

JEFFREY S. CHIESA
ATTORNEY GENERAL OF NEW JERSEY
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Counsel for Plaintiff

FILED

MAY 24 2013

Peter E. Doyne, A.J.S.C.

By: Victoria A. Manning
Deputy Attorney General



Paul E. Minnefor
Deputy Attorney General



JEFFREY S. CHIESA, Attorney General of
New Jersey, on behalf of ABBE R. TIGER,¹
Chief of the New Jersey Bureau of
Securities,

Plaintiff,

v.

THOMAS J. FAGAN,
Individually and as Chairman of the
Board, President and
Chief Executive Officer of
Energex Systems, Inc.,
Managing Member and President of
Arbios Acquisition Partners, LLC,
and as Chairman of the Board,
President and Chief Executive
Officer of Arbios Systems, Inc.;
CANDACE FAGAN, Individually;
ENERGEX SYSTEMS, INC.,
a Delaware corporation;
ARBIOUS ACQUISITION PARTNERS,
LLC,
a Delaware limited liability company; and

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
CHANCERY DIVISION
GENERAL EQUITY

Civil Action

Docket No. BER-C-204-11

**CONSENT ORDER AND FINAL
JUDGMENT AS TO DEFENDANTS
THOMAS J. FAGAN, ENERGEX
SYSTEMS, INC., ARBIOS
ACQUISITION PARTNERS, LLC
AND ARBIOS SYSTEMS, INC.**

¹ This action was commenced by former Attorney General Paula T. Dow on behalf of Abbe R. Tiger, Chief of the New Jersey Bureau of Securities. In accordance with R. 4:34-4, the caption has been revised to reflect the current Attorney General, Jeffery S. Chiesa.

ARBIOS SYSTEMS, INC.,
a Delaware corporation

Defendants.

This matter was initially presented to the Court by the Attorney General of New Jersey, on behalf of Abbe R. Tiger, Chief of the New Jersey Bureau of Securities (“Plaintiff” or “Bureau Chief”), (Deputy Attorneys General Victoria A. Manning and Paul E. Minnefor, appearing), pursuant to N.J.S.A. 49:3-69(a) for violations of the New Jersey Uniform Securities Law (1997), N.J.S.A. 49:3-47 et seq. (“Securities Law”). On October 18, 2011, the Court appointed William D. Wallach, Esq. as the Special Fiscal Agent over Defendants Energex Systems, Inc. (“Energex”), Arbios Systems, Inc. (“ASI”) and Arbios Acquisition Partners, LLC (“AAP”) (collectively, the “Entity Defendants”) with the powers set forth in N.J.S.A. 49:3-69(c), among others, and on September 26, 2012, Mr. Wallach was appointed Receiver over Energex (“Special Fiscal Agent/Receiver”). On September 26, 2012, the Honorable Harry G. Carroll entered an Order Granting In Part Plaintiff’s Motion for Partial Summary Judgment against Defendant Thomas J. Fagan, pro se, (“Fagan”) on the following:

- a) Count IV on liability against Fagan for acting as an unregistered agent in connection with sales of stock issued by Energex, in violation of N.J.S.A. 49:3-56(a);
- b) Count VI on liability against Fagan for selling unregistered securities in connection with the Energex stock sales, in violation of N.J.S.A. 49:3-60;
- c) Count V on liability against Energex for employing an unregistered agent, in violation of N.J.S.A. 49:3-56(h); and
- d) Count VI on liability against Energex for selling unregistered securities, in violation of N.J.S.A. 49:3-60.

The Court's September 26 Opinion ("Sept. 26 Opinion") included, among others, the following findings of fact and conclusions of law:

- a) Starting in at least 2002, Fagan has served as Chairman of the Board, President, and Chief Executive Officer of Energex. Sept. 26 Opinion at 7.
- b) Fagan created the subscription agreement that was provided to Energex shareholders. Id.
- c) Every Energex stock certificate and subscription agreement was either personally signed by Fagan or was signed on his behalf by an Energex employee who was authorized by Fagan to use his signature stamp. Ibid.
- d) From at least 2000 to 2002, Fagan personally spoke with most Energex shareholders before they invested and at least initially Fagan was personally responsible for everything that prospective shareholders were told about investing in Energex. Ibid.
- e) In their totality, the facts demonstrate Fagan's control over Energex and his participation in the sale of Energex securities. Sept. 26 Opinion at 8.
- f) Fagan set the offer price per share of the Energex stock. Sept. 26 Opinion at 7.
- g) From 2000 to February 18, 2009, at least 344 transactions in Energex stock occurred. Id.
- h) As of September 21, 2009, Fagan served as the Director, Chairman of the Board, President, and Chief Executive Officer of ASI. Sept. 26 Opinion at 8.
- i) After September 21, 2009, approximately fifty one investors purchased ASI stock, at least thirteen of whom resided in New Jersey. Id.
- j) In their totality, the facts demonstrate Fagan's control over ASI and his participation in the sale of ASI's securities. Ibid.
- k) Fagan was not registered with the Bureau. Sept. 26 Opinion at 7.

- l) Fagan acted as an agent of Energex and ASI, as defined by N.J.S.A. 49:3-49(b) of the Securities Law. Id. at 7-8.
- m) The ASI Promissory Notes are securities. Sept. 26 Opinion at 8.
- n) Fagan acted as an unregistered agent in selling Energex stock in violation of N.J.S.A. 49:3-56(a). Id. at 8, 10.
- o) Energex violated N.J.S.A. 49:3-56(a) by employing Fagan, who was an unregistered agent. Id. at 10.
- p) Fagan and Energex violated N.J.S.A. 49:3-60 by selling the Energex stock, which was not registered with the Bureau and not exempt from registration. Id. at 11.

Plaintiff, Fagan and the Special Fiscal Agent/Receiver have agreed to resolve any and all issues in controversy in this action on the terms set forth in this Consent Order and Final Judgment (“Consent Order”). This Court has reviewed and approved entry of this Consent Order by the Special Fiscal Agent/Receiver.

In addition to the Court’s findings in the September 26, 2012 Opinion, the Bureau Chief makes the following findings of fact and conclusions of law, which Fagan and the Entity Defendants neither admit nor deny:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Energex was formed by defendant Fagan in Delaware on August 4, 1999 under the name Orthomedics, Inc. Its name was changed to Orthosonix, Inc. on March 23, 2000 and later to Energex Systems, Inc. on or about January 16, 2003. At all relevant times from 1999 through 2011, Energex was located in Old Tappan, New Jersey; then Emerson, New Jersey; and later in Allendale, New Jersey.

2. From the formation of Energex through approximately 2002, Fagan was on the Board of Directors and President of Energex. Thereafter, Fagan was the sole officer and Board member of Energex. He also functioned as the de facto Secretary and Treasurer of Energex, although he used the signature stamp of Richard Tienken to sign the Energex stock certificates as the nominal Treasurer and Secretary of Energex. Fagan had full control over Energex's finances.
3. From at least 1999 to 2011, Fagan effected the sale of Energex stock to at least 344 investors in approximately 26 states. The Energex stock sales raised approximately \$9.5 million.
4. Fagan and Energex claimed to have two (2) biotechnology products in FDA-approved clinical trials, the immunomodulator a/k/a the Hemo-modulator and the Hemo-sterilizer, both of which purportedly relied upon the use of UV light to inactivate blood-borne pathogens, such as HIV/AIDS and Hepatitis C.
5. Energex had a separate technology, the "Energex device," which purportedly utilized pulsed radio frequency energy to treat chronic temporomandibular joint (TMJ) dysfunction and chronic anterior knee pain.
6. Between in or about 1999 and through in or about April 2011, the main source of Energex's funding was the approximately \$9.5 million generated from the sale of the Energex stock, plus a \$750,000.00 payment for the Hemo-modulator device. It also received nominal revenue from the sale and use payments of the Energex device. All other funds used to operate Energex were from the sale of the Energex stock.
7. In raising these funds, Fagan failed to disclose certain material information to Energex investors prior to the sale of the Energex Stock, including, but not limited to:
 - a. Energex was actually insolvent;

