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' PETITION FOR REVIEW OF THE INITIAL DECISION

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Respondents, BioElectronics Corporation ("BIEL"), Ibex, LLC ("IBEX"), St. John's, LLC ("St. John's"), Andrew J. Whelan ("A. Whelan") and Kelly A. Whelan ("K. Whelan" and, collectively with BIEL, IBEX, St. John's and A. Whelan, "Respondents")[1], through the undersigned counsel, respectfully petition the Securities and Exchange Commission ("SEC" or "Commission") for review of the Initial Decision issued by Administrative Law Judge Cameron Elliot ("ALJ Elliot") dated December 13, 2016 (the "Initial Decision") pursuant to Rule 411(b)(2) of the SEC's Rules of Practice.[2]

The Initial Decision at pages 1-2 summarizes that ALJ Elliot: "(1) finds that these five Respondents violated Section 5 of the Securities Act of 1933; (2) finds that BIEL violated Section 13 of the Securities Exchange Act of 1934, that BIEL and A. Whelan violated Rules thereunder, and that A. Whelan caused some of BIEL's violations; (3) orders Respondents to cease and desist from committing and causing any violations; (4) orders Respondents to disgorge a total of approximately $1,820,000 in ill-gotten gains, plus prejudgment interest; (5) permanently bars A. Whelan and K. Whelan from participating in offerings of penny stock; and (6) imposes civil penalties of $650,000 against St. John's and $130,000 against A. Whelan." All in, ALJ Elliot proposes that the Commission impose devastating injunctive and monetary relief, including a cease and desist order, a full permanent penny stock bar, and more than $2.5 million in monetary awards against individual investors, with interest, and a company which needs every dime it has to complete the development stage of its revolutionary drug free pain relief product. Although all claims noticed in the Order Instituting Proceedings ("OIP") are non-fraud, non-scienter claims, ALJ Elliot proposes sanctions as if the OIP contained claims premised on

[1] All Respondents excluding only Robert P. Bedwell.

[2] Respondents timely filed a motion to correct the Initial Decision. That motion was denied on January 13, 2017. This Petition is timely filed on or before February 3, 2017.

criminal or malicious intent. Respondents do not remotely have sufficient means to pay such award. The award is unjust considering the facts and circumstances before the Commission. See Section E of Initial Decision, pp. 57-59.

Respondents have invested their life's savings and any proceeds generated from their transactions investing and re-investing in BIEL. BIEL, in turn, invested in the development of its revolutionary, limited FDA market approved, non-pharmaceutical pain relieving products and the international marketing efforts of that product that have resulted in millions of dollars of sales of product and jobs for its employees. The individual investor Respondents cannot disgorge what has been reinvested into BIEL and spent by BIEL. That is particularly true because the Commission, if it adopts the Initial Decision, effectively short-circuits any prospects that Respondents could realize on that reinvestment through the proposed financial death sentence laid out in the Initial Decision. ALJ Elliot's proposal that Respondents be subject to a permanent penny stock bar, disgorge money they have already reinvested in BIEL and BIEL has invested in its business, and that St. John's and A. Whelan pay civil penalties too, all after a brief trial based on an OIP devoid of claims based on scienter, constitutes a manifest injustice and a grave error in discretion.

The commission reviews the findings of fact and conclusions of law in an initial decision *de novo*. An initial decision is entitled no deference. Theodore W. Urban, Order Denying Motion for Summary Affirmance, Exchange Act Rel. No. 56961 (Dec 13 2007).

Respondents respectfully ask the Commission, upon *de novo* review, to reject the Initial Decision in its entirety because it violates the Appointments Clause of the United States Constitution (Art. 2, Section 2, clause 2) and/or because the Initial Decision was premised on proceedings fatally tainted by the law judge's errors in discretion (e.g. failing to permit the introduction of testimony to establish reliance on counsel to mitigate any allegations of willful

misconduct; refusing to place any weight or to allow live testimony from experts as to whether or not Section 5 or Section 13 were violated; whether and to what extent BIEL's withdrawal of registration in 2006 and 2007 were effective such that BIEL was not subject to Section 13 obligations owed only by companies with a class of registered shares and whether IBEX's conduct was part of a scheme to evade or sound investments consistent with other lead investors' behavior.) If the Commission rejects such contentions such that it is inclined to ratify the proceedings themselves, it should nevertheless substantially reduce the award proposed in the Initial Decision to comport with the Due Process Clause in the 4th and 14th Amendments, the 8th Amendment's guaranty against excessive fines by the government, and basic notions of fairness given the content of the OIP, as well as the Respondents' ability to pay, the Respondents' actual conduct in light of all of the facts and circumstances, and the applicable five-year statute of limitations under 28 USC §2462.

The standards for granting review pursuant to a petition for review under Rule 411(b)(2) are satisfied as follows:

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

1. **The Trial Was Not Conducted by A Judge Appointed in Compliance with the Appointments Clause of the U.S. Constitution.**

   a. The proceedings were conducted by ALJ Elliot, who was not properly appointed under the Appointments Clause of the United States Constitution (see *Bandimere v. United States Securities and Exchange Commission*, AP# 15-9586, 844 F.3d 1168 (10th Cir. December 27, 2016) (holding that ALJ Elliot's actions in presiding over a similar administrative proceeding violated the Appointments Clause, citing *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991)).

b. Violations of the Appointments Clause of the United States Constitution constitute a structural error requiring automatic reversal of the Initial Decision. As *Bandimere* makes clear at footnote 31, "Those who challenge agency action typically have the burden to show prejudicial error. 5 U.S.C. § 706; *Shinseki v. Sanders*, 556 U.S. 396, 406-07 (2009). The error here is structural because the Supreme Court has recognized the separation of powers as a 'structural safeguard.' *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (emphasis omitted). Structural errors are not subject to prejudicial-error review. See *Rivera v. Illinois*, 556 U.S. 148, 161 (2009) (stating 'constitutional errors concerning the qualification of the jury or judge' require automatic reversal (emphasis omitted)); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir.2015) ('[A]n Appointments Clause violation is a structural error that warrants reversal regardless of whether prejudice can be shown.'); *United States v. Solon*, 596 F.3d 1206, 1211 (10th Cir. 2010) (stating structural errors are subject to automatic reversal)."

