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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

BIOELECTRONICS CORPORATION,
IBEX, LLC,
ST. JOHN'S, LLC,
ANDREW J. WHELAN,
KELLY A. WHELAN, AND
ROBERT P. BEDWELL,

Respondents.

File No. 3-17104

RESPONDENTS' MOTION TO CORRECT MANIFEST ERRORS OF FACT IN INITIAL DECISION DATED DECEMBER 13, 2016

I. INTRODUCTION.

Respondents Bioelectronics Corporation ("BIEL"), Ibex, LLC ("IBEX"), St. John's, LLC ("St. John's"), Andrew J. Whelan and Kelly A. Whelan (collectively, "Respondents")[1], through the undersigned counsel, respectfully move the Administrative Law Judge to correct his Initial Decision in this case with respect to manifest errors of fact, pursuant to 17 CFR 201.111(h), discussed in detail below. In short:

1. The Court erred in computing the profits earned by IBEX on its sales of BIEL securities, which profit amount should be $462,534, rather than $1,580,593;
2. The Court erred in concluding that there were 16,011 shareholders of record; the actual number of shareholders of record was less than 300 at all times;
3. The Court's assessment of civil penalties against St. John's for failure to file a Form 144 is extraordinarily excessive and not supported by the facts. The transactions were supported by legal opinions; the sales, which were made through a registered broker, represented only 5% of St. John's loans and were isolated primarily during two months of that period (February and March 2014); the transactions did not result in new investments in BIEL; and there was no direct or indirect evidence of scienter by Patricia Whelan, the 99% owner and person in control of St. John's. Notably, Patricia Whelan was not deposed by the SEC Staff investigators during the several years that it investigated this matter; and did not testify at the hearing, despite her availability and attendance. Most telling is that Patricia Whelan, the only person whose scienter can be imputed to St. John's, was not named as a respondent in the case. If the Division thought she had third tier fraudulent scienter, after their thorough

[1] All Respondents excluding only Robert P. Bedwell.

investigation, she certainly would have been. Under these facts, while disgorgement of any ill-gotten profit finds support in the facts of the case, third tier penalties totaling $650,000 against an elderly woman who did nothing other than believe the advice of her counsel that a Form 144 was not required and that there were no volume restrictions on her sales on the basis that BIEL was not a SEC reporting company (having successfully withdrawn its registration), is not supported by the facts. The factual findings of the Court in that regard constitute manifest error of fact.

II. ARGUMENT.

A. The Court's Computation of Profits to IBEX of $1,580,593 constitutes manifest error – the correct number is $462,532.

IBEX sold its notes at the face value of the debt represented by those notes (break-even price with no profits), or at a small loss, at all times from July 1, 2008 to the present. See Post-Hearing Declaration of Brian Flood, Exhibit 1. The computation of profits to be disgorged should be based on the handful of profitable transactions that were completed within the five-year statute of limitations from April 17, 2010 through February 9, 2016.[2] Using only the transactions within the 5-year statute of limitations, the total profits is only $462,532. See *Id.*

The bulk of the $1,580,593 computed by the Court was based on pre-April 17, 2010 transactions outside of the statute of limitations. Of that amount, $631,686 should be excluded as arising from transactions outside of the statute of limitations period, net of 15% capital gains taxes addressed separately. If the Court limits its award to the transactions within the statute of limitations, as requested, an additional $259,291 should be reduced, because the notes sold

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[2] Tolling Agreements, attached to the Post-Hearing Declaration of Stanley C. Morris at Exhibit 1, reflect that the statute of limitations that would have started February 9, 2011, was extended by written agreement to April 17, 2010. Transactions before that date should be excluded from the relief awarded in the Initial Decision.

included lawful interest accrued on the debt converted or sold (which should be offset against profits). Finally, $193,096 should be reduced from the disgorgement amount because that amount constitutes 15% of the profits of such sales – which amount was paid by IBEX based on capital gains taxes. Since that amount was already paid to the federal government, the federal government should not be allowed to double dip – collecting both taxes and disgorgement to the treasury of the same moneys as if such taxes had not already been paid. The Respondents were not able to construct, exactly, the computation prepared by the Court. The numbers are based on the computations of Brian Flood, attached to his declaration at Exhibit 1, and approximately reconcile to the Court's number using these three reductions.

If the Court does not limit its disgorgement computation to the transactions within the statute of limitations period, the profits would be $1,094,220. The offset for interest of the notes converted and sold would be $259,291 and the offset for capital gains taxes paid would be $193,096. *Id.*

B. The Statute of Limitations Bars the Bulk Of The Profits To Be Disgorged In the Initial Decision.

On February 9, 2016, the SEC initiated this action by serving its Order Instituting Proceeding ("OIP") on Respondents seeking, among other things, "disgorgement" of ill-gotten gains from alleged non-scienter based securities law violations. Respondents filed an Answer that raised the affirmative defenses of statute of limitations and laches. (See Respondents' Answers, at Affirmative Defenses 10 and 11). On December 13, 2016, this Court issued an Initial Decision that ordered IBEX and BioElectronics to disgorge approximately $1,580,593, of which approximately $743,160 (before taxes) was the result of conduct that occurred more than five-years before the Division filed its OIP.[3] See Exhibit 1 to the Flood Post-Hearing Declaration.

