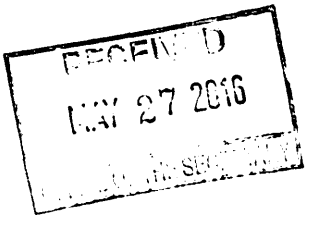
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

BIOELECTRONICS CORPORATION,
IBEX, LLC,
ST. JOHN'S, LLC,
ANDREW J. WHELAN,
KELLY A. WHELAN, AND
ROBERT P. BEDWELL,

Respondents.

File No. 3-17104



RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

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I. INTRODUCTION.

Respondents, BioElectronics Corporation ("BIEL"), IBEX, LLC ("IBEX"), St. John's, LLC ("St. John's"), Andrew J. Whelan and Kelly A. Whelan (collectively, "Respondents"), hereby move under Rule 250 of the Rules of Practice granting complete or partial summary disposition of allegations in the Order Instituting Cease-and-Desist Proceedings ("OIP").

Ninety percent of the monetary relief sought turns on whether IBEX's private sales of notes detailed in The Division of Enforcement's More Definitive Statement ("More Definitive Statement") violated the registration requirements under Section 5 of the Securities Act. Section 5 requires registration of such securities unless an exception applies. IBEX's notes were not registered. Whether Section 5 was violated turns on whether the transactions are exempt.

The applicable exemption is Section 4(1) of the Securities Act, which in turn calls for the application of Rule 144 (17 CFR 230.144). Rule 144 was enacted to define "underwriter" as used in Section 4(1) to create a safe harbor upon which investors could rely. IBEX complied with Rule 144 and was entitled to rely on Rule 144's safe harbor.

The Division disputes that IBEX complied with Rule 144. Specifically, the Division contends that IBEX failed Rule 144 based on misguided contentions that: (1) IBEX and BIEL were under the control of Andrew Whelan or under the common control of Andrew Whelan and Kelly Whelan; (2) even though IBEX held securities for several years before selling them in full compliance with Rule 144, because IBEX reinvested in BIEL after many exempt sales, the previously exempted sale became non-exempt; and (3) IBEX's serial compliance with Rule 144 establishes a plan to evade the same laws. The Division is patently wrong on all counts.

The St. John's transactions at issue in this matter are set forth on the last schedule attached to the More Definitive Statement. Such transactions give rise to the remaining 10% of the monetary relief sought. Unlike IBEX and Kelly Whelan, St. John's was an affiliate of BIEL.

Patricia Whelan, the principal of St. John's, is married to Andrew Whelan, the Chief Executive Officer of BIEL, and lives in the home with him. Because St. John's is an affiliate (IBEX is not), its exemption for sales of BIEL securities requires that St. John's meet elevated requirements. St. John's was careful to do so. Thus, while the analysis is different, the result is the same. St. John's complied with the affiliate requirements of Rule 144. Like IBEX, St. John's serial compliance with Rule 144 does not prove an intent to evade the securities laws.

The Division focuses on an obscure accounting issue and disclosures surrounding two immaterial bill and hold transactions reported for 2009. BIEL recognized $366,000 in revenue in 2009. There is no question that all the revenue was received, but the SEC complains about the *timing* of the revenue recognition. The charge is not that the income was phantom revenue, or that the money was never received, but that some portion of that revenue should not have been recognized in 2009, and, instead, in the following reporting periods.

The Division is incorrect. BIEL disclosed such revenue accurately. Its qualified auditor formally opined that its Form 10K complied with GAAP. The OIP includes claims against Robert Bedwell, the CPA upon which BIEL reasonably relied. The Division concedes that compliance with accounting standards on revenue recognition rest on the auditor's expertise.

Perhaps more importantly, if there was a mistake, it was an honest, temporary and immaterial error in BIEL's Form 10K. A holistic reading of the same Form 10K reveals a full and fair disclosure of the precarious financial condition of BIEL. Throughout that Form 10K, BIEL emphasized that it had suffered substantial losses throughout its short existence, little or no cash on hand, other than borrowed cash, serious doubt as to its continued existence, and that its very survival would depend on securing new capital through issuing debt on top of a pile of existing debt. Including (correctly or not) the relatively modest bill and hold transactions, BIEL suffered another year of substantial losses, decisively negative cash flow from operations, bare

cash drawers and a desperate need of new capital for the survival of BIEL's operations. Like so many start-up companies, BIEL suffered from constant cash flow drain threatening its operations and existence, and made that financial condition absolutely clear in its 2009 Form 10K.