- b. Fagan was not registered with the Bureau or any securities regulator to sell securities;
 - c. After 2002, Energex was operated by Fagan without the oversight of a Board of Directors and no financial audits of the company were conducted;
 - d. Fagan used Energex funds for his and/or Candace Fagan's personal benefit, including:
 - (i) jewelry, landscaping for the Fagans' residence, trips to casinos and a sports club membership, which were charged to the Energex American Express (Amex) card and paid for by unreimbursed Energex funds;
 - (ii) travel expenses, including trips to the 2006 Winter Olympics in Torino, Italy, Nevada, Florida and Atlantic City, New Jersey, paid for with unreimbursed Energex funds;
 - (iii) personal casino hotel expenses in Las Vegas, Nevada, paid for with unreimbursed Energex funds;
 - (iv) more than \$2.1 million in Energex funds transferred from Energex to Fagan since at least 2003 through approximately 2009.
8. On or about September 21, 2009, Fagan became the Chairman of the Board, CEO and President of ASI, and took control of ASI through its Chapter 11 bankruptcy reorganization plan. Thereafter, Fagan acted as an unregistered agent in effecting or attempting to effect the sale of securities in the form of ASI stock and "membership units" consisting of 20,000 shares of Energex stock, a 5 year warrant to purchase 20,000 Energex shares at \$.75, and the benefit of 75,000 shares of Arbios Systems, Inc., all of which were sold outside of the confirmed Chapter 11 amended plan of reorganization ("ASI Bankruptcy Plan").

9. Fagan caused investor funds raised by the sale of Energex stock after 2009 to be paid, at times, to AAP, which Fagan formed to participate in the ASI Bankruptcy Plan. Similarly, Fagan caused investor funds raised for the sale of ASI stock on or after September 21, 2009, to be paid, at times, to Energex. Additionally, Fagan solicited investors to purchase the Energex stock and the ASI stock on Energex letterhead, signed by Fagan as “Partner” of AAP, prior to the September 21, 2009 effective date of the ASI Bankruptcy Plan. As a result, Fagan caused AAP and Energex to act as unregistered broker-dealers as defined in N.J.S.A. 49:3-49(c).
10. In or about December 2009 through at least May 2010, Fagan, effected or attempted to effect the sale of at least seven (7) ASI Promissory Notes issued by ASI (“ASI Promissory Notes”), through Fagan, which are “securities” as defined in the Securities Law.
11. The ASI Promissory Notes and “membership units” were not registered with the Bureau, although they were required to be and were not exempt from registration. They were also sold outside of the ASI Bankruptcy Plan.
12. Funds raised from investors by Fagan from the sale of the unregistered Energex stock and the ASI stock were paid to either Energex or AAP. Funds raised from the sale of the ASI Promissory Notes were paid to ASI.
13. At all relevant times, Fagan controlled the bank accounts of the Defendant Entities.
14. Fagan transferred investor funds between the Defendant Entities and made inter-company “loans” to Energex.
15. Fagan transferred thousands of dollars of AAP and ASI funds to himself and withdrew funds from AAP’s account through “debit” cash transactions, which were used for Fagan’s personal benefit.

16. Energex, through Fagan, violated the antifraud provisions of the Securities Law, specifically, N.J.S.A. 49:3-52(b) and (c), and acted as a broker-dealer without registration, in violation of N.J.S.A. 49:3-56(a).
17. AAP, through Fagan, violated the antifraud provisions of the Securities Law, specifically, N.J.S.A. 49:3-52(c), sold unregistered securities in the form of the Energex stock, in violation of N.J.S.A. 49:3-60, and acted as a broker-dealer without registration, in violation of N.J.S.A. 49:3-56(a).
18. ASI, through Fagan, violated the antifraud provisions of the Securities Law, specifically, N.J.S.A. 49:3-52(c), sold unregistered securities in the form of the Energex stock, in violation of N.J.S.A. 49:3-60, and employed Fagan as an unregistered agent, in violation of N.J.S.A. 49:3-56(h).
19. Fagan omitted material facts to investors in connection with the offer and sale of the Energex stock in violation of N.J.S.A. 49:3-52(b). Fagan also violated the antifraud provisions of N.J.S.A. 49:3-52(c).

