UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F Street, NE
Washington, DC 20549-5937

DIVISION OF ENFORCEMENT

Sarah Heaton Concannon
Trial Counsel
(202) 551-5361
ConcannonS@sec.gov

January 12, 2018

BY HAND AND EMAIL (alj@sec.gov)

The Honorable Cameron T. Elliot
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: In the Matter of BioElectronics, Inc., Admin. File No. 3-17104

Dear Judge Elliot:

I write on behalf of the Division of Enforcement ("Division") in the above-referenced matter pursuant to this Court's Notice to the Parties and Order Following Ratification, dated December 6, 2017 and this Court's Order Granting Motion for Extension of Time and Pages in Part, dated December 27, 2017.

On November 30, 2017, the Commission issued an order ratifying the prior appointment of its administrative law judges to preside over administrative proceedings. *See In re: Pending Administrative Proceedings*, Securities Act Release No. 10440 (Nov. 30, 2017). As applied to this proceeding, the order directs the administrative law judge to determine, based on a de novo reconsideration of the full administrative record, whether to ratify or revise in any respect all prior actions taken by any administrative law judge during the course of this proceeding. *Id.* at 1-2.

It is well established that subsequent ratification of an earlier decision rendered by an unconstitutionally appointed officer remedies any alleged harm or prejudice caused by the violation. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996). And that principle applies whether or not the ratifying authority is the same person who made the initial decision, so long as "the ratifier has the authority to take the action to be ratified," and, "with full knowledge of the decision to be ratified," makes a "detached and considered affirmation of th[at] earlier decision." *Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016).

Accordingly, to implement this remedy, the administrative law judge should conduct a de novo review of the administrative record, engage in an independent evaluation of the merits through the exercise of detached and considered judgment, and then determine whether prior actions should be ratified and thereby affirmed. This process ensures "that the ratifier does not blindly affirm the earlier decision without due consideration." *Advanced Disposal Services East*, 820 F.3d at 602-03.

The Division submits that the previous decisions issued by an administrative law judge in this proceeding, including the Initial Decision issued on December 13, 2017, were well-founded and respectfully requests that they be ratified, with one amendment required by an intervening change in law.

Specifically, in its Initial Decision, this Court determined that Respondents Andrew Whelan, Kelly Whelan, BioElectronics, and IBEX were jointly and severally liable for disgorgement of $1,580,593 and prejudgment interest running from March 1, 2015. Initial Decision at 2, 54-75. In light of the United States Supreme Court's subsequent decision in *Kokesh v. Securities and Exchange Commission*, 137 S.Ct. 1635 (2017), and as detailed in the Division's supplemental submission to the Commission in support of the Division's opposition to Respondents' appellate brief to the Commission, attached as **Exhibit A** hereto, using the conservative disgorgement methodology described by this Court in the Initial Decision, this disgorgement amount should be reduced to $872,593.03, plus prejudgment interest.

To that end, the Division attaches, as **Exhibit B** hereto, a proposed draft order to this letter.

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
U.S. SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.E.
Washington, D.C. 20549

Counsel for the Division of Enforcement

EXHIBIT A

Division of Enforcement's Supplemental Submission to the Commission on *Kokesh v. Securities and Exchange Commission*, 137 S.Ct. 1635 (2017)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17104

In the Matter of

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

Respondents.

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

INTRODUCTION

Pursuant to Rule 450 of the U.S. Securities and Exchange Commission's Rules of Practice, 17 C.F.R. § 201.450, the Division of Enforcement (the "Division") respectfully submits this Supplemental Submission in Support of Division's Opposition to Respondents' Appellate Brief to the Commission ("Supplemental Submission"). The purpose of this Supplemental Submission is to provide the Commission with the Division's position as to the impact of the United States Supreme Court's decision in *Kokesh v. Securities and Exchange Commission*, No. 16-529, slip op. (June 5, 2017) ("*Kokesh*") on the question of disgorgement before the Commission on Respondents' *de novo* petition for review of the Administrative Law Judge's ("ALJ") Initial Decision in this matter.

