

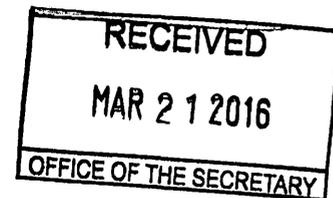
**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**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' MOTIONS FOR MORE DEFINITE STATEMENT**

The Division of Enforcement ("Division") of the U.S. Securities and Exchange Commission ("Commission") respectfully submits this opposition to the motions for more definite statement ("motions") filed by (1) Respondent Robert Bedwell ("Bedwell"); and (2) Respondents BioElectronics Corp ("BIEL"), IBEX, LLC, St. John's LLC, Andrew J. Whelan ("Whelan"), and Kelly A. Whelan ("Kelly Whelan") (collectively, the "Whelan Respondents").

**INTRODUCTION**

Respondents move the Court to order the Commission to amend the Order Instituting Proceedings ("OIP") for a number of reasons, none of which are valid. The OIP sets forth in sufficient detail the facts giving rise to this proceeding, and the legal bases under which the Commission has brought its claims. There is no question that the Respondents have sufficient notice of the allegations raised against them to allow them to defend their positions. Indeed, the Respondents submitted detailed and expansive Wells responses, motions, and Answers and

Affirmative Defenses that expose their full understanding of the factual and legal contours of the OIP. Far from needing a more definite statement, Respondents have taken full advantage of the opportunity to answer the OIP to provide a sneak preview of the full spread of defenses that they plan to present at the hearing. Their strident arguments, which belong, if anywhere, in a pre- or post-hearing brief, are premature. *See optionsExpress, Inc. et al.*, 104 S.E.C. Docket 419, 2012 WL 8704501, \*2 (July 12, 2012) (denying motion for more definite statement) (“[T]he More Definite Statement Motion consists mainly of legal arguments which are not a proper basis for this type of motion.”) In any event, the specificity that the Respondents demand in their motions rises to the level of seeking disclosures of the Division’s evidence and legal theories in advance of the hearing, none of which is required or appropriate under the SEC Rules of Practice (“Rules”).

### **RELEVANT PROCEDURAL HISTORY**

The OIP, filed on February 5, 2016, alleges that the Whelan Respondents illegally distributed, and participated in the illegal distribution of hundreds of millions of BIEL shares, in violation of Section 5 of the Securities Act of 1933 (“Securities Act.”). OIP at ¶¶ 1, 10-18, 37, 38, 47. The OIP further alleges that BIEL falsely recognized revenue from two “bill-and-hold” transactions in a public filing, in violation of Sections 13(a) and 13(b) of the Securities Exchange Act of 1934 (“Exchange Act.”), and accompanying Rules. OIP at ¶¶ 1, 19-25, 39-42. Finally, the OIP alleges that BIEL’s auditor, Bedwell, engaged in improper professional conduct by allowing BIEL to record revenue on these bill-and-hold transactions, in violation of Rule 102(e). OIP at ¶¶ 1, 19-36, 50.

Prior to issuing the OIP, the Division issued a Wells notice to the Respondents, and the Respondents submitted detailed responses setting forth their interpretations of the relevant facts

and law, and why they believed that the Division should not recommend that the Commission bring charges against them. Many of these same arguments were echoed in Respondents' motions and Answers and Affirmative Defenses. Following institution of the OIP, the Division has produced and made available to the Respondents all non-privileged documents from its investigative file for this matter, which contain all documents received from Respondents and third parties that support the Division's claims and theories.

## **ARGUMENT**

### **I. Legal Standard for a Motion for More Definite Statement**

Pursuant to Rule 200(b), an OIP shall (i) state the nature of the hearing; (ii) the legal authority and jurisdiction under which the hearing is to be held; (iii) the nature of any relief or action sought to be taken; and (iv) "the factual and legal basis [for the OIP] in such detail as will permit a specific response, thereto." The Rules do not require any additional pleading of evidence or legal theories. As the Commission recently confirmed:

We have consistently held that there is no "right to a disclosure of evidence in advance of the hearing." In particular, although a respondent is entitled to be "sufficiently informed of the nature of the charges against him so that he may adequately prepare his defense," the OIP is not required to contain a "recital of the evidence which may be introduced at the hearing" to support those charges. In short, the limited function of an OIP is to provide notice of *what* violations of the securities laws are alleged; it need not detail *how* the Division ultimately will try to prove them.

*Timbervest, LLC, et al.*, S.E.C. Release No. 4197, 2015 WL 5472520, \*19 (Sept. 17, 2015)

(emphasis in original).

Should an OIP fall short of these pleading requirements, Rule 220(d) allows the filing of motions "for a more definite statement of matters of fact or law to be considered or determined." The Court, however, routinely denies motions for more definite statement, precisely because the OIP requires only notice pleading and not the pleading of supporting evidence or legal theories.

