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 RESPONSE TO RESPONDENTS' RESPONSE TO THE COMMISSION'S RATIFICATION ORDER AND JUDGE CAMERON ELLIOT'S NOTICE AND ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES AND REGULATIONS

SEC RELEASES

OTHER AUTHORITIES

The Division of Enforcement ("Division") respectfully submits this response to Respondents' January 11, 2018 Submission to this Court. Despite this Court's invitation to submit *new* evidence relevant to its reexamination of the record, Respondents merely resubmit evidence previously considered and rejected by the Court, and rehash legal arguments that provide the Court with no basis to refrain from independently ratifying all prior actions in this proceeding. This Court should enter the Division's proposed order ratifying the Initial Decision, except as specifically amended in light of the United States Supreme Court's subsequent decision in *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635 (2017). Division's Jan. 12, 2018 Letter to the Court ("Letter"), Ex. B.

ARGUMENT

A. The Commission's Order Is Valid, Applies To This Action, And Has Effectively Remedied Respondents' Alleged Injury

Respondents raise scattershot challenges to the Commission's Ratification and Remand Order, Release No. 10440 (Nov. 30, 2017) ("Order"), this Court's appointment, and the application of the Order to this action. Submission at 2-5, 8. Each of these arguments fails.

The Order itself forecloses Respondents' challenge to the Commission's ratification of the appointment of its ALJs. It is undisputed that the Commission, acting in its capacity as head of a department, has the constitutional authority both to appoint ALJs as inferior officers and to ratify any such appointments after the fact. U.S. Const. Art. II, § 2, Cl. 2; 15 U.S.C. § 78d(b)(1); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 512 (2010); *Wilkes-Barre Hospital Company, LLC v. NLRB*, 857 F.3d 364, 370-71 (D.C. Cir. 2017). The Commission's Order exercising that authority and ratifying the appointment of the Commission's ALJs is binding on those ALJs. The scope of the inquiry before *this* Court is therefore limited to whether—having had his

appointment ratified by the Commission—the presiding ALJ should affirm or revise in any respect his prior actions in this proceeding.

Even if this Court could consider the validity of the Commission's ratification of its ALJs' appointments, Respondents' claim that the ratification was invalid falls short. Respondents assert, incorrectly, that the act being ratified is a hiring decision made by OPM—and insist that the Commission may not ratify that decision. Submission at 4-5. But the Commission's Order does not ratify any action taken by *OPM*[1]; rather, the Order ratifies the decisions by the Commission's *own staff* to appoint the ALJs to their current positions. The Commission's staff members, unlike OPM officials, are indisputably agents of the Commission. Thus, any defect in the initial appointment process was remedied by the Commission's Order. 1 Mechem § 533 (ratification of an act "render[s] it good from the beginning and the same as though he had originally authorized or made it"); *accord United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907) (ratification "retroactively give[s]" an agent's acts "validity").

Respondents also err in attacking the procedures set forth in the Commission's Order as inadequate to remedy their alleged harm. Submission at 3, 5. In particular, Respondents complain that the Commission's ratification of the ALJs' appointments was insufficiently deliberative and that too little time was allotted for additional briefing. That is wrong. The Commission made the considered decision to ratify the appointment of its ALJs and, having done so, remanded this proceeding with instructions to reconsider the entire record. The

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[1] Indeed, OPM does not make ALJ hiring decisions on behalf of federal agencies. Rather, it administers the competitive examination process for ALJs, ranks the candidates, and prepares a list of eligible candidates for agencies to appoint. 5 U.S.C. § 1104(a)(2); 5 C.F.R. §§ 332.401, 332.402, 930.201; *see also* 5 U.S.C. § 3105 (specifying that "[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title").

Commission also specified that Respondents would have the opportunity to introduce new evidence and submit new briefing, and Respondents have done so.

The procedures set forth in the Commission's Order are more than sufficient to allow for a valid ratification decision. Indeed, courts routinely have upheld ratification decisions made after far less rigorous procedures. *CFPB v. Gordon*, 819 F.3d 1179, 1186, 1192 (9th Cir. 2016) (upholding ratification after Director issued a "Notice of Ratification" stating, in part: "To avoid any possible uncertainty [about decisions made during recess appointment] ... I hereby affirm and ratify any and all actions I took during that period."), *cert. denied*, 137 S. Ct. 2291 (2017); *FEC v. Legi-Tech*, 75 F.3d 704, 709 (D.C. Cir. 1996) (finding no basis to invalidate ratification even though respondent "may well be right in arguing that the Commission's 'review'" for purposes of ratification "was nothing more than a 'rubberstamp'"). Courts have not hesitated to uphold ratification decisions made after de novo review. *E.g., Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 118-19 (D.C. Cir. 2015) (de novo review of the record allows for a valid ratification decision, which does not require "a new hearing"); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016) (holding ratification valid where ratifying authority acted with "full knowledge of the decision to be ratified" and made "a detached and considered affirmation of the earlier decision").

