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.

THE DIVISION OF ENFORCEMENT'S AMENDED OPPOSITION TO RESPONDENTS' BRIEF IN SUPPORT OF APPEAL TO THE COMMISSION

Charles D. Stodghill (202) 551-4413
Paul W. Kisslinger (202) 551-4427
Sarah H. Concannon (202) 551-5361
Thomas B. Rogers (202) 551-4776
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

COUNSEL FOR THE DIVISION
OF ENFORCEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL RULES AND STATUTES

SEC RELEASES

INTRODUCTION

During the five-day administrative hearing, the Division of Enforcement ("Division") proved that Respondent BioElectronics Corp. ("BioElectronics" or "BIEL")—through the efforts of Respondents Andrew Whelan, Kelly Whelan, IBEX, LLC ("IBEX"), and St. John's, LLC ("St. John's")—distributed billions of shares of stock into the market in illegal unregistered transactions, repeatedly violating Section 5 of the Securities Act of 1933 (the "Securities Act"). The Division also proved that BIEL overstated nearly one half of its sales revenue in the first and only Form 10-K that it ever filed, by falsely recording $366,000 in revenue on two so-called "bill and hold" transactions. These transactions were not recordable as bill and hold sales *or* traditional sales. BIEL and Andrew Whelan therefore violated Section 13 of the Securities Exchange Act of 1934 (the "Exchange Act") and related rules by issuing a materially false and misleading annual report, and failing to maintain adequate books and records and internal controls.

Respondents did not dispute much of the Division's evidence during the hearing, nor could they. Respondents stipulated that IBEX made millions of dollars in loans to BIEL, while simultaneously selling millions of dollars' worth of BIEL securities to third-party purchasers.[1] Respondents also conceded that IBEX was BIEL's primary lender, responsible for "keeping the lights on" and the Company's ability to make payroll, and that without IBEX's financing, BIEL may well have gone out of business. Respondents admitted that Kelly Whelan (Andrew Whelan's daughter) had a close relationship with BIEL. They also admitted that IBEX, under Kelly Whelan's control, had the ultimate power to bankrupt BIEL when its loans came due, but that it was a "friendly lender" that chose not to do so. Respondents conceded that IBEX serially

[1] Joint Stipulations [DX 1], Exs. A & B.

returned proceeds from its sales of BIEL securities back to the issuer, BIEL, to fund new loans, and that, on many occasions, third-party buyers paid BIEL directly, completely bypassing IBEX, the alleged independent seller. Respondents likewise conceded that St. John's, a company owned by Andrew Whelan's wife, Patricia Whelan, sold tens of millions of shares of BIEL stock without timely filing any Forms 144. Nor did Respondents contest that *billions* of shares of BIEL entered the public market without a single registration statement being filed, and that BIEL's Board of Directors voted to authorize those shares, at least in part, to fund conversions of notes by IBEX's purchasers. Respondents also did not credibly contest that BIEL's 2009 10-K included $366,000 in revenue from two transactions that never should have been characterized as bill and hold transactions, and were subsequently restated.

On appeal to the Commission, Respondents raise scattershot challenges to the Administrative Law Judge's ("ALJ") constitutional authority, and to various findings in the Initial Decision. Respondents in essence ask the Commission to grant them leave to continue to fund the operations of BIEL through violations of the securities laws. In so doing, they ignore well-established law and the weight of the evidence, deny the import of their own sworn testimony, offer conclusory assertions without evidentiary basis, and attempt to play on the Commission's sympathies.

Contrary to Respondents' claims, however, registration under Section 5 is not a mere technicality. A chain of distribution to the public market, such as the one Respondents created here, deprives investors of the information to which they are entitled in a registration statement. The Division has met its *prima facie* burden under Section 5. The Respondents, however, have not met their burden to establish that their unregistered transactions were exempt under Section 4(a). In arguing that their transactions are exempt, Respondents parse the exemptions in a

manner that is divorced from the objectives of the statute. All the exemptions in Section 4(a) are rooted in the fundamental distinction between *distributions*, such as those by Respondents here, and ordinary trading. *Geiger v. SEC*, 363 F.3d 481, 487 (D.C. Cir. 2004) ("The term 'distribution' refers to the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hand of the investing public.").

As for Respondents' arguments concerning BIEL's purported compliance with Section 13, they simply misconstrue the law. The Company was not excused from complying with Section 13. The Form 8-A registration that BIEL filed in 2006 remained in effect until BIEL withdrew its registration in April 2011. During the intervening years, BIEL was a full-fledged reporting company that was bound to follow the applicable reporting, books and records, and internal control provisions mandated by Section 13.

Respondents next plead for a toothless remedy, challenging the ALJ's determination of the sanctions warranted by their misconduct, and arguing that they are unable to pay disgorgement, interest, and penalties. But even if this were true—and the evidence does not support Respondents' contention—inability to pay is merely one factor to be considered in administrative proceedings.[2] The Commission should consider the remedies necessary and appropriate to protect not just current BIEL shareholders, but *future* investors as well. Despite the gravity of their violations, Respondents continue to show no appreciation for the need to make required disclosures and to keep accurate books and records. Thus, there is no reason to

[2] 17 C.F.R. § 630.

believe that Respondents will not continue to engage in the very misconduct at issue in this case unless the Commission orders them to stop.[3]

After full consideration of the evidence and governing law, the ALJ correctly held that Respondents violated Section 5 of the Securities Act and Section 13 of the Exchange Act. The ALJ also correctly sanctioned Respondents for their repeated, serial, and unapologetic violations of the securities laws. The Division respectfully moves the Commission to reach a similar result on all grounds in its *de novo* review.

FACTUAL BACKGROUND

Since its inception in April 2000, BioElectronics has struggled to make ends meet. During the years leading up to the events in this case, BioElectronics lost over 10 million dollars, and, over its lifetime, accumulated losses of 27 million dollars. At the same time, the number of shares of BioElectronics stock in the market has exploded—going from 750 million shares authorized in June 2009, to 7 billion shares authorized at the end of 2014, and 15 billion shares authorized today (11 billion outstanding)—all reaching the hands of public investors in unregistered transactions. To keep his struggling company afloat, Andrew Whelan, the Chief Executive Officer, President, Chief Financial Officer, and founder of BioElectronics—assisted by his friends and family, his fellow Respondents—repeatedly violated Section 5, and BIEL and Andrew Whelan violated Section 13 and related rules.

I. RESPONDENTS DISTRIBUTED BILLIONS OF BIEL SHARES TO THE PUBLIC IN UNREGISTERED TRANSACTIONS

During the Relevant Period (August 2009 to November 2014), BIEL entered into dozens of illegal securities offerings in which billions of its shares were sold into the public market

[3] Respondents' miscellaneous arguments concerning the weight placed by the ALJ on certain expert testimony, their reliance on counsel "defense," and proffered character evidence, are also without merit, and addressed below.

through Kelly Whelan and her company, IBEX, and through St. John's, a company owned by Andrew Whelan's wife, Patricia Whelan.

A. IBEX and Kelly Whelan Sold Billions of BIEL Shares in Unregistered Transactions

Kelly Whelan founded IBEX sometime before 2005 with money raised by taking funds from her personal savings and other sources,[4] with the intention of investing in her father's company, BioElectronics.[5] Since its creation, IBEX's sole business has been to finance BioElectronics through sales of BIEL convertible notes and shares to third parties.[6] Sometime between 2003 and 2005, Kelly Whelan made her first investment in BIEL.[7] Thereafter, Kelly Whelan and IBEX made frequent loans to BIEL to finance BIEL's operations.[8] IBEX quickly became BIEL's primary source of financing.[9] Kelly Whelan estimated that IBEX made "in the neighborhood of 100" loans to BIEL just between 2010 and 2014, and admitted that she could not "remember a time when [she] refused to make a loan to BioElectronics Corporation."[10]

---

[4] Tr. 449:4-450:5, 534:13-19, 1230:20-1231:5; DX 1 ¶¶ 22-23.

[5] Tr. 443:17-18.

[6] Tr. 1048:13-15 (K. Whelan: "IBEX is not anything. It is where I sometimes hold investments."), 1049:15-16 (K. Whelan: "IBEX doesn't do anything in the securities market. IBEX doesn't do anything."), 878:3-16, 1048:16-1049:14.

[7] Tr. 1054:6-17.

[8] DX 1, Ex. A.

[9] RX 194B at 14 ("Our primary source of financing over the last several years has been loans provided to us by IBEX LLC, whose principal, Kelly Lorenz, is the daughter of Andrew Whelan, our president."); RX 194C at 13 (same); Tr. 243:13-23, 538:10-25 (M. Whelan: discussing IBEX as BIEL's primary source of financing and stating that "there have been periods, obviously, when IBEX was critical to making the company whole and keeping the lights on.").

[10] Tr. 448:24-449:3, 452:1-12, 1065:17-20.

During the Relevant Period alone, IBEX loaned BIEL over $5.4 million, providing 16 percent of BIEL's *total* financing over its 16-year lifetime.[11]

The unrebutted testimony of William D. Park—a Senior Director in the Enforcement Department of the Financial Industry Regulatory Authority ("FINRA"), with over 19 years' experience conducting complex investigations—establishes that IBEX funded its loans to BIEL through sales of BIEL stock and convertible notes.[12] Mr. Park testified regarding his review of dozens of IBEX loans to BIEL and sales to third parties (whom Mr. Park terms "Liquidating Entities") during the Relevant Period.

Mr. Park explained that during the Relevant Period, BIEL received a substantial amount of its operating funds through the public resale of purportedly unrestricted securities, primarily by IBEX.[13] After accumulating significant inventory of convertible BIEL notes in exchange for funds loaned to the issuer, IBEX sold tranches of those notes to a small group of investors. Those Liquidating Entities in turn almost immediately converted the notes into unrestricted BIEL shares that they then sold into the public market in unregistered transactions. IBEX returned almost all the funds it received from these sales to BIEL immediately or very shortly after the sales were completed. Neither BIEL nor IBEX took any steps to ensure that the Liquidating Entities were acquiring BIEL notes and shares with investment intent.[14] Presumably, this is because the Liquidating Entities had no intention of holding onto the securities. Rather, the whole point of the Liquidating Entities' purchases was to acquire notes that were already due,

---

[11] Order Instituting Administrative Cease-and-Desist Proceedings ¶ 1 (Feb. 5, 2016) ("OIP"); DX 1, Ex. A; Tr. 537:12-19 (M. Whelan: total capitalization is approximately 33 million over BIEL's lifetime); 1279:7-1280:3.

[12] *See generally* Park Report [DX 137].

