



UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

COPY

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 FOR A
MORE DEFINITE STATEMENT**

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 for a more definite statement as to certain of the allegations, pursuant to Rule 220(d) of the Securities and Exchange Commission's Rules of Practice.

¹ All Respondents excluding only Robert P. Bedwell.

A. The OIP.

On February 5, 2016, the Securities and Exchange Commission issued an Order Instituting Administrative and Cease-And-Desist Proceedings (“OIP”) alleging (i) inaccurate public disclosures in a Form 10-K filed by BIEL for the period ending December 31, 2009, which allegedly improperly recorded revenue from two bill and hold transactions; and (ii) actions of each of the Respondents resulting in the distribution of unregistered shares of issuer, BIEL, during the period August 2009 through November 2014 (which paragraph 1 of the OIP defines as “the relevant period”).

B. The OIP Is Unclear As To Whether A Section 5 Claim Is Asserted And On What Factual Allegations It Is Based.

The caption of the OIP and the introductory paragraph provide notice of claims by the Commission pursuant to Section 8A of the Securities Act of 1933; Sections 15(b), 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules of Practice. No mention, whatsoever, is made of a claim based on Section 5 of the Securities Act until Paragraph 38 of the OIP.

At the very least, the Division of Enforcement (the “Division”) should be compelled to either strike any mention of Section 5, or, alternatively, provide a clear statement in the title and introductory paragraph that it is pursuing a claim under Section 5. If the latter, the Division should be compelled to allege, with particularity, the factual basis upon which such claim is made and the specific respondents against whom such claim is asserted.

C. The OIP Fails To Identify The Securities And Transactions At Issue.

The OIP fails to provide any notice of the specific transactions to which the claims are aimed, by date, amount, specific securities purchased or sold, the relief sought with respect to each transaction and the person or persons as to which such relief is sought with respect to each

transaction. Each Respondent has no notice of the extent and magnitude to which he, she or it may have liability under the OIP and the basis of such liability. Such information is necessary for each Respondent to appreciate his, her or its risk of failing to aggressively defend the OIP, and to determine which defenses, such as statute of limitations, may apply to the transactions at issue for such Respondent in this proceeding. The OIP should be amended to provide such information.

D. Andrew Whelan Should Be Defined As “A. Whelan”, not “Whelan”.

Paragraph 5 of the OIP defines Andrew J. Whelan as “Whelan”. The definition intentionally conflates the Whelan Respondents. There are three Respondents and one other referenced person that have the same last name, Whelan. Kelly Whelan, a 48 year old CPA who lives in a different state, is the daughter of Andrew Whelan. OIP, ¶6. Kelly Whelan and her father, Andrew Whelan, live separately in Virginia and Maryland, respectively, and run different companies located in different states. OIP, ¶¶2-6. Kelly Whelan is not an officer, director, employee of Andrew Whelan’s company, BIEL. Andrew Whelan is not an officer, director, employee, member, or shareholder of IBEX. BIEL owns no stock in IBEX. *Id.* Patricia Whelan is Andrew Whelan’s wife and owner of 99% of St. John’s. *Id.* Mary Whelan, Andrew Whelan’s sister, owns eMarkets Group, LLC, referenced in paragraph 8 of the OIP. The OIP should be amended to reference Andrew Whelan in a manner that is distinct from the other Whelan’s referenced in the OIP.

E. The OIP Inadequately Pleads Facts To Establish Control By Andrew Whelan and BIEL over Kelly Whelan and Ibex, LLC.

Kelly Whelan’s company, IBEX, funded a series of convertible notes on fair market terms to Andrew Whelan’s company, BIEL, during the so-called relevant period. OIP, ¶11. The issuance of such convertible notes by BIEL to IBEX, and IBEX’s subsequent conversions and

stock sales and/or private sales of such convertible notes to unrelated third parties more than a year after acquiring the notes are transactions at the heart of this proceeding. *Id.*

This component of the Division's case turns on whether or not Kelly Whelan and her company, IBEX, were under the control of Andrew Whelan and BIEL. As explained in greater detail in the concurrently filed memorandum of points and authorities, if IBEX was not under the control of Andrew Whelan, then IBEX was not an affiliate of BIEL. It necessarily follows that the sales by non-affiliate IBEX of BIEL stock after the statutory holding period squarely complied with Rule 144 and are exempt from registration under Section 4. In that case, the SEC's claims against Respondents based on such transactions fail as a matter of law. Thus, allegations that Andrew Whelan and BIEL control Kelly Whelan and IBEX are dispositive as to the gravamen of the OIP's claims arising out of all IBEX/BIEL transactions. Because the issue of control is dispositive, Respondent demands, and is entitled to, a statement with particularity of the facts upon which the Division concludes that Andrew Whelan and BIEL, as borrower, controlled Kelly Whelan and IBEX.