Finally, Respondents are mistaken in their argument that certain claims in this case are "time-barred," and that ratification as to those claims is invalid. Submission at 8. As an initial matter, Respondents appear to misapprehend the Commission's Order. The Commission ratified the appointments of its ALJs and directed the ALJs to consider whether to affirm or revise in any respect their prior actions in pending administrative proceedings. The Commission did *not* ratify the issuance of its OIP in this or any other proceeding. Because OIPs are issued by the

Commission itself—and the constitutionality of the Commissioners' appointments is undisputed—there is no need to ratify the Commission's OIPs. The OIP here was therefore valid when issued and remains so, notwithstanding any initial defect in ALJs' appointments.

The OIP also is not, as Respondents seem to believe, time-barred under *Kokesh* or 28 U.S.C. § 2462. Section 2462 applies only to certain forms of relief (fines, penalties, and forfeitures) and *not* to entire actions. Thus, absent a congressional enactment to the contrary (and here there is none), the Commission was free to initiate this action at any time; its ability to file charges against Respondents was "subject to no time limitation." *E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924); *see also, e.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392, 396-397 (1946); *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) (collecting examples). The 2016 OIP therefore appropriately sought injunctive relief with respect to all of Respondents' conduct, including conduct dating back to 2009. *Birkelbach v. SEC*, 751 F.3d 472, 482 (7th Cir. 2014) (upholding sanctions ruling that considered conduct outside of the five-year limitations period; "even assuming the five-year period applies, there was no error in the SEC considering events outside that period in crafting its sanction"). This Court may assess Respondents' liability for that conduct without regard to any limitations period.

The five-year limitations period Respondents invoke is therefore relevant only to the question of monetary relief. The OIP properly sought penalties based on claims that accrued within five years of the OIP, and the Division has acknowledged that, under *Kokesh*, it is appropriate to reduce the disgorgement previously ordered against certain Respondents that was based on claims that accrued outside of that five-year period. Letter & Ex. B; *infra*, Section B. The limitations period does not, as Respondents suggest, somehow limit remedies not

included within Section 2462's terms, nor does it restrict this Court's ability to ratify its prior actions in this properly instituted case.

B. Respondents' Arguments Under *Kokesh* Are Unavailing

The Supreme Court's decision in *Kokesh* constitutes an intervening change in law that this Court should take into consideration in its decision on remand. Letter at 2. The Division believes that the sole modification to the Initial Decision required is to reduce the disgorgement previously ordered jointly and severally against Respondents Andrew Whelan, Kelly Whelan, BioElectronics, and IBEX from $1,580,593.00 to $872,593.03.

Relying on the Post-Hearing Declaration of Brian Flood, Respondents argue that disgorgement should be no greater than $462,532. Submission at 6. In its January 13, 2017 order, this Court found that "Flood's post-initial decision calculation is inconsistent with the stipulated aggregate proceeds." Release No. 4522. Thus, even though Flood's declaration might now be considered as "new evidence" relevant to ratification, Respondents offer this Court no basis to admit evidence that directly contradicts the hearing record and has never been subject to cross examination.[2] This Court should reject Respondents' argument.

Respondents further argue that this Court should reduce the disgorgement award by the amount of interest earned on the debt, because "[l]awful interest is not ill-gotten gains." Submission at 7. In its December 27, 2016 Order, this Court held, *inter alia*, that the Division "need not address ... whether accrued interest should be counted as ill-gotten gains," because

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[2] In the alternative, Respondents argue that this Court should reduce the Division's proposed disgorgement of $872,593.03 by $105,000, and award $767,593 in disgorgement, because of a purported error in the Division's calculation of the Court's cost basis. Submission at 7. The Division has not been able to replicate Respondents' calculations and defers to the Court as to whether it did or did not include the $105,000 in the calculations set forth in the Initial Decision. Initial Decision at 54-57.

this argument is purely legal. Release No. 4484 at 2. Because Respondents' argument does not present any new evidence, the Court should likewise reject it here.

Moreover, Respondents' argument that pre-judgment interest is improper after *Kokesh* is unsupportable as a matter of law. Congress has made clear that prejudgment interest on disgorgement awards is appropriate: It has afforded the Commission the ability to order disgorgement "including reasonable interest" in administrative and cease-and-desist proceedings. Exchange Act §§ 21B(e), 21C(e). The cases on which Respondents rely for the contrary conclusion construed provisions of New Jersey state law that (1) have no bearing here; and (2) in any event, cannot override the express congressional determination that prejudgment interest be available in administrative and cease-and-desist proceedings. Submission at 7.

C. The Disgorgement And Penalties Assessed By This Court Do Not Violate The Eighth Amendment

Respondents also argue that the disgorgement and penalties assessed by this Court are excessive under the Eighth Amendment. Submission at 9. Respondents' reading of *Kokesh* is unsupportable, and their claims are factually baseless.