[13] DX 137 ¶¶ 19-21.

[14] Tr. 264:18-24, 1082:6-12.

negotiate a favorable conversion price—below market price and immediately sell the stock for an instant, virtually guaranteed, profit.[15] The Liquidating Entities were acquiring stock to sell, and Respondents were happy to oblige through letters (falsely) certifying that IBEX was not an affiliate and that the securities acquired by the Liquidating Entities could be resold without registration.

Overall, from January 2010 through February 9, 2015, IBEX served as a conduit for approximately 3.5 billion shares of BIEL sold to the public. Ninety-five percent of this amount (approximately 3.3 billion shares), was sold between January 2013 and November 2014. By November 2014, IBEX had facilitated the sale of over 50 percent of BIEL's total shares outstanding.[16] On a quarterly basis during this period, IBEX's total sales often amounted to more than one percent of the total shares outstanding. For instance, the sales in three quarters alone were at least ten percent of the total shares outstanding, with one of them (1Q 2014) representing 25 percent. Overall, from January 2010 through February 9, 2015, IBEX received approximately $4 million from the Liquidating Entities and sent approximately $5 million to BIEL. During the January 2013 through November 2014 time frame, IBEX received approximately $2.7 million from Liquidating Entities and sent approximately $2.5 million to BIEL, or over 90 percent of the amount it received from the unregistered sales.[17]

---

[15] DX 137 ¶¶ 42, 44.

[16] DX 137 ¶¶ 19-21, 42-43. Between January 2013 and November 2014, IBEX sold convertible debt to eight Liquidating Entities. *Id.* ¶¶ 43-44. These entities typically purchased the debt at a significant discount to the market price, which enabled them to profit from immediate resales. The entities would immediately convert the debt to shares and sell the shares into the public market. As IBEX received money from the Liquidating Entities, it sent most of the money to BIEL. *Id.*

[17] DX 137 ¶¶ 19-21, 56.

B. St. John's Sold Tens of Millions of BIEL Shares in Unregistered Transactions

BIEL also distributed shares to the public markets through Patricia Whelan's company, St. John's, of which Kelly Whelan is a one percent owner and registered agent.[18] Patricia Whelan formed St. John's LLC in 2009.[19] Since its formation, St. John's has loaned BIEL approximately $2.9 million in exchange for convertible notes.[20] Two of these convertible notes were issued on June 30, 2010 (for $95,794.67) and August 31, 2010 (for $61,108.82).[21] On June 20, 2012, St. John's converted these notes, and BIEL issued 91,808,086 shares to St. John's.[22] St. John's subsequently sold 81 million of these 91 million shares in 17 separate transactions between March 26, 2013 and March 6, 2014.[23] At the time of these sales, St. John's and BIEL did not file any Forms 144 providing notice of their intent to sell BIEL's stock.[24] Rather, the sole Form 144 filed for these transactions is dated May 26, 2016, two to three *years* after the time of St. John's sales.[25] And, even this late-filed Form 144 only includes 14 of St. Johns' 17 sales of BIEL shares and omits sales on March 5 and 6, 2014.[26]

C. Respondents Benefitted at the Expense of Investors

Respondents benefitted from their distributions of unregistered BIEL securities at the expense of an uninformed public. BIEL filed a registration statement in February 2006, because

---

[18] DX 1 ¶ 3; DX 120 at 19; Tr. 502:6-503:7.

[19] DX 1 ¶ 29.

[20] DX 1 ¶¶ 30-31.

[21] DX 1 ¶ 32.

[22] DX 1 ¶ 33.

[23] DX 1 ¶¶ 34-35; RX 172H.

[24] Tr. 905:8-11; DX 122.

[25] DX 1 ¶ 36.

[26] RX 176.

it was a requirement of its agreement with one of its lenders.[27] When it became too financially onerous to comply with the registration requirements,[28] BIEL pulled its registration and paid a settlement to the lender.[29] Thereafter, BIEL became gun-shy of dealing with arms' length lenders and was unable to generate interest from venture capitalists, and decided instead to finance BIEL's operations primarily through IBEX and Kelly Whelan, "friendly" lenders (which, in contrast to BIEL's arms' length lender, did not require BIEL to register).[30] Kelly Whelan sold BIEL stock and notes, sending back monies received to BIEL in the form of "new investments."[31] In essence, BIEL used IBEX as a conduit to raise money from public investors for Company operations.

Kelly Whelan personally became wealthy at the expense of uninformed public shareholders. After initially financing IBEX with her own limited assets,[32] Kelly Whelan "bec[a]me very liquid" in 2009 by selling BIEL stock.[33] In 2010, Kelly Whelan had $3.8 million in the bank, "most of" which was the result of sales of BIEL shares.[34] Kelly Whelan used the proceeds of her sales of BIEL convertible notes and shares to fund further monies made available to BIEL,[35] and continued to make loans because the accrual of interest at eight percent and the

---

[27] RX 188; Tr. 640:10-641:6.

[28] Tr. 665:21-666:3.

[29] Tr. 641:7-18.

[30] *See, e.g.,* Tr. 665:4-666:3.

[31] DX 1, Ex. B.

[32] DX 1 ¶¶ 22-23; Tr. 1230:20-1231:5.

[33] Tr. 416:24-417:1 (K. Whelan: "The stock price of BioElectronics Corporation went up significantly in July of 2009, and I was able to become very liquid at that point"); *id.* 448:21-23 (similar), 487:4-6 (similar), 1061:23-1062:1.

[34] Tr. 1229:14-1230:19, 1233:10-13.

[35] Tr. 487:14-19.

sales of BIEL securities were profitable to her.[36] Other than her initial (undocumented and nominal) investment, Kelly Whelan never took on any additional investment risk; she simply took the proceeds of sales of BIEL securities and immediately reinvested them in BIEL, effectively replacing the shares sold, with an ability to obtain shares in the future.[37]

Despite profiting personally from her sales of BIEL shares and using those sales to fund BIEL's operating expenses—all while BIEL's share value was plummeting—Kelly Whelan exhibited no concern for BIEL's public shareholders, whose interests were being diluted every time BIEL authorized additional shares to meet IBEX's conversion rights.[38]

Andrew Whelan and BIEL's Board of Directors were equally unconcerned about the impact of their actions on the investing public.[39] Although BIEL's Board paid lip service to concern about the diminution in shareholder value resulting from conversions and sales of BIEL's notes to the public markets,[40] they justified this *immediate* harm to BIEL's shareholders by suggesting that "all ships would rise, as the saying goes, with the success of the firm" and FDA approval.[41] Thus, BIEL concluded "as a business decision," that "it was [BIEL's] best

---

[36] Tr. 485:8-12.

[37] DX 137 ¶ 27.

[38] Tr. 497:4-498:3 (K. Whelan: "I didn't see any reason for me to have a concern about that.").

[39] Tr. 877:3-12 (A. Whelan: "I'm not distraught by it because it's not unusual in the type of business that we're in, and I believe that the shareholders will get a good return. That when we dilute, we're bringing in additional capital."), 341:17-21, 1017:22-1018:3, 1024:25-1025:20, 1284:11-1287:19.

[40] Tr. 1253:13-1254:9.

[41] Tr. 1284:11-1287:19. On appeal, BIEL seeks to introduce new evidence that it received FDA clearance in February 2017. *See* Respondents' Motion to Supplement the Record (Mar. 30, 2017). Even if the Commission considers such new evidence, however, it is irrelevant to the question whether Respondents violated the securities laws. Indeed, the gloss of legitimacy provided by the FDA's actions makes it even more imperative that BIEL provide investors with accurate information about the way in which it has been funding its operations.

opinion that this was the only option available to [BIEL] for financing, to get the capital to stay alive and meet our obligations to pay off the notes."[42] Although Mr. Whelan admitted that when the Liquidating Entities convert their notes and sell shares of BIEL into the market, it shifts risk onto the investing public, he expressed no concern for his own responsibility for that shift.[43] Richard Staelin, BIEL's sole independent Board member, was similarly nonplussed. Mr. Staelin professed that his "primary role as an independent Board member is to look out for the shareholders and shareholder value,"[44] but during Mr. Staelin's tenure on BIEL's Board, BIEL's share price has gone from a high of 12 cents per share in 2009,[45] to just eight one-thousandths of a cent at the time of trial.[46] Respondents' actions deprived public investors of the knowledge that "they [we]re helping to support the issuer by the passing of the proceeds right back to BIEL. If they had known that they might not have bought it."[47]

II. BIEL IMPROPERLY RECORDED REVENUE ON TWO BILL AND HOLD TRANSACTIONS WITH CLOSELY RELATED PARTIES

A. BIEL Filed a Form 8a-12g in 2006 and Did Not Withdraw It Until FiveYears Later

BIEL is a Maryland corporation with a sole location employing approximately twelve people in Frederick, Maryland. BIEL has a class of equity securities, previously registered with

---

[42] Tr. 315:5-7 (A. Whelan: "I have a long term view of the company.... I don't get excited day to day."), 314:3-322:23, 1287:1-5; DX 29.

[43] Tr. 302:6-11.

[44] Tr. 1246:19-21.

[45] DX 51 at 16.

[46] Tr. 1031:9-1032:20. The Commission may take judicial notice of BIEL's stock quote, as reported on BIEL's corporate website (http://www.bielcorp.com/category/news/) and OTC Markets (http://www.otcmarkets.com/stock/BIEL/quote). *See, e.g., Ieradi v. Mylan Lab., Inc.*, 230 F.3d 594, 600 n.3 (3d Cir. 2000) (taking judicial notice of reported stock prices).

[47] Tr. 161:16-162:6.

the Commission pursuant to Exchange Act Section 12(g), with approximately 15 billion shares issued today.

Bioelectronics' Section 12 reporting obligation arose as a result of its filing a Form 8A-12g on February 13, 2006, and, on that same day, a Form SB-2/A.[48] Approximately four months later, on June 19, 2006, BIEL filed another Form SB-2/A. The Company thereafter filed additional Forms SB-2 and SB-2/A between August 2006 and February 2007.[49]

Eventually, BIEL determined that completing the registration process would be prohibitively expensive, and elected to forego registration and instead pay a contractual penalty.[50] BIEL withdrew its original Form SB-2 by filing Forms RW on July 10, 2006, and again on July 13, 2006.[51] It filed its most recent Form RW on March 16, 2007.[52] It did not, however, file a Form 15 to terminate its Exchange Act registration until April 18, 2011.[53] Because all of BIEL's Forms SB-2 and SB0-2/A were withdrawn no later than 2007, the BIEL securities at issue in this proceeding were unregistered under the Securities Act. BIEL currently trades on OTC Link operated by OTC Markets Group, Inc. ("OTC Link"). It continues to operate, selling its products both in the United States and overseas.