The bill and hold transactions between BIEL and YesDTC and eMarkets were described in substantial detail in BIEL's 2009 Form 10K. Tellingly, there was no spike in the stock price or volume of BIEL when the Form 10K was published per the Events Study conducted at Duke University. See Declaration of Yue Qin, Exh. 1. Further disclosures were made in BIEL's 2010 Form 10Qs. In both cases, qualified auditors certified that the statements fairly stated the financial condition of BIEL in compliance with GAAP. A. Whelan Decl., ¶¶ 11- 14, Exh 1.

II. STATEMENT OF UNDISPUTED FACTS

A. The OIP and More Definitive Statement.

The OIP alleges (i) inaccurate public disclosures in a 2009 Form 10-K filed by BIEL, which allegedly prematurely recognized revenue from two bill and hold transactions; and (ii) distribution of unregistered shares of issuer, BIEL. The Division provided Respondents with details of the IBEX and St. John's transactions at issue in its More Definitive Statement.

B. BIEL.

BIEL is a medical device company founded in 2000 and headquartered in Frederick, Maryland. In 2002, the U.S. Food & Drug Administration awarded BIEL clearance for sale of its products by licensed physicians. BIEL is awaiting FDA classification changes and market clearances to permit over-the-counter sales in the United States. A. Whelan Decl., ¶ 4.

BIEL's products, proven effective in seven clinical studies, are available over-the-counter in dozens of foreign countries. In the United Kingdom, BIEL's product is sold at Boots, the largest pharmacy chain in the UK. BIEL has sold more than 700,000 units representing about 40 million treatments, and generating revenue of approximately $6.7 million. A. Whelan Decl., ¶ 5.

BIEL's Board of Directors Chairman, Dr. Richard Staelin, is a Chaired Professor of Business Administration at the Fuqua School of Business at Duke University. BIEL's Board previously included: Dr. Brian M. Kinney, Chief of Plastic Surgery at Century City Hospital in California and faculty at University of Southern California Medical School; Ashton Perry, former Vice President at Lucent Technologies, Inc.; and Douglas Watson, former President of Ciba/Geigy's United States Pharmaceutical Division, and Chairman and Chief Executive Officer of Novartis Corporation, among others. A. Whelan Decl., ¶ 6.

C. Kelly Whelan (formerly known as Kelly Lorenz)

Kelly Whelan is a Certified Public Accountant and daughter of Andrew Whelan. She is 48 years old. She has not lived in the same household as Andrew Whelan for the past 30 years. Kelly Whelan, at all relevant times, maintained an office in Virginia separate from the Maryland offices of BIEL. Kelly Whelan's relationship to IBEX was disclosed to BIEL's stockholders in SEC periodic and annual filings and Form 15c2-11. K. Whelan Decl., ¶168.

D. IBEX, LLC

Kelly Whelan formed IBEX, LLC in 2005 and is its sole member. Kelly Whelan initially capitalized IBEX with assets of her own and those of her former husband, Robert Lorenz. These assets included personal savings, a home equity loan, credit card advances, and withdrawals from an ERISA 401K retirement account. IBEX was formed to invest in small capitalization companies after Kelly Whelan learned from her father how such companies were forced to seek capital from lenders at extraordinarily high rates of return. K. Whelan Decl., ¶169.

IBEX's relationship to BIEL is as a lender. Over the years, IBEX made loans or purchased equity in several companies, including BIEL's convertible notes. The BIEL convertible notes issued to IBEX were on substantially similar terms to those of other lenders to BIEL, and approved by the BIEL's board of directors, including initially, by a board comprised

of a majority of independent directors. IBEX was only one of the many lenders to BIEL. A. Whelan Decl., ¶ 7; K. Whelan Decl., ¶170.

