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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4020/July 26, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17104

In the Matter of BIOELECTRONICS CORP., IBEX, LLC, ST. JOHN'S, LLC, ANDREW J. WHELAN, KELLY A. WHELAN, CPA, and ROBERT P. BEDWELL, CPA	ORDER DENYING MOTIONS FOR SUMMARY DISPOSITION

On February 5, 2016, the Securities and Exchange Commission issued an order instituting proceedings (OIP) against Respondents 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.

On May 27, 2016, Respondents BioElectronics Corp. (BIEL), IBEX, LLC, St. John's, LLC, Andrew J. Whelan (Whelan), and Kelly A. Whelan, CPA (K. Whelan) filed a motion for summary disposition (Resp. Motion), which included: the declaration of Andrew J. Whelan (Whelan Decl.) with three exhibits (Whelan Exs. 1-3); the declaration of Patricia Whelan (P. Whelan Decl.) with three exhibits (P. Whelan Exs. 1-3); the declaration of Kelly A. Whelan (K. Whelan Decl.) with approximately 167 exhibits (K. Whelan Exs. 1-167) and one index; the declaration of Mary Whelan (M. Whelan Decl.) with two exhibits (M. Whelan Exs. 1-2); the declaration of Joseph Noel (Noel Decl.) with two exhibits (Noel Exs. 1-2); and the declaration of Yue Qin in support of her event study (Qin Event Study) with one exhibit. The Division of Enforcement timely filed an opposition (Div. Opp.), which included: the declaration of Charles D. Stodghill with eight exhibits (Div. Opp. Exs.) not numbered sequentially; the declaration of William D. Park (Park Decl.) with two exhibits (Park Exs. A-B); and the declaration of Thomas B. Rogers (Rogers Decl.). Respondents timely filed a reply (Resp. Reply), which included: the declaration of Sarah Glosenger (Glosenger Decl.) with one exhibit (Form 144); the expert report of David Robinson; and the second supplemental declaration of Andrew J. Whelan with three exhibits.

Also on May 27, 2016, the Division filed a motion for partial summary disposition (Div. Motion) against BIEL, which included the declaration of Paul W. Kisslinger and eleven exhibits (Div. Exs.) not numbered sequentially. BIEL timely filed an opposition (BIEL Opp.), which

included the supplemental declaration of Andrew J. Whelan (Whelan Supp. Decl.) and one exhibit (Whelan Supp. Ex. 1), as well as the supplemental declaration of Mary Whelan (M. Whelan Supp. Decl.) and five exhibits (M. Whelan Supp. Exs. 1-5). The Division timely filed a reply (Div. Reply).

A. Summary Disposition Standard

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts on summary disposition must be viewed in the light most favorable to the non-moving party. *See Jay T. Comeaux*, Securities Act Release No. 9633, 2014 SEC LEXIS 3001, at *8 (Aug. 21, 2014). However, once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials, but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing. *See id.*; *accord Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *22 (Feb. 4, 2008), *pet. denied*, 561 F.3d 548 (6th Cir. 2009). Thus, summary disposition may be appropriate in non-follow-on proceedings. *E.g.*, *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *9 (Dec. 5, 2014); *Gordon Brent Pierce*, Exchange Act Release No. 71664, 2014 WL 896757, at *7-8 (Mar. 7, 2014), *pet. denied*, 786 F.3d 1027 (D.C. Cir. 2015); *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *16 (Nov. 4, 2013).

In considering Respondents' motion for summary disposition, the OIP has been taken as true, except as modified by stipulations or admissions made by the Division, by uncontested affidavits, and by facts officially noticed pursuant to Rule of Practice 323, which includes any matter in the Commission's public official records. *See* 17 C.F.R. §§ 201.250(a), .323. Conversely, in considering the Division's motion, Respondents' answers have been taken as true, except as modified by stipulations or admissions made by Respondents, by uncontested affidavits, and by facts officially noticed. *See* 17 C.F.R. § 201.250(a).

