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JUDGMENT OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT (SEPTEMBER 11, 2020)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

JOHN J. MASIZ,

Defendant-Appellant,

BIOCHEMICS, INC.,

Defendant-Appellee,

GREGORY S. KRONING; CRAIG MEDOFF,

Defendants.

No. 19-2206

US SECURITIES & EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

JOHN J. MASIZ,

Defendant-Appellant,

BIOCHEMICS, INC.; CRAIG MEDOFF;
GREGORY S. KRONING,

Defendants.

No. 20-1177

IN RE: JOHN MASIZ,

Petitioner.

No. 20-1729

Before: TORRUELLA, THOMPSON
and BARRON, Circuit Judges.

Having considered the parties' responses to this court's Order to Show Cause ("OSC") why Appeal No. 19-2206 should not be dismissed as moot or for want of jurisdiction, we dismiss Nos. 19-2206 and 20-1177 as moot for the reasons outlined in the OSC. The writ of prohibition requested in No. 20-1729 is denied. The Emergency Motion for a stay of the September 2020 joint-sale proceedings pending our resolution of the aforementioned matters is denied as moot.

By the Court:

Maria R. Hamilton
Clerk

cc:

Donald Campbell Lockhart
Martin F. Healey
David H. London
Kathleen Burdette Shields
Theodore Weiman
Jan Richard Schlichtmann
John A. Sten
Michael P. Angelini
Douglas Thomas Radigan
Francis J. DiMento Sr.
Keith L. Sachs
Orestes G. Brown
Peter Sabin Willett
Jonathan M. Albano
Howard M. Cooper
Elizabeth M. Bresnahan
Joseph M. Cacace
Mark G. DeGiacomo
Taruna Garg
Michael J. Fencer
Craig Medoff
Donald F. Farrell Jr.
Carol E. Schultze
Joshua S. Grinspoon
Jonathan M. Horne

ORDER OF THE DISTRICT COURT (AUGUST 28, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 1:12-cv-12324-MLW

Before: Mark L. WOLF, United States District Judge.

WOLF, D.J.

In his August 5, 2020 limited objection (Dkt. No. 642, the "Objection") regarding the Receiver's motion for an order approving the notice of sale and for authority to auction assets, *see* Dkt. Nos. 620, 632, defendant John Masiz requested that:

> [T]he District Court and Bankruptcy Court clarify that, if Mr. Masiz participates in the sale process, he will not be subjected to an investigation by the District Court as to whether he complied with 2004 and 2017

> Consent Decree injunctions obtained by the [Securities and Exchange Commission].

Dkt. No. 642 at 20. For the reasons stated in the excerpt of the August 27, 2020 hearing attached hereto as Exhibit A, it is not appropriate to assure Mr. Masiz that, whatever his conduct, the court will not inquire concerning whether he has violated the injunctions. *See also* Dkt. No. 591, *Securities and Exchange Commission v. BioChemics*, 435 F.Supp.3d 281 (D. Mass. 2020). Therefore, his request and the Objection (Dkt. No. 642) are hereby DENIED.

As also explained at the hearing, the questions counsel for Mr. Masiz proposed to ask the Bankruptcy Trustee for Inpellis, Inc. at the August 27, 2020 hearing were not relevant to the Objection, and any arguable value they purportedly had was substantially outweighed by the waste of time in a lengthy hearing focused on other issues. Therefore, counsel was not permitted to question the witness.

Counsel stated that Masiz intends to appeal or in some other manner seek relief from these decisions. As stated at the August 27, 2020, hearing, it is hereby ORDERED that if Masiz does so, he shall provide the Court of Appeals for the First Circuit this Order, including the transcript attached hereto as Exhibit A.

/s/ Mark L. Wolf
United States District Judge

EXHIBIT A—EXCERPT OF MOTION HEARING (AUGUST 27, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 1:12-cv-12324-MLW

Before: Mark L. WOLF, United States District Judge.

[August 27, 2020 Transcript, p.4]

(The following proceedings were held via videoconference before the Honorable Mark J. Wolf, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on August 27, 2020.)

[* * * *]

JUDGE WOLF: Judge Panos, let me do this so I can try to get focused on what Mr. Schlichtmann would like to question about.

Mr. Schlichtmann, Mr. Masiz filed two objections, and working backwards, one was filed August 25, Docket 660 in the District Court case, and that supplemental objection regarded the free and clear sale of Biochemics and Inpellis assets in the 820 order converting the 8/27 hearing, today's hearing, on sale motions to an evidentiary hearing.

Do you wish to question the trustee about that objection?

MR. SCHLICTMANN: You're referring to the objection having to do with the use of the proceedings to somehow divest Mr. Masiz of his ownership rights. My understanding is—I'm sure I'm clear on this—that the Courts are not using this proceeding to do that because the receiver and the trustee are not doing that, so there's no basis to have a hearing on that. So that objection is taken care of, there's no question about that. We're satisfied that that has been addressed to our satisfaction.

JUDGE WOLF: That's with regard to whether Mr. Masiz is an inventor and an owner of one or more of the patents, just to make sure I understand and the record is clear.

MR. SCHLICTMANN: Correct.

JUDGE WOLF: Okay. So is there anything else in the objection that you filed on August 25 that you wish to question the receiver about—I'm sorry, the trustee about?

MR. SCHLICTMANN: Well, the objection is a supplemental objection to our 8/5 objection—

JUDGE WOLF: Okay, so—okay. So the objection you filed on August 5 is Docket Number 642 in the District Court case, and that's the objection that you want to question the receiver about.

MR. SCHLICTMANN: Correct.

JUDGE WOLF: And the relief that you asked for in that objection on page 20 says, For these reasons, so that Masiz may freely participate in the sale process on the same terms applicable to every other participant, Masiz respectfully requests that the District Court and the Bankruptcy Court clarify that if Mr. Masiz participates in the sale process, he will not be subjected to an investigation by the District Court as to whether he complied with the 2004 and 2017 consent decree injunctions obtained by the SEC.

MR. SCHLICTMANN: Correct.

JUDGE WOLF: That's the relief you're seeking, right?

MR. SCHLICTMANN: Right. We want to participate without threat of being investigated as explained in that objection.

JUDGE WOLF: And I anticipated that I'd give you a chance to discuss that further, but what would you want to ask the trustee about that?

MR. SCHLICTMANN: Because the trustee has personal knowledge about—personal knowledge as to this factual history, and the factual history—everything he was asked about goes directly to the validity of the reasons why Mr. Masiz has to be subjected to an investigation. And I want to be able to support my objection—he has testified,

and that testimony is directly relevant to my objection. I need to clarify the record—

JUDGE WOLF: Here, pause. You used an important term, "relevant."

MR. SCHLICTMANN: Yes.

THE COURT: The questioning has to promise to provide something relevant—

MR. SCHLICTMANN: Yes.

JUDGE WOLF:—so it's not an undue waste of time. Why—tell me what your objection is—and of course I've read it, and it reiterates arguments you've made before that I have addressed before and are before the 1st Circuit to some extent, but why—what is the objection and what questions would you want to ask and why are they relevant?

MR. SCHLICTMANN: Okay. So the objection is that the reasons that were given by the Court, by yourself, at the July 10th hearing, you referred back to your opinion, which you referred to again today; and you specifically referred that it was this collusion charge by ADEC, basically, that the SEC settlement, okay, that resulted in the lien which everybody's been testifying to about that was supposedly fraudulent is the reason why you said, Because of ADEC's accusations, I don't trust the SEC, and I don't trust Mr. Masiz, who's a two-time loser; and, therefore, if he comes in here and he wants to bid on these assets, I'm going to treat him differently than anyone else, and I'm going to subject him not just to an investigation about whether he complied with giving a disclosure, but I'm also going to

investigate him whether he violated the securities laws which both things are in the province of the SEC and are inappropriate for the Court to go into, and we believe we have a constitutional right not to be excluded on that basis.

And since you've made an evidentiary hearing on the very factual premise of our objection and taken testimony, this is an evidentiary hearing —and in your order both Courts said—noted our objection and said that—

JUDGE WOLF: Which order are you referencing?

MR. SCHLICTMANN: The order that is the foundation of this evidentiary hearing. And what you said—

JUDGE WOLF: What's the date of the order, please?

MR. SCHLICTMANN: Okay. The date of the order is 20th, August 20, 2020, and it's—August 20th is the order. It's the order that actually has brought us to this evidentiary hearing, which converted the approval hearing into an evidentiary hearing, and now evidence has been taken.

JUDGE WOLF: So—okay.

Let me do the following: First, as to what was said on July 10, the transcript will be the record. Either you've misunderstood it or mischaracterized it, but, in any event, I think some clarification may be helpful with regard to Mr. Masiz.

So, as I said, in this limited objection filed on August 5th, Docket Number 642 in the District Court case, Mr. Masiz requests assurances from the District Court and the Bankruptcy Court

that if he participates in the sales process he'll not be subjected to an investigation by the District Court as to whether he complied with the 2004, 2017 consent decree injunctions obtained by the SEC.

Mr. Masiz is not barred from participating in the auction if we approve this so it goes forward.

If he's affiliated with a bidder, that will have to be disclosed.

MR. SCHLICTMANN: Correct.

JUDGE WOLF: And the sources of all funds utilized by the successful bidder will have to be disclosed. That's in the notice that was given to all potential bidders, that's Docket 632 at page 6 of 19.

If those disclosures—if Mr. Masiz participates or an affiliate participates—

MR. SCHLICTMANN: Let me be clear on that. There will never be any question—if Mr. Masiz has any connection, no matter how remote, to any bidder, it is going to be fully and completely disclosed to you. It will be direct and on the record.

JUDGE WOLF: Okay. I'm listening to you. Take a breath and continue to listen to me.

MR. SCHLICTMANN: All right.

JUDGE WOLF: Okay?

MR. SCHLICTMANN: Yes.

JUDGE WOLF: So if the—there is the possibility that if Mr. Masiz participates that will. I ask questions.

MR. SCHLICTMANN: Yes.

JUDGE WOLF: It's possible he might be ordered to provide some evidence of compliance and do that on the public record. The reasons for that are essentially described in my January 17, 2020 Memorandum and Order. It's Docket 591, and it's 435 F.Supp.3d 281.

To the extent that Mr. Masiz would be treated differently than other bidders, it's because he's in what I hope is a unique situation.

I found that after he agreed to the injunction in the *Vaso* case in 2004 I think, he at least negligently violated it in raising money for Biochemics. And he's now agreed to another injunction, which is a court order, that requires certain disclosures and, again, that he not violate the securities laws.

The assurance that you're seeking here in advance that he won't be investigated or inquired of would essentially bind the authority of the Courts in the following hypothetical scenario: Let's say Mr. Masiz is affiliated with a successful bidder, might be the only bidder if he participates, and the bid is $5 million, and somebody comes in before the final hearing and says, Mr. Masiz solicited me; he asked me to give money; he didn't make the disclosure required by the injunction, I just learned of it, and I gave him a million dollars for this venture or $5 million for this venture based on what I believe are misrepresentations. I wouldn't assure Mr. Masiz that I wouldn't investigate that.

So I think the real—I think at the heart of this, you haven't been able to find anybody not associated with Mr. Masiz to buy this previously. So if he's still interested, if he's able in a manner that's consistent with the injunction to raise funds, to put together a group to buy this property that he has faith in that third-parties haven't demonstrated yet, despite the best efforts of Gordian and others, you know, if you're confident that can be done lawfully and consistent with the injunction, you just need to be prepared for the possibility that you'll have to provide some evidence of that. That's the situation.

And I don't see that any questions to the trustee are relevant to that, because the trustee's interactions with Mr. Masiz are not the foundation or haven't contributed to the concerns that caused me to issue my orders a year ago.

MR. SCHLICTMANN: So—

JUDGE WOLF: Go ahead.

MR. SCHLICTMANN: I want to see if—I'm calmed down. I want to see if I can try and be helpful here, all right.

I want to be very clear, what is the issue we are having, all right. From our standpoint, the agency that has the responsibility, the Article II responsibility who obtained the consent decree is the SEC, and that is the agency to which Mr. Masiz is in fear of. And normally, like every other citizen, he's got the consent decree, he knows they obtained it, he knows they do their job, and everyone knows the history.

And it is the SEC's obligation, responsibility to carry out their authority, and under Article II, if they do something, I have—I can deal with it in the ordinary course.

When your Honor takes over that responsibility, you deny me that opportunity. You're the adjudicator, your Honor. You're not the investigator, and that's the point we're trying to make. So this has a profound constitutional meaning to us.

I do not—there is no way, your Honor, that we are engaging in behavior here which can be interpreted as somehow is going to prevent the SEC from doing their job, okay. And if the SEC believes because of this that there's reasons to believe that the consent decrees have been violated, it is their obligation to deal with it so I can deal with it in the ordinary course.

When you do it, your Honor, you are becoming an Article II authority, not an Article III.

JUDGE WOLF: Okay—

MR. SCHLICHTMANN: Let me just—

JUDGE WOLF: Go ahead.

MR. SCHLICTMANN: I have told you as an officer of the court Mr. Masiz wants to participate, and if he does, he is going to be participating through an entity, whether it has his name or not, his company, whatever, will be fully disclosed; there will be no question he's participating, okay. Let's put that to the side.

Also, I understand this is a rule that applies to everybody else, including Mr. Masiz, which we

accept, there has to be a disclosure about source of funds. And Mr. Masiz will make a disclosure like everybody else in accordance with the terms of the receiver and the trustees say. All right. And we will do that. And I'm also going to tell you, not because I have an obligation to as part of an investigation, but I believe as an officer of the court to see if I can remove an issue between us that I really think is hurting everything, hurting the estate, hurting the sale, causing all this stuff, which is, your Honor, Mr. Masiz, has not been raising funds, he hasn't been, and he's not going to be all through this process. And he's not going to be using funds raised from an investor in which he made a promise. He is not, and I'm telling you that, not because you're compelling me to tell you but because I'm trying to help you understand—but if the SEC thinks what I just said is untrue or someone reports—there's a whole public record. If somebody knows they have Mr. Masiz, you know, in a place where very few people have, do you think—they would go to the SEC, which would be appropriate, and the SEC would do whatever they do, and we would defend or concede or whatever it would be. That's the appropriate way.

But I can assure you I am not going to let Mr. Masiz and Mr. Masiz is not going to let himself, who wants to participate, do anything or raise any money from anybody. It is going to be funds that he has obtained within the family that are his funds or funds generated by revenues, but it will not be raised funds. It will not be publicly raised funds, it will not be privately raised funds,

it will not be inducing somebody to invest in this operation. I'm telling you that, and the SEC can hold me to that.

JUDGE WOLF: Okay. Here, thank you.

One, that confirms for me that there are no relevant questions for the trustee that you would have, and I hope based on what I said you now understand why that is better.

Two, right now there's nothing—there's nothing before me. If he's not going to do anything that would implicate the terms of the injunction—and I don't want to paraphrase it—but if he's not going to do anything that implicates the terms of the injunction, your concerns are moot.

To the extent you're arguing again about the authority that the District Court has and the propriety of conduct, I addressed that in detail in the January decision. I looked at it again on your motion to reconsider, which I denied, and you raised it with the 1st Circuit from which, of course, I'll take guidance when they decide the case.

Hopefully what you've said I think puts this all in a more concrete context, and—but there's no—I'm not going to permit—I don't even know if you still want to question the trustee, but—

MR. SCHLICTMANN: Well, your Honor, we're close. I think there has to be—because I am before the 1st Circuit with an appeal and a petition for prohibition, because we are I think we have to be clear with each other. We're close and maybe we're there. So I think the acid test would be I have asked—officially I've asked for that relief,

and the relief, you are correct, says that we don't—we want it clarified that he's just going to be subjected to the same terms as everyone else and that he is not going to be singled out for any kind of questioning or investigation that is not consistent with anybody else. That's what the ruling—

JUDGE WOLF: The request for that relief is denied for the reasons I explained to you a few moments ago. That's it.

MR. SCHLICTMANN: If you denied me the relief—

JUDGE WOLF: Yes.

MR. SCHLICTMANN: But you denied me the relief, your Honor, which is the problem, I think, procedurally here. You called for an evidentiary hearing on the objections and you said in your order—again, your Honor, I want us to resolve this issue, trust me. But you say in your order, Any party wishing to cross-examine the trustee or the receiver with respect to the affidavits will have an opportunity to do so—

JUDGE WOLF: You're going too fast, perhaps, for the stenographer.

MR. SCHLICTMANN: I'm sorry. It says, Any—

JUDGE WOLF: Go ahead. Say—put on the record what you want to put on.

MR. SCHLICTMANN: Thank you, your Honor.

It says, The receiver and trustee will submit affidavits having to do with the issues before us, which includes our objection. Any party wishing to cross-examine the trustee or the receiver with

respect to the affidavits will have an opportunity to do so at the sale and settlement approval hearing and further direct testimony may be permitted.

And then you said, If any objecting or responding party seeks to designate witnesses, identify exhibits with respect to their objections or responses, they shall do so and provide copies of exhibits to opposing counsel—

JUDGE WOLF: Too fast.

MR. SCHLICTMANN: Sorry, your Honor.

It also says, If any objecting or responding party seeks to designate witnesses or identify exhibits with respect to their objections or responses, they shall do so and provide copies of exhibits to opposing counsel by the designation deadline.

Frankly, your Honor, the only one who actually took advantage of that is Mr. Masiz, not ADEC, not the SEC, not even the receiver and the trustee. We have put in evidence, okay, which directly bears—

JUDGE WOLF: Where's the evidence?

MR. SCHLICTMANN: Mr. Masiz's testimony accompanying the objection in support of it and the record appendix supporting all the documents he refers to.

JUDGE WOLF: Well, those matters are part of the record before us and part of the case.

MR. SCHLICTMANN: That's correct.

JUDGE WOLF: Implicit in any order when a hearing is established is that the parties will have an opportunity to provide relevant evidence.

MR. SCHLICTMANN: Yes.

JUDGE WOLF: And evidence, the potential probative value of which is not substantially outweighed by wasting time.

And for the reasons I explained to you, the trustee has no relevant evidence relating to the reasons I just denied your request and has no relevant evidence to the events that generated the issue.

MR. SCHLICTMANN: Your Honor, may I briefly, briefly—

JUDGE WOLF: No, no, this has got to end.

MR. SCHLICTMANN: I understand, your Honor, but we have a procedural problem, and I have to at least tell you the objection. It's a due process one, a fundamental one.

You have denied—you said in your order that we are going to have an evidentiary hearing. You've taken an evidentiary—you've taken evidence which is directly relevant to my objection, and you are denying my objection without allowing me to put in the evidence you said I could put in on cross-examination, and that's a problem procedurally.

You've now denied Mr. Masiz fundamental due process. It violates your own order, and I'm trying to prevent a procedural problem, an unnecessary one for you, your Honor, and the proceedings.

JUDGE WOLF: You haven't identified any question that would elicit relevant evidence from the trustee, and that's the end of that.

MR. SCHLICTMANN: Well, forgive me—

JUDGE WOLF: Stop, stop.

MR. SCHLICTMANN: Your Honor, you challenged—you said I haven't identified. You've never given me an opportunity to do that; my documents do that.

JUDGE WOLF: I asked you—

MR. SCHLICTMANN: I'm saying collusion. The fundamental premise—

JUDGE WOLF: Mr. Schlichtmann, I'm ordering you to stop.

MR. SCHLICTMANN: Then I'll stop.

JUDGE WOLF: I'm not asking you; I'm ordering you.

MR. SCHLICTMANN: All right, then I have no choice. And I object, your Honor, and I will take whatever steps the law provides to assert Mr. Masiz's rights, and I think it's very unfair and unfortunate and it's just and added unnecessary inconvenience and expense. And we wanted to provide evidence to you—

JUDGE WOLF: Stop. I ordered you to stop.

MR. SCHILCTMANN: I am stopping

JUDGE WOLF: I'll order you to also order the transcript.

ORDER OF THE DISTRICT COURT (AUGUST 20, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

IN RE: INPELLIS, INC.,

Debtor.

Chapter 7 Case No. 18-12844-CJP

Before: Mark L. WOLF, United States District Judge, Christopher J. PANOS, United States Bankruptcy Judge.

The United States District Court for the District of Massachusetts and the United States Bankruptcy Court for the District of Massachusetts (the "Courts") having entered an Order on July 10, 2020 scheduling a joint Zoom hearing for August 27, 2020 at 10:00 a.m. (the "Sale and Settlement Approval Hearing") regarding the following motions filed in the above captioned cases (C.A. No. 12-12324-MLW (the "BioChemics Action") and Case No. 18-12844-CJP (the "Inpellis Bankruptcy"), respectively): (i) the Motion for Entry of Order Approving Stipulation By and Among Chapter 7 Trustee, Securities and Exchange Commission, and ADEC Private Equity Investments, LLC (Inpellis Bankr. Dkt. No. 253) (the "9019 Motion") filed by John J. Aquino, the duly appointed trustee (the "Trustee") of the Chapter 7 bankruptcy estate of Inpellis, Inc. ("Inpellis"); (ii) the Amended Motion for Entry of Order Authorizing Sale of Certain Personal Property Assets by Public Sale Free and Clear of All Liens, Claims and Encumbrances and Approving Allocation of Sale Proceeds (Inpellis Bankr. Dkt. No. 254) (the "Inpellis Sale Motion") filed by the Trustee; and (iii) the Motion for the Entry of an Order Authorizing the Sale of Assets by Public Auction Free and Clear of Liens, Claims, Encumbrances and Other Interests and Approving Allocation of Sale Proceeds (Biochemics Action Dkt. No. 620) (the "BioChemics Sale Motion") filed by the court-appointed receiver for BioChemics, Inc. ("BioChemics"), Mark G. DeGiacomo (the "Receiver") (the 9019 Motion and Inpellis and BioChemics Sale Motions, collectively, the "Motions"); and the Courts having established a deadline to object to the 9019 Motion, the "50/50" allocation of sale proceeds settlement set forth in the Inpellis and BioChemics Sale Motions (the "Sale

Proceeds Settlement"), and the proposed sale of assets free and clear of liens, claims, and interests contemplated by the Inpellis and BioChemics Sale Motions, and to respond to any objections; and Bio Strategies, L.P. ("Bio Strategies") having filed an omnibus objection (Inpellis Bankr. Dkt. No. 273; BioChemics Action Dkt. No. 641) (the "Omnibus Objection") to the Motions and John Masiz, in addition to a prior limited objection filed to the BioChemics Sale Motion (BioChemics Action Dkt. No. 627), having filed an additional limited objection (BioChemics Action Dkt. No. 642) (the "Limited Objections," together with the Omnibus Objection, the "Objections"); and the Trustee (Inpellis Bankr. Dkt. No. 277; BioChemics Action Dkt. No. 647), the Receiver (Inpellis Bankr. Dkt. No. 278; BioChemics Action Dkt. No. 648), and ADEC Private Equity Investments, LLC ("ADEC")[1] (Inpellis Bankr. Dkt. No. 279; BioChemics Action Dkt. No. 649) having filed responses to the Omnibus Objection (collectively, the "Responses"); upon consideration of the Motions, Objections, and Responses, and in order to facilitate the conduct of the Sale and Settlement Approval Hearing, the Courts hereby order as follows.

(i) The Sale and Settlement Approval Hearing is converted to an evidentiary hearing by Zoom video conference, at which the Courts may consider taking evidence with respect to the Motions.

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[1] The Securities and Exchange Commission also filed a joinder in support of the Motions (Inpellis Bankr. Dkt. No. 275; BioChemics Action Dkt. No. 646).

(ii) On or before August 25, 2020 at 11:59 p.m., the Trustee and Receiver shall file[2] any supporting affidavits (the "Affidavits") regarding the 9019 Motion, the Sale Proceeds Settlement, and the proposed sale of assets free and clear of liens, claims, and interests. The Affidavits shall serve as direct testimony of the Trustee and Receiver with respect to the evidentiary burdens they must satisfy in connection with the relief sought at the Sale and Settlement Approval Hearing. The Affidavits should also address whether any bona fide dispute exists as to ownership of the four patents and/or patent applications regarding transdermally-delivered combination drug therapy for pain identified on Schedule A to the Notice of Intended Public Auction of Certain Assets Free and Clear of Liens, Claims, Encumbrances and Other Interests (Intellectual Property Assets) (Inpellis Bankr. Dkt. No. 269) (collectively, the "Disputed Assets") such that an order may be entered, if necessary, pursuant to 11 U.S.C. § 363(b) and (f)(4) with respect to the Disputed Assets. Any party wishing to cross-examine the Trustee or the Receiver with respect to the Affidavits will have an opportunity to do so at the Sale and Settlement Approval Hearing. Further direct testimony may be permitted.

---

[2] Items directed to be filed by the deadlines established in this Order shall be filed in both cases.

(iii) If the Trustee and Receiver intend to present witnesses in addition to themselves or documentary exhibits not presented with the Affidavits, they shall file any designation of witnesses and/or exhibits, and provide copies of exhibits to opposing counsel, on or before August 25, 2020 at 11:59 p.m. (the "Designation Deadline"). If any objecting or responding party seeks to designate witnesses or identify exhibits with respect to their Objections or Responses, they shall do so, and provide copies of exhibits to opposing counsel, by the Designation Deadline.

(iv) In addition, ADEC having identified in its Response a potential conflict of interest involving counsel to Bio Strategies, Holland & Knight LLP ("H&K"), which firm ADEC asserts previously represented Inpellis on matters materially relevant to the Omnibus Objection, Bio Strategies, H&K, and the Trustee are directed to respond to the conflict issues that have been raised on or before August 24. 2020 at 11:59 p.m.

Entered this 20th day of August, 2020

/s/ Mark L. Wolf
United States District Judge

/s/ Christopher J. Panos
United States Bankruptcy Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (JULY 28, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

Before: Mark L. WOLF, United States District Judge.

WOLF, D.J.

The Securities and Exchange Commission ("SEC") brought this case against BioChemics, Inc. ("BioChemics"), its Chief Executive Officer John Masiz, and others, alleging that material false and misleading statements were made in connection with the sale of BioChemics' securities. In June 2017, the court granted summary judgment for the SEC on its claims that Masiz was negligent in making material false and misleading statements in selling BioChemics securities.

The court scheduled a hearing to decide whether it should grant the SEC's motion for summary judgment on whether Masiz made those fraudulent representations intentionally. The parties then settled their dispute.

In August 2017, the court entered the SEC's and Masiz's jointly proposed Final Judgment against him. *See* Dkt. No. 345. Among other things, Masiz admitted negligently making false and misleading material misrepresentations. He agreed to pay a $120,000 fine and to an injunction prohibiting him from violating federal securities laws in the future. In addition, the Final Judgment required that if Masiz solicited any investment in the future, he disclose, in a specified manner, his history with the SEC, including concerning this case and a 2004 injunction in another case prohibiting him from violating federal securities laws. *Id.* §§ I-IV. The court retained jurisdiction to enforce the Final Judgment. *Id.* § VII.

For the reasons explained in detail in a January 17, 2020 Memorandum and Order, the court ordered Masiz to file for the public record evidence of his compliance with the Final Judgment and denied Masiz's motion to seal such evidence. Dkt. No. 591; *SEC v. BioChemics, Inc.*, 435 F. Supp. 3d 281 (D. Mass. 2020). Masiz has filed a Motion for Reconsideration or in the Alternative to Alter or Amend that decision (Dkt. No. 602, the "Motion").

The First Circuit described the standard for motions for reconsideration in *United States v. Allen*, 573 F.3d 42, 53 (1st Cir. 2009). "Motions for reconsideration are not to be used as a vehicle for a party to undo its procedural failures or allow a party to advance arguments that could and should have been

presented to the district court prior to judgment." *Id.* "Instead, motions for reconsideration are appropriate only in a limited number of circumstances: if the moving party presents newly discovered evidence, if there has been an intervening change in the law, or if the movant can demonstrate that the original decision was based on a manifest error of law or was clearly unjust." *Id.* As the First Circuit has also stated, "reconsideration is 'an extraordinary remedy which should be used sparingly.'" *Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006) (quoting 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810.1 (2d ed. 1995)).

The court has considered the Motion, as well as Masiz's memorandum and affidavit filed in support of it. *See* Dkt. Nos. 602, 603, 603-1. Masiz does not submit newly discovered evidence. Nor does he assert that there has been an intervening change in the law. Rather, Masiz argues, in essence, that the court's decision was manifestly incorrect as a matter of law and clearly unjust. These contentions rely in part on misstatements of the court's reasoning and, in any event, are incorrect.

As explained in the January 17, 2020 Memorandum and Order, the court had the authority to ensure compliance with the Final Judgment and had a proper factual basis for exercising it. *See* Dkt. No. 591 at 19-23. In addition, the court had a proper basis for requiring that the information concerning compliance that Masiz belatedly submitted to the court be made part of the public record. *See id.* at 24-27.

As the standards for the extraordinary relief requested are not met, Masiz's Motion for Reconsideration or in the Alternative to Alter or Amend the

Court's 1-17-20 Memorandum and Order (Docket No. 602) is hereby DENIED.

/s/ Mark L. Wolf
United States District Judge

ORDER OF THE DISTRICT COURT APPROVING NOTICE OF SALE (JULY 20, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

IN RE: INPELLIS, INC.,

Debtor.

Chapter 7 Case No. 18-12844-CJP

Before: Mark L. WOLF, United States District Judge, Christopher J. PANOS, United States Bankruptcy Judge.

