HARD COPY

RECEIVED
MAR 31 2017
OFFICE OF THE SECRETARY

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.

Administrative Proceeding
File No. 3-17104

RESPONDENTS' BRIEF IN SUPPORT OF APPEAL TO THE COMMISSION

Stanley C. Morris, Esq.
Brian T. Corrigan, Esq.
CORRIGAN & MORRIS LLP
201 Santa Monica Boulevard, Suite 475
Santa Monica, California 90401-2212
Telephone: 310-394-2828
Facsimile: 310-394-2825
scm@cormorllp.com
bcorrigan@cormorllp.com

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

I. INTRODUCTION.

Respondents, BioElectronics Corporation ("BioElectronics"), Ibex, LLC ("IBEX"), St. John's, LLC ("St. John's"), Andrew J. Whelan ("A. Whelan") and Kelly A. Whelan ("K. Whelan and collectively, "Respondents") submit this Opening Brief pursuant to the Commission's Order Granting Petition for Review and Scheduling Briefs dated February 28, 2017. That Order states that "the Commission will determine what sanctions, if any, are appropriate in this matter." Upon *de novo* review (see Theodore W. Urban, Order Denying Motion for Summary Affirmance, Exchange Act Rel. No. 56961 (Dec. 13, 2007)), the sanctions proposed in the Initial Decision issued by Administrative Law Judge Cameron Elliot ("ALJ Elliot") dated December 13, 2016 (the "Initial Decision") should be reduced or eliminated.

Procedural defects in the underlying proceeding require a new trial before a judge properly appointed pursuant to the Appointments Clause of the United States Constitution. Erroneous findings of fact and conclusions of law in the Initial Decision compounded by an abuse of discretion pertaining to the proposed sanctions, including disgorgement, interest, penalties and injunctive relief, warrant rejection of the proposals and a fresh look at what is appropriate under the circumstances. These Respondents have no ability to pay the monetary sanctions, particularly in light of the injunctive relief ordered, and their conduct does not remotely warrant the proposed award. The result of the Initial Decision would be an abrupt end to a company that only recently secured FDA approval to sell its inexpensive, innovative, drug free pain relief medical device product over the counter in the United States. The Respondents, as well as BioElectronics' employees and investors, would suffer a forfeiture of immeasurable magnitude. No such suffocating relief is warranted.

There are no fraud allegations in this case. Instead, non-scienter highly technical issues are dispositive of the claims: (1) were IBEX's transactions exempt from the registration

requirements of Section 5; (2) were St. John's' transactions exempt from the registration requirements of Section 5; and (3) were BioElectronics' withdrawal of its registration statement filings in 2006-2007 effective, such that it owed no reporting duties under Section 13? The answer to each question is: YES.

The Section 5 (17 USC §77e) charges hinge on whether the transactions were exempt from registration under Section 4 of the Act (15 USC §77d). The applicable exemptions are Section 4(a)(1), (2) and (7) of the Securities Act. Section 4(a)(1) implicates the safe harbor provisions of Rule 144 (17 CFR 230.144).

Chronologically, the analysis starts with the issuance of unregistered convertible notes and stock by BioElectronics to IBEX and St. John's. Section 4(a)(2) of the Securities Act exempts "transactions by an issuer not involving any public offering." The uncontroverted testimony of Andrew Whelan, Kelly Whelan, Mary Whelan and Richard Staelin unanimously supports a finding that IBEX and St. John's were accredited private parties to whom such securities were issued. Thus, the issuances were exempt under Section 4(a)(2). The fact that those parties then held such securities for well over a year after acquisition and before such notes were sold privately or converted into stock and sold, confirms that Section 4(a)(2) applies.

The next set of transactions chronologically are St. John's' and IBEX's sales of such securities, after holding periods of over one year, and averaging more than 30 months. These transactions were exempt from registration under Section 4(a)(1). Section 4(a)(1) of the Securities Act exempts from registration "transactions by any person, other than an issuer, underwriter or dealer."

IBEX and St. John's were not issuers (BioElectronics is the issuer). Even if IBEX was considered an issuer, its private sales to several accredited parties would be exempt from registration under Section 4(a)(2).

IBEX and St. John's were not dealers. IBEX's loans increased over time and reflected its long-term investment in and financial support for BioElectronics, unlike what one would expect a dealer to do. The average period that IBEX held its BioElectronics securities before resale exceeded 30 months. RX 1A, RX 206; TR. 1112 et seq., TR. 1202 et seq. IBEX's long-term holdings and increasing investments reflect that it was a private investor, not an underwriter or dealer.

St. John's sales at issue in this case occurred nearly three years after it became at risk for such loans. DX 1, Exhibits B and B; RX 1A; RX 1-167; TR. 1112 *et seq.*; TR. 1202 *et seq.* St. John's' sales were limited to 5.4% of its notes, and to only 11 months of the 5-year period analyzed. Because of such long holding periods, St. John's modest and isolated sales, and continuing long term investments in BioElectronics, the Commission should find that St. John's was a committed long term private investor, not an underwriter or dealer.

IBEX, as a non-affiliate, complied with Rule 144. Even if it was an affiliate (which it was not), IBEX's and St. John's transactional exemptions under Section 4(a)(1) are not dependent on perfect compliance with Rule 144, a non-exclusive safe harbor.

The Division's case against IBEX and BioElectronics rests unsteadily on their contention that BioElectronics controlled IBEX or was under common control. Andrew Whelan, Kelly Whelan, Richard Staelin and Mary Whelan emphatically and uniformly testified that IBEX did not control BioElectronics, and vice versa. K Whelan TR. 430 et seq. and TR. 444, A Whelan TR. 644 et seq.; A Whelan TR. 878 et seq.; R. Staelin TR. 1258-1259.

Turning to the alleged reporting violations under Sections 12 and 13, the Division cannot establish that BioElectronics owed such reporting obligations, much less violated them. As explained below, BioElectronics had no class of shares registered with the Commission at the time, and thus owed no duties under Section 13 pursuant to its express terms.

In the event the Commission is inclined to award a monetary judgment, Respondents ask the Commission to limit its disgorgement order against IBEX and St. John's to any unjust profits. On the rare occasion that IBEX sold stock, it did so at a 50% discount to its public market price. TR. 184-185. There is no evidence that such price overpaid IBEX the true value of such shares. IBEX generally sold notes for the face value of the debt. DX 1, Exhibits A and B; RX 1A; RX 1-167; TR. 1112 *et seq.*; TR. 1202 *et seq.* There is no evidence that the notes were not collectible in full or that the value of such notes on the date sold was less than the face value of the debt. Therefore, there is no proof of an unjust enrichment, only a return of principal.

At the same time, BioElectronics did not profit, unjustly or otherwise, when it **borrowed** money from IBEX and issued notes in the face amount **borrowed**. It took on a lawful obligation to repay every penny borrowed with interest. There is no equitable basis to disgorge profits that never were received.

The Respondents have submitted Form D-A's to establish an inability to pay. Respondents are fully invested in the business of BioElectronics. Due to BioElectronics' well documented "anemic" financial condition, any substantial judgment against BioElectronics likely would strangle BioElectronics' finances, and forfeit the existing marketing. Initial Decision, p. 57. Such would wipe out any value of the securities issued by BioElectronics to the Respondents and, thus, ensure their inability to respond to any award. Perhaps most importantly, only through reducing or eliminating the proposed sanctions would BioElectronics survive financially so that it could bring to the public in the United States its inexpensive, innovative, drug free pain relieving product.[1]

[1] After the hearing, and at long last, BioElectronics received clearance from the FDA to sell its products over the counter for certain specified conditions. See Motion to Supplement Evidence, Exhibit 1.

Balancing the equities, Respondents pray for a just and modest judgment, even if the Commission finds inadvertent violations of the securities laws (which it should not.)

In deciding the disgorgement award, if any, Respondents urge the Commission to conduct its analysis on a transaction by transaction basis. For example, if the theory upon which disgorgement is ordered is that there was a scheme to evade the registration requirements, the Commission should limit the disgorgement to those transactions made during such scheme. Mr. Park, the Division's expert, limited his testimony as to the existence of a scheme to the transactions in 2013 and 2014. TR. 155 and 201. Although Respondents strongly deny that any such scheme existed at any time, if the Commission disagrees, at the very most, the Commission should base its disgorgement of actual profits received on the transactions made during and as a result of the purported scheme – limited to transactions closed in 2013 and 2014.

Respondents respectfully ask the Commission to reject the Initial Decision in its entirety and issue an award in line with the non-scienter based claims in the OIP, the honest, legally advised, transactions and disclosures at issue in the case, and the public interests favoring the future success of BioElectronics, for the benefit of the public, its shareholders and employs.