Thus, the OIP's allegations that were not denied by Respondents' answers have been deemed true. *See* 17 C.F.R. § 201.220(c). Sworn statements, such as declarations, certifications, and attestations, are equivalent to affidavits. *E.g.*, Whelan Decl.; Rogers Decl.; *see Allen v. Potter*, 152 F. App'x 379, 382 (5th Cir. 2005). Official notice has been taken of all of BIEL's Commission filings. A statement by a party, or by a party's agent, or that a party agrees is true, constitutes an admission within the meaning of Rule of Practice 250. *See Wheat, First Sec., Inc.*, Exchange Act Release No. 48378, 2003 WL 21990950, at *12 & n.55 (Aug. 20, 2003) (citing Federal Rule of Evidence 801(d)(2)). Thus, statements by a party or a party's agent in a Commission filing, in investigative testimony, or in a document, are all admissions and have been considered against that party. *E.g.*, Div. Ex. 19 (memorandum by Whelan on behalf of BIEL); P. Whelan Decl. & Ex. 2 (declaration authenticating opinion letter from counsel). By contrast, exhibits that do not contain admissions have not been considered as evidence against Respondents (although they have been considered in opposition to the Division's motion), and vice versa.

The parties' motion papers and all documents and exhibits of record have been fully reviewed and carefully considered. All arguments and proposed findings and conclusions that are inconsistent with this Order were considered and rejected.

B. Pleadings and Alleged Violations

According to the OIP, Whelan founded BIEL and has served at all relevant times as its president, CEO, and principal financial officer. *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, Whelan's daughter, 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, Whelan's wife, 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 sold unrestricted BIEL shares in unregistered transactions, at the request of 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.* 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 Whelan and K. Whelan willfully violated, Securities Act Section 5, which generally prohibits selling unregistered securities. *See* OIP at 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." Staff Accounting Bulletin 104, Release No. SAB 104 (Dec. 17, 2003), at 20. 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 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 Whelan caused BIEL's violation; 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 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* OIP at 9-10.

Respondents do not dispute certain allegations. They agree that Whelan is the founder and CEO of BIEL, that K. Whelan is Whelan's daughter and controlled IBEX, that St. John's is an affiliate of BIEL, and that BIEL withdrew its securities' registration in April 2011. *See* Whelan Answer at 2, 5-6, 13; K. Whelan Answer at 2, 6; St. John's Answer at 6. They agree that IBEX and St. John's sold unregistered convertible notes issued by BIEL, that IBEX loaned over $1 million to BIEL, and that St. John's made loans to BIEL. *See* IBEX Answer at 6; Whelan Answer at 5; BIEL Answer at 14-15. They agree that BIEL did not register any securities offerings with the Commission during any relevant period. *See* BIEL Answer at 21. They agree that BIEL recorded revenue in its 2009 financial statements, as reported in its March 31, 2010, Form 10-K, from bill and hold transactions with YesDTC and eMarkets. *See id*. at 21-22, 24.

But Respondents dispute other key allegations of the OIP. They aver that all securities at issue were exempt from registration under Rule 144. *See* Whelan Answer at 5; IBEX Answer at 6. They contend that IBEX was not an affiliate of BIEL, and that no Respondent participated in an offering of BIEL stock. *See* IBEX Answer at 6, 14; K. Whelan Answer at 14-15; Whelan Answer at 15. They deny that IBEX and St. John's sold shares for BIEL or acquired securities from BIEL for distribution. *See* IBEX Answer at 19; 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* Whelan Answer at 21-23.

C. Genuine Issues of Material Fact Exist Regarding Section 5 Exemptions

Respondents argue that the sales of BIEL securities by IBEX and St. John's did not violate Securities Act Section 5. *See* Resp. Motion at 1-2, 17. Sections 5(a) and (c) prohibit any person from directly or indirectly selling or offering to sell securities in unregistered transactions unless an exemption from registration applies. 15 U.S.C. §§ 77e(a), (c); *see also Jacob Wonsover*, 54 S.E.C. 1, 8 (Mar. 1, 1999). 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 SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004); *David F. Bandimere*, Exchange Act Release No. 76308, 2015 WL 6575665, at *5 (Oct. 29, 2015). With respect to the first element, it must be shown that the respondent was a "necessary participant" or "substantial factor" in the sale. *Calvo*, 378 F.3d at 1215; *SEC v. Elliott*, No. 09-cv-7594, 2011 WL 3586454, at *7 (S.D.N.Y. Aug. 11, 2011). Section 5 is a strict liability statute, so a showing of scienter is not required. *Calvo*, 378 F.3d at 1215. Once the Division has made out a prima facie case, the burden shifts to the respondent to prove entitlement to an exemption. *See David F. Bandimere*, 2015 WL 6575665, at *5.