E. Every BIEL Note Sold By IBEX Had Been Held For More Than 1 Year.

Each security sold by IBEX identified on the More Definitive Statement was to a private party after IBEX had held that security (or, in the case of stock, the note converted into such stock) for well over a year – and in many cases more than three years. See K. Whelan Decl., ¶¶1-168, 171, and Exh. 1-168.

With respect to sales of stock converted by IBEX to BIEL shares, which shares were then sold privately, the lowest holding period was well over a year and the average holding period in excess of two years. K. Whelan Decl., ¶¶1-168, 172 and Exh. 1-168.

With respect to parts of the Revolving Convertible Promissory Note dated January 1, 2005, portions of which were sold directly to investors who subsequently converted their notes to BIEL shares, the lowest holding period was 4.19 years, with the range from 4.19 - 4.67 years, and the average holding period 4.53 years. K. Whelan Decl., ¶¶1-168, 173 and Exh. 1-168.

IBEX notes issued after January 1, 2010, were sold directly to investors. The shortest holding period was 2.14 years, with the range from 2.14-4.41 years, and the average holding period 3.66 years. K. Whelan Decl., ¶¶1-168, 174 and Exh. 1-168.

It is important to note that for all IBEX note conversions and sales during the period 2010 - 2014, there was not a single sale that had a holding period less than **two years**.

F. Andrew Whelan and BIEL Did Not Control Kelly Whelan and IBEX.

The Division contends that IBEX is an affiliate of BIEL because IBEX and BIEL were either controlled by Andrew Whelan or under the common control of Andrew Whelan and Kelly Whelan. OIP, ¶15. The Division is wrong.

At the time the transactions identified in the More Definitive Statement were made, and to this day, Kelly Whelan and IBEX were NOT under the control of Andrew Whelan and BIEL. See K. Whelan Decl., ¶176. At no time were IBEX and BIEL under the common control of Kelly Whelan and Andrew Whelan. K. Whelan Decl. ¶176; and A. Whelan Decl., ¶¶ 8-13.

IBEX and Kelly Whelan were not affiliates of BIEL. Kelly Whelan was not an officer, director or control person for BIEL. Kelly Whelan maintained her own office in Virginia and did not live in the same household as her father, Andrew Whelan. Neither Kelly Whelan nor IBEX ever held 10% of the securities of BIEL. K. Whelan Decl., ¶177.

Section 2.2 of IBEX's Note provides that IBEX's right to convert shares, in each instance, is expressly conditioned on BIEL's Board approving such conversion. BIEL's Board was well aware of the securities law implications that would arise in the event IBEX became an affiliate, and had no intention of approving a conversion that would cause IBEX to become a 10% owner of BIEL's stock. IBEX and BIEL agreed that IBEX would not seek such a conversion and, in no instance, did so, and BIEL confirmed such intent in Board Resolutions. A. Whelan Decl., ¶12; Exh. 1; K. Whelan Decl., ¶178.

BIEL's notes to IBEX were on terms negotiated at arms'-length and substantially the same as notes between BIEL and unrelated third parties. They were secured with a lien on all of the assets of BIEL. BIEL's notes to IBEX bear eight percent (8%) interest per annum. Each of the BIEL convertible notes was embodied in a formal writing bearing the foregoing terms. Extensive formal documentation under which such debt was issued is attached to the K. Whelan Decl. ¶179, Exhs. 1-167.

Kelly Whelan and IBEX were motivated to make loans to BIEL every time Andrew Whelan advised of BIEL's willingness to issue such notes because IBEX thought every loan

would be profitable for IBEX. Of course, IBEX was eager to make profitable loans to BIEL, just as any lender who believed it would profit from such loan would be. K. Whelan Decl., ¶180.

From time to time, when BIEL needed money to fund its operations, it went to its lender, IBEX, and asked to borrow those funds. When the funds were loaned, BIEL issued a convertible note to IBEX, just as any borrower would issue to any lender. When a note came due, and BIEL wished to extend or renew the note, the note was extended or renewed on market terms profitable to IBEX. See A. Whelan Decl., ¶13; K. Whelan Decl. ¶181, Exhs. 1-167.