Even assuming that this Court's disgorgement order were subject to the Excessive Fines Clause—which *Kokesh* did not purport to address, *see SEC v. Jammin Java Corp.*, 2017 WL 4286180, at *2–4 (C.D. Cal. Sept. 14, 2017) ("*Kokesh* is best seen as a decision clarifying the statutory scope of § 2462, rather than one redefining the essential attributes of disgorgement")—a fine violates the Eighth Amendment only if it is "grossly disproportional" as compared to "the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998). The disgorgement in this case—limited to the amount of gain resulting from Respondents' violations—was perfectly proportional to those violations. *SEC v. Metter*, 706 F. App'x 699 (2d Cir. 2017) (disgorgement not grossly disproportional because "it almost precisely equaled the

gains from the illicit conduct" and was therefore "directly keyed to the scope of the wrongdoing").

Furthermore, Respondents' argument that the disgorgement and penalties assessed by this Court are excessive under the Eighth Amendment because they "caused no harm" is specious. As the Division proved at trial, Andrew Whelan and BioElectronics's Board of Directors were wholly unconcerned about the impact of their actions on the investing public. Respondents decided to fund BioElectronics's day-to-day operations through Section 5 violations at the expense of BioElectronics's shareholders, who saw their stock value plummet with the dilution of BioElectronics stock. Division's Post-Hearing Brief at 17-21, 73-79; Division's Post-Hearing Reply Brief at 36-45.

D. Respondents' Post-Hearing Evidence And Arguments Should Not Change The Outcome Of This Case

Respondents challenge this Court's findings of liability under Sections 5 and 13(a). Resp. Submission at 8. As extensively argued in the Division's post-hearing briefs[3] and fully addressed by this Court in its Initial Decision, Respondents repeatedly and egregiously violated Section 5 over a period of at least five years by funding BioElectronics's daily operations through sales of BioElectronics stock in unregistered transactions. Initial Decision § III.B. Likewise, the Division has proven by a preponderance of the evidence that, at all relevant times, BioElectronics had a class of securities registered under Section 12(g) of the Exchange Act and was required to comply with Section 13(a) of the Exchange Act. *Id.* at 32. Respondents' rehashes of stale arguments are unavailing.

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[3] The Division's Post-Hearing submissions and submissions to the Commission on Respondents' Petition for Review available upon request of the Court and on file with the Office of the Secretary.

1. This Court Has Considered Respondents' Post-Hearing Briefing And Evidence

Respondents re-submitted, as Exhibits 1 through 13, post-hearing briefs and declarations previously presented to this Court and to the Commission, and further assert that this Court improperly excluded three categories of hearing evidence. Submission at 3. None of Respondents' "new" evidence is in fact "new."

This Court expressly addressed Respondents' Exhibits 1 through 4 in a prior order. Release No. 4522.[4] The Court "carefully reviewed the six factual assertions Respondents contend are erroneous, and [found] no error in them, manifest or otherwise." *Id.* at 2. Similarly, in its Initial Decision, this Court considered Respondents' arguments regarding three categories of evidence purportedly improperly excluded at the hearing. Initial Decision at 31, 53. Respondents provide the Court with no ground to reconsider its reasoned conclusions.

2. The Purported "Errors" At The Hearing Identified By Respondents Are Immaterial, Previously Addressed By The Court, And Do Not Render Ratification Inappropriate

Finally, Respondents identify six purported errors at the hearing. Each of these so-called errors already has been considered by the Court in prior orders. Release Nos. 4484, 4522; Initial Decision at 56. Furthermore, Respondents wholly fail to inform this Court as to how, individually or cumulatively, these errors, even if true, materially alter the conclusions reached by this Court after a week of hearing evidence and hundreds of pages of briefing.

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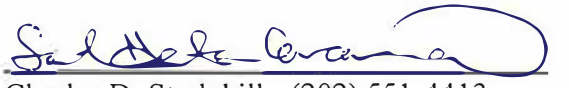
[4] Respondents' Exhibits 5 and 6 constitute their submission of the same evidence to the Commission, and Exhibits 7 through 12 comprise Respondents' briefs to the Commission. Exhibit 13 is the Division's supplemental submission to the Commission on *Kokesh*, also appended as Exhibit A to the Division's Letter.

CONCLUSION

For the foregoing reasons and those stated in the Division's Letter, the Division respectfully requests that the Court enter the Division's proposed order on remand. Letter, Ex. B.

Dated: January 19, 2018

Respectfully submitted,



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CERTIFICATION OF LENGTH

I hereby certify that the Division of Enforcement's Response to Respondents' Response to The Commission's Ratification Order and Judge Cameron Elliot's Notice and Order complies with the length limitations set forth in this Court's Notice to Parties and Order Following Ratification, Release No. 5296 (Dec. 26, 2017) and Order Denying Division's Motion for Extension of Time, Release No. 5464 (Jan. 16, 2018). 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 and table of authorities, any addendum, and exhibits, is 2465 words. The Division's Letter, exclusive of headings, signature lines, and exhibits, is 505 words. The total word count is 2970 words.

Counsel for the Division of Enforcement

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were served on the following, this 19th day of January 2018, in the manner indicated below:

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