INITIAL DECISION RELEASE NO. 1089
ADMINISTRATIVE PROCEEDING
FILE NO. 3-17104

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of BIOELECTRONICS CORP., IBEX, LLC, ST. JOHN'S, LLC, ANDREW J. WHELAN, KELLY A. WHELAN, CPA, and ROBERT P. BEDWELL, CPA	INITIAL DECISION December 13, 2016

APPEARANCES: Charles D. Stodghill, Paul W. Kisslinger, Sarah H. Concannon, and Thomas B. Rogers for the Division of Enforcement, Securities and Exchange Commission

Stanley C. Morris and Brian T. Corrigan, Corrigan & Morris LLP, for Respondents BioElectronics Corp., IBEX, LLC, St. John's, LLC, Andrew J. Whelan, and Kelly A. Whelan, CPA

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

Respondent Andrew Whelan (A. Whelan) is the president, CEO, and principal financial officer of Respondent BioElectronics Corp. (BIEL), a Maryland medical device manufacturer. Respondents St. John's, LLC, and IBEX, LLC, are owned and controlled by Patricia Whelan (P. Whelan), A. Whelan's wife, and Respondent Kelly Whelan (K. Whelan), the daughter of A. Whelan and P. Whelan. In dozens of unregistered transactions between 2009 and 2014, BIEL issued millions of dollars' worth of convertible notes to IBEX and St. John's, and IBEX and St. John's converted them to BIEL stock and then sold them to third parties, or sold the notes to third parties without conversion. Also, for its 2009 fiscal year, BIEL improperly recognized $366,000 in revenue on two "bill and hold" transactions.

This initial decision: (1) finds that these five Respondents violated Section 5 of the Securities Act of 1933; (2) finds that BIEL violated Section 13 of the Securities Exchange Act of 1934, that BIEL and A. Whelan violated Rules thereunder, and that A. Whelan caused some of BIEL's violations; (3) orders Respondents to cease and desist from committing and causing any

violations; (4) orders Respondents to disgorge a total of approximately $1,820,000 in ill-gotten gains, plus prejudgment interest; (5) permanently bars A. Whelan and K. Whelan from participating in offerings of penny stock; and (6) imposes civil penalties of $650,000 against St. John's and $130,000 against A. Whelan.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission commenced this proceeding on February 5, 2016, with an order instituting administrative and cease-and-desist proceedings (OIP) pursuant to Section 8A of the Securities Act of 1933, Sections 4C, 15(b), and 21C of the Securities Exchange Act of 1934, and Rule 102(e) of the Commission's Rules of Practice. The proceeding has ended as to Respondent Robert P. Bedwell, CPA. *BioElectronics Corp.*, Exchange Act Release No. 79176, 2016 SEC LEXIS 4034 (Oct. 27, 2016). The remaining Respondents (hereinafter Respondents) filed their answers on March 14, 2016. Prior to the hearing, I granted in part Respondents' motion for more definite statement and denied the parties' motions for summary disposition. *BioElectronics Corp.*, Admin. Proc. Rulings Release No. 4020, 2016 SEC LEXIS 2588 (ALJ July 26, 2016); *BioElectronics Corp.*, Admin. Proc. Rulings Release No. 3761, 2016 SEC LEXIS 1228 (ALJ Apr. 4, 2016).

Ten witnesses testified during a hearing held in Washington, D.C. the week of September 19-23, 2016. The admitted exhibits are listed in the record index issued by the Office of the Secretary on November 23, 2016. The Division of Enforcement and Respondents filed post-hearing briefs, and briefing was complete on November 18, 2016. Citations to the transcript of the hearing are noted as "Tr. __." Citations to the Division's exhibits are noted as "DX __," and citations to Respondents' exhibits are noted as "RX __." The page numbers of certain exhibits are cited to by the last non-zero numerical digits of their Bates numbers. The Division's and Respondents' post-hearing briefs are noted as "Div. Br. __" and "Resp. Br. __," respectively. The Division's and Respondents' reply briefs are noted as "Div. Reply __" and "Resp. Reply __," respectively.

B. Summary of Allegations

According to the OIP, A. Whelan founded BIEL and has served at all relevant times as its president, CEO, principal financial officer, and member of the board of directors. *See* OIP at 3. BIEL is a Maryland corporation that makes medical devices and patches. *See id.* at 2. It had a class of equity securities registered with the Commission from 2006 until it voluntarily withdrew its registration in 2011. *See id*. at 2 & n.2 K. Whelan is the manager, sole employee, and sole owner of IBEX, a Virginia limited liability company that made millions of dollars in loans to BIEL. *See id.* at 3. P. Whelan is the majority owner of St. John's, a Virginia limited liability company that also provided funding to BIEL. *See id.* K. Whelan is a minority owner of St. John's. *See id.*

Two alleged courses of conduct are at issue. First, between 2009 and 2014, BIEL received several million dollars in proceeds from a series of unregistered share sales. *See* OIP at

4; *see also* More Definite Statement. When BIEL needed funds, IBEX sometimes sold unrestricted BIEL shares in unregistered transactions, at the request of A. Whelan, directly to third-party purchasers at a discount to market prices. *See* OIP at 4. IBEX retained a percentage of the proceeds of each sale and forwarded the rest to BIEL, and in return BIEL provided a convertible note to IBEX and a new grant of unrestricted shares. *See id.* When each note came due, BIEL did not pay it; instead, BIEL provided IBEX with additional unrestricted shares in return for extending the note's due date. *See id.* BIEL and St. John's engaged in similar transactions between 2010 and 2012. *See id.* A. Whelan and K. Whelan directed the activities of BIEL and IBEX, and IBEX and St. John's were affiliates of BIEL at all relevant times. *See id.* The OIP alleges that by this conduct BIEL, IBEX, and St. John's violated, and A. Whelan and K. Whelan willfully violated, Securities Act Section 5, which generally prohibits selling unregistered securities. *See* OIP at 8-9.

Second, BIEL filed a Form 10-K on March 31, 2010, covering its 2009 fiscal year, which improperly recognized revenue on two bill and hold transactions, in violation of Generally Accepted Accounting Principles (GAAP). *See* OIP at 5-6. As relevant here, bill and hold transactions occur when a manufacturer has received a purchase order but "customers may not yet be ready to take delivery of the products." SEC Staff Accounting Bulletin No. 104, 68 Fed. Reg. 74436, 74438 (Dec. 23, 2003) (SEC SAB 104). One bill and hold transaction involved a distribution agreement with YesDTC Holdings, Inc. *See* OIP at 6. The transaction failed to meet GAAP requirements because YesDTC had no fixed commitment to purchase BIEL products, YesDTC never met the contractual requirement that it receive regulatory approval to sell BIEL products, and the agreement contained no fixed delivery schedule. *See id.* The other bill and hold transaction involved eMarkets Group, LLC, a distributor of BIEL products. *See id.* The transaction failed to meet GAAP requirements because the BIEL-eMarkets agreement contained no fixed delivery schedule and because certain product finishing activities called for under the agreement had not been completed. *See id.* The OIP alleges that by this conduct: BIEL violated Exchange Act Section 13(a) and Rule 13a-1 thereunder, which requires issuers to file accurate annual reports, and A. Whelan caused BIEL's violation; BIEL violated Exchange Act Section 13(b)(2)(A) and (B), which requires issuers to make and keep accurate books and records and to design and maintain adequate internal controls, and A. Whelan caused BIEL's violation; A. Whelan willfully violated Exchange Act Rule 13a-14, which requires certifications by an issuer's principal executive and financial officers of the accuracy of the issuer's Form 10-K; and A. Whelan willfully violated Exchange Act Rules 13b2-1 and 13b2-2, which prohibit falsification of an issuer's books and records and false statements by an issuer's officer or director to the issuer's accountant. *See id.* at 9-10.

Although the parties stipulated at the hearing to a number of facts, Respondents dispute the key allegations of the OIP. *See generally* Resp. Br. at 2-8. They aver that all securities at issue were exempt from registration under Securities Act Section 4 and all sales by St. John's and IBEX fall within the safe harbor under 17 C.F.R. § 230.144 (Rule 144). *See* A. Whelan Answer at 5; IBEX Answer at 5-6. They contend that IBEX was not an affiliate of BIEL. *See* Resp. Br. at 20-23. They deny that IBEX and St. John's sold shares for BIEL or acquired securities from BIEL for distribution. *See* IBEX Answer at 19; A. Whelan Answer at 20. And they assert that the revenue from the bill and hold transactions was correctly recognized, and that the transactions were in any event not material. *See* A. Whelan Answer at 21-23; Resp. Br. at

41-43. Although some of their arguments resemble affirmative defenses – for example, their argument that they relied on the Commission's silence regarding BIEL's failure to file periodic reports – the only formal affirmative defenses they assert are reliance on advice of professionals (which was stricken) and inability to pay. *See* Tr. 914-22; Resp. Br. at 37-38, 56, 71-75.

II. FINDINGS OF FACT

The findings and conclusions herein are based on the entire record. All documents and exhibits of record have been fully reviewed and carefully considered. I have determined all facts based on the preponderance of the evidence. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981). I have considered and rejected all arguments, proposed findings, and conclusions that are inconsistent with this initial decision.

A. Respondents

BIEL manufactures medical devices used for treating chronic pain. *See generally* Tr. 856-61; RX 178. BIEL currently has no general regulatory approval in the United States, although the Food and Drug Administration has approved its products for use in one narrow category of treatment, and its products are also sold for veterinary use. *See* Tr. 597, 860-61. BIEL was founded in 2000 as a Maryland corporation and is headquartered in Frederick, Maryland. Stipulation 2; BIEL Answer at 13. It considers itself a development stage company, and as of December 31, 2015, had sustained a total net loss since inception of $27,527,776. *See* RX 171Q at 1705, 1707. From 2009 to September 2016, BIEL has had a three-person board of directors, comprised of A. Whelan, A. Whelan's sister Mary Whelan (M. Whelan), and Richard Staelin. Stipulation 11. During that time, Staelin has been the chairman of the board and the sole member of the board's audit committee. Stipulations 19, 20. In 2007, during an investigation by the Maryland Securities Commissioner, BIEL agreed to temporarily "cease the offer and sale of [BIEL] securities." DX 83 at 166, 168 (of 214 pdf pages). It eventually paid a civil penalty and agreed to a cease and desist order. *See id.* at 162-63, 171-72 (of 214 pdf pages).

A. Whelan is the founder, CEO, president, and CFO of BIEL. Stipulation 1. He has a bachelor's degree in accounting from St. Peter's College. *See* RX171Q at 1715. From 1984 to April 2000, he worked as an executive and consultant in the health care industry. *See id.*; RX 171C at 1351. He is seventy-four years old and resides in Frederick, Maryland. *See* DX 81 at 1-2.

IBEX is a Virginia limited liability company. *See* IBEX Answer at 14. K. Whelan founded IBEX in 2005 and is its sole member. Stipulation 21. Between January 2008 and November 2014, IBEX loaned BIEL approximately $6.4 million in 135 separate transactions. *See* Stipulation at Ex. A. The record shows that IBEX's only line of business is financing BIEL. Tr. 878; *see* Tr. 415, 1048-49. Although K. Whelan denied that BIEL loans were IBEX's only business, she admitted that a "major part" of IBEX's revenue has come from financing BIEL and she did not identify any other business that IBEX conducts. *See* Tr. 415. K. Whelan initially capitalized IBEX with her own assets and the assets of her former husband, Robert Lorenz. Stipulation 22. BIEL and IBEX are related parties, according to BIEL's 2009 Form 10-K. *See* DX 51 at 23, 26.

K. Whelan has a bachelor's degree from the University of Maryland and is licensed as a certified public accountant. Tr. 413-14. She formerly worked as an accountant and as the controller of a private company. Tr. 414. Since 2005 she has been self-employed as a consultant, as proprietor of IBEX, and in other business ventures, including the sale of BIEL products. *See* Tr. 414-15, 417. Since 2003 she has also worked at BIEL as a consultant, sometimes for compensation and sometimes not, she has at times used BIEL's office space to perform her work for BIEL, she has attended "two or three" BIEL board meetings, and she has for years possessed and used a BIEL email address. *See* Tr. 241-42, 434-36; DX 30; *but see* Tr. 1069 (K. Whelan denied having an office at BIEL). She has supported herself since 2009 at least in part from the proceeds of the sale of BIEL stock. *See* Tr. 416. K. Whelan sometimes went by the name Kelly Lorenz. Tr. 345. She resides in Leesburg, Virginia. *See* Tr. 434.

St. John's is a Virginia limited liability company. *See* St. John's Answer at 12. P. Whelan formed St. John's in 2009. Stipulation 29. The company is owned 99% by P. Whelan and 1% by K. Whelan, K. Whelan is its registered agent, and K. Whelan has on at least one occasion signed a document for St. John's as its "Manager." *See* Tr. 502-03; DX 120 at 19. Since 2009, St. John's has loaned BIEL approximately $2.9 million in exchange for convertible notes. Stipulation 31. St. John's was funded by a combination of loans, apparently from A. Whelan, and by A. Whelan's $150,000 annual BIEL salary, apparently paid directly to St. John's. *See* Tr. 901-02. St. John's' only assets are BIEL securities and cash. *See* Tr. 901; RX 196.

B. BIEL Recognized Revenue from Bill and Hold Transactions for its 2009 Fiscal Year

1. BIEL Filed a Form 8A-12g in 2006, and Withdrew it in 2011

BIEL received a $750,000 loan from LH Financial in December 2005. *See* Tr. 640; RX 188 at 2147. In return, BIEL issued to LH Financial a convertible promissory note with a twenty-four-month term and an interest rate of eight percent, and with a conversion price that tracked the market price. *See* Tr. 1035; *but see* RX 188 at 2147, 2172 (stating that the conversion price was fixed at $0.25). One condition of the loan was that BIEL had to register its stock. *See* Tr. 640-41.

BIEL filed a Form SB-2 to register a stock offering under the Securities Act on February 13, 2006. *See* RX 188; RX 190 at 2203. It filed a Form 8A-12g to register its stock under the Exchange Act on February 16, 2006, and on that same day filed a Form SB-2/A. *See* RX 190 at 2203. Approximately four months later, on June 19, 2006, BIEL filed another Form SB-2/A. *See id.* It thereafter filed additional Forms SB-2 and SB-2/A between August 2006 and February 2007. *See id.*

Eventually BIEL determined that completing the registration process would be prohibitively expensive – "several hundreds of thousands of dollars" – and it elected to forego registration and instead pay a $78,000 contractual penalty to LH Financial. Tr. 641, 666. BIEL withdrew its original Form SB-2 by filing Forms RW on July 10, 2006, and again on July 13, 2006. *See* RX 189; *see also* RX 190 at 2203. It filed its most recent Form RW on March 16,

2007. *See* RX 190 at 2203. However, it did not file a Form 15 to terminate its Exchange Act registration until April 18, 2011. *See* RX 208.

Because all of BIEL's Forms SB-2 and SB-2/A were withdrawn no later than 2007, all the BIEL securities at issue in this proceeding were unregistered under the Securities Act.

2. BIEL Negotiated a Distribution Agreement With YesDTC in 2009

Joseph Noel is the former CEO of YesDTC, a company located in San Francisco, California. Stipulation 40; RX 169B at 1274. Noel also consulted for BIEL in 2008 and 2009 on "strategic planning issues" and investor relations. Stipulation 41; Tr. 378-79. Noel, on behalf of YesDTC, signed a distributorship agreement with BIEL in December 2009. Stipulation 42; RX 169B. The distributorship agreement gave YesDTC the exclusive right to sell certain BIEL products in Japan. *See* RX 169B at 1267-68; Tr. 372-73. Neither of the two copies of the distributorship agreement in the record are signed by BIEL. *See* Tr. 1323-24; DX 67 at 6318; RX 169B at 1275.

As of December 2009, however, YesDTC did not have regulatory clearance to sell BIEL products in Japan. Tr. 373-74. The YesDTC distributorship agreement accordingly contained a voidability provision: "[s]hould Distributor be unable to gain regulatory clearance within six months of contract execution, this agreement is voidable at the option of Distributor." RX 169B at 1267. That is, if YesDTC did not obtain Japanese regulatory clearance by June 2010, YesDTC could void the agreement, although A. Whelan's understanding was that YesDTC "could void the contract in the first six months." *See* Tr. 374, 376-77. In any event, if YesDTC had no regulatory clearance in Japan, BIEL would not have delivered its products to YesDTC. *See* Tr. 374.

The distributorship agreement required an initial purchase of 15,000 units at $10 per unit, and the shipping arrangement was "F.C.A. Frederick, Maryland, U.S.A.," meaning "the seller's responsibility [was] over when they're in the seller's warehouse." *See* RX 169B at 1269-70, 1276; Tr. 1338. The particular units YesDTC purchased were "an older model and inferior to the newer models of inventory." DX 14 at 13. Although BIEL issued an invoice to YesDTC, its usual practice was not to require purchase orders. *See* Tr. 366, 1318-19; DX 86 at 4250. Payment of $100,000 was required immediately, with the $50,000 balance to be paid within ninety days. *See* RX 169B at 1270. YesDTC timely made both payments. *See* RX 169C. On March 31, 2010, the same day YesDTC wired the $50,000 balance, Noel and A. Whelan discussed by email a modification to the agreement, whereby BIEL would refund the $50,000 under certain conditions, although it does not appear that the two had a meeting of the minds on the modification. *Compare* DX 112 (Noel sought confirmation that the $50,000 would be refunded if Japanese regulatory clearance took more than four months), *with* Tr. 379-81 (A. Whelan testified that he agreed only to refund the $50,000 "if we terminate the agreement"); Tr. 942, 948.

Ultimately YesDTC failed to obtain Japanese regulatory approval, and although BIEL shipped YesDTC some samples, BIEL never shipped the vast majority of the 15,000 units to YesDTC. *See* Tr. 351, 364, 377; Stipulation 43. The 15,000 units instead remained in BIEL's warehouse, even though YesDTC accounted for it as its own inventory. Tr. 377, 944; RX 169E at 1284. BIEL and YesDTC terminated the distributorship agreement by letter dated November 2, 2010, and signed by A. Whelan and Noel. DX 52. The letter stated that "YesDTC agrees to provide [BIEL] with access to previous[ly] shipped materials so that these materials can be return[ed] to proper storage in [BIEL's] facility." *Id.* Noel never formally requested a refund of any portion of the purchase price, however, nor did he receive a refund. *See* Tr. 662-63, 943.

3. BIEL Entered Into a Distribution Agreement With eMarkets in 2009

M. Whelan is sixty-seven years old and spent much of her career at AT&T and Lucent in marketing and sales, and eventually became a vice president at both companies. *See* DX 17 at 1; Tr. 619. She was one of BIEL's first investors and worked as its vice president of marketing between 2002 and 2003. *See* Tr. 518-19. She was not compensated in cash for this work, and conducted it through her company eMarkets. *See* Tr. 519-20. eMarkets is a Nevada limited liability company domiciled in New Jersey, which M. Whelan founded in 2001 and of which she is the president and managing director. Stipulations 37, 38. M. Whelan has also been BIEL's "PR person of last resort," also without cash compensation. Tr. 520. In 2003 she became a director of BIEL, and from 2003 to 2004 she was BIEL's corporate secretary. *See* Tr. 521. When M. Whelan was compensated by BIEL, it was through issuance of securities and credits against invoices. *See* Tr. 522-27; DX 23. She presently possesses twenty-four million BIEL shares, $115,000 worth of BIEL notes, and an unknown number of BIEL options. Tr. 534-35. She sold approximately $300,000 worth of BIEL investments in 2009. Tr. 636.

M. Whelan candidly admitted that she and other Whelan family members had "conflicts out the wazoo" with respect to BIEL. Tr. 549. One such conflict was the distribution agreement BIEL formed with eMarkets. *See* Tr. 550; Stipulation 39. The agreement, which is still in effect, covers BIEL's veterinary products and has resulted in $475,000 worth of payments by eMarkets to BIEL since 2009, of which approximately $320,000 represented product purchases (as opposed to marketing support and shipping costs). *See* Tr. 583-84, 649-50; DX 18 at 1.

A. Whelan and M. Whelan signed the distribution agreement on February 9, 2009. *See* DX 18 at 232, 242; Stipulation 39. The agreement required an initial purchase of 1,500 units – although M. Whelan testified that the initial purchase was "not included necessarily in this distributor agreement" – and M. Whelan accordingly wired $15,750 to BIEL after the agreement was signed. *See* Tr. 601-02, 605; DX 18 at 235; RX 181 at 1889. The agreement specified additional purchases in the first and succeeding years of the agreement. *See* DX 18 at 235. The agreement required written orders for purchases, but there is no documentary evidence that eMarkets provided a formal purchase order for the initial purchase, and M. Whelan cannot remember providing one. *See* DX 18 at 236; Tr. 605. In fact, eMarkets normally does not provide formal purchase orders pursuant to the agreement; emails are deemed sufficient. *See* Tr. 599-600, 603. Also, the agreement stated that orders were "due and payable by Distributor on net 30-day terms, FOB factory," by which M. Whelan understood that eMarkets bore the cost of shipping from BIEL. DX 18 at 236; Tr. 601.

eMarkets did not have orders for 1,500 units at the time of the initial purchase. *See* Tr. 605. The units stayed in BIEL's warehouse at M. Whelan's request, although she could not remember committing that request to writing prior to March 2010. *See* Tr. 606. The practice of storing eMarkets' inventory at BIEL's warehouse was repeated for all of eMarkets' 2009 purchases. *See* Tr. 672-73. According to M. Whelan and A. Whelan, eMarkets' inventory was "always" in BIEL's warehouse, but segregated and packaged in eMarkets' boxes. Tr. 370, 607, 654-55.

In approximately June 2009, BIEL decided to discontinue certain products for which M. Whelan had developed a market, so eMarkets bought the remaining inventory. *See* Tr. 624-25, 630. eMarkets at the time did not have orders for the total remaining inventory, and indeed, during all of 2009 it had eighty-nine sales totaling only approximately $15,000. *See* Tr. 584. In September 2009 eMarkets wired $90,000 to BIEL, and on December 15, 2009, BIEL issued an invoice to eMarkets for $110,835. *See* RX 181 at 1890, 1894, 1895a-b. Thus, eMarkets ordered approximately $216,000 worth of products in 2009 without immediate shipment, including the initial purchase of 1,500 units, and paid BIEL a total of approximately $105,000 in 2009, leaving a balance of $110,835 as of December 31, 2009. *See* DX 90 at 11842; RX 181 at 1893-94; Tr. 595. Although Respondents assert that eMarkets actually ordered approximately $219,000 worth of BIEL products in 2009, the evidence they cite in support of this assertion is ambiguous at best, and I find that the more reliable dollar amount is what BIEL eventually reported in its 2009 Form 10-K – "approximately $216,000." *See* Resp. Br. at 50-51 (citing RX 181); DX 51 at 21.

The dearth of purchase orders, and the ambiguity in at least one purchase order that was issued, make the record somewhat confusing on this point. For instance, on October 2, 2009, eMarkets issued a purchase order to BIEL for two units at a total price of $21, to be shipped to a customer in New York City via "Standard Shipping and Handling." *See* DX 12. One of the two units was part of eMarkets' initial purchase of 1,500 units, and the other unit was not. *See* Tr. 590-92. That one unit had already been purchased is not indicated anywhere on the purchase order, however, and M. Whelan relied on BIEL's "one person," its logistics manager, to keep track of both BIEL's and eMarkets' inventory, ensure that eMarkets was not charged twice, and otherwise manage eMarkets' bookkeeping. *See* Tr. 594-95; DX 12; *see also* DX 93 (discussing a "credit for PR services").