The Division incorrectly contends that because IBEX loaned BIEL money whenever Andrew Whelan asked for a loan, BIEL or Andrew Whelan controlled IBEX. OIP, ¶11. But, the fact that IBEX loaned money to BIEL whenever BIEL asked for a loan does not indicate that BIEL had **power** over IBEX or Kelly Whelan. Instead, it proves only that IBEX thought it could make profits by making each and every requested loan to BIEL. K. Whelan Decl. ¶182.

With respect to the IBEX loan transactions identified in the More Definitive Statement, IBEX loaned BIEL $4,908,138; while receiving substantially less from third parties to whom IBEX had sold pre-existing aged notes. On a net basis (funds received minus funds loaned), IBEX **increased** its investment in BIEL, on a long term basis, by hundreds of thousands of dollars. Such is not the action of an underwriter, but of a long term investor at full risk of economic loss, as Rule 144 makes absolutely clear. K. Whelan Decl. ¶¶1-167, 183; Exh. 1-167.

The Division contends that IBEX and St. John's paid BIEL's business expenses, BIEL's contractors for services and Andrew Whelan's travel expenses. OIP, ¶15. These facts establish nothing more than that IBEX and St. John's, acting independently, believed that each advance made for such expenses would be profitable to each lender. K. Whelan Decl. ¶184.

The Division alleges that Andrew Whelan decided when IBEX should sell its securities. OIP at ¶15. Not true. Andrew Whelan decided when BIEL needed money, as was his role as

Chief Executive Officer of BIEL. A. Whelan Decl. ¶13. Andrew Whelan, with approval of the Board, also decided who he would ask to make such loan, the terms he would offer to lenders and the timing of such proposal, including circumstances in which he asked Kelly Whelan and IBEX for a loan. A. Whelan Decl. ¶13. The Division claims that Andrew Whelan introduced IBEX to buyers of IBEX's notes in order that IBEX could generate the money necessary to finance such loan. These acts, if proven, simply underscore that BIEL needed to borrow money to survive while operating at substantial cash flow negatives and was highly incentivized to borrow money from IBEX on prevailing market terms. K. Whelan Decl. ¶185.

IBEX and its owner, Kelly Whelan, had every right and all power to decide whether or not to sell IBEX's notes and whether or not to make the requested loan to BIEL after doing so. Like any borrower, BIEL enticed IBEX to make such loans by offering profitable terms – which IBEX accepted. K. Whelan Decl. ¶186.

G. St. John's Complied With Rule 144 Holding Period and Volume Limits.

1. Rule 144 Affiliate Rules Apply To St. John's.

St. John's was formed in 2009 by Patricia Whelan. Patricia Whelan is married to Andrew Whelan. The sole compensation Andrew Whelan received for his services, as CEO of BIEL, is $150,000 per year paid to St. John's. Since 2009, BIEL has paid St. John's just $71,700 in cash and the balance in convertible notes for Andrew Whelan's services. St. John's also loaned $1.5 million to BIEL in exchange for convertible notes. P. Whelan Decl., ¶4; and Exh. 1.

2. Holding Period.

St. John's satisfied Rule 144 by holding its securities for at least 34 months before selling. The More Definitive Statement details the issuance by BIEL to St. John's of 91,808,086 shares on June 20, 2012. Those shares were issued upon the conversion of convertible notes acquired by St. John's on June 30, 2010 ($95,794.67) and August 31, 2010 ($61,108.82). All but

10 million shares of that 91,808,056 shares were liquidated from March 26, 2013 through March 6, 2014, generating $404,613 in proceeds. The first sales occurred **34 months after the June 2010 note issuance** on March 26, 2013. Nine months later, on December 27, 2013, the next shares were sold. St. John's still holds 10 million of the BIEL conversion shares generated from the June 2012 conversion of such 2010 notes. P. Whelan Decl., ¶¶ 7-8; and Exh. 1-3.

3. Issuer Information

BIEL satisfied the issuer information requirement because BIEL had either SEC annual and periodic statements on file with the Commission and/or 15c211 information with the Pink Sheets OTC Exchange. A. Whelan Decl., ¶14; and Exh. 2.