Respondents do not dispute that IBEX and St. John's sold BIEL securities when no registration statement was in effect or filed as to those securities. *See* Resp. Motion at 1-2. Nor

do they dispute that BIEL is a Maryland corporation, IBEX and St. John's are Virginia LLCs, St. John's sold its BIEL securities through a broker in New York, and at least some sales by IBEX involved purchasers, brokers, and transfer agents outside Maryland and Virginia, so that BIEL's securities were sold through the use of interstate facilities. *See* BIEL Answer at 13; IBEX Answer at 14; St. John's Answer at 12; P. Whelan Decl. & Ex. 3; K. Whelan Decl. at 9, 11 & Exs. 20, 30, 148; Form 144 at 1. Respondents therefore have the burden of proving that an exemption to registration applies to sales by IBEX and St. John's, and indeed, they concede that "[w]hether Section 5 was violated turns on whether the transactions are exempt." Resp. Motion at 1.

Respondents present a number of arguments concerning registration exemption, all pertaining to Securities Act Section 4(a)(1), and primarily to Rule 144 thereunder. *See* Resp. Motion at 16-28; 15 U.S.C. § 77d(a)(1); 17 C.F.R. § 230.144. Section 4(a)(1) exempts transactions by persons other than issuers, dealers, or underwriters. *See* 15 U.S.C. § 77d(a)(1). The Securities Act defines an underwriter as, among other things, any person who has purchased securities from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security. *See* 15 U.S.C. § 77b(a)(11). Rule 144 creates a "safe harbor" from underwriter status when certain conditions are met. 17 C.F.R. § 230.144, preliminary note.

Respondents possess the burden of proof, so that even a single genuine issue of material fact regarding exemption suffices to warrant denial of their motion on this point. The record shows many such genuine issues of material fact, some of which are both foundational and entirely ignored by the parties. For example, Respondents assert in conclusory fashion that IBEX and St. John's were not dealers; the Division is silent on dealer status. *See* Motion at 17; Div. Opp. at 8-10. The Securities Act defines a dealer as "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). Respondents apparently do not dispute that IBEX and St. John's acquired and sold millions of dollars' worth of BIEL securities in dozens of transactions over the course of several years, all for their own accounts, which would seemingly qualify IBEX and St. John's as dealers in BIEL securities. *See* P. Whelan Decl. at 2-3; *see generally* K. Whelan Decl. As another example, although Respondents contend that "[n]inety percent of the monetary relief sought turns on whether IBEX's private sales of notes" violated Section 5, Respondents' motion completely ignores BIEL's own alleged violations. Resp. Motion at 1. It is undisputed that BIEL was an issuer, and its own sales thus did not qualify for exemption under either Section 4(a)(1) or Rule 144; again, the Division is silent on any exemption applicable to BIEL. *See* Resp. Motion at 17 ("BIEL is the issuer"); Div. Opp. at 10-13. So it is seemingly undisputed that BIEL reaped millions of dollars in ill-gotten gains from repeated violations of Section 5.

The evidence at the hearing may be more complete, of course. For instance, IBEX, St. John's, and BIEL may show that some other exemption applies to their securities transactions. But Respondents have failed to meet their burden of proving that BIEL's sales were exempt, or that IBEX and St. John's were not dealers. This alone is sufficient to deny summary disposition as to the Section 5 allegations.

