UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17104

In the Matter of

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

Respondents.

DIVISION OF ENFORCEMENT'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO CORRECT MANIFEST ERRORS OF FACT IN THE INITIAL DECISION

The Division of Enforcement hereby submits its response to the Respondents' Motion to Correct Manifest Errors of Fact in Initial Decision Dated December 13, 2016, filed on December 23, 2016 (the "Motion to Correct").

INTRODUCTION

Pursuant to the Court's December 27, 2016 Order Regarding Motion To Correct Manifest Errors of Fact,[1] there are two remaining issues that the Division must address in responding to

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[1] In the December 27, 2016 Order, the Court limited the Division's response as follows:

> It is further ORDERED that in responding to the motion the Division need not address the following issues: (1) whether the statute of limitations and the Commission's positions in bankruptcy proceedings bar disgorgement for unlawful securities sales predating April 17, 2010 (motion at 3-15); (2) whether income tax payments may offset the ordered disgorgement (motion at 3-4); (3) whether accrued interest should be counted as ill-gotten gains (motion at 15); (4) whether sales proceeds reinvested in BioElectronics should be counted as ill-gotten gains (motion at 16-17); and (5) whether the civil penalty imposed against St. John's was excessive (motion at 25-29). Such arguments are purely legal and are not properly presented in a motion to correct manifest errors of fact.

the Motion to Correct: (1) whether the Court made manifest errors concerning the credibility of Mr. Flood through six particular statements (Motion to Correct at 17-20), and (2) whether the Court made manifest errors concerning the number of shareholders of BioElectronics (Motion to Correct at 20-25). As we set forth below, neither of these represent manifest errors of fact as provided in Rule 111(h), and the Respondents' motion should be denied.

Not only have the Respondents failed to establish that the challenged statements are erroneous, which they are not, but they have failed to demonstrate the relevance of the purported errors, as required. As we show below, the challenged statements concerning the credibility of Mr. Flood and the number of BIEL shareholders, even if false, are independent of any decision or determination in the Initial Decision.

Standard of Review

Rule 111(h) of the Commission's Rules of Practice allows a party to file a motion to correct manifest error of fact within ten days of issuance of the Initial Decision. 17 C.F.R. § 201.111(h). Motions to correct manifest errors are properly filed "only if they contest a patent misstatement of fact in the initial decision." *Marketxt, Inc.,* Release No. APR-624, 2006 WL 372656 (Jan. 5, 2006) ("*Marketxt*") (citation omitted).

A patent misstatement is something that is "readily visible or intelligible: obvious." *Trautman Wasserman & Co., Inc.,* Release No. APR-637, 2008 WL 294722, *2, citing Merriam-Webster's Collegiate Dictionary, 849 (10th ed. 2001). "A **manifest error** is "an **error** that is plain and indisputable, and that amounts to a complete disregard of … the credible evidence in the record." *Gary L. McDuff,* Rulings Release No. APR-1928, 2014 WL 11460355, *1 (Oct. 21, 2014) (emphasis in original, citation omitted). There also is a relevance and materiality component to a Rule 111(h) motion. A manifest error of fact should "be reasonably considered

to alter the court's decision." *Marketx* at 1, citing *Word v. Croce,* No. 01 Civ. 9614, 2004 U.S. Dist. LEXIS 3643 (Mar. 9, 2004). *See also Raymond James Financial Services, Inc.,* Release No. APR-622, 2005 WL 3778678, *2 (Oct. 14, 2005) ("The items identified by Raymond James come nowhere near what is necessary to be considered manifest errors of fact. None of the alleged errors are facts upon which a finding of liability was based or affected a conclusion reached in the Initial Decision.")

Arguments such as the ones made by Respondents here, that are divorced from any Court decision, that urge different findings or inferences to be drawn from the evidence, or that argue legal principles, are not proper for a Rule 111(h) motion. *See Daniel Bogar,* Release No. APR-836, 2013 WL 11116630 (Sept. 4, 2013).

Argument

I. The Statements In The Initial Decision Relating To The Credibility Of Brian Flood Do Not Represent a Manifest Error of Fact.

The Respondents argue that the Court erroneously attacked the credibility of their accounting expert, Brian Flood, by way of six statements they claim to be in error, quoted on pages 17-20 of the Motion to Correct. Their arguments are misplaced. As we show below, none of the challenged statements represents a manifest error of fact. All of the statements are true, and all were supported by accurate citations to the evidentiary record. The Respondents' arguments thus go to the weight of the evidence, or inferences to be drawn from evidence, and do not represent patent misstatements of fact. *See Gerard A. M. Oprins, CPA,* Release No. APR-663, 2011 WL 7820428, *3 (Jan. 21, 2011) ("*Oprins*").