Jarenz LLC, a company owned by K. Whelan, signed a factoring agreement with BIEL in March 2010, whereby Jarenz purchased some of BIEL's accounts receivable. *See* DX 49 at 1731, 1739. Again, the documentation is somewhat confusing, but it appears that one such account receivable was the $110,835 eMarkets owed to BIEL. *See* Tr. 614-15; RX 181 at 1892, 1895. eMarkets paid almost $170,889 in June 2010, by three checks to Jarenz. *See* DX 22. The total amount of the checks exceeded the account payable balance, apparently because Jarenz had separately loaned money to eMarkets, so that eMarkets owed Jarenz more than $110,835 at the time. *See* Tr. 614-16; DX 22. That loan remains outstanding today. *See* Tr. 652.

4. BIEL Accounted for its Distributors' Payments as Bill and Hold Transactions

BIEL filed a Form 10-K for fiscal year 2009 on March 31, 2010. *See* Tr. 350; DX 51. A. Whelan signed the Form 10-K as BIEL's president, CEO, CFO, and director. *See* DX 51 at 47. BIEL reported that as of December 31, 2009, it had 16,011 holders of record of its common stock, current assets of $1,167,646, sales of $1,145,647, and a net loss of $259,977. *See* DX 51 at 16; RX 211 at 2740-41. However, in June 2011 it reported to OTC Markets that it had only 103 holders of record as of December 31, 2009, and 154 holders of record as of December 31, 2010. *See* RX 194B at 2293, 2313; *see also* Tr. 642-43, 910-11.

BIEL's reported revenues included "$150,000 of sales related to a bill and hold transaction. The units will be shipped in 2010 to help meet the distribution 2010 purchase obligation." DX 51 at 20. This statement in the Form 10-K referred to the YesDTC transaction. Tr. 350-51. BIEL's reported revenues also included "$216,000 of revenues related to bill and hold transactions and for which the related product is expected to be delivered during the fourth quarter of 2010." DX 51 at 21. This statement referred to the eMarkets transaction. Tr. 352.

In early 2010 BIEL lacked a chief financial officer. *See* Tr. 386. Esther Ko, an outside accountant, was effectively BIEL's CFO. Tr. 386; *see* DX 116. BIEL's auditor at the time was Berenfeld Spritzer Shechter & Sheer LLP, an accounting firm in Florida, and the audit manager was Brian Leitstein. Tr. 750; DX 115. Berenfeld was succeeded by Cherry, Bekaert & Holland (CBH). *See* DX 78 at 4546.

As part of its audit of BIEL's 2009 financial statements, Berenfeld noted that "[i]mproper revenue recognition" was an "Identified Fraud Risk" for the audit. DX 76 at 11508. In December 2009, Leitstein wrote a memorandum documenting the auditor's "basic understanding of [BIEL's] revenue recognition policies." DX 78 at 4546. According to Leitstein, BIEL recognized revenue "in accordance with the requirements of SAB 104," which states that revenue is normally earned when four criteria have been met. *Id.*; SEC SAB 104, 68 Fed. Reg. at 74437. One such criteria is that "[d]elivery has occurred or services have been rendered." DX 78 at 4547; SEC SAB 104, 68 Fed. Reg. at 74437. Leitstein noted that BIEL "has established with each distributor and customer that the products will be shipped as FOB shipping point, which implies that the sale has occurred at the seller's shipping dock." DX 78 at 4547. BIEL's Form 10-K, by contrast, represented that it recognized revenue when, in addition to the other three SEC SAB 104 criteria, "shipment has occurred or title of the goods has been transferred to our buyers." DX 51 at 26.

BIEL's Form 10-K also represented that it recognized revenue on bill and hold arrangements when the four normal revenue recognition criteria had not been met because shipment would occur at a later date, but the seven bill and hold criteria specified in SEC SAB 104 had been met. *See* DX 51 at 27; SEC SAB 104, 68 Fed. Reg. at 74439. In January 2010, an auditor noted in a work paper that no bill and hold transactions had been "identified or disclosed." DX 88 at 11864. In March 2010 Leitstein and Noel corresponded regarding the BIEL/YesDTC transaction. *See generally* DX 91. After Noel responded to a standard confirmation letter, Leitstein observed that because the YesDTC order had not been fully shipped, "[i]t appears that [YesDTC] and [BIEL] have entered into a Bill and Hold agreement." DX 91 at 11828. Leitstein requested additional information about two of the criteria: that the buyer requested the transaction be on a bill and hold basis, and that there was a fixed delivery schedule. *See id.*; SEC SAB 104, 68 Fed. Reg. at 74439. Noel replied that YesDTC requested the bill and hold arrangement because BIEL had an "ISO certified" warehouse and YesDTC did not, that storage at the manufacturer was customary within the industry, and that YesDTC planned to take possession of the remaining 15,000 units by December 31, 2010. *See* DX 91 at

11828. At about the same time he was corresponding with Leitstein, Noel made similar representations to Ko. *See* DX 86 at 4252-53. Specifically, that YesDTC had taken title to the goods, and that it was "good business sense" to store the goods in BIEL's ISO certified warehouse. *Id.* Also, although he had previously told Ko only that he intended to "draw the inventory as needed," he later informed her that his "plan" was to "use all of the 15K units by the end of the year." *Id.*

As for eMarkets, M. Whelan explained the nature of its purchases to Ko in an email dated March 23, 2010. *See* Tr. 651; RX 170C. M. Whelan stated that: (1) eMarkets' inventory stayed in BIEL's "FDA/ISO certified warehouse"; (2) BIEL had agreed to "drop ship orders to customers on demand"; (3) she anticipated that the goods would be sold and shipped to customers by December 31, 2010; and (4) eMarkets had "take[n] title to the goods" at the time of purchase. RX 170C; *see also* Tr. 607-08; DX 93 at 11814. M. Whelan's explanation of "drop ship" was not entirely clear, but it appears to refer to the practice of BIEL shipping eMarkets' purchased units directly to eMarkets' customers from BIEL's factory. *See* Tr. 588-93. Also, M. Whelan testified that eMarkets' purchased units were "complete and available for sale" notwithstanding the lack of adhesive in the units' package, because adhesive was not appropriate for the veterinary market. Tr. 652-53.

BIEL's own rationale for its bill and hold accounting is found in a memorandum, initially drafted by A. Whelan, that represented "what [BIEL] decided" would appear in its financial statements. *See* Tr. 390-91; DX 90. The memorandum includes a table analyzing the YesDTC and eMarkets transactions, and although it is unclear who prepared the table, Ko forwarded a draft of the memorandum (including the table) to Berenfeld on March 23, 2010. *See* RX 174 at 1776-79. On March 26, 2010, Bedwell provided Ko his comments, pertaining to the delivery schedule and transfer of risk of ownership. *See id.* at 1782. As to risk of ownership, Bedwell commented that "the inventory should be removed from the inventory balance at year-end and recorded as cost of good sold" so that "gross profit is not overstated." *Id.*

The first page of the memorandum stated that as of December 31, 2009, full payment for the YesDTC and eMarkets purchases had not been received, and that $50,000 and $110,835, respectively, constituted "Collection yet to receive." DX 90 at 11842. The table noted that one of the four criteria for normal revenue recognition – completed delivery – was not satisfied for either the YesDTC or the eMarkets transactions. *See* DX 90 at 11845. The table also noted that all seven bill and hold criteria had been met as to both transactions. *See id.*; DX 70 at 11840.

In particular, as to both transactions, the table noted that: (1) the president of each distributor had confirmed that the risks of ownership had passed to the buyer; (2) there was an executed contract and an invoice, with no mention of purchase orders; (3) neither distributor had an ISO certified warehouse and the president of each distributor confirmed that the bill and hold transactions had been at each distributor's request; (4) there was a fixed schedule for delivery in that all goods would be shipped by December 31, 2010; (5) the goods were packaged and segregated; and (6) the goods were ready for shipment. *See* DX 90 at 11845. The table also stated that there were no additional performance obligations, although as to YesDTC it noted the regulatory clearance contingency and that BIEL considered the contingency inapplicable to "sales that have already [been] made." *See id.* There is no mention of the Jarenz factoring agreement, Jarenz's loan to eMarkets, the lack of orders from end-purchasers, or the lack of purchase orders from eMarkets. *See id.* Berenfeld concluded that the "bill and hold arrangements at 12/31/09 appear reasonable." *Id.*

5. BIEL Restated its Financials in 2011

BIEL and the Commission's Division of Corporation Finance corresponded on the subject of BIEL's periodic filings throughout 2010 and 2011. *See generally* DX 83. The earliest such correspondence in the record is a letter to BIEL dated June 22, 2010, which noted that the company had filed its 2009 Form 10-K "using the file number of [BIEL's] February 2006 Exchange Act registration statement on Form 8-A12G." *Id.* at 208 (of 214 pdf pages). BIEL responded by letter dated July 7, 2010, in which it asserted that: (1) its 2009 Form 10-K was "voluntary"; (2) it intended to "promptly" file a Form 15 to withdraw its registration if necessary; (3) it "believed" that its Form 8A-12g had been withdrawn, apparently by the filing of Forms RW in July 2006 and March 2007; and (4) the "file number" it used to file its 2009 Form 10-K was BIEL's "identification number with SEC.gov." *Id.* at 162-63 (of 214 pdf pages). After additional correspondence, Corporation Finance sent a letter to BIEL dated September 3, 2010. *See id.* at 111 (of 214 pdf pages). BIEL responded by letter dated November 15, 2010, and signed by A. Whelan, in which it noted that in bill and hold transactions, a BIEL customer "must sign a purchase order." *Id.* at 67, 83, 105 (of 214 pdf pages).

Corporation Finance sent a letter to BIEL dated December 9, 2010, regarding BIEL's "plan to file an amendment to" its December 31, 2009, annual report on Form 10-K. DX 83 at 58 (of 214 pdf pages). BIEL responded by letter dated January 17, 2011, and signed by A. Whelan. DX 14 at 1, 25. BIEL's letter stated: (1) BIEL "shipped the goods, without recourse or return"; (2) BIEL management "believes all requirements have been met for revenue recognition as a distributor agreement, but not as [a] 'bill-and-hold' transaction"; (3) YesDTC "chose not to take delivery" and BIEL "agreed to keep the inventory that YesDTC abandoned by agreement"; (4) YesDTC's "units would be shipped to Japan upon receipt of regulatory clearance"; and (5) the YesDTC contract was "voidable but not voided." *Id.* at 13-17. BIEL's letter also stated that eMarkets surrendered all rights to its inventory in August 2010, even though BIEL reported (apparently in a periodic Commission filing) that as of September 30, 2010, eMarkets had "'requested shipment of the bill and hold transactions from 2009 in lieu of purchasing additional units.'" *Id.* at 16, 20. The letter further stated that "[d]elivery was replaced by transfer of title," and that the bill and hold transactions were immaterial because "the amount of inventory that was not forfeited was immaterial." *Id.* at 16.

Additionally, throughout 2010 BIEL lacked sufficient internal controls over financial reporting (ICFR). The 2009 Form 10-K contained a certification, signed by A. Whelan, stating that: (1) it does not contain any untrue statement of material fact, or omit to state a material fact necessary to make the statements made not misleading; (2) it fairly presents in all material respects BIEL's financial condition and results for fiscal year 2009; (3) A. Whelan was the sole officer responsible for establishing and maintaining ICFR; and (4) A. Whelan designed or caused to be designed such ICFR to provide reasonable assurance regarding the reliability of financial reporting and the preparation of GAAP-compliant financial statements. *See* DX 113. The Form 10-K itself, however, stated that BIEL's ICFR "was not effective as of December 31, 2009, due to the existence of significant deficiencies constituting material weaknesses." DX 51 at 32. These material weaknesses had been brought to BIEL's attention by Berenfeld. *See id.* at 33.

In particular, BIEL's ICFR possessed three material weaknesses, including "[i]nsufficient segregation of duties in [its] finance and accounting functions" because only one staff member performed nearly all aspects of its financial reporting process. DX 51 at 33. The three material weaknesses were also noted in BIEL's three Forms 10-Q filed in 2010. *See* DX 114B at 26-27; DX 114C at 29-30; DX 114D at 36-37. In April 2010 Berenfeld made numerous recommendations to remedy the material weaknesses, including adding personnel to handle cash receipts, bank reconciliations, and accounts receivable. *See* DX 72 at 306. Berenfeld also noted other "significant deficiencies," including: (1) supervisors could make check requests without supporting documentation; (2) BIEL had no formal or consistent process for handling reimbursements, such as for travel expenses; (3) checks could be written with only one signature; (4) BIEL lacked a consistent system for periodically counting inventory; and (5) BIEL did not maintain property and equipment inventory records, and lacked a formal procedure for ensuring proper documentation of disposal of fixed assets. *See id*. at 306-08. Although BIEL stated in its periodic filings that it was taking remedial action, there is no evidence that it did so during 2010. *See* DX 51 at 33-34; DX 114D at 37-38.

BIEL determined to restate its financials at some point prior to April 2011, and on March 31, 2011, it filed a Form 12b-25, which stated that it could not file its Form 10-K for 2010 on time. *See* DX 66; DX 114A. As noted, BIEL filed a Form 15 to terminate its registration on April 18, 2011. *See* RX 208. A few days later, BIEL's auditor stopped its work on BIEL's proposed restatement of earnings, and in May 2011, BIEL issued an unaudited restatement. *See* Tr. 359, 975; DX 13; DX 66. There were three reasons for the restatement, one of which was that BIEL "incorrectly recognized revenues on transactions previously characterized as 'bill and hold.'" DX 13 at 26. The approximately $366,000 in receipts from YesDTC and eMarkets were restated as deferred revenues, and the corresponding approximately $87,000 in cost of goods sold was restated as inventory. *See* DX 13 at 5, 26. As restated, BIEL had current assets of $1,254,225, sales of $779,794, and a net loss of $634,091, as of December 31, 2009. *See* DX 13 at 2-3.

C. St. John's Sold $400,000 Worth of Unregistered BIEL Shares in 2013 and 2014

BIEL issued a convertible promissory note to St. John's on June 30, 2010, in return for $95,794.67, and another on August 31, 2010, in return for $61,108.82. Stipulation 32; St. John's Answer at 12; RX 172B; RX 172C. These notes were converted to 91,808,086 BIEL shares on June 20, 2012. Stipulation 33; RX 172D. St. John's sold most of these shares in seventeen separate transactions on seven separate dates in 2013 and 2014; these are the only stock sales in this proceeding involving St. John's. *See* More Definite Statement, Ex. B; Stipulations 34, 35. St. John's filed a Form 144 on May 26, 2016, covering the transactions on five of the seven trade dates, but it filed no other Forms 144. Stipulation 36; DX 122; RX 176; Tr. 905-06.

The first promissory note was due on June 30, 2012, and accumulated simple interest at eight percent. *See* RX 172B at 1752. It was signed on behalf of St. John's by K. Whelan, and K.

Whelan was listed as the point of contact for notice to the noteholder. *See id.* at 1754. The conversion rate was $0.01 per share. *See id.* at 1752; DX 34 at 12520.

The second promissory note was due on August 31, 2012, and accumulated simple interest at eight percent. *See* RX 172C at 1755. It, too, was signed on behalf of St. John's by K. Whelan, and K. Whelan was listed as the point of contact for notice to the noteholder. *See id.* at 1757. The conversion rate was $0.007 per share. *See id.* at 1755.

On June 7, 2012, A. Whelan wrote to BIEL's transfer agent to request issuance of 91,808,086 shares of BIEL common stock to St. John's. *See* DX 120 at 9. The stock certificates were to be mailed to "BioElectronics Corporation, Attn: Andrew J. Whelan." *See id.* The letter stated that BIEL's board had authorized the conversion of the two St. John's loans to common stock, but did not note a date of authorization. *See id.* It also requested that the transfer agent issue the shares without a restrictive legend. *See id.*

In a letter dated June 19, 2012, and addressed to BIEL's transfer agent, Alexander Kuhne, BIEL's attorney, opined that St. John's' shares should be issued "without any Rule 144 restriction imprinted on the certificate." RX 172G at 1762. Kuhne opined specifically that St. John's' shares were "freely tradable and salable as a Brokers' Transaction, as defined by Rule 144(f)(1)(i)." *Id.* Kuhne did not make any assumptions or observations about which broker St. John's used for the conversion or intended to use for subsequent share sales, he did not opine on the need (if any) to file a Form 144, and he did not opine on whether the conversion satisfied Rule 144(e), concerning limitations on the amount of securities sold. *See generally id.* at 1761-62; 17 C.F.R. § 230.144(e). He did, however, opine on other pertinent matters, including that: (1) BIEL's financial information, as filed with OTC Markets, was current; (2) St. John's had "at least one member" who "could be considered an Affiliate" of BIEL; (3) the notes had a one year holding period pursuant to Rule 144(d)(1)(ii), which had been satisfied; and (4) St. John's' shares would be exempt from registration under the Securities Act. *See* RX 172G at 1762. He also noted that the conversion price for the notes had been amended to $0.002 per share. *See id.* at 1761. BIEL's board resolved to amend the conversion price, on a date not recorded on the resolution, because BIEL did "not have the cash to pay the Notes and wishe[d] to avoid being in default." DX 121 at 6-8 (of 8 pdf pages).

St. John's had trouble finding a broker to sell its shares. *See* Tr. 904. P. Whelan attempted to open an account with World Trade Financial Corporation in June 2012, but the broker "rejected the deposit due to insufficient paperwork to clear [its] due diligence process." DX 120 at 1-2, 8 (of 24 pdf pages). The market value of St. John's 91,808,086 shares at the time was approximately $390,000. *See id.* at 12. Eventually St. John's sold 81,808,086 of the shares through registered broker-dealers Primary Capital and Alpine Securities on seven dates between March 2013 and March 2014. *See* Tr. 904-05; Stipulation 35; RX 172D, 172F, 172H. The sales prices varied between $0.0005 and $0.0066 per share, and the total proceeds were $397,196.70. Stipulation 35; *see* RX 172H.

D. IBEX Sold Unregistered BIEL Shares

Sometime between 2003 and 2005, K. Whelan made her first loan to BIEL. *See* Tr. 1054. She knew at the time that BIEL was "struggling" and needed a cash infusion. Tr. 1054. She continued to loan money to BIEL between 2005 and 2009, apparently both personally and through IBEX. *See* DX 138 at 111-16; RX 1F at 40-43. Prior to June 2009, her loans were not documented individually, that is, the loan agreements were oral rather than written and IBEX (which had no accounting system) did not record them in a ledger, although BIEL tracked the total loan balance. *See* Tr. 1105, 1113, 1116-17.

Between 2006 and 2008, LH Financial obtained over $12 million in proceeds from selling BIEL stock converted from its BIEL loan. *See* Tr. 1035-37. BIEL's stock price dropped precipitously as a result, and A. Whelan testified that he did not wish to conduct a similar financing again. *See* Tr. 1037, 1040; *see also* Tr. 645 (M. Whelan testified that the LH Financial loan may well have been BIEL's "biggest mistake"). During this same period, K. Whelan, generally through IBEX, converted some of her BIEL loan balance into BIEL stock, and then sold the stock. *See* DX 138 at 111-16; RX 1F at 40-43. Although the terms of IBEX's conversions were not documented contemporaneously, they were substantially the same as the terms of LH Financial's conversions. *See* Tr. 1065-66.

At some point in 2009, BIEL's stock price increased "significantly," from approximately $0.0012 to $0.12 per share, because of progress in obtaining regulatory approval for its products. Tr. 1041-42, 1061-62, 1067; *see* DX 51 at 15. K. Whelan profited from the price increase; by early 2010 she had "$3.8 million in the bank." Tr. 1061-62, 1230; RX 210 at 2491. Her profits were apparently so substantial that in August 2009 she was able to both buy from St. John's a BIEL loan with a balance of approximately $530,000, and fund her own BIEL loan of $519,920, which were her largest individual BIEL loans up to that time. *See* Tr. 1216; DX 68; DX 138 at 111-16; RX 1F at 43.

K. Whelan's last originally undocumented loan to BIEL was in June 2009. *See* Tr. 1113; RX 1F at 43. In the fall of 2009, IBEX and BIEL executed a loan agreement involving a revolving convertible promissory note (Revolver) of up to $2 million, with a maturity date of January 1, 2015. *See* DX 43 at 1798; DX 44. The Revolver was signed on an unknown date by A. Whelan and K. Whelan, representing BIEL and IBEX, but was backdated with an effective date of January 1, 2005, and was intended to cover IBEX's loans to BIEL between January 1, 2005 and 2009. *See* Tr. 1113; DX 43 at 1798, 1804; DX 44 at 1778, 1786. The $530,000 loan IBEX assumed from St. John's was apparently not individually documented, and its terms are unknown, but it was eventually treated as part of the Revolver, at least for some purposes. *See* RX 1F at 43; *but see* Tr. 1216; RX 1D at 34. The $519,920 loan IBEX made directly to BIEL, as documented in an individual promissory note, was due on August 31, 2011, accrued simple interest at eight percent, and was convertible at a fixed price of $0.019 per share. *See* DX 68.

The Revolver balance (including the $530,000 loan IBEX assumed from St. John's) peaked on September 30, 2009, at $1,373,031.17. *See* RX 1F at 43. Thereafter, IBEX continued to loan money to BIEL in return for individual promissory notes rather than under the Revolver. *See* Tr. 473-75; Stipulation at Ex. A. The individual promissory notes generally had a two-year term, accrued eight percent interest, and permitted conversion to BIEL stock at any time at a fixed conversion price equal to half the closing market price on the day the loan was funded. *See* Tr. 869, 875, 1064; *e.g.*, DX 138 at 1239. In its 2009 Form 10-K, BIEL reported that the Revolver had been "entered into" on January 1, 2005, and that BIEL owed IBEX, a related party, approximately $1,288,000 on the Revolver and $519,920 separately. *See* DX 51 at 23-24. BIEL also reported that IBEX had "no current intention to pursue repayment" of any of this debt, but it did not report that IBEX took a security interest in all of BIEL's personal and intellectual property as collateral for the $519,920 note. *See* DX 7 at 12510; DX 51 at 23; DX 68 at 10188.

1. 2010 through 2012

Between January 2010 and August 2011, IBEX loaned money to BIEL in "dribs and drabs," specifically, thirty-two separate loans totaling approximately $2,160,000 and individually ranging from $5,000 to $310,000. *See* Stipulation at Ex. A. IBEX's loans were intermittent and in varying amounts because K. Whelan only provided a loan when she "was asked to make a loan to [BIEL]." Tr. 504. Such requests were mostly communicated to K. Whelan by her father, and at other times by BIEL board members, and K. Whelan could not remember ever refusing a loan request. *See* Tr. 481, 505, 1065. BIEL used the loan proceeds to fund its operations, including payment of a judgment, balances due to multiple contractors, and payroll. *See* Tr. 398, 401-02, 1275-77; DX 85.

Concurrently with IBEX loaning BIEL money in 2010 and 2011, IBEX converted loans to stock and then sold the stock. *See* Stipulation at Ex. B. Conversion was BIEL's exclusive method for paying off the notes; BIEL "never liquidated a note," although it did renegotiate them. *See* Tr. 246-49. Between January 2010 and June 2011, IBEX conducted thirty-two conversions, twenty-four of which were sold to third parties and eight of which were transferred without money changing hands. *See* Stipulation at Ex. B; Tr. 401-02. According to K. Whelan, the stock was converted during this period exclusively from the Revolver. *See* Tr. 1201-07; RX 1A at 1-2.