*See optionsXpress*, 2012 WL 8704501, \*2 (July 11, 2012) (“It has long been established that a respondent is not entitled to disclosure of the evidence on which the Division intends to rely or to disclosure of the Division’s theory of the case.”), and *J. Kenneth Alderman*, 105 S.E.C. Docket 2892, 2013 WL 10619170, \*2 (Feb. 20, 2013) (denying motion) (“Information beyond a sufficient understanding, by a respondent, is considered evidence to which they are not entitled prior to the hearing.”)

**II. The OIP Provides Sufficient Notice of the Factual and Legal Bases of the Division’s Claims**

The Respondents raise a number of arguments concerning the specificity and clarity of the OIP. None are valid, as we set forth below. The OIP leaves no doubt as to the factual and legal bases of the allegations brought against the Respondents. And the Respondents, as they have shown through their expansive submissions and filings, are unquestionably well-prepared to mount a rigorous (though ultimately unsuccessful) defense.

**A. The OIP Adequately Alleges the Means by which Bedwell Acted with “Improper Professional Conduct.”**

Respondent Robert Bedwell raised one argument in his motion for more definite statement (“Bedwell Motion”). He claims that the OIP is deficient because it does not inform him of the culpable state of mind under which the Commission claims he acted. *See* Bedwell Motion at 3-4. In particular, Bedwell asserts that the OIP does not specify whether he acted with recklessness or negligent misconduct, and if the latter, whether his misconduct represented a “single instance of highly unreasonable conduct,” or “repeated instances of unreasonable conduct,” as provided in Rule 102(e)(1)(iv)(B). *Id.*

Bedwell’s criticisms are unfounded. From a plain reading of the OIP, Bedwell is able to determine the means by which he allegedly engaged in “improper professional conduct,” as

provided in Rule 102(e)(1)(ii) and (iv). The OIP lists, in detail, the Auditing Standards that Bedwell unreasonably violated, and the many red flags that he knowingly and/or recklessly ignored. See OIP at ¶¶ 27-34. Bedwell thus does not seek clarification of “what” standards or regulations he allegedly violated, but “how” the Division will prove its claims. *Timbervest*, 2015 WL 5472520, \*19. In order to advance the proceedings, however, the Division clarifies that the OIP alleges, and the Division will establish at the hearing, that Bedwell’s professional misconduct represents, in the alternative, both reckless and negligent conduct as provided in Rule 102(e)(iv)(A) and (B). In support of its negligence claims, the Division will demonstrate that Bedwell’s misconduct represented, in the alternative, both a “single instance of highly unreasonable conduct in violation of professional standards in circumstances in which [he] [knew] or [should have known], that heightened scrutiny was warranted,” and “repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.” Rule 102(e)(iv)(B).

**B. The OIP Sufficiently Charges the Whelan Respondents with Violating Section 5.**

The Whelan Respondents assert that the OIP is deficient for not mentioning in the opening paragraph that the Commission’s claims are brought pursuant to Section 5 of the Exchange Act.<sup>1</sup> See Whelan Respondents’ Memorandum of Points and Authorities in Support of Motion for More Definite Statement (“Whelan Resp. Mem.”) at 2. The Division simply does not understand this assertion. The OIP clearly alleges that the Whelan Respondents violated Section 5 by participating in the issuance of hundreds of millions of shares of BIEL stock in illegal

---

<sup>1</sup> The Division notes that in the opening paragraph of the OIP, following standard Commission practice, the Commission set forth the jurisdictional and procedural basis for the case, not the statutory provisions that the Respondents allegedly violated. The OIP sets forth these statutory provisions in the Violations section (¶¶ 37-44) and summary of charges (¶¶ 45-50) – including the charges under Section 13 of the Exchange Act which also are not mentioned in the opening paragraph.

unregistered transactions. *See* OIP at ¶¶ 1, 10-18, 37-38. The OIP also describes the manner and means by which BIEL used IBEX and St. John’s as affiliates, underwriters, and conduits to illegally distribute hundreds of millions of shares into the marketplace.

The Whelan Respondents are undoubtedly on notice of the Section 5 claims brought against them. As noted above, they have made expansive submissions to the Division and Court that purport to explain the legal and factual bases under which their actions were in conformity with the Securities Act registration requirements. The Whelan Respondents thus do not require any additional detail or clarity of the Commission’s allegations to prepare their defenses. *See Miguel A. Ferrer, et al.*, 103 S.E.C. Docket 3179, 2012 WL 8704497, \*5-6 (June 13, 2012) (“Respondents Answers give no indication that they did not understand the allegations. ... I reject Respondents' claim that the OIP does not give sufficient notice about the specific charges against them.”)