After a hearing conducted jointly by the United States District Court for the District of Massachusetts and the United States Bankruptcy Court for the District of Massachusetts (the "Courts") on July 10, 2020 (the "Hearing") on the following pending motions in the above captioned cases (C.A. No. 12-12324-MLW (the "BioChemics Action") and Case No. 18-12844-CJP (the "Inpellis Bankruptcy Case"), respectively): (i) the Motion for Entry of Order Approving Stipulation By and Among Chapter 7 Trustee, Securities and Exchange Commission, and ADEC Private Equity Investments, LLC (Inpellis Bankr. Case Dkt. No. 253) (the "9019 Motion") filed by John J. Aquino, the duly appointed trustee (the "Trustee") of the Chapter 7 bankruptcy estate of Inpellis, Inc. ("Inpellis"); (ii) the Amended Motion for Entry of Order Authorizing Sale of Certain Personal Property Assets by Public Sale Free and Clear of All Liens, Claims and Encumbrances and Approving Allocation of Sale Proceeds (Inpellis Bankr. Case Dkt. No. 254) (the "Inpellis Sale Motion") filed by the Trustee; and (iii) the Motion for the Entry of an Order Authorizing the Sale of Assets by Public Auction Free and Clear of Liens, Claims, Encumbrances and Other Interests and Approving Allocation of Sale Proceeds (BioChemics Action Dkt. No. 620) (the "BioChemics Sale Motion") filed by the court-appointed receiver for BioChemics, Inc. ("BioChemics"), Mark G. DeGiacomo (the "Receiver") (the 9019 Motion and Inpellis and BioChemics Sale Motions, collectively, the "Motions"), the Courts entered orders establishing certain deadlines with respect to the sale process (collectively, the "Scheduling Orders"). *See* Ords. (BioChemics Action Dkt. No. 629 and Inpellis Bankr. Case Dkt. No. 265). The Trustee and Receiver having

submitted Proposed Notices of Intended Sale and Request For Clarification of Scheduling Orders (Bio-Chemics Action Dkt. No. 632 and Inpellis Bankr. Case Dkt. No. 267) (the "Submissions"), and upon consideration of the Submissions and the request for clarification regarding the objection deadlines set forth in the Scheduling Orders, the Courts hereby approve the modified sale notice attached hereto as Exhibit 1 to this Order.

Entered this 20th day of July, 2020

/s/ Mark L. Wolf
United States District Judge

/s/ Christopher J. Panos
United States Bankruptcy Judge

NOTICE OF INTENDED PUBLIC AUCTION OF CERTAIN ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS (INTELLECTUAL PROPERTY ASSETS)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

IN RE: INPELLIS, INC.,

Debtor.

Chapter 7 Case No. 18-12844-CJP

Before: Mark L. WOLF, United States District Judge, Christopher J. PANOS, United States Bankruptcy Judge.

Notice is hereby given, pursuant to 11 U.S.C. § 363, Fed. R. Bankr. P. 2002(a)(2), 6004 and 9019, MLBR 2002-5 and 6004-1, 28 U.S.C. §§ 2001, 2002 & 2004 and the United States District Court's equitable receivership authority, that Mark G. DeGiacomo, the court appointed receiver (the "Receiver") of BioChemics, Inc ("BioChemics") and John J. Aquino, the duly appointed trustee (the "Trustee") of the Chapter 7 bankruptcy estate of Inpellis, Inc. ("Inpellis"), intend to jointly sell all of their interests in the respective intellectual property assets of BioChemics and Inpellis (the "Assets") by public auction (the "Auction") free and clear of liens, claims, encumbrances, and other interests as set forth in the *Receiver's Motion For the Entry of an Order Authorizing the Sale of Assets by Public Auction Free and Clear of Liens, Claims, Encumbrances And Other Interests and Approving Allocation of Sale Proceeds* dated July 6, 2020, and the *Amended Motion of Chapter 7 Trustee for Entry of an Order Authorizing Sale of Certain Personal Property Assets by Public Sale Free and Clear of All Liens, Claims, and Encumbrances and Approving Allocation of Sale Proceeds* dated June 25, 2020, each motion filed in the respective above-captioned cases (collectively, the "Sale Motions"). The Sale Motions also seek authority to resolve certain disputes by agreeing to evenly split the proceeds of the sale between the receivership estate and the bankruptcy estate. Additionally, in conjunction with his Sale Motion, the Trustee has also filed his *Motion For*

Entry of Order Approving Stipulation by and Among Chapter 7 Trustee, Securities and Exchange Commission, and ADEC Private Equity Investments, LLC seeking additional relief relating to the proposed public auction sale (the "Stipulation Approval Motion").

The Assets include all right, title and interest in and to the intellectual property assets owned by BioChemics and Inpellis, whether owned solely or jointly, as described in the Sale Motions. The Assets consist of all intellectual property rights, including, without limitation, all know-how, patents, patent applications, trademarks, service marks, and trade names, and all claims to such intellectual property rights, and including the specific patents and rights identified on Schedule A attached hereto.

The Auction will be conducted jointly by the Trustee and Receiver. The Auction will be held on September 22, 2020 at 11:00 a.m. (prevailing Eastern time) (the "Auction Date") at the Receiver's offices located at Murtha Cullina LLP, 99 High Street, 20th floor, Boston, MA 02110. Bidders may participate in the Auction remotely via telephone or video conference, and, in light of Covid-19 concerns, the Trustee and Receiver may, in their sole discretion, require all bidding to be conducted remotely. The Trustee and Receiver may, in their reasonable business judgment, set a minimum bidding threshold/reserve at the Auction, remove some or all of the Assets from the Auction and/or reject any and all bids made for the Assets at the Auction.

The following procedures shall also apply:

(i) Deposit. A deposit of $50,000.00 (the "Deposit") is required for bidders to participate in

the Auction. The Deposit shall be paid to the Trustee, in immediately available funds, no later than seven (7) days before the scheduled Auction Date and must also be accompanied by documentation which, in the reasonable discretion of the Receiver and Trustee, satisfactorily evidences the bidder's ability to consummate the Sale as well as the source of funds to be used.

(ii) Bidder Disclosures. Any bidders participating in the Auction must, no later than seven (7) days prior to the Auction, provide the Receiver and Trustee with:

(a) the full name and identity of the bidder and any representative;

(b) disclosure of any relationship between the bidder (including any affiliates of the bidder), and BioChemics and/or Inpellis (including any insiders or affiliates of the foregoing);

(c) disclosure of any relationship between the bidder (including any affiliates of the bidder) and the Receiver and/or Trustee; and

(d) disclosure of all sources of funds to be utilized in connection with any successful bid.

(iii) Access To Electronic Data Room. The Trustee shall make electronic access to due diligence information available to prospective bidders upon the receipt by the Trustee of an executed acceptable non-disclosure agreement.

(iv) Credit Bidding. Credit bidding shall not be allowed at the Auction.

(v) Format. The Auction may be conducted in an open cry or sealed bid format, or a combination of the two. The Trustee and Receiver will announce the bidding format at the start of the Auction.

(vi) Closing. The winning bidder at the Auction shall deliver the full purchase price and close the purchase of the Assets within fourteen (14) business days of the entry of Orders of the U.S. District Court and the U.S. Bankruptcy Court confirming the sales unless extended by agreement in writing by the Receiver and the Trustee ("Closing Date"). In the event that the winning bidder does not close the purchase of the Assets by the Closing Date, the Trustee and Receiver may sell the Assets to the next highest bidder without delay and without the necessity of further court approval.

The Assets will be sold free and clear of liens, claims, encumbrances, and other interests, with all such liens, claims, encumbrances, and other interests attaching with equal effect and priority to the proceeds of the Auction, subject to the "carve-out" and proceeds allocation agreements as set forth in the respective Sale Motions. The respective Sale Motions provide for the allocation of gross sale proceeds on an equal 50%-50% basis between the BioChemics receivership estate and the Inpellis bankruptcy estate (the "Proposed Proceeds Allocation"). The orders of the U.S. Bankruptcy Court and the U.S. District Court approving the sale of the Assets will also serve

to bar the assertion against the Buyer, or such other entity as may be the successful bidder for the Assets, of any claims for successor liability.

If you are interested in bidding at the Auction please contact the Receiver, the Trustee, or their respective undersigned counsel at least seven (7) days prior to the Auction Date, in order to (i) to arrange for execution and delivery of a confidentiality agreement pursuant to which such additional information regarding the assets will be provided, and (ii) provide the required deposit and the additional disclosures and information set forth herein, and (iii) to arrange to appear at the Auction.

OBJECTIONS: Please take notice that any and all objections to: (i) the Sale Motions; (ii) the Proposed Proceeds Allocation as set forth in the respective Sale Motions; or (iii) the relief requested in the Stipulation Approval Motion sale shall be filed in writing in each of the above-captioned cases on or before August 5, 2020 at 4:30 p.m. (the "Objection Deadline"). A copy of any objection also shall be served upon the undersigned. Any objection to the Sale Motions, the Proposed Proceeds Allocation, or the Stipulation Approval Motion must state with particularity the grounds for the objection and why the proposed sale should not be authorized or the relief requested not be granted. Objections filed in the BioChemics receivership case shall be filed with the Clerk, United States District Court, John Joseph Moakley U.S. Courthouse, 1 Courthouse Way, Boston, MA 02210. Objections filed in the Inpellis bankruptcy case shall be filed with the Clerk, United States Bankruptcy Court, John W. McCormack Post Office and Court House, 5 Post Office Square, Boston, MA 02109-3945. Responses

to any objections shall be filed on or before August 14, 2020 at 4:30 p.m.

SALE AND SETTLEMENT APPROVAL HEARING: A joint Zoom videoconference hearing on the relief requested in the Sale Motions, the Proposed Proceeds Allocation and the Stipulation Approval Motion and any objections thereto is scheduled to take place on August 27, 2020 at 10:00 a.m. before the Honorable Mark L. Wolf, U.S. District Court Judge, and the Honorable Christopher J. Panos, Chief U.S. Bankruptcy Judge, (the "Sale and Settlement Approval Hearing"). Any party who has filed an objection must either (i) participate at the Sale and Settlement Approval Hearing or (ii) have a representative participate at the hearing, failing which the objection may be overruled. If no objection to the relief requested in the Sale Motions, the Proposed Proceeds Allocation or Stipulation Approval Motion is timely filed, the Courts, in their discretion, may cancel the scheduled hearing and approve the relief requested without hearing.

POST-AUCTION REPORT: On or before September 25, 2020, the Trustee and the Receiver shall file a report in each respective case regarding the auction, together with any supporting affidavits regarding the sale and the status of the proposed purchaser as a good faith purchaser and qualified bidder, and a proposed form of order approving the sale. Any objections based upon the manner in which the Auction or sale process was conducted, the propriety of the successful bidder and qualification of the successful bidder as a good faith purchaser, or the adequacy of the winning bid or any back-up bid ("Auction Objections") shall

also be filed on or before September 25, 2020 in each of the respective cases.

SALE CONFIRMATION HEARING: A joint evidentiary hearing is scheduled for October 2, 2020 at 2:00 p.m. before the Honorable Mark L. Wolf, U.S. District Court Judge, and the Honorable Christopher J. Panos, Chief U.S. Bankruptcy Judge, (the "Sale Confirmation Hearing"). Any party who has filed an Auction Objection must either (i) participate at the Sale Confirmation Hearing or (ii) have a representative participate at the hearing, failing which the objection may be overruled. If no Auction Objections are timely filed, the Courts, in their discretion, may cancel the scheduled hearing and confirm the sale without hearing.

PLEASE TAKE FURTHER NOTICE THAT copies of the Sale Motions and/or Stipulation Approval Motion may be obtained by making a request to undersigned counsel to the Receiver or Trustee in writing or by email.

MARK G. DEGIACOMO
RECEIVER OF BIOCHEMICS, INC.

By his counsel,

s/ Jonathan M. Horne
Mark G. DeGiacomo (BBO 118170)
Jonathan M. Horne (BBO 673098)
MURTHA CULLINA LLP
99 High Street

Boston, MA 02110
617-457-4000
mdegiacomo@murthalaw.com
jhorne@murthalaw.com

JOHN J. AQUINO
CHAPTER 7 TRUSTEE

By his counsel

/s/ Donald F. Farrell, Jr.
Donald F. Farrell, Jr. (BBO 159580)
ANDERSON AQUINO LLP
240 Lewis Wharf
Boston, MA 02110
617-723-3600
dff@andersonaquino.com

SCHEDULE A

BioChemics owns the following patents and patent applications:

Subject	Methods and Compositions for Topical Treatment of Medical Conditions Including Wounds and Inflammation		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	12/358,078	22 Jan 2009	Issued
	Pat Number	**Issue Date**	
	8,343,486	01 Jan 2013	
Subject	Control of Blood Vessel Physiology to Treat Skin Disorders		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Canada	2,727,710	11 Jan 2009	Granted
	Pat Number	**Issue Date**	
	2,727,710	01 Nov 2016	
Subject	Control of Blood Vessel Physiology to Treat Skin Disorders		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	12/483,073	11 Jun 2009	Issued
	Pat Number	**Issue Date**	
	8,367,122	05 Feb 2013	

Subject	Methods and Compositions for Tattoo Removal		
Jurisdiction	**App Number**	**Filing Date**	**Status**
France	2352543	04 Dec 2009	Granted
	Pat Number	**Issue Date**	
		03 Apr 2019	
Subject	Methods and Compositions for Tattoo Removal		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Germany	2352543	04 Dec 2009	Granted
	Pat Number	**Issue Date**	
		03 Apr 2019	
Subject	Methods and Compositions for Tattoo Removal		
Jurisdiction	**App Number**	**Filing Date**	**Status**
UK	2352543	04 Dec 2009	Granted
	Pat Number	**Issue Date**	
		03 Apr 2019	
Subject	Methods and Compositions for Tattoo Removal		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	12/631,698	04 Dec 2009	Issued
	Pat Number	**Issue Date**	
	9,278,233	08 Mar 2016	

Subject	Methods and Compositions for Topical Treatment of Medical Conditions Including Wounds and Inflammation		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	13/693,346	04 Dec 2012	Issued
	Pat Number	**Issue Date**	
	8,802,085	12 Aug 2014	
Subject	Methods and Compositions for Tattoo Removal		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	15/008,699	28 Jan 2016	Issued
	Pat Number	**Issue Date**	
	10,322,077	18 Jun 2019	
Subject	Control of Blood Vessel Physiology to Treat Skin Disorders		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	15/140,801	28 Apr 2016	Abandoned
Subject	Topical formulation to treat muscular dystrophy		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US			Prefiling

Subject	Transdermally-Delivered Combination Drug Therapy for Pain		
Jurisdiction	**App Number**	**Filing Date**	**Status**
PCT[1]	PCT /US2018/031 729	09 May 2018	Abandon ed
Subject	Transdermally-Delivered Combination Drug Therapy for Pain		
Jurisdiction	**App Number**	**Filing Date**	**Status**
EP[1]	18727554.0	09 May 2018	Pending
Subject	Transdermally-Delivered Combination Drug Therapy for Pain		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Canada[1]	3063870	09 May 2018	Pending
Subject	Transdermally-Delivered Combination Drug Therapy for Pain		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US[1]	15/974,796	09 May 2018	Issued
	Pat Number	**Issue Date**	
	10,624,867	21 Apr 2020	

[1] John Masiz asserts that he is co-owner and has not assigned his rights to BioChemics, Inc.

Subject	Molecular Transdermal Transport System		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	08/227,365	13 Apr 1994	Expired
	Pat Number	**Issue Date**	
	5,460,821	24 Oct 1995	
Subject	Molecular Transdermal Transport System		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	08/542,068	12 Oct 1995	Expired
	Pat Number	**Issue Date**	
	5,645,854	8 Jul 1997	
Subject	Molecular Transdermal Transport System		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	08/871,156	9 Jun 1997	Expired
	Pat Number	**Issue Date**	
	5,853,751	29 Dec 1998	
Subject	Molecular Transdermal Transport System		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Canada	2,164,109	22 Jun 1994	Expired
	Pat Number	**Issue Date**	
	2,164,109	27 Sep 2005	

Subject	Molecular Transdermal Transport System		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Europe	92923196.3	22 Jun 1994	Expired
	Pat Number	**Issue Date**	
	0 705 085	22 Mar 2000	

Inpellis owns the following patents and patent applications:

Subject	Ibuprofen for Topical Administration		
Jurisdiction	**App Number**	**Filing Date**	**Status**
EP	19179229.0	10 Sept. 2009	Pending
Subject	Ibuprofen for Topical Administration		
Jurisdiction	**App Number**	**Filing Date**	**Status**
AU	2009291755	10 Sept. 2009	Pending
Subject	Ibuprofen for Topical Administration		
Jurisdiction	**App Number**	**Filing Date**	**Status**
CA	2749941	10 Sept. 2009	Pending
	Pat Number	**Issue Date**	
	2749941	24 Apr 2018	
Subject	Ibuprofen for Topical Administration		
Jurisdiction	**App Number**	**Filing Date**	**Status**

EP	09792433.6	10 Sept. 2009	Pending
Subject	Ibuprofen for Topical Administration		
Jurisdiction	**App Number**	**Filing Date**	**Status**
PCT	PCT /US2009/056 568	10 Sept. 2009	Abandon ed
Subject	Ibuprofen for Topical Administration		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	13/604,040	5 Sept. 2012	Issued
	Pat Number	**Issue Date**	
	9,561,174	2 Feb. 2017	
Subject	Topical and Transdermal Ibuprofen-Containing Composition		
Jurisdiction	**App Number**	**Filing Date**	**Status**
			Prefiling

BioChemics and Inpellis jointly own the following patents and patent applications:

Subject	Transdermal Drug Delivery using an Osmolyte and Vasoactive Agent		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Canada	2,702,604	22 Sep 2009	Granted

	Pat Number	**Issue Date**	
	2,702,604	03 Dec 2013	
Subject	Transdermal Drug Delivery using an Osmolyte and Vasoactive Agent		
Jurisdiction	**App Number**	**Filing Date**	**Status**
EP	09740777.9	22 Sep 2009	Published
Subject	Transdermal Drug Delivery using an Osmolyte and Vasoactive Agent		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Mexico	MX/A/2010/004169	22 Sep 2009	Granted
	Pat Number	**Issue Date**	
	349176	14 Jul 2017	
Subject	Transdermal Drug Delivery using an Osmolyte and Vasoactive Agent		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	12/564,841	22 Sep 2009	Issued
	Pat Number	**Issue Date**	
	9,566,256	14 Feb 2017	
Subject	Topical Formulation and Methods for Drug Delivery		
Jurisdiction	**App Number**	**Filing Date**	**Status**
PCT	PCT /US 14/29240	14 Mar 2014	Abandoned

Subject	Transdermal Drug Delivery using an Osmolyte and Vasoactive Agent		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	14/980,348	28 Dec 2015	Issued
	Pat Number	**Issue Date**	
	10,537,536	21 Jan 2020	
Subject	Transdermal Drug Delivery using an Osmolyte and Vasoactive Agent		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	14/996,968	15 Jan 2016	Published
Subject	Transdermal Drug Delivery using an Osmolyte and Vasoactive Agent		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Mexico	MX/A/2017/009307	14 Jul 2017	Pending
Subject	Solution-Based Transdermal Drug Delivery System		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Canada	2,360,590	23 Oct 2001	Granted
	Pat Number	**Issue Date**	
	2,360,590	8 Jun 2010	
Subject	Solution-Based Transdermal Drug Delivery System		
Jurisdiction	**App Number**	**Filing Date**	**Status**

US	09/698,483	27 Oct 2000	Issued
	Pat Number	**Issue Date**	
	6,635,274	21 Oct 2003	
Subject	Solution-Based Transdermal Drug Delivery System		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Australia	200179417	15 Oct 2001	Granted
	Pat Number	**Issue Date**	
	783924	6 Apr 2006	
Subject	Methods of Device-Assisted Drug Delivery		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Australia	2005286822	20 Sep 2005	Granted
	Pat Number	**Issue Date**	
	2005286822	18 Aug 2011	
Subject	Methods of Device-Assisted Drug Delivery		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Canada	2,569,285	20 Sep 2005	Granted
	Pat Number	**Issue Date**	
	2,569,285	6 Dec 2011	
Subject	Methods of Device-Assisted Drug Delivery		
Jurisdiction	**App Number**	**Filing Date**	**Status**

Brazil	0513446-3	20 Sep 2005	Pending
Subject	Methods of Device-Assisted Drug Delivery		
Jurisdiction	**App Number**	**Filing Date**	**Status**
India	7601/DELNP/2006	20 Sep 2005	Abandoned
Subject	Methods of Device-Assisted Drug Delivery		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Mexico	Mx/a/2007/001222	30 Jan 2007	Granted
	Pat Number	**Issue Date**	
	300417	19 Jun 2012	
Subject	Bifunctional Synthetic Molecules		
Jurisdiction	**App Number**	**Filing Date**	**Status**
US	11/820,172	18 Jun 2007	Issued
	Pat Number	**Issue Date**	
	8,354,116	15 Jan 2013	
Subject	Bifunctional Synthetic Molecules		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Canada	2,690,357	17 Jun 2008	Granted
	Pat Number	**Issue Date**	
	2,690,357	25 Mar 2014	
Subject	Bifunctional Synthetic Molecules		
Jurisdiction	**App Number**	**Filing Date**	**Status**

Europe	8768535.9	17 Jun 2008	Abandoned
Subject	Bifunctional Synthetic Molecules		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Hong Kong	HK1142815	17 Dec 2010	Abandoned
Subject	Bifunctional Synthetic Molecules		
Jurisdiction	**App Number**	**Filing Date**	**Status**
India	8551/DELNP/2009	29 Dec 2009	Abandoned
Subject	Bifunctional Synthetic Molecules		
Jurisdiction	**App Number**	**Filing Date**	**Status**
Mexico	Mx/a/2009013759	15 Dec 2009	Granted
	Pat Number	**Issue Date**	
	311871	31 Jul 2013	

BioChemics owns the following registered trademarks:

Mark	DR.DOG
Application Number	75/111,610
Filing Date	30 May 1996
Status	Registered
Registration Number	2,457,502
Registration Date	5 Jun 2001

Mark	DR.DOG
Application Number	75/977,412
Filing Date	30 May 1996
Status	Registered
Registration Number	2,235,427
Registration Date	23 Mar 1999
Mark	OSTEON
Application Number	75/789,971
Filing Date	1 Sep 1999
Status	Registered
Registration Number	2,511,038
Registration Date	20 Nov 2001
Mark	REPIDERM
Application Number	76/311,455
Filing Date	11 Sep 2001
Status	Registered
Registration Number	3,066,248
Registration Date	7 Mar 2006
Mark	DERMA-RELEASE
Application Number	78/814,979
Filing Date	15 Feb 2006
Status	Registered
Registration Number	3,684,541
Registration Date	15 Sep 2009

Mark	DERMAL ELASTICS
Application Number	77/408,234
Filing Date	28 Feb 2008
Status	Registered
Registration Number	3,743,435
Registration Date	26 Jan 2010
Mark	DERMAL ELASTICS TECHNOLOGIES
Application Number	77/408,263
Filing Date	28 Feb 2008
Status	Registered
Registration Number	3,753,420
Registration Date	23 Feb 2010
Mark	BIO-SPECIAL TY PRODUCTS
Application Number	77/692,831
Filing Date	17 Mar 2009
Status	Registered
Registration Number	3,861,623
Registration Date	12 Oct 2010
Mark	VAS-EX
Application Number	77/825,932
Filing Date	14 Sep 2009
Status	Registered
Registration Number	3,901,599
Registration Date	4 Jan 2011
Mark	B1O-SCRIPTIVES
Application Number	77/822,554

Filing Date	9 Sep 2009
Status	Registered
Registration Number	3,826,392
Registration Date	27 Jul 2010
Mark	ALO-VERIX
Application Number	77/825,966
Filing Date	14 Sep 2009
Status	Registered
Registration Number	3,871,380
Registration Date	2 Nov 2010

Inpellis owns the following registered trademarks:

N/A

ORDER OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT (MAY 21, 2020)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

JOHN J. MASIZ,

Defendant-Appellant,

BIOCHEMICS, INC.,

Defendant-Appellee,

GREGORY S. KRONING; CRAIG MEDOFF,

Defendants.

No. 19-2206

Appellant John Masiz filed a notice of appeal on November 22, 2019 (D.E. No. 585) in 1:12-cv-12324 appealing the district court order (D.E. No. 582) which denied his request for an extension of time to file certain unredacted documents in the public record.

The challenged order does not appear to be a final judgment or an appealable interlocutory order,

and therefore, this court may not have jurisdiction to hear this appeal. *See* 28 U.S.C. § 1291; 1292. *See also Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 257 (1st Cir. 1989) (noting that a party "can gain the right of appeal from the discovery order by defying it, being held in contempt, and then appealing from the contempt order, which would be a final judgment as to them.")

Additionally, the appeal appears to now be moot in light of appellant's January 30, 2020 filing towards compliance with the district court's order.

Accordingly, appellant is directed either to move for voluntary dismissal pursuant to Fed. R. App. P. 42(b) or to show cause, in writing, why this appeal should not be dismissed as moot. The failure to take either action by June 4, 2020 may lead to dismissal of the appeal for lack of diligent prosecution. 1st Cir. R. 3.0(b).

By the Court:

Maria R. Hamilton
Clerk

cc:

Donald Campbell Lockhart
Martin F. Healey
David H. London
Kathleen Burdette Shields
Theodore Weiman
Jan Richard Schlichtmann

John A. Sten
Michael P. Angelini
Douglas Thomas Radigan
Francis J. DiMento Sr.
Keith L. Sachs
Orestes G. Brown
Peter Sabin Willett
Jonathan M. Albano
Howard M. Cooper
Elizabeth M. Bresnahan
Joseph M. Cacace
Mark G. DeGiacomo
Taruna Garg
Michael J. Fencer

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS (JANUARY 17, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

No. 12-12324-MLW

Before: Mark L. WOLF, United States District Judge.

I. Summary

For the reasons explained in this Memorandum, the court is denying the November 22, 2019 Emergency Motion by Defendant John Masiz Requesting an Order Staying the Court's 11-5-19 (Doc. #574), 11-20-19 (Doc. #579) & 11-22-19 (Doc. #582) Orders so that Masiz may Immediately Appeal the Court's Orders Denying Masiz Relief (Dkt. No. 584) (the "Emergency Motion"). Since September 2019, Masiz has repeatedly failed to obey orders directing him to file, for the

public record, evidence relating to whether he has complied with the injunction prohibiting him from again violating federal securities laws and to make certain disclosures concerning his history to potential investors that he solicits. The documents at issue also relate to decisions the court must make in this continuing litigation.

The court granted a temporary stay on November 22, 2019 in order to consider the arguments Masiz could—and should—have made in response to the September 6, 2019 Order he did not obey and in response to subsequent orders that he also did not obey.

On November 21, 2019, Masiz requested a stay to permit him to focus on mediation of a dispute that relates to this case of 45 days or until seven days after the mediation concluded, which the court denied. The temporary stay resulting from the November 22, 2019 Emergency Motion for a stay pending appeal has been in effect for more than 45 days. The mediation concluded unsuccessfully on December 16, 2019. Masiz's belated, November 22, 2019 claims that the court lacks the authority to order the submission of documents and information relevant to issues the court must decide and to whether Masiz has complied with the injunction against him are unmeritorious. In addition, he has not satisfied the standards for extending the stay pending appeal.

Masiz reportedly did, as ordered, provide the documents and information at issue to the Securities and Exchange Commission ("SEC"). There is no justification for Masiz's refusal to submit the documents and information for the court's consideration, and to do so on the public record.

Therefore, unless the First Circuit otherwise orders, Masiz is being ordered to file, by January 30, 2020, for the public record, the documents and information he was first ordered to file by September 12, 2019, and later ordered to file by November 22, 2019.

II. Procedural History

In 2012, the SEC brought this case against BioChemics, Inc. ("BioChemics"), its Chief Executive Officer John Masiz, and others, alleging that material false and misleading statements were made in connection with the sale of BioChemics' securities. This was not the first time Masiz was accused of fraud in the sale of securities.

In 2004, the SEC accused Masiz of fraud in connection with the sale of securities of Vaso Active Pharmaceuticals, Inc. ("Vaso"). Masiz, without admitting liability, agreed to a judgment against him that required that he pay an $80,000 civil penalty and not serve as an officer or director of a publicly traded company for five years. *See* Final Judg. as to Deft. J. Masiz, *SEC v. Vaso Active Pharm., Inc.*, No. 04-CV-01395-RJL (D.D.C. Sept. 13, 2004), Dkt. No. 5. Masiz was also permanently enjoined from violating federal securities laws. *See id.*

In the instant case, in 2015, BioChemics agreed not to contest liability and to pay a substantial judgment against it. The court rejected the first proposed judgment submitted by the SEC because it questioned whether BioChemics had the means to pay what the court determined would be an almost $18,000,000 judgment and because the SEC had not attempted to assure BioChemics could pay it. *See* Mar. 18, 2015 Hr'g Tr. 5:10 (Dkt. No. 139).

The parties subsequently jointly presented a revised proposed consent judgment that required that BioChemics pay $17,897,884 to the SEC in six instalments within the next twelve months, with the first payment due no later than seven months after the entry of judgment. *See* Docket No. 121. After a hearing, on March 25, 2015, the court entered that judgment. *See* Suppl. Judg. (Dkt. No. 123).

BioChemics timely made the first required payment of $750,000. BioChemics did not, however, make any of the additional required payments. The SEC informed the court that BioChemics, with Masiz as CEO, had transferred to third parties all of the assets it previously had to satisfy the judgment. *See* Jan. 27, 2016 Hr'g Tr. 12 (Dkt. No. 174). Nevertheless, the SEC joined BioChemics in requesting that the court provide BioChemics another twelve months to pay the judgment. In a settlement agreement providing for a Modified Judgment, BioChemics agreed to give the SEC a first-priority security interest in its assets, and to cause an entity that BioChemics had created called the Shareholder Resolution Trust (the "Trust"), and Inpellis, Inc. ("Inpellis"), to give the SEC a first-priority security interest in their assets. The court entered the Modified Judgment on May 25, 2016. *See* Docket No. 202. The settlement agreement was not submitted to the court until June 5, 2017 and, therefore, was not available to the public when the Modified Judgment was entered. *See* Docket No. 307-1. The parties' April 14, 2016 joint memorandum in support of the proposed Modified Judgment did not indicate that the lien the SEC would obtain on the assets of Inpellis, which was not a party in this case,

would severely prejudice existing creditors of Inpellis. *See* Docket No. 197-2.