Even considering only the points addressed by the parties, multiple genuine issues of material fact exist. The pattern and timing of sales of BIEL stock and convertible notes,

particularly by IBEX, does indeed "raise disputed issues of material fact as to whether Respondents engaged in an unlawful scheme to evade registration requirements," which would disqualify every Respondent from safe harbor coverage. Div. Opp. at 12-13; 17 C.F.R. § 230.144, preliminary note (Rule 144 is "not available to any person with respect to any transaction or series of transactions that, although in technical compliance with Rule 144, is part of a plan or scheme to evade" registration requirements). Respondents' own evidence documents multiple transactions conforming to the following pattern: (1) a loan from IBEX to BIEL in return for a convertible note; (2) conversion of the note to stock two or more years thereafter; and (3) sale of the stock to various purchasers. *See generally* K. Whelan Ex. 1A at 1-5 (pdf pages 67-71 of 1231). The Division has offered evidence that in many instances the purchasers either bought BIEL stock directly from IBEX, or bought the convertible notes from IBEX, immediately converted the notes to stock, and sold the stock to the public, and that at about the same time IBEX issued loans to BIEL that were frequently "close in value to the sums IBEX received from the [purchasers]." *See* Park Decl. at 4-5. These transactions apparently provided much of BIEL's cash flow: in 2015, BIEL's "Net Cash Provided By Financing Activities" was $1.85 million, in contrast with "Gross profit" from sales of $1,341,700, and as of 2015 BIEL's "total net loss since inception" was over $27 million. Whelan Ex. 2 at 383-84, 389. And the bulk of these transactions took place after the Commission's Division of Corporation Finance sent BIEL a comment letter regarding BIEL's "plan to amend its December 31, 2009 annual report on Form 10-K," and after BIEL withdrew registration of its stock in April 2011 – timing that suggests a motive to evade registration requirements. *Compare* Div. Ex. 83 *with* K. Whelan Index (listing dates of IBEX sales) *and* P. Whelan Decl. at 1-2 (detailing dates of St. John's sales). Viewing this evidence in the light most favorable to the Division, Respondents may well have engaged in "an unlawful distribution of unregistered securities" by intentionally and repeatedly using Rule 144 to circumvent the Securities Act's registration requirements. Div. Opp. at 13.

There are also genuine issues of material fact regarding whether IBEX qualifies as an affiliate of BIEL for Rule 144 purposes. *See generally* Div. Opp. at 13-15. An affiliate includes a person controlled by an issuer, and it is more difficult for an affiliate to qualify for the safe harbor than a non-affiliate. *See generally* 17 C.F.R. § 230.144. The Division's evidence suggests that K. Whelan sold BIEL stock owned by IBEX "at a significant discount" to compensate one purchaser for consulting work performed for BIEL, and that she did so at Whelan's direction. Div. Opp. Ex. 1 at 170-72; Div. Opp. Ex. 2 at 53-54. K. Whelan admits that she caused IBEX to, in some instances, pay "BIEL's business expenses, BIEL's contractors for services and Andrew Whelan's travel expenses." K. Whelan Decl. at 43. And it is undisputed that K. Whelan "never refused a BIEL loan." Resp. Motion at 21.

Lastly, because each sale by St. John's exceeded 5,000 shares, a Form 144 was required for each sale. *See* 17 C.F.R. § 230.144(h) (Form 144 required for every transaction during a three month period involving more than 5,000 shares). Respondents assert, without documentary corroboration, that St. John's filed such a Form 144 for each sale at issue. *See* P. Whelan Decl. at 3. But no Forms 144 could be found in the Commission's records as to St. John's as of June 23, 2016. *See* Rogers Decl. And the Form 144 that St. John's eventually did file was not timely as to the sales at issue. *See* Glosenger Decl.; 17 C.F.R. § 230.144(h)(2) (Form 144 must be filed "concurrently with" the placement of an order with a broker). This is sufficient to raise a genuine issue of material fact as to whether St. John's met all the requirements of Rule 144.

In sum, there exist genuine issues of material fact regarding the applicability of exemptions to Securities Act Section 5 as to all Respondents.

D. Genuine Issues of Material Fact Exist Regarding the Bill and Hold Transactions

Respondents and the Division cross-move regarding the bill and hold transactions. *See* Resp. Motion at 28-33; *see generally* Div. Motion. Specifically, Respondents move for summary disposition as to all alleged violations arising from the bill and hold transactions. *See* Resp. Motion at 28-34. They argue principally that Whelan "simply reported the facts as he understood them to his accountants and followed the advice of his accountants, third party consultants, lawyers and auditor," and that the "facts pertaining to the bill and hold transactions . . . w[ere] immaterial." Resp. Motion at 29-30, 33. The Division moves for summary disposition only as to the alleged Section 13(a) and Rule 13a-1 violation, and only as to BIEL. *See* Div. Motion at 1.

