UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

| | |
|---|---|
| In the Matter of<br><br>**BIOELECTRONICS CORPORATION,**<br>**IBEX, LLC,**<br>**ST. JOHN'S, LLC,**<br>**ANDREW J. WHELAN,**<br>**KELLY A. WHELAN, AND**<br>**ROBERT P. BEDWELL,**<br><br>Respondents. | ADMINISTRATIVE PROCEEDING<br><br>File No. 3-17104 |

# RESPONDENTS' SUPPLEMENTAL PETITION FOR REVIEW OF THE INITIAL DECISION AND REVISION ORDER

Brian T. Corrigan, Esq.
bcorrigan@cormorllp.com
Stanley C. Morris, Esq.
scm@cormorllp.com
Corrigan & Morris LLP
12300 Wilshire Boulevard, Suite 210
Los Angeles, CA 90025
(310) 394-2829; (310) 394-2828

Attorneys for Respondents,
**BIOELECTRONICS CORPORATION,**
**IBEX, LLC,**
**ST. JOHN'S, LLC,**
**ANDREW J. WHELAN, and**
**KELLY A. WHELAN**

Respondents, BioElectronics Corporation ("BIEL"), Ibex, LLC, St. John's, LLC, Andrew J. Whelan and Kelly A. Whelan (collectively, "Respondents"), renew and update their petition to the Commission for review of the Initial Decision issued by Administrative Law Judge Cameron Elliot ("ALJ Elliot") dated December 13, 2016 (the "Initial Decision"), as amended by ALJ Elliot's February 14, 2018 Order Ratifying in Part and Revising in Part Prior Actions (the "Revising Order"). This Petition requests a d*e novo* review of the Initial Decision and Revising Order.[1] The standards for granting review under Rule 411(b)(2) are satisfied:

**A. Prejudicial Errors were Committed in the Conduct of the Proceeding:**

1. ALJ Elliot excluded evidence of A. Whelan's Character. RT, pp. 1194, 1256.
2. ALJ Elliot refused to consider expert reports or permit testimony of three of Respondents' experts. Initial Decision, p. 31, § II.G.3; BioElectronics Corp., Admin. Proc. Rulings Release No. 4127, 2016 SEC LEXIS 3340 (ALJ Sept. 6, 2016); RX 201, 202 and 205.
3. ALJ Elliot unfairly misconstrues and discounts expert Brian Flood's testimony. Post-Hearing Evidence, Exh. 1, pp. 17-20; Exh. 2, ¶¶10-20.
4. Joint and several liability was unwarranted because gains could be and should be apportioned. Post-Hearing Evidence, Exh. 10, pp. 34-37.
5. ALJ Elliot awarded restitution at law, not disgorgement. He had no authority to do so.
6. ALJ Elliot miscalculated and overstated the disgorgement award; and awarded excessive punitive relief in violation of the Eighth Amendment to the U.S. Constitution.
7. ALJ Elliott ignored and struck evidence of reliance on counsel. RT 913-922. See *Howard v. SEC,* 376 F.3d 1136, 1148, n. 20 (D.C. Cir. 2004). He did so in the face of legal opinion letters on every transaction. Initial Decision, pp. 4, 11; RT, p. 25, ln 8. See RX 39, 41, 43, 45, 69, 71, 74, 76, 78, 80-82, 85, 87-89, 91, 94, 98, 101, 103, 105, 108, 110, 113, 114A, 115, 119, 123, 127-129, 131, 133-34, 136, 138-39, 141-42, 144-45, 147-149, 151, 154, 155, 157-58, 160, 162, 166-67, 172G, 192. See RT 417 [K. Whelan: "I rely on the opinions of my attorneys."]; RT 922: ALJ Elliot admitted "I HAVE NEVER FOUND ADVICE OF COUNSEL." The Division's counsel argued that advice of counsel was irrelevant because the OIP asserted non-scienter violations. RT 920. True. But, in that case, third tier penalties cannot be awarded. The Staff cannot have their cake and eat it too.