Inpellis had been a subsidiary of BioChemics which held a world-wide, royalty-free license to use BioChemics' intellectual property. In 2015, BioChemics transferred its shares in Inpellis to the Trust, in what the SEC suggests was a fraudulent conveyance or at least a conveyance without consideration. *See* Jan. 27, 2016 Tr. 14:17-15:3 (Dkt. No. 174). BioChemics subsequently transferred to Inpellis ownership of its intellectual property in exchange for the $750,000 BioChemics used to make the first payment on the judgment in this case.[1]

Inpellis had raised money to finance an Initial Public Offering ("IPO") of its stock. Among other investors, ADEC Private Equity Investments, LLC ("ADEC"), in 2015, loaned Inpellis $3,000,000 to finance the IPO. The SEC was investigating Inpellis for possible fraud in connection with the proposed IPO. That investigation was terminated when the SEC received its first-priority security interest in the assets of Inpellis, and Inpellis abandoned its pursuit of the IPO without informing its creditors.

In May 2017, ADEC moved for relief from the Modified Judgment after Inpellis defaulted on its obligations to pay ADEC, and ADEC learned Inpellis

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[1] As Inpellis had a world-wide license to use BioChemics' intellectual property for free, questions have been raised concerning whether ownership of the intellectual property had any value to Inpellis and, in any event, whether it was worth $750,000. There is, therefore, a question of whether the payment by Inpellis of $750,000 was a fraudulent conveyance made to benefit BioChemics.

had given a first-priority security interest in its assets to the SEC and was no longer pursuing an IPO. *See* Mot. for Relief (Dkt. No. 275). ADEC alleged that it had loaned Inpellis $3,000,000 to finance an IPO in reliance on Inpellis' representation that Inpellis was no longer affiliated with BioChemics. *See* Mem. Supp. Mot. for Relief 3-4 (Dkt. No. 276); *see also* Ross Decl. ¶¶ 4-5 (Dkt. No. 277) (Inpellis represented it "[was] not an affiliate of BioChemics"); Clarke Decl. ¶¶ 5-8 (Dkt. No. 278) (stating board of directors of Inpellis had not approved the grant of the security interest to the SEC). ADEC also alleged that the Inpellis grant of the first-priority security interest in its intellectual property to the SEC was a fraudulent conveyance, and that the SEC was complicit in it because the SEC had terminated its investigation of the proposed Inpellis IPO only after it received that security interest. *See* Mem. Supp. Mot. for Relief 4-6 (Dkt. No. 276).

On June 15, 2017, the court granted summary judgment for the SEC on its claims that Masiz was negligent in making material false and misleading statements in the offering and selling of BioChemics securities. *See* June 15, 2017 Hr'g Tr. 60:14-18 (Dkt. No. 323); June 15, 2017 Order ¶ 1 (Dkt. No. 319). The court scheduled a further hearing to address whether it should grant the SEC's motion for summary judgment on the issue of whether Masiz made those fraudulent representations intentionally. *Id.*

Prior to that hearing, the SEC and Masiz reported that they had reached an agreement to resolve the case against him. They asked the court to refrain from ruling on the remainder of the SEC's motion for summary judgment. *See* Docket No. 339. The court did so.

On August 18, 2017, the court entered the parties' jointly proposed Final Judgment as to Defendant John J. Masiz. *See* Docket No. 345. Among other things, Masiz admitted negligently making false and misleading material misrepresentations and agreed to pay a $120,000 fine. He also agreed to another injunction prohibiting him from violating federal securities laws and, if he solicited any investment in the future, to disclose his history with the SEC.

More specifically, the Final Judgment states, in part, that:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a)(2) and (a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and (a)(3)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(b) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil

Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from providing information to, soliciting, or accepting investments or funds from, any investor or potential investor regarding the offer or sale of any securities issued by any entity that Defendant directly or indirectly owns, controls, consults for, or is employed by, without first providing such person with the following written disclosure regarding Defendant's prior regulatory history, and keeping a written record that he provided such written disclosure to that person:

> "I, John Masiz, make the following disclosure concerning my regulatory history:
>
> 1. *SEC v. Vaso Active Pharmaceuticals, Inc. and John Masiz*, No. 04-CV-1395-RJL (D.D.C.).
>
> *See* SEC Litigation Release No. 18834, dated August 17, 2004, with additional statement, that is attached hereto.[2]
>
> 2. *SEC v. BioChemics, Inc., et al.*, No. 12-cv-12324-MLW (D. Mass.).

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[2] The *SEC Litigation Release No. 18834*, dated August 17, 2004, is attached to this Memorandum as Exhibit A.

On December 14, 2012, the Commission filed a lawsuit against BioChemics, Inc., Masiz, and two others, charging them with securities fraud in violation of Section 10(b) of, and Rule 10b-5 under, the Exchange Act and Section 17(a) of the Securities Act. *See SEC v. BioChemics, Inc. et al.*, No. 12-12324-MLW (D. Mass.). On 8/18/18 the Commission dismissed the claims against Masiz under Section 10(b) of, and Rule 10b-5 under, the Exchange Act and Section 17(a)(1) of the Securities Act. The remainder of the Commission's claims against Masiz were resolved by Settlement entered as a Final Judgment on 8/18/17. Pursuant to this Final Judgment, Masiz admitted that he violated Sections 17(a)(2) and (a)(3) of the Securities Act. The Final Judgment enjoined Masiz from future violations of these provisions, prohibited Masiz from acting as an officer or director of a public company, and ordered him to pay a $120,000 civil penalty. The Final Judgment also enjoined Masiz from providing information to, soliciting, or accepting investments or funds from, any investor or potential investor regarding the offer or sale of any securities issued by any entity Masiz directly or indirectly owns, controls, consults for, or is employed by, without first providing this written disclosure and keeping a written record that he provided this disclosure to that person."

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)],

> Defendant is prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

Id. §§ I-III (emphasis added).

In summary, Masiz was accused of making fraudulent statements in the sale of Vaso securities, paid an $80,000 penalty to settle that charge, and was permanently enjoined from making fraudulent statements in any future solicitation of investments. This court subsequently found, in effect, that Masiz violated that injunction by at least negligently making material misrepresentations in connection with the offering and selling of BioChemics' securities. The court did not decide whether Masiz had made those misrepresentations intentionally. The court did, however, issue another injunction prohibiting Masiz from making fraudulent statements in connection with soliciting investments. It also ordered Masiz to make full disclosure to any potential investor of that injunction, the charges against him and the penalties imposed on him in the *Vaso* and *BioChemics* cases, and directed Masiz to keep a written record of each required disclosure.

Despite being afforded additional time to attempt to do so, by October 2018 BioChemics had been unable to find a buyer for its intellectual property and, therefore, had paid only about $1,000,000 of the almost $18,000,000 judgment against it, which was accruing interest. *See* Pl. Status Rpt. 1 (Dkt. No. 420). Therefore, on October 9, 2018, on motion of the SEC, the court

appointed a receiver for BioChemics. *See* Docket No. 452. The Receiver was given "exclusive jurisdiction and possession of all [BioChemics] property," *id.* ¶ 1, and directed to "marshal, pursue, and preserve the Receivership Assets with the objective of maximizing the recovery of assets," *id.* ¶ 2.

On July 31, 2019, the Receiver moved for approval of a process to sell BioChemics' intellectual property. *See* Mot. for Approval of Bidding Procedures ¶ 13 (Dkt. No. 542). The Receiver proposed an auction that would start with a bid to sell BioChemics' assets to BioPhysics Pharma, Inc. ("Biophysics") for $17,500,000, with $4,000,000 to be paid in cash at closing. *See* Receiver's Mot. for Sale 1 (Dkt. No. 541). The Receiver characterized BioPhysics as a company owned and controlled by Masiz that was formed in June 2017. *See* Mot. for Approval of Bidding Procedures ¶ 13 (Dkt. No. 542); ADEC Opp'n to Mot. for Sale 15 (Dkt. No. 548). It reportedly occupies Inpellis' former lab space and employs former employees of Inpellis, including Inpellis' chief scientist. *See* Sept. 5, 2019 Hr'g Tr. 60:13-19 (Dkt. No. 563); ADEC Opp'n to Mot. for Sale 15; Dec. 19, 2018 Inpellis Creditors Mtg. Tr. 111:16-22, 112:3-4, 113:12-15, 114:21-115:1, 135:12-20 (Dkt. No. 548-4).

At a September 5, 2019 hearing, the court raised questions about the proposed "auction." More specifically, it questioned what, if anything, the Receiver had done to determine whether BioPhysics had $4,000,000. It also questioned whether Masiz was being held out as an officer or director of Biophysics; whether Masiz had played a role in raising money for BioPhysics; whether Masiz had made the disclosures to potential investors required by the judgment against him in

this case; whether Masiz had maintained the required written record of any such disclosures; and whether BioPhysics intends to raise money publicly in a manner that could implicate the judgment against Masiz. *See* Sept. 5, 2019 Hr'g Tr. 7 (Dkt. No. 563). As the court was not satisfied with the responses to these questions, it denied without prejudice the Receiver's request to sell BioChemics' intellectual property in an auction, Docket Nos. 541, 542, 543, at which it was foreseeable that BioPhysics, controlled by Masiz, would likely be the only bidder. *See* Sept. 5, 2019 Hr'g Tr. 87-88 (Dkt. No. 563); Sept. 6, 2019 Order ¶ 2 (Dkt. No. 559).

In view of Masiz's history, including the court's finding that Masiz had in essence violated the injunction in the *Vaso* case by negligently making material false and misleading statements in raising money for BioChemics, ADEC's charges that fraud had been committed in raising money for an Inpellis IPO, and that, as the controlling shareholder of BioChemics, Masiz had engineered a fraudulent conveyance by Inpellis of its intellectual property to secure the SEC's judgment against BioChemics, the court was concerned that if Masiz had successfully participated in raising $4,000,000 for BioPhysics, he may have failed to make the disclosures to investors required by the judgment against him, and that any such misconduct might be continuing. Therefore, on September 6, 2019, the court ordered that:

> Defendant John Masiz shall, by September 12, 2019, file an affidavit providing: (a) a list of investors and potential investors from whom he has solicited funds for Biophysics Pharma, Inc. or any other entity since the

> entry of Final Judgment on August 18, 2017; (b) the written disclosure that he provided to each investor and potential investor he solicited; and (c) the contemporaneous written record of such disclosures required by Section II of the Final Judgment as to Defendant John J. Masiz (Dkt. No. 345). The SEC shall, by September 19, 2019, review Mr. Masiz's affidavit and report whether it believes Mr. Masiz has complied with the relevant requirements of the Final Judgment.

Sept. 6, 2019 Order ¶ 5 (Dkt. No. 559).

On September 12, 2019, Masiz filed a brief affidavit. He did not, as ordered, file a list of actual or potential investors he had solicited for BioPhysics, the written disclosure provided to each, or any contemporaneous records of such disclosures. *See* Docket No. 562-1. Nor did Masiz request relief from the order that he do so. However, on September 16, 2019, Masiz moved to file under seal the required documents, which he represented had been delivered to the SEC. *See* Docket No. 565. He stated that the SEC assented to the motion to seal. *See id.* Masiz did not, however, file an affidavit or memorandum in support of the motion to seal as required by Rule 7.1(b)(1) of the Local Rules of the United States District Court for the District of Massachusetts.

On September 19, 2019, the SEC reported that it had received the documents Masiz had been ordered to file. *See* Docket No. 566. It stated that: Masiz had participated in 80 solicitations of investments in BioPhysics; Masiz represented that the required written disclosures had been provided directly to potential investors 73 times; in the other seven instances the

disclosures were included in a drop box linked to an email, which for the SEC "raised concerns that an important written disclosure like that required by the final judgment could be buried by simply providing a link to a much larger collection of documents. . . . " *Id.*

In a November 5, 2019 Order, the court questioned whether the sealing belatedly requested by Masiz was justified in view of the common law presumption that the public should have access to documents upon which a court relies in determining the substantive rights of litigants "and in performing its adjudicatory function." Dkt. No. 574 (citing and quoting *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)). As the court explained, "[p]ublic access is particularly appropriate where, as here, the government is a party." *Id.* at 2. Therefore, "'[o]nly the most compelling reasons can justify non-disclosure of judicial records,' and the burden of proof is on the party seeking confidentiality." *Id.* (quoting *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410-11). "Although certain justifications such as the protection of documents subject to attorney-client privilege or privacy rights 'can limit the presumptive right of access to judicial records,' *Ark. Teacher Ret. Sys. v. State Street Bank & Tr. Co.*, 391 F. Supp. 3d 167, 169 (D. Mass. 2018) (quoting *Standard Fin. Mgmt. Corp.*, 830 F.2d at 411), even selective sealing 'must be based on a particular factual demonstration of potential harm, not on conclusory statements.'" *Id.* (quoting *United States v. Kravetz*, 706 F.3d 47, 60 (1st Cir. 2013)).

The court noted that Masiz had not filed the affidavit or memorandum in support of the motion to seal required by the Local Rules. *See id.* Nor had he articulated any reason why evidence concerning

whether he had complied with the disclosure requirements of the judgment against him, which consists of documents provided to third parties, should not be part of the public record. *See id.* Nevertheless, the court provided Masiz an opportunity to attempt to do so.]

More specifically, on November 5, 2019, the court ordered that, by November 14, 2019:

> 1. Masiz shall either (a) file a statement that sealing of the evidence of compliance is no longer requested and file a full, unredacted copy of the evidence of compliance for the public record; or (b) file an affidavit and memorandum in support of the request to seal his evidence of compliance which, among other things, addresses the fact that the evidence contains material that was disclosed to third parties.
>
> 2. If Masiz wishes to maintain his motion to seal the evidence of compliance, Masiz shall both (a) file a redacted version of the evidence of compliance for the public record, and (b) submit to the court a full, unredacted copy of the evidence of compliance, which shall be sealed, at least temporarily, to preserve its confidentiality if the sealing of it proves to be justified.

Id.

Masiz did not respond to that order by November 14, 2019. Rather, on November 15, 2019, Masiz filed a "Notice" "request[ing] the court's temporary indulgence" because "he believed the parties had entered into an agreement as to how the parties should proceed regarding filings in this and other matters." Dkt. No.

578. In a November 20, 2019 Order, the court stated that "[i]t is axiomatic that the parties do not have the authority to alter court orders by agreement." Dkt. No. 579. Moreover, Masiz had still not filed a memorandum or affidavit in support of the motion to seal. Nor had he, as ordered, filed even redacted versions of the required documents for the public record. Because the court intended to decide whether Masiz had complied with the disclosure requirements of the Final Judgment, and because there is a "presumed common law right of public access to information on which judicial decisions are made," *id.*, the court ordered that:

1. By November 22, 2019, Masiz shall file on the public record a full, unredacted copy of all of the evidence on which he relies in representing that he has complied with his obligations under § II of the Final Judgment.

2. Any failure to comply with this Order may be deemed a civil and/or criminal contempt.

Id.

On November 21, 2019, Masiz filed a motion to stay for 45 days proceedings relating to ADEC because they had agreed to mediation of their dispute. *See* Docket No. 580. He also filed an "Emergency" Motion to extend the November 22, 2019 deadline for the filings required by the November 20, 2019 Order so he could focus on settling the dispute with ADEC. *See* Docket No. 581. Masiz requested leave to make the required submissions seven days after the mediation was completed. *See id.* Finding that "the issue of whether Masiz has complied with the requirements of the Final Judgment is independent of the dispute

between ADEC and Masiz," the court promptly denied Masiz's request for an extension. *See* Docket No. 582.

Masiz did not make the required filings on November 22, 2019. Rather, on that day, Masiz filed the Emergency Motion requesting a stay of the order that he make filings for the public record "while Masiz immediately applies to a single justice of the 1st Circuit Court of Appeals" for relief. Dkt. No. 584. Masiz argued for the first time that the court lacks the authority to order, *sua sponte*, the submission of documents relevant to whether he has complied with the judgment against him and that requiring such documents be filed for the public record would be an impermissible penalty in the form of "public shaming" of him. *Id.* at 2, 5.

Later on November 22, 2019, while expressing doubt that Masiz's appeal would be found meritorious, the court stated it would consider Masiz's arguments, which could and should have been made in response to the September 6, 2019 Order. *See* Docket No. 586. Therefore, the court stayed temporarily Masiz's obligation to make the submissions required by the November 19, 2019 Order. *See id.*

Also on November 22, 2019, Masiz filed an "Emergency Notice of Appeal" of the orders at issue. *See* Docket No. 585. According to the First Circuit docket, he has not requested any action by a single judge of the First Circuit or any other action on his appeal. *See SEC v. Masiz*, No. 19-2206 (1st Cir. filed Nov. 22, 2019).

On January 14, 2020, the Receiver reported that after a mediation on December 16, 2019, BioChemics and ADEC had not settled their dispute. *See* Docket

No. 589. The Receiver also reported that he had not identified a potential purchaser for BioChemics' intellectual property other than Biophysics and is considering the best way to auction that asset. *See id.* Therefore, the court expects to receive soon a renewed motion to approve an "auction" of BioChemics assets in which it is foreseeable that BioPhysics would be the only bidder.

III. Analysis

A. The Claim That the Court's Orders Exceed Its Authority Is Unmeritorious.

The court has considered Masiz's belated contentions in his November 22, 2019 Emergency Motion that the court lacks the authority to order, *sua sponte*, that he file evidence relevant to whether it should authorize a process that would result in a sale of BioChemics' assets to BioPhysics and to whether Masiz has complied with the judgment against him.[3] Those contentions are incorrect and unpersuasive.

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[3] As indicated earlier, the arguments Masiz made for the first time on November 22, 2019 could and should have been made in response to the September 6, 2019 Order and subsequent orders. Arguments made only in a perfunctory manner may properly be denied. *See, e.g., United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990); *De Giovanni v. Jani-King Int'l, Inc.*, 968 F. Supp. 2d 447, 450 (D. Mass. 2013); *Coopersmith v. Lehman Bros., Inc.*, 344 F. Supp. 2d 783, 790 n.5 (D. Mass. 2004); *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 892 F. Supp. 347, 355 n.8 (D.N.H. 1995). For months, Masiz made no arguments at all to support his refusal to obey the court's orders. The court could have denied his requests for relief on this ground alone. Nevertheless, it has analyzed the arguments made by Masiz on November 22, 2019, and finds them to be without merit.

The documents that Masiz has been ordered to file relate to the Receiver's recently reiterated interest in selling BioChemics' assets to BioPhysics and decisions the court will have to make concerning the "auction" that will be proposed. Masiz and BioChemics repeatedly represented that BioChemics would pay almost $18,000,000, plus interest, to satisfy the judgment against BioChemics and never did. The documents that Masiz has been ordered to produce relate, among other things, to whether Biophysics has $4,000,000 to purchase BioChemics' assets. If it does not, allowing the Receiver to pursue a process expected to result in the sale of BioChemics' assets to BioPhysics at an auction would be a time-consuming, costly, and ultimately futile exercise.

If BioPhysics has $4,000,000 to consummate a purchase of BioChemics' assets, it will be prudent and appropriate for the court to consider how these funds were obtained and whether they can properly be used to acquire BioChemics' intellectual property. The SEC reports that Masiz states that he participated in 80 solicitations of funds for BioPhysics. This court found that he at least negligently violated the 2004 injunction in the *Vaso* case by making fraudulent misrepresentations in raising money for BioChemics. In addition, Masiz may have caused fraudulent conveyances to occur in transferring BioChemics' intellectual property to Inpellis and later causing Inpellis to give the SEC a first-priority security interest in intellectual property BioChemics claimed was owned by Inpellis. There is, therefore, reason to question whether Masiz made the disclosures required by the judgment against him in raising, or attempting to raise, money for BioPhysics. The fact that the SEC has reviewed the documents

Masiz refuses to provide to the court and expressed concern about the adequacy of only some of his disclosures to potential investors is not sufficient to resolve these questions as the court has in this case at times disagreed with the SEC, and ADEC has raised issues concerning the propriety of the SEC's own conduct.

If money was raised improperly by Masiz, or was raised for purposes other than acquiring BioChemics' assets, it is important that this be discovered before the funds are used by BioPhysics to purchase those assets. The alleged misapplication of funds lent by ADEC to Inpellis for an IPO, and alleged fraudulent conveyance of Inpellis' assets to pay part of the judgment against BioChemics have spawned complicated and expensive litigation. The court wishes to minimize the risk that this will recur.

In addition, as the Supreme Court has stated, "a federal court [has] inherent power to enforce its judgments." *Peacock v. Thomas*, 516 U.S. 349, 356, 116 S. Ct. 862, 133 L.Ed.2d 817 (1996). "Consent decrees [such as the consent judgment in the instant case] are subject to continuing supervision and enforcement by the court. '[A] court has an affirmative duty to protect the integrity of its decree.'" *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (citation omitted). Therefore:

> "[B]ecause a district court has a significant administrative interest in securing compliance with its orders, it 'may take such [remedial] steps as are appropriate. . . . ' And, though a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad.

> Where equitable remedies which exceed the confines of the consent decree are reasonably imposed in order to secure compliance of the parties, the court has not overstepped its bounds, and its orders must be obeyed.

EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 593 (2d Cir. 1991) (quoting *Berger*, 771 F.2d at 1569).[4]

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[4] The cases mentioned by Masiz in his First Circuit docketing statement are distinguishable from the instant case. *See* Docketing Statement 4, *SEC v. Masiz*, No. 19-2206 (filed Nov. 25, 2019) (Dkt. No. 00117520272). *Ricci v. Patrick*, 544 F.3d 8 (1st Cir. 2008), involved a district court's decision to reopen a case and modify the consent decree by issuing new remedial orders following an investigation into whether the Commonwealth of Massachusetts had complied with a consent decree. *See id.* at 11. "The district court's authority to investigate [ ] allegations of violation [was] not at issue." *Id.* In *Ricci*, the court's final order closing the case had allowed for re-opening of the case only upon fulfilment of specified conditions, none of which had occurred. *See id.* at 13-14. The Supreme Court case on which *Ricci* relies similarly involved a final order in which the district court did not retain general jurisdiction to enforce the settlement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376-77, 114 S. Ct. 1673, 128 L.Ed.2d 391 (1994). Neither *Ricci* nor *Kokkonen* is comparable to the instant case, as the Final Judgment against Masiz states that "this [c]ourt shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment." Final Judg. § VII (Dkt. No. 345). *Kokesh v. SEC*, ___ U.S. ___, 137 S. Ct. 1635, 1645, 198 L.Ed.2d 86 (2017), and *SEC v. Liu*, 754 F. App'x 505, 509 (9th Cir. 2018), *cert. granted, Liu v. SEC*, ___ U.S. ___, 140 S. Ct. 451, 205 L.Ed.2d 265 (2019)), are also inapposite. Each concerned the court's equitable power to order disgorgement of profits. In *Liu*, the Supreme Court will consider whether a disgorgement penalty can properly be imposed pursuant to the judicial equitable power. In both cases, the disgorgement remedies at issue were imposed by a court over the petitioner's objection. *See Kokesh*, 137 S. Ct. at 1641 (disgorge-

Therefore, it is permissible and appropriate for the court to have issued its orders and the required documents must be filed.

B. The Claim That Masiz's Response to the Court's Orders Should Be Sealed Is Unmeritorious.

The documents at issue have also been properly ordered to be filed on the public record. The court recognizes that Masiz has represented, without contradiction, that the SEC has assented to the sealing of them. However, again, the SEC's conduct is also subject to question in this case. For example, as described earlier, the court refused to approve the SEC's initial proposed judgment against BioChemics because the SEC had failed to assure that there was a reasonable prospect that BioChemics would be able to pay it. In addition, ADEC has raised a meaningful question concerning whether the SEC colluded with BioChemics in what may have been a fraudulent conveyance of a first-priority security interest in Inpellis' assets that has harmed ADEC and other creditors.

As explained earlier, there is a common law presumption that the public should have access to judicial records, meaning documents that are filed and play a part in the process of adjudication. *See Standard Fin. Mgmt. Corp.*, 830 F.2d at 408. "Public access to judicial records and documents allows the citizenry to monitor

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ment judgment entered following jury trial on liability); *Liu*, 754 F. App'x at 507 (disgorgement judgment entered at resolution of case upon summary judgment). These cases are distinguishable because the question in the instant case concerns whether Masiz has complied with the terms of a consent decree to which Masiz agreed to settle the case and avoid adjudication of serious allegations.

the functioning of our courts, thereby insuring quality, honesty and respect for our legal system. The appropriateness of making court files accessible is accentuated in cases where [as here] the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *Id.* at 410 (internal quotation and citation omitted). Therefore, while "the public's right to access is not absolute . . . only the most compelling reasons can justify non-disclosure of judicial records." *Id.* (internal quotation and citation omitted).

In this case, placing in the public record the disclosures that Masiz represents he made to potential investors in BioPhysics is particularly important. As described earlier, the failure of BioChemics and the SEC to inform the court, and therefore the public, that the first-priority security interest in Inpellis' assets given to the SEC to benefit BioChemics would severely prejudice its creditors prompted ADEC to seek relief from the Modified Judgment when it belatedly discovered that transaction. Anyone solicited by Masiz should have the opportunity to review the disclosures claimed to have been made to him or her, and to present promptly to the court any disputes concerning whether they were properly made before the court relies on Masiz's representations in decisions it must make.

Masiz, however, argues that the public filing of the disclosures he made to potential investors would be an unjustified form of "public shaming" that would not protect investors, but would make Masiz a "pariah in the marketplace." *See* Docket No. 584-1, at 3. This contention is unconvincing. The description of both

Masiz's alleged and demonstrated violations of federal securities laws that he is required to disclose are in the judgment and, therefore, already in the public record. Therefore, the public filings Masiz has been ordered to make will not divulge any confidential information or any information injurious to Masiz that is not already available to the public.

If the required disclosures have indeed been made to potential investors, the public filing of them will provide them with no disparaging information about Masiz that they do not already have. However, if public filing does provide them with additional information, that will serve to protect potential investors. As explained earlier, the SEC reports that Masiz represents that in seven instances he made the required disclosures by providing them in a drop box linked to an email, which also contained other documents. Therefore, potential investors may not have known about the disclosures and read them. Accordingly, there is reason to be concerned that at least some potential investors did not receive, in proper form, the information Masiz was required to disclose. Public filing may rectify that problem and give any actual investors, particularly, information that may be material concerning how they wish to proceed. If, as Masiz suggests, the information in the public filings causes others to be wary of doing business with Masiz, the judgment will have served its intended purpose of assuring that potential investors are provided material information concerning Masiz as they decide whether to invest with or in him.

It is not clear whether Masiz is claiming that public filing of the disclosures he made to private investors would violate their personal privacy interests.

The court recognizes that the privacy interests of third-parties can limit the presumptive right of public access to judicial records. *See United States v. Kravetz*, 706 F.3d 47, 62 (1st Cir. 2013); *Standard Fin. Mgmt. Corp.*, 830 F.2d at 411. However, Masiz does not claim that he promised potential investors confidentiality. In any event, he did not have the authority to do so. In addition, if the disclosures required by the judgment were made, a reasonable potential investor would have realized that his or her communications with Masiz might become public in litigation concerning whether Masiz had performed as ordered and, therefore, would not have had a reasonable expectation of privacy.

In any event, as explained earlier, the burden is on Masiz to prove that sealing is justified. *See id.* at 410-11. Even selective sealing "must be based on a particular factual demonstration of potential harm, not on conclusory statements." *Kravetz*, 706 F.3d at 60 (quoting *Standard Fin. Mgmt. Corp.*, 830 F.2d at 412). Masiz has not satisfied his burden of proving that complete sealing of the documents he has been ordered to file, or the filing of redacted versions of them, are justified.

In summary, it was permissible and appropriate for the court to issue its orders, and to require that Masiz's submissions in response to those orders be on the public record. He is, therefore, again being ordered to file the required documents and information on the public record.

C. The Motion for a Further Stay Is Unmeritorious.

As described earlier, Masiz filed his Emergency Motion for a stay pending an immediate appeal on November 22, 2019. *See* Docket No. 584. He asked that the court stay its orders directing the public filing of evidence that he had made the disclosures required by the judgment against him in soliciting potential investors for BioPhysics "while Masiz immediately applies to a single justice of the 1st Circuit Court of Appeals." *Id.* at 1.[5] The First Circuit docket indicates that Masiz has not requested relief from a single judge of the First Circuit, or done anything to expedite or advance his appeal in the almost two months that this court has stayed its orders. The question, therefore, is whether a further stay should be granted pending appeal.[6]

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[5] In his supporting memorandum, Docket No. 584-1, Masiz added that he was requesting an extension of time to respond to the Orders until seven days after the completion of the ADEC mediation. *See id.* On January 14, 2020, the Receiver informed the court that the mediation concluded unsuccessfully on December 16, 2019. *See* Docket No. 589.

[6] The court assumes, without finding, that the November 20, 2019 order directing Masiz to file on the public record the documents he provided to the SEC is an appealable order under the collateral order doctrine. The collateral order rule permits appeal where the appellant demonstrates "that an order (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349, 126 S. Ct. 952, 163 L.Ed.2d 836 (2006) (internal citations omitted). The First Circuit has interpreted the second prong of the *Will* test to require that the appeal involve "an important and unsettled question of controlling law, not merely a question of the exercise of the trial court's dis-

As this court has previously written:

> The Supreme Court has stated that the factors regulating the issuance of a stay pending appeal "are generally the same" for a district court and for a court of appeals. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L.Ed.2d 724 (1987). These factors are:
>
> > (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.
>
> *Id.*

The first prong of this test has not been interpreted or applied literally, even by the Courts of Appeals. Rather, it has been held that:

> on motions for stay pending appeal the movant need not always show a "probability of success" on the merits; instead, the movant need only present a substantial case on the

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cretion." *U.S. Fid. & Guar. Co. v. Arch Ins. Co.*, 578 F.3d 45, 55 n.15 (1st Cir. 2009) (emphasis added) (internal quotation marks and citation omitted). As explained below, *Standard Financial Management*, *supra*, settled the sealing question Masiz presents, and reiterated that a district court's sealing decision is reviewed "only for abuse of discretion." 830 F.2d at 411. Therefore, it is questionable whether the First Circuit will find that the collateral order rule applies. The First Circuit, however, must decide that issue.

> merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.

Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981) (citing *Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) ("Where . . . the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay.")) *See also Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); 11 Wright, Miller & Kane, Federal Practice and Procedure § 2904, at 503 & n.11 (2d ed. 1995 & Supp. 1997).

When the request for a stay is made to a district court, common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal.

Rather, with regard to the first prong of the *Hilton* test, the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear. *See Exxon Corp. v. Esso Worker's Union, Inc.*, 963 F. Supp. 58, 60 (D. Mass. 1997); *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558, 1561 (M.D. Ala. 1996); *Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 580 (S.D. Ohio 1983); *Evans v. Buchanan*, 435 F. Supp. 832, 844 (D. Del. 1977). *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 149-52 (D. Mass. 1998).

Masiz has satisfied the second prong of the Hilton test. If required to file on the public record the disclosures that he was required by the judgment to make in connection with soliciting potential investors for BioPhysics, the harm done to him will be substantially irreversible if this court's directives are ultimately found to be erroneous. *See Standard Fin. Mgmt. Corp.*, 830 F.2d at 407. However, Masiz has failed to satisfy any of the three other prongs of the *Hilton* test and the interests they address outweigh the risk of unjustified irreparable harm to him.

Masiz's appeal does not present any serious legal issue. As explained earlier, the court has reason to question whether Masiz has made the disclosures required by the judgment, and it has the authority to order Masiz to submit to it the documents necessary to resolve that question. *See Peacock*, 516 U.S. at 356, 116 S. Ct. 862; Local 580, 925 F.2d at 593; *Berger*, 771 F.2d at 1568.

In addition, as also explained earlier, the documents Masiz has been ordered to file for the public record are relevant to whether the court should approve the renewed request the Receiver reports he is preparing to make for an "auction" in which Biophysics will almost certainly be the only bidder. In 1987, the First Circuit characterized some of the issues concerning sealing presented in *Standard Financial Management* as "somewhat novel." 830 F.2d at 407. However, those issues were in that case settled based on the strong common law presumption of public access to records on which judicial decisions are made, particularly where, as here, the conduct of the government—the SEC—is an issue. *Id.* at 410. The First Circuit has applied those principles in subsequent

cases. *See, e.g., Kravetz*, 706 F.3d at 60-62 (presumption applies to sentencing memoranda and sentencing letters); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 70-72 (1st Cir. 2011) (district court did not err in unsealing trial records where organization had "failed to make a compelling case" that the privacy rights of third parties mentioned in its submissions outweighed the presumption of public access).

A further stay will impede the Receiver's progress and the delay will likely result in the dissipation of the assets he has been ordered to marshal for the benefit of BioChemics' creditors. BioPhysics is, realistically, the only potential buyer for BioChemics' assets and has offered to pay at least $4,000,000 for them. In view of its long history with BioChemics and Masiz in this case, the court is unwilling to approve a process that will lead to a sale of BioChemics' assets to BioPhysics without proof that BioPhysics has funds necessary to make the required payment. In addition, the court has found, in effect, that Masiz violated the injunction in *Vaso* that prohibited him from making material false and misleading representations in soliciting investments. If BioPhysics has raised $4,000,000, or any other substantial sum, the court wants to be reasonably assured that Masiz did not in soliciting that violate the comparable injunction in the judgment against him in this case, including by failing to make the required disclosures to potential investors. Masiz's repeated refusal to provide the necessary documents to the court is, therefore, injuring the ability of the Receiver to conclude his work and thus injuring BioChemics' creditors.

The public interest will not be served if this case is further stayed and delayed. If the court determines

that Masiz has made the disclosures required by the judgment, the case will proceed—hopefully to a final conclusion. If the submissions that the court has ordered raise questions, the court will act promptly to address them. If the court determines that Masiz has violated the injunction in this case, the public interest will be served by the orders the court will enter to end such violations.

In view of the foregoing, the Emergency Motion to stay is being denied. However, the court is providing Masiz until January 30, 2020 to attempt to obtain a stay from the First Circuit.

IV. Order

Accordingly, it is hereby ORDERED that:

1. The Emergency Motion (Dkt. No. 584) is DENIED and the temporary stay ordered on November 22, 2019 (Dkt. No. 586) is LIFTED.

2. Unless otherwise ordered by the First Circuit, Masiz shall, by January 30, 2020, file on the public record a full, unredacted copy of all of the evidence on which he relies in representing that he has complied with his obligations under § II of the Final Judgment. Such evidence shall include: (a) a list of investors and potential investors from whom he has solicited funds for BioPhysics Pharma, Inc. or any other entity since the entry of Final Judgment on August 18, 2017; (b) the written disclosure that he provided to each investor and potential investor he solicited; and (c) the contemporaneous written record of such disclosures required by Section II of the Final Judgment as to Defendant John J. Masiz (Dkt. No. 345).

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (NOVEMBER 22, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

v.

BIOCHEMICS, INC ET AL.

C.A. No. 1:12-cv-12324-MLW

Notice of Electronic Filing

WARNING: CASE CLOSED on 08/22/2017
Document Number: 586 (No document attached)

Docket Text:

Judge Mark L. Wolf: "The court doubts that the orders at issue are now appealable and, in any event, that any appeal will be found to be meritorious. However, it does wish to consider this belatedly filed submission. Therefore, Masiz' obligation to make the submission required by November 19, 2019 Order (Docket No. [579]) is hereby STAYED temporarily until further Order of the court."

ELECTRONIC ORDER entered re: [584] Emergency MOTION for Injunctive Relief For An Immediate

Stay So Defendant Can Appeal the Court's Orders Regarding the public filing of the submission at issue filed by John J. Masiz. (Bono, Christine)

1:12–cv–12324–MLW
Notice has been electronically mailed to:

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ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (NOVEMBER 22, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

Before: Mark L. WOLF, United States District Judge.

WOLF, D.J.

On the evening of November 21, 2019, defendant John Masiz filed an "emergency" motion requesting an extension of time to respond to the November 5 and 19, 2019 Orders (Docket Nos. 574 and 579) directing that Masiz, by November 22, 2019, file for the public record, a full unredacted copy of all of the evidence on which he relies in representing that he has complied with his disclosure obligations under § II of the Final Judgment against him (the "Motion"). The Motion

relies, in part, on a November 21, 2019 motion for entry of a limited stay of proceedings between ADEC Private Investments, LLC ("ADEC") and Masiz only (Docket No. 580). However, the issue of whether Masiz has complied with the requirements of the Final Judgment is independent of the disputes between ADEC and Masiz. The Motion represents that Masiz has, as required by Local Rule 7.1(b)(2), submitted an affidavit and supporting memorandum, but neither has been filed.

In any event, the Motion (Docket No. 581) is not meritorious and, therefore, is hereby DENIED.

/s/ Mark L. Wolf
United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (NOVEMBER 20, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

Before: Mark L. WOLF, United States District Judge.

WOLF, D.J.

In the August 18, 2017 Final Judgment as to defendant John Masiz, Masiz was ordered to make certain written disclosures regarding his regulatory history to anyone from whom he solicited or accepted funds, and to keep a written record of such disclosures. *See* Docket No. 345, § II. On September 6, 2019, the court ordered Masiz to file an affidavit detailing his compliance with that Final Judgment, the documents constituting the required disclosures, and his contem-

poraneous record of them. *See* Docket No. 559, ¶ 5. In response, on September 16, 2019, Masiz filed a motion, to which plaintiff Securities and Exchange Commission (the "SEC") assented, seeking leave to file under seal his evidence of compliance with the Final Judgment *See* Docket No. 565.[1]

In a November 5, 2019 Order, the court questioned whether the requested sealing is justified in view of the common law presumption that the public should have access to documents upon which a court relies in determining the substantive rights of litigants "and in performing its adjudicatory function." Docket No. 574 (quoting *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)). As the court explained, public access is particularly appropriate where, as here, the government is a party. *Id.* Thus, "'[o]nly the most compelling reasons can justify non-disclosure of judicial records,'" and the burden of proof is on the party seeking confidentiality. *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410-11 (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983)). Although certain justifications such as the protection of documents subject to attorney-client privilege or privacy rights "'can limit the presumptive right of access to judicial records,'" *Ark. Teacher Ret. Sys. v.*

[1] According to an affidavit filed by Masiz on September 12, 2019, the evidence of compliance consists of disclosures Masiz believes he was required to provide pursuant to the Final Judgment; a list of the disclosures, and the people to whom Masiz made those disclosures since August 2017; and a list of the people, who are not insiders, from whom BioPhysics Pharma, Inc., has received investment since August 2017, as well as the disclosure provided to these investors. *See* Sept. 12, 2019 Masiz Aff. (Docket No. 562-1) ¶ 2. Masiz has provided these documents to the SEC, *see id.* ¶ 3, but not to the court.

State Street Bank & Trust Co., 391 F. Supp. 3d 167, 169 (D. Mass. 2018) (quoting *Standard Fin. Mgmt. Corp.*, 830 F.2d at 411), even selective sealing "must be based on a particular factual demonstration of potential harm, not on conclusory statements." *United States v. Kravetz*, 706 F.3d 47, 60 (1st Cir. 2013) (citation omitted).

Masiz had not filed an affidavit or memorandum in support of the motion to seal. Nor had he articulated any reason why evidence of his compliance with the disclosure requirements of the Final Judgment, which consists of documents provided to third parties, should not be part of the public record. Nevertheless, the court provided Masiz an opportunity to do so.

More specifically, on November 5, 2019, the court ordered that, by November 14, 2019:

1. Masiz shall either (a) file a statement that sealing of the evidence of compliance is no longer requested and file a full, unredacted copy of the evidence of compliance for the public record; or (b) file an affidavit and memorandum in support of the request to seal his evidence of compliance which, among other things, addresses the fact that the evidence contains material that was disclosed to third parties.

2. If Masiz wishes to maintain his motion to seal the evidence of compliance, Masiz shall both (a) file a redacted version of the evidence of compliance for the public record, and (b) submit to the court a full, unredacted copy of the evidence of compliance, which shall be sealed, at least temporarily, to preserve

> its confidentiality if the sealing of it proves to be justified.

Id.

Masiz did not respond to the Order by November 14, 2019. Nor has he yet complied with it. Rather, on November 15, 2019, Masiz filed a "Notice" "request[ing] the court's temporary indulgence" because "he believed the parties had entered into an agreement as to how the parties should proceed regarding filings in this and other matters." Docket No. 578.

It is axiomatic that the parties do not have the authority to alter court orders by agreement. In any event, Masiz still has not filed a response to the November 5, 2019 Order.

Therefore, in view of the court's intention to decide whether Masiz has complied with the disclosure requirements of the Final Judgment and the presumed common law right of public access to information on which judicial decisions are made, it is hereby ORDERED that:

1. By November 22, 2019, Masiz shall file on the public record a full, unredacted copy of all of the evidence on which he relies in representing that he has complied with his obligations under § II of the Final Judgment.

2. Any failure to comply with this Order may be deemed a civil and/or criminal contempt.

/s/ Mark L. Wolf
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (NOVEMBER 5, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

Before: Mark L. WOLF, United States District Judge.

WOLF, D.J.

On September 6, 2019, the court ordered Masiz to file an affidavit detailing his compliance with the Final Judgment against him in this case (Dkt. No. 559). In response, on September 16, 2019, Masiz filed an assented-to motion to file under seal his evidence of compliance with the Final Judgment (Dkt. No. 565).[1]

[1] According to an affidavit filed by Masiz on September 12, 2019, the evidence of compliance consists of disclosures Masiz believes he was required to provide pursuant to the Final Judgment; a

The court questions whether sealing is justified. The common law presumes that the public may access documents upon which a district court relies in determining the substantive rights of litigants "and in performing its adjudicatory function." *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). Public access is particularly appropriate where, as here, the government is a party. *Id.* Thus, "'[o]nly the most compelling reasons can justify non-disclosure of judicial records,'" and the burden of proof is on the party seeking confidentiality. *Id.* at 410-11 (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983)). Although certain justifications such as the protection of documents subject to attorney-client privilege or privacy rights "can limit the presumptive right of access to judicial records," *Ark. Teacher Ret. Sys. v. State Street Bank & Trust Co.*, 391 F. Supp. 3d 167, 169 (D. Mass. 2018) (quoting *Standard Fin. Mgmt. Corp.*, 830 F.2d at 411), even selective sealing "must be based on a particular factual demonstration of potential harm, not on conclusory statements." *United States v. Kravetz*, 706 F.3d 47, 60 (1st Cir. 2013) (citation omitted).

Masiz has not filed an affidavit in support of the motion to seal. Nor has he articulated any reason why his evidence of compliance, which consists of disclosures already made to third parties, should not be

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list of the disclosures and the people to whom Masiz made those disclosures since August, 2017; and a list of the people, who are not insiders, from whom BioPhysics Pharma, Inc., has received investment since August 2017, as well as the disclosure provided to these investors. *See* Masiz Aff. ¶ 2, Dkt. No. 562-1. Masiz has apparently already provided these appendices to the SEC, *see id.* ¶ 3, but not to the court.

part of the public record. The court is providing Masiz an opportunity to do so.

Accordingly, it is hereby ORDERED that, by November 14, 2019:

1. Masiz shall either (a) file a statement that sealing of the evidence of compliance is no longer requested and file a full, unredacted copy of the evidence of compliance for the public record; or (b) file an affidavit and memorandum in support of the request to seal his evidence of compliance which, among other things, addresses the fact that the evidence contains material that was disclosed to third parties.

2. If Masiz wishes to maintain his motion to seal the evidence of compliance, Masiz shall both (a) file a redacted version of the evidence of compliance for the public record, and (b) submit to the court a full, unredacted copy of the evidence of compliance, which shall be sealed, at least temporarily, to preserve its confidentiality if the sealing of it proves to be justified.

/s/ Mark L. Wolf
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (SEPTEMBER 6, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

Before: Mark L. WOLF, United States District Judge.

WOLF, D.J.

For the reasons stated in court on September 5, 2019, it is hereby ORDERED that:

1. The Receiver's Motion to Approve Liquidation Plan (Dkt. No. 484) is MOOT.

2. The Receiver's Motions for Order of Sale (Dkt. No. 541), to Approve Bidding Procedures (Dkt. No. 542), and to Employ Gordian Group, LLC (Dkt. No. 543) are DENIED without prejudice.

3. ADEC Private Equity Investments, LLC's ("ADEC") request for attorneys' fees under Mass. Gen. Laws ch. 231, § 59H (Dkt. No. 508) is DENIED.

4. ADEC's Motion for Stay of Litigation (Dkt. No. 480) is ALLOWED with respect to claims that do not belong to Inpellis, Inc. ("Inpellis"), and ADEC's Motion for Leave to Serve Rule 2004 Subpoena on the Receiver (Dkt. No. 551) is ALLOWED. In addition, ADEC may assist the Inpellis Bankruptcy Trustee in pursuing claims of Inpellis. However, this Order does not alter the automatic stay resulting from the Inpellis bankruptcy action. *See In re Inpellis, Inc.*, 18-bk-12844 (Bankr. D. Mass.).

5. Defendant John Masiz shall, by September 12, 2019, file an affidavit providing: (a) a list of investors and potential investors from whom he has solicited funds for Biophysics Pharma, Inc. or any other entity since the entry of Final Judgment on August 18, 2017; (b) the written disclosure that he provided to each investor and potential investor he solicited; and (c) the contemporaneous written record of such disclosures required by Section II of the Final Judgment as to Defendant John J. Masiz (Dkt. No. 345). The SEC shall, by September 19, 2019, review Mr. Masiz's affidavit and report whether it believes Mr. Masiz has complied with the relevant requirements of the Final Judgment.

6. The Receiver's Motions for Compensation and Expenses (Dkt. Nos. 532 and 537) are ALLOWED.

7. The participants in the September 5, 2019 hearing shall order a transcript of it on an expedited basis.

/s/ Mark L. Wolf
United States District Judge

FINAL JUDGMENT AS TO DEFENDANT JOHN J. MASIZ (AUGUST 18, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

Civil Action No. 12-12324-MLW

Before: Mark L. WOLF, United States District Judge.

The Securities and Exchange Commission having filed a Complaint and Defendant John J. Masiz ("Defendant" or "Masiz") having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; consented to entry of this Final Judgment; waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment; and Defendant having admitted that his conduct violated Section 17(a)(2) and (a)(3) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)(2) and (a)(3)], as set forth in the Consent of Defendant John J. Masiz:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a)(2) and (a)(3) of the Securities Act [15 U.S.C. § 77q(a)(2) and (a)(3)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(b) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgement by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from providing information to, soliciting,

or accepting investments or funds from, any investor or potential investor regarding the offer or sale of any securities issued by any entity that Defendant directly or indirectly owns, controls, consults for, or is employed by, without first providing such person with the following written disclosure regarding Defendant's prior regulatory history, and keeping a written record that he provided such written disclosure to that person:

I, John Masiz, make the following disclosure concerning my regulatory history:

1. *SEC v. Vaso Active Pharmaceuticals, Inc. and John Masiz*, No. 04-cv-1395-RJL (D.D.C.).

See SEC Litigation Release No. 18834, dated August 17, 2004, with additional statement, that is attached hereto.

2. *SEC v. BioChemics, Inc., et al.*, No. 12-cv-12324-MLW (D. Mass.).

On December 14, 2012, the Commission filed a lawsuit against BioChemics, Inc., Masiz, and two others, charging them with securities fraud in violation of Section 10(b) of, and Rule 10b-5 under, the Exchange Act and Section 17(a) of the Securities Act. *See SEC v. BioChemics, Inc. et al.*, No. 12-12324-MLW (D. Mass.). On 8/18/18 the Commission dismissed the claims against Masiz under Section 10(b) of, and Rule 10b-5 under, the Exchange Act and Section 17(a)(1) of the Securities Act. The remainder of the Commission's claims against Masiz were resolved by Settlement entered as a Final Judgment on 8/8/17. Pursuant to this Final Judgment, Masiz admitted that he violated Sections 17(a)(2) and (a)(3) of the Securities Act. The Final Judgment enjoined Masiz from future viola-

tions of these provisions, prohibited Masiz from acting as an officer or director of a public company, and ordered him to pay a $120,000 civil penalty. The Final Judgment also enjoined Masiz from providing information to, soliciting, or accepting investments or funds from "any investor or potential investor regarding the offer or sale of any securities issued by any entity Masiz directly or indirectly owns, controls, consults for, or is employed by, without first providing this written disclosure and keeping a written record that he provided this disclosure to that person."

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)], Defendant is prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 781 or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for a civil penalty in the amount of $120,000 pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)]. Defendant shall satisfy this obligation by paying $120,000 to the Securities and Exchange Commission within 180 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment

may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Masiz's name as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant.

Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961. The Commission shall hold the funds, together with any interest and income earned thereon (collectively, the "Fund"), pending further order of the Court.

The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of

the Sarbanes-Oxley Act of 2002. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Defendant shall not, after offset or reduction of any award of compensatory damages in any Related Investor Action based on Defendant's payment of disgorgement in this action, argue that he is entitled to, nor shall he further benefit by, offset or reduction of such compensatory damages award by the amount of any part of Defendant's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Defendant shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this Final Judgment. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Defendant by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the allegations in the complaint are true and admitted by Defendant, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under this Final Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

VIII.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

/s/ Mark L. Wolf
United States District Judge

Dated: August 18, 2017

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (JULY 28, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW
Before: Mark L. WOLF, United States District Judge.

The Securities and Exchange Commission ("SEC") brought this case against BioChemics, Inc. ("BioChemics"), its Chief Executive Officer John Masiz, and others, alleging that material false and misleading statements were made in connection with the sale of BioChemics' securities. In June 2017, the court granted summary judgment for the SEC on its claims that Masiz was negligent in making material false and misleading statements in selling BioChemics securities. The court scheduled a hearing to decide whether it should grant the SEC's motion for summary judgment on whether Masiz made those fraudulent representations intentionally. The parties then settled their dispute.

In August 2017, the court entered the SEC's and Masiz's jointly proposed Final Judgment against him. *See* Dkt. No. 345. Among other things, Masiz admitted negligently making false and misleading material misrepresentations. He agreed to pay a $120,000 fine and to an injunction prohibiting him from violating federal securities laws in the future. In addition, the Final Judgment required that if Masiz solicited any investment in the future, he disclose, in a specified manner, his history with the SEC, including concerning this case and a 2004 injunction in another case prohibiting him from violating federal securities laws. *Id.* §§ I-IV. The court retained jurisdiction to enforce the Final Judgment. *Id.* § VII.

For the reasons explained in detail in a January 17, 2020 Memorandum and Order, the court ordered Masiz to file for the public record evidence of his compliance with the Final Judgment and denied Masiz's motion to seal such evidence. Dkt. No. 591; *SEC v. Bio-Chemics, Inc.*, 435 F. Supp. 3d 281 (D. Mass. 2020). Masiz has filed a Motion for Reconsideration or in the Alternative to Alter or Amend that decision (Dkt. No. 602, the "Motion").

The First Circuit described the standard for motions for reconsideration in *United States v. Allen*, 573 F.3d 42, 53 (1st Cir. 2009). "Motions for reconsideration are not to be used as a vehicle for a party to undo its procedural failures or allow a party to advance arguments that could and should have been presented to the district court prior to judgment." *Id.* "Instead, motions for reconsideration are appropriate only in a limited number of circumstances: if the moving party presents newly discovered evidence, if there has been an intervening change in the law, or if the movant

can demonstrate that the original decision was based on a manifest error of law or was clearly unjust." *Id.* As the First Circuit has also stated, "reconsideration is 'an extraordinary remedy which should be used sparingly.'" *Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006) (quoting 11 *Charles Alan Wright et al.*, Federal Practice and Procedure § 2810.1 (2d ed. 1995)).

The court has considered the Motion, as well as Masiz's memorandum and affidavit filed in support of it. *See* Dkt. Nos. 602, 603, 603-1. Masiz does not submit newly discovered evidence. Nor does he assert that there has been an intervening change in the law. Rather, Masiz argues, in essence, that the court's decision was manifestly incorrect as a matter of law and clearly unjust. These contentions rely in part on misstatements of the court's reasoning and, in any event, are incorrect.

As explained in the January 17, 2020 Memorandum and Order, the court had the authority to ensure compliance with the Final Judgment and had a proper factual basis for exercising it. *See* Dkt. No. 591 at 19-23. In addition, the court had a proper basis for requiring that the information concerning compliance that Masiz belatedly submitted to the court be made part of the public record. *See id.* at 24-27.

As the standards for the extraordinary relief requested are not met, Masiz's Motion for Reconsideration or in the Alternative to Alter or Amend the Court's 1-17-20 Memorandum and Order (Docket No. 602) is hereby DENIED.

/s/ Mark L. Wolf
United States District Judge

NOTICE OF ELECTRONIC FILING (AUGUST 27, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

The following transaction was entered on 8/27/2020 at 4:02 PM EDT and filed on 8/27/2020

Case Name:
Securities and Exchange Commission v. Biochemics, Inc et al

Case Number: 1:12-cv-12324-MLW

WARNING: CASE CLOSED on 08/22/2017

Document Number: 666 (No document attached)

Docket Text:

Electronic Clerk's Notes for proceedings held in a joint session before Judge Mark L. Wolf and Chief Judge Christopher J. Panos of the US Bankruptcy Court for the Dist. of MA, Court Case No. 18-12844, Inpellis, Inc.–Debtor. Granting [620] Motion for Order of Sale; denying [653] Motion to Continue; granting [657] Motion to Withdraw as Attorney. Attorney John J. Monaghan terminated. Evidentiary Hearing held on 8/27/2020 via videoconference. Affidavit of John Aquino, Chapter 7 Trustee of Inpellis, Inc. (Docket No. 658) and Affidavit of Receiver, Mark G. DeGiacomo (Docket No. 659) admitted into evidence. Witness, John Aquino, sworn and gives testimony. Cross-examination of Aquino by Attorney Bennett. Witness, Mark G. DeGia-

como, sworn and gives testimony. Cross-examination of DeGiacomo by Attorney Bennett. Attorney Schlichtmann states objections for the record, moves to stay sale. Attorney Schlichtmann shall order excerpt of transcript. Closing arguments made. Rulings made from the bench by Judge Panos (sale motions in the bankruptcy action are hereby allowed) and by Judge Wolf (Motion for Sale, allowed; Emergency Motion to Continue, denied without prejudice; Motion to Withdraw, allowed.). (Court Reporter: Debra Joyce at joycedebra@gmail.com.) (Attorneys present: Shields, London, Aquino, Horne, Schlichtmann, DeGiacomo, Cacace, Farrell, Scheuer, Galletta, Monaghan, Parker, Bennett) (Loret, Magdalena)

1:12-cv-12324-MLW Notice has been electronically mailed to:

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SECOND EXCERPT OF MOTION HEARING VIA VIDEOCONFERENCE (AUGUST 27, 2020)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ,

Defendants.

Civil Action No. 12-12324-MLW

Before: Mark L. WOLF, United States District Judge.

[August 27, 2020 Transcript, p.4]

(The following proceedings were held via videoconference before the Honorable Mark J. Wolf, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on August 27, 2020.)

[* * * *]

JUDGE PANOS: May I ask, Judge Wolf, whether Mr. Farrell intends to redirect the trustee and whether any other parties contemplate examining the trustee?

MR. SCHLICHTMANN: Mr. Masiz is contemplating taking the advantage of the opportunity of cross-examination as stated in the order for the hearing, absolutely.

JUDGE WOLF: I'm going to have a question about what objection you've raised on which you would question, but—so don't take that for granted.

MR. SCHLICHTMANN: I'll be happy to address it, your Honor, when you wish me to do so.

JUDGE WOLF: All right, because you have—as I understand—okay. In fact, if we discuss it—

MR. SCHLICHTMANN: Sure.

JUDGE WOLF: We will, and I just encourage you, if it's on the issue that Judge Panos talked about—

MR. SCHLICHTMANN: That's taken off the table, as I understand it.

JUDGE WOLF: You're satisfied.

MR. SCHLICHTMANN: I am.

JUDGE WOLF: All right. Just so I can think about it in the next ten minutes, what would be the issues you would cross-examine on?

MR. SCHLICHTMANN: The issue of Mr. Masiz—our issue is that Mr. Masiz is being wrongly excluded and not allowed to participate based on certain assumptions which go directly to what the trustee has been examined on.

So we need to elicit information to—because it goes directly to our case. It's the same factual basis.

JUDGE WOLF: Then that's not going to be, I think, in the context of this questioning. I'll think about

this. We have that—I have that on the agenda. If there's a proper basis for any further questions to Mr. Aquino, we'll come back to it or maybe we'll hear from you then.

All right. We'll take that 10-minute break.

According to my clock it's now 12:20 almost, we'll resume at 12:30. Thank you.

[* * * *]

JUDGE PANOS: And, Mr. Schlichtmann, I understand you'd like the opportunity to cross-examine the trustee, which we can take up after Mr. Bennett is finished and we understand the intentions of Mr. Farrell.

MR. SCHLICHTMANN: Yes, I'm doing it pursuant to the order that both Judges issued, and I just demand my rights under that order that you issued, unless the Court—the Courts are now amending or have amended, that I'm not aware of, their order. I am going to conform to orderly process in accordance with the order that both Courts issued.

JUDGE PANOS: Why don't we take that up, Mr. Schlichtmann, when it's your turn to speak.

MR. SCHLICHTMANN: I look forward to it.

[* * * *]

JUDGE PANOS: And the only other party that has indicated an interest in examining the trustee is Mr. Schlichtmann.

JUDGE WOLF: Judge Panos, let me do this so I can try to get focused on what Mr. Schlichtmann would like to question about.

Mr. Schlichtmann, Mr. Masiz filed two objections, and working backwards, one was filed August 25, Docket 660 in the District Court case, and that supplemental objection regarded the free and clear sale of BioChemics and Inpellis assets in the 820 order converting the 8/27 hearing, today's hearing, on sale motions to an evidentiary hearing.

Do you wish to question the trustee about that objection?

MR. SCHLICHTMANN: You're referring to the objection having to do with the use of the proceedings to somehow divest Mr. Masiz of his ownership rights. My understanding is—I'm sure I'm clear on this—that the Courts are not using this proceeding to do that because the receiver and the trustee are not doing that, so there's no basis to have a hearing on that. So that objection is taken care of, there's no question about that. We're satisfied that that has been addressed to our satisfaction.

JUDGE WOLF: That's with regard to whether Mr. Masiz is an inventor and an owner of one or more of the patents, just to make sure I understand and the record is clear.

MR. SCHLICHTMANN: Correct.

JUDGE WOLF: Okay. So is there anything else in the objection that you filed on August 25 that you wish to question the receiver about—I'm sorry, the trustee about?

MR. SCHLICHTMANN: Well, the objection is a supplemental objection to our 8/5 objection—

JUDGE WOLF: Okay, so—okay. So the objection you filed on August 5 is Docket Number 642 in the

District Court case, and that's the objection that you want to question the receiver about.

MR. SCHLICHTMANN: Correct.

JUDGE WOLF: And the relief that you asked for in that objection on page 20 says, For these reasons, so that Masiz may freely participate in the sale process on the same terms applicable to every other participant, Masiz respectfully requests that the District Court and the Bankruptcy Court clarify that if Mr. Masiz participates in the sale process, he will not be subjected to an investigation by the District Court as to whether he complied with the 2004 and 2017 consent decree injunctions obtained by the SEC.

MR. SCHLICHTMANN: Correct.

JUDGE WOLF: That's the relief you're seeking, right?

MR. SCHLICHTMANN: Right. We want to participate without threat of being investigated as explained in that objection.

JUDGE WOLF: And I anticipated that I'd give you a chance to discuss that further, but what would you want to ask the trustee about that?

