UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17104

In the Matter of

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

Respondents.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN PARTIAL OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

INTRODUCTION

The Division of Enforcement ("Division") hereby submits this Memorandum of Law in Partial Opposition to the Respondents' Motion for Leave to Supplement the Record Pursuant to Commission Rules of Practice 323 and 452, filed on March 29, 2017 ("Motion to Supplement"). Respondents seek to reopen the record in an attempt to support legal theories that the Initial Decision and other rulings of the Administrative Law Judge properly rejected. Specifically, Respondents would have the Commission consider evidence that, months after the September 2016 hearing in this proceeding, the Food and Drug Administration ("FDA") acted on Respondent BioElectronics Corporation's ("BioElectronics") request for market clearance of one of its products ("FDA Clearance," **Exhibit 1** to Motion to Supplement). Respondents also seek to supplement the record to include a declaration (and attachments) prepared after the

Administrative Law Judge's Initial Decision by Respondents' accounting expert, Brian Flood (the "Flood Declaration," **Exhibit 3** to Motion to Supplement), which primarily consists of arguments aimed at responding to and rebutting various findings in the Initial Decision, presently before the Commission for review.

These recent events are irrelevant to Respondents' liability for willfully violating Section 5 of the Securities Act of 1933 (the "Securities Act") and Section 13 of the Securities Exchange Act of 1934 (the "Exchange Act") and related rules. Respondents contend that these documents are "critical to the proper understanding" of the issues before the Commission on appeal, but these documents simply have no bearing on whether Respondents willfully violated the securities laws. Further, even if these documents were relevant (which they are not), Respondents have not "shown with particularity that such additional evidence is material," Rule of Practice 452, 17 C.F.R. § 201.452, or that they could not have submitted much of this evidence before or at the hearing. Respondents' efforts to inject irrelevant, post-hearing information into the proceeding should be rejected. The admission of this evidence at this stage would unfairly prejudice the Division, which will have no opportunity to challenge the relevance or accuracy of the proffered materials through cross-examination or otherwise.[1]

ARGUMENT

1. The Commission Need Not Take Official Notice of the FDA Clearance Action.

Rule 323 provides that the Commission may take official notice of "any material fact which might be judicially noticed by a district court ... any matter in the public official records

[1] The Division takes no position with regard to Respondents' request for leave to supplement the record with the Internal Revenue Code section 6621(a) and Civil judgment Code section 28 U.S.C. §1961(a) interest rate tables (**Exhibit 2** to Motion to Supplement). The Division joins Respondents' request for leave to supplement the record with the Declaration of Stanley Morris and the tolling agreements attached thereto (**Exhibit 4** to Motion to Supplement).

of the Commission or any which is peculiarly within the knowledge of the Commission as an expert body." 17 C.F.R. § 201.323. Respondents do not contend that the FDA Clearance is reflected within the public official records of the Commission or peculiarly within the Commission's knowledge as an expert body. Accordingly, the Commission should take official notice of the FDA Clearance under Rule 323 only if such action constitutes a "material fact which might judicially noticed by a district court." *Id.*

Respondents, however, have failed to present the Commission with any argument, much less proof, that that the FDA Clearance is any way material to any issue presented by Respondents' petition for review and before the Commission for consideration. *See* Motion to Supplement at 3. Indeed, even a cursory review of the Initial Decision compels the opposite conclusion; none of the Administrative Law Judge's conclusions regarding Respondent's liability under the securities laws or the type and scope of appropriate sanctions to be imposed against Respondents turned on whether BioElectronics' product was FDA-approved or whether BioElectronics was authorized to sell any of its products over-the-counter in the United States. In the absence of any showing of how the FDA Clearance is material, the Commission need not take official notice of this development that occurred well after the Initial Decision was issued.

2. The Commission Should Not Grant Leave to Supplement the Record with the Flood Declaration.

The Commission should also reject Respondents' request, pursuant to Rule 452, to supplement the record with the Flood Declaration and attached materials. Prior to the hearing, consistent with the Administrative Law Judge's pre-trial order, Mr. Flood submitted a written expert report[2] in support of Respondents' contentions regarding "holding periods" allegedly applicable to Respondents' transactions in BioElectronics securities. The Administrative Law

[2] *See* Respondents' Exhibit 206.