2. **ALJ Elliot Failed to Consider and Allow Respondents to Offer Evidence of A. Whelan's Character.**

   a. ALJ Elliot refused to consider and struck character testimony in favor of Andrew Whelan offered under oath by Brian Flood (Respondents' expert on holding periods)[3] on the invalid ground that an expert witness cannot also provide testimony bearing on the character of a Respondent.

[3] Examination of Respondents' Expert Witness on Holding Periods Applicable to Securities Sold by Respondents, Brian Flood, who had prepared financial statements for BIEL for three years, testified as follows Starting at Reporter's Transcript, p. 1194:

"14 THE WITNESS: Okay, thank you.
15 I just wanted to share with you that in
16 going back to when I first started, and in my
17 capacity I've been CFO for many different
18 organizations, I have worked with a lot of different
19 presidents over my career, and, you know, my
20 experience with Andy[Whelan]--you know, I've now done 15
21 straight quarters of financial statements, and I
22 just wanted -- I thought it was important to say
23 that never once in any of these -- in the generation
24 of any of these financials has he asked me to do
25 anything that's inappropriate.
Page 1195
1 And on the contrary, he has -- whenever
2 I've recommended any adjustments to be made to those
3 financials, that may be an adjustment that added
4 expense to his financials, he's never objected.
5 He's always agreed to record those transactions.
6 And so that's certainly my experience.
7 I think it was -- I think it's fair to
8 say, and I wanted to share that with you, that I've
9 certainly observed that in my dealings with him,
10 he's always been -- he's always demonstrated high
11 integrity. He's always accepted whatever
12 recommendations I've made when it comes to his
13 financial statements that he has to then share and
14 disclose and publish. And I thought that was
15 important to be able to communicate that.
16 MS. CONCANNON: Your Honor --
17 JUDGE ELLIOT: Hold on.
18 THE WITNESS: I also want to add that, you
19 know, when I come to his offices, the first thing he
20 always asks me is how my son is doing. My son is a
21 helicopter pilot in the Navy. I know Andy served,
22 and I think that speaks to his character. My
23 observation is that he certainly is a high character
24 individual, and I just ask that you consider these
25 factors based on my experience in any judgment you
Page 1196
1 make from this.
2 MS. CONCANNON: Your Honor --
3 THE WITNESS: So I wanted to contribute
4 that.

b. ALJ Elliot refused to consider character testimony in favor of Andrew Whelan offered under oath by Richard Staelin[4] on invalid grounds that the witnesses also offered fact testimony – putting counsel to the false choice of either offering such witness for fact or character testimony. There is no sound legal basis to support precluding character testimony under such circumstances. Accordingly, such decision constitutes an abuse of discretion.

3. **ALJ Elliot Failed to Limit Claims to Five-Year Statute of Limitations Prescribed By 28 USC §2462.**

   a. ALJ Elliot's Initial Decision proposes to grant relief beyond that permitted by the five-year statute of limitations (28 USC §2462) applicable to the claims asserted in the OIP.

   b. On January 13, 2017, the Supreme Court granted certiorari in *Kokesh v. Securities and Exchange Commission* (U.S. Jan. 13, 2017) (No. 16-529) to determine

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5 JUDGE ELLIOT: All right. Thank you.
6 Okay. So, Mr. Corrigan, I will give you a
7 choice. He can be your expert or your character
8 witness but not both.
9 MR. CORRIGAN: We will need him as our
10 expert. Thank you, Your Honor.
11 JUDGE ELLIOT: So I'm going to strike what
12 you just said. Thank you anyway.
13 THE WITNESS: Okay."

[4] Examination of Richard Staelin, p. 1256 of Reporter's Transcript:
21 Q Have you in your experience with Andrew
22 Whelan known him to be dishonest in any way?
23 MS. CONCANNON: Objection.
24 JUDGE ELLIOT: Okay. So he can be a fact
25 witness or a characteristic witness.
Page 1257
1 MR. CORRIGAN: All right. Let's stick
2 with the facts.

whether disgorgement claims are subject to the five-year statute of limitations applicable to enforcement proceedings seeking civil penalties. The decision would resolve a split between the Tenth Circuit, which held in *Kokesh* that the five-year limitations period does not apply, and the Eleventh Circuit, which has held that it does.

c. With only a few exceptions, investor IBEX sold its long-held notes at the face value of the debt represented by those notes (break-even price with no profits), or at a small loss, during the period from July 1, 2008 to the present. See RX 1A; and Post-Hearing Declaration of Brian Flood, Exhibit 1. The computation of profits to be disgorged, if any, should be based only on the handful of profitable transactions that were completed within the five-year statute of limitations between April 17, 2010 and February 5, 2016.[5] Using only the transactions within the 5-year statute of limitations, the total profits is only $462,532. See *Id.*

c. The OIP was published February 5, 2016 (Securities Act of 1933 Release No. 10036; Securities Exchange Act of 1934 Release No. 77073). Tolling Agreements, attached to the Post-Hearing Declaration of Stanley C. Morris at Exhibit 1, reflect that the statute of limitations that would have started February 5, 2011, was extended by written agreement to April 17, 2010. Transactions before April 17, 2010 should be excluded from the relief awarded in the Initial Decision. The bulk of the $1,580,593 computed by ALJ Elliot was based on pre-April 17, 2010 transactions outside of the statute of limitations. Of that amount, $631,686

