UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

BIOELECTRONICS CORPORATION,
IBEX, LLC,
ST. JOHN'S, LLC,
ANDREW J. WHELAN,
KELLY A. WHELAN, AND
ROBERT P. BEDWELL,

Respondents.

Administrative Proceeding
File No. 3-17104

RESPONDENTS' REPLY TO DIVISION OF ENFORCEMENT'S SUPPLEMENTAL SUBMISSION IN SUPPORT OF DIVISION'S OPPOSITION TO RESPONDENTS' APPELLATE BRIEF TO THE COMMISSION

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

Attorneys for Respondents

Respondents, BioElectronics Corporation ("BIEL"), Ibex, LLC, St. John's, LLC, Andrew Whelan and Kelly Whelan (collectively, "Respondents") submit this reply to the Division of Enforcement's Supplemental Submission in Support of Division's Opposition to Respondents' Appellate Brief to the Commission ("Supplemental Submission").

I. THE PARTIES AGREE THAT KOKESH V. SEC LIMITS AWARD.

To the extent the Commission intends to award any portion of the award proposed in the Initial Decision (Respondents maintain all arguments that the Initial Decision is not warranted on the merits and should be vacated based on the Appointments Clause of the United States Constitution), Respondents agree with the Division that the Commission would need to adjust the Initial Decision pursuant to the United States Supreme Court's decision in *Kokesh v. Securities and Exchange Commission*, No. 16-529, slip op. (June 5, 2017) ("*Kokesh*"). Respondents also agree with the Division that "under *Kokesh*, any ill-gotten gains received before April 17, 2010—five years before April 17, 2015—should be excluded from the disgorgement relief to be awarded." Supplemental Submission, p. 1.

II. *KOKESH V. SEC* DOES NOT AFFECT RIGHT TO OFFSET COSTS OF NOTES AGAINST PROCEEDS FROM SALE OF NOTES IN COMPUTING DISGORGMENT AWARD.

Respondents object to the Division's attempt to use the *Kokesh* decision to re-argue its contention that ill-gotten gains should include gross receipts from sales of notes and converted stock, without setoff for costs or value conveyed by Respondents in exchange for such notes. Supplemental Submission, pp. 4-5. Respondents will not respond in kind by repeating their arguments, except to point out ALJ Elliot was on solid ground when he rejected that argument, explaining, at page 55 of the Initial Decision:

"Respondents correctly point out that the measure of disgorgement under the facts of this case is the value of the securities sold minus their cost of acquisition. See Resp. Br. 62-63; *SEC v. Lines*, No. 07-civ-11387, 2011 U.S. Dist. LEXIS 91360, at *14-17 (S.D.N.Y. June 7, 2011); *Rodney R. Schoemann*, 2009 WL 3413043, at *13; see also Edgar R. Page, Advisers Act Release No. 4400, 2016 WL 3030845, at *13 n. 77 (May 27, 2016) ('[T]he amount by which [the sale] price exceeded Page's cost basis in PageOne equity still would have been wrongfully obtained profits that we would have required Respondents to disgorge.')." The arguments are not affected by the *Kokesh* decision and therefore need not be restated in these supplemental submissions. Respondents incorporate their previous arguments on this point.

III. THE PARTIES AGREE THAT GROSS PROCEEDS FROM TRANSACTIONS OUTSIDE STATUTE OF LIMITATIONS IS $813,000

The parties agree that $813,000 of gross proceeds from pre-statute of limitations sales were wrongfully included in the prior Division calculations as well as ALJ Elliot's Initial Decision (plus pre-judgment interest thereon). See Initial Decision, p. 55; Joint Stipulation, Exhibit B at DX 1; Supplemental Submission, p. 5 ("the Division reduced the aggregate sales proceeds of $4,296,266 determined by the ALJ by $813,000"); RX 1A; and POST-HEARING DECLARATION OF BRIAN FLOOD IN SUPPORT OF RESPONDENTS' MOTION TO CORRECT MANIFEST ERRORS OF FACT IN INITIAL DECISION DATED DECEMBER 13, 2016), Exhibit 1, second row, and paragraphs 7-8. Thus, any award approved by the Commission based on the Initial Decision must reduce the gross proceeds computation by $813,000.

IV. THE ILL-GOTTTEN GAINS SHOULD BE REDUCED BY THE SAME AMOUNT, $813,000.

The parties disagree as to the applicable setoff attributable to the cost basis related to the pre-statute of limitations transactions that resulted in $813,000 in loan proceeds.