The proceeds from the twenty-four sales totaled approximately $1.5 million. *See* Stipulation at Ex. B. In many instances the proceeds from a particular sale were almost immediately used to fund another loan to BIEL. *See id.*; Tr. 1223-24, 1226, 1281-83. Indeed, in some cases the proceeds were paid by the purchaser of the stock directly to BIEL rather than to IBEX. *See* Tr. 1223-24, 1226. For twenty of the twenty-four stock sales in 2010 and 2011, BIEL either countersigned the stock purchase agreement, or made representations to its counsel in support of an opinion that the shares should be issued without a restrictive legend pursuant to Rule 144. *See* DX 138 at 121, 126, 138, 143, 153, 158, 163, 172, 182, 187, 221, 231, 336-38, 352-55, 369-71, 382, 405, 428; RX 6, 39. Of the remaining four stock sales, three occurred close in time to IBEX loans of equal dollar value: (1) 5,000,000 shares sold to Mazuma Holdings on September 13, 2010, resulted in proceeds of $50,000 seventeen days before a $50,000 loan; and (2) 15,000,000 shares sold to Goldstrand Investments on November 5, 2010 (for $75,000), and 5,000,000 shares sold to Simon Jacobson on November 6, 2010 (for $25,000), resulted in total proceeds of $100,000 approximately ten days before a $100,000 loan. *Compare* Stipulation at Ex. B (lines 15, 18, 19), *with* Stipulation at Ex. A (lines 64, 68). The twenty-fourth stock sale – 10,000,000 shares sold to Goldstrand Investments on October 25, 2010, for $50,000 – took place ten days before IBEX loaned $40,000 to BIEL, which itself took place one day before the November 5, 2010, sale of 15,000,000 shares to Goldstrand Investments for $75,000. *Compare* Stipulation at Ex. B (lines 17, 18), *with* Stipulation at Ex. A (line 67); *see* DX 138 at 279-84.

Between September 2011 and December 2012, IBEX loaned BIEL $237,000 in three separate transactions. *See* Stipulation at Ex. A (lines 86-88). IBEX sold no stock during this period, although on September 15, 2012, it sold a BIEL note to John Martinez for $11,734. *See* Stipulation at Ex. B (line 33); DX 138 at 205-08. Martinez was BIEL's head engineer, and because he wanted to "increase his position" in BIEL, he asked K. Whelan to sell him one of IBEX's notes. Tr. 508.

According to K. Whelan, IBEX's lending slowed during this period because BIEL did not ask for loans from her, and her securities sales slowed because she had sufficient cash on hand to fund the loans she did make. *See* Tr. 508. She testified that she believed that BIEL received financing during this period from the Export-Import Bank of the United States (Ex-Im Bank); in fact, the Ex-Im bank loan was not finalized until May 2013. *See* Tr. 508-09; RX 171M at 1643. A. Whelan, by contrast, was "surprised" by "how much [IBEX's lending] had dropped off at that time," and believed it had to do with the conversion rates of BIEL's notes, although he also believed that BIEL was "doing other financings" at the time. *See* Tr. 409-10; *see also* Tr. 404-07.

2. 2013 through 2015

Between January 2013 and January 2015, IBEX made forty-seven separate loans to BIEL, totaling approximately $2,500,000 and individually ranging from $4,900 to $150,000. *See* Stipulation at Ex. A. Nonetheless, between December 2012 and September 2014, the total balance of BIEL's debt to IBEX varied relatively little, staying between approximately $4.8 million and $5.1 million. *See* RX 171I at 1564, 1566; RX 171L at 1629-30; *see generally* DX 137 at 16. In part, this was because the new loans replaced the Revolver balance. *See* Tr. 400-01; DX 137 at 16.

In contrast to IBEX's transactions in previous years, however, the new loans were generally financed by sales of notes rather than by conversion of notes and then sale of the resulting stock. *See* Tr. 1241-42. Between January 2013 and February 2015, IBEX completed forty-eight such note sales for total proceeds of approximately $2.6 million. *See* Stipulation at Ex. B (lines 35-86). During this same period IBEX converted notes, and then sold stock, totaling only approximately $125,000. *See id.* (lines 34, 43, 46). One transaction, on May 3, 2013, was stipulated to be a note sale for $50,000, but the documentary evidence shows it was actually a conversion. *Compare id.* (line 41), *with* DX 138 at 606-09, *and* RX 1A at 3. There was also one transaction, in May 2013, where no money changed hands; IBEX had hired an investor relations consultant for BIEL and compensated him by converting a note to BIEL stock, and transferring the stock to him. *See* Tr. 461-64; DX 134.

Because of BIEL's concern that K. Whelan's debt, if converted, would give her a large quantity of BIEL shares, BIEL's board passed a written resolution on April 5, 2013, stating that it would not convert debt if the result was that one investor owned 9.99% or more of BIEL stock.

See Tr. 581-82; RX 171B. K. Whelan understood and accepted this resolution, even before it was reduced to writing. *See* Tr. 882-83, 1068. The majority of IBEX's note sales took place after April 5, 2013, and the most common purchaser was Redwood Management LLC, a company that specializes in bulk purchases of "free trading shares." *See* Stipulation at Ex. B; Tr. 897. In fact, all of Redwood's note purchases (and its one stock purchase after a conversion by IBEX) took place after April 5, 2013. *See* Stipulation at Ex. B. A. Whelan believed Redwood had approached him about BIEL. *See* Tr. 898. Both A. Whelan and K. Whelan disclaimed any understanding of Redwood's plans for the BIEL securities it bought and converted. *See* Tr. 899-900, 1082. However, the April 5, 2013, board resolution was intended only to limit IBEX's ownership of BIEL stock, and indeed, when Redwood converted its BIEL notes into BIEL shares, in some instances it negotiated the right to unilaterally waive the 9.99% limit. *See* Tr. 965; DX 138 at 588, 831, 1248.

Moreover, BIEL facilitated all of Redwood's thirty-seven conversions and one stock purchase, by, among other actions: (1) instructing its transfer agent to issue shares, in many instances after receiving a conversion notice from Redwood; (2) making representations to Redwood or counsel in support of an opinion that the shares should be issued without a restrictive legend, or supplying an opinion from BIEL's counsel on that topic; (3) making representations, including to BIEL's transfer agent and Redwood's broker, about the transaction or about BIEL's status; (4) countersigning Redwood's securities settlement agreement; and/or (5) passing board resolutions to increase the number of authorized BIEL shares. *See* DX 132 at 919; DX 138 at 577-600, 602-05, 665-71, 687-90, 701-04, 710-13, 719-23, 733-35, 741-44, 755-57, 793-98, 808-10, 813-17, 822-36, 846-49, 851-57, 867-71, 896-900, 906-10, 916-20, 947-51, 953-57, 968-72, 978-82, 993-97, 1003-07, 1017-21, 1064-68, 1078-82, 1092-95, 1097-1101, 1107-08, 1113-15, 1117-21, 1171-74, 1179, 1228-38, 1243-57; RX 89, 91; *see also* RX 96 at 677-80u; RX 119, 120. Most of the conversions occurred on or within a few days of Redwood's purchase of the associated BIEL note from IBEX, and Redwood's sales of stock into the public market occurred, in every case, within fifteen days of the issuance of stock to Redwood. *See* DX 137 at Ex. B.

Between January 2013 and November 2014, IBEX also sold BIEL securities to seven different purchasers other than Redwood in fourteen separate transactions. *See* Stipulation at Ex. B. Three were stock sales and eleven were note sales. *See id.*; *supra* (noting that one note sale was actually a conversion). BIEL facilitated each transaction in the same ways it facilitated the Redwood transactions. *See* DX 138 at 482-88, 495-98, 506-08, 518-29, 538-45, 551-57, 561-65, 607-09, 619-27, 633-35, 759-63, 767-91, 873-94, 922-29, 1027-61, 1131-63, 1193-1226. The purchasers' sales of stock into the public market typically took longer than Redwood's, although most occurred within thirty days of stock issuance. *See* DX 137 at Ex. B.

IBEX sold most of its BIEL notes at face value, although in many cases (especially in sales to Redwood) not including accrued interest. *See* Tr. 1239. K. Whelan nonetheless benefited from these sales because they gave IBEX funds to purchase new BIEL notes at a lower conversion price, which was calculated based on BIEL's consistently dropping share value. *See* Tr. 400-01, 1242; DX 137 at 28-30 (between January 2013 and November 2014, IBEX "rarely made sales to [purchasers] without forwarding some or all of the proceeds to BIEL shortly thereafter"). BIEL benefited because it received financing from IBEX whenever requested, and was able to convert current liabilities into long-term liabilities. *See* Tr. 321, 335. As a consequence, though, it suffered severe dilution; BIEL's board authorized increases in shares every year between 2009, when it authorized an increase to one billion shares, and 2015, when it authorized an increase to fifteen billion shares. *See* RX 171Q at 1707. The note purchasers benefited because they were able to renegotiate their notes' conversion prices and then sell stock into the public markets at favorable prices. *See* Tr. 1240-41. K. Whelan testified that she believed all of the notes she sold had reached maturity at the time, which gave the purchasers leverage in their negotiations. *See* Tr. 1241. As a result, between January 2013 and December 2014: IBEX received approximately $2.7 million in proceeds from note and stock sales; the note purchasers received approximately $5.5 million in proceeds from stock sales, representing a collective net profit to the purchasers of approximately $2.8 million; and BIEL completely paid off the Revolver, and received new loans, while maintaining essentially the same overall indebtedness to IBEX. *See* DX 137 at 16, 22.

E. Expert Evidence – Accounting Issues

1. Albert A. Vondra

The Division engaged Albert A. Vondra to opine on certain accounting and financial reporting matters related to BIEL's financial statements. DX 135 at 2. Vondra graduated with a bachelor's degree in accounting from Cleveland State University and a juris doctor from the Cleveland-Marshall College of Law. DX 135 at 2, 64. He is a certified public accountant licensed in three states, a certified fraud examiner, and certified in financial forensics. *Id.* at 2, 64. Vondra is a partner in the advisory services practice at PricewaterhouseCoopers Advisory Services LLP. *Id.* at 2, 64; Tr. 680. He has over thirty-seven years' experience in public accounting, with extensive experience as an audit and forensic engagement partner to publicly held and private companies. DX 135 at 2, 64; Tr. 680.

Vondra's opinion was that: (1) BIEL improperly recognized revenue under GAAP from the YesDTC and eMarkets transactions; and (2) this improperly recognized revenue was material to BIEL's 2009 financial statements. DX 135 at 4. According to Vondra, GAAP "is a technical accounting term that encompasses the conventions, rules, and procedures necessary to define accepted accounting practice at a particular time" and consists of "broad guidelines of general application" and "detailed practices and procedures." *Id.* at 7-8. Vondra explained that GAAP is derived from Commission Staff Accounting Bulletins, Financial Accounting Standards Board Accounting Standards Codification (ASC), and American Institute of Certified Public Accountants Statements of Position. *Id.* at 9-10.

In analyzing the YesDTC and eMarkets transactions, Vondra relied on SEC SABs 101 and 104 and other GAAP guidance. DX 135 at 10-13, 19; Tr. 697-99. As discussed above, SEC SABs 101 and 104 describe four criteria that must be met for revenue to be realized or realizable and earned in the general case. *See* SEC SAB No. 101, 64 Fed. Reg. 68936, 68936-37 (Dec. 9, 1999); SEC SAB 104, 68 Fed. Reg. at 74437. They also describe seven criteria that must be met to recognize revenue when delivery has not occurred, that is, in bill and hold transactions. *See* 64 Fed. Reg. at 68938; 68 Fed. Reg. at 74439. These two sets of criteria were addressed in

BIEL's 2010 bill and hold memorandum, and BIEL purportedly applied them in its 2009 financial statements. *See* DX 51 at 26-27; DX 90.

According to Vondra, the YesDTC transaction failed at least three of the four requirements for revenue recognition under GAAP and BIEL's own stated revenue recognition criteria: as of December 31, 2009, (1) there was no persuasive evidence of an arrangement between BIEL and YesDTC, (2) there was no delivery, and (3) the sales prices were not fixed or determinable. DX 135 at 21, 25-29. Vondra found that the fourth requirement, that collectability was reasonably assured, was apparently met because YesDTC made a partial payment to BIEL and another partial payment to a creditor of BIEL. DX 135 at 29.

First, Vondra found that there was no persuasive evidence of an arrangement because the YesDTC agreement contained a material contingency that allowed YesDTC to void the agreement if it was unable to obtain regulatory clearance in Japan in six months. DX 135 at 22. According to Vondra, an unsatisfied contingency defeats revenue recognition under GAAP and precluded BIEL from recording the sale as a final binding agreement. *Id.* at 22 & n.44. In addition, Vondra was unable to find sufficient persuasive evidence of a binding agreement between the parties because: the agreement was signed by only YesDTC; the December 31, 2009, invoice issued by BIEL to YesDTC for $150,000 was not signed by YesDTC; and YesDTC did not issue any purchase orders for this amount agreeing to buy or take title of the products. *Id.* at 22. Vondra disagreed with Respondents' assertion that the YesDTC agreement was a valid, binding contract under Maryland Commercial Code Section 2-204, because the evaluation of the transaction for revenue recognition purposes should be done under GAAP, and not the Maryland Commercial Code. *Id.* at 22-23.

Second, Vondra found that BIEL never delivered any products to YesDTC; the products instead remained in BIEL's warehouse. DX 135 at 24. According to Vondra, because the goods were not delivered by December 31, 2009, the transaction should have been evaluated as a possible bill and hold transaction. *Id.* at 24-25.

Third, Vondra found that the seller's price to the buyer was not fixed or determinable due to the contingency provision for regulatory approval in Japan. DX 135 at 25-26. SEC SABs 101 and 104 state that sales prices in arrangements that are cancelable by the customer are neither fixed nor determinable until the cancelation privilege lapses, and revenue recognition on an arrangement subject to subsequent approval would be inappropriate until that subsequent approval is complete. *Id.*; 64 Fed. Reg. at 68937, 68941.

Vondra also found that the YesDTC transaction did not satisfy GAAP requirements for a bill and hold transaction. DX 135 at 29-38. First, Vondra found no contemporaneous documentation that risk of ownership passed from BioElectronics to YesDTC, and the YesDTC agreement by itself was not sufficient to justify the transfer of ownership of goods from an accounting perspective. *Id.* at 29-30. Vondra opined that YesDTC's transferal of $150,000 to BIEL was insufficient to justify the transfer of ownership of goods, due to a lack of purchase orders. *Id.* at 30-31. Second, Vondra believed that there was no fixed commitment to purchase the goods due to the contingency provision for regulatory approval in Japan. *Id.* at 31. Third, Vondra did not find contemporaneous evidence that YesDTC requested the transaction to be on a bill and hold basis and opined that the bill and hold basis was only considered around the time of BIEL's end-of-year audit. *Id.* at 31-33. Fourth, Vondra noted the lack of any evidence of a fixed delivery schedule; he disregarded YesDTC's plan to draw inventory as needed and noted that the Japanese regulatory approval contingency provision constituted a further indication that there could be no fixed delivery schedule until the contingency was cleared. *Id.* at 34-35. Fifth, Vondra believed that the regulatory contingency provision was a specific performance obligation that prevented completion of the earning process. *Id.* at 36. Sixth, Vondra noted the absence of any documentary evidence to support the fact that the ordered goods were segregated from the seller's inventory. *Id.* at 36-37.

With respect to the eMarkets transaction, Vondra opined that BIEL improperly recognized $216,000 in revenue and found that amount represented approximately 19% of revenue reported for the 2009 calendar year. DX 135 at 38. According to Vondra, the eMarkets transaction failed at least three of the four SEC SABs 101 and 104 revenue recognition requirements: (1) there was no persuasive evidence of an arrangement; (2) there was no delivery; and (3) collectability was not reasonably assured. *Id.* at 39. Vondra opined that the fixed price requirement appears to have been met because the parties included a list of items and prices in the written agreement. DX 135 at 42-43.

First, although BIEL entered into an agreement with eMarkets, Vondra believed that the agreement alone, with no corresponding order requests as required under the terms of the agreement, was not persuasive evidence of an arrangement for purposes of revenue recognition. DX 135 at 39-40. Vondra noted that there were orders in 2009 totaling under $10,000, but there was no contemporaneous evidence to support M. Whelan's testimony that eMarkets placed $216,000 of orders in 2009. *Id.* at 40. Vondra dismissed the June 22, 2016, supplemental declaration of M. Whelan as persuasive evidence because she did not provide any contemporaneous documentary support for her table of purchases, nor identify or refer to any executed sales documentation. *Id.* As with the YesDTC transaction, Vondra disagreed with BIEL's reliance on the Maryland Commercial Code to satisfy GAAP requirements. *Id.* at 41.

Second, Vondra noted that he did not find any evidence that the products had been delivered and found that there was no fixed delivery schedule. DX 135 at 41-42. He stated that GAAP does not allow for constructive or de facto delivery in the absence of physical delivery, except if all bill and hold criteria are met. *Id.* at 42.

Third, Vondra thought that collectability was not reasonably assured because there were no binding purchase orders, and eMarkets did not have orders anywhere near $216,000 in 2009. DX 135 at 43.

Analyzing the eMarkets transaction under the GAAP bill and hold criteria, Vondra found that at least five of the seven elements were not met. First, Vondra determined that the risks of ownership did not pass to eMarkets because he did not find any contemporaneous documentation to support this factor. DX 135 at 44-47. According to Vondra, the eMarkets agreement by itself was not sufficient to justify the transfer of ownership of goods. *Id.* at 44. Second, Vondra found that eMarkets did not make a fixed commitment to purchase the goods because the agreement required eMarkets to place specific purchase orders, which it never did. *Id.* at 47. Additionally, according to Vondra, eMarkets did not have any orders from customers to purchase these products. *Id.* at 48. Third, Vondra found no contemporaneous evidence that eMarkets requested that the transaction be on a bill and hold basis and doubted that eMarkets even had a substantial business purpose to make this request. *Id.* at 48-52. Vondra dismissed "after-the-fact evidence" generated during the 2009 audit that M. Whelan sent to BIEL's accounting consultant. *Id.* at 49. Fourth, Vondra determined that there was no fixed delivery schedule for the eMarkets transaction. *Id.* at 52-53. Fifth, Vondra found no contemporaneous evidence that BIEL segregated the products in its warehouse. *Id.* at 54.

As for materiality, Vondra opined that the YesDTC and eMarkets improper revenue recognition was material both quantitatively and qualitatively. DX 135 at 59-62. Quantitatively, Vondra noted that the $366,000 of improperly recognized revenue was approximately 32% of BIEL's total revenue in 2009, and 47% of BIEL's properly recognized revenue. *Id.* at 60. He calculated that these transactions represented approximately 66% of 2009 fourth quarter sales. *Id.* Vondra also noted that these transactions, which contributed to an increase of revenue for BIEL from 2008 to 2009, could have suggested a potential growth trend, which could have been relevant in an investor's decision to purchase the stock. *Id.* at 60-61.

Qualitatively, Vondra pointed out that these two transactions directly involved senior management decisions as well as related parties. DX 135 at 61. The transactions also involved distinct issues highlighted by BIEL in other parts of its Form 10-K – specifically, BIEL noted the veterinary market as a "distinct segment" (eMarkets transaction) and referred to governmental regulations on the business as an important factor in business operations (YesDTC transaction). *Id.* Although Vondra admitted that BIEL's going concern disclosure was "serious," he believed that the inclusion of additional loss (by not considering the YesDTC and eMarkets transactions as revenue) would nonetheless have been material. Tr. 706, 708; RX 211 at 2755.

2. Colin Linsley

Respondents engaged Colin Linsley to prepare a report on the YesDTC and eMarkets transactions. RX 203 at 2420-21. Linsley graduated with a bachelor's degree from the University of Durham and a master's degree and doctor of philosophy in economics from the University of Essex. *Id.* at 2432. He is a certified valuation analyst and holds a CPA certificate from the state of Delaware, but is not certified to be a CPA for a public firm. *Id.* at 2420; Tr. 1297. He has taught accounting and economics at the university level for twenty years and has been published in peer-reviewed economics and accounting journals, but not on the subjects of GAAP, revenue recognition, or bill and hold transactions. RX 203 at 2420, 2432-33; Tr. 1299. Linsley has never worked in private practice for an accounting or consulting firm. Tr. 1296. He has never done any public accounting or forensic accounting. Tr. 1296.

Similar to Vondra, Linsley analyzed the YesDTC and eMarkets transactions using the four general revenue recognition criteria described in SEC SABs 101 and 104. RX 203 at 2424. Unlike Vondra, however, Linsley determined that all four of these criteria were met with respect to both transactions. *Id.* at 2424-26. Linsley also opined that both transactions met the bill and hold criteria. *Id.* at 2426-27 & n.2.

Linsley believed that persuasive evidence of an arrangement existed for the YesDTC transaction because payments totaling $100,000 had been made by December 31, 2009; the agreement had been signed by December 31, 2009, and was accompanied by an initial order of $150,000; and the final agreement was executed by the properly authorized personnel of the buyer and seller. RX 203 at 2424. Linsley believed that the contingency provision requiring Japanese regulatory approval did not matter because approval was considered easy to obtain. Tr. 1312-13. He would have treated the possibility of non-approval as a contingency event after the sale under ASC 450. Tr. 1312-13, 1325, 1332. According to Linsley, regulatory non-approval would only have permitted cancelation of the contract going forward, and did not affect the initial purchase obligation. Tr. 1314. Regarding the eMarkets transaction, Linsley cited to the final agreement executed by the properly authorized personnel of the buyer and seller and the fact that payments of $105,000 had been made by December 31, 2009, to support his belief that persuasive evidence of an arrangement existed. RX 203 at 2424.

According to Linsley, the seller's price to the buyer was fixed or determinable for both the YesDTC and eMarkets transactions because both the buyer and seller accepted the amount of the transaction ($150,000 for YesDTC and $216,000 for eMarkets). RX 203 at 2424. Linsley also cited to the pricing described in the YesDTC distribution agreement and testimony of M. Whelan. *Id.*

For the collectability factor, Linsley noted that YesDTC had already paid a non-refundable amount of $100,000 by December 31, 2009, with the balance following in March 2010. RX 203 at 2425. And eMarkets paid a non-refundable amount of $105,000 by December 31, 2009, and the remaining balance by June 2010. *Id.*

Regarding the delivery factor, Linsley stated that "shipment to a site other than the buyer's place of business can constitute delivery, subject to a condition regarding payment." RX 203 at 2425. He found it reasonable to view BIEL's warehouse as the site specified by the customer because there were important business and regulatory compliance reasons for both YesDTC and eMarkets to store their goods there. *Id.* at 2426. According to Linsley, delivery occurred because YesDTC and eMarkets requested that the goods be held at the BIEL warehouse, both companies provided significant regulatory and business reasons for doing so, title was held by YesDTC and eMarkets on December 31, 2009, payment was not conditional on delivery to the final site, and both buyers stated they accepted the risks associated with an advance purchase. *Id.*

As for the bill and hold criteria, Linsley found that risk of ownership had passed to the buyers, the customers made fixed commitments to purchase their goods, the buyers requested the transactions be on a bill and hold basis, the seller did not retain any specific performance obligations, the ordered goods were segregated from the seller's inventory (though he noted that he did not see a specific statement that the YesDTC inventory was segregated), and the product was complete and ready for shipment. *Id.* at 2427 & n.2. With respect to the fixed schedule for delivery of the goods, Linsley stated that even if the goods were never shipped to YesDTC and eMarkets, both buyers paid non-refundable, substantial sums of cash by December 2009, and there was no indication that a sale had not taken place. *Id.* at 2427.