**B. The Commission Should Review the Decision Because it Embodies:**

1. Findings or conclusions of material fact that were clearly erroneous, including:

   a. that Kelly Whelan and IBEX had control over Andrew Whelan and BIEL or that IBEX and BIEL were jointly controlled;

   b. that there were at least 500 shareholders of record of BIEL at the time of its registration withdrawal in 2007 (see Post-Hearing Evidence, Exh. 1, pp. 2, 20-25; Exh. 4, ¶¶3, 4; RX 194, 194B at 2242, 2293, 2313; and TR 642-643; 910-911);

---

[1] The Commission granted Respondents' petition to review the Initial Decision on February 28, 2017. On November 29, 2017, the Solicitor General concurred with respondents in *Raymond J. Lucia and Raymond J. Lucia Companies, Inc. v. SEC* (No. 17-130). The next day, November 30, 2017, the Commission entered its Order purporting to ratify the hiring of its administrative law judges (the "Ratification Order"). The Ratification Order compelled ALJ Elliot to reconsider the record and his Initial Decision. The Revising Order followed papers filed by all parties.

c. that the disgorgement award approximated Respondents' actual profits within 5-year statute of limitations, after deductions of costs, taxes, lawful interest and reinvestments;

d. that ALJ Elliot's punitive disgorgement award, plus duplicative third tier penalties, cease and desist order and penny stock bar are supported by applicable law and a preponderance of evidence, based on non-scienter-based claims in the OIP;

e. that IBEX's investments in BIEL were anything other than legitimate, arms-length, long-term investments, on market terms, which, but for the Staff's intervention, would have been profitable because BIEL received its FDA and UK NHS approvals after the trial;

f. that penalties/disgorgement were limited by Respondents' ability to pay; and

g. that St. John's, 99% owned by Patricia Whelan, an unsophisticated investor with no history of violations, who cooperated in the investigation, and was not named as a respondent or even called to testify at trial, by making a select few isolated stock sales of a tiny portion of St. John's securities, through a registered broker and after advice of counsel, should suffer a draconian $650,000 third tier penalty based on technical violations of failing to file its Form 144 on time and nominally exceeding the volume limitations under Rule 144.

2. The following conclusions of law were erroneous:

a. that ALJ Elliott was Constitutionally appointed;[2]

b. that Respondents violated Section 5, based on rationale that (1) Rule 144 was the exclusive basis for exemption; and (2) IBEX was an affiliate of BIEL (which it was not);

c. that BIEL's 2006 and 2007 voluntary withdrawals from registration were ineffective under Section 12(g) of the Securities Act (RX 189, RX 190); and

d. that it is appropriate to tack onto a punitive disgorgement award (see *Kokesh v. Securities and Exchange Commission,* No. 16-529, slip op. (June 5, 2017) *("Kokesh")*, interest and duplicative penalties, including an excessive $650,000 penalty against St. John's.

---

[2] ALJ Elliot was not properly appointed under the Appointments Clause of the US Constitution. *Bandimere v. United States Securities and Exchange Commission*, AP# 15-9586, 844 F.3d 1168 (10th Cir. 2016), citing *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991)); see also *Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016). The Ratification Order did not cure the Appointments Clause violation. Because the SEC's ALJ's were *hired* by the OPM, not appointed under the Appointments Clause, there was no appointment to ratify. See *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Separately, the purported ratification fails to satisfy common law elements of ratification. A "ratifier must, at the time of ratification, still have the authority to take the action to be ratified. Second, the ratifier must have full knowledge of the decision to be ratified. Third, the ratifier must make a detached and considered affirmation of the earlier decision." *Advanced Disposal Servs. E. v. NLRB,* 820 F.3d 592, 602 (3d Cir. 2016). The first element fails because the OPM is not the agent of the Commission and the Commission is not the principal of the OPM. The OPM hired ALJ Elliot. The OPM did not and could not appoint him. The Commission can, at most, ratify the hiring. It cannot ratify an appointment that did not occur in the first place. See 5 U.S.C. § 1302; 5 C.F.R. §§ 930.201, 930.204, 337.101; OPM, Qual. Standard for Admin. Law Judge Positions, https://perma.cc/2G7J-X5BW. The third element also fails. The Commission did not make a "detached affirmation" of such appointments. The Commission's so-called ratification of every ALJ reflects a legal strategy, not an independent analysis.