[5] Tolling Agreements, attached to the Post-Hearing Declaration of Stanley C. Morris at Exhibit 1, reflect that the statute of limitations that would have started February 9, 2011, was extended by written agreement to April 17, 2010. Transactions before that date should be excluded from the relief awarded in the Initial Decision.

should be excluded as arising from transactions outside of the statute of limitations period, net of 15% capital gains taxes addressed separately. See RX 1A; and Post-Hearing Declaration of Brian Flood, Exhibit 1. If the Commission limits its award to the transactions within the statute of limitations, as requested, an additional $259,291 should be reduced, because the notes sold included lawful interest accrued on the debt converted or sold (which should be offset against profits). *Id.* Finally, $193,096 should be reduced from the disgorgement amount because that amount constitutes 15% of the profits of such sales – which amount was paid by IBEX based on capital gains taxes. Since that amount was already paid to the federal government, the federal government should not be allowed to double dip – collecting both taxes and disgorgement to the treasury of the same moneys as if such taxes had not already been paid. The Respondents were not able to reconstruct, exactly, the computation created by ALJ Elliot and referenced in his Initial Decision in support of his proposed award, although the difference is nominal. Respondents' numbers, instead, are based on the computations of Brian Flood, attached to his declaration at Exhibit 1. The Brian Flood numbers approximately reconcile to the Court's number using these three reductions. If the Commission does not limit its disgorgement computation to the transactions within the statute of limitations period, the profits would be $1,094,220. The offset for interest of the notes converted and sold would be $259,291 and the offset for capital gains taxes paid would be $193,096. *Id.*

d. A 5-year statute of limitations applies to the Division's claims against the Respondents. See *28 U.S.C. § 2462.* See, *SEC v. Graham*, 823 F.3d 1357 (11th Cir. Fla. 2016). The five-year limitations period of §2462 applies to actions

seeking "any ... penalty." A "penalty" is "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). A penalty is thus animated by the "traditional aims of punishment--retribution and deterrence," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and is not solely intended to "'afford a private remedy to a person injured by the wrong,'" *Johnson*, 87 F.3d at 487.

e. In determining the punitive nature of a remedy, courts look not only at the labels attached, but the "purpose or effect" of the remedy. *United States v. Ward*, 448 U.S. 242, 249 (1980). Disgorgement has substantial punitive aspects. First, disgorgement is marked by a deterrent purpose, which is a hallmark of punitive remedies. See, e.g., *SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993) ("The theory behind the remedy is deterrence and not compensation."); *SEC v. First City Fin. Corp.*, 890 F2d 1215, 1232 n.24 (D.C. Cir. 1989) ("[I]n the context of an SEC enforcement suit ... deterrence is the key objective."); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) ("The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits"); see also *Blue Shield of Va. v. McCready*, 457 U.S. 465, 473 n.10 (1982) ("Only by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully served.").

f. This is confirmed by the SEC's public statements about its enforcement actions, which highlight the deterrent and retributive effect of its disgorgement

orders. See, e.g., SEC, Press Release No. 2005-93 (June 28, 2005) (in announcing settlement providing for disgorgement plus interest of $474,279 and a civil penalty of $120,000, the SEC stated that "[t]his action is a message to all those who would seek to deprive mutual bank depositors of their rightful opportunity to participate in their bank's IPO. Hopefully, the actions taken today by the SEC and the Justice Department will deter anyone considering this type of misconduct in the future."); SEC, Press Release No. 2016-203 (Sept. 29, 2016) (in announcing settlement providing for nearly $200 million in disgorgement and interest, the SEC emphasized that "[f]irms will be held accountable for their misconduct no matter how they might structure complex transactions").

g. As a matter of legal parlance, the terms forfeiture and disgorgement are interchangeable. Forfeiture has long been defined as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." Black's Law Dictionary 765 (10th ed. 2014). Fitting comfortably within that definition, disgorgement is defined as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *Id.* at 568. Both terms involve the giving up of property as a result of wrongdoing. Accordingly, the case law often uses the terms forfeiture and disgorgement interchangeably. See, e.g., *United States v. Ursery*, 518 U.S. 267, 284 (1996) ("Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.").

h. The underlying policies of disgorgement and forfeiture are also similar. Civil forfeiture "prevent[s] further illicit use of the conveyance and ... impos[es] an economic penalty, thereby rendering illegal behavior unprofitable." *Calera-*

Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687 (1974). Likewise, disgorgement "operates to make the illicit action unprofitable for the wrongdoer." *Contorinis*, 743 F.3d at 301; see also *SEC v. Palmisano, 135 F.3d 860, 866 (2d Cir. 1998)* ("Disgorgement, like the forfeitures discussed in *Ursery*, is designed in part to ensure that the defendant not profit from his illegal acts.")

i. Moreover, courts put the burden of uncertainty on defendants in both contexts, as a consequence of the defendant's wrongdoing. Compare *Teo*, 746 F.3d at 107 with *United States v. Warshak*, 631 F.3d 266, 332 (6th Cir. 2010).