B. BIEL Improperly Recognized Revenue for Fiscal Year 2009 from Two So-Called Bill and Hold Transactions

In its first and only Form 10-K, filed with the Commission on March 31, 2010, BIEL recorded revenue from two purported "bill and hold" transactions with closely related

---

[48] RX 190 at 2203.

[49] *Id.*

[50] Tr. 641, 666.

[51] RX 189; RX 190 at 2203.

[52] RX 190 at 2203.

[53] RX 208.

companies, in which product never left BIEL's warehouse.[54] These transactions, which totaled $366,000, represented 47% of BIEL's revenue in 2009.[55] Months after filing the 2009 10-K, BIEL admitted to the SEC's Division of Corporation Finance that the transactions did not represent valid bill and hold arrangements.[56] In May 2011, the Company posted its restated financial statements, expressly stating that "[t]he Company incorrectly recognized revenues on transactions previously characterized as 'bill and hold.'"[57] Andrew Whelan likewise admitted BIEL's misstatement at trial, as did Respondent's expert, Dr. Colin Linsley.[58]

ARGUMENT

The Division proved, by a preponderance of the evidence, that Respondents violated or caused violations of the securities laws at issue in the OIP, as the ALJ correctly held. None of the issues raised in Respondents' appeal should change the outcome of this case.

I. THE ALJ'S APPOINTMENT COMPLIED WITH THE APPOINTMENTS CLAUSE

The Commission should reject Respondents' argument that the ALJ who presided over this matter was an inferior officer not appointed in a manner consistent with the Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 2. The Commission has consistently held

---

[54] DX 51 at 20-21; Tr. 350-352, 377:18-25, 382:12-20 (A. Whelan: products did not leave BIEL's warehouse).

[55] DX 51 at 20-21 [$366,000/(1,145,647 – 366,000)] = 47 percent. If the bill and hold transactions are included in the denominator, they represent 32 percent of revenue as recorded. *See* Vondra Report ¶ 123(1) [DX 135].

[56] DX 14 at 13, 18 (stating transactions were not "bill and hold" transactions as defined in FASB ASC 605).

[57] DX 13 at 26-27; Tr. 364:14-20 (A. Whelan: "Q: And in the May 2011 restatement that we've just been discussing, you restated the YesDTC revenue as other income, not sales revenue, correct? A: Yes. Q: And that's because no product had been delivered to YesDTC? A: Yes."); *see also* DX 135 ¶ 38; Vondra Supp. Report [DX 9] ¶ 8.

[58] Tr. 363:7-15, 1315:17-16:6 (Linsley: "Q: But you also agree that they were incorrectly recorded as bill and hold transactions. A: Yes.").

that the Appointments Clause's requirements apply only to officers of the United States, not employees and that its ALJs are employees. *See, e.g., Bennett Group Financial Services, LLC,* Release No. 4676, 2017 WL 1176053, at *5 (Mar. 30, 2017). The Commission recently reiterated that holding in two decisions that post-date the Tenth Circuit's contrary determination in *Bandimere v. SEC,* 844 F.3d 1168 (10th Cir. 2016), on which Respondents rely. *See Harding Advisory LLC,* Release No. 4600, 2017 WL 66592, at *19 & n.90 (Jan. 6, 2017); *Bennett,* 2017 WL 1176053, at *5. The Commission explained that it "respectfully disagree[d] with the *Bandimere* panel ... for the reasons stated in [the Commission's] petition for rehearing en banc filed with the Tenth Circuit," and it "decline[d] to acquiesce in that decision." *Bennett,* 2017 WL 1176053, at *5; *see also* Petition for Reh'g or Reh'g En Banc, *Bandimere v. SEC,* 844 F.3d 1168 (10th Cir. 2016) (No. 15-9586). The Commission's position remains correct, and Respondents have offered no compelling reason why the Commission should depart from its carefully considered and established approach.

II. RESPONDENTS VIOLATED SECTION 5 OF THE SECURITIES ACT AND NO EXEMPTION APPLIES

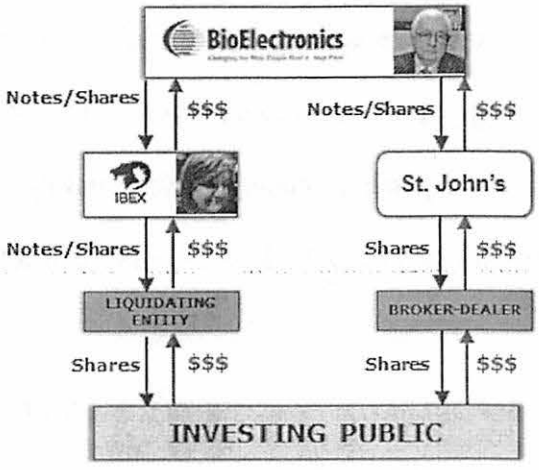
A. The Division Proved Its *Prima Facie* Section 5 Case Against all Respondents

. To establish a *prima facie* case for a violation of Sections 5(a) and 5(c), the Division must prove that: (1) Respondents offered to sell or sold a security; (2) Respondents used the mails or interstate means to sell or offer to sell the security; and (3) no registration statement was filed, or in effect as to the security. *SEC v. Continental Tobacco Co.*, 463 F.2d 137, 155-56 (5th Cir. 1972). The Division is not required to prove scienter or intent. *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 859-60 (S.D.N.Y. 1997).

As illustrated by **Figure 1**, below, during the Relevant Period, BIEL and IBEX engaged in dozens of distributions to the public market, whereby BIEL issued convertible notes or shares

to IBEX, IBEX sold the convertible notes or shares to third parties, and the third parties converted the notes into purportedly unrestricted shares of BIEL and sold them to the market.[59] BIEL also issued convertible notes to St. John's, which St. John's converted and sold to the public.[60] No registration statements were filed, or in effect, as to the securities.[61] Thus, absent a showing by Respondents—by a preponderance of the evidence—that these distributions of BIEL stock to the public fall within an exemption to the registration requirement, each Respondent is strictly liable under Section 5.

Figure 1: The Distribution Chain



B. Respondents Have Failed to Prove Entitlement to an Exemption to Section 5

Respondents have failed to prove entitlement to any exemption to Section 5's registration requirements. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124-26 (1953). The question for the Commission is whether—*in substance*—Respondents engaged in a distribution of securities to the public without a registration or exemption. *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d

---

[59] DX 137 ¶¶ 19-21; DX 1, Exs. A & B.

[60] DX 1 ¶¶ 29-36.

[61] *See generally* DX 137; DX 122; Tr. 432:4-8, 905:8-11, 1029:22-1030:10. There is no dispute, and ample evidence, that Respondents used the instrumentalities of interstate commerce. Initial Dec. at 41.

1072, 1086 (9th Cir. 2010); *Zacharias v. SEC*, 569 F.3d 458, 463-66 (D.C. Cir. 2009). The evidence here establishes that Respondents did just that.

1. BioElectronics is Liable for IBEX's and St. John's Sales

As the issuer, BioElectronics is liable for IBEX's and St. John's sales of BIEL securities in unregistered transactions, because it set in motion the chain of distribution to the public and took affirmative steps to further that distribution, including issuing notes and stock to IBEX and St. John's in exchange for their "investments" in BIEL, and providing (often false) information to transfer agents to enable the lifting of the restrictive legends. Respondents argue, however, that BIEL's sales to IBEX and St. John's are exempt under Section 4(a)(2), because they "were not public offerings."[62] Section 4(a)(2) is construed narrowly in furtherance of the Securities Act's purpose, and the issuer bears the burden of proof. *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980) (citing *SEC v. Blazon Corp.*, 609 F.2d 960, 968 (9th Cir. 1979)). Respondents have not met their burden.

In arguing for an exemption under Section 4(a)(2), Respondents improperly sever the first part of the chain of distribution from the remainder of the chain, and ask the Commission to ignore everything that came thereafter. But the Congressional objectives of Section 5 require registration when securities are distributed to the public by the issuer or a control person, and when securities are distributed to the public *through intermediaries* who buy with a view to public resale or sell for the issuer or control person. *Geiger*, 363 F.3d at 487. Here, BIEL's sales to IBEX and St. John's were the first, essential, step in one continuous public offering, carried out through intermediaries. As the issuer, BIEL cannot hide behind Section 4(a)(2) when it

---

[62] Resp. Br. at 14.

knew that securities converted and transferred to IBEX and St. John's were being resold into the market and knew that IBEX's "loans" to BIEL were funded by these public distributions.[63]

2. IBEX's Sales are Not Exempt Under Section 4(a)(1), Nor Within Rule 144's Safe Harbor

Respondents next argue that IBEX's sales are exempt under Section 4(a)(1), because it was not an issuer, underwriter, or dealer.[64] IBEX did not meet its burden of proving an exemption under Section 4(a)(1).

(a) Section 4(a)(1)'s Governing Legal Principles

The Section 4(a)(1) exemption is not available if there is a distribution of securities by an issuer, underwriter, or dealer. 15 U.S.C. § 77(d)(a)(1); *SEC v. Chinese Consol. Benevolent Ass'n, Inc.*, 120 F.2d 738, 741 (2d Cir. 1941). Under the Securities Act, "every person who issues or proposes to issue any security" is an issuer. 15 U.S.C. § 77b(a)(4). A dealer is "any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person." 15 U.S.C. § 77b(a)(12).[65] "Underwriter" is broadly defined as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in

---

[63] *Ackerberg v. Johnson*, 892 F.2d 1328, 1335 (1989) (Congress intended "to cover all persons who might operate as conduits for the transfer to the public").

[64] Resp. Br. at 14-15.

[65] IBEX bears the burden of proving that it is *not* a dealer under Section 4(a)(1). Initial Dec. at 42. Because the evidence that IBEX acted as an underwriter, and sold BIEL securities to underwriters, is dispositive, the Division consistently has argued that this question need not be reached. Should the Commission wish to reach the question , however, IBEX has not proven by a preponderance of the evidence that it was not "engage[d] either for all or part of [their] time, directly or indirectly, as agent, broker, or principal in the offering, buying, selling or otherwise dealing or trading in securities issued by another person." 15 U.S.C. § 77b(a)(12); *see also Donald J. Anthony, Jr. et al.*, AP File No. 3-15514, 2015 SEC LEXIS 707, at *258, n.111 (Feb. 25, 2015) (discussing the "expansive" definition of dealer under Section 77b(a)(12)). Indeed, the evidence supports the opposite conclusion. Initial Dec. at 42-44.

connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking." 15 U.S.C. § 77b(a)(11). This is because "[t]he congressional intent in defining 'underwriter' [in Section 2(a)(11)] was to cover *all* persons who might operate as conduits for the transfer of securities to the public." *Ackerberg*, 892 F.2d at 1335-36.