1. **Section 2462's Five-Year statute of limitations period applies to the Division's Claims for Disgorgement.**

Section 2462, the default statute of limitations for federal civil enforcement actions, provides that:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.

28 U.S.C. § 2462. See, *SEC v. Graham*, 823 F.3d 1357 (11th Cir. Fla. 2016).

Because disgorgement is punitive, generally and as applied in this case, the disgorgement award constitutes a manifest error of fact as incorrectly including transactions outside the applicable statute of limitations. As noted above, the five-year limitations period of § 2462 applies to actions seeking "any ... penalty." A "penalty" is "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). A penalty is thus animated by the "traditional aims of punishment--retribution and deterrence," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and is not solely intended to "'afford a private remedy to a person injured by the wrong,'" *Johnson*, 87 F.3d at 487. In determining the punitive nature of a remedy, courts look not only at the labels attached, but the "purpose or effect" of the remedy. *United States v. Ward*, 448 U.S. 242, 249 (1980).

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[3] The Respondents and the Division entered into a tolling agreement that provided the applicable statute of limitations would be tolled beginning on April 17, 2015.

Disgorgement has substantial punitive aspects. First, disgorgement is marked by a deterrent purpose, which is a hallmark of punitive remedies. See, e.g., *SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993) ("The theory behind the remedy is deterrence and not compensation."); *SEC v. First City Fin. Corp*., 890 F2d 1215, 1232 n.24 (D.C. Cir. 1989) ("[I]n the context of an SEC enforcement suit ... deterrence is the key objective."); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) ("The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits"); see also *Blue Shield of Va. v. McCready*, 457 U.S. 465, 473 n.10 (1982) ("Only by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully served."). This is confirmed by the SEC's public statements about its enforcement actions, which highlight the deterrent and retributive effect of its disgorgement orders. See, e.g., SEC, Press Release No. 2005-93 (June 28, 2005) (in announcing settlement providing for disgorgement plus interest of $474,279 and a civil penalty of $120,000, the SEC stated that "[t]his action is a message to all those who would seek to deprive mutual bank depositors of their rightful opportunity to participate in their bank's IPO. Hopefully, the actions taken today by the SEC and the Justice Department will deter anyone considering this type of misconduct in the future."); SEC, Press Release No. 2016-203 (Sept. 29, 2016) (in announcing settlement providing for nearly $200 million in disgorgement and interest, the SEC emphasized that "[f]irms will be held accountable for their misconduct no matter how they might structure complex transactions").

The SEC has recognized that profits from fraud are often dissipated, whether through business expenses, personal expenditures, or investment losses. SEC, *Report Pursuant to Section 308(c) of the Sarbanes Oxley Act of 2002*, at 21 (2003). As a result, disgorgement orders regularly force defendants into bankruptcy and burden them with debts that they will never be able to pay. *Id.* This may be justified, but it cannot be doubted that it operates as a harsh punishment for wrongdoing.

In addition, where the SEC seeks disgorgement of amounts that cannot be calculated or traced with sufficient certainty, the request "takes on the character of a plea for punitive relief." *SEC v. Wills,* 472 F. Supp. 1250, 1276 (D.D.C. 1978). But this is precisely what courts allow: In estimating the amount to be disgorged, the SEC is only required to provide a "reasonable approximation." *SEC v. Teo*, 746 F.3d 90, 107 (3d Cir. 2014). The burden then shifts to the defendant to demonstrate that this amount is not a reasonable estimate. *Id.* By putting the entire burden of uncertainty on the defendant, the disgorgement remedy has the effect of punishing defendants.

Moreover, penalties, like disgorgement orders, are not remedial and compensatory in purpose--disgorgement is not pegged to the losses incurred by victims and the proceeds of a disgorgement order go to the United States, not victims. *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) ("In a securities enforcement action, as in other contexts, 'disgorgement' is not available primarily to compensate victims.").[4] Although the SEC may create "fair funds" to compensate victims, such funds are permitted only when penalties are imposed, and penalties are permitted only for violations within the five-year limitations period of § 2462. See15 U.S.C. § 7246(a); 17 C.F.R. § 201.1100 (providing that disgorgement goes to alleged victims only if monetary penalties are also imposed). Thus, applying a five-year limitations period to disgorgement actions would not deprive victims of monetary compensation that would otherwise be available.

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[4] See also FTC v. Bronson Partners, LLC, 654 F.3d 359, 373 (2d Cir. 2011) ("While agencies may, as a matter of grace, attempt to return as much of the disgorgement proceeds as possible, the remedy is not, strictly speaking, restitutionary at all, in that the award runs in favor of the Treasury, not of the victims.").