Judge admitted Mr. Flood's expert report, and Mr. Flood testified extensively at the hearing concerning its contents.[3] The Administrative Law Judge expressly considered Mr. Flood's expert opinions and testimony in rendering the Initial Decision, particularly with regard to the appropriate measure of disgorgement.[4] After the Initial Decision issued on December 13, 2016, Mr. Flood prepared and submitted the Declaration at issue here, in connection with Respondents' Motion to Correct Manifest Errors of Fact in the Initial Decision ("Motion to Correct"). The Declaration purports to address, among other things, what Respondents assert are errors in the Initial Decision as to the appropriate disgorgement figure, as well as the Administrative Law Judge's alleged "misunderstandings" regarding Mr. Flood's expert report and hearing testimony.

In an order dated January 13, 2017 ("Jan. 13 Order"), the Administrative Law Judge denied Respondents' Motion to Correct and explicitly declined to consider the Flood Declaration, because "it was not part of the hearing record." Jan. 13 Order at 2 (attached hereto as **Exhibit 1**). Respondents now move to have the Commission consider this same immaterial and untimely Declaration.

To prevail on a motion to supplement the record, Rule 452 requires the moving party to show with particularity that "such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. § 201.452. Respondents wholly fail to meet either prong of the Rule. Accordingly, their request to supplement must be rejected.

First, Respondents have failed to show that the additional evidence is material to any consideration before the Commission. Respondents claim, without citation or support, that the

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[3] *See* Hearing Tr. at pp. 1134-1196.

[4] *See* Initial Decision at pp. 30-31, 55.

Flood Declaration is "critical to the proper understanding of each sale of IBEX into the securities markets, the time period the security was held prior to sale, and the proceeds from such sale ...." Motion to Supplement at 4. But each and every one of those issues was properly before the Administrative Law Judge at the hearing, and Respondents already adduced substantial fact and expert testimony on those topics. Thus, it is impossible to discern from Respondents' arguments why additional testimony on the same exact topics already considered by the Administrative Law Judge in his Initial Decision is "material."

Second, Respondents have failed to establish reasonable grounds for their failure to adduce such evidence previously. Respondents assert that they only became aware of the significance of the material contained in the Flood Declaration after the issuance of the Initial Decision. Motion to Supplement at 4. Contrary to Respondents contention, however, Respondents most certainly were aware before the hearing that the issue of disgorgement was a central issue in the proceeding. Respondents were therefore free to offer whatever evidence they wished on this matter at a time when Mr. Flood would be subject to robust cross-examination and before the hearing record was closed. Now, having had the opportunity to review the Initial Decision, Respondents cannot be allowed to submit additional arguments in the guise of a factual declaration simply to counter the Administrative Law Judge's assessment of the evidence that was before him when the Initial Decision was issued.[5]

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[5] Respondents' reliance on the Commission's decision in *In re Ralph W. LeBlanc*, Exchange Act Release No. 48254, 2003 WL 21755845, at *6 n.23 (July 30, 2003), in which the Commission allowed the admission of supplemental declarations, is misplaced. *LeBlanc* involved an assertion by a respondent that the Law Judge made certain assurances regarding the level of sanctions likely to be imposed in an unrecorded pretrial hearing that led respondent to change his trial strategy. Respondent claimed that only after the initial decision issued imposing more severe sanctions did he realize that the asserted assurances had not been honored and sought to supplement the record with evidence of what the Law Judge had told him in the off the record proceeding. By contrast, here, Respondents simply seek to present supplemental evidence

Third, Respondents' assertion that simple fairness requires admission of the Flood Declaration because Respondents believe it will help the Commission understand certain of the arguments in their opening brief is likewise without merit. Motion to Supplement at 4. To the contrary, the admission of the Flood Declaration would be unduly prejudicial to the Division. The Declaration contains supplemental calculations regarding Respondents' profits from their wrongdoing and related matters, the accuracy and relevance of which the Division has had no opportunity to test by cross-examination or to counter through the proffer of contrary fact and expert evidence. Fairness therefore requires that the proffered materials be rejected.

CONCLUSION

For all the foregoing reasons, Respondents motion should be denied to the extent it seeks to supplement the record with information contained in the FDA Clearance materials and the Flood Declaration.

Dated: April 4, 2017

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regarding questions of which Respondents plainly were aware were at issues well before the evidentiary record was closed at the end of the evidentiary hearing.