ALJ Elliot assigned absolutely no cost basis to such $813,000. Accordingly, the *Kokesh* adjustment should include no change in the $2,715,673 loan principal sums used by ALJ Elliot in calculating his proposed disgorgement award. Initial Decision, p. 55. The proposed award of $1,580,593 (*Id.*) ($4,296,266-$2,715673) should be reduced by $813,000 to $767,593. Any prejudgment interest accrued thereon should be reduced *ab initio*.

The Division wrongly contends that the $2,715,673 offset for loans at the Initial Decision, p. 55, should be reduced by $105,000, as it did in its calculations. The Division explains, at the bottom of page 5 of its Supplemental Submission: "the division reduced the aggregate loan principal of $2,715,673 determined by the ALJ by $105,000, reflecting the aggregate loan principal corresponding to those ten sales of BIEL stock, as summarized by Respondent's expert, Mr. Flood, in his trial submission. RX 1A." But, ALJ Elliot did **not** include that $105,000 into the $2,715,673, as he expressly explained at page 55 of the Initial Decision, pp. 55: the $2,715,673 cost basis "does not include the first loan listed in Flood's analysis, because the record is insufficient to determine precisely how much of the original loan should be apportioned to what was sold in 2010. See Stipulation at Ex. A (line 3); RX 1A at 1, 7; *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998) (any risk of uncertainty falls on the wrongdoer)." The first loan, excluded from the $2,715,673, was the same $105,000 that the Division now seeks to use to reduce that $2,715,673 cost basis. It would be entirely inappropriate and unfair to Respondents to reduce $105,000 from the cost basis number, when that $105,000 was never included in the $2,715,673 cost basis number calculated by ALJ Elliot in the first place.

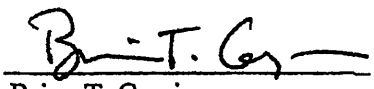
The entire $813,000 of gross proceeds from transactions before April 17, 2010 was included in ALJ Elliot's proposed disgorgement award, without reduction for the first loan of $105,000, and therefore the entire $813,000 should be deducted from the same disgorgement award, without reduction for the first loan of $105,000, in order to properly account for the *Kokesh* decision. $813,000, plus interest calculated thereon, should, at a minimum, reduce the disgorgement award proposed by ALJ Elliot.

V. NO PRE-JUDGMENT INTEREST ON PENALTIES – INCLUDING DISGORGEMENT

The *Kokesh* decision calls into question whether pre-judgment interest is appropriate on disgorgement – deemed a penalty by the Supreme Court. *Kokesh*, p. 1. ALJ Elliot relied on 17 CFR ¶201.600(a), written without the benefit of the *Kokesh* decision, which plainly prescribes prejudgment interest on disgorgement orders. At pages 56 and 57 of the Initial Decision, ALJ Elliot included an award of pre-judgment interest starting March 1, 2015 on the IBEX transactions, and starting April 1, 2014 on the St. John's transactions. But, after *Kokesh*, which made clear that such disgorgement awards are a penalty ("Disgorgement in the securities-enforcement context is a 'penalty'" (*Kokesh*, p. 1)), any awards of pre-judgment interest would be improper.

"[P]rejudgment interest is not available on punitive damages awards." *Nance v. City of Newark*, 501 F. App'x 123, 129 (3d Cir. 2012), citing *Belinski v. Goodman*, 139 N.J. Super. 351, 354 A.2d 92, 96 (N.J. Super. Ct. App. Div. 1976) (applying New Jersey law); *Poleto v. Consol. Rail Corp.*, 826 F.2d 1270, 1278 n.14 (3d Cir. 1987), *abrogated on other grounds by Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 834-35, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990) (applying federal law). *See also Nance v. City of Newark*, Civil Action No. 97-6184 (JLL), 2014 U.S. Dist. LEXIS 96494, at *14 (D.N.J. July 16, 2014). Since it is now clear that disgorgement awards in this proceeding are punitive awards, no interest should be awarded as a matter of law.

Dated: July 20, 2017

By: 

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

PROOF OF SERVICE

I hereby certify that on July 20, 2017, I caused to be served a true and correct copy of the following document on the date and in the manner indicated below.

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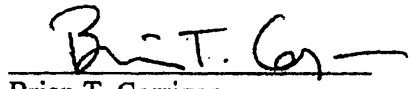
Office of the Secretary
Securities and Exchange Commission
Attn: Secretary of the Commission Brent J. Fields
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
Fax: (202) 772-9324
Email: alj@sec.gov
And Overnight Courier Service (Fedex)

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

Attorneys for SEC Division of Enforcement



Brian T. Corrigan