4. Manner of Sale

St. John's complied with the manner of sale requirement as each sale was executed through a registered broker-dealer. P. Whelan Decl., ¶¶7-8; and Exh. 2-3.

5. Volume Limitation.

St. John's stock sales complied with the leak-out provisions of Rule 144.

The first three transactions listed on the More Definitive Statement are: March 26, 2013, 2,598,508 shares; December 27, 2013, 4,228,212 shares; and February 25, 2014, 20,981,366 shares. Each of those three transactions qualify under the leak out provisions in Rule 144(e)(1)(i) (less than 1% of total outstanding shares.) P. Whelan Decl., ¶9; and Exh. 3.

On November 19, 2012, BIEL's financial statements published on OTC Markets' web site reflect outstanding shares of 2,655,448,291 shares. P. Whelan Decl., ¶10. One percent of the outstanding shares was 26,554,482 shares. The 2,598,508 sold on March 26, 2013 was less than 10% of the 26,554,482 shares that could have been sold under Rule 144(e)(1)(i). It is noteworthy that St. John's could have been selling 1% of the outstanding stock volume each quarter from July 2011 through March 2013, a total of approximately 175,000,000 shares! St. John's had

been deliberately constrained through March 2013 and remained so restrained. For the next nine months, St. John's did not sell a share of BIEL stock.

St. John's sold only 4,228,212 shares on December 27, 2013. On November 15, 2013, BIEL's financial statements published on OTC Markets' web site, reflects outstanding shares of 3,447,263,126. One percent of the outstanding shares was 34,472,631 shares. The 4,228,212 shares sold December 27, 2013 by St. John's was less than 13% of the 34,472,631 shares that could have been sold under Rule 144(e)(1)(i). On February 25, 2014, St. John's sold 20,981,366. The total of the foregoing two sales within three months was approximately 24 million shares. Still, that amount was only 73% of the 34,472,631 shares that could have been sold under Rule 144(e)(1)(i). P. Whelan Decl., ¶13; and Exh. 3.

Shares sold December 27, 2013 through March 6, 2014, totaling 79,209,578 shares, exceeded the permissible limits of Rule 144(e)(1)(i), but is well within the statutory limits in Rule 144(e)(1)(ii). Looking back four weeks, and then taking the average weekly volume of shares traded during that period, reflects that 4,080,306,831 shares were traded -- an average weekly trading volume of 1,020,076,710 shares. Because Rule 144(e) expressly states that the limitation is the "greater of" the following subparagraphs (i), (ii) and (iii), and because 79 million is less than 8% of the applicable volume limit of over a billion shares, St. John's complied with the leak-out provisions applicable to subparagraph (e) applicable to affiliate transactions. P. Whelan Decl., ¶¶7-14; and Exh. 2 -3.

These transactions would not have been possible had they not complied with Rule 144(e). Each transaction required St. John's to tender to its broker and transfer agent, a legal opinion indicating compliance with federal securities laws. P. Whelan Decl. ¶15; and Exh. 2.

Moreover, each transaction had to be approved by broker, Alpine Securities, before it would execute the transaction. P. Whelan Decl. ¶15; and Exh. 3.

6. Form 144 Filings.

St. John's has filed its Form 144 with respect to each of the sales referenced in the More Definite Statement. P. Whelan Decl. ¶16; and Exh. 4.

H. Timing Of Revenue On Bill and Hold Transactions Is Immaterial.

The OIP alleges premature revenue recognition in BIEL's December 31, 2009 Form 10-K with respect to two bill and hold transactions. OIP ¶¶1, 19-27. Notably, the Division does not, and cannot, contend that the revenue was not received. Importantly, $366,000 of revenue was reported and $366,000 was received. None of those funds were returned.

The Division rests its claim on the *timing, only,* of the revenue recognition in 2009, not the existence of such revenue. BIEL contends that the recognition of such revenue was accurately reported and, even if some portion of that revenue arguably should have been reported in 2010 or 2011, the timing of such modest amount of revenue recognition is immaterial. BIEL's reliance on its accountants and lawyers is particularly reasonable where the accounting rules and the SEC's own bulletins on the subject offer only ambiguous guidance. See SEC Staff Accounting Bulletin 101, fn. 4 ("SFAC No. 5, ¶84(a), (b), and (d). Revenue should not be recognized until the seller has *substantially* accomplished what it must do pursuant to the terms of the arrangement, which *usually* occurs upon delivery or performance of the services." Emphasis added.)