II. ERRORS IN THE INITIAL DECISION.

A. Prejudicial Errors:

1. ALJ Elliot was not constitutionally appointed.
2. Respondents did not violate Section 5 because:
    a. Kelly Whelan and IBEX did not have control over Andrew Whelan and BioElectronics, or vice versa, and IBEX and BioElectronics were not jointly controlled;
    b. IBEX complied with Rule 144;

c. St. John's and IBEX held their investments more than a year and on average 30 months, and made increasing investment in BioElectronics -- conduct of a long-term investor, not an issuer, dealer or underwriter.

3. The proposed award exceeds the five-year statute of limitations (28 USC §2462).
4. The Respondents cannot pay the proposed disgorgement, interest and penalties. See Form D-As filed herewith.
5. Third tier penalties, a cease and desist order and penny stock bar are not supported by the allegations in the OIP, much less a preponderance of evidence.
6. ALJ Elliot improperly excluded evidence of A. Whelan's character. RT, pp. 1194, 1256.
7. ALJ Elliot refused to consider expert reports or permit testimony of three of Respondents' experts. Initial Decision, p. 31, § II.G.3; BioElectronics Corp., Admin. Proc. Rulings Release No. 4127, 2016 SEC LEXIS 3340 (ALJ Sept. 6, 2016); RX 201, 202 and 205.
8. The reporting requirements upon which the OIP is based under Section 13(a) do not apply because BioElectronics' 2006 and 2007 withdrawal from registration was effective under Section 12(g) of the Securities Act. 15 USC §78m.

III. FACTUAL BACKGROUND.

A. Procedural Background.

This Commission commenced this proceeding on February 5, 2016, with an order instituting administrative and cease-and-desist proceedings ("OIP"). Ten witnesses testified during a hearing held in Washington, D.C. the week of September 19-23, 2016. The parties filed post-hearing briefs, and the Respondents supplemented their briefs with Post-Hearing

declarations of Brian Flood and Stanley C. Morris. Respondents have submitted herewith Form D-As and a Motion to Supplement the Record.

B. Respondents.

Andrew Whelan is the founder, Chief Executive Officer, President, and Chief Financial Officer of BioElectronics. DX 1, ¶1.

Patricia Whelan is Andrew Whelan's wife. DX 1, ¶3.

Mary Whelan is Andrew Whelan's sister. DX 1, ¶4.

BioElectronics is a medical device company founded in 2000 and headquartered in Frederick, Maryland. DX 1, ¶2.

Since 2009, BioElectronics had a three-person Board of Directors, comprised of Andrew Whelan, Richard Staelin, and Mary Whelan. DX 1, ¶11.

Non-party, Mary Whelan, has been a member of the Board of Directors of BioElectronics from April 2002 to present. DX 1, ¶13.

Non-party, Richard Staelin, has been a member of BioElectronics' Board of Directors from April 2005 to present. DX 1, ¶16-20. Since 2008, Richard Staelin has served as the sole member of BioElectronics' Audit Committee. DX 1, ¶19.

From approximately 2009 to present, Mr. Staelin has served as the Chairman of BioElectronics' Board of Directors. DX 1, ¶20.

Kelly Whelan is Andrew and Patricia Whelan's daughter. DX 1, ¶7. Kelly Whelan is a certified public accountant. DX 1, ¶8.

Kelly Whelan formed IBEX in 2005 and is its sole member. DX 1, ¶21. IBEX is not an operating company. TR. 148-49. Kelly Whelan explained, "It is where I sometimes hold investments." TR. 148. IBEX is one of BioElectronics' lenders. DX 1, ¶24,

The parties agreed to a chronology of IBEX loans to BioElectronics between January 1, 2008 and November 27, 2014 and IBEX sales of BioElectronics convertible promissory notes and/or stock. DX 1, ¶¶27, 28, Exhs. A, B.

The testimony of Kelly Whelan and Brian Flood, Brian Flood's expert report, and RX 1A, which is based on BioElectronics' account statements and documents at RX 1-167, establish that IBEX had been at risk for such loan for more than one year, and for an average of approximately 30 months. RX 1A, RX 206; TR. 1112 et seq., and 1202 et seq. In addition, that IBEX loaned substantially more to BioElectronics during the relevant period than it received in proceeds from all of its securities sales. *Id.*

Patricia Whelan formed St. John's LLC ("St. John's") in 2009. DX 1, ¶29. St. John's is one of BioElectronics' lenders. DX 1, ¶30. From 2009 to present, St. John's has loaned BioElectronics approximately $2.9 million, and has received in exchange approximately $2.9 million in convertible notes. DX 1, ¶31.

BioElectronics issued convertible notes to St. John's on June 30, 2010 ($95,794.67) and August 31, 2010 ($61,108.82). DX 1, ¶32. On June 20, 2012, St. John's converted the convertible notes referenced in paragraph 22, and BioElectronics issued 91,808,086 shares to St. John's. DX 1, ¶33. Between March 26, 2013 and March 6, 2014, St. John's liquidated 81,808,086 of the 91,808,086 conversion shares issued by BioElectronics to St. John's through an SEC registered broker-dealer for a total of $397,197. DX 1, ¶¶34-35.

C. IBEX is not an Affiliate of BioElectronics.

Richard Staelin, Mary Whelan, Andrew Whelan and Kelly Whelan unanimously and consistently testified, under oath, that BioElectronics and Andrew Whelan, on one hand, were not in control of IBEX and Kelly Whelan, on the other hand, and vice versa, nor were such

parties under common control. K Whelan TR. 430 et seq. and TR. 444, A Whelan TR. 644 et seq.; A Whelan TR. 878 et seq.; R. Staelin TR. 1258-1259. at TR. 430, Kelly Whelan testified:

> 21 ... I don't consider myself to be an
>
> 22 affiliate of the company. I'm not employed there,
>
> 23 not a board member. I don't have any control over
>
> 24 the company...

At TR., p. 664, Andrew Whelan testified as follows:

> 10 ...it was more an
>
> 11 issue of control and not wanting to concede control
>
> 12 to IBEX."

At TR. 1258-1259; Richard Staelin, Chairman of BioElectronics' Board of Directors, testified that IBEX and K. Whelan had no power over BioElectronics and A. Whelan; and that the loans IBEX made to BioElectronics were in the best interests of BioElectronics and its shareholders. See also RX 202.

D. There Was No Scheme To Evade The Registration Requirements.

There was no scheme to evade the registration requirements. M. Whelan TR. 643 et seq.; 644-667; R. Staelin TR. 1256; A. Whelan TR. 926. Indeed, there is not a shred of evidence that Kelly Whelan, a central player in the alleged scheme, ever understood what registration was or that registration of her shares would benefit her. TR. 149. There was no registration rights agreement. TR. 149. And, there was no provision in her loan documents discussing a right to register IBEX's notes and stock. RX 1-167. BioElectronics' CEO testified that IBEX never asked, and, if it had asked, he "would probably have said no." TR. 1040.

It is also telling that the 2006 and 2007 Registration Statements filed by BioElectronics on account of the loans by LH Capital, another BioElectronics lender, did not register IBEX, St. John's, or any of the director's notes. RX 188; TR. 912 et seq.

Registration of securities was attempted by BioElectronics in 2006, when an investor, LH Capital, LLC, required that such registration statement be filed. RX 188, 189, 190. It was withdrawn, amended, withdrawn, amended and withdrawn again, such that by the end of March 2007, the registration efforts by BioElectronics to facilitate its deal with LH Capital, LLC had been exhausted. RX 189, 190. Although LH Capital insisted on registration rights, IBEX never did so. Kelly Whelan admitted feeling like an idiot because she did not even know about registration rights agreements until this litigation started. TR. 510.

The same applies to Mary Whelan, St. John's, IBEX and other family members of the Whelans. All held unregistered convertible notes and there is not a single registration rights agreement or demand for registration in any of the documents, much less that some illicit scheme to avoid registration. RX 189, 190; TR. 912 et seq. And, none were included in the registration statement for LH Capital's securities.

The Division's own expert, Mr. Parks, strained to find evidence of such a scheme. TR. 136 et seq.

One of the principal badges of a scheme to evade is concealment. TR. 153. But, the OTC Market filings by BioElectronics fully disclosed the conversions and increased lending by IBEX. 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.**

Emphasis added. Similar disclosures were made each and every quarter. See TR. 153-154; RX 171C, p. 1360; RX 171D, p. 1377-1378; RX 171E, p. 1410, 1411; RX 171F, p. 1448-49; RX 171G, p. 1509, 1521; RX 171H 1541-45; RX 171I, p. 1564-68; RX171J, p. 1583-85; RX 171K p. 1614-15; RX 171L, p. 1629-30; RX 171M, p. 1644-45; RX 171N, p. 1663-64; RX 171O, 1679-80; RX 171P, p. 1693-94; RX 171Q p. 1708-10 RX 171R, p. 1736-38.

2. In the end, Mr. Park conceded that the period of activities upon which his opinion was based was limited to the 2013-2014 period, "So 2013 and 2014 is the period." TR. 155 and 201. Importantly, during that period, there was no profits, ill-gotten or otherwise. See Flood Post-Hearing Decl., Exh. 1.