1. Section 13(a) and Rule 13a-1

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 these provisions. *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); *Gregory M. Dearlove, CPA*, Exchange Act Release No. 57244, 2008 SEC LEXIS 223, at *112 (Jan. 31, 2008), *pet. denied*, 573 F.3d 801 (D.C. Cir. 2009).

For present purposes, I take official notice that in 2009 and 2010 BIEL had a class of securities registered with the Commission under Exchange Act Section 12(g). *See* Whelan Decl. Ex. 2 at 13; BIEL Answer at 13; BIEL Form 8-A12g (filed February 16, 2006) at 1. In their reply, Respondents argue that "BIEL's registration was withdrawn formally on March 18, 2007." Resp. Reply at 31. Although the Division has not had an opportunity to respond to this argument, because it was first presented in a reply brief, the parties' motions for summary disposition are denied, so the dispute need not be resolved at summary disposition. In any event, it is undisputed that on March 31, 2010, BIEL filed with the Commission a Form 10-K financial statement for 2009. *See* Whelan Decl. at 2-3 & Ex. 2. It is also undisputed that the Form 10-K reported revenue of $366,000 from bill and hold transactions with YesDTC and eMarkets, and total 2009 revenue (including from the bill and hold transactions) of $1,145,647. *See* Resp. Opp. at 16; Whelan Decl. at 3 & Ex. 2 at 33-34.

There is no dispute that BIEL's revenue recognition policy for both traditional and bill and hold transactions, as disclosed in the Form 10-K, was supposed to be consistent with GAAP and with Commission staff guidance. *See* Whelan Decl. Ex. 2 at 39-40; Div. Motion at 10-11 & n.44 (citing SAB 104). According to BIEL, revenue recognition for a traditional transaction required evidence that an arrangement existed, that pricing was fixed and determinable, that collection was reasonably assured, and that shipment had occurred or title of the goods had been transferred to the buyer. *See* Whelan Decl. Ex. 2 at 39; SAB 104 at 20. Revenue recognition for

a bill and hold transaction required satisfaction of seven criteria: (1) risk of ownership had passed to the buyer; (2) the buyer had a fixed commitment to purchase the goods; (3) the buyer, not the seller, had requested the transaction be on a bill and hold basis; (4) there was a fixed schedule for delivery of the goods; (5) the buyer had not retained any specific performance obligations such that the earnings process was not complete; (6) the ordered goods were segregated from the seller's inventory and were not being used to fill other orders; and (7) the product was complete and ready for shipment. *See* Whelan Decl. Ex. 2 at 40; SAB 104 at 21-22.

As for the particulars of the two bill and hold transactions at issue, there exist genuine issues of material fact regarding whether all seven bill and hold criteria were satisfied. For example, Whelan's bill and hold memorandum stated that YesDTC "planned to take all of the 15,000 units by December 31, 2010," and that eMarkets' "goods will be shipped by December 31, 2010." *See* Div. Ex. 19 at 3. On the other hand, BIEL admitted in its January 2011 letter to Corporation Finance that both YesDTC and eMarkets "abandoned the inventory and forfeited all payments [and] paid for the entire commitment but chose not to take delivery." Div. Ex. 83 at 15. Viewing the evidence in the light most favorable to Respondents, it is possible that the purported deadlines recited in the bill and hold memorandum qualify as "fixed schedule[s] for delivery," even if the schedules were not met. Whelan Decl. Ex. 2 at 40. Conversely, viewing the evidence in the light most favorable to the Division, the purported deadlines were purely aspirational, and could not have qualified as fixed delivery dates because shipment was contingent on YesDTC obtaining regulatory clearance and on eMarkets finding buyers, and because the contracts themselves lacked fixed delivery dates. *See* Resp. Reply at 26, 29; Div. Ex. 83 at 13 (BIEL "management believes all requirements have been met for revenue recognition as a distributor agreement, but not as 'bill-and-hold'"); Noel Decl. & Ex. 1 at 8-9; M. Whelan Decl. & Ex. 1 at 8. Expert evidence would be helpful in determining whether all seven bill and hold criteria were satisfied.