These punitive features of disgorgement orders are not incidental.[5] Instead, they derive from the principle that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *First City Fin. Corp.*, 890 F.2d at 1232; *see also id.* ("The line between restitution and penalty is unfortunately blurred."). This is in stark contrast to the remedy of restitution. When calculated in such a way, restitution does not have the characteristics of a penalty. But in the context of a disgorgement order against a wrongdoer, as the SEC has sought here, harsher rules apply. These harsher rules effectively operate as punishment for the defendant's wrongdoing, and disgorgement should accordingly be treated as a penalty under § 2462.

In this case, no victims can even be identified. While the Court is well aware that the funds it has ordered disgorged by IBEX were promptly reinvested into BioElectronics (See Park Expert Report at DX 137) and are therefore unavailable to IBEX to satisfy the disgorgement order, especially in light of the penny stock bar imposed in the same order preventing the liquidation of IBEX's BioElectronics securities, the Initial Decision gives no credit to such facts, implicitly using disgorgement to punish IBEX for its conduct deemed wrongful by the Court.

B. Disgorgement Is A Type Of "Forfeiture"

As a matter of legal parlance, the terms forfeiture and disgorgement are interchangeable. Forfeiture has long been defined as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." Black's Law Dictionary 765 (10th ed. 2014).[6]

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[5] See Kull, Restitution's Outlaws, 78 Chi.-Kent L. Rev. 17, 18 (2003) ("[R]estitution does not punish, but it punishes negatively: not by imposing liability on disfavored parties, nor by enhancing the liability to which disfavored parties are subject, but by denying a restitutionary claim (or counterclaim) to which the disfavored party would otherwise be entitled.").

[6] This meaning has remained stable since § 2462 was adopted in 1948. See Black's Law Dictionary 778 (4th ed. 1951) (defining forfeiture as "[s]omething to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty"); Webster's Collegiate *Dictionary*

Fitting comfortably within that definition, disgorgement is defined as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *Id.* at 568. [7] Both terms involve the giving up of property, and both terms require the property to be given up because of wrongdoing. Accordingly, the case law often uses the terms forfeiture and disgorgement interchangeably. See, e.g., *United States v. Ursery*, 518 U.S. 267, 284 (1996) ("Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.").

The underlying policies of disgorgement and forfeiture are also similar. Civil forfeiture "prevent[s] further illicit use of the conveyance and ... impos[es] an economic penalty, thereby rendering illegal behavior unprofitable." *Calera-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974).[8] Likewise, disgorgement "operates to make the illicit action unprofitable for the wrongdoer." *Contorinis*, 743 F.3d at 301; see also *SEC v. Palmisano, 135 F.3d 860, 866 (2d Cir. 1998)* ("Disgorgement, like the forfeitures discussed in *Ursery*, is designed in part to ensure that the defendant not profit from his illegal acts.") Moreover, courts put the burden of uncertainty on defendants in both contexts, because of the defendant's wrongdoing. Compare *Teo*, 746 F.3d at 107 ("but-for" causation sufficient to establish amount of disgorgement) with *United States v. Warshak*, 631 F.3d 266, 332 (6th Cir. 2010) (affirming forfeiture of entire business's revenues,

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393 (5th ed. 1946) (defining forfeit as "[a] thing forfeited; that which is lost by a crime, offense, neglect of duty, or breach of contract; hence, a fine; a penalty").

[7] Disgorgement, in the sense used by the SEC, is a relatively recent term of art, appearing in less than a dozen published eases from 1800 to 1960, and first defined in Black's Law Dictionary after 2000. See Roach, A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies, 12 Fordham J. Corp. & Fin. L. 1, 49 (2007).

[8] See also *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) ("[F]orfeiture also serves a deterrent purpose distinct from any punitive purpose."); *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) ("Consequently, instead of punishing the forfeiting party, the forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme.").

whether or not legitimate sales, because sales all resulted "directly or indirectly" from a conspiracy to commit fraud).

Applying the label of "equitable" to disgorgement provides no basis to distinguish between the effect of forfeiture and disgorgement: "In both instances, money liability is predicated upon a finding of the owner's wrongful conduct." *United States v. U.S. Coin & Currency, 401 U.S. 715, 718 (1971)* (finding no distinction between forfeiture and fine). From the perspective of a business, the liability is the same whether termed as a disgorgement order, or civil forfeiture. The SEC should not be able to avoid the congressionally imposed limitations period of § 2462 by resort to formality.