Linsley based his opinions on representations by Noel and M. Whelan, and he relied on the veracity of the documents he reviewed and representations he received. Tr. 1324, 1328, 1330, 1333, 1339-40. He admitted, however, that the most persuasive evidence would have been documents exchanged in the ordinary course of business before December 31, 2009, and not months after the fact. Tr. 1341. Linsley also noted that a new revenue recognition standard will become effective over the next one to three years that drops the fixed delivery schedule requirement for bill and hold transactions. RX 203 at 2428-29. He believed the guidance in 2009 "was not of the highest quality, making it difficult at times to resolve issues, with inevitable differences of professional judgment." *Id.* at 2429.

Linsley opined that the transactions were not material based solely on a qualitative analysis, and that no quantitative threshold can establish materiality. RX 203 at 2430 (citing SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 19, 1999) (codified at 17 C.F.R. pt. 211)). Reviewing nine qualitative factors described in SEC SAB 99, Linsley determined that none of these factors were present with respect to BIEL. *Id.* He noted that BIEL operated at a loss from 2007 through 2009 and that its management made absolutely clear that there was great uncertainty as to their ability to continue as a going concern. *Id.* As a result, according to Linsley, "it is not possible . . . to see that the recording of $366,000 of revenue as anything that would change a reasonable investor to reach a conclusion other than that BIEL was a company in very serious financial trouble," and the $366,000 of revenue was therefore not material. *Id.* at 2431.

3. Vondra Rebuttal

Vondra provided a rebuttal to Linsley's expert report. DX 9. Vondra disagreed with Linsley's overall conclusions, both as to revenue recognition and materiality. *Id.* at 1-2. Vondra opined that the new revenue recognition standard that will become effective over the next three years is "totally irrelevant" to the GAAP requirements that BIEL was required to apply to the YesDTC and eMarkets transactions. *Id.* at 6.

Vondra noted that Linsley based his opinions on non-contemporaneous documentation, relied on post-transaction declarations and testimony, and did not comment on the lack of contemporaneous evidence for the bill and hold transactions. DX 9 at 3, 5. Because revenue is considered a high risk financial statement area, Vondra believed that auditors should ordinarily presume there is a risk of material misstatement due to fraud and thus should treat representations of management with professional skepticism. *Id.* at 2-3.

For both transactions, Vondra believed that Linsley did not appropriately consider the contractual requirements to which both parties agreed. DX 9 at 3-4. First, for the YesDTC transaction, Vondra stated that Linsley did not consider the impact of the contractual requirement by YesDTC to obtain regulatory clearance in Japan within six months. *Id.* at 3. According to Vondra, this contractual obligation precluded revenue recognition until either a lapse of the six month period or Japanese regulatory clearance. *Id.* Vondra also disagreed with Linsley's reliance on the $100,000 payment and bill and hold memorandum as evidence to support the standard revenue recognition criteria, because Linsley's opinion did not address the contractual provisions that required YesDTC to notify BIEL of the number of units it needed on a monthly basis and BIEL to acknowledge receipt of those orders. *Id.* at 4. As for eMarkets, Vondra objected to Linsley's reliance on the payments of approximately $216,000 and the bill and hold memorandum, because the agreement required eMarkets to submit orders in writing; according to the agreement, only orders accepted and confirmed in writing by BIEL would be deemed valid and binding on the parties. *Id.*

According to Vondra, Linsley employed "flawed logic" by stating that BIEL's warehouse could be considered a delivery site specified by the customer. DX 9 at 5. Vondra believed any business could generate fictitious sales where the goods remain in the business' warehouse with no actual delivery to the customer. *Id.* Vondra disagreed with Linsley's conclusion that delivery was accomplished in both transactions, because shipping product from the seller's premises is essential for demonstrating delivery. *Id.* at 6.

As for materiality, Vondra noted that Linsley disregarded BIEL's restatement of the two transactions in its December 31, 2010, financial statements. DX 9 at 7. According to Vondra, BIEL's restatement confirms that there was an error in initial disclosure and validates the materiality of the transactions. *Id.* Vondra also stated that Linsley ignored the importance of these transactions to the growth and ultimate profitability of BIEL. *Id.*

F. Expert Evidence – Event Studies

In support of their contention that the YesDTC and eMarkets transactions were immaterial to BIEL's 2009 financial statements, Respondents offered an event study by Yue Qin as an attachment to their motion for summary disposition. *See BioElectronics Corp.*, Admin. Proc. Rulings Release No. 4020, 2016 SEC LEXIS 2588 (July 26, 2016). At the hearing, Respondents offered a similar event study by Robert Hills, and they no longer rely on Qin's work. *See* Resp. Br. 43; RX 204. The Division retained Benjamin A. Sacks to opine on Qin's and Hills' analyses. *See* DX 136.

1. Robert Hills

Hills graduated with a bachelor's degree in accounting from Brigham Young University (BYU) and is currently a third-year doctoral student in accounting at Duke University. RX 204 at 2437, 2445. His research interests are corporate taxation and income shifting, and he has experience as an audit intern for Deloitte and Touche. *Id.* at 2445-46. During his time at Duke, he has conducted numerous event studies aimed at determining whether the introduction of new information into the marketplace resulted in abnormal returns. *Id.* at 2437. Although his background is primarily in accounting, he has taken four econometric classes, two statistics classes, and four accounting finance seminars where he analyzed event studies while at BYU and Duke. Tr. 827-30. Hills was approached by Staelin, a professor at Duke and a BIEL board member, to run a series of event studies to determine if there were any significant abnormal returns for BIEL stock associated with specific announcements disclosed in its financial statements. RX 204 at 2437; Tr. 813, 827. Hills organized his event study to fix the errors noted by Sacks in Qin's study. RX 207 at 2482.

In summary, Hills opined that changes in BIEL's stock price associated with four disclosure events were not statistically significant, from which Hills concluded that the disclosure events were not material. RX 204 at 2440, 2443. Hills based his opinion on the concept that if information made available to the market is material, then the market will quickly adjust stock prices to reflect this new information, and if the information is not material and does not alter expected future profits, then the market will not react and there will be no significant unexpected or abnormal returns. RX 204 at 2437. Hills analyzed BIEL's stock price associated with disclosures on the following dates: (1) 2009 Form 10-K filed March 31, 2010; (2) first quarter 2010 Form 10-Q filed May 12, 2010; (3) second quarter 2010 Form 10-Q filed August 16, 2010; and (4) third quarter Form 10-Q filed November 16, 2010. *Id.* at 2438.

Hills analyzed BIEL's stock prices under the "conventional" market model as well as under a "three-factor" model using two non-event pre-periods: daily stock data for all trading days (1) in 2008 and 2009 and (2) from January 1, 2009, to March 15, 2010. RX 204 at 2438-39, 2441-42. He chose a three-day event window, beginning one day before the event to account for leakage of information before an announcement, and ending one day after the identified event to allow time for the new information to be disseminated to investors. *Id.* at 2439. Under both models, Hills found that none of the four event dates were statistically significant. *Id.* at 2440-42. Hills admitted, however, that any lack of price movement on March 30 and 31 up to 4:03 p.m. (when the BIEL 2009 Form 10-K was released) would have offset, from a statistical perspective, any movement that occurred on April 1. Tr. 820. Hills conducted twenty additional analyses using different event windows of one, two, and five days, and a shortened pre-period of October 15, 2009, to March 15, 2010. RX 204 at 2442. His findings were consistent with his prior results in that none of the four events was statistically significant. *Id.*

In rebuttal to Sacks' initial expert report, Hills conducted an event study for the May 16, 2011, disclosure, using both one- and two-day event windows for May 16 and for May 17. Resp. Ex. 207 at 2482. Hills found no abnormal rates of return associated with these two dates, concluding that information related to the bill and hold transactions was not material to investors. *Id.* at 2482-83. Hills also reiterated in rebuttal that a two-day event window for the March 31 disclosure was appropriate because the OTC market was still open for over an hour after the Form 10-K was filed. RX 207 at 2482. Nonetheless, he performed an analysis using April 1, 2010, as the event date and found no significant market reaction. *Id.* Hills believed that his results differed from Sacks' because Sacks relied on Qin's original analysis, which used a different model and different pre-period, even though her underlying data was probably the same as Hills'. Tr. 825, 832, 835. Hills admitted that Sacks' results for April 1, 2010, were statistically significant. Tr. 826.

2. Benjamin A. Sacks

Sacks graduated with a bachelor's degree in mathematical economics from Columbia University and a master's degree in economics from the University of Chicago. DX 136, App. A at 1. Sacks is a principal of The Brattle Group and has over fifteen years' experience providing expert advice and testimony on the application of statistics, economics, and corporate finance to the determination of liability, valuation, and the estimation of damages. *Id.* at 2, App. A at 1.

Sacks' areas of expertise include statistical regression and its application to event studies. *Id.* at 2.

Sacks was initially asked by the Division to review and opine on Qin's event study. *See* DX 136 at 2. He opined, in summary, that Qin's study contained "several implementation errors." *Id*. Sacks was later asked to review and respond to Hills' expert testimony, in the form of a rebuttal expert report. *See* DX 8 at 2. He believed that although Hills corrected some of Qin's errors, Hills repeated some of Qin's most significant errors, and inappropriately used a certain metric, which rendered a large portion of Hills' results irrelevant. *Id.*

According to Sacks, stocks traded in highly liquid and deep markets are typically studied using an event window of one day or less in litigation settings. DX 136 at 3, 8-9. Sacks used a two-day event window when news is released near, but before, market close, and a one-day event window otherwise. *Id.* at 9, 12. Sacks opined that increasing the event window by an additional day would "dramatically increase[]" the standard deviation to be used in calculating whether something is statistically significant, which means that declaring something as statistically significant would be much more difficult. Tr. 789-90. Hills and Sacks agreed that in order for stock price movements to be statistically significant, they need to move at least two times the standard deviation. Tr. 805-06; DX 8 at 5. The standard deviation is a statistical measure of the average price change expected in the same period of time absent any material firm-specific news. DX 8 at 5. Thus, a highly volatile stock has a higher standard deviation. Tr. 786-87, 805.

Sacks considered BIEL to be a highly watched stock whose price responded quickly to news and believed it should be evaluated using a one-day event window. DX 136 at 3-4, 6, 9, 12. Because BIEL filed its 2009 Form 10-K at 4:03 p.m. EDT on March 31, 2010, near the close and after core trading hours for OTC Markets, Sacks used April 1, 2010, as the event window for the disclosure of the bill and hold transactions. *Id.* at 6-7. That is, BIEL's Form 10-K was filed too late in the day on March 31, 2010, for the market to react before its close. DX 8 at 4. Even though Hills conducted additional studies with different event windows, Sacks maintained that Hills incorrectly anchored the windows to March 31, 2010. *Id.* at 4, 10. Sacks also pointed out that Hills did not provide his work regarding the one-day event window for April 1, 2010, and Sacks therefore could not determine whether Hills' findings were accurate or not. Tr. 801.

According to Sacks' analysis of Qin's event study, Qin's data measured an abnormal return of about 9.42% for April 1, 2010, which is consistent with the Form 10-K containing information material to investors. DX 136 at 8, 12-13; DX 8 at 12. Sacks opined that incorporating trading data from March 31, 2010, would "harm" the results by increasing the standard deviation to be used in the analysis. Tr. 790. However, Sacks admitted that Hills' result seemed more likely than Qin's given the volatility of BIEL's stock price. Tr. 843. Sacks candidly testified that it was "probably likely" that a properly conducted event study for April 1, 2010, would not result in a finding of statistical significance, in part because BIEL's stock price was so volatile that the appropriate standard deviation was "enormous." *See* Tr. 843-44. Sacks also admitted that the increased returns could, at least in part, be attributed to an increase in investor confidence due to BIEL's new reporting status; that is, the mere fact that BIEL first filed a Form 10-K on March 31, 2010, "would probably have a positive impact on their stock price." Tr. 784.

Regarding the other disclosures Hills analyzed, Sacks believed that event studies for these disclosures would reveal nothing related to materiality because none of the filings after March 31, 2010, contained any new information related to the bill and hold transactions, except that the obligations to deliver had not yet been completed. DX 136 at 17-18. As a result, these additional event studies were irrelevant. *Id.* at 18; *see also* DX 8 at 4, 13. Additionally, Sacks did not consider BIEL's restatement, as disclosed on May 16, 2011, to be a "valid curative disclosure," due to the filing of the Form 15 on April 18, 2011, which terminated BIEL's reporting obligations and caused a loss in investor confidence and a one-day drop in stock price of 34%. Tr. 781-82, 796-97; DX 8 at 4-5, 7, 9; DX 136 at 19. According to Sacks, the April 18 filing caused the market to question the reliability and utility of BIEL's previously reported financials, undermining investor trust in any later-produced unaudited financials. DX 8 at 7. As a result, the May 16 news was not a valid curative disclosure, that is, one providing investors with complete information about what they had already started to suspect as of April 18, 2011. *Id.* at 9-10; Tr. 797. Sacks contended that the lack of a legitimate curative disclosure date was "fatal" to Hills' event studies. DX 8 at 3-4, 6-10.

Sacks disagreed with Hills on three other points, as well. One, according to Sacks, statistical significance of a price movement may be sufficient to establish the materiality of an event, but the lack of statistical significance does not necessarily mean that an event is not material. DX8 at 3, 6. Two, Sacks noted that although Hills took into account the possibility of leakage of information, there is no evidence that this occurred, and it would be inappropriate in a litigation event study because analysis in that context typically involves only one firm and has low "statistical power." *Id.* at 11-12. Three, Sacks objected to Hills' use of the cumulative average abnormal return (CAAR) measure, noting that Hills did not define the measure or explain why it is relevant. *Id.* at 4, 13-14. Sacks explained that CAAR measures the average response across different firms to a similar type of event, and in this instance, it is not relevant because BIEL was the only firm under consideration. *Id.*

G. Other Expert Evidence

1. William D. Park

William D. Park graduated from Virginia Polytechnic Institute and State University with a bachelor's degree in economics. DX 137 at 2, Ex. A at 2. He is a certified fraud examiner, certified financial services auditor, certified anti-money laundering specialist, and certified regulatory and compliance professional. *Id.* Park started his career in the trade control department at the brokerage firm Legg Mason Wood Walker and has spent the past nineteen years at the Financial Industry Regulatory Authority (FINRA, formerly known as NASD) in a series of increasingly senior roles in securities enforcement investigations. *Id.* at 1, Ex. A at 1-2; Tr. 132.

The Division engaged Park to offer his opinion on whether the sale of unregistered BIEL shares amounted to improper distributions constituting a violation of the registration requirements of Securities Act Section 5. *See* DX 137. As I warned the parties at the final prehearing conference, I have determined that the majority of Park's opinion is not a proper expert opinion because it consists of a legal opinion and opinion of a professional investigator. *See* Prehr'g Tr. 30-31; Tr. 237-38. As I stated at the hearing,

> some of his subsidiary conclusions I can put weight on. . . . I think they are proper expert opinions. For example, his calculation of holding periods, the volume in particular – that particular transactions, his analysis of how the balance on the revolver went down as convertible notes were issued by BioElectronics to IBEX, things like that I think I can place some weight on.

Tr. 238. Indeed, some of Park's testimony is more appropriately considered as summary testimony.

Park prepared a chronology of the securities issuances, deposits, sales, and money movements regarding transactions between BIEL, IBEX, and the purchasers of BIEL securities (what Park calls "the Liquidating Entities") for the period of January 2010 through February 2015. DX 137 at 7 n.4, 10, Ex. B; Tr. 192, 219. According to Park, the chronology reflects the issuance and flow of securities from BIEL to IBEX and then into the public marketplace, the impact on the total shares outstanding, and the flow of funds from the Liquidating Entities to IBEX and then to BIEL. DX 137 at 10. Park used this chronology to determine the frequency and magnitude of share issuances by BIEL through IBEX to various Liquidating Entities; the market impact of the issuance and sale of those shares; and the frequency, timing, and magnitude of funds IBEX received from these sales and the amount of sale proceeds IBEX then reinvested in BIEL. *Id.* at 11.

According to Park, BIEL appeared "very reliant on financing" from IBEX; in 2013 BIEL received over $700,000 from IBEX, and in 2014, approximately $1.9 million. DX 137 at 14. Park's data shows that during 2013 and 2014, the notes payable to IBEX ranged between approximately $4.9 million and $5.1 million. *Id.* at 14, 16. Although the amount of the notes payable remained relatively constant during this time frame, IBEX continued to loan money to BIEL while selling its notes to the Liquidating Entities. *Id.* at 16.

From 2012 through 2014, BIEL increased its total number of authorized shares from three billion to seven billion. DX 137 at 14, 16. According to Park's analysis, BIEL needed to increase the number of its authorized shares to cover the balance owed to IBEX. *Id.* at 15-16. For instance, as of December 31, 2012, BIEL had three billion in authorized shares and forecasted having to issue 1,803,415,186 shares upon conversion of the notes, about 60% of the authorized shares. *Id.* at 16. Throughout 2013, the total number of authorized shares was four billion, while the amount of forecasted shares to be issued upon conversion increased from 1,963,472,698 to 9,863,573,500, going from 49% to 247% of the authorized shares. *Id.* In 2014, the total number of authorized shares rose to six and then seven billion and the amount of forecasted shares to be issued upon conversion fluctuated in the ten and eleven billion share range, from a high of 190% to a low of 156% of the authorized shares. *Id.* Park testified that when the price of a stock goes down, the number of shares convertible from debt instruments goes up. Tr. 203-04. In the later years of the time period, BIEL's stock was dropping in price, so a lot more shares needed to be issued. Tr. 204-05.

According to Park, from January 2010 through February 9, 2015, IBEX facilitated the sale of approximately 3.5 billion BIEL shares. DX 137 at 8, 28. From 2010 to 2012, IBEX sold 81.9 million shares, which was 3% of the total shares outstanding by the end of 2012. *Id.* at 20-21, 24. Approximately 3.3 billion shares, 95% of the shares sold by IBEX, were sold from January 2013 through November 2014. *Id.* at 8, 22. At the end of 2013, IBEX had sold 27% of BIEL's outstanding shares over the past four years, and by the end of 2014, IBEX had sold 53% of BIEL's outstanding shares over the past five years. *Id.* at 20-22, 24.

Park stated that on a quarterly basis from January 2013 through November 2014, the total sales of BIEL shares often amounted to more than 1% of the total shares outstanding. DX 137 at 8. On an annual basis at various points in time, the amount resold in the public markets was in excess of 10%. *Id.* at 24. In six of eight quarters in 2013 and 2014, the amount resold into the public market compared to total shares outstanding ranged between 4% and 25%. *Id.* The quarter with the largest percentage distributed by the Liquidating Entities was the first quarter of 2014, when the Liquidating Entities sold 25% of the total shares outstanding. *Id.* at 24-25. However, while the convertible debt acquired by the Liquidating Entities and then converted and sold to the public constituted a dominant percentage of BIEL's issued and outstanding shares, these shares might not have represented a dominant percentage of the ownership of the company. Tr. 196.

Park's data showed that from January 2010 through February 9, 2015, IBEX received approximately $4 million from the Liquidating Entities and reinvested approximately $5 million in BIEL. DX 137 at 8, 28. From January 2013 through November 2014, IBEX received approximately $2.7 million from the Liquidating Entities and reinvested approximately $2.5 million in BIEL, which was about 90% of the funds IBEX received. *Id.* at 8, 13, 21-22. In 2013, IBEX received $731,357 from sales of BIEL shares and loaned $704,000 to BIEL, or 96% of those funds. *Id.* at 21. In 2014, IBEX received $1,988,255 from sales of BIEL shares and loaned $1,799,305 to BIEL, or 90% of those funds. *Id.*

According to Park, the transfer of funds from IBEX to BIEL closely followed IBEX's sales of securities to the Liquidating Entities. DX 137 at 28. IBEX made forty-two loans totaling $2.9 million to BIEL less than ten days after selling debt to the Liquidating Entities. *Id.* Of these, thirty-three loans totaling $2 million were made within three days of the sales. *Id.* The dollar amounts of the loans closely tracked the sums IBEX received from the Liquidating Entities. *Id.* at 28, Exs. F-G. In approximately twenty-five of the loans, the amount loaned to BIEL was the same amount that IBEX had just received from the Liquidating Entities. *Id.* at 28-29, Exs. F-G. Park's analysis of IBEX's bank account statements from January through June 2013 demonstrates that the funds loaned to BIEL during this time were almost exclusively the proceeds IBEX received from the Liquidating Entities. *Id.* at 30. From January through April 2013, IBEX deposited approximately $331,000 and withdrew approximately $329,000; 92% of the deposits came from the Liquidating Entities and 95% of the withdrawals were loans to BIEL. *Id.* From July 2013 through November 2014, IBEX reinvested in BIEL 92% of the proceeds IBEX received from the Liquidating Entities. *Id.* at 31.

Park opined that the Liquidating Entities converted, deposited, and sold BIEL shares very soon after buying convertible debt from IBEX. DX 137 at 23. As noted, from 2010 through

February 2015, IBEX sold approximately 3.5 billion shares in at least seventy transactions. *Id.* at 28. In sixty-four out of seventy transactions, or 91% of the time, the resales started within ten calendar days after the Liquidating Entities were issued shares. *Id.* at 23, Ex. D. According to Park, Redwood was the Liquidating Entity that purchased the most convertible debt from IBEX, participating in thirty-eight out of seventy transactions. *Id.* at 22-23, Ex. D. Redwood started reselling BIEL shares on average just over three days after the shares' issuance. *Id.* at 23, Exs. D-E.

2. Brian P. Flood

Brian P. Flood graduated with a bachelor's degree in accounting from the University of Notre Dame and an MBA in finance and marketing from the University of Chicago. RX 206 at 2467. He is a licensed CPA in Maryland and was also formerly licensed in Illinois. *Id.* at 2463, 2467. Flood has held financial and accounting management roles for various companies over the past thirty-seven years. *Id.* at 2463, 2466-67. Flood is an independent contractor of Consult Your CFO, Inc., which has a contract with BIEL to assist BIEL's management with the preparation of quarterly and annual unaudited financial statements. *Id.* at 2463; Tr. 1140.

Respondents engaged Flood to analyze loans made by IBEX to BIEL and to calculate the holding periods for which IBEX retained the convertible notes. RX 206 at 2464. According to Flood's calculations: (1) from December 1, 2009, through June 2016, the shortest holding period was no less than twelve months; (2) from December 1, 2009, through August 2015, the average holding period was thirty months; (3) in each year starting in 2010, IBEX invested more in BIEL than the amount of securities it sold to third parties; and (4) the total balance of all outstanding promissory notes payable to IBEX as of June 30, 2016, was $5,323,078, and these notes have been outstanding for an average of 2.8 years. *Id.* at 2464-65.

Flood analyzed the notes two ways, depending on whether the loans were made before August 1, 2009, which were documented by a single Revolver note dated as of January 1, 2005, or after January 1, 2010, when loans were individually documented at the time the loan was made. RX 206 at 2464. To calculate the holding periods for all of these securities, Flood took the dates when the loans were issued and disposed of and calculated the difference between those two dates. Tr. 1135-36, 1166-67. In calculating holding periods pertaining to loans under the Revolver, Flood applied a first-in, first-out analysis, i.e., attributed the oldest loans to the first sales. RX 206 at 2464. Flood admitted that he was not aware that the Revolver was created in 2009 even though it was dated January 1, 2005, but stated that this fact would not have affected his analysis. Tr. 1149. Flood also admitted that he did not consider the "holding period" definition found in the Securities Act. Tr. 1136.