(b) IBEX Cannot Rely on Section 4(a)(1) Because It Sold for the Issuer

IBEX cannot rely on Section 4(a)(1), first and foremost, because it sold *for the issuer*, BIEL, in a distribution, and thus was acting as an underwriter. By Kelly Whelan's own admission, IBEX purchased BIEL convertible notes and shares and sold them to third parties, who distributed them to the market.[66] IBEX then returned the vast majority of the proceeds of these resales back to the issuer.[67] Indeed, by November 2014, IBEX was responsible for 50 percent of the BIEL shares in the public markets.[68] Ms. Whelan did not acquire BIEL securities with investment intent and *never* intended that the BIEL securities "rest" with her.[69] Rather, Ms. Whelan testified that when it became difficult for her to place shares with her own broker-dealer for distribution to the market, she *increased* her sales to Redwood, a company that she knew was in the business of buying debt, converting it, and selling to the market.[70] In so doing, Ms. Whelan provided Redwood with access to purportedly unrestricted securities that it otherwise

---

[66] Tr. 420:14-20, 447:9:23,490:3-492:9, 495:10-496:5.

[67] DX 137 ¶¶ 19, 27-28, 33, 40, 64-65.

[68] DX 137 ¶¶ 19, 42-43.

[69] The failure of BIEL's securities to "come to rest" with IBEX is why Respondents' reliance on so-called "holding periods" is a red-herring. BIEL's pattern of transactions with IBEX are a chain of distribution, in which the securities do not "come to rest" until they land in the hands of the investing public. *E.g.*, Tr. 153:1-7, 246:13-247:2; DX 137 ¶ 33.

[70] Tr. 491:6-492:9.

would not have had, and ensured the sale of BIEL securities to the public for the issuer. Because IBEX sold for the issuer, it is ineligible for the Section 4(a)(1) exemption, and Respondents' arguments resting on Rule 144 and affiliate status are irrelevant.

(c) IBEX Cannot Rely on Section 4(a)(1) Because It is an Affiliate of BIEL

In any event, contrary to Respondents' arguments,[71] the evidence clearly establishes that IBEX is an affiliate of BIEL, forming part of a single control group under Section 5. As an affiliate of the issuer, IBEX may not rely on the Section 4(a)(1) exemption. *SEC v. Cavanagh*, 445 F.3d 105, 111 n.12 (2d Cir. 2006); *see also Platforms Wireless*, 617 F.3d at 1090 ("Strictures placed on transactions involving 'affiliates' prevent those possessing superior access to information and the power to compel registration from abusing their privileged position to foist unregistered securities on an unwitting public."). Likewise, IBEX is an "affiliate" as defined by Rule 144 and therefore cannot take advantage of the rule's safe harbor, having failed to comply with its terms.[72]

The ALJ properly found that IBEX was an affiliate, in a control relationship with BIEL. "Control" in this context means "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." *SEC v. Kern*, 425 F.3d 143, 152 (2d Cir. 2005) (quoting 17 C.F.R. § 230.405). Whether a person or entity is in a control relationship with an issuer depends on the totality of the circumstances, including an appraisal of the person's

---

[71] Resp. Br. at 15-18.

[72] Section 2(a)(11) defines "issuer" for purposes of the underwriter definition as "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." Rule 144 captures the same concept in its use of the terms "affiliate," defining an 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."

influence upon the management and policies of the relevant entity. *Rodney R. Schoemann*, Securities Act Release No. 9076, 2009 WL 3413043, at *7 (Oct. 23, 2009); *see also United States v. Corr*, 543 F.2d 1042, 1050 (2d Cir. 1976)); *Kern*, 425 F.3d at 150. Among other evidence in the record, the following facts strongly support a finding that IBEX is an affiliate of BIEL, forming part of BIEL's control group:

- Kelly Whelan—the founder and sole investor in IBEX—is the daughter of BIEL's Chief Executive Officer, President, Chief Financial Officer, and founder;
- IBEX had no independent corporate purpose other than to facilitate the public distribution of BIEL securities;
- Without IBEX's sales into the market and funneling of sale proceeds into new loans, BIEL would have gone bankrupt;
- IBEX had the power to force BIEL's Board to take action (*e.g.*, to authorize new shares or register its shares) and to put BIEL into bankruptcy; even if Kelly Whelan did not exercise that power, she had the ability to do so;
- Andrew Whelan had the power to influence Kelly Whelan; Kelly Whelan and IBEX have made loans "pretty much whenever they have been requested," and have never demanded repayment in cash;
- Andrew Whelan was "fair" to Kelly Whelan, and Kelly Whelan was not "greedy" in dealing with BIEL, evidencing the symbiotic control relationship between BIEL and IBEX;
- Respondents did not observe corporate formalities; notes were back-dated, loans were not individually documented, Andrew Whelan did not consistently consult with the Board, and Andrew Whelan had blanket authority to accept loans from IBEX;
- IBEX subordinated its security interest in EXIM for no apparent benefit to IBEX;
- Kelly Whelan maintained a presence at BIEL, had a BIEL email address, and was intimately familiar with BIEL's day-to-day goings on;
- Kelly Whelan attended Board meetings and was on Board communications, including critical communications concerning her own investments; and

- IBEX compensated BIEL consultants and paid off a judgment creditor of BIEL (together with Andrew Whelan and Richard Staelin, both members of the Board).[73]

The Commission should therefore find that IBEX and BIEL formed a single control group for purposes of the Section 4(a)(1) analysis.

Because IBEX was an affiliate of BIEL, any entity selling securities on behalf of IBEX was an underwriter participating in a distribution. Thus, no participant in the distribution chain—including IBEX—may claim the Section 4(a)(1) exemption. *Kern*, 425 F.3d at 152 ("[I]f *any* person involved in a transaction is a statutory underwriter, then none of the persons involved may claim exemption under Section 4[(a)](1).") (emphasis added).[74] Here, when IBEX sold BIEL notes to the Liquidating Entities, the Liquidating Entities acquired those securities with a view to immediate distribution to the public. No exemption is available.

(d) IBEX Cannot Rely on Section 4(a)(1) Because It Participated in a Public Distribution

In the alternative, IBEX "consciously engaged in steps necessary to the consummation of the public distribution of shares by the issuer [BIEL] and ... cannot invoke the exemption provided by Section 4[(a)](1)." *SEC v. Culpepper*, 270 F.2d 241,247 (2d Cir. 1959). Section 4(a)(1) "does not in terms or by fair implication protect those who are engaged in steps necessary to the distribution of security issues." *Chinese Consol.*, 120 F.2d at 741. Here, IBEX's participation in the chain of distribution was a vital part of the steps necessary to the distribution of BIEL's shares to the public market, *SEC v. Int'l Chem Dev. Corp.*, 469 F.2d 20, 28 (10th Cir. 1972), and IBEX cannot rely on Section 4(a)(1).

---

[73] Factual Background, § I, *supra*; *see also* Initial Dec. at 14-18, 27-31 (Findings of Fact), 45-46 (detailing facts establishing control).

[74] *See also United States v. Wolfson*, 405 F.2d 779, 782 (2d Cir. 1968) (holding that where control persons sold securities through brokers, control persons could not claim exemption because brokers were underwriters under Section 2(a)(11)).

Respondents do not dispute that IBEX sold to numerous third parties that sold their shares to the public market.[75] Indeed, Kelly Whelan expressly acknowledged that Redwood was in the business of buying debt, converting it, and selling to the market.[76] Mr. Park's expert report details the sales into the market by the Liquidating Entities that purchased convertible notes from IBEX.[77] None of these sales could have occurred but for IBEX's participation in the transactions. The Section 4(a)(1) exemption is unavailable to IBEX. *Culpepper*, 270 F.2d at 246 (exemption unavailable to "one who 'participate[d] or ha[d] a direct or indirect participation in [the] undertaking.") (quoting Section 4(a)(1)); *Chinese Consol.*, 120 F.2d at 740 (holding that defendant violated Section 5 by soliciting offers to buy securities "for value" and thereby participated in the distribution).

(e) IBEX's Sales are Not Within Rule 144's Safe Harbor

IBEX likewise cannot rely on Rule 144's safe harbor, because it was an affiliate at the time of the sales, and did not satisfy Rule 144's stringent criteria for sales by affiliates. 17 C.F.R. § 230.144(a)-(h); *Platforms Wireless*, 617 F.3d at 1090. Among other problems, IBEX did not consistently sell through registered broker-dealers, never filed a single Form 144 with the Commission providing notice of its intent to sell shares of BIEL, and grossly exceeded Rule 144's volume limitations for sales by affiliates of an issuer.[78]

Respondents argue, however, that IBEX nevertheless should be entitled to rely on Rule 144's safe harbor, because "IBEX held all securities sold for a period exceeding one year and for

---

[75] RX 1A; DX 1, Ex. B.

[76] Tr. 491:6-492:9.

[77] DX 137 ¶¶ 43, 48.

[78] Tr. 423:19-424:1, 430:14-25, 1058:22-1059:14; DX 1, Ex. B; DX 137 ¶¶ 19, 28, 52-53.

an average period of approximately 30 months."[79] Because IBEX was an affiliate that sold restricted securities to the public market through third-party underwriters without complying with Rule 144's requirements for affiliate sales, IBEX's holding periods are irrelevant.[80]

Moreover, even if the Commission reaches the question of holding periods, Respondents' argument that IBEX satisfied them is unavailing. First, their holding period argument elevates form over substance. Although it often might be the case that if a purchaser holds its stock for an extended period of time before selling, it is suggestive of ordinary trading, not distribution, that falls apart where the purchaser is an essential part of the issuer's chain of distribution to the market. "A distribution commences when the issuer begins making offers and does not end until the securities come to rest with the public." *Schoemann*, 2009 WL 3413043, at *11. Here, IBEX acted as a conduit for the delivery of BIEL shares to the market, and the securities at issue did not "come to rest" until they landed in the hands of the investing public, and IBEX round-tripped the majority of the proceeds back to BIEL. Differently put, IBEX was selling for the issuer, BIEL, and when IBEX made "investments" in BIEL, it did so with a view toward receiving convertible notes and selling those notes and converted shares to the public.[81] Under these facts and circumstances, to find that IBEX is entitled to Rule 144's safe harbor would eviscerate the intent of the Securities Act. *See, e.g.*, *Platforms Wireless*, 617 F.3d at 1085 ("We are concerned

---

[79] Resp. Br. at 19.