3. Finally, during the entire period upon which the Division has brought its case, 2010-2015, IBEX invested a million dollars more into BioElectronics than the total amount of its sales revenue from all the transactions at issue in their case. TR. 202.

E. Bill and Hold Transactions.

BioElectronics recognized $366,000 in revenue on its FY2009 Form 10-K from transactions with YesDTC and eMarkets. DX 1, ¶44.

YesDTC entered into a Distribution Agreement with BioElectronics on December 30, 2009 (the "Distribution Agreement"). DX 1, ¶42; RX 169B. The Distribution Agreement obligated YesDTC to pay $100,000 dollars to BioElectronics upon signing, and $50,000 in 2010. *Id.* On December 30, 2009, YesDTC paid BioElectronics $100,000 and on March 31, 2010 YesDTC paid $50,000 to Jarenz LLC, a creditor of BioElectronics, at BioElectronics' instruction. RX 169C. Joseph Noel, President of YesDTC, confirmed his understanding that the $150,000 paid to BioElectronics could not be refunded and was not a conditional payment. RX 169D.

YesDTC attempted to register product in Japan, but was unsuccessful. DX 1, ¶43. Notwithstanding YesDTC's failure to sell the product in Japan, BioElectronics was not required to refund the $150,000 paid because YesDTC bargained for the exclusive license in Japan, and received that license. RX 169D. The parties executed a termination letter agreement, which provided that BioElectronics would keep the initial $150,000 paid and released YesDTC from obligations to make future purchases. RX 197.

Mary Whelan formed eMarkets LLC ("eMarkets") in 2001 and is its President and Managing Director. DX 1, ¶37. In February 2009, eMarkets entered into a distribution agreement with BioElectronics. DX 1, ¶39; DX 18; RX 170B. When BioElectronics decided to stop making the plastic encased squares and crescents, Mary Whelan decided to purchase as many of the devices as she could to meet the anticipated needs of her customers. TR. 624-630. eMarkets Group purchased $219,025 of inventory from BioElectronics and paid those amounts in full. DX 22; RX 170B. eMarkets paid in full for such purchase by June 30, 2010. TR. 595, RX 181. At no time did eMarkets or BioElectronics have any expectation that funds paid were refundable. TR. 994.

IV. LEGAL ARGUMENTS

A. ALJ Elliot's Appointment Did Not Comply with the Appointments Clause.

ALJ Elliot was not properly appointed under the Appointments Clause of the United States Constitution. *Bandimere v. United States Securities and Exchange Commission*, AP# 15-9586, 844 F.3d 1168 (10th Cir. December 27, 2016), citing *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991)). Because the proceedings here were conducted by ALJ Elliot, the same judge whose decision was overturned in *Bandimere*, there can be no doubt that his appointment did not comply with the Appointments Clause.

Violations of the Appointments Clause of the United States Constitution constitute a structural error requiring automatic reversal of the Initial Decision. See *Bandimere* at footnote 31, citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995); *Rivera v. Illinois*, 556 U.S. 148, 161 (2009); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir.2015); and *United States v. Solon*, 596 F.3d 1206, 1211 (10th Cir. 2010).

B. Section 4 Exempts All Securities Transactions At Issue In This Case.

1. BioElectronics' Issuances of Convertible Notes to IBEX and St. John's Were Exempt from Registration under Section 4(a)(2).

Section 4(a)(2) of the Securities Act exempts "transactions by an issuer not involving any public offering." Transactions in which BioElectronics issued convertible notes and stock to IBEX and St. John's, each private parties, were not public offerings, and were therefore exempt. The fact that those parties then held such securities for well over a year before such notes were sold and converted into stock, or converted into stock and sold, reflects that such private investments fall squarely within the intended exemption under Section 4(a)(2).

Similarly, if the Commission decides that IBEX acted as an issuer, then IBEX's sales would to a few accredited investors were exempt under Section 4(a)(2).

2. The IBEX Private Sales Transactions Were Exempt Under Section 4(a)(1) and Rule 144.

Section 4(a)(1) of the Securities Act exempts from registration "transactions by any person, other than an issuer, underwriter or dealer." IBEX was not an issuer.

An underwriter is a person who purchases with a view to distribution, offers or sells for an issuer in connection with a distribution, or participates in any distribution or underwriting. 15 USC §77b(a)(11).

> The Commission adopted Rule 144 to establish specific criteria for determining whether a person is not engaged in a distribution. **Rule 144 creates a safe harbor** from the Section 2(a)(11) definition of "underwriter." A person satisfying the applicable conditions of the Rule 144 safe harbor **is deemed not to be engaged in a distribution of the securities** and therefore not an underwriter of the securities for purposes of Section 2(a)(11). Therefore, **such a person is deemed not to be an underwriter** when determining whether a sale is eligible for the Section 4(1) exemption for "transactions by any person other than an issuer, underwriter, or dealer."

Emphasis added. Rule 144 preamble.

The non-exclusive exemption language provides flexibility in Respondents' favor. If the Commission finds that IBEX did not comply with the safe harbor provisions of Rule 144, the preamble expressly instructs that Rule 144 is not exclusive. The Commission, if Rule 144 is not met, must then determine whether, based on the facts and circumstances presented, IBEX was acting as an underwriter. In that case, the very lengthy holding periods (some in excess of three years) in which IBEX remained at full risk of economic loss, weigh definitively against the Division's characterization of their acts as those of an underwriter.

Even Mr. Park, the Division's expert witness on the issue, concedes that underwriters and dealers do not remain at risk for the securities underwritten and dealt by them, much less for years at a time, and do not reinvest on a long-term basis in the same issuers. TR. 201-203. Over the five years analyzed, 2010-2015, Mr. Park confirmed that IBEX invested into BioElectronics over a million dollars more than it generated from sales of its BioElectronics securities. TR. 202. Because of such long holding periods and continuing and growing long-term investments in BioElectronics, the Commission should find that IBEX was not acting as an underwriter or dealer, but as a private investor to whom Rule 144 affords a safe harbor.

3. IBEX is Not An Affiliate of BioElectronics.

The Division argued that IBEX is an affiliate of BioElectronics because BioElectronics and IBEX were "under common control of [Andrew] Whelan, or, at the least, the common control of [Andrew] Whelan and Kelly Whelan." OIP, ¶15. The Division is wrong.

Footnote 3 to paragraph 15 of the OIP explains:

> Rule 144 defines 'affiliate' as 'a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.' 17 C.F.R. § 230.144(a)(1). Although the rule does not define 'control,' courts borrow the definition from Rule 405, which defines it as 'the possession, direct or indirect, of the **power to direct** or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.' 17 C.F.R. § 230.405.

Emphasis added. *See also, Pennaluna & Co. v. SEC*, 410 F.2d 861, 864 (9th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970); *SEC v. Micro-Moisture Controls, Inc.*, 148 F. Supp. 558, 562 (S.D.N.Y. 1957). Control persons are generally officers, directors and/or larger shareholders of the issuer. *U.S. v. Wolfson*, 269 F. Supp. 621, 626 (1967). Courts do not find persons to be "control" when they do not have the ***power*** to control the issuer. *U.S. v. Sherwood*, 175 F. Supp. 480, 483 (S.D.N.Y. 1959) (8% stockholder did not have the power to control the issuer).

Each loan provided necessary funding to BioElectronics. RX 201; TR. 1034. Each loan was made on terms that were both profitable to IBEX and the most reasonable terms that BioElectronics could hope to secure in the marketplace. *Id.*

BioElectronics and A. Whelan owned no membership interests in IBEX. DX1 ¶21. A. Whelan was not an officer, director, employee or agent of IBEX. *Id.* K. Whelan owned all of IBEX and controlled it completely. *Id.*

IBEX's rights over BioElectronics were contractual only, and those contract rights did not make IBEX a control person. IBEX did not have the power to convert sufficient shares that it could own more than 9.99% of the outstanding BioElectronics shares. RX 171B; TR. 1758-59.

Andrew Whelan, at the direction of the board, controlled BioElectronics, only, and Kelly Whelan controlled IBEX, only. K Whelan TR. 430 et seq. and TR. 444, A Whelan TR. 644 et seq.; A Whelan TR. 878 et seq.; R. Staelin TR. 1258-1259.

Mr. Staelin, a Duke University MBA and tenured professor, and an expert in the area of business management, offered his expert report regarding the issue of control and first-hand observation that no such control existed. RX 202; TR. 1258-1259. In short, because neither BioElectronics nor IBEX had any power to force the other to take terms not agreeable to the other, there was no actual or control.

Kelly Whelan never refused a BioElectronics loan. Rather than proving control, that proves only that Kelly Whelan believed each loan offered by BioElectronics would be profitable for IBEX. TR. 452, 485. See also expert report of David Robinson at RX 201. American Express accepts every credit worthy customer's charge because it believes it will profit on every charge for that customer, not because the customer has control over American Express.