In addition, Respondents universally have failed to explain the relevance of the purported errors they identify, or how correcting the purported errors would make any difference in terms of the Court's decisions. The Court did not make any findings as to the credibility or

competence of Mr. Flood. Moreover, the Court's finding that IBEX was a dealer, affiliate, and underwriter of BIEL rendered Flood's opinions as to the holding periods of the BIEL notes irrelevant. *See* Initial Decision at 40 (holding period discussed in Rule 144 permit only *non-affiliates* to qualify for safe harbor), 47-48 (Respondents failed to prove that IBEX transactions did not involve an underwriter or dealer). To the extent the Court applied or relied on Flood's analysis, it worked *to the benefit* of the Respondents in the disgorgement analysis. *See* Initial Decision at 55 (finding that Respondents "met their burden by providing acquisition costs in the form of Flood's analysis.") Accordingly, even if Respondents are correct in their challenge to the Court's statements concerning Flood, they can identify no resulting prejudice or harm.

Statement 1: "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. Tr. 1149." Respondents claim that this statement is manifestly erroneous under Rule 111(h) because it "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." Motion to Correct at 17. The Court should reject their argument for several reasons.

First, the challenged statement is patently true and supported by the evidence. At page 1149 of the transcript, the Division's counsel and Mr. Flood exchanged the following questions and answers:

Q Let me ask you to look at what's been admitted as Division Exhibit 44, and ask you if that's the document to which you refer.
A It appears to be, yes.
Q Are you aware, Mr. Flood, that though it bears the date of January 1st, 2005, the document was actually created in 2009?
A No, I'm not aware of that.
Q Had you been aware of that, would that

10 have impacted the analysis that you performed?
11 A Well, based on the analysis I performed
12 with transactions that were associated with the
13 period 2010 to 2014, *it would not have affected my*
14 analysis.

(emphasis added). The italicized testimony explicitly supports the Court's statements that Flood was not aware that the note was created in 2009, and that this fact would not have affected his analysis.

Second, the Respondents' interpretation of what the statement "implies" about the knowledge and competence of Mr. Flood is beyond the scope of Rule 111(h). *See Oprins,* 2011 WL 7820428, *3. Third, even if the challenged statement is erroneous, as Respondents argue, it is divorced from any findings or determinations of the Court. As noted above, the Initial Decision did not make any findings as to Mr. Flood's competence and credibility, and the Court did not rely on any opinions or analysis of Mr. Flood, except in a manner that *benefitted* the Respondents in the disgorgement analysis.

Statement 2: "Flood also admitted that he did not consider the "holding period" definition found in the Securities Act. Tr. 1136." Respondents claim that this statement is erroneous because it "appears to impugn the quality of Mr. Flood's analysis, without a factual basis." Motion to Correct at 18. Their argument is factually and legally wrong for similar reasons as the prior statement.

Again, the challenged statement is patently true and supported by the evidence. At page 1136 of the transcript, Mr. Flood admitted that he did not opine on the definition of holding period applied in the Securities Act:

3 Q So whether that is a "holding period" as
4 defined in the Securities Act is beyond what you're
5 opining here, correct?
6 A Yes. It's simply that calculation,
7 mm-hmm.

In addition, Respondents' argument that the statement "appears to impugn the quality of Flood's analysis" is beyond the scope of Rule 111(h), as was the prior statement. It is also irrelevant, as the Court did not use or rely on Flood's holding period analysis, as it independently found IBEX a dealer, affiliate, and underwriter of BIEL.

Statement 3: "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 Tr. 1170-71, 1181." Respondents similarly argue that this statement is erroneous because it "appears designed to impugn Mr. Flood's credibility, without factual support." Motion to Correct at 19. Once again, Respondents have failed to identify any manifest errors of fact.

Again, the challenged statement is patently true. In the italicized statements of the transcript at 1170-71, 1181, Mr. Flood testified that he did not include the $519,000 loan in his analysis because he determined that the loan was not sold between 2010 and 2014:

Q I'm sorry. And during your analysis, and this may be testing you, Mr. Flood, do you recall a loan in the amount of $519,000?
A 519.
MR. STODGHILL: Can you bring up Division 68.
BY MR. STODGHILL:
Q Let me show you something a second.
A I think -- I think that was the first promissory note, was it not? Yes. Okay, mm-hmm.
Q All right. Is that loan or that note reflected in -- some place in your chart?
A No, because I -- that -- let me see, on
1171
page 7.
Q First of all, let me --
A That loan has not been -- that note has not been sold. I don't believe that note has been sold. That was a separate note that –

And at 1181:

MR. STODGHILL: If you could bring back up 68, DX 68.

BY MR. STODGHILL:

Q I think you started to explain, Mr. Flood, why that particular loan agreement is not included in your analysis. Is that right?

A Yes, my understanding is that -- that note has not been sold between 2010 and 2014.

(emphasis added).

And again, Respondents' delving into hidden meanings beyond the text of the statement is beyond the scope of Rule 111(h). The purported error is also irrelevant, as the Court's made no finding as to Mr. Flood's credibility, and its decision is independent of Mr. Flood's opinions, except to the extent it benefitted the Respondents.