PROCEDURAL BACKGROUND

On December 13, 2016, the ALJ issued an Initial Decision in which the ALJ ordered, among other relief, that Respondents disgorge a total of approximately $1,820,000 in ill-gotten gains, plus prejudgment interest. Specifically, the ALJ determined that Respondents Andrew Whelan, Kelly Whelan, BIEL, and IBEX were jointly and severally liable for disgorgement of $1,580,593 and prejudgment interest running from March 1, 2015, and that Andrew Whelan, BIEL, and St. John's are jointly and severally liable for disgorgement of $240,293.21 and prejudgment interest running from April 1, 2014. Initial Decision at 2, 54-57

On February 2, 2017, Respondents sought Commission review of the Initial Decision, including, *inter alia*, raising a statute of limitations challenge to the disgorgement relief ordered by the ALJ. *See* Respondents' Petition for Review of the Initial Decision at 7-13 (Feb. 2, 2017); Respondents' Amended Petition for Review of the Initial Decision at 1-2 & n. 2 (Feb. 24, 2017). In their Brief in Support of Appeal to the Commission, submitted on March 29, 2017 ("Resp. Br."), Respondents argued that Section 2462's 5-year statute of limitations applies to the

Division's claims against Respondents. *See* Resp. Br. at 24 (citing 28 U.S.C. § 2462; *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016)); *see also* Respondents' Reply Brief in Support of Appeal to the Commission at 10 (May 12, 2017). Respondents asserted that the computation of profits to be disgorged should not exceed profits on transactions completed within the 5-year statute of limitations (between April 17, 2010 and February 5, 2016). Resp. Br. at 24. Using the ALJ's disgorgement methodology, relying on a post-hearing expert declaration not admitted into evidence, and applying a five-year statute of limitations, Respondents argued that the total profits from the unlawful transactions within the 5-year statute of limitations were $462,532. *Id.*

In its Amended Opposition to Respondents' Brief in Support of Appeal to the Commission ("Opp."), submitted on May 8, 2017, the Division opposed Respondents' challenge to the ALJ's order of disgorgement. With respect to the applicability of Section 2462's five-year statute of limitations, the Division asserted, consistent with the Commission's holding in *Larry P. Grossman*, Release No. 10227, 2016 WL 5571616, at *16 (Sept. 30, 2016), that Section 2462's five-year statute of limitations does not apply to disgorgement. Opp. at 33. The Division submitted that the Commission should order disgorgement of $4,643,462.70, reflecting the total proceeds from Respondents' unlawful sales of BIEL stock and notes in unregistered transactions during the Relevant Period, or, in the alternative, affirm the ALJ's conservative assessment of disgorgement in the amount of $1,580,593. *Id.* at 35.

On June 5, 2017, the United States Supreme Court issued its decision in *Kokesh*, in which it resolved the Circuit Court split with regard to the applicability of Section 2462's five-year statute of limitations to disgorgement claims by the SEC, holding that "any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued." *Kokesh*, No. 16-529, slip op., at 11.

ARGUMENT

In light of the Supreme Court's holding in *Kokesh*, the Division respectfully submits this Supplemental Submission, in order to advise the Commission as to the amount of Respondents' ill-gotten gains obtained during Section 2462's five-year limitations period.

The Order Initiating Proceeding ("OIP") was published on February 5, 2016 (Securities Act of 1933 Release No. 10036; Securities Exchange Act of 1934 Release No. 77073). On April 17, 2015, the parties executed the first of a series of Tolling Agreements [attached to the Post-Hearing Declaration of Stanley C. Morris at Exhibit 1 (Exhibit 3 to the Motion to Supplement the Record)], such that all applicable statutes of limitation were tolled on April 17, 2015. Resp. Br. at 24, n.3. Accordingly, under *Kokesh*, any ill-gotten gains received before April 17, 2010—five years before April 17, 2010—should be excluded from the disgorgement relief to be awarded.