On pages 45 and 46 of the Initial Decision, ALJ Elliot sets forth his analysis of the evidence at the hearing. By giving no weight to the corroborating testimony of Respondents' four separate witnesses, ALJ Elliot found common control of IBEX and BIEL by focusing his findings on three issues: (1) the lack of corporate formalities, (2) the timing of IBEX's sales with its reinvestments into BioElectronics, and (3) the handling of two specific loan transactions for $519,920 and $530,037.

The first and third point are the same – because IBEX and BioElectronics, at times, did not formally document each transaction, they must be under common control. There is, however, a more obvious reason. They trust each other to honor their verbal promises because they are father and daughter.

The $519,920 and $530,037 transactions, the latter of which ALJ Elliot characterized as "especially troubling", had nothing to do with one another, other than that the transactions were both executed in August 2009 and they both started with a 5. Initial Decision, p. 45.

The $519,920 loan was a straight forward cash loan made to BioElectronics, which was formally documented in a separate set of loan documentation when made on August 1, 2009. See DX 68. That loan was the only IBEX loan that was secured by the assets of BioElectronics (which security interest was later subordinated to the United States' XM Bank loan of $500,000.) TR 302, 508-509.

The $519,920 Note was properly included as a loan made by IBEX to BioElectronics, and properly excluded from Mr. Flood's holding period analysis, because it was never sold. The holding period analysis was designed to determine how long a note was held before it was sold to determine whether the sale complied with Rule 144 and Section 4. Because no part of the $519,920 loan was ever sold, there was no purpose to determining its holding period and thus it was properly excluded from the holding period analysis.

The $530,037 debt was an assigned loan made by St. John's to BioElectronics and purchased in August 2009 by IBEX from St. John's. TR. 1216. BioElectronics did not issue a formal note to either St. John's or IBEX. Instead, it was simply an accounting entry in BioElectronics' books. The $530,037 debt was listed in Mr. Flood's holding period analysis of the Notes sold (see RX 1A), but not listed as a loan made by IBEX to BioElectronics. See DX 1, Exhibits A and B. That debt was properly included in the holding period analysis because it was eventually sold more than a year after it was acquired by IBEX from St. John's. Because St. John's is owned by Kelly Whelan's mother, there was understandably no formality to the transaction, and instead was reflected in the accounting ledger of BioElectronics. TR. 1216; RX 1A.

ALJ Elliot infers wrongdoing from the fact that Mr. Flood, an outside accountant for BioElectronics, was unaware that the Revolver had not been documented until the fall of 2009, although it was dated as of January 1, 2005. Initial Decision, p. 45, citing RX 1F at 43; RX 1D; TR 1108-1110; 1149; 1172, 1216. But, Mr. Flood's work compiling financial reports for BioElectronics did not start until March of 2013, nearly four years after the Revolver had been documented. TR. 1142. There is no logical reason why Mr. Flood would have known the date of the Revolver's documentation. ALJ Elliot's inferences from those facts are not well taken.

4. Reinvesting Sales Proceeds Does Not Invalidate Section 4(a)(1) Exemption.

The crux of the case is ALJ Elliot's second point. IBEX privately sold aged debt or stock, then in many instances, loaned the sales proceeds to BioElectronics. Section 4(a)(1) and Rule 144 do not limit the number of times an investor can sell securities using those exemptions, reinvest the proceeds, wait the statutory period, then do that again. Nor is such unwritten law intuitively obvious, particularly here where legal counsel blessed the transactions.

Rule 144(d) provides, in pertinent part: "[i]f the **securities sold** are restricted securities, the following provisions apply:

> (1) General rule. (i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of six months must elapse between the later of **the date of the acquisition of the securities from the issuer**, or from an affiliate of the issuer, **and any resale of such securities** in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.
>
> (ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of one year must elapse between the later of **the date of the acquisition of the securities from the issuer**, or from an affiliate of the issuer, **and any resale of such securities** in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.

Emphasis added. 17 CFR 230.144(d).

Thus, Rule 144(d) expressly applies to the "securities sold". It requires the Commission to compare the "date of the acquisition of the securities" to the date of "any resale of such securities." As detailed above, and in RX 1A, the Flood Expert Report at RX 206; the testimony of Kelly Whelan and RX 1-167, IBEX held all securities sold for a period **exceeding one year** and for an **average period of approximately 30 months.** RX 1A, RX 206; TR. 1112 et seq., TR. 1202 et seq.

For purposes of computing the holding period, the newly acquired securities were "deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms." Rule 144(d)(3)(ii). Thus, the holding periods included in Mr. Flood's analysis at RX 1A and described in both Mr. Flood's and Kelly Whelan's testimony are based on the date that IBEX made such loans and became at risk for such investment. RX 1-167, RX 206; TR. 1112 et seq., TR. 1202 et seq.

The Division, through Mr. Park, focuses on the *holding period of sales proceeds* -- the time that IBEX held the cash after selling its BioElectronics' securities, and before IBEX reinvested the proceeds of that sale in BioElectronics. DX 137. There is no support for that approach in the applicable statutes or rules, nor should there be because it would defy the purposes of Section 4 and Rule 144.

Congress and this Commission have uniformly expanded lawful sales of unregistered securities. Rule 144 started with a 2-year holding requirement, was changed to 1 year, and now is only 6 months. New exemptions, such as Section 4(a)(7), make it easier than ever to sell unregistered securities. The intent has been to allow transactions in unregistered securities to encourage investments in small companies, create jobs and collect taxes.

Should investors who loan money to public companies only do so once, lest the Commission burry them in protracted litigation and third tier penalties? Should Rule 144 add to the holding period of securities, a separate holding period for cash proceeds from exempt sales under Section 4? Who should decide these policy questions? Congress?

The Commission should reject the Division's invitation to make catastrophically bad law contrary to Congressional intent through enforcement.

5. Newly Enacted Section 4(a)(7) Provides An Exemption For All IBEX Resales of BioElectronics' Securities.

Section 4(a)(7) exempts from the registration requirements of Section 5 "transactions meeting the requirements of subsection (d)." 15 USC 77d(a)(7).

With respect to the resales by IBEX of notes and stock, the bulk of such resales were to a single purchaser, Redwood Management, LLC. See RX 1A. Redwood represented and warranted that it was an accredited investor. RX 1A, pp. 3-7; RX 120, pp. 812 (¶7) and 822 (¶4); RX 136, pp. 941h (¶7) and 941r (¶4); RX 167, pp. 1234 (¶7) and 1250 (¶4). Similarly, all of the other investors purchasing IBEX's stock and convertible notes issued by BioElectronics were accredited investors, some of which made express representations and warranties as to their sophistication in the contracts with IBEX. See, for example, representations made by Tangiers Investments at RX 160, p. 1145 (¶F); RX 166, p. 1208 (¶F). Such representation is consistent with the sheer volume and dollar amounts of their purchases of IBEX's securities Redwood Management, LLC's purchases. See RX 1A. The fact that the Division refers to these entities as the "Liquidating Entities" underscores that such persons and businesses were sophisticated traders in securities, at the very least. More perplexing is why the sales by Redwood to the public were presumably deemed exempt (Redwood was omitted from the proceeding).

The reporting requirements of Section (a)(7) above, are clearly satisfied by the SEC and OTC public filings by BioElectronics. See RX 190-194c and 171C-171S; Park Test. at TR. 175.

6. St. John's Stock Sales Transactions Through its Broker Were Exempt Under Section 4(a)(1).

a. St. John's Holding Period: 34 months.

St. John's shortest holding period was 34 months, **22 months longer than** Rule 144(d) requires. DX 1, ¶¶32-35. St. John's held convertible notes from June and August 2010 through

June 2012, then converted and remained in possession of the securities until March 26, 2013, when it began trickling out conversion shares (note, in the first 9 months after conversion, less than 3% of the shares had been sold.) *Id.*

The Commission should compute the holding period from the time the convertible notes were purchased, not from the date of conversion. Rule 144(d)(3)(ii).

b. BioElectronics' Issuer Information Satisfied Rule 144.

Rule 144 imposes a public information requirement on affiliate transactions. BioElectronics had either SEC annual and periodic statements on file with the Commission and/or 15c211 information with the Pink Sheets OTC Exchange. See RX 190-194C; 191C-191S.

c. St. John's Complied With Rule 144's Manner of Sale Requirements.

In compliance with Rule 144(f)(3)(ii), each sale was executed through a registered broker-dealer. DX 1, ¶34.

d. St. John's Complied With Rule 144's Volume Limitation Except With Respect to Two Trading Days, March 3, 2014 and March 4, 2014.

