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**RESPONDENTS' MOTION FOR A  
MORE DEFINITE STATEMENT  
WITH INCORPORATED  
MEMORANDUM OF LAW**

Administrative Proceeding  
File No. 3-17104



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*Robert P. Bedwell*

Respondent Robert P. Bedwell), by and through undersigned counsel, respectfully moves the Administrative Law Judge ("ALJ") to order the SEC to provide a more definite statement of fact as to certain of the allegations, pursuant to Rule 220(d) of the Securities and Exchange Commission's Rules of Practice. In support of the Motion, Respondent states:

**THE OIP DOES NOT PERMIT RESPONDENT TO PREPARE  
AN ADEQUATE DEFENSE**

Rule 200(b) of the SEC Rules of Practice requires the Division to provide in its OIP a "plain statement of the matters of fact and law to be considered and determined." 17 C.F.R. § 201.200(b)(3) (2014). It is bedrock principle that, through the OIP, Respondents "are entitled to be sufficiently informed of the charges against them so that they may adequately prepare their defense." *David F. Bandimere*, Admin. Proceeding File No. 3-15124, Order (ALJ Feb. 11, 2013) (hereinafter "*Bandimere*"). Allegations that are "vague, ambiguous, and generalized" will not suffice. *Alfred M. Bauer*, Admin. Proceeding File No. 3-9034, 62 SEC Docket 2273, Order (ALJ Aug. 27, 1996) (CFF) (hereinafter "*Bauer*"). The OIP fails to state the standard for the determination of the state of mind of Mr. Bedwell in conducting the single audit which forms the basis of the charges against him. There can be no more fundamental omission.

The question of what state of mind must accompany a violation of professional standards has been the subject of much debate. The issue came to a head in the D.C. Circuit Court of Appeals decision in *SEC v. Checkosky*, 139 F.3d 221, 226 (D.C. Cir. 1998) ("*Checkosky II*"). Having remanded the case for clarification and an explanation from the Commission as to whether simple negligence could constitute a violation of the rule, and whether recklessness meant a "higher form of ordinary negligence," or a "lesser form of intent," the court determined that the Commission had failed to "articulate an intelligible standard for 'improper professional conduct'" on the part of accountants. *Marrie v. SEC*, 374 F.3d 1196, 1198 (D.D.C. 2004). The court concluded that, in light of the "strong signs" that the Commission was unlikely to provide a

uniform theory “anytime soon,” the matter should be remanded with instructions to dismiss the charges. *Checkosky II*, 139 F.3d at 226-27.

In the wake of this decision, the SEC amended Rule 102(e) to address this concern, as it applies to accountants, and to articulate more clearly the standard for “improper professional conduct.” Under the amended definition, “improper professional conduct” can result from recklessness or from negligence. 17 C.F.R. s201.102(e)(1)(iv)(A). Specifically, the amendments added language to the rule, which clarifies that “improper professional conduct” includes “[i]ntentional or knowing conduct, including reckless conduct that results in a violation of applicable professional standards.” *Id.* The Commission stated that “for purposes of consistency under the federal securities laws,” it was adopting the definition of recklessness employed by the courts for substantive violations of the federal securities laws: an extreme departure for the standard of ordinary care.” Rel. No. 33-7593 (1998).

In addition, the Commission specified two types of negligent conduct that could constitute professional misconduct under the rule. The first type is defined as “a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows or should know that heightened scrutiny is warranted.” 17 C.F.R. s201.102(e)(1)(iv)(B)(1). The second standard for negligent conduct is satisfied with a showing of “repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards that indicate a lack of competence to practice before the Commission.” 17 C.F.R. s201.102(e)(1)(iv)(B)(2). Unlike the “highly unreasonable conduct” standard, “unreasonable” connotes, according to the Adopting Release, “an ordinary or simple negligence standard.” Rel. No. 33-7593 (1998).

Despite the fact that these standards are laid out in the regulations and releases, the OIP against Respondent is silent as to which state of mind Mr. Bedwell allegedly possessed. “Given the enormous impact on accountants ... that the Rule has, and in fairness to petitioners, the Commission must be precise in declaring the standard against which petitioners' conduct is measured.” *Marrie v. S.E.C.*, 374 F.3d 1196, 1206 (D.C. Cir. 2004) (internal citations and quotations omitted). *See also Halvonik v. Dudas*, 398 F. Supp. 2d 115, 124 (D.D.C. 2005) *aff'd*, 192 F. App'x 964 (Fed. Cir. 2006) (“the agency must also provide reasonable notice of the offense itself, including the required mental state, necessary to constitute a violation of the rules”).

A motion for a more definite statement is proper if the pleading “fails to specify the allegations in a manner that provides sufficient notice,” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). For example, if the Respondent moves for summary disposition, he must know what standard he alleges that the government must meet, as that is the starting point for such an analysis. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986) (When evaluating a motion for summary judgment, the court views the evidence through the prism of the evidentiary standard of proof that would pertain at trial.).

This is not a matter which can be resolved through discovery. The Respondent needs to know what standard his conduct will be measured against in order to know what he is charged with and what he must do to prepare his defense. Here the Commission has failed to “articulate an intelligible standard for improper professional conduct” on the part of Mr. Bedwell, and they must be ordered to do so now.

**CONCLUSION**

WHEREFORE, Respondent respectfully requests that the SEC be required to provide a more definite statement regarding the alleged state of mind of the Respondent in this matter.

Respectfully Submitted, March 11, 2016

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**SERVICE LIST**

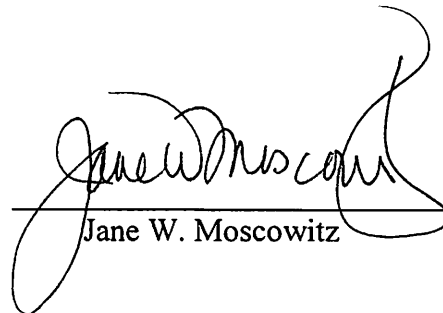
I hereby certify that a true and correct copy of the foregoing was served on the following  
on the 11<sup>th</sup> day of March, 2016, in the manner indicated below.

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Office of the Secretary  
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[alj@sec.gov](mailto:alj@sec.gov)  
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The Honorable Cameron Elliot  
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