j. Applying the label of "equitable" to disgorgement provides no basis to distinguish between the effect of forfeiture and disgorgement: "In both instances, money liability is predicated upon a finding of the owner's wrongful conduct." *United States v. U.S. Coin & Currency, 401 U.S. 715, 718 (1971).*

k. The terms of § 2462 are mirrored in the Bankruptcy Code, which provides that debts arising from "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" cannot be discharged. 11 U.S.C. § 523(a)(7). In that context, the SEC has argued--successfully--that disgorgement orders fit within the bankruptcy discharge exception. See *In re Telsey*, 144 B.R. 563 (Bankr. S.D. Fla. 1992).[9] In accepting the SEC's argument that disgorgement is a nondischargeable "fine, penalty, or forfeiture," one court explained that the

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[9] See also, e.g., *In re Towers*, 162 F.3d 952, 955 (7th Cir. 1998) ("It is easy enough to call restitution under the Illinois Consumer Fraud and Deceptive Business Practices Act 'a fine, penalty, or forfeiture.'"); *HUD v. Cost Control Mktg. & Sales Mgmt. of Virginia, Inc., 64 F.3d 920, 928 (4th Cir. 1995)* ($8.65 million disgorgement order not dischargeable in bankruptcy, because government's interest in enforcing debt was "penal"); *In re Jensen*, 395 B.R. 472, 484 (Bankr. D. Colo. 2008) ($ 228,836 disgorgement order obtained by State of Colorado not dischargeable in bankruptcy, because of "penal and deterrence goals" of Colorado consumer protection statutes).

"deterrence purpose" of disgorgement is "sufficiently penal to characterize the resulting debt as a fine, penalty, or forfeiture.'" *Id.* at 565. Having prevailed on that issue in the bankruptcy court, the SEC is judicially and equitably estopped to argue in the context of section 2462, that the Commission should come to the opposite conclusion here.

l. Similarly, the IRS has taken the position that disgorgement orders may be "punitive" debts, and therefore not deductible, where the order "serves primarily to prevent wrongdoers from profiting from their illegal conduct and deters subsequent illegal conduct." IRS, Office of Chief Counsel, Memorandum, No. 201619008, at p. 9 (May 6, 2016). The IRS noted that "cases that impose disgorgement as a discretionary equitable remedy can have similarities to some cases that impose forfeiture as required by statute." *Id.*

m. The government should not be permitted to pick and choose when its disgorgement orders are penalties or forfeitures by advancing contradictory interpretations of the same language in different statutes. See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988); *Northcross v. Board of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973).

n. When considered together, the SEC's contradictory interpretation of these two "fine, penalty, or forfeiture" provisions would allow the SEC to impose nondischargeable monetary obligations without any time restriction and without regard to whether the defendant himself ever obtained or still holds the monies ordered disgorged. It should not be lightly assumed that Congress intended to impose such a draconian burden on securities law violators, especially given that many securities law violations, including those at issue in this proceeding, require

no showing of culpable intent. See, e.g., 15 U.S.C. § 78n(a) (solicitation of proxies); id. § 78k(a) (registration of securities); id. § 78r(a) (misleading statements); see also *SEC v. Merck. Capital, LLC*, 397 F. App'x 593, 595 (11th Cir. 2010); *SEC v. Colello*, 139 F.3d 674, 675 (9th Cir. 1998).

4. **ALJ Elliot Failed to Reduce Proposed Monetary Relief to Account for The Fact that The Respondents Cannot Repay the Proposed Disgorgement Amount, Much Less the Penalties Proposed, Especially Given the Overbroad Proposed Injunctive Relief Included in The Initial Decision.**

   a. The Respondents timely filed appropriate financial disclosures seeking relief based on their inability to pay. ALJ Elliot incorrectly found that all the Respondents have the ability to pay disgorgement. Initial Decision, p. 57-58. They do not have such ability. Indeed, ALJ Elliot described BIEL's financial condition as "anemic" and that such financial condition was "well documented." Initial Decision, p. 58. Substantially all the net worth of the remaining Respondents is wholly dependent on the value of the BIEL securities held by such Respondents. To complete the development stage of its business, BIEL requires further infusions of capital, the prospect of which would be devastated by the terms of the Initial Decision, if adopted by the Commission.

   b. Although ALJ Elliot did recognize that K. Whelan, BIEL and IBEX are unable to pay individual civil penalties, he loaded up on penalties against A. Whelan and St. John's, neither of which have the ability to pay the disgorgement amount, much less civil penalties. ALJ Elliot contends that Patricia Whelan, Andrew Whelan's wife and the owner of St. John's, a non-party to these proceedings, should have disclosed her financial condition "in fairness", to support his decision to impose

whopping civil penalties against her company, St. John's. Yet, there is no evidentiary support for holding her liable for St. John's (a duly formed Limited Liability Company) debts. Patricia Whelan was not even called as a witness at the hearing by either side. Under these circumstances, nothing should be inferred from the fact that she did not voluntarily involve herself into the case by injecting her financial disclosures into the case. If ALJ Elliot wanted to see her financial disclosures, as a non-party to the case, he could have and should have made clear at some point that such non-party's finances would be required and why they would be required in order for him to consider granting relief to either the Respondents in this case, A. Whelan or St. John's, based on A. Whelan's and St. John's inability to pay.

c. The Commission should eliminate the civil penalties awarded in the Initial Decision, in their entirety, and reduce substantially the disgorgement amount, and/or remand the matter to ALJ Elliot for reconsideration. U.S. Constitution, Article 8 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment.")