Paragraph 11 of the OIP alleges that:

when BIEL needed funds to continue its operations, IBEX sold hundreds of millions of unrestricted BIEL shares in dozens of unregistered transactions, at the request of Whelan, directly to third party purchasers at a discount to then current market prices. IBEX retained a percentage of the money obtained from the sales but funneled the rest to BIEL, and, in return, BIEL provided both a "convertible loan" to IBEX and a new grant of unrestricted shares which, in effect, replaced the shares IBEX sold. When each of these "loans" came due, after one or two years' time, BIEL "renegotiated" them by providing IBEX with additional purportedly

unrestricted shares in return for extending the loan's due date. BIEL never repaid any of the “loans” in cash. These transactions were not registered with the Commission.

Paragraph 13 of the OIP adds that Andrew Whelan “communicated BIEL’s financial needs to IBEX and St. John’s” and “ordered the issuance of BIEL shares to IBEX and St. John’s through BIEL’s transfer agent.”

Paragraph 14 repeats a subset of the allegations in paragraphs 11-13 of the OIP.

Paragraph 15 alleges that

During the relevant period, IBEX, and St. John’s were affiliates of BIEL as each was under the common control of Whelan, or, at the least, the common control of Whelan and Kelly Whelan. Among other things, Whelan determined when IBEX and St. John's sold shares to the public. In addition, IBEX and St. John's paid BIEL's business expenses, including paying BIEL's contractors for services rendered and paying Whelan's travel expenses incurred while performing BIEL related work.

Paragraph 16 alleges that “IBEX and St. John's offered and sold shares for BIEL or, in the alternative, acquired securities from BIEL with a view to distributing the securities. Each sold BIEL shares, at Whelan's request, for that purpose and Whelan replaced shares sold by IBEX and St. John's so that the process could be repeated.”

There is no allegation contained in the OIP that would support a finding that Andrew Whelan or BIEL controlled Kelly Whelan or IBEX any more than could be made of any other borrower controlling any other lender. Lenders are motivated by profits inherent in loan transactions. IBEX is no exception. IBEX was eager to make profitable loans to BIEL, just as any lender would be. When BIEL needed money to fund its operations, it went to its lender and

asked to borrow those funds. When the funds were loaned, BIEL issued another note to IBEX, just as any borrower would issue to any lender. The allegations, if true, would not establish that the borrower, BIEL, controlled the lender, IBEX.

The fact that IBEX paid BIEL's business expenses, including paying BIEL's contractors for services and Andrew Whelan's travel expenses, proves only that the relationship of IBEX and BIEL was that of a lender and borrower. Just as a line of credit or other flexible lending facilities exists commonly in commercial banking relationships throughout the country, the fact that a borrower would have flexibility in the timing and purposes of loans is all too common to constitute a badge of control of borrower over lender. If that borrower/lender relationship could evidence control, then it follows that every credit card company and other revolving credit lender is controlled by every credit card user - borrower. The contention is ludicrous. The allegation must establish more than that, at BIEL's request, IBEX loaned it money. It must establish that BIEL had the *power* to force IBEX to loan it money, even when IBEX did not want to make that loan.

The only substantive allegation supporting the SEC's conclusion that Andrew Whelan controlled IBEX is that Andrew Whelan decided when IBEX should sell its securities. OIP at ¶15. But, determining when BIEL needed money, or even deciding when IBEX should sell its BIEL stock, does not constitute control over IBEX. An honest factual allegation would have to be made that Andrew Whelan held and, in fact, exercised *power* over IBEX to force it to sell BIEL stock even when IBEX did not want to sell such stock. Because the control contention is the only peg upon which the SEC appears to be making its claim that IBEX was an affiliate of BIEL, it is critical that the OIP provides all facts supporting such assertion (which Respondents adamantly deny). Respondents request that the ALJ requires that the OIP include all material facts establishing the existence and exercise of power by BIEL or Andrew Whelan over Kelly

Whelan and IBEX, including details of the content of any and all communications in which such power was created and/or exercised, or otherwise references the time, date and manner of such creation and/or exercise of power.

Respondents would not have a fair opportunity to defend the claims asserted in the OIP without a full, complete and detailed statement of the facts upon which the Division of Enforcement intends to assert its claims against the Respondents.

WHEREFORE, pursuant to Rule 220(d) of the Securities and Exchange Commission's Rules of Practice, Respondents seek an order:

- A. Striking all references to claims made based on Section 5 or, in the alternative, including in the OIP's caption and introductory paragraph that the Commission intends to pursue claims under Section 5, and stating in the body of the OIP the particular transactions and other material facts upon which such claims are to be pursued in this proceeding;
- B. Compelling the Commission to identify in the OIP the amount of relief sought and all facts alleged that would support such relief as against each Respondent, including a detailed listing of any and all securities transactions, by date, security transaction, parties to such transactions and the amount of relief sought with respect to such transactions.
- C. Either dismissing with prejudice all claims against the Respondents based on the transactions between BIEL and IBEX or, in the alternative, requiring that the OIP provide detailed factual allegations sufficient to establish, if proven, that borrower, BIEL, had the power to control and did, in fact, control lender, IBEX, in connection with the purchase of convertible notes and sale of those notes to third parties.

- D. For purposes of clarity, requiring that the OIP define and reference Whelan in terms other than “Whelan” that do not conflate Andrew Whelan with other Whelan respondents and third parties, including Kelly Whelan.

Dated: Santa Monica, California
March 11, 2016

Respectfully submitted,

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