THEREFORE, based on the Court's September 26, 2012 Order Granting In Part Plaintiff's Motion for Partial Summary Judgment against Fagan, and the Bureau Chief's foregoing findings of facts and conclusions of law, it is on this 24th day of May, 2013, ORDERED AND AGREED THAT:

20. Fagan is assessed a civil monetary penalty pursuant to N.J.S.A. 49:3-70.1 for violations of the Securities Law stated above in the amount of \$1,000,000, which shall be paid to the Bureau, and is remedial and not punitive in nature.

21. Fagan is permanently enjoined from controlling and acting as an officer and/or director of an issuer offering for sale or selling any security to, from or within New Jersey including, but not limited to, Energex, AAP, ASI and/or their successors and/or assigns.
22. Fagan is permanently enjoined and restrained from engaging in the conduct set forth in the Verified Complaint.
23. Fagan, individually and by or through any corporation, business entity, agent, employee, broker, partner, officer, director, attorney, stockholder and/or any other person who is directly or indirectly under his control and/or direction, is permanently enjoined from the issuance for sale, sale, offer for sale, purchase, offer to purchase, solicitation, advancing the sale of and/or promotion of, negotiation, advising regarding the sale, advertisement or distribution from or within the State of New Jersey, of any security as that term is defined in N.J.S.A. 49:3-49 of the Securities Law.
24. Fagan is permanently enjoined from acting as an agent as defined in N.J.S.A. 49:3-49(b), except that sales of securities owned by Fagan or on his benefit must be sold through a registered broker-dealer.
25. Fagan is permanently enjoined from acting from and within the State of New Jersey as: an agent as defined in N.J.S.A. 49:3-49(b); a broker-dealer as defined in N.J.S.A. 49:3-49(c); an investment adviser as defined in N.J.S.A. 49:3-49(g); or an investment adviser representative as defined in N.J.S.A. 49:3-49(s).
26. Fagan is permanently enjoined from violating the anti-fraud provisions of the Securities Law, N.J.S.A. 49:3-52 (a)-(d).

27. Fagan is denied all exemptions contained in N.J.S.A. 49:3-50 subsection (a) paragraph 9, 10, and 11 and subsection (b), and the exemptions to the registration requirements provided by N.J.S.A. 49:3-56(b), N.J.S.A. 49:3-56(c) and N.J.S.A. 49:3-56(g).
28. Energex, AAP and ASI by or through any person, corporation, business entity, agent, employee, broker, partner, officer, director, attorneys, stockholder and/or any other person who is directly or indirectly under their control or direction, are permanently restrained and enjoined from directly or indirectly, issuing, offering the sale or selling, offering to purchase or purchasing, distributing, promoting, advertising, soliciting, negotiating, advancing the sale of and/or promoting securities, or advising regarding the sale of any securities, in any manner to any resident in New Jersey other than existing holders of securities issued by the Defendant Entities.
29. Energex, AAP and ASI, by or through Fagan, are permanently restrained and enjoined from directly or indirectly issuing, offering the sale or selling, offering to purchase or purchasing, distributing, promoting, advertising, soliciting, negotiating, advancing the sale of and/or promoting securities, or advising regarding the sale of any securities, in any manner to, from, or within the State of New Jersey.
30. Energex, AAP and ASI by or through any person, corporation, business entity, agent, employee, broker, partner, officer, director, attorneys, stockholder and/or any other person who is directly or indirectly under their control or direction, are permanently restrained and enjoined from directly or indirectly:
- a. issuing, offering the sale or selling, offering to purchase or purchasing, distributing, promoting, advertising, soliciting, negotiating, advancing the sale of and/or promoting securities, or advising regarding the sale of any securities, in any manner

from the State of New Jersey, in violation of the Securities Law or this Consent Order;

- b. engaging in the conduct alleged in the Verified Complaint;
- c. violating the Securities Law;
- d. allowing or permitting Fagan to directly or indirectly hold a controlling shareholder interest, defined as (1) an individual who owns a majority of the shares or who, for other reasons, has domination or control of the corporation, or (2) a member of a small group of shareholders who collectively own a majority of shares or otherwise have that domination or control, and/or (3) one who has control of a large enough block of voting stock shares in a company such that no one shareholder or coalition of shareholders can successfully oppose a motion. in Energex, AAP and/or ASI, their successors, and/or assigns; and
- e. allowing or permitting Fagan to act as an officer or director of Energex, AAP and/or ASI, their successors, and/or assigns for so long as there are investors, including shareholders, who are residents of New Jersey.