In relevant part, Rule 144(e)(1) requires that St. John's sales of BioElectronics shares, when taken together with all of St. John's sales of BioElectronics stock within the preceding three months, not exceed "[o]ne percent of the shares ... as shown by the most recent report or statement published by the issuer." St. John's complied with such volume limitations through March 2, 2014 (less than 1% of outstanding shares of 3,859,893,093), but exceeded such volume limitations with respect to certain sales exceeding that volume on March 3 and 4, 2014. See DX 1, ¶35, RX 171I, p. 1554; and RX 171J, p. 1576.

e. Form 144 Filings.

St. John's belatedly filed its Form 144 with respect to each of the sales referenced in the More Definite Statement. DX 1, ¶36, RX 176. St. John's and IBEX did not file Form 144's at

the time of their transactions because Lex Kuhne, their counsel, advised that IBEX was not an affiliate and because BioElectronics was not a company with stock registered with the Commission. TR. 907-908; DX 33. Accordingly, while at least with respect to St. John's, such advice was faulty, there is no question that in this complex area of the law, such reliance was reasonable.

7. Imperfect Compliance With Non-Exclusive Rule 144 Does Not Void Respondents' Section 4(a)(1) Exemption.

Rule 144 is a "nonexclusive safe harbor provision" for unregistered securities. *SEC v. Cavanagh*, 445 F.3d 105, 114 (2d Cir. 2006). Although Rule 144 was intended to provide a safe harbor, a person who falls short of Rule 144 may nevertheless be entitled to the exemption of Section 4(a)(1). See 17 C.F.R. § 230.144(j); Adoption of Rule 144, *supra,* at 591-92; Resales of Securities, Securities Act Release No. 5980, 1978 WL 195944, at *2 n.8 (Sept. 20, 1978).

To the extent IBEX, St. John's or BioElectronics did fall short of Rule 144's requirements, such was an honest mistake, made after dutiful engagement of professionals and reliance on their advice. Each and every IBEX sale transaction was made pursuant to written documents, fully disclosed by BioElectronics in its OTC Markets public filings, in reliance on formal written opinions of counsel. See RX 1-167; RX 171B-171R. Every St. John's transaction was executed through a SEC registered broker-dealer. DX 1, ¶34.

Under the circumstances detailed herein, the Commission should find that both IBEX and St. John's transactions are exempt under Section 4(a)(1) of the Securities Act, whether or not the Commission finds St. John's was in strict compliance with Rule 144. In the alternative, the sanction imposed for their failure to comply with specific technical aspects of Rule 144 in reliance on counsel should be in proportion to the honest mistake made and the complexity of the technical violations involved.

C. ALJ Elliot Failed to Limit Claims to The Five-Year Statute of Limitations Prescribed By 28 USC §2462.

A 5-year statute of limitations applies to the Division's claims against the Respondents. See 28 U.S.C. § 2462. See, *SEC v. Graham*, 823 F.3d 1357 (11th Cir. Fla. 2016).[2] The computation of profits to be disgorged should not exceed profits on transactions completed within the 5-year statute of limitations (April 17, 2010-February 5, 2016).[3] As detailed below, there were no profits earned on the alleged transactions, when properly calculated by comparing the value of the security sold against the proceeds of such sale. There were no such profits, properly calculated, for the reasons detailed below

ALJ Elliot took a different (and incorrect) approach, akin to a tax computation, by subtracting the cost of the security against the sales proceeds. Even using ALJ Elliot's computation, the total profits from transactions within the 5-year statute of limitations is only $462,532. See RX 1A; and Post-Hearing Declaration of Brian Flood, Exhibit 1 (Exhibit 3 to the Motion to Supplement the Record). If the Commission goes one step further, and limits disgorgement to ill-gotten gains between 2013 and 2014, the period during with the Division and Mr. Park contends was the period of a scheme to evade the registration requirements (which Respondents vehemently dispute), the proper disgorgement would be zero, since there were no

---

[2] On January 13, 2017, the Supreme Court granted certiorari in *Kokesh v. Securities and Exchange Commission* (U.S. Jan. 13, 2017) (No. 16-529) to take up the issue.

[3] The OIP was published February 5, 2016 (Securities Act of 1933 Release No. 10036; Securities Exchange Act of 1934 Release No. 77073). Tolling Agreements, attached to the Post-Hearing Declaration of Stanley C. Morris at Exhibit 1 (Exhibit 3 to the Motion to Supplement the Record), reflect that the statute of limitations that would have started February 5, 2011, was extended by written agreement to April 17, 2010. Transactions before April 17, 2010 should be excluded from the relief awarded.

gains, ill-gotten or otherwise, during that time period. See Post-Hearing Declaration of Brian Flood, Exhibit 1 (Exhibit 3 to the Motion to Supplement the Record).

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). Applying the label of "equitable" to disgorgement is not determinative where, as here, the intent is to effect a forfeiture and punishment: "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).

Disgorgement has substantial punitive aspects. First, disgorgement is marked by a deterrent purpose, 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.").

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). 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. Courts often use the terms forfeiture and disgorgement interchangeably. See *United States v. Ursery*, 518 U.S. 267, 284 (1996).

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). 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).

The punitive nature of disgorgement is also reflected in the Commission's uniquely burdensome interest rate applicable explicitly to disgorgement. Rule 600(b) of the Commission's Rules of Practice provides that "[i]Interest on the sum to be disgorged shall be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), **and shall be compounded quarterly**." Emphasis added. Even without quarterly compounding (unique to Rule 600(b)), Internal Revenue Code section 6621(a) imposes an interest rate that is substantially higher than the federal rate charged on civil judgments under 28 USC §1961(a). Compare tables at Exhibit 2 to the Motion to Supplement the Record, filed herewith. Between 2010 and 2016, IRC section 6621 rate was 3% or 4%. Compounding that rate quarterly results in a total interest factor of more than 25%. The total

post-judgment interest rate on a non-compounded quarterly basis is slightly more than 2% for the entire five-year period, a whopping 23% lower than the amount dictated by the Commission's Rule 600(b) to be applied to Respondents' disgorgement.

Implicitly, the uniquely high interest rate charged for tax underpayments by the IRS is higher than the federal judgment rate of interest because there is a higher level of wrongdoing for underpaying one's taxes than the wrongdoing generally arising from a civil judgment. The Commission goes one step further in Rule 600(b), requiring that such IRS rate be "compounded quarterly". In charging an even higher interest rate than the already punitive IRS rate, through quarterly compounding, the Commission implicitly imposes an additional penalty on the conduct upon which disgorgement is ordered. In other words, the wrongdoing attributable to one who is compelled to disgorge, is greater than the wrongdoing attributable to someone who underpays his taxes, which in turn is greater than the wrongdoing of an ordinary civil litigant who is subject to a federal judgment.

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). 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 judicially and equitably estopped to argue in the context of section 2462, that the Commission should come to the opposite conclusion here.

Similarly, the IRS has taken the position that disgorgement orders may be "punitive" debts, and therefore not deductible, 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.*

The government is 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); *Northcross v. Board of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973).

The government is not allowed to double dip – collecting both taxes and a disgorgement of the same funds. $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. The federal government should not be allowed to double dip – collecting both taxes and disgorgement of the same moneys.

If the Commission does not limit its disgorgement computation to the transactions within the statute of limitations period, and adopts the proceeds minus cost basis approach to computing profits, the profits should nevertheless be reduced to $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.*

D. The Respondents Cannot Pay The Proposed Disgorgement, Interest and Penalties.

The Initial Decision at pages 1-2 summarizes that ALJ Elliot: "...(3) orders Respondents to cease and desist from committing and causing any violations; (4) orders Respondents to

disgorge a total of approximately $1,820,000 in ill-gotten gains, plus prejudgment interest; (5) permanently bars A. Whelan and K. Whelan from participating in offerings of penny stock; and (6) imposes civil penalties of $650,000 against St. John's and $130,000 against A. Whelan."

The Respondents' inability to pay is a relevant factor for the Commission's consideration in entering a Judgment in this case. Subsection (d) of 15 USC §78u-2 expressly provides that "a respondent may present evidence of the respondent's ability to pay such penalty." *See also, SEC v. Huffman*, 996 F.2d 800, 803 (5th Cir. 1993); *SEC v. Harris*, 2012 U.S. Dist. LEXIS 31394, at *16 (N.D. Tex. 2012).

Each of the Respondents, plus non-party, Patricia Whelan, have submitted Form D-As and other financial documents pursuant to a confidentiality order entered by ALJ Elliot. Given the confidential nature of the individual submissions, the arguments below are abbreviated. Respondents ask that the Commission review each Form D-A and related documents for purposes of assessing the proper sanctions to be issued in this matter.