5. **ALJ Elliot's assessment of third tier penalties, a cease and desist order and a penny stock bar were not supported by facts established by a preponderance of evidence, and were not based on facts alleged in the OIP, which advised Respondents only of non-scienter based claims (Respondents were not on notice that ALJ Elliot would be considering remedies beyond those asserted in the OIP.)**

a. In *Christopher A. Lowry*, Rel. No. 35131 (Dec 5, 2001) p. 2, the Commission denied summary affirmance because the law judge's decision to impose a

permanent bar which the respondent directly challenged, constituted an exercise of discretion which was important and that the Commission should review. Here, there is an extensive record and lengthy decision and the law judge imposed two separate permanent bars that have been directly challenged and which warrant review.

b. Notably, the OIP alleges neither fraud nor an intent to defraud. There is no claim for violations of Rule 10b-5, for example, which one would typically expect to see as a predicate to third tier sanctions. The OIP, at most, asserts that A. Whelan and K. Whelan willfully violated Sections 5 and 13, neither of which require a showing of willfulness. ns 5 and 13, neither of which require a showing of willfulness. See OIP 8, 41, 42. Because there was insufficient notice in the OIP that this proceeding could result in sanctions arising out of a willful tort, the proposed award exceeds the bounds of Due Process and should be stricken, in its entirety, as unconstitutional.

c. Defining "willful" as merely intending the physical act which constitutes the violation does not capture a qualitative difference between a violation that is "willful," and subject to civil penalties, and a violation that is not "willful," for which civil penalties are not available. Except where a person is in a trance or sleepwalking, neither Section 5 nor Section 15(a) can be violated by an unintentional physical act. It is absurd to think that Congress used the term "willful" to ensure civil penalties were not imposed on sleepwalkers.

d. We have found no instance where the Commission actually applied the "willfulness" standard used by the law judge to a case that did not involve at least negligent conduct. The Commission, in *International Shareholders Service Corp.*,

1976 WL 160366 (SEC Apr. 29, 1976), as amended 1976 WL 182458 (SEC June 8, 1976), dismissed the law judge's finding of a "willful" Section 5 violation against a broker who sold unregistered securities in reliance on an exemption made inapplicable by the issuer's conduct.

e. The record reflects the Respondents acted reasonably by consulting with counsel regarding the legality of Respondents' activities and by securing formal legal opinion letters as a predicate to each issuance of unregistered stock. The court in *Howard v. SEC,* 376 F.3d 1136, 1148, n. 20 (D.C. Cir. 2004) recognized that even for securities professionals, compliance with the securities laws was sufficiently difficult that laymen have no real choice but to rely on counsel, and the proper functioning of the securities markets depends on the ability to rely on counsel. Concluding that relying on counsel is irrelevant, or a negative, as did the law judge here, can only be a disincentive to obtaining advice from counsel.

f. ALJ Elliot struck the reliance on counsel defense even after recognizing that the mountain of legal opinion letters surrounding the securities transactions in this case may negate scienter. Initial Decision, p. 4; Reporter's Transcript, p. 25. Respondents clearly did rely on counsel, Alexander Kuhne, and other counsel and professionals in connection with their securities transactions and financial reporting (indeed, every issuance of unregistered securities at issue in the case was predicated upon a formal legal opinion letter to the transfer agent – the transfer agent would not have sent the stock otherwise!). See, e.g. RX 39, 41, 43, 45, 69, 71, 74, 76, 78, 80, 81, 82, 85, 87, 88, 89, 91, 94, 98, 101, 103, 105, 108, 110, 113, 114A, 115, 119, 123, 127, 128, 129, 131, 133, 134, 136, 138, 139, 141, 142, 144, 145, 147, 148, 149, 151, 154, 155, 157, 158, 160, 162, 166, 167, 172G,

192. See also RT 417 [K. Whelan testified: "I rely on the opinions of my attorneys."] Moreover, ALJ Elliot expressly references the opinions of counsel, Lex Kuhne, in the Initial Decision at p. 13. At the hearing, Judge Elliot recognized that legal opinion letters "may negate scienter." RT, p. 25, ln 8. Yet, ALJ Elliot refused to even permit A. Whelan to testify about his reliance on counsel, Kirkpatrick and Lockhart, regarding his understanding that BIEL's withdrawal from registration in 2006 and 2007 was effective. RT 913-922. ALJ Elliot contended that it would be unfair to sandbag the Division with such testimony and that, in any event, advice of counsel defenses is difficult to establish – so much so in his mind that "I HAVE NEVER FOUND ADVICE OF COUNSEL." RT 922. Meanwhile, the Division's counsel argued that advice of counsel was irrelevant because they were not asserting scienter as to any of its violations (clearly even the Division did not contemplate second or third tier penalties would be proposed by ALJ Elliot's Initial Decision).[6] While paying lip service to the existence of such legal opinions at the hearing, ALJ Elliot's proposed findings that third tier civil penalties should be awarded based on non-scienter claims asserted in the OIP, ignores that the securities law issues in this case a beyond a layman's reasonable level of sophistication and ignores the fact

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[6] **13 MS. CONCANNON: Well, Your Honor, I**
14 continue to be confused when counsel talks about
15 deliberative attempt not to comply. Assuming we're
16 talking about the Section 13 piece of this matter,
17 as you just said, there may be a small scienter
18 requirement to one element of the Division's case.
19 But under Section 5, these are non-intent,
20 non-fraud offenses, and I would ask that counsel
21 refrain from seeming to conflate these two issues." RT 920.

that legal opinions were provided and Respondents reasonably relied on each and all of such legal opinions at every step of the way in the subject transactions. The Division never disputed that such legal opinions were prevalent or that the Respondents did not reasonably rely on them, instead contending they were irrelevant because scienter was not an element of their claims. ALJ Elliot's decision to strike the defense in its entirety constitutes an abuse of discretion.

g. The fact that ALJ Elliot concluded that all those legal opinions were wrong does not transmute Respondents' good faith reliance into willful wrongdoing. ALJ Elliot violated the Appointments Clause of the U.S. Constitution by presiding over the trial. While he undoubtedly did so in good faith, if this Commission, the appellate court or the Supreme Court were to agree with Respondents that such acts violated the Constitution, would it be fair to impose third tier penalties against ALJ Elliot (e.g. bar him from practicing law and impose devastating financial sanctions) for inadvertently violating a complex law? Of course not! The law is often complicated. Those, like the Respondents and ALJ Elliot, who endeavor to follow the law as they understand it and particularly those laymen who are counseled by lawyers, should be able to do their jobs without facing the type of third tier penalties prescribed by the Initial Decision.