**C. The OIP Sufficiently Identifies the Securities and Transactions at Issue.**

The Whelan Respondents fault the OIP for not including a detailed chart identifying the BIEL shares that they sold, and participated in selling, in unregistered transactions. Whelan Resp. Mem. at 3. These arguments are misplaced for several reasons. First, as set forth above, the OIP adequately alleged the factual and legal bases supporting the Commission’s Section 5 claims, such that the Whelan Respondents are on notice and able to prepare a defense. Second, the evidentiary details that the Whelan Respondents demand in the OIP are well beyond Rule 200(b)’s requirements of a “short and plain statement of the matters of fact and law to be considered and determined.” *See J. Kenneth Alderman*, 2013 WL 10619170, \*3 (“The identity of the specific securities that will be evaluated by its expert and in its case-in-chief goes beyond that required to provide a response and prepare an adequate defense.”)

Third, the Division has produced and made available to the Whelan Respondents all non-privileged documents that it received from Respondents and third parties during the investigation. These include transcripts, bank, brokerage, and transfer agent records from which the Whelan Respondents may derive the details of the BIEL transactions at issue. The Division's investigative file also includes a detailed chart that the Whelan Respondents or their counsel prepared purporting to identify the "loans" that IBEX made to BIEL, and the unregistered BIEL stock transactions giving rise to the OIP. Such a chart, available to, and prepared by the Whelan Respondents, casts a shadow on their claims of uncertainty as to the scope of the Section 5 claims. *See E. Ronald Lara*, 57 S.E.C. Docket 2600, 1994 WL 615226 (Nov. 3, 1994) (denying motion for more definite statement seeking identity of purchasers and sellers of subject securities and date and time of each transaction, "[i]n light of the Division's intent to make available to respondents its investigatory file...").

At the appropriate time, when the Court directs the parties to exchange expert reports and hearing exhibits, or as otherwise agreed by the parties, the Division will provide a listing of the BIEL transactions that it claims violated Section 5, as well as a quantification of the illegal profits that the Whelan Respondents received from these illegal transactions that are subject to disgorgement. During this exchange of hearing exhibits, the Division will expect a similar chart from the Whelan Respondents that supports their own defenses, as it is their burden to demonstrate that the unregistered BIEL transactions were covered by a valid exception to the reporting requirements.

**D. The OIP Sufficiently Differentiates Between the Whelan Respondents.**

The Whelan Respondents assert that the OIP improperly refers to Andrew Whelan, the lead Whelan Respondent, as "Whelan." Whelan Resp. Mem. at 3. Again, the Division is not

clear on the purported uncertainty that the Whelan Respondents contend results from this claimed deficiency in the OIP. All of the other Whelan family members mentioned in the OIP are identified by their full names. *See e.g.*, OIP at ¶ 10 (“From at least August 2009 to at least November 2014, BioElectronics, through IBEX and St. John’s, and the efforts of *Whelan and Kelly Whelan*, distributed hundreds of millions of unrestricted shares in a series of unregistered transactions.”). The Whelan Respondents have not identified one sentence or paragraph of the OIP in which a reader could possibly be confused as to which Whelan is referenced, and the Division on its own is unable to identify any such ambiguity or confusion.

**E. The OIP Sufficiently Alleges that IBEX and St. John’s Were Affiliates and Underwriters of BIEL.**

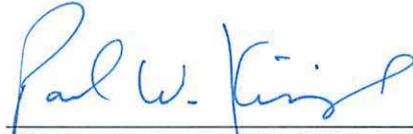
Finally, the Whelan Defendants contend that the OIP does not sufficiently plead facts to establish Whelan’s control of Kelly Whelan and IBEX. *See Whelan Resp. Mem.* at 4-5. Again, this contention is without merit, and demands far more from the OIP than Rule 200(b) requires. The OIP sets forth a detailed description of the inter-Whelan conduct and relationships at issue in the case, from which the Whelan Respondents not only are on notice of the Section 5 claims, but also the manner and means by which Kelly Whelan, IBEX, and St. Johns, were affiliates and underwriters of BIEL. *See OIP* at ¶¶ 1, 10-18. The additional detail demanded by the Whelan Respondents on this issue represents evidence, as opposed to allegations, and as such, is beyond the pleading requirements of Rule 200(b). *See J. Kenneth Alderman*, 2013 WL 10619170, \*2-3 (describing dividing line between allegations and evidence).

**CONCLUSION**

For the foregoing reasons, the Court should deny Respondents’ motions for more definite statement.

Dated: March 21, 2015

Respectfully submitted,



Charles D. Stodghill (202) 551-4413  
Paul W. Kisslinger (202) 551-4427  
Thomas B. Rogers (202) 551-4504  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

COUNSEL FOR THE DIVISION  
OF ENFORCEMENT

**Certificate of Service**

I declare that on March 21, 2016, the foregoing was served upon counsel to the respondents by electronic mail, per agreement of the parties, at the following addresses:

Jane W. Moscovitz - [jmoscovitz@moscovitz.com](mailto:jmoscovitz@moscovitz.com)

Stanley C. Morris - [scm@cormorllp.com](mailto:scm@cormorllp.com)



Paul W. Kisslinger