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were served on the following, this 4th day of April 2017, in the manner indicated below:

By hand and email:

Office of the Secretary
Securities and Exchange Commission
Attn: Secretary of the Commission Brent J. Fields
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Exhibit 1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4522/January 13, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17104

In the Matter of BIOELECTRONICS CORP., IBEX, LLC, ST. JOHN'S, LLC, ANDREW J. WHELAN, KELLY A. WHELAN, CPA, and ROBERT P. BEDWELL, CPA	ORDER DENYING MOTION TO CORRECT MANIFEST ERRORS OF FACT

On December 13, 2016, I issued an initial decision as to Respondents BioElectronics Corp., IBEX, LLC, St. John's, LLC, Andrew J. Whelan, and Kelly A. Whelan, CPA.[1] *BioElectronics Corp.*, Initial Decision Release No. 1089, 2016 SEC LEXIS 4597. On December 23, 2016, Respondents filed a motion to correct manifest errors of fact in the initial decision, pursuant to 17 C.F.R. § 201.111(h). The Division of Enforcement timely filed an opposition.

A manifest error is "an error that is plain and indisputable, and that amounts to a complete disregard of . . . the credible evidence in the record." *Robert Cord Beatty*, Admin. Proc. Rulings Release No. 618, 2005 SEC LEXIS 359, at *8 (ALJ Feb. 10, 2005) (quoting *Black's Law Dictionary* 563 (7th ed. 1999)), *finality notice*, Securities Act of 1933 Release No. 8554, 2005 SEC LEXIS 622 (Mar. 16, 2005). For an error of fact to be manifest, it must be an error that could reasonably affect the outcome of the decision. *See Raymond James Fin. Servs., Inc.*, Admin. Proc. Rulings Release No. 622, 2005 WL 3778678, at *1 (ALJ Oct. 14, 2005), *finality notice*, Exchange Act Release No. 52810, 2005 WL 3108488 (Nov. 21, 2005). A motion contesting the substantive merits of the initial decision may not be brought under Rule 111(h). *See* Adoption of Amendments to the Rules of Practice and Related Provisions and Delegations of Authority of the Commission, 70 Fed. Reg. 72566, 72567 (Dec. 5, 2005).

The bulk of Respondents' motion is devoted to purely legal issues, which may not be contested under Rule 111(h). And those portions of the motion asserting manifest errors of fact are meritless. For example, Respondents dispute six factual assertions in the initial decision

[1] The proceeding has ended as to Respondent Robert P. Bedwell, CPA. *BioElectronics Corp.*, Securities Exchange Act of 1934 Release No. 79176, 2016 SEC LEXIS 4034 (Oct. 27, 2016).

pertaining broadly to the testimony of Brian Flood, one of Respondents' expert witnesses. *See* Motion at 17-20. In support of their arguments, Respondents submitted a "Post-Hearing Declaration of Brian Flood," which may not be considered because it is not part of the hearing record, and which therefore cannot establish a manifest error of fact. I have in any event carefully reviewed the six factual assertions Respondents contend are erroneous, and find no error in them, manifest or otherwise.

Respondents dispute two other factual assertions in the initial decision. First, they dispute the alleged "finding that BioElectronics had 16,011 shareholders of record in 2009." Motion at 24. But the initial decision made no such finding; instead, it observed that "BIEL reported that as of December 31, 2009, it had 16,011 holders of record of its common stock," and "there is evidence that as of December 31, 2009, BIEL . . . common stock was held of record by 16,011 persons." *BioElectronics Corp.*, 2016 SEC LEXIS 4597, at *22, *93 (Dec. 13, 2016) (citing DX 51 at 16). These observations were accurate, a point Respondents concede. *See* Motion at 22, 24.

Second, Respondents contend that Flood's "detailed calculation of the aggregate proceeds [of IBEX's securities sales] is slightly different" from the calculation in the initial decision. Motion at 15. But Flood's post-initial decision calculation is inconsistent with the stipulated aggregate proceeds – $1,639,841 (stock sales) plus $2,656,425 (note sales) equals $4,296,266 – and may not be considered in any event because the calculation is not part of the hearing record. *See* Stipulation at Ex. B.

Respondents' motion to correct manifest errors of fact is therefore DENIED.

Cameron Elliot
Administrative Law Judge