Flood explained that he excluded an August 1, 2009, loan for approximately $519,000 because he believed that the loan was not sold between 2010 and 2014. Tr. 1170-71, 1181; *see* DX 68. Flood understood that the August 31, 2009, loan for $530,037 was not related to the $519,000 loan. Tr. 1171. According to Flood, the $530,037 loan was the last loan of the Revolver. Tr. 1172. Flood explained that the "loan balance after sale" figure of $632,548 was higher than the original loan amount of $530,037 because the "loan balance after sale" column reflects the loan amount plus accrued interest. Tr. 1174.

Flood initially based his analysis on BIEL's underlying documents and the work he conducted for BIEL in documenting the Revolver balance; for further corroboration, Flood consulted an analysis conducted by IBEX's tax accountant that showed all transactions related to the Revolver from the original date of the loan made to BIEL to the sale of the related shares that had been converted from the Revolver. Tr. 1143-44, 1156, 1167, 1182-85; RX 206 at 2464. He also received some information from K. Whelan and reviewed transfer agent records. Tr. 1178, 1180, 1186-87.

3. Other Proffered Expert Evidence

Respondents proffered expert evidence from three other persons: Staelin, David Robinson, and M. Richard Cutler, Esq. *See* RX 201, 202, 205. I previously noted that I would not place any weight on these witnesses' expert reports because I did not consider them to be helpful, and now that the record is complete my views have not changed. *BioElectronics Corp.*, Admin. Proc. Rulings Release No. 4127, 2016 SEC LEXIS 3340, at *2-3 (ALJ Sept. 6, 2016); Prehr'g Tr. 28-29; *see* Tr. 1258. Regarding Staelin's and Robinson's reports, I found that "there are matters which I think are either not sufficiently [fleshed] out or else there are things that I just don't see as being . . . subject matter for experts." Prehr'g Tr. 28-29. Regarding Cutler's report, I found that it was a legal opinion letter in the form of an expert report. Prehr'g Tr. 29. Nonetheless, I permitted Staelin to testify as a percipient witness on certain matters that he included in his expert report. *See* Tr. 1258-59. I have also cited to Cutler's report in this initial decision, although I have not relied on it. Robinson and Cutler did not testify at the hearing, however.

III. CONCLUSIONS OF LAW

A. BIEL Violated Exchange Act Section 13, BIEL and A. Whelan Violated the Rules Thereunder, and A. Whelan Caused some of BIEL's Violations

1. BIEL had a Class of Securities Registered in 2009 and 2010

BIEL filed a Form SB-2 on February 13, 2006. *See* RX 188; RX 190 at 2203. It filed a Form 8A-12g on February 16, 2006, and attached three exhibits, including the Form SB-2 filed on February 13. *See* RX 190 at 2203; BIEL Form 8A-12g (available at https://www.sec.gov/Archives/edgar/data/1320869/000114420406006731/v036036.htm) (last accessed Nov. 29, 2016). BIEL withdrew its original Form SB-2 by filing Forms RW on July 10 and 13, 2016. *See* RX 189; RX 190 at 2203. But it did not file a Form 15 to terminate its Exchange Act registration until April 18, 2011. *See* RX 208. By operation of law, BIEL's Form 8A-12g became effective sixty days after filing – in this case, April 17, 2006 – and was only withdrawn approximately five years later. *See* 15 U.S.C. § 78*l*(g)(1) (Exchange Act registration statements "shall become effective sixty days after filing with the Commission"). BIEL filed its Form 10-K for fiscal year 2009 on March 31, 2010, during the period when its Form 8A-12g was in effect. *See* DX 51. Therefore, BIEL filed its 2009 Form 10-K while it had securities registered under Exchange Act Section 12.

Respondents present three unpersuasive arguments against this conclusion. First, they argue that BIEL's "registration effort" was withdrawn in July 2006, apparently by the filing of the Forms RW. Resp. Br. 37; Resp. Reply 3-4. But the Forms RW were for withdrawal of the Form SB-2, not for withdrawal of the Form 8A-12g. *See* RX 189 at 2201. That BIEL abandoned its "registration effort" under the Securities Act does not mean that it withdrew its registration under the Exchange Act.

Second, Respondents argue that they and their counsel believed the withdrawal of the Form 8A-12g had been effective, and that the Commission never told them otherwise until BIEL started filing periodic reports in 2010. *See* Resp. Br. 37-38. But even a mistaken belief that a company lacks a class of securities registered under Exchange Act Section 12(g) does not nullify the company's duty to file accurate reports. *See SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1165 (D.D.C. 1978) (stating that Exchange Act reporting provisions are "clear and unequivocal"). Nor does the Commission's silence vitiate that duty. *See The Robare Grp., Ltd.*, Investment Advisers Act of 1940 Release No. 4566, 2016 SEC LEXIS 4179, at *36 n.37 (Nov. 7, 2016) (rejecting respondent's alleged detrimental reliance on Commission's "no further action letter").

Third, Respondents argue that the provisions of Exchange Act Section 13 do not apply because BIEL, even if registered voluntarily, was not required by Section 12(g) to register. *See* Resp. Br. 38-41. This argument is foreclosed by the plain language of Section 12(g)(1), which states that "[a]ny issuer may register any class of equity security not required to be registered by filing a registration statement pursuant to the provisions of this paragraph." 15 U.S.C. § 78*l*(g)(1). Exchange Act Section 13(a) and rules thereunder require issuers of securities registered pursuant to Section 12 to file with the Commission accurate and current information in periodic reports, whether their registration was mandatory or voluntary. And although the number is technically immaterial, there is evidence that as of December 31, 2009, BIEL had total assets exceeding $1 million and its common stock was held of record by 16,011 persons, and so it may have been required to register in any event under the law in effect at the time. *See* 15 U.S.C. § 78*l*(g)(1)(A) (2004); DX 51 at 16; RX 211 at 2740; *but see* Tr. 642-43, 910-11.

2. BIEL Improperly Recognized Revenue From YesDTC and eMarkets

Under SEC SAB 104, if a purchaser is not able to take delivery of a manufacturer's product, for example, because of a lack of available space for inventory, the manufacturer generally may not immediately recognize revenue for the sale. *See* SEC SAB No. 104, 68 Fed. Reg. at 74438-39. The exception is when the transaction meets the seven bill and hold criteria. *See id.* at 74439; DX 135 at 11-12; RX 203 at 2427. It is undisputed that none of the BIEL products "sold" to YesDTC and eMarkets in 2009 left BIEL's warehouse in 2009. *See* Tr. 361, 377, 606, 944. Therefore, the YesDTC and eMarkets payments were not properly recognizable as revenue, or reported as such in BIEL's Form 10-K, unless the transactions qualified under the bill and hold criteria. *See* DX 13 at 26; DX 135 at 23-25, 41-42.

It is irrelevant that other standard revenue recognition criteria may have been satisfied, because SEC SAB 104 expressly contemplates the situation presented here – namely, when the manufacturer retains possession of the products sold, even if title has passed to the buyer. *See* Resp. Br. 54-55; SEC SAB No. 104, 68 Fed. Reg. at 74437. To the extent Linsley's opinion was to the contrary, it is rejected as inconsistent with BIEL's restatement and with SEC SAB 104, which, again, expressly contemplates a situation that is materially indistinguishable from the YesDTC and eMarkets transactions. *Compare* SEC SAB No. 104, 68 Fed. Reg. at 74438-39, *with* RX 203 at 2424-26. It also bears noting that Linsley's opinion that the final YesDTC agreement was executed by the properly authorized personnel of the buyer and seller is patently wrong. *Compare* RX 203 at 242, *with* DX 67 at 6318. And to the extent A. Whelan's testimony was to the contrary, his explanation for his views was so inconsistent with SEC SAB 104 that such testimony undermined his overall credibility. *See* Tr. 959-60 ("[D]elivery is not a requirement . . . for the accounting."); Tr. 362-63, 975 (denying that BIEL improperly recognized revenue, notwithstanding its restatement).

As for the bill and hold criteria, there was no "fixed schedule for delivery of the goods" sold to either YesDTC or eMarkets. SEC SAB No. 104, 68 Fed. Reg. at 74439. Vondra opined with respect to YesDTC that drawing inventory "as needed" and pursuant to a "plan," in the absence of actual expected sales and the lack of regulatory clearance, "is not a fixed delivery schedule." DX 135 at 34 (citing DX 86 at 4252-53). He opined with respect to eMarkets that M. Whelan's "anticipation" of shipment by December 31, 2010, in the absence of identified customers or orders, "is not a fixed delivery schedule." *Id.* at 52-53 (citing RX 170C). Linsley opined, in summary, that both transactions met "a reasonable interpretation of" the fixed delivery schedule criterion, that the criterion called for a delivery schedule but not a delivery date, and that the criterion was "effectively redundant" in any event. RX 203 at 2427. Vondra's opinion is more persuasive than Linsley's because it is more consistent with the plain language of SEC SAB 104; a schedule without dates is not a schedule, nor is the need for a delivery schedule in any sense redundant of the other six criteria. And, again, BIEL admitted in its restatement that it incorrectly recognized revenue from the transactions. *See* DX 13 at 26. I therefore accept Vondra's opinion on this point and find that neither transaction involved a fixed schedule for delivery of the purchased goods.

The remaining six criteria were largely, but not entirely, satisfied. As for YesDTC, I agree with Vondra that there was no fixed commitment to purchase the goods, because, among other factors, Japanese regulatory approval had not been obtained and the agreement was voidable; Linsley, by contrast, essentially ignored regulatory approval in his expert report, and testified that it should be handled as a loss contingency entirely outside the bill and hold criteria. *See* DX 135 at 31; RX 203 at 2424-27; Tr. 1331-32. However, according to the distribution agreement any such regulatory approval was the responsibility of YesDTC, not of BIEL, and Vondra's opinion that BIEL retained a specific performance obligation is not well-taken. *Compare* DX 67 at 6310, *with* DX 135 at 36. As for eMarkets, contrary to Vondra's opinion, I interpret paragraph 2.3 of the distribution agreement to constitute a fixed commitment to purchase the goods as to which BIEL recognized revenue. *Compare* DX 18 at 235, *with* DX 135 at 47-48. Also, I accept A. Whelan and M. Whelan's testimony that the goods were ready for shipment, and find that their investigative testimony on the topic was not to the contrary, and I accept M. Whelan's testimony that she believed eMarkets was required to store its inventory in an approved warehouse. *See* Tr. 382-85, 596, 652-53; *but see* DX 135 at 50-52 (Vondra did not view the need for an approved warehouse as a "substantial business purpose"). Vondra's opinion as to both transactions, to the extent it found each criterion not satisfied, otherwise generally rested on the lack of documentation supporting each bill and hold criterion. *See* DX

135 at 29-33, 36-38, 44-52, 54; DX 9 at 2-3. This lack of documentation is troubling, and certainly should have raised red flags to an auditor, but I do not understand Vondra's opinion to be that the lack of documentation itself violated GAAP (as opposed to generally accepted auditing standards (GAAS)). *Compare* Div. Reply 31-32 (arguing that the lack of documentation violated GAAP), *with* DX 9 at 2-3 & n.7 (citing GAAS in criticizing BIEL's lack of documentation). Instead, the oral testimony of A. Whelan and M. Whelan was generally sufficient to establish the factual predicates for each proven criterion, even if such testimony would have been insufficient to an auditor.

Respondents make much of the fact that BIEL received payment in full for both transactions. *See* Resp. Br. 45, 54. This is irrelevant; the issue is whether BIEL should have recognized the payments as bill and hold revenue in 2009 (notably, before payment had been completed), or as something else, or at some other time. It is similarly irrelevant that GAAP revenue recognition rules may change in the near future. *See* RX 203 at 2428-29. Vondra's opinion, that the payments should have been accounted for in 2009 as a "deferral," is generally consistent with BIEL's restatement and is well supported, and even Linsley agreed that the payments, although properly recognized as revenue, should not have been reported as bill and hold revenue. *See* Tr. 685, 1316; DX 13 at 5; DX 135 at 19 & n.32. And whether the YesDTC agreement was a binding contract under Maryland law – a question Respondents spend several pages discussing in their post-hearing brief – is beside the point, because the question is whether the YesDTC constituted a "fixed commitment" to purchase BIEL products under GAAP. *See* Resp. Br. 45-48. On balance, therefore, BIEL improperly recognized revenue from its purported bill and hold transactions with YesDTC and eMarkets, and it falsely reported such revenue in its 2009 Form 10-K.

3. BIEL's Improperly Recognized Revenue was Material

A statement is material if there is a substantial likelihood that a reasonable investor would consider the statement important in making an investment decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). There is no bright-line test of materiality, and it is dependent on the facts and circumstances of each case. *See Matrixx Initiatives v. Siracusano*, 563 U.S. 27, 38-44 (2011). SEC SAB 99 provides guidance regarding materiality determinations in the preparation of financial statements, recognizing both quantitative and qualitative measures to assess materiality. *See* SEC SAB No. 99, 64 Fed. Reg. 45150 (Aug. 19, 1999). SEC SAB 99 states that the use of a numerical threshold to assess materiality, such as five percent, may be appropriate as a preliminary analysis of materiality. *Id.* at 45151. However, SEC SAB 99 also notes that "exclusive reliance on certain quantitative benchmarks to assess materiality . . . is inappropriate; misstatements are not immaterial simply because they fall beneath a numerical threshold." *Id.* at 45150. Quantitative benchmarks should not be used as a substitute for a full analysis of "all relevant considerations." *Id.* at 45151.

Financial statements that do not comply with GAAP are presumptively materially misleading. *See SEC v. Sys. Software Assocs., Inc.*, 145 F. Supp. 2d 954, 958 (N.D. Ill. 2001) ("A financial statement that recognizes revenue and does not conform to the requirements of GAAP is presumptively a false or misleading statement of material fact under Rule 10b–5."); 17 C.F.R. § 210.4-01(a)(1). In addition to relying on this presumption, the Division points to

Vondra's opinion that the transactions were material. *See* Div. Br. 63-66; DX 135 at 57-62. Vondra relied on several considerations: (1) the improperly recognized revenue was 32% of reported 2009 revenue and 47% of actual 2009 revenue, and represented a 160% increase in sales over the prior year; (2) the two transactions represented 66% of 2009 fourth quarter sales; (3) the apparent increase in revenue would have been important to investors because it suggested a potential growth trend; (4) the two transactions directly involved senior management decisions; (5) the two transactions involved qualitative factors identified in SEC SAB 99, namely, a distinct business segment – the veterinary market – and regulatory compliance, as well as the fact that BIEL touted its international distribution channels and regulatory approvals in its Form 10-K; and (6) BIEL's restated financials, and its intent to restate as acknowledged to the Commission in January 2011, confirmed the two transactions' materiality. *See* DX 135 at 60-62.

Respondents rely on three factors, which they argue weigh against a finding of materiality: Linsley's opinion, BIEL's poor financial condition, and Hills' event study. *See* Resp. Br. 42-43. Linsley noted that SEC SAB 99 lists nine qualitative considerations relevant to evaluating materiality, including whether the misstatement masks a change in earnings or other trends, and whether the misstatement concerns a business segment that has played a significant role in operations or profitability. *See* RX 203 at 2430. In contrast to Vondra, Linsley found that BIEL's Form 10-K implicated none of these considerations. *See id.*; DX 135 at 61. Linsley's opinion on this point is conclusory and clearly wrong. BIEL's misstated 2009 revenue misleadingly suggested that its overall losses were decreasing, that its international segment was expanding, and that its veterinary segment had improved much more than it really did. *See* DX 51 at 17-20.

As for BIEL's poor financial condition, Respondents argue that it had "massive cash flow shortfalls and sustained eight figure losses," and that the Form 10-K provided a detailed disclosure of its "uncertain viability as a going concern." Resp. Br. 42-43. Linsley echoed this point, noting that the additional $366,000 in revenue would not have made a reasonable investor "reach a conclusion other than that BIEL was a company in very serious financial trouble." RX 203 at 2431. BIEL has indeed always been in very serious financial trouble, so much so that as of December 31, 2015, it had a total net loss since inception of over $27 million. *See* RX 171Q at 1707. But its net loss for 2009, as reported on its Form 10-K, was approximately $260,000, when it should have been reported as $634,000. *Compare* DX 51 at 21, *with* DX 13 at 5. Vondra clearly had the right of it when he opined that the improperly recognized revenue suggested a potential growth trend, or at least the prospect of one. *See* DX 135 at 60-61. Indeed, BIEL's consistently poor performance made its misleadingly dramatic reduction in net loss even more material than it would otherwise have been. *See* Div. Br. 65-66.

I place little weight on the competing event studies. Hills' event study found no statistically significant price change at the time BIEL issued the Form 10-K; Sacks' event study, which used at least some of the same parameters and data as Hills', found the opposite. Neither Hills nor Sacks could provide a definitive explanation for this discrepancy, although Hills noted that he and Qin used different models and pre-periods, and Sacks relied on Qin's model. *See* Tr. 825, 832, 835. Although Sacks forthrightly admitted that a properly conducted event study would likely not result in a finding of statistical significance, he also opined that the inconsistent event studies could be explained by the extreme volatility of BIEL's stock price. *See* Tr. 843-44.

Conversely, Hills admitted that Sacks' results for April 1, 2010, were statistically significant. *See* Tr. 826. All these considerations suggest that the event studies were so sensitive to the assumptions that went into them, and therefore so easily subject to manipulation, that they should not be given significant weight in the materiality analysis. In any event, "the movement of a company's stock price, or lack thereof, is not dispositive of whether a given statement is material." *SEC v. Monterosso*, 768 F. Supp. 2d 1244, 1265 (S.D. Fla. 2011) (collecting cases), *aff'd*, 756 F.3d 1326 (11th Cir. 2014).

On balance, the two bill and hold transactions combined were materially false. They exceeded the standard five percent metric by a wide margin. *See* DX 135 at 58, 60. They involved the decisions of senior management. *See* SEC SAB No. 99, 64 Fed. Reg. at 45152 (intent of management may provide significant evidence of materiality). They exaggerated BIEL's prospects. And, again, BIEL restated its financials and reported that the revenue from the two transactions should not have been recognized as revenue at all in 2009, even under the standard criteria. *See United States v. Reyes*, 660 F.3d 454, 470 (9th Cir. 2011) (a restatement can be used as "evidence" of materiality even if it does not, by itself, establish materiality).

4. BIEL Violated Section 13 and Rule 13a-1, and A. Whelan Caused the Violations

Exchange Act Section 13(a) and Rule 13a-1 thereunder require issuers with securities registered under Exchange Act Section 12 to file annual reports with the Commission. 15 U.S.C. § 78m(a); 17 C.F.R. § 240.13a-1. An issuer violates these provisions if it files reports with the Commission that contain materially false or misleading information. *SEC v. Kalvex, Inc.*, 425 F. Supp. 310, 316 (S.D.N.Y. 1975); *Russell Ponce*, 54 S.E.C. 804, 812 n.23 (2000), *pet. denied*, 345 F.3d 722 (9th Cir. 2003). Scienter is not required to establish violations of Exchange Act Section 13(a) and Rule 13a-1. *See SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998); *SEC v. Wills*, 472 F. Supp. 1250, 1268 (D.D.C. 1978). Because BIEL's 2009 Form 10-K reported materially false revenue, BIEL violated Exchange Act Section 13(a) and Rule 13a-1 thereunder.

Exchange Act Section 13(b)(2)(A) requires an issuer registered with the Commission pursuant to Exchange Act Section 12 to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." 15 U.S.C. § 78m(b)(2)(A). Exchange Act Section 13(b)(2)(B) requires these issuers to "devise and maintain a system of internal accounting controls." 15 U.S.C. § 78m(b)(2)(B). Neither scienter nor materiality need be shown to establish liability under Exchange Act Section 13(b)(2). *See Rita J. McConville*, 58 S.E.C. 596, 622 (2005), *pet. denied*, 465 F.3d 780 (7th Cir. 2006); *SEC v. World-Wide Coin Invs., Ltd.*, 567 F. Supp. 724, 749-50 (N.D. Ga. 1983). Because BIEL's 2009 financial statements recorded materially false revenue, BIEL violated Exchange Act Section 13(b)(2)(A). And because BIEL's ICFR "was not effective as of December 31, 2009, due to the existence of significant deficiencies constituting material weaknesses," BIEL violated Exchange Act Section 13(b)(2)(B). DX 51 at 32.

A. Whelan's liability for causing BIEL's violations of the Exchange Act requires proof that: (1) BIEL committed primary violations; (2) A. Whelan was a cause of those violations; and (3) A. Whelan knew or should have known that his acts and omissions would contribute to BIEL's violations. *See* 15 U.S.C. § 78u-3(a); *Robert M. Fuller*, 56 S.E.C. 976, 984 (2003), *pet.*

denied, 95 F. App'x 361 (D.C. Cir. 2004). As noted, BIEL committed primary violations, and it is undisputed that A. Whelan was BIEL's principal executive and financial officer at the time. *See* DX 113.

As to BIEL's Section 13(a) and 13(b)(2)(A) and Rule 13a-1 violations, A. Whelan testified that recognizing revenue from the YesDTC and eMarkets payments as bill and hold transactions was improper, that he believed it was improper at the time BIEL filed its Form 10-K, and that he still believes that. *See* Tr. 357-58, 363. He also testified that he believed at the time, and still believes, that the revenue could have been recognized under the standard criteria. *See* Tr. 358, 363. But the evidence shows that he was not sincere in these beliefs. His own bill and hold memo listed the standard criteria, followed by the bill and hold criteria, for the purpose of demonstrating that bill and hold revenue recognition was proper but that standard revenue recognition was not – the opposite of his hearing testimony. *See* DX 90. BIEL's January 2011 response to Corporation Finance, which was signed by A. Whelan, stated initially that "management believes all requirements have been met for revenue recognition as a distributor agreement, but not as 'bill-and-hold.'" *See* DX 14 at 13, 25. Later in that same response, though, BIEL provided a rambling explanation for why recognizing revenue as bill and hold transactions actually did comply with GAAP. *See* DX 14 at 22. BIEL's 2009 Form 10-K, also signed by A. Whelan, characterized one of the standard revenue recognition criteria differently from the bill and hold memo, by restating: "[D]elivery has occurred or services have been rendered" as "shipment has occurred or title of the goods has been transferred to our buyers." *Compare* DX 90 at 2, *with* DX 51 at 26; DX 51 at 47. This otherwise pointless modification of BIEL's normal revenue recognition policy suggests that A. Whelan knew that the standard criteria had not been met. Under the totality of the circumstances, therefore, A. Whelan plainly knew that his own conduct would contribute to BIEL's Section 13(a) and 13(b)(2)(A) and Rule 13a-1 violations, and he thus caused them.

As to BIEL's Section 13(b)(2)(B) violation, A. Whelan was the "sole officer . . . responsible for establishing and maintaining" its ICFR. DX 113. BIEL's Form 10-K stated that management had evaluated its ICFR under A. Whelan's supervision as of December 31, 2009. *See* DX 51 at 32. That evaluation showed three material weaknesses that A. Whelan could have remedied but did not: (1) an insufficient number of independent directors on the board and the audit committee; (2) no financial expert on the audit committee; and (3) insufficient segregation of finance and accounting duties caused by having only one staff member performing nearly all aspects of BIEL's financial reporting process. *See id.* at 33. As the certifying officer of a public company, he had a duty to understand BIEL's ICFR, to know how to adequately implement it, and to certify that he had designed and evaluated it. *See* 17 C.F.R. § 240.13a-15; DX 113. At a minimum, therefore, A. Whelan should have known that his failure to fix these problems contributed to BIEL's violations, and he thus caused them. *See SEC v. Jensen*, 835 F.3d 1100, 1113 (9th Cir. 2016) ("[O]ne cannot certify a fact about which one is ignorant.").