6. **ALJ Elliot prematurely determined that three of Respondents' experts on critical issues before the Court[7] could offer no expert testimony to which he might be inclined to give weight at trial and instructed the parties that such**

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[7] **Experts proposing to testify on compliance with Section 5 and Rule 144 (M. Richard Cutler, RX 205); absence of "control" by Kelly Whelan and Andrew Whelan over BioElectronics and IBEX, respectively (Richard Staelin, RX 202), and valid arms'-length business reasons for IBEX's decisions to make loans based on market terms to BIEL (David Robinson, RX 201).**

witnesses and their testimony not be presented at the hearing. See Initial Decision, p. 31, section II.G.3, and BioElectronics Corp., Admin. Proc. Rulings Release No. 4127, 2016 SEC LEXIS 3340, at *2-3 (ALJ Sept. 6, 2016).

a. M. Richard Cutler, an expert in securities law, explains at RX 205, pp. 2454 et seq., why, in his expert opinion, the securities transactions at issue in the case complied with applicable securities laws and were exempt from Section 5 under section 4(a)(1); and why, as a voluntary filer, Section 12(g)(1) did not call for the automatic registration of its securities within 60 days of its filing of a registration statement. As such, the Section 13 violations could not stand. While ALJ Elliot refused to give the opinion any weight or to permit his testimony at trial, due to the fact that the report included opinions of law, ALJ Elliot at the same time warmly accepted the Division's expert opinion of William D. Park (DX 137), who was not a lawyer, much less an expert on securities law. See ¶¶ 7-21 of Mr. Park's Expert Report at DX 137 in which Mr. Park, a non-lawyer, attests to the law upon which he formulates his opinion. These questions involve a mix of fact and law. Why should the Division's non-lawyer expert be given weight and the right to testify, while Respondents' legal expert was given no weight and prevented from testifying? Such lopsided approach at the exercise of discretion over evidentiary matters is grounds for reversal of the entire Initial Decision.

b. Similarly, ALJ Elliot prohibited Respondent's expert, David T. Robinson, PhD, from testifying, and refused to give any weight to his expert report at RX 201. Dr. Robinson's opinion explained that IBEX had sound business reasons, based on market terms or better than market terms, to make each and every loan it made to BIEL. Instead, ALJ Elliot exclusively heard the so-called expert opinion of

Mr. Park that BIEL's loans evidenced control (See DX 137, ¶45 et seq.) by BIEL over IBEX and a scheme to evade the securities laws (See DX 137, ¶49 et seq.). Again, ALJ Elliot's lopsided approach at exercising discretion over evidentiary matters is grounds to reverse the Initial Decision and certainly warrants a detailed review by the Commission.

c. ALJ Elliot prohibited Respondent's expert, Richard Staelin, from offering testimony on the topic of control and why, in his expert opinion, neither A. Whelan or BIEL exercised any control over K. Whelan and IBEX. See RX 202. Given that this issue is at the heart of the disputed issue in the case, and given that the issue of control is a mixed question of law and fact, ALJ Elliot should have allowed such testimony and given it appropriate weight. His failure to do so warrants a review of the entire proceeding by the Commission.

7. **ALJ Elliot erred by striking Respondents' reliance on counsel defense (discussed above).**

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.

i. There are a variety of factors, none of which are dispositive, to be considered in ascertaining if one is an affiliate. Whether the law judge properly evaluated the various factors is an issue that should be important to the Commission.

ii. At page 1 of the Initial Decision, ALJ Elliot begins to blur the lines between K. Whelan and IBEX, on the one hand, and P. Whelan and St.

John's, on the other hand ("Respondents St. John's, LLC and IBEX, LLC, are owned and controlled by Patricia Whelan ("P. Whelan"), A. Whelan's wife, and Respondent Kelly Whelan (K. Whelan), the daughter of A. Whelan and P. Whelan." It is true that P. Whelan owned and controlled St. John's. It is also separately true that K. Whelan controlled IBEX. Because the issue of affiliation is at the core of this case, ALJ Elliot is presumably purposeful in his conflating the identities of the Whelan family members and their ownership and management of specific entities. Perhaps the most logical way of reading this sentence is that all three Whelans, Patricia, Andrew and Kelly, own and control BIEL. That is simply not the case. See Stipulated Facts at DX 1.

iii. A more thorough statement of ALJ Elliot's proposed findings relative to the control issue are set forth at pages 45 and 46 of his Initial Decision. Although the explanation offered references many facts, none of them show that K. Whelan and IBEX controlled BIEL or that IBEX and BIEL were under common control. Indeed, every fact recited could be explained as follows: (1) like any lender, K. Whelan and IBEX loaned money to BIEL on the terms upon which the parties' agreed (the terms of which were established based on prior years transactions with independent third parties and approved by an independent Board of Directors) because it was in their financial interests to do so; (2) BIEL borrowed the money from IBEX because IBEX offered a consistent source of loans based on market or below-market terms that were not readily available to BIEL otherwise; (3) the initial documentation of the loans from A. Whelan and