MR. SCHLICHTMANN: Because the trustee has personal knowledge about—personal knowledge as to this factual history, and the factual history—everything he was asked about goes directly to the validity of the reasons why Mr. Masiz has to be subjected to an investigation. And I want to be able to support my objection—he has testified, and that testimony is directly relevant to my objection. I need to clarify the record—

JUDGE WOLF: Here, pause. You used an important term, "relevant."

MR. SCHLICHTMANN: Yes.

THE COURT: The questioning has to promise to provide something relevant—

MR. SCHLICHTMANN: Yes.

JUDGE WOLF: —so it's not an undue waste of time.

Why—tell me what your objection is—and of course I've read it, and it reiterates arguments you've made before that I have addressed before and are before the 1st Circuit to some extent, but why—what is the objection and what questions would you want to ask and why are they relevant?

MR. SCHLICHTMANN: Okay. So the objection is that the reasons that were given by the Court, by yourself, at the July 10th hearing, you referred back to your opinion, which you referred to again today; and you specifically referred that it was this collusion charge by ADEC, basically, that the SEC settlement, okay, that resulted in the lien which everybody's been testifying to about that was supposedly fraudulent is the reason why you said, Because of ADEC's accusations, I don't trust the SEC, and I don't trust Mr. Masiz, who's a two-time loser; and, therefore, if he comes in here and he wants to bid on these assets, I'm going to treat him differently than anyone else, and I'm going to subject him not just to an investigation about whether he complied with giving a disclosure, but I'm also going to investigate him whether he violated the securities

laws which both things are in the province of the SEC and are inappropriate for the Court to go into, and we believe we have a constitutional right not to be excluded on that basis.

And since you've made an evidentiary hearing on the very factual premise of our objection and taken testimony, this is an evidentiary hearing —and in your order both Courts said—noted our objection and said that—

JUDGE WOLF: Which order are you referencing?

MR. SCHLICHTMANN: The order that is the foundation of this evidentiary hearing. And what you said—

JUDGE WOLF: What's the date of the order, please?

MR. SCHLICHTMANN: Okay. The date of the order is 20th, August 20, 2020, and it's—August 20th is the order. It's the order that actually has brought us to this evidentiary hearing, which converted the approval hearing into an evidentiary hearing, and now evidence has been taken.

JUDGE WOLF: So—okay.

Let me do the following: First, as to what was said on July 10, the transcript will be the record. Either you've misunderstood it or mischaracterized it, but, in any event, I think some clarification may be helpful with regard to Mr. Masiz.

So, as I said, in this limited objection filed on August 5th, Docket Number 642 in the District Court case, Mr. Masiz requests assurances from the District Court and the Bankruptcy Court that if he participates in the sales process he'll not

be subjected to an investigation by the District Court as to whether he complied with the 2004, 2017 consent decree injunctions obtained by the SEC.

Mr. Masiz is not barred from participating in the auction if we approve this so it goes forward.

If he's affiliated with a bidder, that will have to be disclosed.

MR. SCHLICHTMANN: Correct.

JUDGE WOLF: And the sources of all funds utilized by the successful bidder will have to be disclosed. That's in the notice that was given to all potential bidders, that's Docket 632 at page 6 of 19.

If those disclosures—if Mr. Masiz participates or an affiliate participates—

MR. SCHLICHTMANN: Let me be clear on that. There will never be any question—if Mr. Masiz has any connection, no matter how remote, to any bidder, it is going to be fully and completely disclosed to you. It will be direct and on the record.

JUDGE WOLF: Okay. I'm listening to you. Take a breath and continue to listen to me.

MR. SCHLICHTMANN: All right.

JUDGE WOLF: Okay?

MR. SCHLICHTMANN: Yes.

JUDGE WOLF: So if the—there is the possibility that if Mr. Masiz participates that will I ask questions.

MR. SCHLICHTMANN: Yes.

JUDGE WOLF: It's possible he might be ordered to provide some evidence of compliance and do that on the public record. The reasons for that are essentially described in my January 17, 2020 Memorandum and Order. It's Docket 591, and it's 435 F. Supp. 3d 281.

To the extent that Mr. Masiz would be treated differently than other bidders, it's because he's in what I hope is a unique situation.

I found that after he agreed to the injunction in the Vaso case in 2004 I think, he at least negligently violated it in raising money for BioChemics. And he's now agreed to another injunction, which is a court order, that requires certain disclosures and, again, that he not violate the securities laws.

The assurance that you're seeking here in advance that he won't be investigated or inquired of would essentially bind the authority of the Courts in the following hypothetical scenario: Let's say Mr. Masiz is affiliated with a successful bidder, might be the only bidder if he participates, and the bid is $5 million, and somebody comes in before the final hearing and says, Mr. Masiz solicited me; he asked me to give money; he didn't make the disclosure required by the injunction, I just learned of it, and I gave him a million dollars for this venture or $5 million for this venture based on what I believe are misrepresentations. I wouldn't assure Mr. Masiz that I wouldn't investigate that.

So I think the real—I think at the heart of this, you haven't been able to find anybody not associated

with Mr. Masiz to buy this previously. So if he's still interested, if he's able in a manner that's consistent with the injunction to raise funds, to put together a group to buy this property that he has faith in that third-parties haven't demonstrated yet, despite the best efforts of Gordian and others, you know, if you're confident that can be done lawfully and consistent with the injunction, you just need to be prepared for the possibility that you'll have to provide some evidence of that. That's the situation.

And I don't see that any questions to the trustee are relevant to that, because the trustee's interactions with Mr. Masiz are not the foundation or haven't contributed to the concerns that caused me to issue my orders a year ago.

MR. SCHLICHTMANN: So—

JUDGE WOLF: Go ahead.

MR. SCHLICHTMANN: I want to see if—I'm calmed down.

I want to see if I can try and be helpful here, all right.

I want to be very clear, what is the issue we are having, all right. From our standpoint, the agency that has the responsibility, the Article II responsibility who obtained the consent decree is the SEC, and that is the agency to which Mr. Masiz is in fear of. And normally, like every other citizen, he's got the consent decree, he knows they obtained it, he knows they do their job, and everyone knows the history. And it is the SEC's obligation, responsibility to carry out their

authority, and under Article II, if they do something, I have—I can deal with it in the ordinary course.

When your Honor takes over that responsibility, you deny me that opportunity. You're the adjudicator, your Honor. You're not the investigator, and that's the point we're trying to make. So this has a profound constitutional meaning to us.

I do not—there is no way, your Honor, that we are engaging in behavior here which can be interpreted as somehow is going to prevent the SEC from doing their job, okay. And if the SEC believes because of this that there's reasons to believe that the consent decrees have been violated, it is their obligation to deal with it so I can deal with it in the ordinary course.

When you do it, your Honor, you are becoming an Article II authority, not an Article III.

JUDGE WOLF: Okay—

MR. SCHLICHTMANN: Let me just—

JUDGE WOLF: Go ahead.

MR. SCHLICHTMANN: I have told you as an officer of the court Mr. Masiz wants to participate, and if he does, he is going to be participating through an entity, whether it has his name or not, his company, whatever, will be fully disclosed; there will be no question he's participating, okay. Let's put that to the side.

Also, I understand this is a rule that applies to everybody else, including Mr. Masiz, which we accept, there has to be a disclosure about source

of funds. And Mr. Masiz will make a disclosure like everybody else in accordance with the terms of the receiver and the trustees say. All right. And we will do that. And I'm also going to tell you, not because I have an obligation to as part of an investigation, but I believe as an officer of the court to see if I can remove an issue between us that I really think is hurting everything, hurting the estate, hurting the sale, causing all this stuff, which is, your Honor, Mr. Masiz, has not been raising funds, he hasn't been, and he's not going to be all through this process. And he's not going to be using funds raised from an investor in which he made a promise. He is not, and I'm telling you that, not because you're compelling me to tell you but because I'm trying to help you understand—but if the SEC thinks what I just said is untrue or someone reports—there's a whole public record. If somebody knows they have Mr. Masiz, you know, in a place where very few people have, do you think—they would go to the SEC, which would be appropriate, and the SEC would do whatever they do, and we would defend or concede or whatever it would be. That's the appropriate way.

But I can assure you I am not going to let Mr. Masiz and Mr. Masiz is not going to let himself, who wants to participate, do anything or raise any money from anybody. It is going to be funds that he has obtained within the family that are his funds or funds generated by revenues, but it will not be raised funds. It will not be publicly raised funds, it will not be privately raised funds, it will not be inducing somebody to invest in this

operation. I'm telling you that, and the SEC can hold me to that.

JUDGE WOLF: Okay. Here, thank you.

One, that confirms for me that there are no relevant questions for the trustee that you would have, and I hope based on what I said you now understand why that is better.

Two, right now there's nothing—there's nothing before me. If he's not going to do anything that would implicate the terms of the injunction—and I don't want to paraphrase it—but if he's not going to do anything that implicates the terms of the injunction, your concerns are moot.

To the extent you're arguing again about the authority that the District Court has and the propriety of conduct, I addressed that in detail in the January decision. I looked at it again on your motion to reconsider, which I denied, and you raised it with the 1st Circuit from which, of course, I'll take guidance when they decide the case.

Hopefully what you've said I think puts this all in a more concrete context, and—but there's no—I'm not going to permit—I don't even know if you still want to question the trustee, but—

MR. SCHLICHTMANN: Well, your Honor, we're close. I think there has to be—because I am before the 1st Circuit with an appeal and a petition for prohibition, because we are I think we have to be clear with each other. We're close and maybe we're there. So I think the acid test would be I have asked—officially I've asked for

that relief, and the relief, you are correct, says that we don't—we want it clarified that he's just going to be subjected to the same terms as everyone else and that he is not going to be singled out for any kind of questioning or investigation that is not consistent with anybody else. That's what the ruling—

JUDGE WOLF: The request for that relief is denied for the reasons I explained to you a few moments ago. That's it.

MR. SCHLICHTMANN: If you denied me the relief—

JUDGE WOLF: Yes.

MR. SCHLICHTMANN: But you denied me the relief, your Honor, which is the problem, I think, procedurally here. You called for an evidentiary hearing on the objections and you said in your order—again, your Honor, I want us to resolve this issue, trust me. But you say in your order, Any party wishing to cross-examine the trustee or the receiver with respect to the affidavits will have an opportunity to do so—

JUDGE WOLF: You're going too fast, perhaps, for the stenographer.

MR. SCHLICHTMANN: I'm sorry. It says, Any—

JUDGE WOLF: Go ahead. Say—put on the record what you want to put on.

MR. SCHLICHTMANN: Thank you, your Honor.

It says, The receiver and trustee will submit affidavits having to do with the issues before us, which includes our objection. Any party wishing to cross-examine the trustee or the receiver with

respect to the affidavits will have an opportunity to do so at the sale and settlement approval hearing and further direct testimony may be permitted.

And then you said, If any objecting or responding party seeks to designate witnesses, identify exhibits with respect to their objections or responses, they shall do so and provide copies of exhibits to opposing counsel—

JUDGE WOLF: Too fast.

MR. SCHLICHTMANN: Sorry, your Honor.

It also says, If any objecting or responding party seeks to designate witnesses or identify exhibits with respect to their objections or responses, they shall do so and provide copies of exhibits to opposing counsel by the designation deadline.

Frankly, your Honor, the only one who actually took advantage of that is Mr. Masiz, not ADEC, not the SEC, not even the receiver and the trustee. We have put in evidence, okay, which directly bears—

JUDGE WOLF: Where's the evidence?

MR. SCHLICHTMANN: Mr. Masiz's testimony accompanying the objection in support of it and the record appendix supporting all the documents he refers to.

JUDGE WOLF: Well, those matters are part of the record before us and part of the case.

MR. SCHLICHTMANN: That's correct.

JUDGE WOLF: Implicit in any order when a hearing is established is that the parties will have an opportunity to provide relevant evidence.

MR. SCHLICHTMANN: Yes.

JUDGE WOLF: And evidence, the potential probative value of which is not substantially outweighed by wasting time.

And for the reasons I explained to you, the trustee has no relevant evidence relating to the reasons I just denied your request and has no relevant evidence to the events that generated the issue.

MR. SCHLICHTMANN: Your Honor, may I briefly, briefly—

JUDGE WOLF: No, no, this has got to end.

MR. SCHLICHTMANN: I understand, your Honor, but we have a procedural problem, and I have to at least tell you the objection. It's a due process one, a fundamental one.

You have denied—you said in your order that we are going to have an evidentiary hearing. You've taken an evidentiary—you've taken evidence which is directly relevant to my objection, and you are denying my objection without allowing me to put in the evidence you said I could put in on cross-examination, and that's a problem procedurally.

You've now denied Mr. Masiz fundamental due process. It violates your own order, and I'm trying to prevent a procedural problem, an unnecessary one for you, your Honor, and the proceedings.

JUDGE WOLF: You haven't identified any question that would elicit relevant evidence from the trustee, and that's the end of that.

MR. SCHLICHTMANN: Well, forgive me—

JUDGE WOLF: Stop, stop.

MR. SCHLICHTMANN: Your Honor, you challenged—you said I haven't identified. You've never given me an opportunity to do that; my documents do that.

JUDGE WOLF: I asked you—

MR. SCHLICHTMANN: I'm saying collusion. The fundamental premise—

JUDGE WOLF: Mr. Schlichtmann, I'm ordering you to stop.

MR. SCHLICHTMANN: Then I'll stop.

JUDGE WOLF: I'm not asking you; I'm ordering you.

MR. SCHLICHTMANN: All right, then I have no choice. And I object, your Honor, and I will take whatever steps the law provides to assert Mr. Masiz's rights, and I think it's very unfair and unfortunate and it's just an added unnecessary inconvenience and expense. And we wanted to provide evidence to you—

JUDGE WOLF: Stop. I ordered you to stop.

MR. SCHLICHTMANN: I am stopping.

JUDGE WOLF: I'll order you to also order the transcript.

[* * * *]

JUDGE PANOS: Thank you. Any other party that filed an objection have any anything for Mr. DeGiacomo subject to Judge Wolf's ruling already on Mr. Schlichtmann?

MR. SCHLICHTMANN: So I take objection, your Honor, for the record, but I understand from the order I cannot further argue this issue.

JUDGE WOLF: That's correct.

MR. SCHLICHTMANN: Okay, and I'm complying with your order.

[* * * *]

JUDGE PANOS: We're back on the record?

JUDGE WOLF: Yes.

One threshold matter, unless there is some objection from Mr. Schlichtmann, I'm ordering that he order the excerpt of this three-hour-plus transcript on an expedited basis from the court reporter. And if there's any kind of—if he files something in the Court of Appeals or elsewhere that he append the transcript to the submission, and I'll memorialize that order in writing later. Okay?

MR. SCHLICHTMANN: Your Honor, on that point, not on—I'm complying with your order, I'm not arguing my point, but just procedurally—and thank you for that, I am ordering, I will request immediately to do that, and that will be fast because that will be the excerpt part.

The other thing, your Honor, because we are going to be appealing it and because we have a petition from before, which is related to this, I would ask can I make a motion now to you pro-

cedurally to stay the proceedings pending the outcome of our appeal so you'd have an opportunity now to act on it so it would be—

JUDGE WOLF: Stay what proceedings?

MR. SCHLICHTMANN: To stay these proceedings about the sale, because Mr. Masiz is—while I take your order on appeal.

JUDGE WOLF: The order prohibiting you from questioning the trustee?

MR. SCHLICHTMANN: The denial of my objection, exactly, as—

JUDGE WOLF: The denial of your objection.

MR. SCHLICHTMANN: The denial of my objection.

JUDGE WOLF: Okay. So you're making an oral motion for a stay.

MR. SCHLICHTMANN: Yes, because I'm going to be appealing your order today having—you've denied me the relief specified in my objection.

JUDGE WOLF: On page 20 that I read.

MR. SCHLICHTMANN: Okay, yes.

JUDGE WOLF: There's not—well, let's see. I don't want to get diverted on this.

The standards for stay require—I addressed in my Canterbury Liquors case in 1998, you can look at it. If you want to file a motion for stay, you may, but at the moment I doubt it would be meritorious and—I don't think we should get diverted with that.

Anyway, okay. I'll turn it back to Judge Panos.

[* * * *]

JUDGE PANOS: Thank you.

Mr. Schlichtmann, you don't have an objection other than the one you have discussed with Judge Wolf. I understand your rights are on the record on that one, so I'm assuming you don't want to argue because that would be the only thing you're arguing.

MR. SCHLICHTMANN: Well, am I being given the opportunity to argue?

JUDGE PANOS: Not those points. I think I heard Judge Wolf order you not to argue those points any longer. Those issues are preserved on the record.

MR. SCHLICHTMANN: Okay. But I'm not allowed to make a statement about our position regarding our objection.

JUDGE PANOS: Not if it's the same position that Judge Wolf ordered no further argument on.

MR. SCHLICHTMANN: Well, I don't believe it is, but I will just state very simply, if you'll allow me, so it's clear, we stand on our objection as filed based on our filing and object, of course, to being denied our opportunity as granted by the order to deal with the evidence—to cross-examine as ordered.

On that basis, we will be appealing our rights here and asking that these—the sale be stayed because Mr. Masiz is being denied, unconstitutionally denied his right to freely participate and his due process rights in the proceedings itself. And with that I will conclude my remarks.

JUDGE PANOS: Thank you. [* * * *]

AFFIDAVIT OF MARK G. DEGIACOMO (AUGUST 25, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

IN RE: INPELLIS, INC.,

Debtor.

Chapter 7 Case No. 18-12844-CJP

I, Mark G. DeGiacomo, hereby depose and say upon my own personal knowledge:

1. I am a partner with the law firm of Murtha Cullina LLP and am licensed to practice law in the Commonwealth of Massachusetts and the Federal District Court for the District of Massachusetts.

2. I am the Court-appointed receiver of BioChemics, Inc. ("BioChemics") and have personal knowledge of the facts set forth in this Affidavit.

3. Since 1995, I have been a Chapter 7 bankruptcy panel trustee in the District of Massachusetts. In that role I have been appointed as the Chapter 7 trustee in thousands of bankruptcy cases, and have conducted hundreds of asset sales in Chapter 7 proceedings, including many sales of intellectual property assets.

4. I am submitting this affidavit in support of the *Motion for the Entry of an Order Authorizing the Sale of Assets by Public Auction Free and Clear of Liens, Claims, Encumbrances and Other Interests and Approving Allocation of Sale Proceeds* [C.A. No. 12-12324-MLW, Docket No. 620] (the "Sale Motion"), and in response to the objection to the Sale Motion filed by Bio Strategies, L.P. [Docket No. 641].

5. On October 9, 2018, the Court entered an Order appointing me as the receiver of BioChemics, Inc. [Dkt. No. 452] (the "Receiver Order").

6. The Receiver Order provides that "[t]he Receiver shall assume control of all Receivership Assets." Receiver Order ¶ 5. The Receiver Order defines "Receivership Assets" as "all property of whatever kind and wherever situated, of defendant BioChemics, Inc., as well as property of the Shareholder Resolution Trust in which the Commission has first-priority security interests." Receiver Order ¶ 1.

7. The Receiver Order further provides in relevant part that:

> Until further Order of this Court, Mark DeGiacomo is hereby appointed to serve without bond as the receiver to assume control of, marshal, pursue, and preserve the Receivership Assets with the objective of maximizing the recovery of assets, and, to the extent that assets recovered are inadequate to make defrauded investors whole, ensuring that the distribution of those assets is as just and equitable as practicable; . . .

Receiver Order, ¶ 2.

8. Prior to my appointment, BioChemics specialized in the research and development of a patented transdermal drug delivery technology known as VALE (Vaso-active Lipid Encapsulated), which aimed to allow drugs to be efficiently administered through the skin with the promise to transform orally administered drugs into transdermals that were safer, less expensive and potentially faster acting.

9. Those research and development efforts resulted in an intellectual property portfolio consisting of dozens of registered trademarks, patents and patent applications (the "BioChemics Assets"). The Assets include intellectual property relating to the VALE delivery system itself, as well as specific applications of the VALE technology including, among other things, for cosmetic and veterinary purposes.

10. In addition, BioChemics jointly owns certain intellectual property with Inpellis, Inc. ("Inpellis") which has ownership rights in the jointly-owned intel-

lectual property for use with respect to several specified products (the "Joint Patents").

11. Inpellis obtained its interests in the Joint Patents pursuant to an *Intellectual Property Purchase Agreement* dated October 24, 2015 (the "IP Purchase Agreement").

12. The BioChemics Assets are encumbered by a first priority security interest held by the Securities and Exchange Commission (the "Commission") which secures an outstanding judgment in the amount of $17,897,884.

13. The Commission also holds a first priority security interest securing the same judgment in all of Inpellis's intellectual property (the "Inpellis Assets").

14. ADEC Private Equity Investments, LLC ("ADEC") asserts a security interest in the Inpellis Assets, and asserts that the security interest granted to the Commission in the Inpellis Assets was a fraudulent transfer subject to avoidance by the Inpellis bankruptcy trustee (the "Trustee").

15. The Commission asserts that it provided reasonably equivalent value in exchange for its security interest in the Inpellis Assets, and it has raised the possibility that the original transfer to Inpellis pursuant to the IP Purchase Agreement itself was a fraudulent transfer.

16. Mr. Masiz is listed as an inventor and joint owner with respect to a certain patent and patent applications pertaining to a Transdermally-Delivered Combination Drug Therapy for Pain.

17. Based on my discussions with intellectual property counsel, it is my understanding that as joint

owners both BioChemics and Mr. Masiz may make, use, offer to sell, or sell the patented invention within the United States, or import the patented invention into the United States, without the consent of and without accounting to the other owners. I have also determined that BioChemics may have a claim that Masiz is obligated to assign his rights to BioChemics on the basis that he may have conceived of the invention while conducting work in his role at BioChemics, used materials and resources that were supplied by and owned by BioChemics, and that the inventions were within the scope of Masiz's responsibilities at BioChemics. Additionally, Masiz was named as inventor in other BioChemics' owned patent assets, so a pattern had been established whereby he assigned his rights to BioChemics for presumably all other inventions; it is unclear why the invention in the above-mentioned patent assets is different and would not also be assigned to BioChemics.

18. However, given the uncertainty, delay and expense in pursuing this issue I have determined that it is not in the best interests of BioChemics to pursue claims against Mr. Masiz in connection with the assets he asserts are jointly owned with him, or attempt to sell the assets free and clear of his ownership interest. Instead I have decided to sell only BioChemics interest in the jointly owned assets, while disclosing the interest Mr. Masiz asserts to potential buyers. *See* Sale Notice, Fn. 1. I understand the successful buyer would have the right to challenge the ownership claim asserted by Mr. Masiz.

19. Prior to the receivership, the investment banking firm The Gordian Group ("Gordian") had been

engaged to market the BioChemics Assets and the Inpellis Assets for sale and/or to raise capital.

20. Upon my appointment as receiver I consulted with representatives of Gordian who were familiar with these assets. Based on those discussions, I learned that given the interrelatedness of the BioChemics Assets and Inpellis Assets, it was likely that a joint sale would likely yield a better overall price for the assets, then the sum of two sales conducted separately.

21. Based on my experience selling intellectual property assets in bankruptcy cases it is often very difficult to separately value intellectual property assets prior to a sale, especially where the assets are inter-related and do not have an established history of generating commercial revenue.

22. Since my appointment, I have investigated options available to sell the BioChemics's Assets for the highest and best price, including both a private sale and public auction, jointly with the Trustee and separately.

23. After receiving a competitive private offer for the BioChemics Assets from BioPhysics Pharma, Inc. ("BPI"), an entity affiliated with Mr. Masiz, I sought approval to sell the BioChemics Assets to BPI via a private sale, subject to higher and better offers.

24. ADEC Private Equity Investments ("ADEC") objected to the proposed sale and argued that some of the BioChemics Assets proposed to be sold actually belonged to Inpellis. The Court ultimately denied the proposed sale without prejudice.

25. Following document and depositions discovery, ADEC, BPI, the Trustee and I participated in

full-day mediation before the Hon. Joan N. Feeney (Ret.). One of my aims at the mediation was to negotiate a private sale of the BioChemics Assets to BPI that could ultimately obtain Court approval. Following mediation, it became clear to me that a private sale of the BioChemics Assets was not feasible.

26. Thereafter, I discussed with the Trustee the possibility of conducting a joint public auction of both the BioChemics Assets and Inpellis Assets.

27. I believe that a joint sale is in the best interests of the receivership estate because having the intellectual property of both estates sold together (a) is likely to bring a higher price than if they were sold separately and (b) a joint sale avoids issues concerning whether some of the BioChemics Assets are actually property of the Inpellis bankruptcy estate.

28. However, in light of the requirements of 11 U.S.C. 363(f) a public auction of the Inpellis Assets free and clear of all liens, claims and encumbrances is only possible if both the Commission and ADEC assented to the sale.

29. Ultimately, the Commission and ADEC negotiated an agreement whereby they would both assent to the sale, but only if: (i) the Commission agreed to release its lien on the Inpellis Assets, and (ii) the Trustee and Receiver agreed to split any proceeds from the sale 50-50.

30. I believe that the proposed 50-50 split of sale proceeds is reasonable and in the best interests of the BioChemics receivership estate for many reasons, including: (i) the Commission, the sole beneficiary of the sale, has agreed to the proposed split; (ii) the mutual value enhancement from conducting the joint

sale; (iii) the inherent difficulty in separately valuing any particular item of intellectual property on its own; and (iv) the fact that a joint sale is not possible absent the Commission and ADEC's assent.

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Signed under the penalties of perjury this 25th day of August, 2020.

/s/ Mark G. DeGiacomo
Court Appointed Receiver of BioChemics, Inc.

AFFIDAVIT OF JOHN J. AQUINO (AUGUST 25, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

C.A. No. 12-12324-MLW

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

IN RE: INPELLIS, INC.,

Debtor.

Chapter 7 Case No. 18-12844-CJP

I, John J. Aquino, being duly sworn, and in support of the allowance of the relief requested in (i) the *Amended Motion Of Chapter 7 Trustee For Entry Of*

Order Authorizing Sale Of Certain Personal Property Assets By Public Sale Free And Clear Of All Liens, Claims, And Encumbrances And Approving Allocation Of Sale Proceeds (*Intellectual Property Assets*) (the "Inpellis Sale Motion"), and (ii) the *Chapter 7 Trustee's Motion For Entry Of Order Approving Stipulation By and Among Chapter 7 Trustee, Securities and Exchange Commission and ADEC Private Equity Investments, LLC* (the "9019 Motion"), hereby depose and state as follows:

Background

1. I am an attorney with the law firm Anderson Aquino LLP, 240 Lewis Wharf, Boston, Massachusetts.

2. I am the duly appointed trustee ("Trustee") of the Chapter 7 bankruptcy estate of Inpellis, Inc. ("Inpellis" or the "Debtor").

3. Inpellis was formed in or about March 2012, under Delaware law, as a wholly-owned subsidiary of BioChemics, Inc. ("BioChemics")[1]. In or about January 2015, BioChemics transferred all of its shares in Inpellis to the Shareholder Resolution Trust ("SRT"), a settlement trust purportedly established to resolve controversies among BioChemics shareholders relating to certain actions of BioChemics.

4. On July 26, 2018, ADEC Private Equity Investments, LLC ("ADEC") and certain affiliated entities and persons filed an involuntary Chapter 7 bankruptcy petition against Inpellis in the U.S. Bankruptcy Court for the District of Massachusetts. An order for

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[1] The Debtor was formerly known as "Alterix, Inc."

relief under Chapter 7 of the Bankruptcy Code was entered on November 1, 2018. On November 5, 2018, I was appointed as the Chapter 7 trustee of the Inpellis bankruptcy estate and I continue to serve in such capacity.

5. In connection with litigation instituted by the Securities and Exchange Commission ("SEC") against BioChemics and other related parties (the "Receivership Proceeding")[2], on

October 9, 2018, the United States District Court for the District of Massachusetts entered an order appointing Mark G. DeGiacomo as receiver ("Receiver") and authorizing him to assume control of receivership assets, including all assets of BioChemics as well as assets of SRT in which the SEC maintained a first priority security interest.

6. Prior to the entry of the order for relief, the Debtor was a specialty pharmaceutical company developing transdermal product candidates for treating pain resulting from musculoskeletal disorders and peripheral neuropathy. The Debtor acquired from BioChemics full or joint ownership of formulations which utilize transdermal drug delivery systems for non-dermal pain, and to patents, patent applications, and know-how related to such transdermal delivery systems.

7. Upon information and belief, Inpellis owns, either solely or jointly, the intellectual property interests identified in Paragraphs 9 and 10 of the Inpellis Sale Motion.

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[2] *Securities and Exchange Comm 'n v. BioChemics, Inc., et al.*, Dist. Mass. Civil Action No. 12-12324-MLW.

8. On June 26, 2020, the Inpellis Sale Motion and the 9019 Motion were filed on my behalf. Pursuant to the Inpellis Sale Motion, I requested authority to sell the intellectual property interests held by the estate (the "Inpellis IP Assets") by means of a public auction sale to be conducted jointly with the Receiver. Pursuant to his *Motion for the Entry of an Order Authorizing the Sale of Assets by Public Auction Free and Clear of Liens, Claims, Encumbrances and Other Interests and Approving Allocation of Sale Proceeds* (the "BioChemics Sale Motion"), the Receiver has requested similar authority in the Receivership Proceeding for the sale of intellectual property interests held by the Receiver (the "BioChemics IP Assets"). At the proposed public auction sale, both the Inpellis IP Assets and the BioChemics IP Assets will be offered for sale, including intellectual property assets owned solely by Inpellis and BioChemics respectively, as well as assets owned together jointly.

9. With respect to the 9019 Motion, I seek approval of a Stipulation which provides for the agreements and consents necessary as prerequisites for approval of both the Inpellis Sale Motion and the BioChemics Sale Motion.

10. Limited objections to the relief requested in the BioChemics Sale Motion, the Inpellis Sale Motion, and the 9019 Motion were filed by Bio Strategies, L.P. ("Bio Strategies") and John Masiz ("Masiz").