1. BioElectronics Cannot Pay the Proposed Disgorgement Award, Much Less Interest.

ALJ Elliot correctly declined to impose any penalty against BioElectronics based on its inability to pay, explaining: "I also decline to impose a civil penalty on BioElectronics. **BioElectronics' anemic financial condition is well documented**, and although the collateral consequences of a sanction in the public interest are not dispositive, it is likely that the persons who will suffer most if BioElectronics goes out of business are its public investors. See Div. Reply 46." Emphasis added. Initial Decision, p. 58. In a related discussion, ALJ Elliot discounted the face balances of IBEX's assets, made up exclusively of BioElectronics promissory notes, because such notes "BioElectronics cannot repay and which are **likely so illiquid as to be unmarketable.**" Emphasis added. Initial Decision, p. 57.

As BioElectronics' financial statements make clear (RX 171C-171R), BioElectronics does not have cash to pay the disgorgement amount. The combination of an unpayable disgorgement judgment of more than $1.8 million to the SEC, together with a penny stock bar proposed against A. Whelan, the Board Chairman and Chief Executive Officer of BioElectronics, and K. Whelan, the Managing Member of IBEX, an otherwise reliable lender to BioElectronics, threatens the survival of BioElectronics. It effectively buries the company in a debt presently due, while shutting down the prospects of future financing for BioElectronics necessary to repay that debt.

2. St. John's Cannot Pay the Proposed Disgorgement, Much Less Interest and Penalties – Its Sole Assets are Illiquid BioElectronics Notes And Stock.

St. John's is proposed to suffer, by far, the most devastating sanctions, relative to the size of its transactions and conduct. St. John's converted only 5.4% of its notes. Specifically, two promissory notes issued by BioElectronics in June and August 2010, with obligations totaling $156,903.49, were converted into 91.8 million shares of BioElectronics. Sales of 81.8 million of those shares (10 million shares were not sold) resulted in stock sales generating only $397,196.70, over 12 months between March, 2013 and March, 2014. See DX 1, ¶¶32-35. As a result of such isolated transactions, ALJ Elliot proposes a disgorgement award of $240,293.21, plus interest at a punitive compounded rate per Rule 600(b), plus a whopping $650,000 penalty! See Initial Decision, p. 15.

St. John's simply has no way to pay the disgorgement, much less the interest and penalties, as all of its assets are in BioElectronics notes ($2.4 million face value) and BioElectronics stock ($240,000 acquisition basis). See St. John's Form D-A filed herewith. If the penny stock bar and draconian sanctions proposed in the Initial Decision are affirmed, as

recognized by ALJ Elliot, these notes have little or no value due to BioElectronics' inability to pay them, and the absence of a liquid market for such notes. See Initial Decision, pp. 57, 58.

3. Andrew Whelan Cannot Pay the Disgorgement Ordered, Much Less Interest and Penalties.

Andrew Whelan has nominal assets and earns only [redacted] per year as Chief Executive Officer of BioElectronics, for which he is paid in the form of promissory notes because BioElectronics, at all times, was cash strapped. RT. 901-903. His Form D-A makes clear that he cannot contribute meaningfully to any part of the award.

4. K. Whelan and IBEX Cannot Pay The Proposed Disgorgement, Much Less Interest or Penalties.

ALJ Elliot correctly assessed K. Whelan's and IBEX's inability to pay:

> IBEX's assets, although substantial on paper, are comprised almost entirely of BioElectronics notes, which **BioElectronics cannot repay and which are likely so illiquid as to be unmarketable.** The Division correctly notes that K. Whelan's financial disclosure form does not disclose an interest in IBEX, but this is a mere formality. See Div. Reply 47. K. Whelan testified that IBEX is simply a pass-through entity, and whether it is IBEX or K. Whelan that owns BioElectronics' notes, the note ownership is clearly disclosed, and there is no evidence that either K. Whelan or IBEX owns any assets other than those disclosed.
>
> I therefore decline to impose a civil penalty on K. Whelan or IBEX.

Emphasis added. Initial Decision, p. 57. See also, Form D-As filed herewith.

E. ALJ Elliot's assessment of third tier penalties was not based on facts alleged in OIP, which asserts only of non-scienter based claims.

The Division seeks extraordinary punitive relief against the Respondents without justification. If and to the extent the Respondents are deemed to have violated the securities laws, they did so unwittingly, in good-faith reliance on advice of qualified accountants and lawyers and in substantial compliance with the same securities laws. The paucity of any evidence of bad-faith conduct militates against the need for extraordinary punitive relief. *SEC v. Manor Nursing Centers, Inc., supra,* 458 F. 2d at 1101, *SEC v. Senex Corp.,* 399 F. Supp. 497, 507 (E.D. Key. 1975); *United States v. Hill,* 298 F. Supp. 1221, 1235 (D. Conn. 1969).

1. Disgorgement May Not Exceed the Profits Obtained Through the Alleged Wrongdoing

"The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing." *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978). Plaintiff must show a causal relationship between the alleged wrongdoing and the amount to be disgorged and, at least, a "reasonable approximation" of the ill-gotten profits. *Allstate Ins. Co. v. Receivable Fin. Co., L.L.C.*, 501 F.3d 398, 413 (5th Cir. 2007) (citation omitted).

In stark contrast to the facts of this case, other SEC enforcement actions under Section 5 typically involve fraud. See, e.g., *SEC v. Cavanagh*, 98 CIV. 1818 DLC, 2004 WL 1594818 (S.D.N.Y. July 16, 2004), *aff'd*, 445 F.3d 105 (2d Cir. 2006). Salary payments have been disgorged when such payments are tied to unlawful acts. See *SEC v. Merch. Capital, LLC*, 486 F. App'x 93, 96 (11th Cir. 2012). But that such payments may be subject to disgorgement does not relieve the Division of its burden to reasonably approximate profits and tie those profits to benefits received from the wrongful conduct. See, e.g., *SEC v. Chapman*, 826 F. Supp. 2d 847, 859 (D. Md. 2011); *SEC v. Resnick*, 604 F. Supp. 2d 773, 783 (D. Md. 2009); *SEC v. Church*

Extension of Church of Church, Inc., 429 F. Supp. 2d 1045, 1050 (S.D. Ind. 2005); *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1087 (D.N.J. 1996), *aff'd*, 124 F.3d 449 (3d Cir. 1997). See also *SEC v. E-Smart Techs., Inc.*, 139 F. Supp. 3d 170, 188-190 (D.D.C. 2015); *SEC v. Wyly*, 71 F. Supp. 3d 399, 420 (S.D.N.Y. 2014); *SEC v. Todd*, No. 03-2230, 2007 U.S. Dist. LEXIS 38985, 2007 WL 1574756, at *18 (S.D. Cal. May 30, 2007), *aff'd in part, rev'd in part on other grounds*, 642 F.3d 1207 (9th Cir. 2011).

Because disgorgement does not serve a punitive function, the disgorgement may not exceed the *profit* obtained through the wrongdoing. *SEC v. Wyly*, No. 10-cv-5760, 2014 WL 3739415 (SDNY 2014). The outer bounds of the appropriate measure of disgorgement is the total value of the securities sold, minus the direct transaction costs of acquiring such securities. See, e.g. *SEC .v Universal Exp. Inc.* 438 Fed App'x 23, 26 (2d Cir 2011); *SEC v. Cavanagh* No. 98 Civ. 1818 2004 WL 1594818 at 30 (S.D.N. Y. 2004), *aff'd by Cavanagh* 445 F.3d at 116-17. In addition, "where benefits result from both lawful and unlawful conduct, the party seeking disgorgement must distinguish between the legally and illegally derived profits." *Id.* In other words, the SEC must establish both a reasonable approximation of the profits and the causal connection between its approximation and the violations.

To determine whether IBEX received an unjust profit, the Division would have to have proven a profit, which it did not do and could not have done, because there was none. The Commission would have to compare the value of what IBEX gave in the transaction (the convertible debt) to the purchase price (the face value of that debt). Here, where debt of a going concern entity, such as BioElectronics, is exchanged at full face value, presumably the exchange would be equal on both sides of the transaction. The Division has not proven otherwise.

Even if IBEX had received a profit, which it did not, there is no evidence that such profit was causally connected to its purported violation of Section 5 of the Exchange Act.

Even in the limited circumstances in which IBEX sold shares of stock that were issued to it as a result of converting a note, IBEX sold those shares to Redwood at a discount that would be applied if a party was selling restricted securities, approximately 50%. TR. 184-185. Academic studies have found that the "[a]verage discounts on unregistered shares are sizable, ranging from 20% to 35%." Mukesh Bajaj et al., *Firm Value and Marketability Discounts*, 27 Journal of Corporate Law 89, 97 (2001) (collecting and summarizing studies). Thus, IBEX did not profit from such sales, and even if there were profits, there is no evidence that such profits were causally related to the alleged Section 5 violation in selling its shares to private party Redwood Management.

Because IBEX did not profit, unjustly or otherwise, from the transactions at issue in this case, disgorgement would constitutes an impermissible penalty. *SEC v. Wash. Cnty. Util. Dist.*, 676 F.2d 218, 220-27 (6th Cir. 1982); *Hateley v. SEC*, 8 F.3d 653, 654-56 (9th Cir. 1993).