31. Energex, AAP and ASI are denied all exemptions contained in N.J.S.A. 49:3-50 subsection (a) paragraph 9, 10, and 11 and subsection (b), and the exemptions to the registration requirements provided by N.J.S.A. 49:3-56(b), N.J.S.A. 49:3-56(c) and N.J.S.A. 49:3-56(g).

32. A civil monetary penalty may be imposed on Energex, ASI, and AAP pursuant to N.J.S.A. 49:3-70.1 for each violation of the antifraud and registration provisions of the Securities Law of not more than \$10,000 for the first violation and not more than \$20,000 for a second and each subsequent violation. In view of the permanent injunction agreed to by Energex, ASI

and AAP set forth in above, imposition of a civil monetary penalty would not best serve the shareholders or public interest.

33. Energex is liable to pay restitution in the amount of \$9.5 million. AAP and ASI are jointly and severally liable to pay restitution in the amount of \$765,000.

34. The Defendant Entities may be reconstituted as operational entities provided the Special Fiscal Agent/Receiver: (a) appoints an independent Board of Directors with at least three (3) members who shall establish corporate governance policies, ensure the Defendant Entities' compliance with this Consent Order and the Securities Law, among other things; or (b) appoints a Board of Directors with at least five (5) members who shall establish corporate governance policies, ensure the Defendant Entities' compliance with this Consent Order and the Securities Law, among other things, with the oversight of a monitor ("Monitor") for five (5) years from the date of entry of this Consent Order to be paid for by the Defendant Entities. The Monitor shall oversee the Defendant Entities' compliance with corporate governance policies, this Consent Order and the Securities Law, and such other matters as the Board of Directors may determine. The Monitor shall be an independent third party who is not an employee or agent of the Defendant Entities. The Monitor shall have unfettered access to all documents and information as necessary, in its sole discretion, to ensure the Defendant Entities' compliance with this Consent Order and with corporate governance policies established by the Board of Directors. The Monitor shall have the authority to meet with and require reports on any subject from any officer, director or employee of the Defendant Entities. The Bureau may, at any time, request a written report from the Monitor for information regarding the Defendant Entities' compliance with this Consent Order. Such report shall be furnished to the Bureau within thirty (30) days of the Bureau's request.

FINAL JUDGMENT

35. Final judgment in the amount of \$1,000,000 is entered against Thomas J. Fagan as a civil monetary penalty pursuant to N.J.S.A. 49:3-70.1.
36. Final judgment is hereby entered against:
- a. Energex in the amount of \$9.5 million, constituting restitution; and
 - b. ASI and AAP, jointly and severally, in the amount of \$765,000, constituting restitution.
37. The final judgment imposed by this Consent Order against the Defendant Entities will be deemed satisfied upon the distribution of the assets of Energex, ASI and AAP through the Special Fiscal Agent/Receiver, in accordance with a plan that is submitted to and approved by the Court on notice to all interested parties regardless of whether there are assets to distribute. Alternatively, if the Defendant Entities are reconstituted as operational entities and make a fully funded rescission offer to shareholders that is compliant with the Securities Law and not in violation of this Consent Order, the final judgment against the Defendant Entities will be deemed satisfied.

ADDITIONAL PROVISIONS

38. Funds used to satisfy payment of the final judgment herein must not have been obtained by Fagan and/or the Defendant Entities in violation of this Consent Order.
39. Payment of the final judgment shall be made by attorney trust fund account check, certified check or other guaranteed funds, made payable to the "State of New Jersey, Bureau of Securities" and delivered to the attention of the Bureau Chief, at the following address: Bureau of Securities, 153 Halsey Street, 6th Floor, Newark, New Jersey 07102. Any notices to the Bureau Chief shall be delivered to the Bureau Chief at the same address.