Between April 17, 2010 and November 17, 2014, Respondents Andrew Whelan, Kelly Whelan, BIEL, and IBEX jointly and severally received ill-gotten gains of **$3,483,266.03**. DX 1 (Stipulation), Ex. B. Between April 17, 2010 and November 17, 2014, Respondents Andrew Whelan, BIEL, and St. John's jointly and severally received ill-gotten gains of **$397,196.70**. DX 1 (Stipulation) ¶ 35.[1] The total proceeds of Respondents' Section 5 violations within the 5-year statute of limitations period are therefore **$3,880,462.73**, and the Division requests that the Commission order Respondents, jointly and severally, to disgorge this amount in full, plus prejudgment interest. *See* Opp. at 33 (arguing that total proceeds are the appropriate measure of disgorgement, since both IBEX and St. John's funded their acquisitions of BIEL notes and stock

[1] All of the St. John's sales of BIEL stock at issue occurred in 2013 and 2014. The disgorgement analysis is therefore not impacted by *Kokesh* under either the Division or the ALJ's methodology.

with ill-gotten gains, using funds received as a result of their Section 5 violations to make new "investments" in BIEL) (citing *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096-97 (9th Cir. 2010)).

In the alternative, using the conservative disgorgement methodology described by the ALJ in the Initial Decision,[2] the Commission should impose disgorgement, jointly and severally, in the amount of **$1,062,886.52**, comprising **$240,293.49** in profit to St. John's (proceeds of $397,196.70, less acquisition costs of $156,903.49)[3] and **$872,593.03** in profit to IBEX (proceeds of $3,483,266.03, less acquisition costs of $2,610,673). DX 1 (Stipulation), Exs. A & B; RX 1A.

As the ALJ observed in the Initial Decision, Respondents did not actually calculate the value of the securities sold, less their cost of acquisition. Initial Decision at 55. Thus, to arrive at the $872,593.03 disgorgement figure for IBEX's Section 5 violations above, the Division replicated the ALJ's analysis as follows: First, the Division reduced the aggregate sale proceeds of $4,296,266 determined by the ALJ by $813,000, reflecting the amount of sale proceeds received from ten sales of BIEL stock between January 27, 2010 and April 15, 2010. DX 1 (Stipulation), Ex. B. Second, 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.

---

[2] In the Initial Decision, the ALJ opined that the appropriate measure of disgorgement here is not the total proceeds received by Respondents, but rather the difference between Respondents' total proceeds from sales of BIEL notes and shares during the Relevant Period and the acquisition costs of those shares. Initial Decision at 54-57.

[3] The disgorgement resulting from St. John's unlawful sales of BIEL stock is not impacted by *Kokesh*, because all of the sales occurred after April 17, 2010. DX 1 (Stipulation) ¶ 35.

Accordingly, the Commission should order disgorgement to be paid joint and severally by Respondents of **$3,880,462.73**, or—at a minimum—**$1,062,886.52**, plus prejudgment interest.

Dated: June 16, 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

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were served on the following, this 16th day of June 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

EXHIBIT B

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.

[PROPOSED] ORDER

After a de novo review and reexamination of the record in these proceedings, I have reached the independent decision to ratify and affirm all prior actions made by an administrative law judge in these proceedings, including the Initial Decision issued on December 13, 2016, except as specifically amended below due to an intervening change in law.

In the Initial Decision, I determined that Respondents Andrew Whelan, Kelly Whelan, BioElectronics, and IBEX were jointly and severally liable for disgorgement of $1,580,593 and prejudgment interest running from March 1, 2015. Initial Decision at 2, 54-75. In light of the United States Supreme Court's subsequent decision in *Kokesh v. Securities and Exchange Commission*, 137 S.Ct. 1635 (2017), I now determine that Respondents Andrew Whelan, Kelly

Whelan, BioElectronics, and IBEX are jointly and severally liable for disgorgement of $872,593.03 and prejudgment interest running from March 1, 2015.

This decision to ratify and affirm, as amended, is based on my detached and considered judgment after an independent evaluation of the merits.

Date:

Cameron Elliot
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were served on the following, this 12th day of January 2018, in the manner indicated below:

By hand and email:

The Honorable Cameron T. Elliot (*ALJ@sec.gov*)
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2582

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