11. I have reviewed the aforesaid limited objections, and I do not believe that any of the asserted objections constitute grounds for the denial of the relief requested in the respective motions.

The Inpellis Sale Motion

12. Pursuant to the Inpellis Sale Motion, authority is requested for the sale of all of the estate's right, title and interest in the Inpellis IP Assets at public auction sale. The Inpellis IP Assets consist of all intellectual property rights, including, without limitation, all know-how, patents, patent applications, trademarks, service marks, and trade names, and all claims to such intellectual property rights. The Inpellis IP Assets will be sold free and clear of any and all liens, claims and encumbrances and as is, where is, without any warranties or representations of any nature whatsoever, with any and all valid liens attaching to the proceeds of the sale in the respective order of priority that existed as of the commencement of the case.

13. Authority is also requested for the conduct of a joint auction with the Receiver at which the we shall offer for sale all intellectual property assets wholly owned by the respective estates as well as intellectual property assets jointly owned.

14. Pursuant to the Inpellis Sale Motion, I also seek approval of the allocation of joint sale proceeds on a 50%-50% basis with the BioChemics receivership estate (the "50/50 Allocation").

15. In conjunction with the preparation of the Inpellis Sale Motion, I conducted a review of the claims in the case. My review of the proofs of claim on file with the U.S. Bankruptcy Court, and a review of UCC financing statements on file in the State of Delaware, indicate that the following are asserted as secured claims in the Inpellis bankruptcy case:

(a) The SEC asserts a perfected security interest in the IP Assets to secure a judgment against BioChemics in the approximate amount of $17,897,884.00. The Debtor granted the SEC a security interest in the IP Assets on May 10, 2016. Any claim that the SEC may have against the Debtor's estate is non-recourse in nature as the Debtor has no direct obligation owed to the SEC. An objection to the SEC claim has been filed by ADEC, and that contested matter is presently pending before the Court.

(b) ADEC is the holder of a security interest in the IP Assets on its own behalf and as collateral agent for certain similarly situated noteholders (collectively, the "Noteholders"). The security interest allegedly secures an asserted indebtedness in the approximate aggregate amount of $8,724,339.58. The security interest was granted by the Debtor on or about December 7, 2016, in conjunction with a forbearance agreement among the Noteholders and the Debtor.

The Noteholders have asserted secured claims as follows:

ADEC	$5,842,211.72
The BTR Trust	255,077.05
The PRK Trust	255,077.05
Armory Ross	255,077.05
JABCO LP	62,500.00
Nxxt Step Funding	1,250,000.00
Mark & Phyllis Waxman	173,125.21

Molly Hsu	609,504.92

(c) Additional secured claims have been filed by Bio Strategies, L.P. ("Bio Strategies") in the amount of $5,799,532.12, and by Sunstein Kann Murphy & Timbers LLP ("Sunstein") in the amount of $156,091.28. I dispute both the Bio Strategies claim and the Sunstein claim on the grounds that any claims held by Bio Strategies and Sunstein are claims against BioChemics solely, and that neither party possesses a valid and perfected lien against Inpellis assets. I have already filed an objection to the Bio Strategies proof of claim. An objection to the Sunstein proof of claim has not yet been filed, however, the supporting documentation filed by Sunstein indicates that the basis of the asserted claim is an alleged attorneys' lien arising in connection with services rendered to BioChemics rather than the Debtor. As a result, liability of the Inpellis estate for the claim asserted by Sunstein is disputed.

16. The SEC and ADEC have assented to the relief requested in the Sale Motion predicated and conditioned upon the allowance of the relief requested in the 9019 Motion and the equal allocation of joint sale proceeds as set forth in the Sale Motion. Thus, it is my belief that, assuming satisfaction of those prerequisites, the SEC and ADEC consent to the proposed sale, and the sale free and clear of liens those liens may be approved as the consents satisfy the requirements set forth in 11 U.S.C. § 363(f)(2).

17. *Bona fide* disputes exist with respect to the Bio Strategies claim and the Sunstein claim as set

forth in Paragraph 17(c) above. I also note that Sunstein has not objected to the relief requested in the Inpellis Sale Motion or the 9019 Motion. In light of the foregoing, it is my belief that the requirements set forth in 11 U.S.C. § 363(f)(4) have been satisfied with respect to the alleged Bio Strategies and Sunstein claims.

18. Pursuant to the Inpellis Sale Motion, authority is requested for the conduct of a joint sale of intellectual property assets by the Inpellis bankruptcy estate and the BioChemics receivership estate. The Receiver and I believe, and have agreed, that selling the assets jointly enhances the value of the intellectual property of both estates. The foregoing belief is based upon consultation with an investment banker which actively marketed the subject intellectual property prior to the institution of the bankruptcy case. In light of the related nature of the intellectual property of BioChemics and Inpellis, and the fact that many of the respective assets are co-owned by BioChemics and Inpellis, it is reasonable to conclude (and was the opinion of the aforementioned investment banker) that the subject assets are likely to command greater value if sold together. Indeed, the marketing materials prepared by the investment banker anticipated a joint sale of the intellectual property assets. Thus, it is my opinion that a joint sale of intellectual property assets by Inpellis and BioChemics is appropriate and warranted in the circumstances, and is in the best interests of the Inpellis bankruptcy estate.

19. In the Sale Motion, approval of the allocation of gross joint sale proceeds equally between the Inpellis bankruptcy estate and BioChemics receivership estate is also requested. I believe that the proposed

allocation is appropriate for several reasons. First, after consultation with the Receiver, and with the benefit of the opinion of the investment banker familiar with the subject assets, it is my understanding and belief that not only are the values of the intellectual property assets of the respective estates enhanced by a joint sale, but valuation of the intellectual property assets as separate items would be wholly speculative, if not impossible. It is also impossible to assess how much of any ultimate sale price would be attributable to the enhancement of value created by the joint sale, and how to allocate that enhancement of value between the estates.

20. In light of the inter-related nature of the majority of the respective intellectual property rights, the co-ownership of a significant number of the assets, and the assertions by various parties to these proceedings that the respective rights in the subject assets may not be accurately reflected by how title is held, I believe that the equal allocation of joint sale proceeds is fair and equitable.

21. Even more significantly, the 50/50 Allocation is the product of extensive negotiation among the parties, failing approval of which, the proposed sale will not be feasible. Without the support of the SEC, the Receiver will not be in a position to proceed with a sale of the BioChemics assets. Without the approval of ADEC, the Inpellis estate is not in a position to proceed with a sale of the Inpellis IP Assets. In order to gain ADEC's consent, the SEC agreed to waive its first priority lien against Inpellis assets (above the $150,000 Carve-Out provided in the Inpellis Sale Motion and 9019 Motion). In order to agree to the waiver of its lien claim against the Inpellis IP Assets,

the SEC required assurance that fifty percent of the joint sale proceeds be received by the BioChemics receivership estate. The 50/50 Allocation is an essential and inextricable term of the agreement among the SEC, ADEC, the Receiver and the Inpellis estate upon which the proposed sale is predicated.

22. Absent a viable avenue for the sale of the Inpellis IP Assets for the benefit of the bankruptcy estate, the likely result is the abandonment of the Inpellis IP Assets. The maintenance costs relating to the Inpellis IP Assets are significant. I currently estimate that the annual maintenance costs will be $30,000 at a minimum, and potentially much higher. The bankruptcy estate has very limited assets available, and the continuing diminution of funds without any reasonable prospect of sale is untenable.

23. I have reviewed the objection to the proposed 50/50 Allocation filed by Bio Strategies. I do not believe Bio Strategies has the requisite standing to object the Inpellis Sale Motion or to the 9019 Motion as I do not believe that Bio Strategies is the holder of an allowable claim against the Inpellis estate. I further note that no other creditor of the Inpellis estate filed an objection to the proposed sale.

24. Leaving aside the issue of standing, I do not believe that the objection submitted by Bio Strategies relating to the proposed 50/50 Allocation is meritorious. In the first instance, Bio Strategies resorts to inapposite hypotheticals and ignores the facts plainly set forth in the Inpellis Sale Motion. The estates cannot proceed to conduct a joint sale of the respective intellectual property without the approval of the 50/50 Allocation and other provisions set forth in the Inpellis Sale Motion and in the 9019 Motion.

25. I believe that the proposed 50/50 Allocation easily satisfies the standards established in *Jeffrey v. Desmond*, 70 F.3d 183 (1st Cir. 1995). Absent approval of the 50/50 Allocation, the sale cannot proceed. There will be no allocation of proceeds between the estates, because there will be no proceeds whatsoever. The Inpellis IP Assets will be abandoned and will produce no value for creditors (absent whatever foreclosure value is ultimately available to the SEC and/or ADEC). On the other hand, a sale of the assets will result in a reduction of administrative claims of the estate, will hopefully reduce ADEC's claims against the estate, which in turn will reduce any deficiency claim that ADEC may have, which will in turn reduce the dilution of other holders of allowed claims with respect to the remaining unencumbered assets of the estate. Moreover, every hypothetical scenario envisioned by Bio Strategies to challenge the 50/50 Allocation is essentially an argument which favors a lesser portion of the proceeds being allocated to the Inpellis estate. I do not agree with Bio Strategies' analysis, and believe that good and valid reasons exist to support the fairness of our agreement to share all IP proceeds equally. Nevertheless, to the extent that Bio Strategies is arguing that the 50/50 Allocation will result in a windfall to Inpellis, there can be no concerns raised that the proposed allocation fails to comply with the standards set out in *Jeffrey v. Desmond*.

26. I further believe that the paramount interest of creditors is served by proceeding with the proposed sale for such benefits as may be reaped by the estate. The SEC, the largest creditor of BioChemics, is prepared to waive the majority of its claim against

the Inpellis IP Assets in consideration of the end of litigation and the approval of the 50/50 Allocation. ADEC, who, together with the similarly situated Noteholders, holds the largest claims against the Inpellis bankruptcy estate support the proposed sale and the 50/50 Allocation. As has been previously cited in pleadings, ADEC and the Noteholders hold approximately 82% of the non-SEC claims in the Chapter 7 case (disregarding the claim asserted by Bio Strategies which I believe should be disallowed in the entirety). Thus, I believe the paramount interest of creditors and a proper deference to their reasonable views is served by approval of the 50/50 Allocation and the approval of the relief requested in the Inpellis Sale Motion. Again, the only objecting "creditor" is one with doubtful standing.

27. As noted in the Inpellis Sale Motion, the proposed auction sale is presented after approximately two years of attempting to negotiate an acceptable private sale offer for the purchase of the intellectual property assets owned by BioChemics and Inpellis. Throughout the course of this bankruptcy and the related receivership case, the Receiver and I have expended substantial efforts in investigating the respective estate assets, the competing claims among creditors, and in assessing the best method of liquidating assets for the benefit of creditors. The Receiver and I initially believed that a private sale of the respective assets, subject to marketing and competitive bidding, would maximize the value of the subject assets. We engaged in lengthy and tedious sale negotiations with a prospective stalking horse offeror. In an effort to resolve strongly held positions of multiple constituents, we participated in a full day of mediation

and continued to work with the mediator for some time thereafter in an effort to resolve outstanding issues, to no avail. At this time, I believe that a joint auction sale of the IP Assets and the Biochemics intellectual property is the only viable option remaining short of abandonment of the assets. The Receiver also believes that the proposed joint sale is the only reasonable option for liquidating BioChemics' assets. In light of the foregoing, I submit that a sale by public auction subject to the terms set forth herein is now the most reasonable available method for liquidation of the IP Assets for the benefit of the bankruptcy estate.

28. In the exercise of my reasonable business judgment, I believe that the approval of the relief requested in the Inpellis Sale Motion, including the provisions for the Carve-Out and the 50/50 Allocation are in the best interests of the bankruptcy estate and comport with all applicable provisions of the Bankruptcy Code and relevant decisional law.

The 9019 Motion

29. Pursuant to the 9019 Motion, approval is sought of a stipulation by and among the Trustee, the SEC, and ADEC (the "Stipulation") relating to conditions precedent to the consent of the SEC and ADEC to the provisions of the Inpellis Sale Motion.

30. The pertinent provisions of the Stipulation may be summarized as follows:

(a) Upon approval of the Stipulation, the SEC and ADEC assent to the terms of the proposed Auction set forth in the Sale Motion, including the proposed allocation of proceeds

between the bankruptcy estate and the receivership estate (the 50/50 Allocation).

(b) Upon approval of the Stipulation and consummation of joint sale as set forth in the Sale Motion, the SEC shall assign $150,000.00 of its lien against the Inpellis IP to the Trustee as a carve-out for payment of administrative expenses (the "Carve-Out"), and shall release any and all claims against the Trustee and the Chapter 7 estate in excess of the Carve-Out.

(c) Upon approval of the Stipulation and consummation of joint sale as set forth in the Sale Motion, the Trustee and ADEC shall release the SEC from any and all claims in any way arising in connection with Inpellis, BioChemics and their affiliates.

(d) Upon approval of the Stipulation and consummation of joint sale as set forth in the Sale Motion, the SEC shall release ADEC from any and all claims in any way arising in connection with Inpellis, BioChemics and their affiliates.

31. I have reviewed the objection filed by Bio Strategies with respect to the 9019 Motion. As stated in Paragraph 26 above, I do not believe that Bio Strategies possesses the requisite standing to object to the relief requested in the 9019 Motion. Furthermore, I do not believe that the objection sets forth adequate grounds for the denial of the relief requested in the 9019 Motion. Bio Strategies' objection presumes: (i) that it can compel the Trustee to litigate an expensive and speculative claim contrary to the Trustee's reason-

able business judgment (and apparently at the Trustee's personal expense), and (ii) that it can cherry pick the terms of an agreement and accept the terms which it finds acceptable, and simply discard terms it dislikes. The facts of this case simply do not allow for those alternatives.

32. The gravamen of Bio Strategies' objection relates to the proposed waiver of the majority of the $17,000,000 SEC lien claim. Rather than accept a waiver of the claim, Bio Strategies asserts that I should litigate an avoidance action against the SEC so that the SEC lien would be preserved for unsecured creditors in the event that I obtained a judgment avoiding the lien.

33. An action to avoid the SEC first priority lien was not instituted previously on behalf of the estate because an analysis of the benefits of such an action did not appear to justify the expense and risk of litigation, and the end result did not in itself provide a pathway to selling the subject assets and monetizing the lien. My considerations at the time included the following:

(i) Obtaining a favorable judgment in the fraudulent conveyance litigation is by no means a certainty. There are complicating issues relating to the grant of the SEC lien, including, as noted by Judge Wolf in prior proceedings, the fact that the lien itself was purportedly intended to remedy an alleged fraudulent conveyance of assets from BioChemics to Inpellis. Thus, there may be viable defenses to an avoidance action; certainly at least complicating factors to consider in an analysis of the strength of the case. Even if there

were a 60%-70% chance of success on the merits, that would also mean that there is a 30%-40% risk of adverse judgment, and considerable expense in prosecution of the litigation.

(ii) Any fraudulent conveyance litigation against the SEC would be time consuming, fact intensive, and very expensive. It is not unreasonable to project that such litigation would cost several tens of thousands of dollars to prosecute. The Inpellis estate has very limited resources available to fund the preservation of estate assets, let alone fund speculative litigation. As ADEC points out in its response to the Bio Strategies objection, "very little" actual work has been done with respect to the ADEC objection to the SEC lien claim, so I reasonably estimate that prosecution of such a claim would cost several tens of thousands of dollars, and would take at least one year to litigate.

(iii) Even if successful in avoiding the SEC lien, absent additional agreements with ADEC and resolution of asset ownership issues between the estates, a sale of assets would still not be feasible. Thus, the estate would have expended considerable resources without a clear avenue of monetizing the estate assets. The importance of this consideration cannot be overstated. Absent the agreements of the SEC and ADEC, no sale would be feasible. Thus, without such agreements, it makes little sense to prosecute a complicated and expensive lien avoidance action if the end

result is a significant amount of accrued expense and a lien that cannot be reduced to money for distribution to creditors.

(iv) Equally important, my review of claims against the estate resulted in the conclusion that the expense of litigation and the risk of adverse determination was not justified by the potential benefits of preserving the SEC lien for the benefit of the estate. Disregarding the Bio Strategies claim (which I believe should be disallowed), ADEC and the related secured noteholders comprise approximately 82% of the claims filed in the Inpellis case. Thus, the junior lienholder, ADEC, would be the primary beneficiary of any lien preservation action. Without a clear path available for monetizing the estate assets, and with the junior lienholder likely to be the primary beneficiary of the action, the perceived benefits were not deemed worthy of the excessive expense and litigation risk that would be entailed in prosecuting such avoidance litigation.

34. The foregoing analysis regarding the prospects of lien avoidance litigation carries over to my analysis of the benefits of the terms of the Stipulation under the standards set forth in *Jeffrey v. Desmond, supra*. As stated in *Jeffrey v. Desmond*, in determining whether a compromise satisfies the applicable standard of reasonableness, courts consider the following factors: "(i) the probability of success in the litigation being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense,

inconvenience and delay attending it; and (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise." *Jeffrey, supra* at 185; *In re Anolik*, 107 B.R. 426, 429 (D. Mass. 1989). In the instant case, to the extent that the "litigation being compromised" is the potential claim against the SEC to avoid its lien, it is my belief that the standards set forth in *Jeffrey v. Desmond* are clearly satisfied.

35. As discussed in Paragraph 34 above, with respect to the first prong of the *Jeffrey* analysis, the potential SEC lien avoidance is not without complications, and obtaining a judgment avoiding the lien is far from a foregone conclusion. Even if there is a better than even chance of obtaining a judgment, undertaking the litigation is still a poor option unless there is an avenue to reduce a judgment to money for distribution to creditors. Winning a judgment alone is insufficient to produce a benefit for the estate. In the rather unique circumstances of this case, that avenue is only provided by the agreements of the SEC and ADEC set forth in the Stipulation. The Stipulation provides the waiver of the majority of the SEC lien claim without additional litigation, cost, and uncertainty of outcome.

36. The second prong of the *Jeffrey* test, difficulties in matters of collection, is not applicable in the sense that avoidance of a lien is automatic upon obtaining a judgment, however, in the broader sense of whether the value of the avoided lien can be monetized for the benefit of the estate, the "collection" analysis is of great significance. In that broader sense, the difficulties in "collection" in this case are effectively insurmountable. Only the agreements of the parties

as set forth in the Stipulation allow for the pathway to liquidation for the benefit of the estate. The consents to the sale contained in the Stipulation provide the only avenue for the estate to realize value from the Inpellis IP Assets.

37. As has been stated in my response to the Bio Strategies objection, I estimate that litigation of an avoidance action against the SEC would require the expenditure of tens of thousands of dollars, and would require at least one year to litigate, with a significant risk of adverse judgment. Again, the time and effort would be fruitless without a pathway to a sale.

38. As to the fourth prong of the *Jeffrey* analysis, I believe that the Stipulation itself sets forth the reasonable views of creditors is in the best interests of all creditors of the bankruptcy estate. Together, the SEC and ADEC hold approximately $26,000,000 of claims backed by properly perfected liens. Leaving aside the SEC claims (which are non-recourse to the estate), and the Bio Strategies alleged claim (which should be disallowed in its entirety), ADEC holds approximately 82% of the value of the claims filed in the Inpellis case. The Stipulation is agreed upon by the Receiver, the Inpellis estate, the SEC and ADEC. The SEC and ADEC are the most significant creditors in each case, and support the relief requested in the 9019 Motion and the Inpellis Sale Motion. Without the approval and implementation of the terms of the Stipulation, there is no sale that can be approved by the Courts. No sale results in no sale proceeds for distribution to any creditor. It is not correct to suggest that the Stipulation provides no benefit to the estate beyond ADEC. First, pursuant to the Carve-Out,

administrative expenses of the estate will be reduced. Second, to the extent that ADEC's claims are reduced, its deficiency claim in the estate will be reduced, and other legitimate creditors will be less diluted with respect to the proceeds of unencumbered non-IP assets of the bankruptcy estate. The estate holds a number of litigation claims which are unencumbered and which will be prosecuted. Thus, I believe that the relief requested in the 9019 motion is consistent with the reasonable views of the holders of the majority of claims against the estate, and is in the best interest of all creditors of the estate.

39. In summary, I respectfully submit that the relief requested in the 9019 Motion is in the best interests of the bankruptcy estate, and meets all applicable statutory and decisional law standards for approval. The approval of the relief requested in the 9019 Motion, including the 50/50 Allocation set forth in both the Stipulation and in the Inpellis Sale Motion, provides the consents necessary to meet the requirements of Section 363(f) for the allowance of the proposed sale. The Stipulation provides tangible benefits for the bankruptcy estate which would not be otherwise available. As such, it is my business judgment as the Chapter 7 trustee of the Inpellis bankruptcy estate that the relief requested in both motions should be granted by the Court, and I recommend and request the allowance of both motions.

Signed under the pains and penalties of perjury this 25th day of August, 2020.

/s/ John J. Aquino
Chapter 7 Trustee

VIDEOCONFERENCE MOTION HEARING
TRANSCRIPT OF PROCEEDINGS
(JULY 10, 2020)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ,

Defendants.

Civil Action No. 12-12324-MLW

IN RE:
INPELLIS, INC.,

Debtor.

Chapter 7 Case No. 18-12844-CJP

Before: The Hon. Mark L. WOLF, United States District Judge., The Hon. Christopher J. PANOS, United States Bankruptcy Judge.

[July 10, 2020, Transcript p. 3]

THE COURT: Will the deputy clerk call the two cases, please.

COURTROOM CLERK: This is Civil Action 12–12324, *SEC v. Biochemics, et al.,* jointly with the U.S. Bankruptcy Court for the District of Massachusetts, Case number 18–12844, *Inpellis, Inc.*, Debtor.

JUDGE WOLF: Good morning. Would counsel, starting with counsel for the receiver and the trustee, please identify themselves for the court and for the stenographer.

MR. HORNE: Good morning, Your Honor. Jonathan Horne, counsel for the receiver, Mark DeGiacomo.

MR. FARRELL: Donald Farrell, counsel for Chapter 7 Trustee of Inpellis, John Aquino.

JUDGE WOLF: All right. I see Mr. DeGiacomo is on the line, on the Zoom videoconference. And let's see, Mr. Farrell, you are representing—

MR. FARRELL: Mr. Aquino.

THE COURT: Is he on the videoconference as well?

MR. FARRELL: He is, Your Honor. He's listed as John.

JUDGE WOLF: Okay. And who do we have for the Securities and Exchange Commission?

MR. LONDON: Good morning, Your Honor. David London for the SEC.

MS. SHIELDS: Good morning, Your Honor. Kathleen Shields for the SEC.

MS. SCHEUER: Good morning, Your Honor. Therese Scheuer for the SEC.

JUDGE WOLF: And for ADEC?

MR. CACACE: Good morning, Your Honor. Joseph Cacace on behalf of ADEC.

JUDGE WOLF: Okay. And is there somebody appearing for Bio Strategies?

MR. MONAGHAN: Yes, Your Honor. Thank you. John Monaghan, Holland & Knight, counsel for Bio Strategies.

JUDGE WOLF: And is there somebody appearing for Mr. Masiz?

MR. SCHLICTMANN: Yes, Your Honor. Jan Schlictmann for Mr. Masiz. Good morning.

JUDGE WOLF: Good morning. And is he on the call?

MR. SCHLICTMANN: No.

JUDGE WOLF: Okay. We're here in these two cases pursuant to the July 6, 2020 order that I entered and that Judge Panos entered in the bankruptcy proceeding concerning Inpellis.

I understand that the receiver and trustee asked Judge Panos to ask me whether he and I, in my view, should coordinate with regard to the proposed settlement of these two cases and the proposed public auction of certain assets. We do want to coordinate and intend to.

In general, I will say that a settlement would be desirable, but that is as long as the sale is conducted in good faith, and if an entity associated with Mr. Masiz is the highest or only bidder, as

long as we're satisfied that the injunction I issued as well as the injunction issued in 2004 concerning Mr. Masiz has not been violated in raising money.

Judge Panos and I have talked. He'll amplify this, but our tentative view is that it would be desirable to conduct the auction, but it should be subject to the parties coming back for confirmation of the sale. That view is tentative. We're interested in hearing from you about it.

And I understand or possibly misunderstand that that confirmation process would resolve the objection of Bio Strategies, which claims a security interest in certain IP. In other words, I myself at the moment perceive Bio Strategies' objection to be one of procedure.

I will say because it should be addressed and—Mr. Cacace, the way your computer is, all I see is your fingers tapping, and it's distracting me, so you can—

MR. CACACE: Apologies, Your Honor.

JUDGE WOLF: You can either turn off your video or—so I can just see your face, not your fingers.

MR. CACACE: Got it.

JUDGE WOLF: I've had this case since 2012. I've conducted innumerable hearings since I approved the settlement against Biochemics, and a word search of the voluminous documents doesn't indicate that Bio Strategies has ever been mentioned in any hearing before me. Bio Strategies now says it has an almost I think $6 million security interest in intellectual property of Biochemics.

I believe somewhere Bio Strategies is characterized as an affiliate of Biochemics. I don't know what the word "affiliate" means in this context. I do understand from recent submissions that Biophysics is owned and controlled by Mr. Masiz. It's my understanding that it was formed in June 2017.

In June 2017, I found Mr. Masiz—I granted summary judgment for the SEC on its motion that Mr. Masiz negligently violated the relevant securities laws, and I scheduled a hearing on their motion for summary judgment concerning whether Mr. Masiz intentionally violated, but it appears that at the same time or in the same time period Biophysics was created. I don't know if the SEC knew about the existence of Biophysics or knew about this alleged security interest, which may have impaired security that should have gone to compensate the class as a result of the Biochemics settlement. But these are matters that can be addressed in the hearing today.

And then I have some general questions, which would be I think primarily for the trustee and the receiver, concerning whether there's a reasonable expectation that anyone other than Mr. Masiz or a company that he controls will bid. I gave the parties essentially I think an extra year to try to accomplish a private sale of the intellectual property, and that didn't succeed.

And I have a question as to why our tentative view that there should be a process of confirmation that I understand is usual in the bankruptcy court should not be employed here. And then I have some specific questions.

I still have two related cases, the dismissal—one appealing the decision for Rule 2004 examination and one for a partial withdrawal of the reference to the bankruptcy court, but the motions relating to those cases have been withdrawn, so I'm inclined to dismiss them. But if Mr. Schlictmann wants to be heard on why they shouldn't be dismissed, I'll hear that.

We're interested in hearing from the trustee and the receiver, as I said, and then I think probably the SEC and ADEC, Bio Strategies and Mr. Masiz' counsel. I will say that I've decided to deny his motion to reconsider my ruling and expect I'll issue a written order on that.

But with that, I'll turn it over to Judge Panos. There may be questions that I'll interject or raise at the end, and when we've finished or substantially finished this hearing, he and I will confer and we'll let you know where we are and where we're going.

JUDGE PANOS: Thank you, Judge Wolf. So the primary questions that I have initially relate to the process. And just a couple of observations that, you know, in terms of moving forward, obviously the first step that would allow the trustees to move forward towards what the parties believe to be the best option to sell the intellectual property that is owned by the receivership estate and the bankruptcy estate is by auction, but the first step would be the approval of a notice of sale.

And there seems to be a little confusion in our minds and maybe some discrepancies between the two asset lists. So just as a technical point,

any notice of sale that goes out should have an agreed upon combined asset list that is consistent with each other, and we'd be looking for the trustee and the receiver to confirm our understanding that anything that's sold at this auction is subject to the 50/50 split, and, if that's not the case, obviously we need to understand that, if there are separate assets that are being sold as part of this auction. But in considering the process and allocation issues potentially, we would want to make sure that it's absolutely clear what's being sold and that whatever is being sold in this auction is subject to the 50/50 split proposed settlement.

The other thing that struck us in terms of the process was, our assumption is that the trustee and the receiver are trying to gain maximum flexibility in the conduct and timing of this auction. We'd like to hear a little bit more about pressures on timing, you know, why the auction is suggested to occur in the middle of August.

There is an objection that has been lodged to the timing of the conduct of the auction. And it seems to me that it may be a concern for the trustee and the receiver that the underlying settlements that are proposed, the 50/50 split, and then in the bankruptcy case the carveout and the other agreements that have been reached between the SEC and ADEC are approved prior to the conduct of the auction so potential third—party bidders will know that there aren't underlying issues that have to be litigated as part of a sale process that might chill the bidding. We're interested to hear about that.

And in our view, the best way to proceed from our perspective, if it's permitted by the conditions on the ground, are that we would approve a form of notice of sale that would allow the trustees to market and arrange for the auction. We would establish an objection deadline and a hearing date for approval of the settlements that would underpin the ultimate arrangement on the division of proceeds. That would be acted on prior to the auction, and then the auction would be conducted after that with the parties returning to the court for approval of the final winning bid.

And as part of the notice of sale and the qualification process for bidders, the expectation would be that I think there's a $50,000 good faith deposit that has been proposed, which seems adequate under the circumstances. We didn't see any mention of the ability to close the transaction. I think the proposal for the terms of sale at auction are closing 14 days after the auction. So that would be probably modified to be closing, you know, after the order approving the sale becomes a final order. But it's a pretty short timeframe, so you would think that the receiver and trustee would want some evidence of ability to close.

And we would think that as part of the qualification process any affiliations or connections between a bidder and either of these estates would have to be disclosed, using kind of standard definitions of affiliates that pick up officers and directors and other connections that would basically disclose if Mr. Masiz is involved in the bidding. And perhaps the trustee and the receiver would want some written statement from Mr. Masiz in connection

with how the money was going to be raised, that, you know, the injunction would be complied with and he'd comply with applicable law if he was raising money from the public. And that would be—if he were the successful bidder, that would be reviewed at that time for compliance by Judge Wolf and he could ask whatever questions associated with that that he would ask.

Obviously we have several objections, one of which relates to the ownership of a patent, which I'm sure raises some issues for the trustee and the receiver. And then there's the claimed security interest by Bio Strategies on the assets that were transferred to Inpellis. And so that's the general structure of what we're thinking and some of the questions that we'd like addressed, and what I would suggest is that either the receiver or trustee counsel first address them.

