UNITED STATES OF AMERICA Before the SECURITIES AND EXCHANGE COMMISSION

ORIGINAL

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

REPLY TO DIVISION'S PARTIAL OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD; DECLARATION OF STANLEY C. MORRIS IN SUPPORT THEREOF

Respondents Bioelectronics Corporation ("BioElectronic"), Ibex, LLC, St. John's, LLC, Andrew J. Whelan and Kelly A. Whelan (collectively, "Respondents")[1], respectfully reply the the Division's opposition to Respondents' Moition for Leave to Supplement the Record Pursuant to Commission Rules of Practice 323 and 452, as follows:[2]

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

[2] Notably, the Division accepts the supplemental evidence offered pertaining to the tolling agreements with the Division. Although this evidence was neither offered by the Division at the hearing, nor helpful to the Respondents, because it extends the applicable statute of limitations pursuant to the parties' agreement, it is offered by the Respondents to provide a full and fair record of the facts so that a correct and just result can be obtained. For the same reasons, the Commission should admit those exhibits at Exhibits 1 and 3 to the Motion. Unfortunately, the Division does not adopt the same approach favoring truth, over procedure. It's opposition cites to no equitable basis to exclude the relevant evidence offered, and stands instead exclusively on procedure. The Commission, in reviewing this matter de novo, should

1. **The Flood Declaration Simply Tallies Data Already Included In The Record So That The Commission Can Easily and Correctly Compute The Amount Of Profits Realized On Transations Closed Within the Statute of Limitations.**

ALJ Elliot relies, for his damages assessment, on Brian Flood's expert analysis at RX 1A, as confirmed by the Stipulated Facts at Exhibits A and B of DX 1.[1] Mr. Flood's Supplemental Declaration does no more than add 5 columns of addition, subtraction and multiplication based on the same fixed data as to which the parties stipulated. It does not change the mix of evidence before the Commission, as the Division suggests.

The most material column is the Calculated Profits column. It simply takes the total sales proceeds for each loan sold from the data provided at RX 1A, and subtracts from that amount the Loan Balance Converted and sold, including interest, to derive the profit or loss

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endeavor to reach a just result, which requires it to consider all material facts. It must grant the Motion to do so.

[1] See Initial Decision, p. 55:
"This aggregate loan principal sums to $2,715,673. A comparison to the stipulated aggregate proceeds ($4,296,266) results in profits of $1,580,593. *See* Stipulation at Ex. B. This total does not include the first loan listed in Flood's analysis, because the record is insufficient to determine precisely how much of the original loan should be apportioned to what was sold in 2010. *See* Stipulation at Ex. A (line 3); RX 1A at 1, 7; *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998) (any risk of uncertainty falls on the wrongdoer). Flood did not analyze the last note sale at issue, a $50,000 note sold in February 2015, and I have assumed it was the remaining half of the $100,000 note dated November 15, 2010, the first half of which was sold in November 2014. *Compare* RX 1A at 7, *with* Stipulation at Ex. B (lines 85-86). The $310,000 note dated March 31, 2010, was not sold in its entirety, but all of the original principal has been counted in the aggregate loan principal, as if the unsold portion constituted accrued interest. *See* RX 1A at 7. Also, I note that eight loans appear twice on Flood's spreadsheet, because a portion of each loan was converted and sold, and the remainder of each loan was later sold directly as a note. *Compare* RX 1A at 2-5, *with* Stipulation at Ex. A (lines 12, 14, 21, 23, 26, 33, 37, 40). Disgorgement as to IBEX therefore totals $1,580,593."

from each sale. Surely, the Commission is not prejudiced by facilitating to add the columns in RX 1A for the Commission -- math that it could easily do for itself. Moreover, the computation is necessary to properly assess the profits that the Commission may order disgorged.