There also exists a genuine issue regarding the materiality of BIEL's allegedly false statement. A statement is material if there is a substantial likelihood that a reasonable investor would consider the statement important in making an investment decision. *See 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, 39-43 (2011). Staff Accounting Bulletin (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. 45150-01 (Aug. 19, 1999) (codified at 17 C.F.R. pt. 211). 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, 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.

BIEL's allegedly improperly recognized revenue exceeded the five percent threshold by a wide margin, and over multiple metrics. *See* Div. Opp. at 20. The fact that BIEL "was a start-up company, had suffered millions of dollars in losses, and was almost entirely dependent on outside funding for its past and immediate future survival" is at best irrelevant, and at worst it

makes a $366,000 increase in 2009 revenue more material, not less. *See* Resp. Opp. at 20. And even if BIEL received payment in full by the end of 2010, it is well established that shifting the timing of revenue recognition can be materially misleading. *See* Resp. Motion at 30-33; *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."). Indeed, although not establishing precedent, the Commission has settled numerous cases involving improper bill and hold transactions. *See, e.g.*, *Grant Thornton, LLP*, Exchange Act Releases No. 76536, 2015 WL 7755463 (Dec. 2, 2015); *Robert L. Saxton, CPA*, Exchange Act Release No. 58637, 2008 WL 4346464 (Sep. 24, 2008); *Sunbeam Corporation*, Securities Act Release No. 7976, 2001 WL 616627 (May 15, 2001).

However, Respondents point to two considerations that create a genuine issue of fact as to whether BIEL's false statements were material. First, Respondents offer the Qin Event Study, which purports to show that "there is no empirical evidence that the market reacted positively or negatively to the information contained in the financial statements released by BioElectronics." Qin Event Study at 5.[1] Second, BIEL has offered the declarations of Joseph Noel and Mary Whelan, which, viewed in the light most favorable to Respondents, purport to show that the bill and hold transactions would have qualified as traditional transactions. *See* Resp. Opp. at 21-23. Had they so qualified, the $366,000 in revenue might have been properly recognized under GAAP, and mischaracterizing the transactions as bill and hold might not have been materially false.

In summary, there are genuine issues of material fact regarding whether, by allegedly overstating BIEL's revenues by $366,000, BIEL's March 31, 2010, Form 10-K contained false information, and there is a genuine issue of material fact regarding the materiality of that alleged overstatement. Therefore, the parties' motions must be denied as to the Section 13(a) and Rule 13a-1 allegations. As a result, there exists a genuine issue of material fact regarding whether Whelan caused BIEL's alleged violation, and Respondents' motion must be denied as to Whelan's liability for BIEL's violation. *See* Resp. Motion at 29-30.

2. Other Allegations Related to the Bill and Hold Transactions

Respondents have moved for summary disposition as to all other allegations arising under Exchange Act Section 13 and its rules. *See* Resp. Motion at 28-33. However, except for certain points which I have not considered because they were improperly presented in their reply, Respondents advance no arguments separate from those previously discussed. *Compare id. with* Resp. Reply at 32-35. For instance, they do not separately argue in their motion that BIEL's internal controls over financial accounting were adequate, or that Whelan provided entirely truthful information to BIEL's auditor. *See* Resp. Motion at 28-33; OIP at 9. Thus, Respondents' motion is denied as to these remaining allegations.

E. No Remedies Can be Foreclosed

[1] Although I have accorded Respondents the benefit of the doubt as to the Qin Event Study, Qin's reasoning is difficult to follow. I encourage the parties to present any expert reports and expert testimony at the hearing more clearly.

Respondents argue that "none of the remedies are remotely warranted." Resp. Motion at 35. This argument is best raised in post-hearing briefing, and the issue is in any event not amenable to resolution by summary disposition. I note that Respondents bear the burden of proving inability to pay any monetary sanctions. *See* 17 C.F.R. § 201.630.

Order

It is ORDERED that Respondents' Motion for Summary Disposition and the Division's Motion for Partial Summary Disposition are DENIED.

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Cameron Elliot
Administrative Law Judge