1. Revenue Properly Recognized in 2009.

BIEL adamantly states that its bill and hold transaction revenue was properly recorded. Its 2009 Form 10K and 2010 10Qs discussed in detail such transactions; and both documents were certified by qualified auditors as fairly stating the financial condition of BIEL in accordance with GAAP. A. Whelan Decl., ¶16, Exh. 3.

a. YesDTC.

YesDTC entered into a Distribution Agreement with BIEL on December 30, 2009 (the "Distribution Agreement"). The Distribution Agreement obligated YesDTC to pay $100,000 dollars to BIEL upon signing, and $50,000 in 2010. On December 30, 2009, YesDTC paid BIEL $100,000 and on March 31, 2010 YesDTC paid $50,000 to Jarenz LLC, a creditor of BIEL, at BIEL's instruction. See Noel Decl., ¶¶3-6, Exh. 1-2; and A. Whelan Decl., ¶19, Exh. 2.

Joseph Noel, President of YesDTC, confirms his understanding that the $150,000 paid to BIEL could not be refunded and was not a conditional payment. See Noel Decl., ¶7, Exh. 1.

YesDTC did not have a storage facility to house the product. Its business location (300 Beale Street, Unit 301, San Francisco, Ca) was a mixed use residential/office building that specifically prohibited commercial shipping and warehousing operations. Therefore, YesDTC asked BIEL to have the product stored at BIEL's facility until delivery was requested by YesDTC. YesDTC was concerned that storing the product in house would not have been permitted by the FDA. Section 21 CFR 820.70(f) requires "buildings to be of suitable design and have sufficient space for packaging and labeling operations." YesDTC was not able to meet these requirements, so a mutual decision was made among BIEL and YesDTC to store the units in BIEL's facility. See Noel Decl., ¶¶ 9-13, Exh. 1; and A. Whelan Decl., ¶22.

YesDTC paid the $150,000 for both (1) the product; and (2) an exclusive license to sell the product into Japan. If product was not purchased in sufficient levels, then YesDTC would lose its license rights. At no time did YesDTC have any expectation that monies for the products purchased under the Distribution Agreement would be refundable if YesDTC proved to be unsuccessful. Instead, YesDTC understood and agreed that if it did not maintain the levels of purchases outlined in the agreement, YesDTC would lose its license to market the product into Japan in the future and that its investment in that license and unsold inventory would be lost.

Section 9.4 of the Agreement was discussed on numerous occasions during the negotiation process. Section 9.4 outlined procedures relating to YesDTC recovering funds should the Agreement be terminated. See Noel Decl., ¶13, Exh.1; and A. Whelan Decl., ¶20.

YesDTC attempted to register product in Japan, but was unsuccessful. Notwithstanding YesDTC's failure to sell the product in Japan, BIEL was not required to refund the $150,000 paid because YesDTC bargained for the exclusive license in Japan, and received that license. YesDTC never asked for a refund of its license fee and inventory purchase and its own audited financial statements mirrored BIEL's accounting of the transaction. Noel Decl., ¶14, Exh. 1-2; and A. Whelan Decl., ¶20.

b. eMarkets

Mary Whelan has served as a director of BIEL since April 2002, and is the sister of Andrew Whelan. In 2002, Mary Whelan worked with Andrew Whelan to commercialize and bring to market the product for which he had just received FDA market clearance. Her marketing consulting firm, eMarkets Group, launched the product: created and registered the brand, ActiPatch; and created the web site, product packaging and promotional materials. eMarkets Group paid for all of the above as well as first production runs of the product and some consulting charges. These expenses totaled about $302,000 invested in the then private company, BIEL. In addition, Ms. Whelan served as unsalaried VP of Marketing for BIEL in 2002-3. Subsequently, Ms. Whelan received 1.5 million founders' shares in BIEL, then a private company, as compensation for her investment and employment. Mary Whelan previously served as a Vice President of eBusiness and also as Strategic Communications and Market Operations Vice President at Lucent, where she ran global marketing operations, including marketing communications, customer programs, and sales support for the worldwide sales force. Prior to Lucent, Mary Whelan worked 23 years at AT&T in various marketing and PR roles. In addition

to BIEL, eMarkets' clients have included: KPMG, NJIT - New Jersey Institute of Technology and a number of small start-up firms. M. Whelan Decl., ¶3.