Relating to that argument is the computation of which transactions closed outside of the statute of limitations period, that were nevertheless included on the schedule – that is those transactions that closed between January 27, 2010 and April 15, 2010. Again, these computations easily could be drawn from a review of RX 1A. The dates of each sale transaction were clearly listed at RX 1A. Mr. Flood's supplemental declaration simply totals for the Court those transactions clearly delineated by date at RX 1A that fall outside of the statute of limitaitons, the profits from which, pre-tax – were $813,000! Because this number (easily obtained by adding the sales data from transactions before April 15, 2010 at RX 1A) is more than half of the total disgorgement award proposed by ALJ Elliot ($1,580,593), it is certainly material to the computation of damages, should the Commission decide to limit the claim to the applicable statute of limitations, as requested.

Again, this information is not new. It can be seen at RX 1A. The Supplemental Flood Declaration simply facilitates an easy review of the facts at RX 1A. There can be no conceivable prejudice suffered as a result of offering the Commission this simple totaling of the numbers provided at RX 1A.

Mr. Flood's next column simply offers to ease the Commission's burden of multiplying 15% times the profits computed for each transactions, so that the capital gains tax paid on such transactions to the federal government not be double-counted in calculating disgorgement. Again, there is no prejudice to the Division by offering such a purely mathematical computation.

2. FDA Clearance Letter Would Be Judicially Noticed By A District Court.

The Division objects to to Exhibit 1 to the Motion on the grounds that the public records of the FDA would not be judicially noticed in a district court, citing no authority for such proposition. The position is simply wrong, as a matter of law. As the District Court explained in *United States ex rel. Modglin v. DJO Global Inc.* (CDCA 2014) 48 F. Supp. 1362:

> Under Rule 201, the court can take judicial notice of "[p]ublic records and government documents available from reliable sources on the Internet," such as websites run by governmental agencies. See *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-1166-IEG, 2009 U.S. Dist. LEXIS 127605, 2009 WL 6597891, *1 (S.D. Cal. Dec. 23, 2009) (citing Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir. 1999)). *See also Daniels-Hall v. National Education Association*, 620 F.3d 992, 999 (9th Cir. 2010) (taking judicial notice of information on the websites of two school districts because they were government entities); *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, 2008 WL 4183981, *5 (N.D. Cal. Sept. 8, 2008) ("Information on government agency websites has often been treated as properly subject to judicial notice"). The court could, therefore, take judicial notice of the documents relators proffer from the ***websites of the FDA***, CMS, Medi-Cal, and the SEC. The court will take judicial notice of most of these documents. [Emphasis added and footnote omitted.]

Id. at 1381-82.

The Declaration of Stanley C. Morris, filed herewith, makes clear that the documents attached at Exhibit 1 to the Motion were simply printed from the Food and Drug Administration's web site, and thus are properly the subject of judicial notice.

The Division contends that even if the documents are judicially noticeable, the Commission should not accept them as evidence because they are not material. If they were truly not material, the Division would not spend its resources to attempt to exclude them from consideration. The truth is that this is a material fact in considering whether or not to put BioElectronics to its financial death by virtue of the disgorgement award proposed in the Initial Decision.

The FDA's market clearance is scientific validation of BioElectronics' breakthrough neuromodulation technology that mitigates the hypersensitive activity of the afferent nerves to provide drug-free relief of neurological disorders such as chronic pain. The technology and medical insight is a significant development for the treatment of migraine headaches, diabetic neuropathy, postoperative surgery, chronic wounds, and other neurological disorders. This drug-free, affordable, noninvasive therapy is an absolute Godsend to reduce medication use (including opioids) for the billions of worldwide sufferers.