Statement 4: "The $530,037 note is an especially troubling example, because it does not appear to have been contemporaneously documented at all." For this challenged statement, the Respondents have not even attempted to demonstrate or describe the basis on which they claim it is erroneous. *See* Motion to Correct at 19. They argue that the assignment of the $530,037 loan from St. John's to IBEX was booked by BIEL as a "journal entry substituting IBEX in place of St. John's as the holder of such pre-existing debt." *Id.* But they never explain how the purported journal entry (they do not identify the alleged entry in the record) represented a *contemporaneous* documentation of the $530,037 note, or the underlying loans that it encompassed. To the contrary, the evidentiary record confirms that BIEL and IBEX kept no such contemporaneous records. Kelly Whelan testified that IBEX's initial loans to BIEL were not memorialized through any formal loan or promissory note agreements or otherwise documented individually. *See* Tr. 469:17-470:3; 1113:1-13; 1116:25-1117:12. The challenged statement is thus amply supported by the evidentiary record.

Statement 5: "Flood, who has been handling BIEL's accounting for years and claimed to be familiar with its finances, was unaware that the Revolver had been backdated, and that the $530,037 note had not actually been executed in August 2009. *See* Tr. 1149, 1172, 1216." Respondents claim that this statement is erroneous because Flood "has not been handling BIEL's accounting for years....and it is unreasonable to assume that Mr. Flood would have known that a document dated in the year 2005 was not actually prepared until 2009." Motion to Correct at 20. Their argument again fails under the facts and law.

At page 1140-42 of the transcript, Flood explained that his relationship with BIEL has been to: "prepare the quarterly and annual statements from their accounting records that are provided to them so that they can then file them with the OTC Markets and use accordingly." (Tr. 1141:9-12). Flood further explained that he has been serving in this capacity since March of 2013, and that "he has done the last 15 quarterly statements." (Tr. 1142:8-10). The evidentiary record thus clearly supports the Court's statement that Flood "has been handling BIEL's accounting for years."

As for Respondents' extrapolation into the hidden meaning of what the statement "assumes" about Mr. Flood's knowledge, that is beyond the scope of Rule 111(h). And once again, the purported error is irrelevant to any finding of the Court.

Statement 6: "BIEL seemingly made no such posting for the $530,037 loan, except to note that it had been assigned to IBEX. *See* RX 1F at 43; *see generally* RX 1D." Respondents claim that this statement is erroneous, because BIEL "recorded the full value of the $530,037 loan in the general ledger, as reviewed by Mr. Flood ...." Motion to Correct at 20. Once again, Respondents have not demonstrated that the challenged statement is false.

The point of the challenged statement, read in the context of the prior paragraphs, is *not* that BIEL did not record a line item entry for $530,037 somewhere in its general ledger, but that it failed to *adequately* and *contemporaneously* document the 2009 note, and the underlying loans it encompassed, in its accounting records. *See* Initial Decision at 45-46. The documents cited in the challenged statement support that point. RX 1F at 43 is a document entitled "BioElectronics Corporation Transaction by Account as of September 30, 2010." It contains a credit entry dated September 30, 2009 for $530,036.77, with an obscure comment, *"AJE to record assignment of assets from P Whelan and PAW to IBEX, LLC to IBEX, LLC per assignment agreement."* There is no further description of the underlying loans or notes to which it refers. RX 1D is a similar nebulous accounting record, entitled, "BioElectronics Corporation Transactions by Account, as of August 2008." It lists a $530,000 entry dated 1/01/2010 with no accompanying comment or description. These incomplete and indecipherable accounting entries support the challenged statement and the Court's overall findings regarding BIEL's lack of corporate formalities and carelessness in its recordkeeping, particularly in its dealings with IBEX. Initial Decision at 45.

II. The Statements In The Initial Decision That BIEL Had More Than 500 Shareholders Are Not Manifest Errors of Fact.

At pages 20-25 of the Motion to Correct, Respondents claim that the following statements in the Initial Decision represent manifest errors of fact:

> 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.

Their arguments are without merit. The Respondents have not demonstrated that these statements are patently false. In fact, they concede that the cited evidence supports the quoted

statements. *See* Motion to Correct at 21, 24. BIEL *did* report in the 2009 10-K that it had 16,011 shareholders. DX 51 at 47; and BIEL *did* report in June 2011 to the OTC Markets that it had 103 and 154 shareholders, respectively. RX 194B at 2293, 2313. Respondents also admit that the record contains no explicitly contrary evidence, conceding that the number of shareholders predating 2009 "cannot be stated with certainty." Motion to Correct at 21. They have thus identified no manifest error of fact.

In addition, the factual issue raised by Respondents as to the number of shareholders is irrelevant to the Court's analysis and decisions. Whether BIEL had 500 or fewer shareholders in 2006 or 2007 has no bearing on BIEL's obligation to comply with Section 13, or its liability for filing false financial statements in the 2009 10-K. The legal arguments raised by Respondents under Section 12(g) -- beyond the scope of Rule 111(h) -- once again, misstate the law. As the Division set forth at length in its post-trial briefing, and as correctly determined by the Court in the Initial Decision, by voluntarily filing a Form 8-A registration statement, BIEL became obligated to comply with Section 13, from the effective date in April 2006 until it filed a Form 15 in April 2011.

CONCLUSION

For the foregoing reasons, the Court should deny the Respondents' Motion to Correct.

Dated: January 10, 2017

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