5. A. Whelan Violated Rules 13a-14 and 13b2-1, but not Rule 13b2-2

Exchange Act Rule 13a-14(a) states that Forms 10-K and 10-Q must include specified certifications signed by the issuer's principal executive and principal financial officer. *See* 17 C.F.R. § 240.13a-14(a). Two such certifications are that the report "does not contain any untrue statement of a material fact" and that it "fairly present[s] in all material respects the financial condition, results of operations and cash flows" of the issuer. 17 C.F.R. § 229.601(b)(31)(i). Another such certification is that the certifying officer has designed adequate ICFR. *See id.* Rule 13a-14(a) is violated if a required certification contains materially false or misleading information. *See Kalvex*, 425 F. Supp. at 315-16 (finding that Exchange Act Section 13(a) is violated when filed reports are not "true and correct"); *Russell Ponce*, 54 S.E.C. at 812 n.23. For the same reasons A. Whelan caused BIEL's violation of Section 13(a) and Rule 13a-1, that is, because he knew its Form 10-K contained false information and did not fairly present its financial condition, he personally violated Rule 13a-14(a). However, he did not violate Rule 13a-14(a) by certifying that he had designed adequate ICFR. Although his certification was false, it was not materially false, because the Form 10-K adequately explained elsewhere that BIEL was grossly deficient in its ICFR. *See* DX 51 at 32-33.

Exchange Act Rule 13b2-1 states that "[n]o person shall[,] directly or indirectly, falsify or cause to be falsified, any book, record or account" subject to Exchange Act Section 13(b)(2)(A). 17 C.F.R. § 240.13b2-1. Scienter is not required for finding a violation of Rule 13b2-1. *Rita J. McConville*, 58 S.E.C. at 620. For the same reasons A. Whelan caused BIEL's violation of Section 13(b)(2)(A), he personally violated Rule 13b2-1.

Exchange Act Rule 13b2-2(a) makes it unlawful for a director or officer of an issuer to make or cause to be made a materially false or misleading statement to an accountant or omit or cause to omit any material information necessary to make the statements made not misleading, in connection with an audit of financial statements or reports filed with the Commission. 17 C.F.R. § 240.13b2-2(a). The Division's evidence that A. Whelan violated Rule 13b2-2(a) is limited; essentially it is only the bill and hold memo, which A. Whelan drafted and which he agreed represented what BIEL decided should be in its financial statements. *See* Tr. 390-91; DX 90. Although the memo was produced from the files of BIEL's auditor, and it stands to reason that A. Whelan drafted it on the understanding that it would be forwarded to BIEL's auditor, the record shows that it was actually forwarded by Esther Ko and not by A. Whelan. *See* RX 174 at 1776. In response, the auditor communicated to Ko, not to A. Whelan. *See id.* at 1782. A. Whelan may well have caused Ko to transmit the bill and hold memo to BIEL's auditor, but he cannot be held primarily liable for transmitting the false statements contained in it. A. Whelan therefore did not violate Rule 13b2-2.

B. Respondents Violated Securities Act Section 5

1. Legal Framework and Undisputed Issues

Section 5(a) of the Securities Act provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise.

15 U.S.C. § 77e(a). Section 5(c) of the Securities Act provides, in pertinent part:

> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.

15 U.S.C. § 77e(c).

A prima facie case for a violation of Section 5 is established by showing that: (1) the respondent directly or indirectly sold or offered to sell securities; (2) through the use of interstate facilities or mail; (3) when no registration statement was in effect or filed as to those securities. *See David F. Bandimere*, Securities Act Release No. 9972, 2015 WL 6575665, at *5 (Oct. 29, 2015); *see also SEC v. Calvo*, 378 F.3d 1211, 1214-15 (11th Cir. 2004) (citing *SEC v. Cont'l Tobacco Co.*, 463 F.2d 137, 155 (5th Cir. 1972)). Proof of scienter is not required. *See Calvo*, 378 F.3d at 1215; *David F. Bandimere*, 2015 WL 6575665, at *5. Liability under Section 5 may be found for persons who are "necessary participant[s]" or whose activities were a "substantial factor" in the illicit sale. *Calvo*, 378 F.3d at 1215; *see generally SEC v. Murphy*, 626 F.2d 633, 649-52 (9th Cir. 1980) (summarizing cases). Once a prima facie case is established, the burden shifts to respondent to prove entitlement to an exemption. *See SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *David F. Bandimere*, 2015 WL 6575665, at *5.

The pertinent exemption in this case is codified at Securities Act Section 4(a)(1), and provides that Section 5 shall not apply to "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(a)(1). Although the OIP could be read to allege that BIEL's issuance of convertible notes to IBEX and St. John's by itself violated Section 5, the Division apparently argues only that "the securities sold by IBEX and St. John's" were unregistered. *Compare* OIP at 4, *with* Div. Br. 33-34; *see BioElectronics Corp.*, 2016 SEC LEXIS 2588, at *15 (noting that the parties' summary disposition briefing did not address any exemption for BIEL's own sales); *but see* Div. Reply 4-5 (arguing that BIEL's sales were not exempt under Section 4(a)(2)). And all the alleged misconduct took place no later than February 2015. *See* Stipulation at Ex. B. The other exemptions cited by Respondents, Sections 4(a)(2) (the "private offering exemption") and 4(a)(7) (which took effect after February 2015), are therefore immaterial. *See* 15 U.S.C. § 77(d)(a)(2), (7); Resp. Br. 16, 27-29. And even if the Section 4(a)(7) exemption were material, the Division correctly points out that Respondents did not satisfy it because, as explained below, there was no disclosure that all the transactions at issue were by control persons, i.e., affiliates. *See* 15 U.S.C. § 77d(a)(7), (d)(3)(K); Div. Reply 16-20.

Section 4 exemptions cover particular transactions rather than participants, even though Section 4(a)(1) requires analysis of the roles the participants play in a transaction. *See SEC v. Kern*, 425 F.3d 143, 152 (2d Cir. 2005). That is, "individuals who take part in the transaction are exempt only insofar as the transaction is exempt." *United States v. Wolfson*, 269 F. Supp. 621, 627 (S.D.N.Y. 1967). Under the Securities Act, "every person who issues or proposes to issue any security" is an issuer. 15 U.S.C. § 77b(a)(4). The parties agree that BIEL was an issuer but that IBEX and St. John's were not. *See* Div. Reply 6; Resp. Br. 16. A dealer is "any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person." 15 U.S.C. § 77b(a)(12). This definition is broader than the definition of the same term in the Exchange Act; for example, it encompasses brokers. *Compare* 15 U.S.C. § 77b(a)(12), *with* 15 U.S.C. § 78c(a)(5) ("The term 'dealer' means any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise."); *see United States v. Crosby*, 294 F.2d 928, 938-39 (2d Cir. 1961). Respondents assert that IBEX was not a dealer, while the Division asserts that it was, but also that the question need not be reached. *See* Div. Reply 7; Resp. Br. 15-17.

But the most vigorously contested issue is whether IBEX and St. John's qualified as underwriters. *See* Resp. Br. 16-34. An underwriter is "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking." 15 U.S.C. § 77b(a)(11). The "issuer" under this definition includes any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer. *See id.* A distribution is defined as "the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hand of the investing public." *Geiger v. SEC*, 363 F.3d 481, 487 (D.C. Cir. 2004) (quoting *Jacob Wonsover*, 54 S.E.C. 1, 12 n.25 (1999), *pet. denied*, 205 F.3d 408 (D.C. Cir. 2000)). Thus, "[a] distribution commences when the issuer begins making offers and does not end until the securities come to rest with the public." *Rodney R. Schoemann*, Securities Act Release No. 9076, 2009 WL 3413043, at *11 (Oct. 23, 2009). The definition of underwriter is "expansive"; for instance, it is possible to qualify as both an underwriter and a dealer with respect to the same transaction, and an underwriter includes a person who sells for a controlling person of an issuer in connection with a distribution. *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1086 (9th Cir. 2010); *see SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 809-10 (11th Cir. 2015); *Jacob Wonsover*, 54 S.E.C. at 12 & n.25 (citing *Pennaluna & Co. v. SEC*, 410 F.2d 861, 863 (9th Cir. 1969)). "[I]f any person involved in a transaction is a statutory underwriter, then none of the persons involved may claim exemption under Section [4(a)(1)]." *Kern*, 425 F.3d at 152; *Zacharias v. SEC*, 569 F.3d 458, 464 (D.C. Cir. 2009).

"[A] person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with," an issuer, is defined as an "affiliate" of the issuer. 17 C.F.R. § 230.144(a)(1). Ordinarily an affiliate may not rely on the Section 4(a)(1) exemption. *See SEC v. Cavanagh*, 445 F.3d 105, 112 (2d Cir. 2006). To address uncertainty in application of this exemption, however, the Commission promulgated Rule 144, a "safe harbor," whereby an affiliate satisfying its conditions "is deemed not to be engaged in a distribution" and "is deemed not to be an underwriter when determining whether a sale is eligible for the Section [4(a)(1)] exemption." 17 C.F.R. § 230.144 (preliminary note). Although the holding periods discussed in Rule 144 permit non-affiliates to qualify for the safe harbor, most of Rule 144's conditions apply only to affiliates. *See generally* 17 C.F.R. § 230.144. Rule 144 is "strictly construed." Definition of Terms "Underwriter" and "Brokers' Transactions," 37 Fed. Reg. 591, 595 (Jan. 14, 1972). Thus, evidence in support of an exemption under Rule 144 must be "explicit, exact, and not built on mere conclusory statements." *John A. Carley*, Securities Act

Release No. 8888, 2008 WL 268598, at *6 (Jan. 31, 2008), *aff'd sub nom., Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009).

It is undisputed that St. John's was an affiliate of BIEL at all relevant times. *See* St. John's Answer at 15. However, the parties hotly dispute whether IBEX was an affiliate of BIEL. *Compare* Div. Br. 40-45, *with* Resp. Br. 20-23.

2. St. John's is Liable

Respondents argue that St. John's met the requirements of Rule 144. *See* Resp. Br. 29-31. According to Rule 144(h), however, St. John's was required to file a Form 144 as to each sale of more than 5,000 shares, to transmit such form for filing "concurrently" with execution of the sale or placement of the order, and to "have a bona fide intention to sell the securities referred to in the notice within a reasonable time after the filing of such notice." 17 C.F.R. § 230.144(h); *see* 17 C.F.R. § 230.144(b) (stating that all provisions of Rule 144 are applicable to affiliates). Each of St. John's seventeen sales of BIEL stock exceeded 5,000 shares. *See* Stipulation 35. St. John's gratuitously filed a Form 144 only years after the sales, in clear violation of Rule 144's timing requirements. *See* Stipulation 36; Resp. Br. 5.

Respondents also argue that St. John's' sales were exempt under Section 4(a)(1) even if they did not meet the requirements of Rule 144. *See* Resp. Br. 33-34. But it is presumed that transactions in unregistered securities not covered by Rule 144 are likewise not covered by Section 4(a)(1). *See Cavanagh*, 445 F.3d at 113 (citing 37 Fed. Reg. 591). The presumption is particularly strong here, because affiliates ordinarily may not rely on the Section 4(a)(1) exemption at all. *See id.* at 112. This is because persons under common control with an issuer, i.e., affiliates, are the issuer for purposes of determining whether someone else is an underwriter. *See* 15 U.S.C. § 77b(a)(11).

Respondents' entire effort to rebut the presumption that St. John's transactions were not exempt focuses on the length of time St. John's held its convertible notes. *See* Resp. Br. 33-34. This is beside the point. As the Division notes, St. John's was legally the issuer for purposes of determining underwriter status, so any person that purchased securities from St. John's with a view to distribution, or offered or sold for St. John's in connection with a distribution, qualified as an underwriter. *See* 15 U.S.C. § 77b(a)(11); Div. Reply 21. At least one of St. John's' brokers, Alpine Securities, sold BIEL stock into the public market for St. John's. *See* Tr. 904-05; RX 172D, 172F, 172H. Alpine Securities was, therefore, an underwriter with respect to St. John's' transactions, and none of the transactions were exempt under Section 4(a)(1).

Respondents have not carried their burden of proving the sales of unregistered BIEL stock by St. John's were exempt from registration. And because BIEL is located in Maryland and St. John's is located in Virginia, the interstate commerce requirement is met. *See* BIEL Answer at 13; St. John's Answer at 12. St. John's is accordingly liable for sales of $397,196.70 in violation of Securities Act Section 5.

3. IBEX is Liable

Respondents contend that IBEX's sales were exempt under Section 4(a)(1). *See* Resp. Br. 16. Respondents bear the burden of proving that its sales were "by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(a)(1). Respondents therefore bear the burden of proving that IBEX was neither an issuer nor an underwriter nor a dealer. *See Big Apple Consulting*, 783 F.3d at 807; *Kern*, 425 F.3d at 148. As noted, the parties agree that IBEX was not an issuer. *See* Div. Br. 36-39. And as with St. John's, because BIEL is located in Maryland and IBEX is located in Virginia, the interstate commerce requirement is met. *See* IBEX Answer at 14.

a. Respondents Failed to Prove IBEX was not a Dealer

I warned the parties in ruling on their summary disposition motions that Respondents bear the burden of proving that IBEX was not a dealer. *BioElectronics Corp.*, 2016 SEC LEXIS 2588. Despite my admonition, the parties' post-hearing arguments on the point are perfunctory. The Division took the position prior to and during the hearing that IBEX's dealership status need not be reached, and so did not even address the issue in its opening post-hearing brief. *See* Tr. 106-07; *see generally* Div. Br. In its Reply, the Division again asserts that the issue need not be reached, and alternatively advances a one-sentence argument that "there is substantial evidence" that IBEX and K. Whelan were dealers. Div. Reply 7. For their part, Respondents do not even cite the definition of "dealer," or address the issue in their Reply. *See* Resp. Br. 15-17; *see generally* Resp. Reply. Indeed, they apparently assume that they do not bear the burden of proof. *See* Resp. Br. 4 ("The Division does not and cannot contend that IBEX and St. John's were . . . dealers."). Respondents' litigative stance approaches a concession of liability.

I briefly address the question of IBEX's dealership status because it is easily resolved. Under the Securities Act, a dealer is defined, in pertinent part, as any person who engages in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person. *See* 15 U.S.C. § 77b(a)(12). Under the Exchange Act, a dealer is defined, in pertinent part, as any person engaged in the business of buying and selling securities for such person's own account, through a broker or otherwise, as part of a regular business. *See* 15 U.S.C. § 78c(a)(5)(A), (B). The differences between these definitions are immaterial in this case, because IBEX sold the securities of another issuer (as required by the Securities Act) for its own account (as required by the Exchange Act). I therefore rely on both Securities Act and Exchange Act authority in evaluating whether IBEX was a dealer. *See Big Apple Consulting*, 783 F.3d at 809 n.11. Under the Exchange Act there exists a "dealer/trader distinction," where a dealer is engaged in the business of buying and selling securities and a trader is not. *See Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934*, 67 Fed. Reg. 67496-01, 67499 (Nov. 5, 2002). Characteristics of a dealer include: having a regular clientele; holding itself out as buying or selling securities at a regular place of business; having a regular turnover of business or participating in the distribution of new issues; and generally transacting a substantial portion of their business with investors. *See id*. Characteristics of a trader include: having a less regular volume; not handling others' money or securities; not making a market; and not furnishing dealer-type services. *See id*. A person may act as a dealer when: (1) it engages in underwriting or as a "de facto market maker," where the public looks to the firm for liquidity; (2) its entire business model is predicated on the purchase and sale of securities; or (3) its purchases are at deep discounts. *See id.*; *Big Apple Consulting*, 783 F.3d at 809-10.

To be sure, some of these factors weigh against finding that IBEX was a dealer. It did not handle others' money or securities, did not furnish dealer-type services, and did not clearly hold itself out as buying or selling securities at a regular place of business. *See* Tr. 493 (K. Whelan testified that she "never made it known that she wanted to sell"); *but see* Tr. 491 (K. Whelan testified that Mazuma and Redwood "call[ed] her often" because they knew she had "old debt" they wished to buy). On the other hand, IBEX had a regular clientele, because it bought essentially all of its notes from the same issuer and sold most of its notes or converted stock to a limited group of purchasers, principally Mazuma and Redwood. *See* Stipulation at Exs. A, B. It participated in the distribution of new issues, either by converting BIEL notes to stock and selling the stock itself or by selling notes to purchasers whenever asked to do so by BIEL, so that the purchasers could convert the notes and then sell the stock. It had a regular volume, other than between about June 2011 and January 2013. It was either a market maker, that is, a market participant that held itself out as being willing to buy and sell a particular security for its own account on a regular and continuous basis, or a de facto market maker, because it appears to have been the principal conduit of publicly traded BIEL stock. *See* 15 U.S.C. § 78c(a)(38) (defining "market maker"); DX 137 at 22-23 (by late 2014 IBEX was responsible for about 50% of outstanding BIEL shares in the public market).

The two most significant factors, however, were that IBEX had only one, narrow line of business and its purchases were at deep discounts. There is no evidence that IBEX did anything other than buy and sell BIEL securities. All of its profits came from one source – liquidating BIEL notes, either by conversion and stock sale or by note sale to a third party for conversion and stock sale. As a result, IBEX did a "substantial portion of [its] business with investors" and its "entire business model [was] predicated on the purchase and sale of securities." *See* 67 Fed. Reg. at 67499; *Big Apple Consulting*, 783 F.3d at 809-10. And its purchases were at deep discounts, with the conversion price typically half of the market price. Such favorable terms are characteristic of dealers, but not of traders. *See Gordon Wesley Sodorff, Jr.*, 50 S.E.C. 1249, 1256 (1992) (finding dealer status where, among other things, the respondent's "profits did not result from appreciation in the value of the securities, but rather from his markup over the price he paid").

To rebut this Respondents present three arguments, none of which pertain to the relevant factors: (1) IBEX's investments in BIEL exceeded the proceeds from its sales of BIEL stock, an investment approach which is inconsistent with dealer status; (2) IBEX held its BIEL notes for years, which is more consistent with being a "long term private investor[]" than a dealer; and (3) Park's testimony supported these points. *See* Resp. Br. 15-17. The first two arguments cut against Respondents. Holding an inventory of an issuer's securities, even for an extended period, may not be common, but is a reasonable tactic for a market maker, because then it always has an inventory on hand with which to make a market. As for Park's testimony, I accord it little weight because it was on a legal question, and the Division did not ask him to opine on the matter, so his testimony at the hearing was apparently extemporaneous. *See* Tr. 165, 171-72.

Respondents do not cite Cutler's opinion regarding IBEX's dealership status, and it was, in any event, neither a proper expert opinion nor well supported. *See* RX 205 at 2458-59.

b. IBEX Failed to Prove its Transactions did not Involve an Underwriter

The Division contends that IBEX was "part of BIEL's control group," that is, IBEX and BIEL were under common control (although the Division is vague about the precise membership of the control group), and that IBEX was therefore an affiliate of BIEL. Div. Br. 9-10, 41; *see* Resp. Reply 20. An affiliate of an issuer must meet multiple requirements to qualify for the Rule 144 safe harbor, including the filing of Forms 144 (if appropriate) and limitations on the volume of sales. *See* 17 C.F.R. § 230.144(a)(1), (c), (e), (h). It is undisputed that if IBEX was an affiliate of BIEL during the relevant time, it did not qualify for the safe harbor as to any sale (except the one to Martinez in September 2012, which did not meet the dollar threshold), because it did not file any Forms 144. *See* Resp. Br. 5; Stipulation at Ex. B. It also exceeded the volume limitations in multiple quarters. *See* 17 C.F.R. § 230.144(e); DX 137 at 24-25.

Control in this context means "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person whether through the ownership of voting securities, by contract, or otherwise." *Kern*, 425 F.3d at 149 (quoting 17 C.F.R. § 230.405). Whether a person has control depends on the totality of the circumstances, including an appraisal of the person's influence upon the management and policies of the relevant entity. *See Rodney R. Schoemann*, 2009 WL 3413043, at *7 (quoting *United States v. Corr*, 543 F.2d 1042, 1050 (2d Cir. 1976)); *Kern*, 425 F.3d at 150. Formal, legally binding control need not be shown, as Respondents contend. *See* Resp. Br. 22 (observing that A. Whelan controlled BIEL, subject to its board and shareholders, and K. Whelan owned IBEX). For example, in *Kern* the defendants executed a scheme to sell the unregistered securities of three issuers, the stock of which was initially owned by nominees who were friends and family members of the defendants. *See* 425 F.3d at 146-47. The *Kern* court held that the defendants controlled both the issuers and the nominees, notwithstanding the fact that the nominees formally had voting control over the issuers, in part because "legal control" was not required. *See id.* at 149-50. Nor is any particular familial relationship necessarily dispositive, as Respondents also contend. *See* Resp. Br. 22-23 (arguing that fathers and daughters are not affiliates under Rule 144(a)(2) unless they live in the same home). In *Schoemann*, for instance, the Commission found a Texas resident had control over a corporation, and over his adult son, a Wisconsin resident, where the father had set up the son as the nominal majority shareholder of the corporation. *See* 2009 WL 3413043, at *1-*2, *7-*9.

Kern and *Schoemann* provide examples of circumstances relevant to evaluating affiliate status. In *Kern*, the court found control and affiliate status based upon the following: (1) the corporations were "blank-check companies" with "limited affairs"; (2) the corporations observed no corporate formalities; (3) the corporate shareholders, who were friends and family of the defendants, were "in a relationship of trust" with them; and (4) the defendants had the ability to "garner overwhelming proportions of [corporate] stock at a fraction of the price" at which it was later sold. 425 F.3d at 149-50. In *Schoemann*, the nominal majority shareholder: (1) never paid for his shares; (2) had no prior experience with mergers, the corporation's only line of business; (3) performed virtually no work for the corporation and primarily signed paperwork sent to him from his father, the control person; and (4) overall, "played no real, independent role in reaching any of the decisions he approved." 2009 WL 3413043, at *7-*8.

Some of these considerations weigh against a finding that IBEX was an affiliate of BIEL. BIEL is not a blank-check company with limited affairs, both A. Whelan (via St. John's) and K. Whelan (via IBEX) gave consideration for their BIEL securities, and K. Whelan at times performed substantive work for BIEL. *See* Tr. 241-42, 434-35. But the Division points to a number of factors consistent with the considerations recited in *Kern* and *Schoemann* that demonstrate the BIEL control group included at least A. Whelan and K. Whelan, and they controlled both BIEL and IBEX. *See* Div. Br. 41-42. IBEX has no operations and is simply "where [K. Whelan] sometimes hold[s] investments." Tr. 1048. BIEL was so dependent on note financing, "primarily through IBEX," that at times it would not have made payroll without issuing such notes. Tr. 1277-78. Staelin testified that the BIEL board viewed IBEX as a "friendly" investor and lender. *See* Tr. 1255, 1278. K. Whelan admitted that A. Whelan approached her whenever BIEL needed financing, and she could not remember ever turning down one of his requests, while A. Whelan implied that IBEX made the decision to lend to BIEL whenever K. Whelan had the needed funds; either way, the transactions were plainly not arms-length. *See* Tr. 395-96, 450-52, 1065. BIEL has never repaid an IBEX loan, and instead it has either renegotiated them or the noteholder has converted them to stock. *See* Tr. 246-49. K. Whelan attended some BIEL board meetings to negotiate IBEX loans, was a recipient of board emails, and at times performed work for BIEL in return for compensation determined by A. Whelan. *See* Tr. 241-42, 434-36, 439-40; DX 30, 31, 33. That work included assistance with preparing BIEL's SB-2 filing. *See* Tr. 443-44. IBEX's loan proceeds were paid in some instances directly to BIEL vendors and creditors, and were used to cover BIEL's payroll. *See* Tr. 398, 401-02, 1275-77; DX 85. And BIEL had, as M. Whelan observed, "conflicts out the wazoo." Tr. 549.