K. Whelan and her former husband were delayed by the independent Board of Directors until they had established market terms with independent third party lenders; and (4) IBEX loaned money to BIEL because it was profitable to do so, assuming the conversions were honored timely by the Company, and, if not, the loans were timely repaid upon demand. K. Whelan believed that her father, A. Whelan, would ensure that she be repaid. trusted that BIEL's CEO, her father, would honor the terms to which the parties agreed verbally at or before the date of each transaction, thereby rendering the documentation of each loan assured, even when it was not documented for months after the loan was made.

iv. The overwhelming weight of evidence establishes that A. Whelan and BIEL did not control IBEX or K. Whelan, and vice versa, and the companies were not under common control. RT 430 [K. Whelan testified:

19 "I mean, I believe I knew that if you were
20 an affiliate, you weren't necessarily able to use
21 Rule 144, but I don't consider myself to be an
22 affiliate of the company. I'm not employed there,
23 not a board member. I don't have any control over
24 the company, so I don't believe I had any obligation
25 to file 144 when I sold –"

RT, p. 664, Andrew Whelan testified as follows:

4 Q Mr. Whelan, you discussed briefly the
5 board of directors' decision to cap IBEX's ownership
6 at 10 percent. And that was done because the board

7 was frustrated at not being able to file
8 registration statements; is that correct?
9 A I never -- no, I -- it was never linked in
10 my mind that we were capping the -- it was more an
11 issue of control and not wanting to concede control
12 to IBEX."

RT 1258-1259; Richard Staelin, Chairman of BIEL's Board of Directors, testified that IBEX and K. Whelan had no power over BIEL and A. Whelan; and that the loans IBEX made to BIEL were in the best interests of BIEL and its shareholders. See also Stipulated Facts at DX 1.

b. That BIEL's formal withdrawal from registration in 2007 was ineffective under Section 12(g) of the Securities Act (discussed in detail below); and

c. That the disgorgement awards proposed by ALJ Elliot far exceed gains made on securities transactions made within the applicable five-year statute of limitations (discussed above).

2. the following conclusions of law were erroneous:

a. that ALJ Elliott was properly appointed under the Appointments Clause of the US Constitution (discussed above);

b. that Respondents violated Section 5

i. St. John's loaned approximately $2.9 million to BIEL in exchange for which it acquired convertible debt starting in 2009. DX 1, ¶31. The notes at issue in this case were dated June 30, 2010 and August 31, 2010 and were not converted and sold until March 26, 2013, at the earliest. DX 1, ¶35. Importantly, most of those isolated shares were not sold until February 25,

2014 through March 6, 2014. The total proceeds from such note conversions and sales was far more than the isolated amounts converted and sold on March 26, 2013 and again between December 27, 2013 and March 6, 2014. See DX 1, paragraphs 32 – 35, inclusive. Notably, during the applicable 5-year period studied by the Commission's Staff, St. John's only sold shares on these discrete dates and in these discrete amounts. If St. John's, holding $2.9 million in debt, sought to evade the securities laws to liquidate its investment, it would have done more during 5 years than converted and sold stock with respect to less than $160,000 of that debt. Its isolated sales that are the subject of this case, after converting only two notes, and after St. John's held those notes for several years, which sales were supported by legal opinion letters, and sold through a registered brokerage firm, while potentially non-compliant with the four corners of Rule 144, surely complied with the intent and spirit of Section 4(a)(1) and were therefore exempt. In any event, such limited transactions do not reflect a willful scheme to evade the securities laws warranting the devastating punishment proposed by ALJ Elliot.

ii. IBEX was not an affiliate of BIEL, did not control it and was not under common control with it. Accordingly, its sales of BIEL securities, after holding such securities for well beyond the one-year period prescribed by Rule 144, were exempt. See RX 1A. Such sales, executed upon reliance of legal opinion letters, cannot support any penalties, much less third tier penalties and a penny stock bar.

c. **The statute of limitations bars a substantial portion of the disgorgement award because it is based on transactions completed outside of the 5-year statute of limitations (discussed above);**

d. **That BIEL's 2006 and 2007 formal withdrawals from registration, whose registration was not mandatory at that time, was effective under Section 12(g) of the Securities Act. RX 189, RX 190.**

i. The Division at footnote 2 of its OIP alleges that "BioElectronics' Section 12 reporting obligation arose as a result of its filing a Form 8A-12g on February 12, 2006 in conjunction with a registration statement on Form SB-2. The Form 8A-12g went effective by operation of law under Section 12(g) 60 days after filing, even though the Form SB-2 was subsequently withdrawn."

ii. The reporting requirements upon which the OIP is based arise under Section 13(a) and apply only to issuers with a class of securities registered under Section 12. 15 USC §78m. BioElectronics never had class of securities registered under Section 12, and thus owed no such reporting obligations.

iii. BIEL filed a Form 8A-12g and SB-2 in February 2006. RX 188, 190. That registration effort was withdrawn in July 2006. RX 189, 190.

iv. Under Rule 477, BIEL had the right to apply to withdraw its registration before the registration went effective, provided it had the SEC's consent. Such consent is presumed unless the SEC objected within 15 days. The SEC did not object, so the withdrawal was effective, provided it was made before the registration went effective automatically. RX 190. BioElectronics, and its counsel who was representing it in connection with such withdrawal, Kirkpatrick, Lockhart, et al. (now KL Gates), believed the withdrawal had

been effective. RT 190; 192 et seq. For years thereafter, the SEC staff appeared to concur, as they issued no notices of deficiency to BioElectronics, despite the fact that it was not filing any 10Qs or 10Ks in 2006, 2007, 2008 and 2009. See RX 190.

