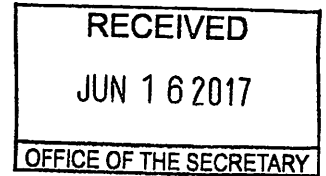


UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



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.<sup>1</sup> 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

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<sup>1</sup> 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,<sup>2</sup> 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)<sup>3</sup> 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.

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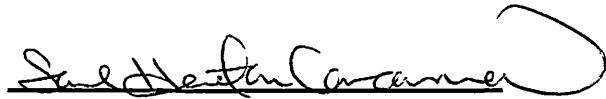
<sup>2</sup> In the Initial Decision, the ALJ opined that the appropriate measure of disgorgement here is not the total proceeds received by Respondents, but rather the difference between Respondents’ total proceeds from sales of BIEL notes and shares during the Relevant Period and the acquisition costs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

<sup>3</sup> 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,



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**CERTIFICATE OF SERVICE**

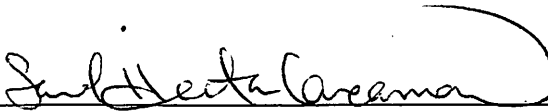
I hereby certify that true copies of the foregoing were served on the following, this 16th day of June 2017, in the manner indicated below:

**By hand and email:**

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Securities and Exchange Commission  
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