[80] *See e.g., SEC v. Olins*, No. C-07-6423 MMC, 2010 WL 900518, *1 (N.D. Cal. 2010) (rejecting defendants' "spectrum of conduct" argument for Rule 144, in which not every element needs to be met to be entitled to safe harbor).

[81] Tr. 171:4-10 (Park: "They were liquidating securities here when they needed to raise funds for the issuer. So again, looking at it again, I can't stress enough that the facts and circumstances surround an underwriter, whether they—and how they were acting as an underwriter, including selling for an issuer.").

with whether *in substance* [Defendant] issued its securities to the public without a registration or exemption.") (emphasis added); *Geiger*, 363 F.3d at 487; *Ackerberg*, 892 F.2d at 1328.

Second, Respondents' holding period speaks only to *one* of the underwriter definitions—whether IBEX purchased securities from BIEL "with a view to" distribution—where lengthy holding periods are suggestive of purchasing with investment intent. But Respondents' argument ignores the fact that liability *also* arises under Section 5 if IBEX "sold for the issuer," "participated in transactions with underwriters," or was an indispensable participant in the issuer's chain of distribution. Under each of these tests, IBEX's holding periods are irrelevant.

Third, Respondents argue that their alleged holding periods "are based on the date that IBEX made such loans and became at risk for such investment."[82] But even assuming, *arguendo*, this is the correct start date for calculation of the holding period, it is far from clear when IBEX "became at risk." In calculating IBEX's holding periods, Respondents' expert, Brian Flood, relied on a back-dated convertible promissory note and unauthenticated records of Kelly Whelan's tax accountant.[83] Kelly Whelan's documentation of loans to BIEL and notes received in exchange is dubious, and, because of her reinvestment in BIEL, Kelly Whelan immediately replaced the vast majority of notes sold with *new* notes, meaning that her "investment risk" was nominal.

Fourth, Respondents mischaracterize the Division's position, arguing that "[t]he 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."[84] The Division's position is that holding periods are *irrelevant*, because

---

[82] Resp. Br. at 20.

[83] Tr. 405:5-10, 470:21-471:12, 1065:20-1066:24, 1148:5-1149:8; DX 43-44.

[84] Resp. Br. at 20.

IBEX's sales of BIEL securities to third parties were inextricably conjoined with IBEX's round-tripping of the sale proceeds back to BIEL. If the Commission finds, as the evidence supports, that Respondents engaged in a multiyear plan to fund BIEL's operations through distributions to the public in unregistered transactions, then Rule 144's safe harbor is unavailable to IBEX.

3. Section 4(a)(7) Does Not Provide an Exemption for IBEX's Sales

The Commission should reject Respondents' argument that "newly enacted Section 4(a)(7) provides an exemption" for IBEX's sales of BIEL securities.[85] Section 4(a)(7) took effect on December 4, 2015, months after the end of the Relevant Period.[86] Moreover, even if Section 4(a)(7) could apply, Respondents did not satisfy its requirements, most notably, by failing to disclose that all of the transactions at issue were by control persons, *i.e.*, affiliates. 15 U.S.C. § 77d(a)(7), (d)(3)(K).

4. St. John's Sales are Not Exempt Under Section 4(a)(1), Nor Within Rule 144's Safe Harbor

Respondents' argument that St. John's Sales of BIEL stock were exempt under Section 4(a)(1),[87] ignores a crucial, and undisputed, fact—St. John's is majority-owned by Andrew Whelan's wife, Patricia Whelan.[88] Thus, St. John's is, by definition, an affiliate of the issuer, BIEL. 17 C.F.R. § 230.144(a)(2)(i) (defining affiliates to include relatives or spouses within the same household). As an affiliate of the issuer, St. John's held restricted securities and could not resell those securities into the market in reliance on the Section 4(a)(1) exemption without

---

[85] Resp. Br. at 21.

[86] *Compare* DX 1, Ex. B (stipulating that final IBEX sale at issue occurred on February 6, 2015), *with* Pub. L. No. 114-94 (enacted Dec. 4, 2015). Since Section 4(a)(7) did not exist during the Relevant Period, IBEX cannot rely on this exemption.

[87] Resp. Br. at 21-22.

[88] Tr. 502-03; DX 1 ¶ 3; DX 120 at 19.

demonstrating compliance with Rule 144's requirements for affiliate sales of restricted securities. St. John's did not do so.

Rule 144 imposes stringent requirements on affiliates of issuers that deal in an issuer's stock, to prevent precisely the type of misconduct that occurred here. The safe harbor "is precisely limited to its terms." *Kern*, 425 F.3d at 147. As the Ninth Circuit stated in *Platforms Wireless*, "[s]trictures placed on transactions involving 'affiliates' prevent those possessing superior access to information and the power to compel registration from abusing their privileged position to foist unregistered securities on an unwitting public." 617 F.3d at 1090. Here, as in *Platforms Wireless*, St. John's relationship with BIEL (and Patricia Whelan's relationship with Andrew Whelan), put St. John's in the position to sell large quantities of unregistered BIEL stock through St. John's.

Among its other requirements, Rule 144 requires that the seller disclose its affiliate sales through the filing of a Form 144. 17 C.F.R. § 230.144(h). St. John's made 17 sales to the public of shares of BIEL stock between March 2013 and March 2014, but failed to file any Forms 144 at the time of these sales,[89] as Mr. Whelan admitted.[90] Moreover, even the late-filed Form 144 that St. John's and BIEL submitted in connection with summary disposition omits four of St. John's sales and 20 million shares of BIEL.[91] St. John's has failed to carry its burden to establish its entitlement to the Rule 144 safe harbor.[92]

---

[89] DX 1 ¶ 35; DX 122.

[90] Tr. 905:8-11.

[91] RX 176.

[92] Because St. John's failed to meet Rule 144's requirement for timely submission of Forms 144, Respondents' arguments based on its alleged holding periods are irrelevant. Resp. Br. at 21-22.

5. "Imperfect Compliance" with Rule 144 is Not Enough

Respondents' argument that "a person who falls short of Rule 144 may nevertheless be entitled to the exemption of Section 4(a)(1)"[93] is nonsensical. IBEX and St. John's are affiliates and part of BIEL's control group that sold in underwriter transactions. Thus, having failed to establish their entitlement to an exemption under Section 4(a)(1) and having failed to establish that they met all of the requirements for the Rule 144 safe harbor, they cannot fall back on so-called "imperfect compliance" or "honest mistake."[94] Respondents cite no case law in support of their position, and the Division is aware of none.

III. BIEL WAS REQUIRED TO COMPLY WITH SECTION 13 OF THE EXCHANGE ACT AND RELATED RULES AND BIEL AND ANDREW WHELAN VIOLATED THAT SECTION

The Initial Decision correctly held that BIEL violated Exchange Act Section 13, BIEL and Andrew Whelan violated the rules thereunder, and Andrew Whelan caused the majority of BIEL's violations.[95] On appeal, Respondents' sole challenge to these findings is that "Section 13 violations cannot lie against BioElectronics, because BioElectronics withdrew its registration under Section 12(g) of the Securities Act."[96] Respondents' argument is unavailing. The Commission should enter an order substantially similar to the ALJ's.

BIEL filed a Form 8A-12g registration under the Exchange Act on February 12, 2006.[97] Having done so, BIEL had 60 days to withdraw the registration before it became effective. 15 U.S.C. § 78*l*(g)(1). Once its registration became effective, BIEL—from that point forward—had a class of securities registered under Section 12(g) of the Exchange Act. As Commission staff

---

[93] Resp. Br. at 23.

[94] Resp. Br. at 23.

[95] Initial Dec. at 31-38.

[96] Resp. Br. at 42-44.

[97] RX 188; RX 190 at 2203.

has explained in external guidance to registrants (Compliance and Disclosure Interpretations (CDI)), at Question 116.06:

> A registration statement on Form 10, Form 20-F, or Form 8-A to register a class of equity securities under Section 12(g) becomes automatically effective 60 days after the date of filing .... The only way to delay or prevent effectiveness is to withdraw the Section 12(g) registration statement before the effective date.[98]

As Commission staff has explained: "Once the Section 12(g) registration statement becomes effective, the company is subject to Exchange Act reporting obligations, including the filing of periodic and current reports."[99] BIEL's reporting status continued until BIEL filed a Form 15 in April 2011, voluntarily deregistering its class of securities.[100]

BIEL's argument that it was not required to comply with Section 13's reporting requirements mistakenly conflates the filing of a SB-2 registration statement seeking to register a securities offering under the Securities Act, with the registration of a class of securities under the Exchange Act.[101] These are completely different regulatory provisions. A company can file any number of registration statements under the Securities Act, without having registered a class of securities under the Exchange Act. Once an issuer has registered a class of securities under Exchange Act Section 12(g) (whether by filing a Form 8-A, Form 10, or Form 20-F), and once that registration statement becomes effective, the registration bell cannot be unrung, except by filing a Form 15 under the Exchange Act, which BIEL did not accomplish until April 2011.[102]

---

[98] *Available at* https://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm.

[99] *Id.*; *see also SEC v. Kalvex, Inc.*, 425 F. Supp. 310, 316 (S.D.N.Y. 1975); *Russell Ponce*, 54 S.E.C. 804, 812 n.23 (2000), *pet. denied*, 345 F.3d 722 (9th Cir. 2003).

[100] RX 208.

[101] Resp. Br. at 42-44.

[102] Nor is it any surprise to BIEL that withdrawing its SB-2 registration statement did not eliminate its obligation to comply with Section 13. In a December 9, 2010 letter, the Division of

BIEL's argument that the sixty-day automatic registration in Section 12(g) only applies to "the mandatory registration statements registering 'such security,'"[103] is likewise meritless. As the Division of Corporation Finance explained to BIEL,[104] the Form 8-A filed by BIEL automatically became effective 60 days after filing in 2006, *regardless* of whether BIEL was a voluntary or a mandatory filer. The statute, Form 8-A, and Commission comments and guidance do not draw any distinction between whether a registrant is a voluntary or mandatory filer. To the contrary, the Commission emphasized in the adopting release to Securities Act Rule 155:

> If the Form 8-A is filed to register the class of securities under Section 12(g), that section provides that registration will become effective automatically 60 days after filing with the Commission.[105]

Corporation Finance informed BIEL that "[y]our response to prior comment 15 regarding voluntary filers appears to be irrelevant because you have a class of securities registered under Section 12(g) of the Exchange Act and therefore have reporting obligations under Section 13 of the Exchange Act; therefore we reissue the comment." DX 83 at 65, ¶ 26; DX 14 at 23.