In the fall of 2008, Mary Whelan suggested to Andrew Whelan that eMarkets should develop a veterinarian branded product line for BIEL because she believed that a veterinary product could be marketed directly to consumers and via retail in the United States. Originally developed for use on humans, BIEL drug-free devices could be used for horses, cats, and dogs to reduce swelling and pain in many conditions. M. Whelan Decl., ¶6.

In February 2009, Mary Whelan entered into a definitive written distribution agreement with BIEL, and made an initial purchase of 1,500 squares for a cost of $15,750, paid for by wire from eMarkets Group's bank on Feb 13, 2009. M. Whelan Decl., ¶7, Exh. 1.

Mary Whelan's affiliation with eMarkets and its related party transactions with BIEL was fully disclosed in BIEL's SEC filings, web site, and the OTC Pink Sheet's web site. Mary Whelan maintained the product eMarkets purchased from BIEL in a discrete segregated section of BIEL's warehouse. The product was maintained at BIEL because under FDA regulations, eMarkets was obligated to store the product at an FDA approved warehouse; and because eMarkets requested that BIEL do so. eMarkets Group took exclusive ownership of the inventory, booked it in its accounts, sold it, and shipped it to customers. At eMarkets' direction, BIEL's employees processed the shipping to the end-user and consolidated the shipment of both the eMarkets inventory items (squares and crescents) with loop products that are "drop-shipped" to avoid multiple shipment expense to the customer. The loop is also used by veterinarians for some applications such as hoof treatments. M. Whelan Decl., ¶7; Exh. 1; A. Whelan Decl., ¶¶23, 32; Exh. 2.

When BIEL decided to stop making the plastic encased squares and crescents, Mary Whelan decided to purchase as many of the devices as she could to meet the anticipated needs of

her customers. At that time, eMarkets Group was in discussions with retail outlets (PetSmart, QVC, Hartz Mountain, Emson, etc.) all of whom require guarantees of sufficient inventory before considering placing an order. eMarkets Group purchased the following inventory:

Date	Product Purchased	Amount
2/4/2009	1,500 Squares	$15,750
6/24/2009	502 Squares	$940.
6/30/2009	12,200 Crescents	$91,500
12/15/2009	10,000 Squares	$75,000
12/15/2009	4,778 Crescents	$35,835
Total	12,002 – Squares 16,978 - Crescents	$219,025

eMarkets agreed to accept the risk of advance purchase of the product based on eMarkets' belief that demand existed and its desire to control the market pricing. The squares and crescents continue to be sold today. M. Whelan Decl., ¶10.

At no time did eMarkets or BIEL have any expectation that funds paid were refundable. No such request has ever been made and no funds have been returned. The fact that eMarkets' product was warehoused in a separate section of BIEL's warehouse was fully disclosed to BIEL's auditor, Robert Bedwell, of Cherry Bekaert, and BIEL's attorneys, and BIEL relied on such professionals in making such disclosures. A. Whelan Decl., ¶24; M. Whelan Exh. 2.

eMarkets initially forecast that it would sell all the product purchased by the end of 2010, but sales later proved to be slower than it anticipated. Although BIEL had booked and actually received all such revenue in 2009, in an abundance of caution, BIEL took remedial action at the end of 2010 to restate its revenue to reflect this fact in its annual report. To date, eMarkets has shipped more than 10,000 of the inventory units purchased. M. Whelan Decl., ¶12; Exh. 2; A. Whelan Decl., ¶¶ 25-27; Exh. 2.

