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 RESPONSE TO SUPPLEMENTAL PETITION FOR REVIEW OF THE INITIAL DECISION AND REVISION ORDER AND MOTION FOR ORAL ARGUMENT

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KELLY A. WHELAN

Respondents, BioElectronics Corporation, Ibex, LLC, St. John's, LLC ("St. John's"), Andrew J. Whelan and Kelly A. Whelan (collectively, "Respondents"), reply to the Division of Enforcement's Response to Respondents' Supplemental Petition for Review of the Initial Decision and Revision Order And Motion for Oral Argument (the "Division's Response"), as follows:

1. The Division's Response implicitly concedes that the standards for granting review under Rule 411(b)(2) have been satisfied with respect to all of the issues set forth in the Respondents' supplemental and renewed petition to the Commission for review *de novo* 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").
2. The Division's Response prematurely seeks oral argument on the issues covered by the supplemental petition. Respondents submit that oral argument would be premature without the filing of new briefs by both parties. A new and substantially revised round of briefing would be appropriate and productive to the Commission in its efforts to adequately prepare for oral argument and reach a full understanding of the legal and factual disputes presently at issue.
3. Much has transpired since the Respondents' initial brief was filed with the Commission on March 29, 2017. It would be unfair and unrealistic to ask the Commission, on its own, to try to figure out the applicability of prior briefs to the present day. In addition to changing the legal landscape for issues fully briefed a year ago, much has occurred which gives rise to issues not even contemplated at the time of such briefing. Among other things,
    a. The Supreme Court's unanimous ruling in *Kokesh v. Securities and Exchange Commission,* No. 16-529, slip op. (June 5, 2017) *("Kokesh")* upended all prior decisions justifying disgorgement as equitable relief, and made clear that such relief

was punitive. Respondents contend that, in addition to making the five-year statute of limitations in 28 USC §2462 applicable to disgorgement awards, which was the ruling in *Kokesh*, there are very significant additional impacts to the ruling that require further thought, research and briefing. For example, footnote 3 of the Kokesh decision expressly excludes from consideration "whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." Another issue raised by the *Kokesh* decision is whether an award of punitive disgorgement eliminates the justification for additional punitive damages or render them violative of the excessive fines limits of the Eighth Amendment? Here, 99% of St. John's is owned by Patricia Whelan, an unsophisticated investor with no history of violations, who was personally investigated and cooperated voluntarily in the investigation, received a Wells notice, filed a Wells submission, after which the Commission declined to name her even as a relief defendant in this proceeding. Indeed, the Division did not even call Patricia Whelan as a witness at the hearing. St. John's, owned and controlled by Patricia Whelan, was not an active trader of securities, and instead held BioElectronics stock for years, then sold only a small fraction of its holdings through a registered broker upon advice of counsel. Under the circumstances, ALJ Elliot's proposed draconian $650,000 third tier penalty on top of a disgorgement penalty of all profits defies equity, particularly considering that the penalty is premised on technical non-scienter violations (failing to file timely its Form 144 and nominally exceeding the volume limitations under Rule 144 on its last few trades). Do such duplicative punishments constitute an excessive fine as to St. John's? Separately, should interest be awarded on disgorgement awards, after

Kokesh, given that it remains well-settled law that interest is not permitted on punitive awards?

b. 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, reacting to the Inspector General's concurrence that its Administrative Law Judges were not appointed in accordance with the Appointments Clause of the United States Constitution, entered an Order purporting to ratify the employment of such Administrative Law Judges (the "Ratification Order"). The Ratification Order, which post-dated the opening brief in this matter by eight months, was not previously briefed in the papers submitted to the Commission. Among other things, Respondents' brief would explain that the Ratification Order failed to 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 detached analysis of whether each ALJ warrants an appointment.

c.e ALJ Elliot's rulings in Revising Order were never briefed.e

4.e Respondents submit that the Commission's efficient and fair resolution of Respondents'e petition can best be accomplished if the parties are permitted to re-brief all matters that aree new and that remain at issue for resolution by the Commission. Rather than ask thee Commission to figure out for itself which parts of the year-old briefing apply and whiche parts of the briefing do not; and which matters at issue are unbriefed to the Commission, such that the Commission should go back into the briefs filed with ALJ Elliot to understand the parties' contentions and applicable law; the Commission should ask the parties to do that work. The parties can most easily carry the burden of making such decisions and presenting fresh briefs with all issues discussed that are presently at issue before the Commission. Respondents therefore ask for a new briefing schedule on all issues, new and pre-existing, presently before the Commission.

Dated: West Los Angeles, California
March 20, 2018

Respectfully submitted,
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PROOF OF SERVICE

I hereby certify that on March 20, 2018, 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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