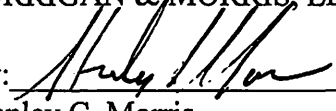
After tens of millions of dollars invested in developing its medical device (a fraction of that typically spent in the industry by competitors) and years and years of trying to obtain approval from the FDA to sell its drug free pain relief device to consumers in the United States, while selling it successfully abroad, BioElectronics finds itself with FDA approval to sell its product over the counter in the United States and, as a result, BioElectronics is at the precipice of bringing to market in the United States a revolutionary pain relief product that potentially could save many lives from being ruined by addictive pharmaceuticals to achieve the same end. The Division proposes that the Commission, in meting out equitable relief on this matter,

be blinded to this material fact. Respondents contend that it is, perhaps, the most material fact in this case.

This fact shows why IBEX and St. John's were long term investors in BioElectronics and why they continued to increase their investments at every opportunity. IBEX and St. John's were not underwriters or dealers, but investors whose actions were taken to ensure that BioElectronics survived financially while it pursued its revolutionary product development and marketing efforts. Equity demands that BioElectronics and its principals be allowed to survive financially so that BioElectronics can continue to employ citizens and bring its innovative pain relief device to market.

Dated: Santa Monica, California
April 10, 2017

Respectfully submitted,
CORRIGAN & MORRIS, LLP

By: 

Stanley C. Morris
(scm@cormorllp.com)
Corrigan & Morris LLP
201 Santa Monica Blvd., Suite 475
Santa Monica, CA 90401

Attorneys for Respondents

DECLARATION OF STANLEY C. MORRIS

I, Stanley C. Morris, declare as follows:

1. I prepared and submitted to the Commission RESPONDENTS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD PURSUANT TO COMMISSION RULES OF PRACTICE 323 AND 452 (the "Motion").

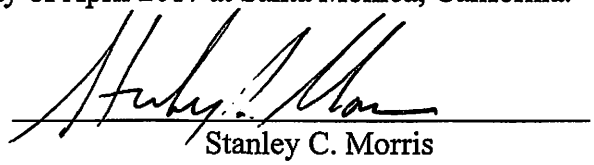
2. Attached as **Exhibit 1** to the Motion is a true and correct copy of documents printed from the Federal Drug Administration's web site on or around March 17, 2017.

3. Attached as **Exhibit 2** to the Motion is a true and correct copy of the Post-Judgment Interest Rate schedule for 2017 from the District Court for Utah, at the following web site address www.utd.uscourts.gov; as well as the IRC 6621 Table of Unterpayment Rates from the United States Department of Labor at www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administrators. Attached hereto at Exhibit 1 is a true and correct copy of further Post-Judgment Interest Rate schedules for 2010 through 2016 taken from the same government web site.

4. Attached as **Exhibit 3** to the Motion is a true and correct copy of the Post-Hearing Declaration of Brian Flood In Support of Respondents' Motion to Correct Manifest Errors of Fact In Initial Decision Dated December 13, 2016.

5. Attached as **Exhibit 4** to the Motion is a true and correct copy of the Post-Hearing Declaration of Stanley C. Morris In Support of Respondents' Motion to Correct Manifest Errors of Fact In Initial Decision Dated December 13, 2016.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 10th day of April 2017 at Santa Monica, California.



Stanley C. Morris

CERTIFICATE OF SERVICE

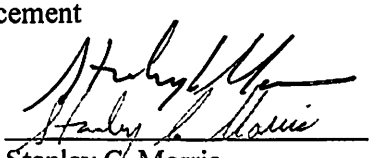
I hereby certify that I caused to be served a true and correct copy of the following documents on the date and in the manner indicated below.

REPLY TO DIVISION'S PARTIAL OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD; DECLARATION OF STANLEY C. MORRIS IN SUPPORT THEREOF

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
(04/10/2017 via overnight mail and electronic mail)

Charles Stodghill, Esq.
Paul Kisslinger, Esq.
Division of Enforcement
Securities and Exchange Commission 100
F. Street, N. E.
Washington, DC 20549
(via email on 04/10/2017 pursuant to the parties' agreement:
concannons@SEC.GOV; Kisslingerp@sec.gov; stodghillc@sec.gov)

Attorneys for SEC Division of Enforcement



Stanley C. Morris