[103] Resp. Br. at 43.

[104] DX 83 at 65, 114, 123, 208.

[105] SEC Release No. 33-7943, *available at* https://www.sec.gov/rules/final/33-7943.htm. This adopting release is entitled to *Chevron* deference as part of the agency's rule-making function. *See Gryl ex rel. Shire Pharms. Group PLC v. Shire Pharms. Group PLC*, 298 F.3d 136, 145 n.8 (2d Cir. 2002) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).)).

Exchange Act C&DI Question 116.04 mirrors the adopting release:

> **Question:** Can a company that files a Section 12(g) registration statement on Form 10, Form 20-F, or Form 8-A delay the effectiveness of the registration statement to a date after the 60-day period specified in Section 12(g)?
>
> **Answer:** No. A registration statement on Form 10, Form 20-F, or Form 8-A to register a class of equity securities under Section 12(g) becomes automatically effective 60 days after the date of filing. A company cannot seek to delay the automatic effectiveness of such registration statement. The only way to delay or prevent effectiveness is to withdraw the Section 12(g) registration statement before the effective date.

The Division of Corporation Finance cited this exact Commission statement in its June 22, 2010 letter to BIEL.[106]

Treating voluntary and mandatory filers consistently is in accord with other Commission staff guidance stating that Section 13 compliance is required whether an issuer was a voluntary registrant or mandatory registrant under Section 12(g):

> **Question:** A company that is not required to register a class of equity securities under Section 12(b) or Section 12(g) nevertheless voluntarily registers the class under Section 12(g). Since the registration of the securities under Section 12(g) is voluntary, can the company later stop filing periodic and current reports without first deregistering the securities under the Exchange Act?
>
> **Answer:** No. Once a company registers a class of equity securities under Section 12(g), it is required to file periodic and current reports, even if the registration of the securities under Section 12(g) is voluntary. The only method provided by the Exchange Act and rules for such a company to properly cease filing periodic and current reports is to deregister the class of securities under the Exchange Act.[107]

BIEL thus was required to comply with the registration, books and records, and internal control provisions mandated by Section 13. Having voluntarily opted to become a reporting company, and having taken full advantage of the benefits of such status—able to raise millions in capital and publicize its prospects and accomplishments to the world through public filings—BIEL may not shirk the serious responsibilities incumbent upon a reporting company, as Section 13 requires.

IV. THE COMMISSION SHOULD ORDER DISGORGEMENT, PENALTIES, AND OTHER EQUITABLE RELIEF AGAINST RESPONDENTS

In determining whether sanctions should be imposed in the public interest, the Commission considers: the egregiousness of the actions; the isolated or recurrent nature of the

---

[106] DX 83 at 208.

[107] Exchange Act C&DI Question 116.02.

infractions; the degree of scienter involved; the sincerity of Respondents' assurances against future violation; Respondents' recognition of the wrongful nature of their conduct; and the likelihood that Respondents' occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Flannery and Hopkins*, AP File No. 3-14081, 2014 SEC LEXIS 4981, *138 (Dec. 15, 2014). The Commission also considers the extent to which a particular sanction will have a deterrent effect. *Schield Mgmt. Co.*, AP File No. 3-11762, 58 S.E.C. 1197, 1217 (Jan. 31, 2006); *Flannery*, 2014 SEC LEXIS 4981, at *151.

Here, Respondents' misconduct was egregious, involved willfulness, and occurred for *at least* five years (and very likely both precedes that date and continues to present). Neither Andrew nor Kelly Whelan offered any assurances against future violations or acknowledged the wrongful nature of their conduct. To the contrary, Respondents do not believe that there is anything improper about the way in which BIEL has systematically financed its operations through distributions to the public market in unregistered transactions or BIEL's improper revenue recognition.[108]

For their egregious violations of the securities laws, the ALJ's Initial Decision orders Respondents to cease and desist from committing and causing any violations and disgorge a total of approximately $1,820,000 in ill-gotten gains, plus prejudgment interest. The Initial Decision also permanently bars Andrew and Kelly Whelan from participating in offerings of penny stock, and imposes civil penalties of $650,000 against St. John's and $130,000 against Andrew

[108] *See* Initial Dec. at 50 ("BIEL's poor financial condition, its need for outside funding, and the occupations of A. Whelan and K. Whelan all suggest not just a risk, but a strong likelihood of future violations in the absence of remedial sanctions.").

Whelan.[109] The ALJ's conclusions were amply supported by the evidence, and the Division respectfully suggests that the Commission should reach a similar result on all grounds.

A. The Evidence Supports the Disgorgement Imposed by the Initial Decision

Exchange Act Section 21C authorizes the Commission to order disgorgement, plus reasonable prejudgment interest. "[D]isgorgement need only be a reasonable approximation of the profits causally connected to the violation," and "the well-established principle is that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create the uncertainty." *Zacharias*, 569 F.3d at 473. With respect to Section 5 violations, the total "proceeds obtained from the illegal sale of ... unregistered securities" constitutes a fairly standard measure of profit from the illegal trading. *Platforms Wireless*, 617 F.3d at 1096-97; *SEC v. StratoComm Corp.*, 89 F. Supp. 2d 357, 367-70 (N.D.N.Y. 2015). Once the Division establishes a fair approximation of a disgorgement amount, the burden shifts to Respondents to show that the disgorgement amount is not a reasonable approximation of their total gain from the transactions. *SEC v. Video Without Boundaries, Inc.*, No. 08-cv-61517, 2010 WL 5790684, at *5 (S.D. Fla. Dec. 8, 2010); *see also First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989).

The ALJ determined that the appropriate measure of disgorgement here is the difference between Respondents' total proceeds from sales of BIEL notes and shares during the Relevant Period and the acquisition costs of those shares. Based on this methodology, the ALJ held that IBEX's profit was $1,580,593 (proceeds of $4,296,266, less acquisition costs of $2,715,673), and that St. John's profit was $240,293.49 (proceeds of $397,196.70, less acquisition costs of

[109] Initial Dec. at 1.

$156,903.49), all of which proceeds were reinvested in BIEL during the Relevant Period.[110] The ALJ's disgorgement finding is a conservative application of the governing legal principles. On appeal, however, the Commission could find that the correct measure of disgorgement is not proceeds less acquisition cost, but rather total proceeds. *E.g.*, *Platforms Wireless*, 617 F.3d at 1096-97. This is because both IBEX and St. John's *funded* their acquisitions of BIEL notes and stock with ill-gotten gains, using funds received as a result of their Section 5 violations to make new "investments" in BIEL. Under this methodology, the Commission can and should order Respondents to make full disgorgement of $4,643,462.70, plus prejudgment interest.

Respondents argue, however, that disgorgement should be even *lower* than the ALJ's Initial Decision, asserting that disgorgement should be: (1) limited to transactions completed within Section 2462's 5-year statute of limitations, (2) reduced by any capital gains taxes paid and the amount of interest that accrued on the BIEL notes that were sold, and (3) limited to the period of the so-called "scheme."[111] Each of Respondents' arguments fails.

First, in a decision Respondents ignore, the Commission has held unambiguously that Section 2462's limitations provisions do not apply to disgorgement authorized under the Remedies Act. *In re Larry P. Grossman,* Release No. 10227, 2016 WL 5571616, at *16 (Sept. 30, 2016) ("Exercising our authority to interpret the term 'disgorgement'... in the Remedies Act, we conclude that disgorgement is an equitable *in personam* remedy distinct from and not equivalent to what courts have held to be the punitive *in rem* sanction of 'forfeiture' to which Section 2462 applies."). The Commission's determination that disgorgement is an "equitable and non-punitive remedy" is supported by the "clear weight of authority." *Id.* *14 & n.138 (citing cases). Further, the Commission expressly disagreed with, and declined to follow, the

[110] Initial Dec. at 55-56.

[111] Resp. Br. at 24-28.

Eleventh Circuit's decision in *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), on which Respondents exclusively rely.[112] Respondents have offered no reason for the Commission to reconsider *Grossman.*

Second, Respondents' assertion that disgorgement should be reduced by the amount of any capital gains taxes Respondents paid on the profits of their illegal sales of BIEL securities likewise contradicts settled Commission precedent. As the Commission has observed, "it is well-settled that disgorgement will not be reduced because the wrongdoer has paid an ordinary tax liability."[113]

Finally, to the extent Respondents argue that the Commission should limit disgorgement to transactions that occurred in 2013 and 2014, under a "scheme to evade" theory of liability, that argument is misplaced.[114] The Division's Section 5 claim does not rest on a scheme to evade; there are multiple alternative grounds for finding that Respondents repeatedly violated Section 5 during the Relevant Period, each of which warrants disgorgement. Second, although the Division's expert, Mr. Park, testified that Respondents' violations *escalated* in 2013 and 2014, he opined that the plan included all purchases and sales during the Relevant Period.[115]

---

[112] *Grossman*, 2016 WL 5571616 at*18 ("Based on our interpretation, we believe that the decisions in *Kokesh* and *Riordan* correctly held that disgorgement is not a "forfeiture' covered by Section 2462 and respectfully disagree with *Graham*'s contrary conclusion and reasoning."). The Supreme Court will consider this issue this term. *Kokesh v. SEC*, No. 16-529 (U.S. Jan. 13, 2017).

[113] *Grossman*, 2016 WL 5571616 at *23 ("Respondent must seek from the IRS, not us, any relief from the taxes he says he paid on the ill-gotten gains that we are ordering disgorged.").

[114] Resp. Br. at 24.

[115] Tr. at 137:14 (Park: "Based on my analysis, [the scheme] started in January 2010").

The Commission should order disgorgement to be paid joint and severally[116] by Respondents of $4,643,462.70, or—at a minimum—$1,820,000, plus prejudgment interest.