C. The SEC's Position Is Undermined By The Contradictory Position It Has Advanced In The Bankruptcy Context

The terms of § 2462 are mirrored in the Bankruptcy Code, which provides that debts arising from "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" cannot be discharged. 11 U.S.C. § 523(a)(7). In that context, the SEC has argued--successfully-- that disgorgement orders fit within the bankruptcy discharge exception. See *In re Telsey*, 144 B.R. 563 (Bankr. S.D. Fla. 1992). [9] In accepting the SEC's argument that disgorgement is a nondischargeable "fine, penalty, or forfeiture," one court explained that the "deterrence purpose" of disgorgement is "sufficiently penal to characterize the resulting debt as a fine, penalty, or forfeiture.'" *Id.* at 565. Having prevailed on that issue in the bankruptcy court, the SEC is

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[9] See also, e.g., *In re Towers*, 162 F.3d 952, 955 (7th Cir. 1998) ("It is easy enough to call restitution under the Illinois Consumer Fraud and Deceptive Business Practices Act 'a fine, penalty, or forfeiture.'"); *HUD v. Cost Control Mktg. & Sales Mgmt. of Virginia, Inc., 64 F.3d 920, 928 (4th Cir. 1995)* ($8.65 million disgorgement order obtained by Department of Housing and Urban Development not dischargeable in bankruptcy, because government's interest in enforcing debt was "penal"); *In re Jensen*, 395 B.R. 472, 484 (Bankr. D. Colo. 2008) ($ 228,836 disgorgement order obtained by State of Colorado not dischargeable in bankruptcy, because of "penal and deterrence goals" of Colorado consumer protection statutes).

judicially and equitably estopped to argue that in the context of section 2462, that the Court should come to the opposite conclusion in this case.

Similarly, the IRS has taken the position that disgorgement orders may be nondeductible, "punitive" debts where the order "serves primarily to prevent wrongdoers from profiting from their illegal conduct and deters subsequent illegal conduct." IRS, Office of Chief Counsel, Memorandum, No. 201619008, at p. 9 (May 6, 2016). The IRS noted that "cases that impose disgorgement as a discretionary equitable remedy can have similarities to some cases that impose forfeiture as required by statute." *Id.* That means that IBEX had to pay income tax on its profits when it recognized them throughout the relevant period, but cannot deduct the disgorgement of the same profits to the Treasury. A more punitive result is difficult to conceive.

The government should not be permitted to pick and choose when its disgorgement orders are penalties or forfeitures by advancing contradictory interpretations of the same language in different statutes. See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988) ("[l]inguistic consistency" requires reading identical language in different statutes the same); *Northcross v. Board of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) ("similarity of language" is "strong indication" that statutes should be interpreted together, particularly where "'the two provisions share a common raison d'etre'"). When considered together, the SEC's contradictory interpretation of these two "fine, penalty, or forfeiture" provisions would allow the SEC to impose nondischargeable monetary obligations without any time restriction and without regard to whether the defendant himself ever obtained or still holds the monies ordered disgorged. It should not be lightly assumed that Congress intended to impose such a draconian burden on securities law violators, especially given that many securities law violations require no showing of culpable intent. See, e.g., 15 U.S.C. § 78n(a) (solicitation of proxies); id. § 78k(a) (registration of securities); id. § 78r(a) (misleading statements); *SEC v.*

Merck. Capital, LLC, 397 F. App'x 593, 595 (11th Cir. 2010) (per curiam) (district court abused discretion in failing to order disgorgement, where defendants failed to register securities and made material omissions out of "mere negligence"); *SEC v. Colello*, 139 F.3d 674, 675 (9th Cir. 1998) ($ 2.6 million disgorgement order against individual defendant who was non-party to fraud).

The following reasoning by the 11th Circuit Court of Appeals is compelling.

> Section 2462 does not define the term "penalty"; we therefore look to the term's ordinary meaning. See *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002, 182 L. Ed. 2d 903 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."); *Consol. Bank, N.A. v. U.S. Dep't of Treasury*, 118 F.3d 1461, 1463-66 (11th Cir. 1997). Definitions of the term "penalty" abound. The Supreme Court has defined a penalty as "something imposed in a punitive way for an infraction of a public law." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423, 35 S. Ct. 328, 59 L. Ed. 644 (1915). Similarly, the Oxford English Dictionary says a penalty is "[a] punishment imposed for breach of law, rule, or contract." Penalty, Oxford English Dictionary (2d ed. 1989). Black's Law Dictionary defines the term as "[p]unishment imposed on a wrongdoer, [usually] in the form of imprisonment or fine; [especially,] a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss)." Penalty, Black's Law Dictionary (10th ed. 2014).
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> Each of these definitions has the common element of looking backward in time. That is, a penalty addresses a wrong done in the past. See, e.g., *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1202 (11th Cir. 1997) (noting that "[u]nlike injunctive relief which addresses only ongoing or future violations, civil penalties address past violations")....
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> C. Disgorgement
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> The district court concluded that "the disgorgement of all ill-gotten gains realized from the alleged violations of the securities

laws—i.e., requiring defendants to relinquish money and property—can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise), which remedy is expressly covered by § 2462." *Graham*, 21 F. Supp. 3d at 1310-11. We agree with the district court that for the purposes of § 2462 forfeiture and disgorgement are effectively synonyms; § 2462's statute of limitations applies to disgorgement.