MR. FARRELL: Your Honor, Don Farrell on behalf of the trustee, if Mark's not going to jump in. The procedure that we had envisioned is not too dissimilar from what you've just outlined. We put a date on the notice of sale which we thought would be an on and after date so that we could move it if the sale hearing took longer, the 9019 motion took longer. But clearly, obviously, we weren't going to have an auction sale until after the approval of the 9019 motion and the approval of sale.

As to your question as to whether there's any pressures as to timing—

JUDGE WOLF: Excuse me. Let me interject for just a moment. What is a 9019 motion?

MR. FARRELL: I'm sorry, Your Honor. Vernacular is for the motion to approve the agreement between the trustee ADEC and the SEC with the releases, I apologize. The motion to approve the compromise among those three parties.

JUDGE PANOS: And between the estates.

MR. FARRELL: And between the estates. There's no real—maybe Mr. Aquino and Mr. DeGiacomo want to jump in here if I'm misstating. I don't think there's any real timing issues other than we want to keep the process moving along because there are accruing maintenance fees and costs of maintaining the IP.

So, for example, Mr. Monaghan suggested that he would prefer a 60-day date rather than a 40-day date as was in our notice of sale. The trustee has no objection to that. I believe the receiver has no objection to that. So that's really a fairly minor issue.

I have not—what we did not anticipate—let me say this. I think you're absolutely right that the notice of sale could be enhanced by having more information as far as disclosure of—requiring disclosure as to associations of any prospective bidders. It's not uncommon, as you know, in the bankruptcy procedures, and we can include that. I don't have a problem with that.

What we hadn't anticipated was a secondary confirmation process, and I'm not sure that I have an opinion on it. I don't know if the trustee and the receiver do. But what we had anticipated was, we've had the approvals for the compromises and the sales so that we can go forward. We per-

form the auction. We have our deposit. We can get proof of ability to close, and then there would be a closing. We did not anticipate coming back to the court a second time. I understand you may want that, and that would be fine if you want that.

JUDGE PANOS: The procedure that has been proposed is more akin to where you're, by public auction, auctioning off the contents of a warehouse. This IP auction really feels more like the sale of the basics for a company, which is more analogous to conducting the auction, coming back, talking about how the auction went and disclosing insiders. And I think both Judge Wolf and I are much more comfortable with that process for this set of assets.

MR. FARRELL: Understood, Your Honor.

MR. DEGIACOMO: Mark DeGiacomo, receiver. I have no problem with having a confirmation of the sale hearing afterwards. We can certainly do that. Attorney Farrell and I have discussed that now that we're doing this jointly with the courts, the thing that probably makes the most sense is—he proposed one notice; I proposed my notice. They're very similar but not identical—is that we come up with one notice that we would send out to all of the parties that would incorporate all of the things that we have in there and any changes that we talk about today. And I also have no problem adding requirements concerning disclosure of affiliates, source of funds, ability to close, that type of thing. So that's acceptable to me.

JUDGE PANOS: And would it work for the trustee and for the receiver to actually notice out a date for a sale to conduct the auction, and then we could

schedule a sale hearing with the understanding, and it would be disclosed in the notice, that the auction date could be moved if in your determination that's necessary? But at least that way we have some fixed dates and we'll know how to schedule the settlement hearing, and people will have notice of the timeframe that they have to accomplish what they need to accomplish.

MR. DEGIACOMO: Right. And we agree—Attorney Monaghan's objection suggested kicking this out, my understanding, for another 30 days. So we agree to set it at September 15, assuming that's not a Saturday or a Sunday, and work with that as the auction date. That should give everybody plenty of time to accomplish what needs to be accomplished and what the courts have discussed today.

JUDGE WOLF: And let me ask you this. It's extremely helpful, and I'm sure—Mr. Farrell and Mr. DeGiacomo have really been highly professional in very difficult circumstances, so in concept this makes sense. But the question I had at the outset, do you think there's a realistic prospect that anybody is going to bid or anybody who is not an affiliate of Mr. Masiz and Biochemics is going to bid?

MR. DEGIACOMO: Well, Your Honor, how do you define "realistic"? We have heard from other people. A Series E creditor I spoke with the other day indicated that he was going to talk to some others about potentially putting a bid forward and then maybe one or two other people that have been considering bidding, and then of course we'll be sending this notice out to everyone who expressed

any kind of an interest. When Gordian Group marketed these assets several years ago—

JUDGE WOLF: Actually, that just occurred to me, that I don't know whether those efforts to sell to entities approached by Gordian, an investment banker, failed because the terms weren't right or because there was no interest, but I do think that's a universe of potential bidders that should be targeted.

MR. DEGIACOMO: I'm sorry, Judge.

JUDGE PANOS: I'm sorry. You're probably going to do just what I was going to ask you to do, which is, I heard at the last status conference what your intentions were for marketing, I specifically asked if you were going to use any of the online marketing resources. And you and Mr. Aquino represented that your intention for marketing the notice of sale was to identify all of the contacts that had been identified by Gordian Group as potential bidders, not just those that expressed interest but their original solicitation list. You were going to notify them. You obviously were going to put the notice on the bankruptcy court's asset auction website, and you were going to provide notice to everyone in this case.

Is there any other marketing effort that you're going to undertake, any advertising, any trade magazine advertising or website notice?

MR. DEGIACOMO: We're going to do everything that you just mentioned, and I believe the trustee was looking into some other types of periodicals or websites. And last I recall, it was still taking a look at that.

MR. AQUINO: Yeah, and I can expand on that, Judge.

JUDGE WOLF: Excuse me. Whoever—stop, stop. Whoever is speaking should identify themselves for the stenographer.

MR. AQUINO: Excuse me. This is John Aquino. I am the Chapter 7 trustee for Inpellis, Inc. And in response to Your Honor, we've looked at the online type of marketing companies, and they fall into two different categories, those in which there are relatively modest listing prices to list intellectual property as if you were listing a piece of real estate that could go on for days, weeks, months, in theory, years, it's just listed there, and it's exposed, people can reach out and contact you—we don't—we're not looking at that kind of timeline, given the 30 days.

The other type of website is one in which the companies themselves conduct an auction. They claim to be able to reach out to interested parties. However there is a fairly substantial buy—in, so to speak, and then beyond that there are commissions that are payable both on the buying side and the selling side that total about 25 percent of the total transaction costs.

So unfortunately, we think for both of those reasons, one, the auction we think would be just too costly on our side to be paying effectively 25 percent. The listing we just think would be window dressing because we just don't think there would be enough time to reach appropriate people.

With respect to what Mr. DeGiacomo mentioned, we have gone back to the Gordian Group. We have looked at all of their notes, seen who they

contacted, what the levels of interest were. In some cases that interest was a little early for them, and in some cases it was too late. For those that were too early, we do think bringing this back up to their attention will be potentially fruitful.

We also know that there are other interested parties who may be, for strategic or other reasons, not necessarily disclosing exactly where they stand today. As everyone knows, ADEC has been involved for quite some time, made in excess of a $3 million investment. We know that Mr. Monaghan's client, Bio Strategies, made something like a $5 million investment, the Series E people. So we do think—

JUDGE WOLF: Stop just a minute. I don't know that Bio Strategies made a $5 million investment. If they gave $5 million to Biochemics, it should have been applied to pay the judgment that the SEC obtained. So I don't know when you first heard of Bio Strategies, but I first heard of it this week, and I've been involved in this far longer than you. Why do you think Bio Strategies—I mean, do you have a record paper trail of $5 million going from Bio Strategies to Biochemics?

MR. AQUINO: Well, they filed a proof of claim under the pains and penalties of perjury, Your Honor, in the bankruptcy court. I have seen a note, I believe, an mended note. There's a narrative describing the timing of the initial loans. There were loans that were made to Inpellis' predecessor, Alteryx, loans made to Biochemics, at least as represented by the parties.

JUDGE WOLF: And actually, I may—just one moment. I see. I want to be careful and not confuse Biophysics with Bio Strategies, because I think it was Biophysics that was formed in June 2017. I see, Bio Strategies, its payment was made prior I think to the judgment.

MR. AQUINO: I believe it was made—and Mr. Monaghan can certainly jump in, but I believe it goes back to 2013, which—well, I believe it goes back to 2013. Let me put it that way.

JUDGE WOLF: That rings a bell with me, too.

MR. MONAGHAN: Your Honor, would you like me to jump in to state what I believe is the case?

JUDGE WOLF: I'm sorry, who is this?

MR. MONAGHAN: I'm sorry. Good point. This is John Monaghan, Holland & Knight, counsel for Bio Strategies.

THE COURT: Sure. Go ahead.

MR. MONAGHAN: The Bio Strategies $5 million debt-based investment was evidenced by a note that was executed by Biochemics on December 4, 2013. The security interests that were granted were granted contemporaneously also in December of 2013, and the interests granted to the extent that they were perfected—and there's an issue there—are evidenced in part through filings with the United States Patent and Trademark Office dated December 15, 2014.

JUDGE WOLF: Okay. Thank you. That amplifies—reminds me of something I had read and amplifies

my understanding of it. I appreciate it. Let me give this back to Judge Panos.

JUDGE PANOS: Mr. Aquino, let me just ask a couple of questions about what you said about Gordian Group. We know from dealing with the investment bankers they maintain a number of different lists. The first list is their tickle list, you know, to whom they send the initial, you know, inquiry of interest. The second list are those who respond. The third list are those who sign confidentiality agreements.

Are you planning to solicit the entire tickler list?

MR. AQUINO: We're planning to solicit all those for whom Gordian provided contact information beyond just the name of a company. For example—I'm just saying this by way of example. If they simply said on their tickler list, Johnson & Johnson is a company we would reach out to, but we don't have any further information beyond that, beyond the name of a person to contact, an email address or any evidence that there was any response, no, it wouldn't be expanded to include all of those companies.

JUDGE PANOS: But are you and Mr. DeGiacomo—I heard that you are going to consider other obvious entities that might be interested. So, you know, companies like Johnson & Johnson, they're not that hard to find, and they might have an interest, and I'm assuming that you're going to develop your own list in addition to the Gordian list or to fill in the blanks on the Gordian list.

MR. AQUINO: I think that's fair, Your Honor, but to be—what our intention was to review all of the

Gordian documents, and they are fairly extensive. This was done over a period of time. They were updated frequently. In some cases it would be—well, they were updated frequently, and we're going to—we're certainly not going to—we'll be over- rather than under-inclusive.

JUDGE PANOS: Anything else you'd like to talk about, the process? Because it sounds to me like the trustee and the receiver, in terms of a process where we have a notice of sale, we have qualifications, we have—you know, the disclosure of ability to close and affiliations, there's a diligence room that's now been set up and presumably is ready to go when a notice of sale could be issued, there's not a pressing timing on the actual conduct of the auction, but we can choose a date, and that date would follow the consideration of the settlement of all of the inter-estate claims and the claims in the bankruptcy court that need to be settled in order for this to move forward. It sounds like we have a process that's acceptable in concept to both the receiver and the trustee with a final approval of the sale occurring at a joint hearing.

JUDGE WOLF: And it sounds that way to me, too. I'd be interested in hearing at least briefly from the SEC and ADEC as to why they believe this is a desirable approach and why this 50/50 split will be in the interest of the parties that you represent. Maybe from the SEC first.

MS. SHIELDS: Good morning, Your Honor. This is Kathleen Shields for the SEC. I think the SEC's view is that it is well passed the time to try to monetize these assets and that despite trying for many years to achieve a higher price through a

private sale, all reasonable attempts to do that have not succeeded. And so this is really the only way left to try to monetize these assets to obtain some recovery for investors.

In terms of the settlement between the SEC and ADEC, I think that we have negotiated hard and for a lengthy period of time, and we think that the costs of ongoing litigation are such that they threaten to diminish the available assets for investors even further, and so this is a reasonable compromise that will allow a sale to proceed and money to be repaid to investors as soon as practicable. And we think that that is at this point in investors' interests because it's the best way through a process to get some money returned to them.

THE COURT: Okay. That's very helpful. Were you aware of this Bio Strategies lien before very recently?

MS. SHIELDS: So it's my understanding that we knew about it but did not believe it was an effective security interest because it was not perfected, and so therefore it was—that the security interests that the SEC obtained in its settlements was superior to—that it would take priority over and was superior to anything else that existed, so we believed that it was not something that we needed to worry about.

JUDGE WOLF: Okay. And what about from ADEC's perspective? ADEC is not a party in my case, but I have been concerned about ADEC's interests.

MR. CACACE: Thank you, Your Honor. This is Joseph Cacace on behalf of ADEC, and we essentially

agree with everything that's been said. You know, we've litigated hard for a while, particularly on a number of issues, including the ownership of intellectual property between and among the two estates and affiliated parties and, you know, attempted through lengthy negotiations to try to reach a private sale. Unfortunately that did not work, and so we're at a point where ADEC believes that an auction laid out generally as the trustee and the receiver have laid it out and has been discussed today is a way to, you know, maximize the value of the estate given where we find ourselves today.

And as far as Bio Strategies is concerned, ADEC's understanding is the same, that the security interest is not properly perfected and so ADEC's security interest is also ahead of that behind the SEC.

JUDGE WOLF: Okay. Now I'll go back to Judge Panos to inquire initially of the others who are interested and represented today.

JUDGE PANOS: I think we should probably hear from Mr. Monaghan about the modified sale procedures. And I know that in the objection that was filed your client has reserved on the proprietary of the settlement and ultimately the sale issues. Do you have any objection to the procedure that has been suggested at this hearing to conduct the auction?

MR. MONAGHAN: I do not, Your Honor. And to be clear, both Mr. DeGiacomo and Mr. Aquino are extraordinarily skilled and well regarded estate representatives. And I do agree with the statement

that has been made by all that it is time to monetize these assets. The idea of a joint sale and conducting that joint sale cooperatively is one that Bio Strategies supports.

Now that the timing issues have been taken care of and there is general agreement that that sale isn't going to take place before the middle of September, the primary objection that Bio Strategies stated to the sale process itself has been dealt with.

The other objections that Bio Strategies stated were largely sequencing. I believe Judge Wolf, when he took the bench, said he perceives them to be procedural. And I agree; they are largely procedural. It was an instance of the cart being put before the horse.

Under the proposed sale procedures, the $150,000 carveout, the 50/50 split and the withdrawal as opposed to avoidance of the SEC's lien in the Inpellis case was stated to be a fait accompli. As I understand in the current process that the two courts have now suggested and that the estate representatives have now agreed to, the sale process, that is the notice that a sale will take place, will get underway, but the final resolution of the substantive aspects of the settlements, the $150,000 carveout, the 50/50 split and the withdrawal rather than avoidance of the SEC lien will be dealt with on another day and prior to the time that either the auction takes place or the sale approval order enters. And if I have perceived that right, Your Honor, I believe that the courts have addressed the concerns of Bio Strategies for now.

I do suggest that there is a high likelihood that there will be an objection by Bio Strategies to parts of the proposed settlement, but as I understand it, the day in court will come when those will be addressed, and with that, Bio Strategies is satisfied.

JUDGE PANOS: Thank you. Just to give us a little preview, what's the relationship of Bio Strategies to the receivership estate and the debtor estate?

MR. MONAGHAN: Sure. So Bio Strategies is a creditor of the receivership estate for $5 million. It has documents in hand that suggest that it has a secured—that its $5 million obligation is secured or the debt holds is secured. There's an executed security agreement.

JUDGE PANOS: No Article 9 perfection?

MR. MONAGHAN: Well, there is an Article 9 perfection that was—the answer to your question is yes, there is an Article 9 perfection, but the effect of that Article 9 perfection was not until after the SEC lien was filed.

The SEC is correct; when the SEC lien was granted, Bio Strategies had a granted lien. It had filed documents with the United States Securities—excuse me—United States Patent and Trademark Office. It had also filed a UCC—1 in a state that was not the state of incorporation of Biochemics. It subsequently did file a UCC-1 in the state of incorporation of Biochemics but did so after the SEC lien was effected and perfected.

As to the Chapter 7 estate, it is Bio Strategies' position that the transfer of the assets from

Biochemics to Inpellis was in effect conversion of Bio Strategies'—sorry. There's a loud noise in back of me; I apologize.

The transfer of the intellectual property was the conversion of Bio Strategies' collateral without authority, without release and with notice by both the transferor and the transferee of the existence of the Bio Strategies lien.

JUDGE WOLF: Mr. Monaghan, let me ask you this.

MR. MONAGHAN: Yes, Your Honor.

THE COURT: Which transfer are you referring to, the transfer from Biochemics to Inpellis?

MR. MONAGHAN: Yes. As I understand it, Your Honor, the acquisition by Inpellis—excuse me—the portfolio of patents and other intellectual property that Inpellis has originated from Biochemics. That's the information I believe I have.

Now, if I'm incorrect about that, I apologize, but I believe there's evidence suggesting that Inpellis' intellectual property portfolio was generated and transferred to it by Biochemics.

JUDGE WOLF: You might want to look at my January—well, I think this is described there—my January 17, 2020 order, 435 F. Supp. 3281, which has a summary of some of the relevant procedural history. And I'm saying this without having had a long time to get reimmersed. But essentially, my understanding—and I'm articulating in part so if and when the time comes you can argue that it's incorrect or clarify it. But when Biochemics reached a consent judgment with the SEC, they agreed to pay many millions of dollars, I expressed

concern that Biochemics—I wasn't going to enter the order unless I thought there was a way for Biochemics to pay the judgment to the SEC, and Biochemics proposed installment payments.

And in connection with that, I understand now, as I recall, that there was a transfer or sale of Biochemics' assets that might have been held at the time by something called Shareholder Resolution Trust to Inpellis which already had a worldwide free license to use it. And Inpellis provided funds to Biochemics, and I believe those funds were used to make the $750,000 payment on the judgment in the SEC's case, but ADEC contends that those are funds that it and other lenders provided to Inpellis for an IPO based on representations that Inpellis was independent of Biochemics.

So you can read what I've written before, and you probably can reconstruct this, but that's my memory. So there was a question ADEC was arguing, as I recall, that there was—the SEC was arguing that there was an improper conveyance. And then when that issue arose, Inpellis transferred or gave the SEC a lien on that intellectual property, which ADEC, as I recall, claims was without consideration. I don't know if that's going to prove to be helpful to you or confusing. You might want to take a look at my decision.

MR. MONAGHAN: Thank you, Your Honor. I will do so.

JUDGE PANOS: Mr. Monaghan, in the motion I think you described Bio Strategies as an affiliate. What's the affiliation?

MR. MONAGHAN: If I did that, Your Honor, I mistyped. I was of the position that Inpellis is an affiliate of Biochemics, not of Bio Strategies. If I have a typo in there, I apologize.

JUDGE PANOS: I just may have misread it. So is Bio Strategies in any way related to either Inpellis or Biochemics or Mr. Masiz?

MR. MONAGHAN: I know that Bio Strategies is a creditor of Biochemics. I believe that the principal of Bio Strategies also has—or an affiliate of Bio Strategies also has an equity investment, made an equity investment in Biochemics and therefore is—again, this is my recollection, and I apologize, but I'm working from recollection here—is therefore also a beneficiary of the SEC's judgment.

And I am unaware of a relationship between Bio Strategies and Inpellis other than the debt that is owed to it there, that Bio Strategies and Mr. Masiz have spoken about potentially Bio Strategies or principals of Bio Strategies investing alongside with Mr. Masiz. That's all I know, Your Honor.

JUDGE WOLF: Investing in what?

MR. MONAGHAN: In an acquisition of the assets of these two estates.

MR. AQUINO: Your Honor.

JUDGE WOLF: I want to let Mr. Monaghan go and then Mr. Schlictmann, if he wants. Mr. Monaghan, say that again. What is your understanding—

MR. MONAGHAN: I believe at one time, I believe at one time that Bio Strategies or a principal of Bio Strategies and representatives of Mr. Masiz were

talking about putting together a transaction to acquire assets of these estates.

JUDGE WOLF: And what time was that?

MR. MONAGHAN: I don't know. I mean, two years ago, a year ago. Not recently, to the best of my knowledge.

MR. AQUINO: Your Honor.

JUDGE WOLF: Go ahead.

MR. AQUINO: This is John Aquino, Chapter 7 trustee. I just want to add, it's my understanding that Mr. Lattimore, the principal of Bio Strategies, served as chief operating officer or in some capacity operated Inpellis for a period of time which I believe was approximately five or six months. I don't have the exact dates. I believe this was in the 2015—2016 range, but I believe that's an additional affiliation.

THE COURT: Was it 2015—2016, or was it before or after the executives of Inpellis resigned, as I recall, and when intellectual property was being transferred back to Biochemics or a lien on it was being given to the SEC?

MR. AQUINO: I believe—and I'm going to correct myself. I believe it was 2014 and 2015. This was in connection with the IPO. I just—I could find those dates for you, but I believe it was—I believe the settlement with the SEC was in 2016. I don't believe Mr. Lattimore was serving at that time, but I'd have to double check my dates.

JUDGE WOLF: All right. These are questions that may arise when we get to the point of hearing

objections to the settlement from Bio Strategies. And Mr. Schlictmann may be in a position to respond to some of this.

Okay. Judge Panos, should we go to—

JUDGE PANOS: I think Mr. Schlictmann has filed an objection to the sale procedures, a limited objection. And so Mr. Schlictmann, any comment or objection to the sale process that has been outlined in the course of this hearing?

MR. SCHLICTMANN: So our objection, Your Honor—thank you very much. Our objection is as stated in our filing, which is detailed in our Rule 59(e) and 60(b) motion and is the subject of our appeal to the First Circuit. We feel that and based on this hearing it appears that we will be treated, Mr. Masiz will be treated differently than other parties who are participating in the process, and we feel that that's unfair, unjustified and without authority.

Our position is laid out. I don't need to repeat it here. But we don't want to—we want, us, we want Mr. Masiz to be treated like any other party so that he can participate in the process like anybody else, but under the present circumstances, he has burdens on him that we feel are unfair and wrong and that we'll have to address. We do want to—

JUDGE WOLF: Just one moment. When you say you will have to address—

MR. SCHLICTMANN: Yes.

THE COURT: When and where?

MR. SCHLICTMANN: Well, presumably, Your Honor has indicated you're filing a response or a ruling on our Rule 59(e) and 60(b) motion. We have a reporting obligation I think on Monday, July 13, to the First Circuit. So if you're issuing your opinion today, that will—

JUDGE WOLF: I don't know whether you'll get it today, and there's a lot going on in many cases, but you might, or you might get it Monday. So you have to provide a status report to the First Circuit?

MR. SCHLICTMANN: Yes, I'm supposed to on July 13, but I'm assuming, you've made the statement that you have made a ruling so I can report that the ruling is imminent or maybe it will be issued by Monday, whatever. But at least they'll know the opinion has come down and now the appeal can go forward. We have to decide what procedural things we need to do, if we have to do anything between now and the sale, if we feel that Mr. Masiz is not being allowed to participate freely.

I think it's a detriment to the estates, frankly, and it's unfortunate, but, you know, again, it's not something we have to address here. Mr. Masiz has been in compliance and should not be singled out for any reason and has been co-operative, as the record shows.

I also want to correct some misapprehensions, Your Honor, that I think would be quite unfortunate if it's part of the decisionmaking by you and Judge Panos.

Number one, Bio Strategies was formed by Mr. Lattimore in I believe 2013 and he became—between December 2013 and June 2014, he

became the chief executive, the president, put together a board, et cetera. This is all fully documented in the record before you, but it's been many years and everything, and so much has happened.

But just to be clear, Bio Strategies is Mr. Lattimore's creation. He used it to put his investment in as a Series E. He's one of the largest Series E investors. I believe almost 25 or 30 percent of the total amount invested came from Mr. Lattimore.

THE COURT: Investor in what?

MR. SCHLICTMANN: Series E investor, which is the subject of the judgement.

JUDGE WOLF: Of which company?

MR. SCHLICTMANN: Bio Strategies. He put his investments through Bio Strategies, and so they are the largest Series E investor that is the subject of the judgment.

THE COURT: Are you talking about in Biochemics?

MR. SCHLICTMANN: Yes, in Biochemics, exactly. And he did that in—of course at that time Biochemics and Alteryx were the same company. The plan was to split off Alteryx and then to conduct an IPO. Again, it's all part of the record. The SEC is fully aware of all of these facts. All the parties are, frankly. So I wanted to clear that up.

So the affiliation, I think you can say yes he was an executive during those months, so to that extent there was an affiliation, I guess. But he's always conducted himself as an independent entity and considers him to be an independent creditor.

And we—when I say "we"—when Mr. Masiz took back the company in 2014 and continuing, we have had continuous interaction with Mr. Lattimore and his attorneys over that period of time and constant communication back and forth and negotiations, various agreements, all part of the record, all fully disclosed, all the parties know about that.

THE COURT: You say "all part of the record." What record?

MR. SCHLICTMANN: Well, the record that's before you, for sure, Your Honor, and the record that's been fully disclosed to all of the parties during all of the ADEC litigation before you and then the litigation by ADEC through the 2004 process. So there's not a stone that has not been turned over. There's not a record or a transaction that has been the subject of anything that's been said today that has not been fully gone over in minute detail.

THE COURT: Well, I did a word search. It may not be perfect. I didn't see Bio Strategies mentioned in any of the transcripts of the proceedings before me. Perhaps it's in memos or perhaps the SEC knew and it wasn't relevant to me. It was just a question.

MR. SCHLICTMANN: Okay. Your Honor, just to be clear here, the draft registration statements which were the subject of the litigation before you with ADEC were all part of the record. And in the draft registration statements, Bio Strategies' claim to a lien was fully disclosed. It was all part of that process. ADEC was fully aware. They went over

the registration statements before, during and after.

So this whole record of this relationship, Your Honor, I think it would be unfortunate if you think somehow there was something untoward or undisclosed or something that would get involved in the decisionmaking here. It would be unfortunate.

JUDGE WOLF: This is why we're having the hearing. This is why we're pleased to hear from you. There are questions and you have responses, and some of them are answered.

With regard to Mr. Masiz—and you're of course entitled to appeal my decisions, and I have a now published decision with regard to the authority to require that he respond if I've got questions about whether he's obeying the injunction, and he's not barred from participating in the sale. But at a very fundamental level, he's not similarly situated to I hope the other potential bidders because he's under two injunctions not to violate the securities laws and to make—if he's raising money, to make certain disclosures. So if he makes—if he complies with the injunction, then he's not disqualified.

MR. SCHLICTMANN: Right. And I appreciate that, Your Honor. And there has been disclosure to the SEC. They have found compliance. All of that disclosure record, which is quite extensive, was also submitted to you and is now part of the public record.

JUDGE WOLF: It is.

MR. SCHLICTMANN: And we're still under investigation, Your Honor.

JUDGE WOLF: Under investigation by?

MR. SCHLICTMANN: By you.

JUDGE WOLF: Well, here, two things. One, there are some redactions from the documents filed before me, but they don't appear to be material. And two—

MR. SCHLICTMANN: I know what you're referring to. It's the form that was signed by the investors in Biophysics that shows that they were given—the part that was redacted was stuff that was nonrelevant, but what was provided was their disclosure, that they read the disclosure and the attached disclosure, which was the issue before the SEC.

JUDGE WOLF: And I ordered you to file unredacted copies, so if you want to make redactions for some reason, and there might be privacy reasons, legitimate privacy reasons, you've got to ask me. If I give you an order to file unredacted copies, it doesn't give you discretion to redact some information, even if I might agree with you that it didn't have to be in the public record.

But I've got these, and so far, you know, I haven't said that there's a failure of compliance. There's a concern that the SEC had about some that were in a Dropbox. But this is procedure, and you have my decisions, and they haven't changed, and the arguments that were made—essentially, just so you have it in mind, there are certain standards for motions to reconsider. They're stated

by the First Circuit in a case called *Allen*, among others, and I haven't found that any of the standards for reconsideration are met.

But what I guess I'm trying to—we'll cross this bridge if we come to it, but it seems to me that at least everybody else agrees that the procedure that Judge Panos explained and that he and I think is appropriate they agree also is appropriate, including coming back for the confirmation.

And just to explain it, if Mr. Masiz is a bidder—an organization and a company that Mr. Masiz is associated with is a bidder and it's not the highest bidder, doesn't win, prevail in the auction, then these issues may be moot. If he does prevail in the auction, at the moment—and Judge Panos tells me that this is familiar in bankruptcy proceedings—this would be essentially an affiliate or insider who might be required to make more disclosures. Some of those will come, if I understand it right, in the qualification phase even before the bidding, but it is foreseeable that I will want to see again, if Mr. Masiz raises money, whether the required disclosures were made.

And if you showed that the injunction was obeyed and the required disclosures were made and people were given accurate, complete, not misleading information and they invested and Mr. Masiz has the money or one of his entities has the money, properly, then if he's the winning bidder and everything else is in order, he will I guess get the property. But you're right, because he's subject to the injunctions, including mine, there are questions that may need to be answered.

MR. SCHLICTMANN: Your Honor, I appreciate that, and, you know, this is—all I can tell you is it seems to be just so unfortunate because, under the present circumstances, it is in the estate's interests to have Mr. Masiz involved in this bidding process for lots of reasons. And his uninvolvement—I also will state clearly to you and to Judge Panos that there will be no attempt to try and bid through a dark horse or a third party or anything else. That's not going to happen here.

If Mr. Masiz is involved in the bidding process, that's going to be fully disclosed. We're not going to set up a situation where someone can come back and say, Oh, this was undisclosed or collusion or anything like that, so I wanted to make that very, very clear. He wishes to participate freely, like anyone else. And we think—you know, we would just ask Your Honor to consider, we had this compliance issue, which is a compliance issue in which information was submitted showing compliance, which the SEC agrees with, unless they're changing their mind, and it's not right—

JUDGE WOLF: Excuse me. As you may have noticed going back to when I didn't just sign off on the consent judgment, I don't always agree with the SEC.