If the Commission does find a scheme to evade warranting of disgorgement, it should limit its disgorgement to those profits causally linked to specific transactions in 2013 and 2014. As Mr. Park conceded, the alleged scheme was effectuated only in 2013 and 2014. TR. 155 and 201. Limited to that period, the Commission should find no ill-gotten gains to disgorge because there were not profitable transactions during that period, ill-gotten or otherwise.

Turning to BioElectronics, it also did not unjustly profit from its transactions. It simply borrowed money from IBEX. It received cash in exchange for convertible notes – a promise to repay the same amount of cash, plus interest at 8%, plus a conversion option. BioElectronics, having an obligation to repay every penny it borrowed, with interest, did not profit from the loan transaction. Accordingly, no disgorgement award is justified against BioElectronics.

2. Joint and Several Liability is Unwarranted Because the Gains Can Be Reasonably Apportioned

When the gains and losses can be reasonably apportioned among the alleged violators, then joint and several liability is inequitable. *SEC .v Universal Exp.* 646 F. Supp. 2d. 552 at 563 (SDNY 2009), *aff'd* 438 Appx. 23 (2d Cir.2011). If the Respondent can prove apportionment, then the Respondent should only be held responsible for certain amounts from which she personally benefited. *SEC v. E-Smart Techs., Inc.*, 139 F. Supp. 3d 170, 188 (D.D.C. 2015). Here, the Commission has ample evidence from which to calculate attribution of profit and loss to any alleged actor and, accordingly, joint and several liability would not be warranted. This is particularly so, where, as here, the actors are not being accused of knowing wrongdoing, but of a non-scienter based registration violation.

3. The Division's Request for Civil Penalties Should be Denied

When considering whether an administrative sanction serves the public interest, the Commission considers the factors identified in *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981): the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations (Steadman factors). *Altman*, 666 F.3d at 1329; Gary M. Komman, Advisers Act Release No. 2840 (Feb. 13, 2009), 95 SEC Docket 14246, 14255, pet. denied, 592 F.3d 173 (D.C. Cir. 2010). Other factors the Commission has considered include the age of the violation (*Marshall E. Melton*, 56 S.E.C. 695, 698 (2003)), the degree of harm to investors and the marketplace resulting from the violation (*id.*), the extent to which the sanction will have a deterrent effect (see Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46), whether there is a reasonable likelihood of violations in the future *(KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1185 (2001), recon. denied,

55 S.E.C. 1, pet. denied, 289 F.3d 109 (D.C. Cir. 2002)), and the combination of sanctions against the respondent (id. at 1192). See also *WHX Corp. v. SEC*, 362 F.3d 854, 859-61 (D.C. Cir. 2004). The Commission weighs these factors in light of the entire record, and no one factor is dispositive. *KPMG*, 54 S.E.C. at 1192; see Gary M. Komman, 95 SEC Docket at Section 21.

Here, the *Steadman* factors and public interest militate against any penalty, including: (1) no Respondent acted with **fraud, deceit, manipulation, or deliberate or reckless disregard** of a regulatory requirement; (2) the alleged violation did not cause **unjust enrichment;** and (3) there is no further **need to deter** the Respondents and other persons from committing the acts or omissions. *See* 15 U.S.C. § 78u-2(c).

Congress empowers the Commission under 15 USCS §78u-2 to award limited civil remedies in the context of administrative proceedings. Such limitations are important, given the inherent imbalance in the proceedings favoring the government against its responding citizens. Among other things, the immense power and financial capacity of the government, the highly one-sided rules governing pre-trial discovery, pre-proceeding investigative powers, evidentiary rules, choice of its own judges, and lopsided proceedings, deprive the respondents of anything close to an even playing field in litigation and render the chance of an unjust runaway verdict all too likely, absent Congressional limits.

Thus, Congress made clear that in administrative proceedings, before the Commission may award even the lowest level of penalty (Maximum of $5000 for natural persons; $50,000 per entity), the Commission must find that a particular respondent has "willfully violated" the Securities Act, among other laws; willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person; willfully made or caused to be made a false or misleading statement of material fact; or failed to supervise another who commits such a violation, if such other person is subject to his supervision. See §78u-2 (a)(1)(A)-(D); and (b)(1).

No such willful violations were even alleged in this case, much less proven. Thus, no penalties should be awarded.

Even more obviously, there are no grounds for second tier penalties (maximum amount of $25,000 for natural persons and $250,000 for others), which would require a showing necessary for first tier penalties, plus a showing of fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. §78u-2 (a)(1)(A)-(D); and (b)(2). There is simply no evidence to support such a penalty. In every instance, the Respondents hired reputable counsel and accountants and relied on their advice. If they were wrong, the mistake was neither reckless nor willful. No second tier penalties are warranted.

Finally, there are no grounds for third tier penalties (maximum of $100,000 for natural persons and $500,000 for others), which would require a showing of willfulness set forth in section (a)(1), plus fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, as required for second tier penalties in section (b)(2), plus a showing of harm to other persons resulting either directly or indirectly from such act or omission; and unjust enrichment by the bad actor. §78u-2 (a)(1)(A)-(D); and (b)(3). There is simply no evidence to support such an award in this case.

4. Respondents' Reliance on Counsel Was Reasonable.

With respect to IBEX and K. Whelan, on the one hand, and BioElectronics and A. Whelan, on the other hand, the record reflects the Respondents acted reasonably by consulting with counsel regarding the legality of Respondents' transactions and by securing formal legal opinion letters as a predicate to each issuance of unregistered stock. See, e.g. RX 39, 41, 43, 45, 69, 71, 74, 76, 78, 80, 81, 82, 85, 87, 88, 89, 91, 94, 98, 101, 103, 105, 108, 110, 113, 114A, 115, 119, 123, 127, 128, 129, 131, 133, 134, 136, 138, 139, 141, 142, 144, 145, 147, 148, 149, 151,

154, 155, 157, 158, 160, 162, 166, 167, 172G, 192. See also TR. 417 [K. Whelan testified: "I rely on the opinions of my attorneys."]

The court in *Howard v. SEC,* 376 F.3d 1136, 1148, n. 20 (D.C. Cir. 2004) recognized that even for securities professionals, compliance with the securities laws was sufficiently difficult that laymen have no real choice but to rely on counsel, and the proper functioning of the securities markets depends on the ability to rely on counsel.

ALJ Elliot struck the reliance on counsel defense even after recognizing that the mountain of legal opinion letters surrounding the securities transactions in this case may negate scienter. Initial Decision, p. 4; RT, p. 25.

ALJ Elliot refused to even permit A. Whelan to testify about his reliance on counsel, Kirkpatrick and Lockhart, regarding his understanding that BioElectronics' withdrawal from registration in 2006 and 2007 was effective. TR. 913-922. ALJ Elliot explained that advice of counsel defenses are difficult to establish – so much so that "I HAVE NEVER FOUND ADVICE OF COUNSEL." TR. 922.

Meanwhile, the Division's counsel argued that advice of counsel was irrelevant because the Division was not asserting scienter as to any of its violations (clearly even the Division did not contemplate second or third tier penalties would be proposed by ALJ Elliot's Initial Decision). TR. 920.

The facts and legal issues in this case are unique. ALJ Elliot commented at the hearing that the case required daily research by him throughout the proceeding. TR. 846-847. The legal issues, such as whether a reinvestment of funds received from an otherwise exempt sale of unregistered securities would retroactively render the sale non-exempt, are not issues most lawyers would identify, much less laymen. Respondents were entitled to look to their legal

counsel for such directions and did so. See *Howard v. SEC*, 376 F.3d 1136, 1148, n. 20 (D.C. Cir. 2004).

F. ALJ Elliot Erroneously Excluded Evidence of A. Whelan's Character.

ALJ Elliot refused to consider and struck character testimony in favor of Andrew Whelan offered under oath by Brian Flood (Respondents' expert on holding periods)[4] on the invalid ground that an expert witness cannot also provide character testimony.

---

[4] Starting at Reporter's Transcript, p. 1194:

"14 THE WITNESS: Okay, thank you.
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[Whelan]--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.
16 MS. CONCANNON: Your Honor --
17 JUDGE ELLIOT: Hold on.

ALJ Elliot also refused to consider character testimony in favor of Andrew Whelan offered under oath by Richard Staelin[5] on invalid grounds that the witnesses also offered fact testimony – putting counsel to the false choice of either offering such witness for fact or character testimony.

---

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.
2 MS. CONCANNON: Your Honor --
3 THE WITNESS: So I wanted to contribute
4 that.
5 JUDGE ELLIOT: All right. Thank you.
6 Okay. So, Mr. Corrigan, I will give you a
7 choice. He can be your expert or your character
8 witness but not both.
9 MR. CORRIGAN: We will need him as our
10 expert. Thank you, Your Honor.
11 JUDGE ELLIOT: So I'm going to strike what
12 you just said. Thank you anyway.
13 THE WITNESS: Okay."