Following the same principles of statutory interpretation as we did with the term "penalty," we look to the ordinary meaning of "forfeiture." Webster's Dictionary defines forfeiture as "the divesting of the ownership of particular property of a person on account of the breach of a legal duty and without any compensation to him." Forfeiture, Webster's Third New Int'l Dictionary (2002). The Oxford English Dictionary likewise defines forfeiture as "[t]he fact of losing or becoming liable to deprivation of (an estate, goods, life, an office, right, etc.) in consequence of a crime, offence, or breach of engagement." Forfeiture, Oxford English Dictionary (2d ed. 1989). These definitions illustrate that forfeiture occurs when a person is forced to turn over money or property because of a crime or wrongdoing.

We find no meaningful difference in the definitions of disgorgement and forfeiture. For example, Black's Law Dictionary defines disgorgement as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." Disgorgement, Black's Law Dictionary (10th ed. 2014). Black's Law Dictionary provides a very similar definition for forfeiture: "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." Forfeiture, Black's Law Dictionary (10th ed. 2014). The Supreme Court, too, has used the terms interchangeably. See *United States v. Ursery*, 518 U.S. 267, 284, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996) ("Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct."). HN10 We thus conclude that for the purposes of § 2462 the remedy of disgorgement is a "forfeiture," and §

2462's statute of limitations applies.[3]

The SEC argues that disgorgement cannot be forfeiture because the two terms refer to fundamentally different things: disgorgement only includes direct proceeds from wrongdoing, whereas forfeiture can include both ill-gotten gains and any additional profit earned on those ill-gotten gains (i.e., secondary profits). *Compare SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (recognizing that "[t]he court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing"),[4] with *United States v. Reed*, 924 F.2d 1014, 1017 (11th Cir. 1991) (requiring defendants to forfeit a building and its subsequent increase in property value between the time the crime began and when the building was sold). But even under the definitions the SEC puts forth, disgorgement is imposed as redress for wrongdoing and can be considered a subset of forfeiture. Because forfeiture includes disgorgement, § 2462 applies to disgorgement. Furthermore, to read the two terms according to the SEC's interpretation would violate the long-settled principle "that words in statutes should be given their ordinary, popular meaning unless Congress clearly meant the words in some more technical sense." *United States v. Nat'l Broiler Mktg. Ass'n*, 550 F.2d 1380, 1386 (5th Cir. 1977), aff'd, 436 U.S. 816, 98 S. Ct. 2122, 56 L. Ed. 2d 728 (1978). We find no indication that in enacting § 2462's widely applicable statute of limitations, Congress meant to adopt the technical definitions of forfeiture and disgorgement the SEC urges over the words' ordinary meanings. "Had Congress wished unique or specialized meanings to attach to any of these terms, it readily could have taken the obvious and usual step either of including a specialized meaning in the definitions section of the statute or by using clear modifying language in the text of the statute." *Consol. Bank*, 118 F.3d at 1464. Particularly because § 2462 applies to a wide variety of agency actions and contexts, we are loath to adopt the technical definition that the SEC promotes.

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[3] Because we hold that disgorgement is a "forfeiture," 28 U.S.C. § 2462, we need not reach the defendants' alternative argument that disgorgement is a "penalty." *Id.*

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all Fifth Circuit decisions issued before the close of business on September 30, 1981.

> In sum, § 2462 applies to the declaratory relief and disgorgement the SEC sought, but not to the injunctive relief.

For the foregoing reasons, the SEC is time-barred from proceeding with its claims for disgorgement that arise from activity before April 17, 2010 (five-years before OIP, plus the tolling periods) because, under the plain meaning of 28 U.S.C. § 2462, these remedies are a penalty and a forfeiture, respectively.

D. Lawful Interest Should Be Deducted From Ill-Gotten Profits Computation.

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<u>**Erroneous Statement in Initial Decision:**</u> **"This aggregate loan principal sums to $2,715,673. A comparison to the stipulated aggregate proceeds ($4,296,266) results in profits of $1,580,593."**

The aggregate loan principal sums to $2,715,673 is accurate, but the fact that the Court only offset the principal sum of the notes, without including accrued interest through the date of the sale transaction, constitutes a manifest error of fact. The principal of each loan, some made years before conversion, generated a reasonable interest rate of 8% per annum. That amount of debt was lawful, accrued and due upon the date of conversion or sale, and thus should be included in the sum of debt converted or transferred in exchange for the proceeds of such transaction. Interest at a reasonable rate of 8% is not "ill-gotten gain".

Attached to the Post-Hearing Declaration of Brian Flood, filed herewith, at Exhibit 1, is a computation of the gain on all such sales. A detailed calculation of the aggregate proceeds is slightly different from the amount above, $4,281,389, as it is based on Mr. Flood's computation, not the Court's, as to which the Respondents do not have access. The value of the accrued interest for the notes, plus the principal balance, totals $2,990,771 (excluding transactions outside of the statute of limitations) for IBEX.