v. BioElectronics, in 2010, voluntarily filed its first 10K with the SEC, hoping such voluntary reporting would help it generate institutional investors. RT 926. Only after that filing did the SEC contend, for the first time, that BioElectronics' and KL Gates' 2006 and 2007 withdrawals were ineffective, on the basis that the registration automatically went effective 60 days after the February 2006 filing, and thus had gone effective before the 2006-2007 withdrawals had occurred.

vi. The sixty-day automatic registration in section 12(g), upon which the Division expressly relies in footnote 2 of the OIP, only applies to "such registration statement" -- "such registration statement" means only the mandatory registration statements registering "such security" set forth in the specific situations described in subparagraphs (A) and (B).[8] BIEL never had a class of

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[8] Section 12(g), which states:

(g)(1) Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce shall—

(A) within one hundred and twenty days after the last day of its first fiscal year ended after the effective date of this subsection on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more persons; and

(B) within one hundred and twenty days after the last day of its first fiscal year ended after two years from the effective date of this subsection on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons,

equity securities held of record by more than three hundred, much less five hundred persons. RT 910-911. Thus, the automatic registration is not applicable to BIEL because it did not have enough shareholders.

vii. This interpretation not only enjoys the support of the plain meaning of the applicable statute, but is entirely consistent with Rule 12g-4, which permits termination of registration using Form 15 for companies with less than 300 shareholders of record, among others.

viii. In essence, Rule 12g-4 provides that where *mandatory* registration is no longer required, one can withdraw without the consent of the Commission. Similarly, section 12(g)(1) does not impose automatic registration unless registration is *mandatory*. Clearly, Congress intended that companies whose registration was mandatory were captured automatically and could withdraw only after the SEC's review, while voluntary filers would not be captured automatically and could withdraw easily without such review.

ix. Although ALJ Elliot refused to allow A. Whelan to testify that he relied on his counsel in securing the effective withdrawal of BIEL's 2006 and 2007 registration attempts, he clearly did so. See RT 913-922. BIEL was represented by one of the premier securities compliance law firms in the

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register **such security** by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to **such security** containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. **Each such registration statement shall become effective sixty days after filing with the Commission** or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 18 of this title. ... [Emphasis added.]

country at that time, Kirkpatrick & Lockhart, now K&L Gates, and relied on its counsel to perform such registration withdrawals, which did, based on the plain language of Section 12(g), effectuate a formal withdrawal.

x. ALJ Elliot's Order Denying Motion to Correct Manifest Errors of Fact in this proceeding (Release No. 4522/January 13, 2017) makes clear that he made no finding as to whether or not BIEL had the requisite number of holders of record of its common stock. See p. 2 of that Order. But, he needed to do so to determine the threshold issue of whether or not Section 13 applies to this case. If he had, he should have found that there were insufficient holders of record and, as such, BIEL was not a mandatory filer in 2006 and 2007. Thus, its registration did not become automatic in 2007 after 60 days, and its formal withdrawals thereafter in 2006 and 2007 were effective.

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**

   1. **Whether the proceedings conducted by ALJ Elliot violated the Appointments Clause of the United States Constitution (Art. 2, Sec. 2, Cl. 2)? There is a split in the Circuit Court of Appeals on this issue. The 10th Circuit's ruling in *Bandimere* holds that ALJ Elliot violated the Appointments Clause, while the D.C. Circuit Court held the opposite in *Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016).**

   2. **Whether the disgorgement award based on transactions outside the 5-year statute of limitations exceeded the power of the Commission and opens respondents to legal relief masquerading as equitable relief over an**

unlimited time? As detailed above, the Supreme Court has agreed to take the matter up to resolve a split among the Circuit Courts on this issue.

3. **Whether St. John's can utilize the Section 4(a)(1) exemption even though it did not technically comply with Rule 144, or is the expressly non-exclusive safe harbor provisions under Rule 144 to be treated by the Commission as an exclusive means of qualifying for such exemption?**
4. **Whether IBEX should be treated as a control person, even though it never had the right to exercise that control, and never did exercise any control, over Andrew Whelan or BIEL?**
5. **Whether Rule 144 implicitly imposes restrictions on the number of times it can be used by a single investor transacting in a single issuer's securities, such that IBEX's otherwise dutiful compliance with Rule 144 can be fairly construed to constitute intentional violations of Rule 144?**
6. **Whether the prompt reinvestment of the proceeds of an otherwise valid Rule 144 exempt previous sale transaction jeopardizes the exempt status of the otherwise exempt transaction, so that investors should be discouraged from reinvesting in the same issuers?**
7. **Whether ALJ Elliot's imposition of new and unwritten restrictions on IBEX's use of Rule 144 transactions to reinvest in BIEL runs afoul of the legislative evolution of Section 4 and Rule 144 which has consistently expanded the defined exempt transactions for the purpose of permitting lawful investments in unregistered securities for purposes of job creation, tax realization and other economic factors favorable to the people of the United States?**

8. **Whether BIEL's 2006 and 2007 formal withdrawals from registration, whose registration was not mandatory at that time, was effective under Section 12(g) of the Securities Act?**

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

10. **Whether third tier penalties and/or a penny stock bar should be awarded in a proceeding commenced by an OIP based entirely on non-scienter violations?**

For each and all of the foregoing reasons, the Petition should be granted.

Dated: Santa Monica, California
February 2, 2016

Respectfully submitted,
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PROOF OF SERVICE

I hereby certify that on February 2, 2017, I caused to be served a true and correct copy of the following document on the date and in the manner indicated below.

RESPONDENTS' PETITION FOR REVIEW OF THE INITIAL DECISION

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