Three particularly noteworthy considerations are the lack of corporate formalities between BIEL and IBEX, the timing of IBEX's investments in BIEL relative to its BIEL securities sales, and the handling of the $519,920 and $530,037 notes. BIEL was generally careless about corporate formalities. *See* Tr. 594-95, 599-600 (eMarkets normally did not submit purchase orders and relied on BIEL's logistics manager to track its purchases); DX 67 at 6318 (distributorship agreement with YesDTC was never signed by BIEL); DX 135 at 55-57 (Vondra's summary of the lack of documentation supporting BIEL's accounting). BIEL's carelessness was especially acute when dealing with IBEX: the parties back-dated the Revolver and failed to individually document loans that were incorporated into the Revolver, A. Whelan "essentially had blanket approval" to accept IBEX loans, and when the BIEL board did deliberate on an IBEX loan it did not always formally vote on it. Tr. 328-30, 470, 1267-68. K. Whelan characterized her loan agreements as "oral." Tr. 1117. Respondents admit to such informality, and even suggest that it was an intentional corporate strategy. *See* Resp. Reply 16.

The $530,037 note is an especially troubling example, because it does not appear to have been contemporaneously documented at all. Flood, who has been handling BIEL's accounting for years and claimed to be familiar with its finances, was unaware that the Revolver had been back-dated, and that the $530,037 note had not actually been executed in August 2009. *See* Tr. 1149, 1172, 1216. According to Flood, he relied on documentation in the form of postings in

BIEL's accounting records and information supplied by IBEX's tax attorney. *See* Tr. 1112, 1152. But BIEL seemingly made no such posting for the $530,037 loan, except to note that it had been assigned to IBEX. *See* RX 1F at 43; *see generally* RX 1D. Indeed, K. Whelan was confused and uncertain when testifying about one of the important documents backing up the Revolver, and the document itself, which does not record the $530,037 loan, is dated "as of August 31, 2008" but lists transactions up to January 1, 2010. *See* Tr. 1108-10; RX 1D.

As for the timing of IBEX investments, A. Whelan agreed that IBEX repeatedly sold BIEL notes and used the proceeds to fund convertible notes in "essentially the same amount." Tr. 400-01. As Park observed: in 2013, IBEX received $731,357 from sales of BIEL shares and loaned $704,000 to BIEL, or 96% of those funds; in 2014, IBEX received $1,988,255 from sales of BIEL shares and loaned $1,799,305 to BIEL, or 90% of those funds; IBEX made forty-two loans totaling $2.9 million to BIEL less than ten days after selling notes to third parties, of which thirty-three loans totaling $2 million were made in three days or less of the sales; and in approximately twenty-five of the loans, the amount loaned to BIEL was the same amount that IBEX had just received from sales. *See* DX 137 at 21, 28-29, Exs. F-G. Park did not focus his analysis on the 2010-11 period, and the transactions during that time were not so clearly connected, possibly because K. Whelan had more available cash then she did later and so was less dependent on third party sales. *See* RX 210. The pattern of transactions during that period is nonetheless striking, and supports the Division's contention that IBEX and K. Whelan were the "financing arm of BIEL" at all relevant times. Div. Br. 3; *see* DX 137 at Ex. B.

Although A. Whelan disagreed, M. Whelan admitted that since August 2011, when the $519,920 note matured, IBEX "probably" could have bankrupted BIEL if K. Whelan had called it in. Tr. 337, 568-70. Staelin was impeached with investigative testimony to similar effect. *See* Tr. 1274-77, 1287. With respect to renegotiating the $519,920 note when it came due, A. Whelan explicitly acknowledged in an email that BIEL "rewarded" K. Whelan by dropping the conversion price, and that M. Whelan's "grand nieces and nephews thank [her]" for that; although the reward was spelled out plainly in an email, A. Whelan denied he was "doing [K. Whelan] a favor." *See* Tr. 334-35, 478-79; DX 28. And at some point IBEX agreed, for no consideration apparent from the record, to subordinate the lien associated with its $519,920 note to a held lien by the Export-Import Bank, as a condition on BIEL's receipt of the Export-Import Bank's loan. *See* Tr. 479-80, 500, 638. As the Division correctly notes, this worked to BIEL's benefit, but not to IBEX's. *See* Div. Reply 12.

The Division contends that IBEX had the power to force BIEL to register its securities. *See* Div. Br. 43-44. This contention is not supported by the record. A. Whelan and M. Whelan viewed registration as too expensive, which is what motivated BIEL to borrow from IBEX in the first place (although M. Whelan denied this). *See* Tr. 640-41, 665-67. According to A. Whelan, had IBEX insisted on registration as a condition of its loans BIEL would "probably have said no." Tr. 1040. On the other hand, IBEX had, and often exercised, the power to compel BIEL to renegotiate its notes when they came due. *See* Tr. 478-79, 507. The record shows that IBEX never called in a note, and instead either converted them, renegotiated them, or sold them to non-affiliated third parties, who then negotiated a favorable conversion price with BIEL. *See* Tr. 246-49, 447, 505. According to Staelin, BIEL never declined a request from A. Whelan to "extend the terms of convertible notes." Tr. 1273. IBEX apparently also had, and exercised, the power to compel BIEL to authorize new shares by virtue of its conversions. *See* DX 55; *see generally* DX 137 at 15-16. At times BIEL's board wished to stop financing through IBEX, but, clearly, its wish was not fulfilled. *See* Tr. 1276-77. On balance, even accepting A. Whelan's testimony that IBEX probably could not have forced BIEL to register its securities, that fact is of little weight in view of BIEL's and IBEX's mutual acquiescence in doing what was needed to fund BIEL's operations.

Respondents cite to several inapposite or unhelpful cases in support of their contention that IBEX was not an affiliate of BIEL. *See* Resp. Br. 21. In *Pennaluna & Co. v. SEC*, 410 F.2d at 866, the court held that a person did not need to be "an officer, director, manager, or even shareholder to be a controlling person." In *SEC v. Micro-Moisture Controls, Inc.*, 148 F. Supp. 558, 561-62 (S.D.N.Y. 1957), the court held that a corporation was controlled by a group "acting together and in concert for a common purpose," even though the corporation had only one voting trustee. In *United States v. Sherwood*, 175 F. Supp. 480, 483 (S.D.N.Y. 1959), the court held that the defendant was not a control person for a variety of reasons, and not merely because he possessed only a minority stake in the company. *See* Resp. Br. 21. And *Wolfson* simply does not hold that "[c]ontrol persons are generally officers, directors and/or larger shareholders of the issuer." *See* 269 F. Supp. at 625-27; Resp. Br. 21.

Respondents' other points are unpersuasive. *See* Resp. Br. 21-22. Staelin's expert report was limited to analyzing the legal question of control. *See generally* RX 202. I have disregarded it as improper expert evidence, and to the extent Park opined on the issue of control, I have also disregarded his expert evidence. *See generally* DX 137. The credibility of Staelin's lay testimony, to the effect that BIEL had no power over IBEX and vice versa, was seriously undermined both because the circumstantial evidence refutes it and because he was impeached many times in his relatively brief period on the stand. *See generally* Tr. 1262-91. A. Whelan and K. Whelan testified similarly, and their testimony was similarly unbelievable. *See* Tr. 327-38, 430, 664. K. Whelan's testimony was especially implausible; she testified both that she had no control over BIEL, and that Redwood had "negotiating power" with BIEL to "force a different conversion price" by virtue of holding the same past-due notes it had purchased from IBEX. *See* Tr. 430, 1241. Respondents also cite to bankruptcy law and various commercial contexts, but these are neither clearly analogous nor otherwise pertinent. *See* Resp. Br. 21-23; Resp. Reply 14.

Under the totality of the circumstances, the record shows that IBEX and BIEL were under the common control at least of A. Whelan and K. Whelan. IBEX was therefore an affiliate of BIEL, and IBEX failed to satisfy the requirements of the Rule 144 safe harbor with respect to all securities transactions at issue except the September 2012 note sale to Martinez. As with St. John's, Respondents argue that IBEX's sales were exempt under Section 4(a)(1) even if they did not meet the requirements of Rule 144. *See* Resp. Br. 33-34. But, also as with St. John's, Respondents' argument is limited to IBEX's holding periods, and they make no effort to show that no other transaction participants qualified as underwriters. *See id*. Respondents have therefore failed to rebut the strong presumption that unregistered transactions by an affiliate not covered by Rule 144 are likewise not covered by Section 4(a)(1). *See id*.; *Cavanagh*, 445 F.3d at 113.

Therefore, inasmuch as Respondents failed to prove IBEX's transactions did not involve an underwriter, it is liable for participating in all but one transaction at issue. And inasmuch as Respondents failed to prove IBEX's transactions did not involve a dealer, it is liable for participating in all transactions at issue.

4. BIEL's Liability Under Section 5

A stock certificate for unregistered shares not covered by an exemption – i.e., "restricted" stock – normally bears a legend stating that the shares have not been registered and cannot lawfully be sold until they are registered. *SEC v. Frohling*, --- F.3d ----, 2016 WL 7093925, at *1 (2d Cir. Dec. 6, 2016). A. Whelan took action on behalf of BIEL to have its stock issued without a restrictive legend, in order for its shares to be sold into the public market, for all sales by St. John's and most sales by IBEX. *See* Tr. 231-32, 323-24; *e.g.*, DX 120 at 9; RX 18; RX 80 at 577-80; RX 128 at 873-76, 894. This was accomplished in the same way "any unregistered share is . . . transacted or traded," by, at minimum, both issuing the instruction to the transfer agent and providing a legal opinion that the restrictive legend could be omitted. Tr. 233-34; *e.g.*, RX 172G at 1761-62 (opinion letter for St. John's' sales). In many instances A. Whelan or BIEL took additional action to facilitate IBEX's transactions, such as countersigning securities settlement agreements, executing various written representations, and/or increasing the number of authorized BIEL shares. *E.g.*, DX 132 at 930-31; RX 80 at 593-96, 599-600; RX 128 at 887-88, 894. For certain transactions A. Whelan executed written representations for BIEL that were directed to third-party purchasers' brokers or to clearing firms regarding IBEX's affiliate status and that IBEX and BIEL had no agreement to remit the sales proceeds to BIEL. *E.g.*, DX 132 at 919. Some of these representations were knowingly false, because, for example, they stated that BIEL's shares were "fully registered." DX 132 at 211, 235. A. Whelan admitted that he signed "a number of" Redwood assignment and assumption agreements, and that by doing so Redwood could "do whatever they wanted to." Tr. 257-58, 264. The only transaction as to which there is no evidence of BIEL's participation is the September 2012 note sale to Martinez. *See* RX 18.

In sum, the record demonstrates that BIEL was a necessary participant and a substantial factor in all of St. John's' sales and all but one of IBEX's sales. *See Calvo*, 378 F.3d at 1215. The same evidence demonstrates that A. Whelan was likewise a necessary participant and a substantial factor in the same sales. A. Whelan and BIEL are therefore liable under Section 5 as participants in IBEX's and St. John's' unlawful transactions.

5. Immaterial Issues

In light of Respondents' failure to meet their burden with respect to IBEX's dealer and underwriter status, some of the Division's points are immaterial. The Division contends that IBEX did not satisfy Section 4(a)(1) because it qualified as a "statutory" underwriter. *See* Div. Br. 39-40. It also contends that third parties sold BIEL securities under circumstances that rendered them underwriters, and that IBEX's role in the underwriters' distributions made it liable under Section 5. *See* Div. Br. 45-46. These contentions are immaterial because IBEX is liable as a participant in non-exempt transactions; whether it was a statutory underwriter of those transactions is beside the point. The Division alternatively contends that Respondents, if in "technical compliance" with the Securities Act, engaged in a "plan or scheme to evade the registration provisions of the Act." Div. Br. 51-53 (quoting 17 C.F.R. § 230.144). Because I found that Respondents did not comply with the Securities Act, this contention, too, is immaterial.

Respondents' arguments regarding a "scheme to evade" are similarly immaterial. Resp. Br. 34-36. Also immaterial are Respondents' various contentions regarding Rule 144's requirements other than the need to file Form 144. *See* Resp. Br. 24-27, 29-31. To the extent Respondents assert advice of counsel or other professionals as a defense to liability – a defense I struck during the hearing because Respondents had not noticed it properly – the defense is immaterial to liability (although not to scienter, as explained below) because the proven violations did not involve scienter. *See* Tr. 914-22; *Rodney R. Schoemann*, 2009 WL 3413043, at *12 (advice of counsel is only relevant to scienter). And because the parties have not briefed St. John's' status as a dealer, I have not addressed it, either.

Respondents argue that BIEL and IBEX had no intent to evade registration requirements, and that IBEX's private sales were necessitated by a "DTC Chill" that made it more difficult to sell through a broker. *See* Tr. 186, 491-92, 512-14; Resp. Br. 36-37; DX 3 (describing the "deposit transaction restriction (the Deposit Chill)"). The Division argues that the DTC Chill provided Respondents a motive to engage in their transactions, because they could not sell directly into the market. *See* Div. Reply 44. I find that there is insufficient evidence surrounding the DTC Chill to reach any conclusions about it one way or the other. The only documentary evidence of it in the record is DX 3, a self-serving BIEL press release offered in evidence by the Division only after K. Whelan and Park testified about a "DTC Chill" during the first hearing day. *See* Tr. 235, 512-13, 986-87; DX 3. The testimonial evidence of it is mystifying. On the one hand, K. Whelan testified that she sold BIEL notes privately starting in 2013 because her broker would not take BIEL stock under the DTC Chill. *See* Tr. 491-92, 512-13. On the other hand, she and A. Whelan testified that the DTC Chill began in 2009, even though IBEX continued selling stock thereafter until 2011 – intriguingly, until almost the very same time BIEL's Form 15 became effective. *See* Tr. 512-13, 862-63; RX 208. And A. Whelan testified that BIEL initially received no notice of a chill from DTC itself – a circumstance that seems extraordinarily unlikely – and that he instead probably first heard about it from a shareholder. *See* Tr. 864, 988. On the whole, there are too many unanswered questions about the DTC Chill to make sense out of it.

IV. SANCTIONS

The Division requests a cease-and-desist order, disgorgement and prejudgment interest, civil penalties, and a permanent bar on participation in an offering of penny stock (penny stock bar) as to A. Whelan and K. Whelan. *See* Div. Br. 74-79.

A. The Public Interest, Scienter, and Willfulness

When considering whether an administrative sanction serves the public interest, the Commission analyzes the factors identified in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981): the egregiousness of the respondents' actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondents' assurances against future violations, the respondents' recognition of the wrongful nature of his or her conduct, and the likelihood that the respondents' occupations will present opportunities for future violations (*Steadman* factors). *See Altman v. SEC*, 666 F.3d 1322, 1329 (D.C. Cir. 2011); *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010). Other factors the Commission has considered include the age of the violation (*Marshall E. Melton*, 56 S.E.C. 695, 698 (2003)), the degree of harm to investors and the marketplace resulting from the violation (*id.*), the extent to which the sanction will have a deterrent effect (*see Schield Mgmt. Co.*, 58 S.E.C. 1197, 1217-18 & n.46 (2006)), whether there is a reasonable likelihood of violations in the future (*KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1185 (2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002)), and the combination of sanctions against the respondent (*id.* at 1192). *See also WHX Corp. v. SEC*, 362 F.3d 854, 859-61 (D.C. Cir. 2004). The Commission weighs these factors in light of the entire record, and no one factor is dispositive. *KPMG Peat Marwick LLP*, 54 S.E.C. at 1192; *Gary M. Kornman*, 2009 SEC LEXIS 367, at *22.

These factors are not all one-sided, but on the whole they weigh in favor of heavy sanctions. Respondents' Section 5 violations were egregious, because they contravened "the heart of the securities regulatory system," and recurrent, because they occurred dozens of times over a five year period. *Charles F. Kirby*, 56 S.E.C. 44, 72 (2003), *pet. denied sub nom.*, *Geiger v. SEC*, 363 F.3d 481 (D.C. Cir. 2004). Respondents' Section 13 violations were isolated, but also egregious, because periodic reports are one of the "primary statutory tools for protecting the integrity of the securities marketplace," and books and records rules are the "bedrock elements of our system of corporate disclosure and accountability." *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *11 (Nov. 4, 2013); *Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 WL 4320146, at *8 (Sept. 20, 2012). Respondents claim there is no risk of future violations, but offer no assurances against them, nor do they recognize the wrongful nature of their misconduct. *See* Resp. Br. 56-57. Absent evidence to the contrary, a single violation raises a risk of future violation; BIEL's poor financial condition, its need for outside funding, and the occupations of A. Whelan and K. Whelan all suggest not just a risk, but a strong likelihood of future violations in the absence of remedial sanctions. *See Ralph Calabro*, Securities Act Release No. 9798, 2015 WL 3439152, at *43 (May 29, 2015). The violations vary in age, with the Section 13 violations occurring over six years ago and the Section 5 violations continuing into 2015, so this factor is not particularly significant. Sanctions will have a strong deterrent effect, both generally and specifically. *See Ralph Calabro*, 2015 WL 3439152, at *46. The overall combination of sanctions is not especially onerous, although the combination of monetary sanctions does present some issues; I address this point below. Respondents argue that the absence of fraud weighs against heavy sanctions. *See* Resp. Br. 56-57. Not so; Respondents' actual misconduct is not mitigated by the fact that they failed to engage in more serious misconduct.

Two particularly significant factors are the degree of harm and scienter. The degree of harm to investors was substantial. Between 2009 and 2015, the authorized BIEL shares increased from 750 million to 15 billion, and the share price dropped from about $0.03 to about $0.0008. *See* DX 137 at Ex. C; RX 171Q at 1707. IBEX was responsible for placing 3.28 billion shares, or over 50% of outstanding shares, in 2013 and 2014 alone. *See* DX 137 at 22. The drop in BIEL's stock price may not have been entirely the result of dilution, but dilution plainly contributed to it. *See* Tr. 316-17. In the meantime, BIEL was unable to turn a profit, and remains unable to turn a profit. BIEL's unaudited financial statements may well have been entirely accurate, and so investors knew what they were buying, as Respondents contend. *See* Resp. Br. 57. But the fact remains that those investors suffered massive dilution, without any concomitant confidence arising from the auditing of BIEL's financial statements or the oversight provided by the Commission, and without knowing that BIEL and its president had violated the securities laws.

The degree of harm to investors arising from St. John's' sales was smaller in dollar value but more disquieting. It is laudable that A. Whelan forbore taking his salary in cash. *See* Tr. 901-02. But it is not laudable that he instead used that money, which funded St. John's, to make significantly more money at the expense of the investing public. As the president of BIEL and the husband of St. John's' control person, he was able to obtain a reduction in conversion price from $0.01 (for one loan) and $0.007 (for the other), to $0.002. *See* RX 172B at 1752; RX 172C at 1755; RX 172G at 1761. BIEL's board went along with St. John's' self-dealing because BIEL did "not have the cash to pay the Notes and wishe[d] to avoid being in default." DX 121 at 1586-88. The result was that St. John's was able to parlay $156,903.49, or about one year's salary, into $397,196.70, for a profit of $240,293.21, by unlawfully selling unregistered securities. Stipulations 32, 35. Even assuming that St. John's' loans were both made on June 30, 2010, the date of the first of its loans, and that its sales were all on March 6, 2014, the date of the last of its stock sales, its annualized return on investment was approximately 42%. BIEL's public investors, by contrast, experienced a share price drop from about $0.0138 to about $0.005 during this time frame. *See* DX 137 at Ex. C; RX 172H.

Scienter is defined as a "mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). A finding of "extreme recklessness" satisfies the scienter requirement. *Dennis J. Malouf*, Securities Act Release No. 10115, 2016 WL 4035575, at *7 n.34 (July 27, 2016); *David Disner*, 52 S.E.C. 1217, 1222 & n.20 (1997). Extreme recklessness is "highly unreasonable" conduct "which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978) (quoting *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977)); *see also Dennis J. Malouf*, 2016 WL 4035575, at *7 n.34; *S.W. Hatfield, CPA*, Exchange Act Release No. 69930, 2013 WL 3339647, at *21 (July 3, 2013). Negligence, by contrast, "is the failure to exercise reasonable care or competence." *Byron G. Borgardt*, 56 S.E.C. 999, 1021 (2003).

Respondents contend that they concealed none of their wrongdoing. *See* Resp. Br. 57. This is debatable, but even assuming it to be true, it weighs against a finding of scienter only slightly. Respondents also contend that they "were not aware of any of the violations alleged." *Id.* The record decisively shows the opposite as to the Section 13 violations, because A. Whelan admitted that he has never believed that the YesDTC and eMarkets deals were proper bill and hold transactions, even though BIEL accounted for them, and reported them, as such. *See* Tr. 358, 363. A. Whelan (and by extension BIEL) therefore acted with scienter by deliberately and knowingly falsifying BIEL's books and records and 2009 Form 10-K.

As to the Section 5 violations: (1) at least one of A. Whelan's letters to third parties in support of IBEX's sales was knowingly false, because it represented that BIEL's shares were fully registered (DX 132 at 211); (2) at least one such letter was at best misleading, because it represented that BIEL and IBEX had no agreement to remit IBEX's sales proceeds to BIEL, but just two days later IBEX loaned BIEL money in the same amount (*compare* DX 132 at 919, *with* Stipulation at Ex. A); and (3) A. Whelan implied, unbelievably, that IBEX independently made the decision to lend to BIEL whenever K. Whelan had the needed funds (*see* Tr. 395-96). On multiple occasions K. Whelan gave disingenuous testimony about IBEX's transactions; for example, she testified that when she sold Noel stock at a discount to reward him for his efforts in promoting BIEL, she did not do so on behalf of BIEL, even though she expected to get reimbursed by BIEL. *See* Tr. 458-60. As another example, she testified that "[a]t times" she decided that it "made sense" for her to sell a note to Redwood, or she just wanted cash and so sold a note to Redwood, as if BIEL never requested her to do so or that it was just happenstance that the note sale proceeds normally went to fund another BIEL note. Tr. 485-86. And she disclaimed any knowledge of what Redwood did with the notes she sold it. *See* Tr. 493-95. The most extreme example of K. Whelan's incredible testimony was her statement that she lacked "control" over BIEL notwithstanding IBEX's ownership of past-due notes, the same past-due notes that gave Redwood "negotiating power" with BIEL "to force a different conversion price." *See* Tr. 430, 1241.

Respondents also had a strong financial motive to participate in unregistered transactions: they did not wish to take out any more "death spiral" loans and instead desired a "friendly investor." Tr. 1034, 1255; *see* Div. Reply 44. Although M. Whelan denied it, there is little doubt that this was BIEL's motive to pursue financing through IBEX. *See* Tr. 337, 641, 666-67. BIEL would not have been able to sell unregistered stock directly to the public because of Section 5, and would have had difficulty selling such stock privately because of the holding period required under Rule 144. But a friendly lender such as IBEX, by acting as an intermediate holding party, could have allowed BIEL's stock to trade freely by meeting Rule 144's requirements and then selling either privately or directly to the public. That IBEX did not so act supports a finding of scienter, because IBEX could have easily met the requirements of Rule 144 had it been slightly more diligent and had Respondents simply assumed that it was an affiliate.