E. Profits Never Received Or Received And Immediately Reinvested In BIEL and Never Repaid Cannot Be Disgorged.

The Court's computation ignores entirely that IBEX re-invested every penny of such purported ill-gotten gains and more than that back into BIEL immediately, and in many instances, directly from the buyer (often Redwood Management) to the issuer, BIEL. Indeed, Mr. Park's opinion at DX 137 rests almost exclusively on the concurrent or very prompt timing between the sale by IBEX of BIEL securities and the reinvestment of the sales proceeds by IBEX into BIEL in exchange for new convertible debt. Many of the payments went directly to BIEL, and were never received by IBEX. See RX 1F and Kelly Whelan testimony RT 1201 *et seq.* IBEX is now being ordered to disgorge funds that, in many instances, it never received directly, as such funds were paid from the buyer of notes directly to IBEX, and other funds that it very promptly reinvested into BIEL. These facts are the cornerstone of the Division's Section 5 claims, and thus cannot be disputed by the Division for purposes of the disgorgement computation.

Because all such profits were reinvested into BIEL, any so-called profit that the Court seeks to disgorge is an equitable order to undo that which cannot be undone of profits that in many cases were never actually received by IBEX. This is not just asking IBEX to squeeze the toothpaste back into the tube. It's more like asking IBEX to do so after the toothpaste has been used to brush BIEL's teeth. As the Court has recognized, BIEL cannot return that investment to IBEX. The Court's penny stock bar all but ensures that IBEX cannot sell the debt to third parties. Consequently, IBEX cannot recover those profits in order to pay them to the Treasury. Such an order does not do equity, but serves only the fiction that the same money can somehow reappear and be paid over to the Commission, as a means of punishing IBEX, BIEL, Andrew

Whelan and Kelly Whelan for their non-scienter based violations of the registration requirements under Section 5.

Such a disgorgement order constitutes a manifest error of fact.

F. Attacks On Brian Flood's Credibility Are Misplaced.

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Statement in Initial Decision: "Flood admitted that he was not aware that the Revolver was created in 2009 even though it was dated January 1, 2005, but stated that this fact would not have affected his analysis".

This statement implies that Mr. Flood's awareness of the date of the creation of the Revolver loan documentation was something that Mr. Flood should have known and was incompetent for not knowing. Brian Flood testified that his services as an outside accountant working, indirectly, for BioElectronics, began in March 2013, while the Revolver loan had been documented in 2009, at the latest, four years earlier, and fully eight years after some of the loans reflected in that Revolver loan documentation were made. RX 1C and 1D; RT 1140-1142. Mr. Flood had nothing whatsoever to do with such documentation. Nor did he testify that he audited the books and records of BioElectronics. It is not the least bit surprising, and does not impugn his testimony, that he was unaware of when such loan had been documented four years before his arrival.

While the date that the Revolver was documented was not important to Mr. Flood's holding period analysis, it was important to Mr. Flood's analysis to track each loan payment made to its original documentation in BioElectronics' books and records. See Post-Hearing Declaration of Brian Flood, attached hereto, at ¶12. All loans under the revolver agreement included in Mr. Flood's analysis were matched by date to the BioElectronics accounting records. *Id.* at ¶12. The reason why Mr. Flood stated that when the actual document was created would not have affected his analysis, was not out of some level of carelessness, but instead because Mr. Flood understood that for the purpose of calculating the holding periods for each IBEX note that was subsequently converted to shares or sold, it simply did not matter when the Revolver loan documentation had been created. *Id.* at ¶12. What mattered was when the loans were actually funded, not when the loan document was signed. *Id.* at ¶12.

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Statement in Initial Decision: "Flood also admitted that he did not consider the 'holding period' definition found in the Securities Act".

This statement appears to impugn the quality of Mr. Flood's analysis, without a factual basis, and thus constitutes a manifest error of fact. Mr. Flood did testify that he did not consider the 'holding period' definition found in the Securities Act. RT 1136. But, he did also testify about exactly how he computed the holding periods, which testimony is entirely consistent with the measure for holding periods as defined in Rule 144(d)(3)(ii). Post-Hearing Declaration of Brian Flood, attached hereto, at ¶ 14. In fact, Mr. Flood used the United States Internal Revenue Service definition of holding period at 26 USC §1223, which for convertible debt includes the time from initial date of the loan to the company until the debt is converted, in addition to the time in which it is subsequently sold. *Id.* The holding period applies to both the initial and subsequent holders of the securities. Similarly, Rule 144(d)(3)(ii) 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." The distinction between the Internal Revenue Code definition which guided Mr. Flood's calculation and the Rule 144 holding period definition under Rule 144(d)(3)(ii), which would generate the very same analysis, constitutes a distinction without a difference. It is unfair to assert this factual statement for purposes of impugning Mr. Flood's analysis. To do so constitutes a manifest error of fact.

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Statement in Initial Decision: "Flood explained that he excluded an August 1, 2009, loan for approximately $519,000 because he believed that the loan was not sold between 2010 and 2014".