MR. SCHLICTMANN: I appreciate that, Your Honor, but they are—

THE COURT: And, and, just to be clear about this, ADEC charges that the SEC was complicit in a fraudulent conveyance, taking a lien, dropping—a different unit, dropping an investigation of the documents submitted for the proposed IPO. So I

have—and I expect the SEC to analyze matters carefully, and that's why I had you submit the documents in the first instance to the SEC, but I'm not relying exclusively on the SEC's judgment.

MR. SCHLICTMANN: Okay. And Your Honor, that's where we take issue, Your Honor. I just want to be clear on that. We feel it's—first of all, I have to say, Your Honor, I think it's being very unfair to the SEC truly in this circumstance and especially to be relying on ADEC's allegations, which I think the record shows very, very clearly should not be taken for something to cast aspersions on either how the SEC did their work or how we interacted with the SEC. We think it's unfair. I've made that clear before. But I think it's unfortunate that you are relying on your decisionmaking on that point. So I would ask that you reconsider that.

JUDGE WOLF: I didn't—this is a settlement, and nobody's going to decide whether there were fraudulent conveyances to Inpellis or from Inpellis. There are questions.

MR. SCHLICTMANN: Right, but you approved that settlement. And unless you think that there's sufficient information to reopen that settlement really and say somehow that there was collusion between us and the SEC, I just think it's completely unfair to them and to us. We've been conducting ourselves quite professionally and we believe carrying out your directives, Your Honor, truly, doing the things that you thought were appropriate of parties who are in a dispute and who you encourage to settle.

The record has been gone over in minute detail by ADEC, by the receiver, by the trustee. And if there was anything untoward, the receiver and the trustee have an obligation to you and to Judge Panos to bring that to your attention. They have not done so to date. I challenge them to do it now because these unsaid things, these things that were said by ADEC and now they're not pursuing anymore, at least not in this particular context—by the way, yes, we agree that those two other actions should be dismissed because the parties are not in dispute anymore, so I don't think we have to clutter the docket with that.

But if the receiver and the trustee who has gone over all of these things in detail, everything you've talked about, have a question or problem or assertion of a claim, they have an obligation, Your Honor, to bring it to everybody's attention, including yours, so that this does not clog up, get in the way of or prevent the free participation of Mr. Masiz or anyone else in the—

THE COURT: Mr. Schlictmann, you know, to some extent you're an interested party as well as a lawyer here given the history of the case, and we've discussed that at times. But I don't think it's profitable to repeat this. Mr. Masiz is not disqualified from participating, but if he has a unique history, there may be questions put to him as to whether, if he raised money, he did it in a way that was consistent with the injunction or injunctions, but mine particularly. And if the answer is that he has obeyed the injunctions and succeeded in raising money and was the highest bidder, at a very general level, I'll have to see what other

complications develop, but I expect the sale to an entity in which he's involved will be approved.

MR. SCHLICTMANN: I do want to assure Your Honor that he was in compliance, has not been raising money, to avoid this entire issue. He has been in compliance in the past and is not raising money, so there's no compliance issue going forward, and he will maintain that because he just doesn't wish to be subjected to being a target of more investigation. So I assure you that that is the case.

JUDGE PANOS: If I could just focus back on the process for the benefit of the trustee and the receiver on this issue. The expectation as part of the notice of sale would be that there has to be disclosure of any connections and affiliations. There's no expectation that either the trustee or the receiver are going to do any inquiry as to whether Mr. Masiz is complying with Judge Wolf's order.

You have to understand the affiliations, if there is an affiliation, if Mr. Masiz is a bidder. You have to obtain proof of the ability to close as part of that. And then, as part of a sale hearing, if the winning bidder is Mr. Masiz, there will be questions that go to the good faith conduct of the auction and whether he's in compliance. But it's not part of the process where the trustee is going to screen Mr. Masiz to determine whether he's in compliance with an injunction. That's Judge Wolf's job.

MR. SCHLICTMANN: And I understand that. Thank you, Judge Panos. I appreciate that. Thank you.

MR. DEGIACOMO: Your Honor, in connection with that, if the two courts put together the notice, if you wanted to put in a provision also that any bidder discloses the source of funds, that's not an unusual provision, that might help move the ball forward.

JUDGE PANOS: That's what we contemplate, evidence of ability to close and source of funds.

MR. DEGIACOMO: I think that may moot this whole issue. That would be great.

JUDGE PANOS: I think we also contemplate that you and Mr. Aquino are going to put your heads together and consolidate your proposed notices of sale, incorporate what we've discussed today and then submit them to us.

MR. DEGIACOMO: Yes, that's fine, we can do that. And I think as far as the date, the September 15 date that we discussed, that's a Tuesday, and if we could have that date or around that date, it will be helpful.

The problem here, which Attorney Farrell addressed earlier in this hearing, is that it is very expensive to maintain all of these patents for both estates. And every once in a while we get notice that another $7,000, $8,000 is owed or else we're not going to have the patent effective in Europe or wherever. And the funds available are running low, so we would like to move the process along. We have no problem kicking it out to the September 15 date but would like to get it in around there.

And then lastly, at the beginning of the hearing, one of Your Honors asked about whether, on the 50/50, whether everything that was going to be sold would be subject to the 50/50. The answer is yes.

JUDGE PANOS: Thank you. What about—the one issue we haven't addressed at all is Mr. Masiz has asserted that he has an ownership interest in one of the assets that's being sold. I think the trustee and the receiver need to have some strategy to deal with that.

If it were purely a bankruptcy case, it might be the sale of a jointly owned asset with the claims to attach to the proceeds. You know, if it's a claim that's in a bona fide dispute, there's a provision of the bankruptcy code that addresses that directly, and you'd seek approval of the sale, again with the claims to attach to the proceeds. But that raises allocation issues. So what's the strategy to deal with that claim?

MR. DEGIACOMO: Well, as I understand it, what Attorney Schlictmann is saying is that this so-called combination drug, which is the ownership—that's one of the ownership issues between Inpellis and Biochemics, that Mr. Masiz is the inventor, which he very well may be, and that he did not assign his rights over to Biochemics. So we will be—we're looking into that. And what he's asking is that that be disclosed at the auction so that everybody understands that this contention is out there. I think that's the relief Mr. Schlictmann is looking at. We'll do some more investigation into that, and certainly the trustee and I will discuss the approach.

JUDGE PANOS: I guess my question was really more, I understood the claim, and I'm assuming that you're going to look to see if there's a conventions agreement that would require him to assign it over and all the typical diligence that will go into that, and I'm sure there have been disclosures made by Mr. Masiz or at his direction that talked about the ownership of the intellectual property assets. And whether he did or didn't claim an interest at that time, I don't know.

But it seems to me that if we're going to get to a sale hearing and this is an asset, that there are two ways to go. You can disclose the adverse claim which might show the bidding on the asset by a third party, or you can seek approval of a sale free and clear of that claim under relevant provisions of the bankruptcy code and by analogy into the receivership. But if you do that, it seems to me you have to amend your motion at some point to do that.

MR. DEGIACOMO: Yeah. Again, we'll review it. I understand, I think the court is correct, I think option one is probably the way we will go with this, but we will review it.

JUDGE PANOS: Okay. So let me ask Judge Wolf, would it make sense to ask anyone else if they'd like to be heard; and, if not, would you like to go into a separate session for a moment and then come back?

JUDGE WOLF: Yes. I'll say the following with regard to the September 15 date. Judge Panos and I share your interest in not seeing the assets diminished by unnecessary delay. But if it's

going to be 60 days, it will have to be 60 days from the date of notice, and you're going to have to rewrite the notice to comply with the discussion we've had, one notice addressing whatever Judge Panos said. So it may not be September 15. It might be the following week because you'll need to submit the proposed form of notice to us again, and we'll review it and either approve it or edit it.

My availability next week is very limited, non-existent after Monday for a couple of days. But I would strongly encourage you, unless Judge Panos wants to draft the notice himself, to work with the trustee to get a notice that makes sure it covers all of the patents in a consistent way and that you're satisfied with it and then submit it to us, and the hearing date or the auction date will derive from when you issue the notice.

MR. DEGIACOMO: Thank you, Your Honor.

THE COURT: Is there anybody else who would like to be heard on anything before Judge Panos and I confer and come back to you? Apparently not. Then the deputy clerk can either exclude you or put us in a breakout room so we can confer.

COURTROOM CLERK: Yes, Your Honor, I'll put you all in the breakout room.

THE COURT: Thank you.

(Recess 12:22 p.m. to 12:40 p.m.)

JUDGE WOLF: We're back in session, and Judge Panos will tell you where we are and where we're going.

JUDGE PANOS: We took the time to try and lay out a schedule looking at the courts' calendars so

that dates coordinated with availability of both courts, which as you might expect isn't always an easy task.

The contemplation in terms of the sale process is that by the 14th of July, the receiver and the trustee will file a notice of proposed form of notice of sale that proposes to the court a form of notice of sale that is consistent with what we've discussed at the hearing today. The contemplation is that the auction would occur on September 22 and that a report would be filed with the court regarding the auction and any issues or information that the trustee and the receiver need to get on file that would support approval of the sale, like affidavits, or, you know, issues if there were an insider, any disclosures associated with that, so that would be by September 24, and the hearing on confirmation and consideration of approval of the sale would be at 2:00 p.m. on October 2.

On that September 24 date, we would also expect any parties that object to the procedures that were employed at the auction or the buyer or any other objections to the sale that haven't been already raised to be filed as well. We also contemplate that we could hear the motion to approve the settlements between the two estates as a joint hearing, and I would also hear the settlements that are part of the bankruptcy motion to compromise at the same time on August 27. And I don't think we set a time for that, but it will be in a scheduling order, and the contemplation is that any objections to the proposed settlements in either case be filed by August 5 with any replies filed by August 14.

JUDGE WOLF: And we're ordering you to order the transcript of today's hearing so we can all refresh ourselves at the appropriate time. But does that schedule work for counsel? We're coming up to or in seasons when sometimes people have planned vacations. Does anybody have a concern with any of those dates, particularly the hearing dates? Apparently not.

JUDGE PANOS: Anything else anyone would like to raise before we adjourn?

MR. FARRELL: Can I just—I have a question of clarification, Judge. This is Don Farrell on behalf of the Chapter 7 trustee.

You set the date of August 4 for objections to the compromise. Would that also be a date for objection to the sale motion itself also?

JUDGE PANOS: So August 5 I think was the date I gave for objections to the settlement.

MR. FARRELL: Yes.

JUDGE PANOS: I think that there are two opportunities to object to the sale. We can set that as a sale objection deadline, but there will also be another opportunity to object through the conduct of the auction, the identity of the winning bidder. That would be filed by September 24 on the same date that the trustee and receiver's report regarding the auction and supporting affidavits will be filed.

MR. FARRELL: That's fine. Thank you, Your Honor.

THE COURT: All right. If there is nothing else today, we'll recess, and I'll talk briefly with Judge Panos again, but thank you all very much.

DECLARATION BY JOHN MASIZ REGARDING THE PUBLIC FILING OF A COPY OF THE 9-12-19 MASIZ DISCLOSURE SUBMISSION PROVIDED THE SEC (DOC. #562, #567) (NOVEMBER 22, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., ET AL.,

Defendants.

Civil Action No. 12-12324-MLW

I, John Masiz, make the following statement under the pains and penalties of perjury:

1. I am a Defendant in this matter. I make this Declaration to supplement my sworn statement dated 9-12-19 (Doc. #562-1) pursuant to the Court's 9-5-19 Order (Doc. #557), and pursuant to the Court's 11-5-19 (Doc. #574) and 11-20-19 (Doc. #579) Orders. It is also provided in support of my motion for an order extending the due date for me to respond to the Court's 11-5-19 (Doc. #574) and 11-20-19 (Doc. #579) Orders to publicly file (with or without redactions) the 9-12-19 submission I provided to the SEC referred to in Doc. #562-1.

2. As I stated in my 9-12-19 Declaration (Doc. #562-1), subsequent to the settlement with the Commission and entry of the 8-17-17 Judgment (Doc. #339, #339-1, and #344), I made it a practice to provide the disclosures required by Section II of the Judgment. Pursuant to the Court's 9-5-19 Order (Doc. #557, #559) I submitted three volumes of information to the Commission which listed the people and the written disclosures that I provided from August, 2017 through the date of my Affidavit.

3. In reply to the Commission's 9-19-19 Response (Doc. #566) to my submission, I provided additional information documenting that in the one instance identified by the Commission where there was a "risk" that the disclosure might have been "buried" in a larger collection of due diligence materials, in fact, the disclosure was made in a similar manner to other instances that the Commission had found was sufficient. With that one exception (subsequently further documented by me as referred to in Doc. #566) the Commission found that "Masiz has complied with the written disclosure requirements of his final judgment." *See*, 9-19-19 Commission Response (Doc. #566) p. 3.

4. The Court's 9-5-19 and 9-6-19 Orders (Doc. #557 & #559) requiring me to make a submission demonstrating that I had complied with Section II of the 8-17-17 Judgment (Doc. #339, #339-1 & #344) was issued by the Court on its own and not in reference to any assertion by the Commission or any other party that 1 had in any way failed to comply with the disclosure obligation. The submission Order came out of the blue during the 9-5-19 Hearing regarding the Receiver's 7-31-19 motion for approval of a stalking horse bid that my company, BioPhysics Pharma, Inc. had entered

into in an effort to assist the marketing and proposed sale of the BioChemics' intellectual property (Doc. #541, #542)—assistance I and my company had been providing since the Receiver was appointed by this Court by Order dated 10-9-18 (Doc. #452), a fact well documented by the record (*see*, *e.g.* 1-7-19 Receiver "Liquidation Plan" (Doc. #484-1). In response to non-party ADEC' s "Opposition" to the sale in which ADEC accused me and others of having committed acts involving the "stealing" of BioChemics and Inpellis intellectual property and perpetrating a "fraud" on the court (Doc. #548)—assertions that this Court characterized as "only allegations" which the *BioChemics*' court had "no way ref assessing the validity,"[1] the Court issued a series of rulings including: declaring the Receiver's 1-7-19 "Liquidation Plan" (Doc. #484-1) "*moot*" (taking it "off the Docket"[2]) and denying the Receiver's motions regarding the marketing and bidding of BioChemics' assets; allowing ADEC's motions to lift the court's stay so ADEC could bring its "claims" against Appellants, serve a Rule 2004 subpoena on the Receiver, and that "ADEC may assist the Inpellis Bankruptcy Trustee in pursuing claims of Inpellis" against Appellants. 9-6-19 Order (Doc. #559). Because the Court believed that there was need for discovery before any plans could be considered ("a lot of issues have been raised [by ADEC] about a lot of transactions" (emphasis added))[3] the Court directed the Trustee with ADEC's "assistance" and the Receiver

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[1] 9-5-19 *BioChemics*' Hearing p. 45.

[2] 9-5-19 *BioChemics*' Hearing p. 86.

[3] 9-5-19 *BioChemics*' Hearing p. 91.

to conduct an investigation of ADEC's accusations.[4] These actions coupled with the inexplicable unpredicated demand by the Court that I, in short order, make the 9-12-19 submission regarding whether I complied with Section II of the Judgment, combined to make it clear to any observer that I was a target of the Court's concern that required extensive investigation and examination.

5. Throughout the months of September and October, 2019, pursuant to the FRBP Rule 2004 proceedings initiated by ADEC, a substantial amount of technical and business records of BioChemics, Inpellis and BioPhysics Pharma Inc. was produced and three full days of depositions were conducted by ADEC, in which the Trustee and Receiver also participated. The depositions were conducted over October 28, 29, and 30, 2019. Subsequent to the production and depositions, on November 6, 2019, the parties came to an agreement to move to stay the various actions in which they were parties to allow the parties an opportunity to mediate their disputes. Unfortunately, as is natural to such multi-party situations, it took much longer than was anticipated to file the appropriate motions with the Court. Because of the delay, I in good faith, provided a one-party notice to the Court of the situation and requested that the Court temporarily indulge the parties while they worked out the procedural details of how best to proceed (11-15-19 "Respondents' Notice" (Doc. #578). The parties' good faith efforts led to the 11-21-19 filings seeking a stay of the various actions so that the parties can focus on the settlement discussions and to conserve the

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[4] 9-5-19 *BioChemics*' Hearing p. 91.

Court's and the parties' resources. *See*, 11-21-19 "Joint" stay request (Doc. #580). As detailed in the parties' filings requesting the stay, the parties are benefitting from the agreement of Hon. Joan Feeney (Ret). to act as the Neutral and Neutral Feeney has complied with the attendant rules. Pursuant to that mandate, Neutral Feeney will be reviewing all aspects of the parties' disputes and their extensive factual and procedural context.

6. Unfortunately, during this sensitive time in the parties' private deliberations regarding moving this matter to mediation, the Court issued its 11-20-19 Order requiring me to publicly file the unredacted submission on pain of being held in civil or criminal contempt. 11-20-19 Order (Doc. #579).

7. As detailed in the Memorandum in support of my motion, it is my strongly held belief for the reasons stated, that the Court's requirement that I publicly file the submission whether redacted or unredacted is an unjustified penalty that amounts to a "public shaming" that was not agreed to or contemplated by me in connection with the 8-15-17 "Joint Motion" by the Commision and myself to enter into the Section II "equitable relief" in question. The public filing requirement substantially interferes with my ability to function in the marketplace and unnecessarily and undeservedly subjects 3rd parties who have dealt with me or contemplating dealing with me to public scrutiny. The requirements unnecessarily interfere with my right to conduct business free of unnecessary or inappropriate scrutiny by public officials or the courts, and contributes to making me a pariah in the marketplace. Requiring me to file the submission under the pains of civil or criminal contempt, under

these circumstances will cause irreparable harm to my Constitutional rights to privacy as well as to be free from imposition of penalty without due process. Requiring me to file under these circumstances will cause me and others who in good faith have dealt with me to suffer unjustified and unnecessary harm. If the Court does not grant the relief requested, and I am forced to make the filing as ordered, 1 will have no ability to rectify the damage that will be done.

8. As importantly, as detailed in the accompanying Memorandum, Defendant believes that the Court's 11-5-19 (Doc. #574) and 11-20-19 (Doc. #579) Orders implicate substantial statutory and Constitutional issues regarding the permissible scope of the injunction entered by the Court's Order dated 8-17-17 Section II (Doc. #339-1). I therefore submit this Affidavit and accompanying Memorandum in further support of my request to continue consideration of the requirement as requested. I do not believe that this request in any way implicates any interest, either of the parties or the public in a negative manner. In fact, as I have testified and as detailed in the accompanying Memorandum, such interests will only be promoted and protected by this request.

/s/ John Masiz

Dated: November 22, 2019

REPLY BY DEFENDANT JOHN MASIZ TO COMMISSION'S RESPONSE (DOC. #566) TO MASIZ'S REGULATORY DISCLOSURES (SEPTEMBER 20, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., ET AL.,

Defendants.

Civil Action No. 12-12324-MLW

Defendant John Masiz makes the following reply regarding the Commission's concern that in one of the solicitations at issue there was a "risk" that the disclosure might have been "buried in the larger collection of due diligence materials" at the dropbox "Due Diligence" link. 9-19-19 Commission Response (Doc. #566) p. 2. The Commission appreciated that this concern was in other instances ameliorated by the fact that reference to the disclosure material was usually made in cover emails. Masiz wishes to assure the Commission and the court, that the required Disclosure was not in that instance, or any other, "buried" among a "larger collection."

As documented by the material in Masiz's Appendix Volumes I-III referred to in his 912-19 Affidavit (Doc. #562), the Masiz Disclosure was, as part of regular practice, referenced in cover emails, referenced in or made a part of attachments to the emails, as well as being provided at the dropbox "Due Diligence" link. The dropbox "Due Diligence" link provided in the one "transmittal email" that was of concern to the Commission, led to just 12 readily identified Folders one of which was identified as "Regulatory-Masiz Disclosure" which contained two disclosures, both of which contained the Masiz Disclosure. *See*, Exhibit A. In addition, regarding that one instance of concern, Masiz has supplemented the Appendix material provided to the Commission with the addition of the follow-up cover emails that pertain to that particular instance. The follow-up cover emails provided as a supplement were similar to others that the Commission found were ameliorative of its concern. The emails that immediately followed up the one of concern contained two attachments, one referenced the "Regulatory history & disclosure" and the other the "detailed summary of the regulatory history and disclosure regarding BioChemics and its founder, John Masiz" at the "Due Diligence" link provided. In addition, the follow-up cover emails provided as a supplement referenced that one of the email's attached documents: "summarizes the opportunity and provides links to Due Diligence, videos regarding the technology, and regulatory history and disclosure." Therefore, as in the other instances, it was part of regular practice to reference the regulatory history and disclosure regarding Mr. Masiz and BioChemics.

Respectfully Submitted by his attorney,

/s/ Jan Schlichtmann
(BBO #445900)
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Dated: September 20, 2019

COMMISSION'S RESPONSE TO JOHN MASIZ'S REGULATORY HISTORY DISCLOSURES (SEPTEMBER 20, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

Civil Action No. 12-12324-MLW

On September 9, 2019, the Court ordered John Masiz to file an affidavit regarding his regulatory history disclosures and further ordered the Commission to review the affidavit and report to the court by September 19, 2019 whether it believes Mr. Masiz has complied with the relevant requirements of his final judgment. *See* Dkt. No. 559, at ¶ 5. The final judgment against Masiz required that he could not solicit, or accept, investments for an entity that he owned controlled, consults for, or is employed by, without making a specified written disclosure to any actual or potential investor about his prior regulatory history. *See* Dkt. No. 345, § II.

On September 12, 2019, Masiz filed an affidavit, Dkt. No. 562, and he also provided the Commission by hand delivery with an appendix[1] of documents comprising his written records of the written disclosures he has provided to investors and potential investors as required by the final judgment, Dkt. No. 345, § II.

The appendix provided documentation relating to 80 instances in which Masiz participated in soliciting an investment for BioPhysics Pharma Inc. ("BPI"), which the Commission understands to be an entity in which he has an ownership interest. The appendix also documents that in 73 of those 80 instances, Masiz, or someone working with Masiz, either emailed, or delivered in person, a written copy of the disclosures required by the final judgment. The appendix discloses that in seven of the 80 instances in which Masiz participated in an investment solicitation on behalf of BPI, Masiz, or someone working with Masiz, provided the potential investor with a link to a dropbox that contained the written disclosure required by the final judgment. The link was provided so that the potential investor could review a larger collection of "due diligence" items, including the written disclosure required by the final judgment. While the Commission has concerns about the potential that an important written disclosure like that required by the final judgment could be buried by simply providing a link to a much larger collection of documents, in six of the seven solicitations here, that concern is ameliorated because Masiz, or someone working with Masiz, specified in the cover email to the potential investor that the dropbox

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[1] Masiz also filed, with the Commission's assent, a motion to file the appendix with the Court under seal. Dkt. No. 565. That motion remains pending.

due diligence materials included Masiz's regulatory history and disclosures.

The Commission does have concerns about one solicitation where a person working with Masiz emailed a potential investor, stating "As a follow-up to our discussion earlier, I am transmitting coordinates to the dropbox which contains due diligence materials about the technology, patents and clinical data." That transmittal email does not specify that the dropbox includes disclosures about Masiz's regulatory history. As a result, there remains the risk that—as to that particular potential investor—the disclosures required by the final judgment are buried in the larger collection of due diligence materials.

Based on the Commission's review of Masiz's affidavit and the related appendix, the Commission overall believes that, other than the single instance specified above, Masiz has complied with the written disclosure requirements of his final judgment.

SECURITIES AND EXCHANGE COMMISSION

By its attorneys,

/s/ David H. London
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Dated: September 19, 2019

AFFIDAVIT OF JOHN MASIZ REGARDING REGULATORY HISTORY DISCLOSURE (SEPTEMBER 12, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., ET AL.,

Defendants.

Civil Action No. 12-12324-MLW

I, John Masiz, do solemnly swear that the following are true statements to the best of my knowledge and belief:

1. On September 5, 2019 the Court ordered me to do the following:

> Defendant, Masiz, shall, by 9/12/19, produce a list of people he has solicited money from and written disclosures he provided as required by Section II of the Judgment entered in this case (Docket #345) and the contemporaneous records showing that such disclosures were made.

9-5-19 Order (Doc. #557).

2. I make the following statement and make the following submission in response to the Court's 9-5-19 Order:

a. Subsequent to the settlement with the Commission and entry of the Final Judgment, I made it a practice to provide the disclosures detailed in Appendix Volume IA to this Affidavit, as required by the Final Judgment entered in this case;

b. Appendix Volume IB through Volume IIIA lists the people and the written disclosures that I provided from August, 2017 through this date; and,

c. Volume IIIB lists the people, who are not insiders, that BioPhysics Pharma, Inc. received investment from after August, 2017 to the present, and the disclosure that they acknowledged being provided prior to making their investment.

3. I have arranged with the Commission, this date, hand delivery to the Commission of Appendix Volumes I-III for their review.

/s/ John Masiz

Dated: September 12, 2019

JOINT MOTION FOR ENTRY OF PROPOSED FINAL JUDGMENT AGAINST DEFENDANT JOHN J. MASIZ (AUGUST 15, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BIOCHEMICS, INC., JOHN J. MASIZ, CRAIG MEDOFF, and GREGORY S. KRONING,

Defendants.

Civil Action No. 12-12324-MLW

Pursuant to the Court's Order dated June 22, 2017 (Dkt. No. 328), Plaintiff Securities and Exchange Commission (the "Commission") and defendant John J. Masiz ("Masiz") jointly move that this Court enter the attached proposed Final Judgment as to Defendant John Masiz ("Final Judgment"). The Commission and Masiz have agreed to all terms in the Final Judgment. In support of this motion, the Commission also files the attached Consent signed by Masiz, memorializing his agreement to the terms of the Final Judgment. Specifically, Masiz admits that he violated Sections 17(a)(2) and 17(a)(3) of the Securities

Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)(2), (3)], and consents to:

1. A permanent injunction against violations of Sections 17(a)(2) and (3) of the Securities Act [15 U.S.C. § 77q(a)(2), (3)]. Section 20(b) of the Securities Act provides that the Commission may seek, and the Court may grant, permanent injunctions against violations of the federal securities laws. 15 U.S.C. § 77t(b);

2. An injunction that permanently restrains and enjoins Masiz from providing information to, soliciting, or accepting investments or funds from, any investor or potential investor regarding the offer or sale of any securities issued by any entity that Masiz directly or indirectly owns, controls, consults for, or is employed by, without first providing such person with a written disclosure regarding Masiz's prior regulatory history, and keeping a written record that he provided such written disclosure to that person. The Court has the authority to order this type of conduct-based injunction under Section 21(d)(5) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78u(d)(5)] ("Equitable Relief.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors"). This injunction provides meaningful protection to investors or potential investors who, in the future, receive information from Masiz about his companies or their technology without imposing an undue restraint on Masiz's ability to work or to discuss the technical aspects of his companies' technology. The injunction specifies the particular language of the disclosure that Masiz must make, so that there is no

ambiguity about whether the disclosure is sufficient. The injunction further specifies the circumstances in which Masiz must make the disclosure, so that there is no uncertainty about when the disclosure is required. The injunction also specifies that Masiz must keep a written record of providing the disclosure to all individuals to whom he provided it so that it will be easy to determine whether Masiz has complied with the Court's injunction;

3. An order barring Masiz from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)]. Under section 20(e) of the Securities Act [15 U.S.C. § 77t(e)], a court may bar an individual found guilty of securities law violations from serving as an officer or director of a public company. The parties have reached agreement that an officer and director bar is appropriate here in light of Masiz's admissions to securities law violations and his history of prior regulatory sanctions; and

4. An order to pay a civil penalty of $120,000. Under Section 20(d)(2) of the Securities Act, the Commission may seek, and the Court may order, civil penalties for violations of the federal securities laws. *See* 15 U.S.C. § 77t(d)(2). The parties have reached agreement that the requested penalty is appropriate in light of the other relief provided as a result of this settlement.

These substantive terms are located in the Final Judgment, Sections I through IV, and in paragraph 2 of Masiz's Consent. The remaining items in the Consent and Final Judgment relate to compliance with the

terms, including, for example, payment terms and potential future distributions (Final Judgment § IV and Consent ¶ 3), acknowledgments concerning the bankruptcy implications of this resolution (Final Judgment § VI), agreements regarding limitations on the source of funds to pay the civil penalty and tax implications (Consent ¶ 4), waiver of rights of appeal (Consent ¶6), notice of potential collateral consequences (Consent ¶ 11), Masiz's agreement not to deny that he violated Sections 17(a)(2) and (a)(3) of the Securities Act (Consent ¶ 12), and a waiver of rights under statutes relating to attorneys' fees (Consent ¶ 13). Many of these items relating to compliance with the terms of the judgment mirror the same items in the Commission's settlement with defendant Craig Medoff, which the Court approved and entered last year. *See* Dkts. 204 (Medoff Final Judgment); 198-1 (Consent of Craig Medoff).

Filed along with the proposed Final Judgment is the Commission's motion to dismiss voluntarily its claims in Counts 1, 3, and 4 of the Complaint that Masiz violated Sections 10(b), and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b), 78t(a)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], and Section 17(a)(1) of the Securities Act. These offenses require proof that Masiz acted with scienter.

The Commission and Masiz submit that these collective settlement terms are fair and reasonable under the circumstances. Together, these terms implement the Court's partial ruling on summary judgment and provide additional meaningful relief and protection for investors. Sums paid by Masiz towards this judgment may be combined with other moneys paid on judgments

in this case and distributed to investors. The injunctive relief serves to place prospective investors on notice of Masiz's disciplinary history and thus serves the public interest. The parties believe that the settlement represents an equitable compromise of their claims and conserves the parties' resources appropriately. *See SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 294 (2d Cir. 2014) ("the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the public interest would not be disserved") (internal quotation omitted).

For the reasons outlined above, the Commission and Masiz jointly request that the Court enter the attached proposed Final Judgment as to Defendant Masiz.

SECURITIES AND EXCHANGE COMMISSION

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