Moreover, Respondents were aware that IBEX's affiliate status was an important issue no later than January 2010, because K. Whelan, on behalf of IBEX, represented that it was not an affiliate in the very first stock purchase agreement at issue, a stock purchase agreement signed by A. Whelan on behalf of BIEL. *See* DX 138 at 118, 121. BIEL apparently did not solicit an opinion letter for any IBEX sale until January 2011; between January 2010 and January 2011, IBEX nevertheless sold over $1 million of unregistered BIEL stock. Stipulation at EX. B; DX 138 at 336. Respondents' knowledge of the significance of affiliate status is also demonstrated by their agreement in April 2013 to limit K. Whelan's and IBEX's ownership interest in BIEL to 9.99%. *See* RX 171B. The record as a whole demonstrates that Respondents knew that IBEX might be an affiliate of BIEL, but they made only token efforts to ensure that IBEX followed all of Rule 144's requirements for an affiliate, even though such efforts would not have been unduly burdensome. Such dismissiveness toward the law, and the other circumstances proven by the record, show that Respondents acted with at least extreme carelessness with respect to the Section 5 violations.

Respondents' assertion of reliance on advice of counsel, far from rebutting scienter, in some respects actually supports it. *See* Resp. Br. 56. This is because Kuhne, who provided a large number of opinion letters, routinely advanced conclusions so unsupported and unbelievable that Respondents could not have relied on them in good faith, such as that: the Revolver was "executed and delivered" on January 1, 2005; BIEL had "audited financial records" for years when it did not; and all the shares St. John's' sold were "freely tradable and salable as a Brokers' Transaction," even though St. John's had identified no purchaser and was unable even to open a brokerage account at the time Kuhne rendered his opinion. *See* Tr. 904; *e.g.*, RX 45 at 369-71; RX 113 at 756-57; RX 172G at 1762; *see generally* 17 C.F.R. § 230.144(f), (g). Moreover, the earliest opinion in the record from Kuhne is dated January 28, 2011, and there appear to be no attorney opinions in the record pertaining to IBEX conversions prior to 2011. *See* DX 138 at 336.

As for witness credibility, in the main most witnesses testified credibly and many of the foundational facts were undisputed. I have therefore credited each witness' testimony except where noted, and generally have not relied on credibility in evaluating scienter. Also, the demeanor of the witnesses was unremarkable, with two exceptions. First, Linsley had an odd visible demeanor (although his auditory demeanor was normal); he sat perpendicular to the examining attorneys and looked at the witness table the whole time. Second, although A. Whelan's visible demeanor was straightforward, he sometimes gave non-responsive answers, even under questioning by his own attorney. *E.g.*, Tr. 864-65, 867-69, 872-73, 1038.

On balance, Respondents acted with scienter. The Division asserts that Respondents also acted in "deliberate and egregious disregard of regulatory requirements," apparently with respect to the Section 13 violations, and "with reckless disregard to Section 5's registration requirements." Div. Br. 77. This equates to an allegation of scienter, and has similarly been proven. *See Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *5 (Sept. 17, 2015) (citing *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *19 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015)). And because Respondents acted with scienter, they also acted willfully. *See Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *13 n.139 (May 16, 2014), *pet. denied in relevant part*, 793 F.3d 147 (D.C. Cir. 2015).

B. Cease-and-Desist Order

Securities Act Section 8A and Exchange Act Section 21C authorize the Commission, after finding that a person has violated a provision of these Acts or any rule thereunder, to impose a cease-and-desist order on that person and on any person that was "a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation." 15 U.S.C. §§ 77h-1(a), 78u-3(a). The Commission requires some likelihood of future violation before imposing such an order. *KPMG Peat Marwick LLP*, 54 S.E.C. at 1185. However, "a finding of [a past] violation raises a sufficient risk of future violation," because "evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist." *Id.*

As established above: (1) all Respondents violated Securities Act Section 5; (2) BIEL violated Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B), and Rule 13a-1 thereunder, and A. Whelan caused such violations; and (3) A. Whelan violated Exchange Act Rules 13a-14(a) and 13b2-1, but did not violate Rule 13b2-2. Respondents' violations and current occupations indicate a likelihood of future violations. I have considered the various points Respondents make against a cease-and-desist order and find none persuasive. *See* Resp. Br. 56-57. The public interest factors therefore weigh in favor of such an order, and one will be imposed.

C. Disgorgement

Disgorgement is authorized in this case by Securities Act Section 8A(e). *See* 15 U.S.C. § 77h-1(e); OIP at 10. Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). The amount of the disgorgement need only be a reasonable approximation of profits causally connected to the violation. *See Laurie Jones Canady*, 54 S.E.C. 65, 84 n.35 (1999) (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996)), *pet. denied*, 230 F.3d 362 (D.C. Cir. 2000). Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to Respondents to demonstrate that the Division's disgorgement figure is not a reasonable approximation. *Guy P. Riordan*, Securities Act Release No. 9085, 2009 WL 4731397, at *20 (Dec. 11, 2009), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010). The standard for disgorgement is but-for causation and does not require analysis of the public interest factors or consideration of the combination of sanctions. *Jay T. Comeaux*, Securities Act Release No. 9633, 2014 WL 4160054, at *3 & n.18, *4 n.32, *5 (Aug. 21, 2014). However, the temporal remoteness of the violations must be considered. *See Larry C. Grossman*, Securities Act Release No. 10227, 2016 WL 5571616, at *22 (Sept. 30, 2016).

The proceeds of all securities transactions at issue were ill-gotten, because Respondents could not prove entitlement to an exemption for any of them. It is undisputed that the total proceeds were $4,693,462.70, comprising $4,296,266 in sales of BIEL notes by IBEX and $397,196.70 in sales of BIEL notes by St. John's. Stipulation 35 & Ex. B. As to IBEX's sales, the Division requests prejudgment interest running from November 17, 2014, the date of IBEX's last note purchase and of its second to last note sale, and joint and several liability between A. Whelan, K. Whelan, BIEL, and IBEX. Stipulation at Exs. A, B; *see* Div. Reply 39 & n.138. As to St. John's' sales, the Division requests prejudgment interest running from the date of each separate sale, and joint and several liability between A. Whelan, BIEL, and St. John's. *See* Div. Reply 40 & n.139. The Division does not seek disgorgement of BIEL's loan amounts, only of sales by IBEX in which BIEL was a participant; BIEL's own liability for disgorgement is entirely dependent on its connection to IBEX's sales, the proceeds of which generally went to IBEX before IBEX furnished them to BIEL as new loans. *See* Resp. Br. 65-66; *cf.* Div. Reply 4-5 (arguing that BIEL is not entitled to the Section 4(a)(2) exemption). The Division also does not seek disgorgement as to the Section 13 claims. *See* Div. Br. 75-76.

I have carefully considered the various equity-based arguments Respondents present in opposing disgorgement; none is sufficiently meritorious to warrant discussion. *See* Resp. Br. 58-62. And because all transactions at issue were unlawful, there is no justification for limiting disgorgement to only some transactions. *See id.* 66-68. Nor is there any doubt that the proceeds of Respondents' unlawful sales were causally connected to the sales themselves. *See Gordon Brent Pierce,* Securities Act Release No. 9555, 2014 WL 896757, at *26 (Mar. 7, 2014), *pet. denied*, 786 F.3d 1027 (D.C. Cir. 2015); Resp. Br. 62-66. Although the sales began years ago, they continued into 2015, and any temporal remoteness is therefore of little significance. *See Larry C. Grossman*, 2016 WL 5571616, at *22.

Respondents correctly point out that the measure of disgorgement under the facts of this case is the value of the securities sold minus their cost of acquisition. *See* Resp. Br. 62-63; *SEC v. Lines*, No. 07-civ-11387, 2011 U.S. Dist. LEXIS 91360, at *14-17 (S.D.N.Y. June 7, 2011); *Rodney R. Schoemann*, 2009 WL 3413043, at *13; *see also Edgar R. Page*, Advisers Act Release No. 4400, 2016 WL 3030845, at *13 n. 77 (May 27, 2016) ("[T]he amount by which [the sale] price exceeded Page's cost basis in PageOne equity still would have been wrongfully obtained profits that we would have required Respondents to disgorge."). In this case the method applies straightforwardly: either stock sale proceeds minus associated loan principal, or note sale proceeds minus associated loan principal.

Although Respondents did not actually perform the calculation themselves, they have met their burden by providing evidence of acquisition cost in the form of Flood's analysis, the stipulated loan amounts, and supporting documentation. I agree with the Division that Flood's analysis is problematic in certain respects, but it is directly probative of acquisition cost and was supported by K. Whelan's testimony, and the Division offers no alternative calculation method. *See* Div. Br. 21-22; RX 1A. As for the calculation itself, by matching up the loans listed in Flood's analysis (RX 1A) to the stipulated loan amounts (Stipulation at Ex. A), it is possible to determine the aggregate loan principal that was either converted to stock and then sold, or sold directly as notes.

This aggregate loan principal sums to $2,715,673. A comparison to the stipulated aggregate proceeds ($4,296,266) results in profits of $1,580,593. *See* Stipulation at Ex. B. This total does not include the first loan listed in Flood's analysis, because the record is insufficient to determine precisely how much of the original loan should be apportioned to what was sold in 2010. *See* Stipulation at Ex. A (line 3); RX 1A at 1, 7; *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998) (any risk of uncertainty falls on the wrongdoer). Flood did not analyze the last note sale at issue, a $50,000 note sold in February 2015, and I have assumed it was the remaining half of the $100,000 note dated November 15, 2010, the first half of which was sold in November 2014. *Compare* RX 1A at 7, *with* Stipulation at Ex. B (lines 85-86). The $310,000 note dated March 31, 2010, was not sold in its entirety, but all of the original principal has been counted in the aggregate loan principal, as if the unsold portion constituted accrued interest. *See* RX 1A at 7. Also, I note that eight loans appear twice on Flood's spreadsheet, because a portion of each loan was converted and sold, and the remainder of each loan was later sold directly as a note. *Compare* RX 1A at 2-5, *with* Stipulation at Ex. A (lines 12, 14, 21, 23, 26, 33, 37, 40). Disgorgement as to IBEX therefore totals $1,580,593.

I am not persuaded by the various arguments the parties make for a different disgorgement amount. Respondents argue, at least for the sale of notes, that IBEX realized no gain because each note's face value (principal plus accrued interest) should be considered its loan principal for disgorgement purposes. *See* Resp. Br. 63-64. As the Division points out, though, K. Whelan admitted that IBEX sold BIEL notes for profit. *See* Tr. 510-11, 1239. Sometimes IBEX sold just the principal and retained the accrued interest, and sometimes it sold the whole note at a price equal to the principal plus accrued interest, i.e., more than the principal it had loaned to BIEL. *See* Tr. 510-11, 1239; RX 1A. In the former instance IBEX earned no actual monetary gain but retained a valuable asset (at no cost basis) on which it may realize a gain in the future, and in the latter instance it realized a gain equal to the accrued interest. Respondents also apparently argue, as to stock sales, that because IBEX sold its securities at a discount to the market price it did not realize any gains. *See* Resp. Br. 64-65. The question, though, is not whether IBEX could have sold at a higher price; the question is whether the price at which it did sell resulted in a gain. The Division argues that because IBEX funded its loans to BIEL using proceeds of earlier sales, it provided no "independent value" to BIEL. Div. Reply 40. This is beside the point. The issue is not how much "value" BIEL received, but how much gain IBEX received.

St. John's' disgorgeable profits are easy to determine: $397,196.70 minus $156,903.49 equals $240,293.21. Stipulations 32, 35. The Division apparently argues that Respondents must identify how much of the loan principal derived from A. Whelan's salary. *See* Div. Reply 40-41. This, too, is beside the point. The parties have stipulated that the combined loan principal was $156,903.49; the source of those funds is irrelevant for calculating disgorgement. Stipulation 32.

As for joint and several liability, BIEL and IBEX were under the common control of at least A. Whelan and K. Whelan, and BIEL was a necessary participant and substantial factor in all but one of IBEX's transactions. Even under the case law Respondents cite, therefore, A. Whelan, K. Whelan, BIEL, and IBEX had a "close relationship in carrying out [their] illegal acts." *SEC v. E-Smart Techs., Inc.*, 139 F. Supp. 3d 170, 187-88 (D.D.C. 2015) (holding that once the Division proves a "close relationship," the burden shifts to the defendant to prove the appropriateness of apportionment); *see* Resp. Br. 68 (citing *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 563 (S.D.N.Y. 2009), *aff'd*, 438 F. App'x 23 (2d Cir. 2011)). A. Whelan, BIEL, and St. John's had a similarly close relationship with respect to St. John's' sales.

As for prejudgment interest, it "shall be due on any sum required to be paid pursuant to an order of disgorgement." 17 C.F.R. § 201.600(a). Respondents' equity-based arguments, including the argument that the violations began years ago, are therefore not well-taken. *See* Resp. Br. 68; *Larry C. Grossman*, 2016 WL 5571616, at *22-23 & n.190. The Division has not provided a prejudgment interest calculation, so the actual amount of prejudgment interest cannot be quantified. The last violation by IBEX appears to have been in February 2015 rather than November 2014. *Compare* Stipulation at Ex. B, *with* Div. Reply 39 n.138. Thus, prejudgment interest as to IBEX's transactions should be calculated from March 1, 2015. *See* 17 C.F.R. § 201.600(a). As to St. John's, although it is legally permissible to impose prejudgment interest separately for each of its seventeen sales, that method makes the interest calculation needlessly complex, and prejudgment interest will instead be imposed in the same manner as with IBEX, that is, it will run on the entire amount of disgorgement from April 1, 2014. *See* Stipulation 35 (last St. John's sale was in March 2014).

In summary, A. Whelan, K. Whelan, BIEL, and IBEX are jointly and severally liable for disgorgement of $1,580,593 and prejudgment interest running from March 1, 2015, and A. Whelan, BIEL, and St. John's are jointly and severally liable for disgorgement of $240,293.21 and prejudgment interest running from April 1, 2014.

D. Penny Stock Bar

Exchange Act Section 15(b)(6)(A)(i) authorizes the Commission, after finding that a person has willfully violated a provision of the Securities Act, to bar any person from participating in an offering of penny stock, if that person was participating in an offering of penny stock at the time of the violation. *See* 15 U.S.C. § 78*o*(b)(4)(D), (b)(6)(A)(i). BIEL has never had net tangible assets in excess of $2,000,000, its stock consistently traded at less than five dollars per share, and its stock did not meet any other exceptions to the penny stock definition; BIEL stock therefore qualified as a penny stock at all relevant times. *See* 17 C.F.R. § 240.3a51-1(d), (g)(1); DX 137 at Ex. C; RX 171Q at 1700; RX 211 at 2740.

In considering whether to impose a penny stock bar, the Commission considers the public interest factors. *See Harold F. Harris*, 58 S.E.C. 1118, 1126-27 (2006). As noted, these factors weigh in favor of a heavy sanction. Respondents' arguments against a penny stock bar generally focus only on its collateral consequences, which I have considered but which are entitled to little weight. *See* Resp. Br. 72-73; *BDO China Dahua CPA Co.*, Initial Decision Release No. 553, 2014 WL 242879, at *81 (Jan. 22, 2014), *finality order as to one respondent*, Exchange Act Release No. 74552, 2015 WL 1267418 (Mar. 20, 2015). In particular, a penny stock bar (as opposed to an officer and director bar) would seemingly not prohibit A. Whelan from running BIEL, or prohibit K. Whelan from lawfully selling her BIEL notes. A permanent penny stock bar will be imposed as to both A. Whelan and K. Whelan.

E. Inability to Pay, Civil Penalties, and the Statute of Limitations

Respondents assert an inability to pay disgorgement and civil penalties. *See* Resp. Br. 73-75. I have reviewed Respondents' financial information and I am satisfied that all four Respondents, jointly and severally, have the ability to pay disgorgement. K. Whelan and IBEX, however, after allowing for some contribution to disgorgement, lack the wherewithal to pay individual civil penalties. This is principally because IBEX's assets, although substantial on paper, are comprised almost entirely of BIEL notes, which BIEL cannot repay and which are likely so illiquid as to be unmarketable. The Division correctly notes that K. Whelan's financial disclosure form does not disclose an interest in IBEX, but this is a mere formality. See Div. Reply 47. K. Whelan testified that IBEX is simply a pass-through entity, and whether it is IBEX or K. Whelan that owns BIEL's notes, the note ownership is clearly disclosed, and there is no evidence that either K. Whelan or IBEX owns any assets other than those disclosed.

I therefore decline to impose a civil penalty on K. Whelan or IBEX. Had I done so, however, I would have imposed third-tier penalties because they acted with reckless disregard for the regulatory requirements of Section 5, and because their misconduct resulted in receipt of substantial pecuniary gain. *See* 15 U.S.C. §§ 77h-1(g)(2)(C).

I also decline to impose a civil penalty on BIEL. BIEL's anemic financial condition is well documented, and although the collateral consequences of a sanction in the public interest are not dispositive, it is likely that the persons who will suffer most if BIEL goes out of business are its public investors. *See* Div. Reply 46. As with K. Whelan and IBEX, had I imposed a civil penalty I would have imposed third-tier penalties.

A. Whelan and St. John's, by contrast, have not established an inability to pay. The 2014 tax returns for A. Whelan and P. Whelan are missing from the financial disclosure documents, and it is not clear whether P. Whelan's finances have been disclosed at all, beyond the tax returns that are in the record. As the majority owner of St. John's and A. Whelan's wife, P. Whelan should in fairness have disclosed her finances. Civil penalties and disgorgement will therefore be imposed against A. Whelan and St. John's without regard to ability to pay.

The Division's civil penalties request, at least as to the Section 5 violations committed by St. John's, involved only a cursory discussion, without even explicitly identifying the requested tier or number of individual penalties. *See* Div. Reply 45. The Division's request as to A. Whelan's contribution to BIEL's Section 5 violations is better developed, but still thin. *See* Div. Br. 76-78; Div. Reply 43-45. To the extent the Division does identify the requested tier and the number of individual penalties, it seeks "dozens" of "maximum penalties," where the maximum penalties were the ones in effect in 2009 – namely, $650,000 for an entity and $130,000 for an individual. Div. Reply 45; *see* Div. Br. 77 n.292. This would result in civil penalties of $11,050,000 against both St. John's ($650,000 multiplied by seventeen unlawful sales) and A. Whelan ($130,000, multiplied by eighty-five unlawful sales involving A. Whelan), which would plainly be excessive. I instead impose only a single, third-tier penalty as to both A. Whelan and St. John's, based on reckless disregard of regulatory requirements and substantial pecuniary gain. *See* 15 U.S.C. § 77h-1(g)(2)(C).

The public interest factors to consider include: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the resulting harm to other persons; (3) any unjust enrichment and prior restitution; (4) the respondent's prior regulatory record; (5) the need to deter the respondent and other persons; and (6) such other matters as justice may require. *See* 15 U.S.C. § 78u-2(c). These factors apply to Securities Act violations, even though the Securities Act does not recite them. *See Thomas C. Gonnella*, Securities Act Release No. 10119, 2016 WL 4233837, at *14 n.70 (Aug. 10, 2016); 15 U.S.C. § 77h-1(g). Although A. Whelan and St. John's individually have a clean regulatory record, A. Whelan was president of BIEL in 2007 when it settled with the state of Maryland over the sale of unregistered stock, and the other public interest factors weigh in favor of a heavy penalty. *See* A. Whelan Answer at 13. I am unpersuaded by the various points Respondents make regarding civil penalties; in particular, their violations were plainly willful. *See* Resp. Br. 69-72.

The Division contends that civil penalties may be imposed for the Section 13 violations, on the theory that the violations continued from March 31, 2010, when BIEL filed its 2009 Form

10-K, to at least May 2011, when it restated its financials. *See* Div. Br. 77-78. Respondents raised the statute of limitations as a defense in their answers, but did not brief it post-hearing. *E.g.*, A. Whelan Answer at 35. The Division offered no documentary evidence of any tolling agreement, and only asserted the existence of one in its post-hearing reply brief. *See* Div. Reply 43 n.148. And the parties have not adequately briefed the potentially tricky question of whether the proven Section 13 violations continued after March 31, 2010, when BIEL filed its 2009 Form 10-K, or after April 17, 2010, which was five years before the effective date of the parties' first tolling agreement. *See id.*; Div. Br. 77-78. In an abundance of caution, I find that the Section 13 violations were not committed within the limitations period, and decline to impose civil penalties for them.

Under the totality of the circumstances, it is in the public interest to impose the maximum penalty amount requested by the Division, namely, $130,000 as to A. Whelan and $650,000 as to St. John's. I note that this is less than the maximum penalty amount presently applicable. *See* 17 C.F.R. § 201.1001, Subpt. E, Table I (2016).

V. RECORD CERTIFICATION

Pursuant to 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the record index issued by the Commission's Office of the Secretary on November 23, 2016.

ORDER

It is ORDERED, pursuant to Section 8A of the Securities Act of 1933, that BioElectronics Corp., IBEX, LLC, St. John's, LLC, Andrew J. Whelan, and Kelly A. Whelan, CPA, shall cease and desist from committing any violations or future violations of Section 5 of the Securities Act of 1933.

It is FURTHER ORDERED, pursuant to Section 21C of the Securities Exchange Act of 1934, that BioElectronics Corp. shall cease and desist from committing any violations or future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Securities Exchange Act of 1934 and Rule 13a-1 thereunder.

It is FURTHER ORDERED, pursuant to Section 21C of the Securities Exchange Act of 1934, that Andrew J. Whelan shall cease and desist from causing any violations or future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Securities Exchange Act of 1934 and Rule 13a-1 thereunder.

It is FURTHER ORDERED, pursuant to Section 21C of the Securities Exchange Act of 1934, that Andrew J. Whelan shall cease and desist from committing any violations or future violations of Rules 13a-14(a) and 13b2-1 under the Securities Exchange Act of 1934.

It is FURTHER ORDERED, pursuant to Section 8A of the Securities Act of 1933, that BioElectronics Corp., IBEX, LLC, Andrew J. Whelan, and Kelly A. Whelan shall jointly and severally disgorge $1,580,593, plus prejudgment interest on that amount, calculated from March 1, 2015, to the last day of the month preceding the month in which payment of disgorgement is made. Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), and shall be compounded quarterly. *See* 17 C.F.R. § 201.600.

It is FURTHER ORDERED, pursuant to Section 8A of the Securities Act of 1933, that BioElectronics Corp., St. John's, LLC, and Andrew J. Whelan shall jointly and severally disgorge $240,293.21, plus prejudgment interest on that amount, calculated from April 1, 2014, to the last day of the month preceding the month in which payment of disgorgement is made. Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), and shall be compounded quarterly. *See* 17 C.F.R. § 201.600.

It is FURTHER ORDERED, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, that Andrew J. Whelan and Kelly A. Whelan are permanently barred from participating in an offering of penny stock, including acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

It is FURTHER ORDERED, pursuant to Section 8A(g) of the Securities Act of 1933, that St. John's, LLC, shall pay a civil money penalty of $650,000, and Andrew J. Whelan shall pay a civil money penalty of $130,000.

Payment of civil penalties, disgorgement, and prejudgment interest shall be made no later than twenty-one days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, bank cashier's check, bank money order, or United States postal money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address along with a cover letter identifying the Respondent and Administrative Proceeding No. 3-17104: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

Cameron Elliot
Administrative Law Judge