Again, this statement appears designed to impugn Mr. Flood's credibility, without factual support. Mr. Flood was asked about a note that was not included in his chart in the original amount of $519,920. Mr. Flood correctly testified that the note was never sold. He did not include the note in his holding period analysis, because that note was not sold – and thus was not part of the Division's case. Post-Hearing Declaration of Brian Flood, attached hereto, at ¶ 16. The Division was suing based on specific note sales detailed in its More Definitive Statement. The $519,920 note was never sold and, accordingly, the note was not at issue in this case, other than for purposes of discussing issues of control by IBEX, as the note was secured by the assets of BIEL. Consequently, its holding period was not relevant to Mr. Flood's work. Accordingly, it was not analyzed among the notes at issue in the case as to its holding period – and properly so. The omission of that unsold note in his holding period analysis of sold notes supports Mr. Flood's competence, not his incompetence.

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Statement in Initial Decision: "The $530,037 note is an especially troubling example, because it does not appear to have been contemporaneously documented at all".

The $530,037 loan was a transfer of debt from St. John's to IBEX. IBEX paid St. John's for that loan the full face amount of the debt transferred ($530,037). RT 1216 (testimony of Kelly Whelan). When the assignment of such debt was booked by BIEL, it was simply a journal entry substituting IBEX in place of St. John's as the holder of such pre-existing debt. Post-Hearing Declaration of Brian Flood, ¶18. That debt was sold years later as part of the debt sold

"BIEL filed a Form 10-K for fiscal year 2009 on March 31, 2010. *See* Tr. 350; DX 51. A. Whelan signed the Form 10-K as BIEL's president, CEO, CFO, and director. *See* DX 51 at 47. BIEL reported that as of December 31, 2009, it had 16,011 holders of record of its common stock, current assets of $1,167,646, sales of $1,145,647, and a net loss of $259,977. *See* DX 51 at 16; RX 211 at 2740-41. However, in June 2011 it reported to OTC Markets that it had only 103 holders of record as of December 31, 2009, and 154 holders of record as of December 31, 2010. *See* RX 194B at 2293, 2313; *see also* Tr. 642-43, 910-11.

The foregoing inconsistent statements by BIEL are relevant only to the issue of whether BIEL was a mandatory filer in 2006 and 2007 when they withdrew their registration filing. If so, BIEL could not have effectively withdrawn its registration after 60 days of filing its registration statement under Section 12(g). If not, it could have and did. See Respondents' Post-Hearing Brief, Section III.H. The magic number is 500 shareholders of record. If less than that, then BIEL's withdrawal was effective, and the Section 13 violations fail as a matter of law.

In fact, BIEL never had more than 500 shareholders of record. RX 194B at 2293, 2313; and TR 642-643; 910-911. Although the number of shareholders of record predating 2009 cannot be stated with certainty, due to the death of Mr. Holladay, the principal of BIEL's transfer agent at that time, and the absence of shareholder ledger records from his firm, the actual number of shareholders reflects that the number has gradually increased over time, and has always been far below 300, much less 500. The number of shareholders of record that BIEL can state, with certainty, are as follows at the end of each calendar year:

2008 96 shareholders (RX 194, p. 2242)

2009 103 shareholders (RX 194, p. 2242)

2010 154 shareholders (RX 194, p. 2242)

2011 180 shareholders (RX 171G, p. 1505)

OIP ¶4. Thus, the disgorgement of St. John's profits, as well as the extraordinarily severe penalties proposed in the Initial Decision, would impact Patricia Whelan almost exclusively. The Court findings of fact to support its third-tier penalties against St. John's in its Initial Decision include manifest errors of fact.

A company's scienter is imputed from that of the individuals controlling it. See *SEC v. Blinder, Robinson & Co., Inc.*, 542 F. Supp. 468, 476 n.3 (D. Colo. 1982) (citing *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1972)).

Here, there was no finding of any scienter on behalf of St. John's controlling person, Patricia Whelan. Implicitly, the extremely thorough investigation of the SEC Staff in this matter concluded that she lacked any fraudulent scienter, as they did not even name her as a Respondent in the case, never took her examination and never called her as a witness at the hearing.

Instead, the Court acknowledged that in a letter dated June 19, 2012, and addressed to BIEL's transfer agent, Alexander Kuhne, BIEL's attorney, opined that St. John's' shares should be issued "without any Rule 144 restriction imprinted on the certificate." Initial Decision at 13, citing RX 172G at 1762. "Kuhne opined specifically that St. John's' shares were 'freely tradable and salable as a Brokers' Transaction, as defined by Rule 144(f)(1)(i)." *Id.* The Court, armed with an obviously strong and well-trained legal mind and many years of professional experience focused on securities law issues of this nature, dismisses Mr. Kuhne's legal opinions all too easily, explaining that because Mr. Kuhne "routinely advanced conclusions so unsupported and unbelievable", "Respondents could not have relied on them in good faith." Initial Decision at p. 53.

Patricia Whelan, unfortunately for her, was not armed with the same education or experience in complex securities law issues. She was in no position to second guess her lawyer's securities advice. She is a sweet elderly woman who, faced with complex securities law issues well beyond her personal education or training, simply relied on the fact that her lawyer said it was legal, and her broker accepted such legal opinion in executing the transactions requested, to honestly believe that the transactions were legal. If she had been charged with a fraud, defense of counsel would have been proven as a defense. But, because she had no notice that she was being charged with a fraud count, she did not mount such a defense, although the undisputed facts establish that she did receive such legal advice.