[5] Examination of Richard Staelin, p. 1256 of Reporter's Transcript:
21 Q Have you in your experience with Andrew
22 Whelan known him to be dishonest in any way?
23 MS. CONCANNON: Objection.
24 JUDGE ELLIOT: Okay. So he can be a fact
25 witness or a characteristic witness.
Page 1257
1 MR. CORRIGAN: All right. Let's stick
2 with the facts.

Such decisions constitute an abuse of discretion. Inasmuch as Andrew Whelan was both a Respondent and a central fact witness in the case, excluding favorable testimony pertaining to his character prejudiced the Respondents' case.

G. ALJ Elliot prematurely decided to give Respondents' experts' opinions no weight and instructed the parties not to present them at the hearing. See Initial Decision, p. 31, section II.G.3, and BioElectronics Corp., Admin. Proc. Rulings Release No. 4127, 2016 SEC LEXIS 3340, at *2-3 (ALJ Sept. 6, 2016).

M. Richard Cutler, an expert in securities law, at RX 205, pp. 2454 et seq., explains why, in his expert opinion, the securities transactions at issue in the case complied with applicable securities laws and were exempt from Section 5 under section 4(a)(1); and why, as a voluntary filer, Section 12(g)(1) did not call for the automatic registration of its securities within 60 days of its filing of a registration statement. As such, the alleged Section 5 and Section 13 violations could not stand.

While ALJ Elliot refused to give Mr. Cutler's opinion any weight or to permit his testimony at trial, purportedly because his report included primarily opinions of law, ALJ Elliot warmly accepted the Division's expert opinion of William D. Park (DX 137), who was not a lawyer, much less an expert on securities law. See ¶¶ 7-21 of Mr. Park's Expert Report at DX 137 in which Mr. Park, a non-lawyer, attests to the law upon which he formulates his opinion. Such lopsided approach at the exercise of discretion over evidentiary matters rendered the trial unfair and is grounds for reversal of the entire Initial Decision. Even more unsettling was ALJ Elliot's refusal to consider the part of Mr. Park's testimony which helped the Respondents in which he acknowledged that underwriters and dealers do not hold securities for years or reinvest more than the proceeds of their sales, as IBEX did here. See TR. 201-203; and Initial Decision, p. 43 ("As for Park's testimony, I accord it little weight because it was on a legal question, and

the Division did not ask him to opine on the matter, so his testimony at the hearing was apparently extemporaneous.")

Similarly, ALJ Elliot prohibited Respondents' expert, David T. Robinson, PhD, from testifying, and refused to give any weight to his expert report at RX 201. Dr. Robinson's opinion explained that IBEX had sound business reasons, based on market terms or better than market terms, to make each and every loan it made to BioElectronics. Thus, these loans were more likely driven by IBEX's legitimate profit objectives, rather than an exercise of control by BioElectronics and A. Whelan over IBEX and K. Whelan. Instead, ALJ Elliot exclusively heard the so-called expert opinion of Mr. Park that BioElectronics' loans evidenced control (See DX 137, ¶45 et seq.) by BioElectronics over IBEX and a scheme to evade the securities laws (See DX 137, ¶49 et seq.). ALJ Elliot's lopsided approach constitutes an abuse of discretion and led to an unfair and biased trial.

ALJ Elliot prohibited Respondents' expert, Richard Staelin, from offering testimony on the topic of control and why, in his expert opinion, A. Whelan and BioElectronics had no control over K. Whelan and IBEX. See RX 202. Given that the issue of control is a mixed question of law and fact, ALJ Elliot should have allowed such testimony and given it appropriate weight, particularly while he welcomed the testimony of Mr. Park on the same subject. His failure to do so resulted in an unfair and biased trial on the merits.

H. Section 13 violations cannot lie against BioElectronics because BioElectronics' withdrew its registration under Section 12(g) of the Securities Act.

The Division at footnote 2 of its OIP alleges that "BioElectronics' Section 12 reporting obligation arose as a result of its filing a Form 8A-12g on February 12, 2006 in conjunction with a registration statement on Form SB-2. The Form 8A-12g went effective by operation of law

under Section 12(g) 60 days after filing, even though the Form SB-2 was subsequently withdrawn." The Division is wrong.

The reporting requirements upon which the OIP is based arise under Section 13(a) and apply only to issuers with a class of securities registered under Section 12. 15 USC §78m. BioElectronics never had a class of securities registered under Section 12, and thus owed no such reporting obligations.

BioElectronics filed a Form 8A-12g and SB-2 in February 2006. RX 188, 190. That registration effort was withdrawn in July 2006. RX 189, 190.

Under Rule 477, BioElectronics had the right to apply to withdraw its registration before the registration went effective, provided it had the SEC's consent. Such consent is presumed unless the SEC objected within 15 days. The SEC did not object, and as a result the withdrawal was effective. RX 190. For years thereafter, the SEC staff appeared to concur, as they issued no notices of deficiency to BioElectronics, despite the fact that it was not filing any 10Qs or 10Ks in 2006, 2007, 2008 and 2009. See RX 190.

The sixty-day automatic registration in section 12(g), upon which the Division expressly relies in footnote 2 of the OIP, only applies to "such registration statement" -- "such registration statement" means only the mandatory registration statements registering "such security" set forth in the specific situations described in subparagraphs (A) and (B).[6] BioElectronics never had a

---

[6] Section 12(g), which states:

(g)(1) Every issuer which is engaged in interstate commerce... shall—

(A) within one hundred and twenty days after the last day of its first fiscal year ended after the effective date of this subsection on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more persons; and

(B) within one hundred and twenty days after the last day of its first fiscal year ended after two years from the effective date of this subsection on which the issuer has total assets exceeding $1,000,000 and a class of

class of equity securities held of record by more than three hundred, much less five hundred persons. TR. 910-911. Thus, the automatic registration is not applicable to BioElectronics because it did not have enough shareholders.

This interpretation not only enjoys the support of the plain meaning of the applicable statute, but is entirely consistent with Rule 12g-4, which permits termination of registration using Form 15 for companies with less than 300 shareholders of record, among others.

Enough has been said on the topic in the statement of facts. 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. If not, which BioElectronics submits is the case, then there are no violations of Section 13.

V. CONCLUSION.

The Respondents are honest people whose departures from the securities laws, if any, were honest mistakes, after consultation with reputable accountants and lawyers. The Commission should award the Division only that relief that constitutes ill-gotten profits causally connected to specific Section 5 violations during the 5-year statute of limitations, and only to the extent that it is reasonably within Respondents' ability to pay. Moreover, no penny stock bar is

---

equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons,

register **such security** by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to **such security** containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. **Each such registration statement shall become effective sixty days after filing with the Commission** or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 18 of this title. ... [Emphasis added.]

warranted. BioElectronics offers a pain relieving device that could compete with drugs as the prevailing pain reliever in the United States. Because drug use for pain relief has led to chemical dependency and the devastation of many people and their families, the public has a compelling interest in allowing BioElectronics to complete its mission. This Commission should resolve this case in a manner which allows BioElectronics to exploit its recently secured FDA approval to sell its innovative and inexpensive non-drug pain relief medical product over the counter in the United States. It would be in the best interests of shareholders, investors, employees and the public at large that the Commission exercise due restraint in imposing any monetary or injunctive relief in this case.

Dated: Santa Monica, California
March 29, 2017

Respectfully submitted,
CORRIGAN & MORRIS, LLP

By: _____

Brian T. Corrigan
(bcorrigan@cormorllp.com)
Stanley C. Morris
(scm@cormorllp.com)
Corrigan & Morris LLP
201 Santa Monica Blvd., Suite 475
Santa Monica, CA 90401
(310) 394-2828 Tel.
(310) 394-2825 Fax

Attorneys for Respondents

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.	Administrative Proceeding File No. 3-17104

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondents Brief in Support of Appeal to the Commission complies with the length limitations of SEC Rule of Practice 450(d). I further certify that this brief was prepared using Microsoft Word and that the word count for the document is 13,996 words.

This 29th Day of March 2017.

Stanley C. Morris

CERTIFICATE OF SERVICE

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.

RESPONDENTS' BRIEF IN SUPPORT OF APPEAL TO THE COMMISSION

Office of the Secretary
Securities and Exchange Commission
Attn: Secretary of the Commission Brent J. Fields
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
Fax: (202) 772-9324
alj@sec.gov
(03/29/2017 via overnight mail and electronic mail)

Charles Stodghill, Esq.
Paul Kisslinger, Esq.
Sarah Concannons, Esq.
Division of Enforcement
Securities and Exchange Commission
100 F. Street, N. E.
Washington, DC 20549
(via email on 03/29/2017 pursuant to the parties' agreement:
concannons@SEC.GOV; Kisslingerp@sec.gov; stodghillc@sec.gov)

Attorneys for SEC Division of Enforcement

Stanley C. Morris