40. The civil monetary penalty has been assessed upon Fagan's representation that he is in dire financial condition and does not presently have the income or assets to satisfy the final judgment.
41. The final judgment is not dischargeable in bankruptcy and Fagan and the Defendant Entities waive any right to assert it is dischargeable in bankruptcy.
42. Nothing in this Consent Order shall prevent the Defendant Entities from seeking a modification of paragraphs 28 and 31 in the future, on notice in writing to the Bureau Chief, the Attorney General of New Jersey and all other interested persons.
43. In the event Fagan is convicted of any crime of embezzlement under state, federal or foreign law or any crime involving any theft, forgery or fraudulent practices in regard to any state, federal or foreign securities, banking, insurance, or commodities trading laws or anti-fraud laws, the Bureau Chief reserves the right to and may summarily bar Fagan from being a partner, officer or director of an issuer, broker-dealer or investment adviser, or from occupying a similar status or performing a similar function or from directly or indirectly controlling or being under common control or being controlled by an issuer, broker-dealer or investment adviser in this State, pursuant to N.J.S.A. 49:3-56(k). Fagan waives any rights he may have to a hearing under N.J.S.A. 49:3-50(c).
44. Fagan, Energex, ASI and AAP hereby release and give up any and all claims and rights, statutory, equitable, and/or common law, known and unknown, from the past, current and/or future, arising out of this case, which they may have against the State of New Jersey, its agencies, agents and/or employees. This releases all claims, including those of which they are not aware. This release is binding upon Fagan's heirs and executors and/or administrators of his estate, and the successors and/or assigns of Energex, ASI and AAP.

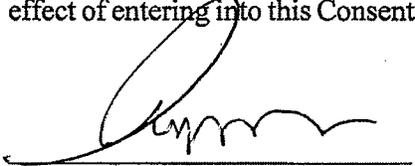
- 45. This Consent Order may be enforced pursuant to the Rules of Court.
- 46. As used in this Consent Order, the plural shall include the singular and the singular shall include the plural. In addition, "or" and "and" shall be interpreted conjunctively.
- 47. Fagan and the Entity Defendants shall not represent or imply that any business practice or other act or practice hereinafter used or engaged in by him has been required or approved, in whole or part, by the Attorney General, the Bureau of Securities, the State of New Jersey or any of the State's agencies, agents or subdivisions.
- 48. Fagan represents that he has been given ample opportunity to seek legal advice prior to signing this Consent Order and Final Judgment.
- 49. Fagan waives any right he may have to appeal this Consent Order.



PETER E. DOYNE, A.J.S.C.

*No objection to
for or entry*

I hereby consent to the form and entry of this Consent Order and Final Judgment. I represent to the Court and parties that I have had sufficient and adequate opportunity to seek counsel on the legal effect of entering into this Consent Order and Final Judgment, and that I do so freely and voluntarily.



THOMAS J. FAGAN, Defendant

Dated: 5/23/13

Consent to the form and entry of this
Consent Order and Final Judgment:

JEFFREY S. CHIESA
ATTORNEY GENERAL OF NEW JERSEY
Division of Law
124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07101
Attorney for Plaintiff

By: _____
Paul E. Minnefor
Deputy Attorney General

Dated:

Consent to the form and entry of this
Consent Order and Final Judgment:

WILLIAM D. WALLACH, ESQ.
Receiver for
Energex Systems, Inc.
Special Fiscal Agent for
Arbios Systems, Inc. and
Arbios Acquisition Partners, LLC

Dated:

I hereby consent to the form and entry of this Consent Order and Final Judgment. I represent to the Court and parties that I have had sufficient and adequate opportunity to seek counsel on the legal effect of entering into this Consent Order and Final Judgment, and that I do so freely and voluntarily.

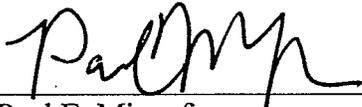
THOMAS J. FAGAN, Defendant

Dated:

Consent to the form and entry of this
Consent Order and Final Judgment:

JEFFREY S. CHIESA
ATTORNEY GENERAL OF NEW JERSEY
Division of Law
124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07101
Attorney for Plaintiff

By:


Paul E. Minnefor
Deputy Attorney General

Dated:

5/24/13

Consent to the form and entry of this
Consent Order and Final Judgment:

Dated:

WILLIAM D. WALLACH, ESQ.
Receiver for
Energex Systems, Inc.
Special Fiscal Agent for
Arbios Systems, Inc. and
Arbios Acquisition Partners, LLC