On advice of counsel, St. John's sold 81,808,086 of the 91,808,086 shares through registered broker-dealers Primary Capital and Alpine Securities on seven dates between March 2013 and March 2014. Initial Decision p. 13, citing Rr. 904-905; Stipulation at DX 1, ¶35, RX 172D, 172F, 172H. The total proceeds were $397,196.70 (Initial Decision at 13, citing DX 1, ¶35 and RX 172H. The Court concluded that such sales generated ill-gotten gains of $240,293.21 and ordered those ill-gotten gains disgorged. Initial Decision, p. 56. This motion does not challenge that portion of the ruling. It focuses, instead, on the penalties issued on top of that disgorgement order.

At page 58, the Court imposes a whopping $650,000 third tier penalty on Patricia Whelan's company, St. John's, on top of the $240,293.21 disgorgement order. Such an award is not supported by the facts.

In addressing the factors applicable to the assessment of third tier penalties, the Court nowhere addresses Patricia Whelan, the owner of St. John's. There is absolutely no evidence that she was ever involved in any fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement; or that she ever had any prior regulatory record or that there was any need to deter her from further violations. Indeed, the OIP makes clear that St. John's "has never had a class of securities registered with the Commission." OIP, ¶4. And, most tellingly, the OIP does not name her as a respondent.

The OIP inaccurately lumps St. John's transactions in with IBEX transactions. OIP, ¶¶11 and 12 ("Starting in mid-2010 and continuing into at least early 2012, BIEL used St. John's to provide financing using the same type of transaction.") Mr. Park's analysis ties IBEX securities sales to its funding of new loans to BIEL. DX 137. But, he could not do the same for St. John's.

To the contrary, the More Definitive Statement, at Exhibit B, comes clean with the facts pertaining to St. John's. While St. John's has loaned BIEL $2.9 million in exchange for convertible notes since 2009 (Initial Decision, p. 5, citing DX 1, ¶31), during the entire five-year period at issue in this case, St. John's liquidated only $156,903.49 of those notes, approximately 5% of its loans. And, its liquidation of such 5% happened almost entirely within a single month in 2014. That is not indicative of someone who is intentionally perpetrating a scheme to illegally dump unregistered shares into the public market.

The fact that St. John's held the two notes that it did liquidate for nearly three years before selling them is further evidence that belies the finding of scienter. DX 1, ¶32-35.

Finally, and perhaps most importantly, St. John's did not pour its sales proceeds back into BioElectronics, as IBEX is accused of doing by the Division. Exhibit B to the More Definitive Statement reveals that St. John's didn't even finish selling the 91 million conversion shares it received, but stopped short at 81 million. Moreover, St. John's sold only $12,070.81 worth of stock on March 26, 2013, and didn't make a loan of any amount for over a month. Then, without any sales after March 26, 2013 and before such loans, St. John's made cash loans to BioElectronics of $17,500; $22,500 and $5,500 on May 1, 2013; July 15, 2013 and September 10, 2013. Again, there were no stock sales before or near any of those loan transactions. It was not until February through early March 2014 that the bulk of the sales were made by St. John's. Importantly, there is no evidence that any of the proceeds of such sales were loaned to BIEL.

These facts reveal that while the OIP conflated St. John's with IBEX, the transactions at issue in this case require separate and distinct treatment. The facts, as applied to St. John's transactions, do not remotely justify third tier penalties. The Court's findings in that regard constitute manifest error of fact.

III. CONCLUSION.

Based on the foregoing, the Respondents respectfully request that the Court correct its Initial Decision, computing the profits earned by IBEX on its sales of BIEL securities, as $462,534, rather than $1,580,593. Post-Hearing Declaration of Brian Flood, Exhibit 1. In addition, Respondents respectfully request that the Court correct its Initial Decision, to find that the actual number of shareholders of record of BIEL was less than 300 at all times. Finally, Respondent request that the Court's reduce and reassess the $650,000 civil penalties proposed to be issued against St. John's.

Dated: Santa Monica, California
December 22, 2016

Respectfully submitted,

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17104

In the Matter of: Laurence I. Balter d/b/a Oracle Investment Research Respondent.

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I hereby certify that I caused to be served a true and correct copy of the following documents on the date and in the manner indicated below.

1. Respondents' Motion to Correct Manifest Errors of Fact In Initial Decision Dated December 13, 2016.
2. Declaration of Andrew J. Whalen in Support of Respondents' Motion to Correct Manifest Errors of Fact In Initial Decision dated December 13, 2016.
3. Declaration of Brian Flood in Support of Respondents' Motion to Correct Manifest Errors of Fact In Initial Decision dated December 13, 2016.
4. Declaration of Stanley C. Morris in Support of Respondents' Motion to Correct Manifest Errors of Fact In Initial Decision dated December 13, 2016.

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