B. The Evidence Supports the Third-Tier Civil Penalties Imposed by the ALJ

In considering whether to impose civil penalties, the factors to consider include: (1) whether the violations involved fraud, deceit, manipulation, or reckless disregard of a regulatory requirement; (2) the harm caused to others; (3) the extent to which any person was unjustly enriched; (4) prior violations by Respondents; (5) the need for deterrence; and (6) such other matters as justice may require. 15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii); *StratoComm*, 89 F. Supp. 3d at 371; *SEC v. One or More Unknown Traders*, 825 F. Supp. 2d 26, 33-34 (D.D.C. 2010). Based on Respondents' "reckless disregard of regulatory requirements and substantial pecuniary gain," the ALJ determined that third-tier penalties would be appropriate against all Respondents.[117] After assessing Respondents' ability to pay, however (*see* Section IV.C, *infra*), the ALJ declined to order civil penalties against BIEL, IBEX, and Kelly Whelan, and instead imposed a single third-tier penalty each against Andrew Whelan and St. John's.[118] The ALJ's determination that Respondents' conduct warrants third-tier penalties is amply supported by the record. Indeed, the record supports a finding of *dozens* of separate violations by each of the

---

[116] Contrary to Respondents' assertion (Resp. Br. at 34-35), joint and several liability in securities cases is appropriate where, as here, "two or more individuals or entities collaborate or have close relationships in engaging in the illegal conduct." *SEC v. Whittemore*, 659 F.3d 1, 9 (D.C. Cir. 2011). After a showing of by the Division of such collaboration and closeness, the burden shifts to Respondents to show why liability should not be joint and several. Initial Dec. at 56. Respondents make no showing why or how the ill-gotten gains they collectively received should be apportioned.

[117] Initial Dec. at 58. Maximum penalties under Securities Act Section 20(d) and Exchange Act Section 21(d)(3) may be for an amount not to exceed either the greater of $650,000 per violation for an entity and $130,000 for an individual. Adjustment of Civil Money Penalties—2005, 17 C.F.R. § 201.1004 (2009) & Table IV.

[118] Initial Dec. at 59.

Respondents.[119] Moreover, the ALJ already reduced to zero several Respondents' civil penalties due to inability to pay. Thus, the ALJ's civil penalty award already is substantially less than the amount the Division asked for and substantially less than the amount the ALJ could have imposed under the statute.

Thus, the ALJ's civil penalty award is already appropriately conservative and should not be further reduced.

Respondents acted with reckless disregard for the regulatory requirements of Section 5, distributed a massive amount of BIEL shares to the market in unregistered transactions, and profited handsomely therefrom. Each of Respondents acted deliberately to further their Section 5 violations. Among other key facts: (i) Andrew Whelan and BIEL sent dozens of letters to transfer agents and purchasers of BIEL shares, incorrectly assuring them that IBEX was not an affiliate and met the technical requirements of Rule 144; (ii) St. John's and Andrew Whelan engaged in self-dealing in order to parlay Andrew Whelan's salary into profit at the expense of the investing public; (iii) Kelly Whelan and IBEX "became very liquid" by selling BIEL notes and stock, and (iv) Kelly Whelan and IBEX deliberately worked around a purported DTC chill on distributions of BIEL stock to ensure BIEL shares still made their way to the investing public. When Respondents decided that the legal approach of complying with Commission rules and registering BIEL securities was too expensive, they intentionally worked together to fund BIEL's operations through sales of securities in unregistered transactions.

The sheer volume of BIEL securities making their way into the hands of investors in unregistered transactions also evidences Respondents' callous disregard for the investing public and the securities laws. During the Relevant Period, the number of shares of BIEL in the market

---

[119] DX 1.

sky-rocketed—from 750 million to 7 billion. Indeed, although the OIP did not charge Respondents with fraud, there is substantial evidence that Respondents deliberately and recklessly disregarded Section 5's requirements, and that their misconduct resulted in "substantial losses or created a significant risk of losses to other persons" (*e.g.*, innocent investors who purchased BIEL's stock in 2009, only to see their share value plummet during the Relevant Period as the direct result of Respondents' distributions of BIEL securities in unregistered transactions).

Respondents also experienced a "substantial pecuniary gain" from their misconduct. During the Relevant Period, Andrew Whelan and BIEL received from IBEX $4.2MM in loans that were the proceeds of IBEX's distributions of BIEL securities. IBEX and Kelly Whelan went from a struggling company, founded on money from Kelly Whelan's 401K and credit-card advances, to a "very liquid" state. Respondents are repeat offenders, having violated Section 5 through *dozens* of transactions and also violated Section 13 and related rules in BIEL's one and only Form 10-K filing.

Under these circumstances, the evidence warrants the imposition of maximum civil penalties against all Respondents to deter them from future violations of the securities laws and in the interest of justice.

C. Respondents Have Not Established Inability to Pay

Under the Securities Act and the Exchange Act, the Commission, in its discretion, may consider a respondent's "ability to pay" in assessing whether imposition of a sanction for violating the securities laws is in the public interest. 15 U.S.C. §§ 77h-1(g)(3), 78u-2(d); Commission Rule of Practice 630 [17 C.F.R. §240.630]. Although ability to pay is one factor for the Commission to consider, however, is not dispositive. *Id.*

After full consideration of Respondents' financial information, the ALJ concluded that Respondents, jointly and severally, have the ability to pay the full amount of disgorgement ordered. The ALJ also held that Andrew Whelan and St. John's, whose principal, Patricia Whelan, is Andrew Whelan's wife, had the financial wherewithal to pay third-tier civil penalties.[120] The ALJ declined, however, to impose civil penalties against either Kelly Whelan or IBEX, finding that—aside from BIEL notes, "which BIEL cannot pay and which are likely so illiquid as to be unmarketable"—neither owns any substantial assets.[121] The Division respectfully submits that the ALJ's assessment of these Respondents' financial wherewithal to pay disgorgement and third-tier civil penalties is reasonable, and need not be revisited in the exercise of the Commission's discretion.

BIEL's assertion that the disgorgement award, coupled with other sanctions imposed by the ALJ, "threatens the survival of BioElectronics" rings hollow, however.[122] BIEL, in substance, argues that if the Commission ends its ability to fund its day-to-day operations through distributions of its securities in unregistered transactions, then it may go out of business. But it is well-past time for BIEL to either prove that it can get legitimate arms'-length financing, or file a registration statement and provide investors with the transparency as to BIEL's business to which they are entitled. Moreover, the evidence as to the impact that a substantial monetary sanction would have on BIEL is unclear. On the one hand, Respondents maintain that BIEL is not financially dependent on IBEX, has or could attract other lenders, has raised $33 million over

---

[120] Initial Dec. at 57-58. The ALJ's decision was based, at least in part, on Andrew and Patricia Whelan's deficient financial disclosures. *Id.* at 58. Although Andrew and Patricia Whelan have submitted additional financial information in connection with this appeal, these belated submissions do not appear to demonstrate an inability to pay.

[121] Initial Dec. at 57.

[122] Resp. Br. at 30.

the lifetime of the Company, and is "generating over $2 million annually."[123] On the other hand, Respondents argue that any payment by BIEL would be punitive and put the Company out of business. Further, even if Respondents were correct, the collateral consequences to BIEL's bona fide investors of the Commission's sanctions are not the determining factor in evaluating whether sanctions in the public interest.[124] Thus, the Commission should, in its discretion, find that inability to pay does not relieve Respondents of their duty to pay full disgorgement and third-tier civil penalties.

V. LIKE THE ALJ, THE COMMISSION SHOULD REJECT RESPONDENTS' ARGUMENTS REGARDING ALLEGED RELIANCE ON COUNSEL

Respondents contend that the ALJ improperly "struck the reliance on counsel defense" and refused to permit testimony on Respondents' alleged reliance.[125] Respondents' arguments mischaracterize the ALJ's decision and ignore governing law. The Commission should neither solicit additional evidence concerning reliance on counsel, nor give weight to such evidence already in the record.

First, the ALJ correctly held that Respondents are precluded from raising an affirmative

---

[123] Tr. 858:12-14 (A. Whelan: "[T]he valuation of this company is a lot more than I think at the—than the 33 million."), 537:12-18, 857:20-22, 888:18-21.

[124] *E.g.*, *Nature's Sunshine Prods., Inc.*, Release No. 59268, 2009 WL 137145, at *8 (Jan. 21, 2009) (discussing policy objectives of reporting requirements— "providing the public, particularly current and prospective shareholders, with material, timely, and accurate information about an issuer's business."). *Cf. Absolute Potential, Inc.*, Release No. 71866, 2014 WL 10762214 (Apr. 4, 2014) ("In evaluating what is necessary or appropriate to protect investors, regard must be had not only for existing stockholders of the issuer, but also for potential investors. All investors in the marketplace, both current and prospective, were deprived of timely reports that accurately reflect the company's financial situation.") (internal quotation marks and citations omitted); *Gateway Int'l Holdings, Inc.*, Release No. 53907, 2006 WL 1506286, at *7 (May 31, 2006) ("[E]xisting shareholders may be harmed by an issuer's failure to have its financial statements audited. For example, in the absence of an audit, an existing shareholder could be forced to determine whether to sell his stock based on financial statements that give an inaccurate view of the issuer's financial situation.").

[125] Resp. Br. at 37-39.

reliance on counsel defense.[126] The Section 5 and Section 13 claims charged in the OIP are not scienter-based. Thus, reliance on counsel, even if proven by a preponderance of the evidence, is not a defense.[127]

Second, the ALJ correctly determined that Respondents failed to give proper notice and opportunity for cross examination as to their alleged reliance on counsel.[128] Respondents did not produce any documents, nor identify any communications between Andrew Whelan and counsel to establish that Mr. Whelan or BIEL: (1) made a complete disclosure to counsel; (2) sought advice on the legality of the intended conduct; (3) received advice that the intended conduct was legal; and (4) relied in good faith on counsel's advice.[129] Respondents also gave no prior notice to the ALJ or the Division that Andrew Whelan would testify concerning his communications with counsel, and did not call their attorneys to testify to allow for cross examination.[130] And, perhaps most troublingly, Respondents did not waive their attorney-client privilege.[131] Thus, even if the Division had independently subpoenaed Respondents' counsel, the Division would

---

[126] Initial Dec. at 49 (citing *Schoemann,* 2009 WL 3413043, *12); Tr. 919:4-6.

[127] *SEC v. CMKM Diamonds, Inc.,* 729 F.3d 1248, 1257, n.6 (9th Cir. 2013) ("[W]e reaffirm that scienter is not an element of Section 5 liability.... [N]either a good faith belief that the offers or sales in question were legal, nor reliance on the advice of counsel, provides a complete defense to a charge of violating Section 5 of the Securities Act.") (citation omitted); *SEC v. e-Smart Technologies, Inc.,* 82 F. Supp. 3d 97, 106 (D.D.C. 2015) (reliance on attorney's advice irrelevant for Section 13(d) violation "because scienter was not a required element") (citation omitted).

[128] Tr. 919:18-19 (ALJ: "I just think you're too little, too late, on this....").

[129] *IMS/CPAs & Assocs.*, Release No. 8031, Admin. File No. 3-9042, 2001 WL 1359521,*11 (Nov. 5, 2001) ("Respondents do not contend that World's attorney reviewed any of the documents the accuracy of which is challenged here, much less that they requested, received, or relied on counsel's advice concerning the accuracy of their representations in those documents.").