3. This case implicates several important legal issues and issues pertaining to the proper exercise of discretion and application of law or policy that are important and that the Commission should review, including:

a. Whether its ALJ's have been Constitutionally appointed? See footnote 2.

b. Whether a violation of the Appointments Clause constitutes a structural error requiring automatic reversal of the Initial Decision? *Bandimere* at 1181, citing, among other cases, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995); and *Rivera v. Illinois,* 556 U.S. 148, 161 (2009).

c. Whether *Kokesh v. Securities and Exchange Commission,* No. 16-529, slip op. (June 5, 2017) *("Kokesh")* warrants the elimination of interest (not available on punitive awards) and/or duplicative penalties, including $650,000 penalty against St. John's.

d. Whether St. John's can satisfy the Section 4(a)(1) exemption even though it did not timely file its Form 144 and slightly exceeded volume limitations on a couple of transactions; and whether the draconian third tier penalties ($650,000) proposed are excessive given that its 99% owner, Patricia Whelan: (i) was an unsophisticated investor; (ii) has no history of securities violations; (ii) converted and sold only a small fraction of St. John's debt; (iii) cooperated with the investigation, then was not named as a respondent or even called to testify; (iv) executed a modest number of sales through a registered broker; and (v) at worst, committed technical violations, without scienter, based on advice of counsel?

e. Whether IBEX should be treated as a control person of BIEL, even though it never had the right to exercise that control, and never did exercise any control?

f. Whether an investor's reinvestment of the proceeds of a valid Rule 144 exempt sale transaction in the same issuer destroys the exemption?

g. Whether ALJ Elliot's punishment of BIEL's reinvestment of Rule 144 sales proceeds in the same issuer runs afoul of the legislative intent to encourage lawful investments in unregistered securities for job creation, tax realization and other U.S. economic benefits?

h. Whether BIEL's 2006 and 2007 withdrawals from voluntary registration were effective under Section 12(g) of the Securities Act?

i. Whether testimony of a Respondent's character cannot be offered by a fact witness or an expert witness, as ALJ Elliot ruled?

j. Whether third tier penalties ($650,000 against St. John's) and a penny stock bar should be awarded based on non-scienter violations?

k. Whether lawful interest on moneys loaned should be disgorged?

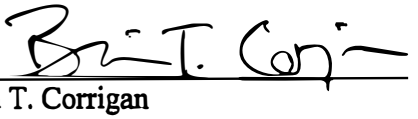
l. Should disgorgement include tax paid on profits (allowing double collection by federal government)?

m. Should disgorgement against investor, IBEX, include moneys never received and/or received and immediately reinvested in the issuer?

n. Does the so-called disgorgement award for money never received or reinvested constitute an award at law for restitution, relief not authorized by statute in this proceeding?

Dated: West Los Angeles, California
March 6, 2018

Respectfully submitted,
CORRIGAN & MORRIS, LLP

By: 

Brian T. Corrigan
(bcorrigan@cormorllp.com)
Stanley C. Morris
(scm@cormorllp.com)
Corrigan & Morris LLP
12300 Wilshire Boulevard, Suite 210
West Los Angeles, CA 90025
(310) 394-2828 Tel.
(310) 394-2825 Fax

*Attorneys for Respondents*

**PROOF OF SERVICE**

I hereby certify that on March 6, 2018, I caused to be served a true and correct copy of the following document on the date and in the manner indicated below.

**RESPONDENTS' SUPPLEMENTAL PETITION FOR REVIEW OF THE INITIAL DECISION AND REVISION ORDER**

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