[130] Tr. 25:1-4, 915:20-922:25.

[131] *See* RX 195H (Respondents asserting attorney-client privilege in correspondence with Division).

not have been able to elicit pertinent information about the nature of their communications with BIEL.[132]

Finally, Respondents have not shown any harm or prejudice flowing from the ALJ's evidentiary rulings. The attorney opinion letters to which Respondents cite on appeal are in evidence.[133] Indeed, the ALJ analyzed them, and found that the letters, *"far from rebutting scienter, in some respects actually supports it,"* because the letters were so riddled with factual errors:

> This is because Kuhne, who provided a large number of opinion letters, routinely advanced conclusions so unsupported and unbelievable that Respondents could not have relied on them in good faith, such as that: the Revolver was "executed and delivered" on January 1, 2005; BIEL had "audited financial records" for years when it did not; and all the shares St. John's' sold were "freely tradable and salable as a Brokers' Transaction," even though St. John's had identified no purchaser and was unable even to open a brokerage account at the time Kuhne rendered his opinion.[134]

Respondents have not explained how they could reasonably have relied on such factually erroneous opinion letters when deciding to distribute billions of shares of BIEL stock to the market in unregistered transactions.

As for the purported advice from Kirkpatrick and Lockhart ("K&L") concerning BIEL's withdrawal of its Form SB-2 registration statements, again, Respondents have not linked any alleged advice from counsel to their violations of the Exchange Act.[135] Indeed, Respondents

---

[132] Tr. 916:2-7 ("And then we have the K&L Gates, and unless there's been a waiver of privilege as to what happened with K&L Gates or Kirkpatrick & Lockhart, then you're really kind of sandbagging the Division at this point because they haven't had a chance to go and inquire.").

[133] Resp. Br. at 37-38 (citing Respondents' exhibits).

[134] Initial Dec. at 53.

[135] Initial Dec. at 51.

have not contended that K&L advised BIEL that it not need comply with the reporting requirements of Section 13 (advice that would have been squarely wrong and in contrast to guidance given to BIEL by the Division of Corporation Finance);[136] that it need not keep accurate books and records; or that it had free rein to misstate sales revenue or issue false and misleading financial statements, without legal consequence or repercussion. Absent any link between counsel's alleged advice and the violative conduct at issue, Respondents' claims of error fail.[137]

VI. THE ALJ DID NOT ERR IN LIMITING CHARACTER EVIDENCE

Respondents next argue that the ALJ erroneously refused to consider character testimony offered by Messrs. Flood and Staelin on behalf of Mr. Whelan.[138] Once again, Respondents' arguments are legally and factually untenable. The ALJ did not erroneously limit character evidence, and in its *de novo* review, the Commission should neither solicit additional character evidence, nor give weight to such testimony already in the record.

Respondents fail to connect the evidence they claim was wrongfully excluded to the holdings in the Initial Decision. As the ALJ correctly opined, the Commission's determination of civil penalties is based on the *Steadman* factors[139]— in particular, the egregious and repetitive nature of Respondents' misconduct, and the substantial harm to investors—*not* on the flaws in Mr. Whelan's character, if any.[140] Respondents have cited to no authority that character

---

[136] DX 83 at 65, DX 14 at 23.

[137] *IMS/CPAs,* 2001 WL 1359521,*11.

[138] Resp. Br. at 39-41.

[139] "When considering whether an administrative sanction serves the public interest, the Commission analyzes the factors identified in *Steadman* ...." Initial Dec. at 49-50.

[140] Initial Dec. at 49-51.

evidence would be probative to mitigate sanctions in this case, rather than merely distracting. As former ALJ Kelly aptly observed:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the finder of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and punish the bad man because of their respective characters, despite what the evidence in the case shows actually happened.

H.J. Meyers & Co., Inc., Release No. 211, 2002 WL 1828078, *55, n.49 (Aug. 9, 2002). The Division did not directly attack Mr. Whelan's character or reputation at the hearing. Thus, the Commission should give no weight to evidence purportedly bolstering his character or reputation.

VII. THE COMMISSION SHOULD GIVE NO WEIGHT TO THE EXPERT OPINIONS OF MESSRS. CUTLER, STAELIN, AND ROBINSON

Respondents next contend that the ALJ abused his discretion[141] by failing to give weight to the opinions of three experts, Richard Staelin, Richard Cutler, and David Robinson.[142] Respondents' arguments fail. The ALJ's decisions with respect to these three experts were correct, and in its *de novo* review, the Commission should give no evidentiary weight to their reports or opinions. They do not represent proper expert testimony, are irrelevant to any disputed issues in the case, and are not rationally based on any specialized knowledge and expertise beyond the ken of a reasonable lay person.[143]

First, Respondents proffered the testimony of a securities lawyer, Richard Cutler, concerning Section 5's registration requirements. These opinions constitute improper legal

---

[141] ALJs retain "broad discretion in determining whether to admit or exclude ... expert testimony." *Thomas C. Gonnella,* Release No. 1579 (July 2, 2014) (citing *Scott G. Monson,* Release No. 28323 (June 30, 2008)).

[142] Resp. Br. at 41.

[143] Initial Dec. at 31.

expert testimony, and are unlikely to assist the Commission. As the ALJ aptly described, Mr. Cutler's report was akin to "a legal opinion letter in the form of an expert report."[144] The Commission and courts consistently have held that expert testimony consisting of legal opinions is neither helpful nor admissible. *IMS/CPAs*, 2001 WL 1359521,*10 (affirming preclusion of securities lawyer as legal expert); *In re Robert D. Potts, CPA,* Release No. 39126, 1997 WL 690519, *10 & n.56 (Sept. 24, 1997) ("The testimony of expert witnesses on questions of law may be precluded, because adjudicators—courts and administrative law judges—are themselves qualified to determine and interpret the law.").[145] As the D.C. Circuit has made clear, "[e]ach courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997).

Second, Respondents proffered a three-page expert report of Dr. Richard Staelin, the sole independent member of BIEL's Board and a percipient fact witness, on the question of "corporate control." Even setting aside the clear issue of bias—Mr. Staelin is financially interested in the outcome of this case—Mr. Staelin's report is inadmissible on numerous other grounds. As an initial matter, there is nothing in Mr. Staelin's background or his expert report suggesting that he has any specialized knowledge or expertise concerning the question of corporate control under Rule 144, the question relevant to this case.[146] Moreover, Mr. Staelin's

---

[144] Initial Dec. at 31. Respondents criticize the ALJ for allowing the SEC's expert, William Park, to opine on issues of law. Resp. Br. at 41. This is incorrect. The ALJ afforded these portions of Mr. Park's opinions no weight. Tr. 238-39; Initial Dec. at 27-28, 47 ("[T]o the extent Park opined on the issue of control, I have also disregarded his expert evidence.").

[145] Citing *United States v. Bilzerian,* 926 F.2d 1285, 1294 (2d Cir. 1991) (an expert may not "usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it")).

[146] Because the ALJ determined that he would place no weight on Mr. Staelin's expert testimony, the Division did not examine Mr. Staelin on his expert qualifications or the opinions

opinions are unconnected to any disputed issue. The question before the Commission is not one of corporate power and control *generally*, but rather whether IBEX "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.[147] That is the ultimate question to be answered by the Commission based on the factual record, and one that the Commission can readily answer on *de novo* review. The Commission therefore has no need to seek guidance on this question from a purported expert, particularly where the "expert" is also a percipient witness and interested party.

Third, Respondents proffered the two-page expert report of Dr. David Robinson, another Duke professor, on IBEX's purported incentives for purchasing promissory notes from BIEL at a discounted rate. Nothing in Dr. Robinson's report is particularly surprising, informative, or useful to the Commission's determination whether IBEX is entitled to the protections of Section 4(a)(1) or Rule 144's safe harbor. Moreover, Dr. Robinson did not perform any analysis of the facts and circumstances surrounding IBEX's sale of 3.5 billion shares of BIEL stock in unregistered transactions. Nor did Dr. Robinson analyze whether IBEX had "ample profit incentive" to do, or refrain from doing, the many actions detailed by the Whelans during their testimony, such as returning nearly all sales proceeds back to BIEL, subordinating IBEX's lien in BIEL to another lender for no consideration,[148] never calling in or foreclosing on a note,[149] and

---

offered in his report. Mr. Staelin admitted during his investigative testimony, however, that he is not a securities expert and is unfamiliar with Rule 144.

[147] Initial Dec. at 44 (citing cases); *id.* at 47 ("Staelin's expert report was limited to analyzing the legal question of control.").

[148] Initial Dec. at 46.

[149] Tr. 569:14-70:1, 1255:6-1256:2.

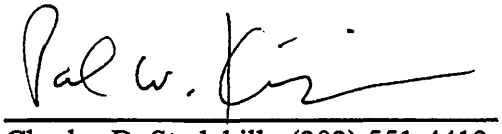
paying vendors and creditors on behalf of BIEL.[150] Dr. Robinson's report is thus of no value to the Commission's determination of liability or remedies in this action.

CONCLUSION

For the reasons set forth above, the Division respectfully requests that the Commission uphold the ALJ's Initial Decision and issue an order in favor of the Division and against Respondents.

Dated: May 8, 2017

Respectfully submitted,



Charles D. Stodghill (202) 551-4413
Paul W. Kisslinger (202) 551-4427
Sarah H. Concannon (202) 551-5361
Thomas B. Rogers (202) 551-4776
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

COUNSEL FOR THE DIVISION
OF ENFORCEMENT

[150] Initial Dec. at 45.

THE DIVISION OF ENFORCEMENT'S CERTIFICATE OF COMPLIANCE PURSUANT TO RULE OF PRACTICE 450

I hereby certify that the Division of Enforcement's Amended Opposition to Respondents' Brief in Support of Appeal to the Commission complies with the length limitations of SEC Rule of Practice 450(c). I further certify that this brief was prepared using Microsoft Word and that the word count for the document, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits, is **13,964** words.

Dated: May 8, 2017

Counsel for the Division of Enforcement

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were served on the following, this 8th day of May 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
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
Fax: (202) 772-9324
Email: alj@sec.gov

By email:

Brian T. Corrigan (*bcorrigan@cormorllp.com*)
Stanley C. Morris (*scm@cormorllp.com*)
Corrigan & Morris LLP
201 Santa Monica Blvd., Suite 475
Santa Monica, CA 90401-2212
Counsel to Respondents (other than Mr. Bedwell)

Counsel for the Division of Enforcement