I. No Badges of Plan To Evade Securities Laws.

BIEL's good faith efforts and substantial compliance with its disclosure requirements belie the Division's contention that there was a plan to evade the registration requirements. Among other things, BIEL filed a registration statement with the Commission in 2007 and Form 10K in 2010. Its audited financial statements pertaining to 2009 fully disclosed the eMarkets, YesDTC, IBEX and St. John's transactions and the relationship between Kelly Whelan, IBEX, Mary Whelan, Andrew Whelan and BIEL, among others. BIEL has had more than a dozen lawyers including blue chip law firms Kirkpatrick and Lockhart and Alston Bird, and several auditors review and assist the Respondents with the execution of its securities transactions. Every conversion of every note resulting in an issuance of BIEL shares was supported by one or more legal opinion letters and was reviewed and approved by BIEL's transfer agent. Not a single lawyer, auditor or transfer agent has ever warned BIEL that there was something illegal or untoward about the loans made by IBEX or St. John's to BIEL. Using qualified professsionals, IBEX, St. John's and BIEL endeavored to make the required disclosures in its SEC filings, to its auditors, and all regulators and investors interested in BIEL. IBEX and St. John's held the underlying securities for two years, three years and longer before liquidating them into the market. In doing so, and in their consistent and steadfast compliance with Rule 144, IBEX and BIEL pursued a course of strict adherence, not evasion, and were not underwriters, as that term is defined by Rule 144. A. Whelan Decl., ¶¶ 7-14.

III. LEGAL ARGUMENT.

A. Section 5 of the Securities Act Requires Registration or An Exemption.

Section 5 of the Securities Act makes it unlawful to offer to sell or sell a security unless a registration statement is in effect, or the transaction is exempt. An exemption is applied on a

transaction-by-transaction basis -- each sale and each offer must be either exempt or registered. *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, 648 (7th Cir. 1990).

B. The Section 4(1) Exemption.

Section 4(1) of the Securities Act exempts from registration "transactions by any person, other than an issuer, underwriter or dealer." The Division does not and cannot contend that IBEX and St. John's were issuers (BIEL is the issuer) or dealers. Whether Section 4(1) applies turns on whether or not IBEX and St. John's were underwriters. They were not.

1. Rule 144 – Purposefully Created A Safe Harbor.

Rule 144 explains: "Section 4(1) of the Securities Act provides one such exemption for a transaction 'by a person other than an issuer, underwriter, or dealer.' Therefore, an understanding of the term 'underwriter' is important in determining whether or not the Section 4(1) exemption from registration is available for the sale of the securities." *Id.* An underwriter is a person who purchases with a view to distribution, offers or sells for an issuer in connection with a distribution, or participates in any distribution or underwriting. 15 USC §77b(a)(11).

> The Commission adopted Rule 144 to establish specific criteria for determining whether a person is not engaged in a distribution. **Rule 144 creates a safe harbor** from the Section 2(a)(11) definition of "underwriter." A person satisfying the applicable conditions of the Rule 144 safe harbor **is deemed not to be engaged in a distribution of the securities** and therefore not an underwriter of the securities for purposes of Section 2(a)(11). Therefore, **such a person is deemed not to be an underwriter** when determining whether a sale is eligible for the Section 4(1) exemption for "transactions by any person other than an issuer, underwriter, or dealer."

Emphasis added. Rule 144 preamble.

The language chosen by the Commission in the preamble was intentional, clear and decisive – not open to the Division's misinterpretation. If the court finds that IBEX

and/or St. John's has complied with Rule 144, the Court must find (absent a showing of an intentional planned evasion) in favor of IBEX and St. John's.

The flexibility comes into play only in Respondents' favor. If the Court finds that IBEX or St. John's did not comply with the safe harbor provisions of Rule 144, the preamble expressly instructs that Rule 144 is not exclusive. The Court, in such circumstances, should determine whether, based on the facts and circumstances presented, IBEX and/or St. John's were acting as underwriters. In that case, the very lengthy holding periods (some in excess of three years) in which IBEX and St. John's invested in BIEL, remaining at full risk of economic loss, weight definitively against the Division's characterization of their acts as those of an underwriter.

2. Rule 144 Applies Different Standards For Affiliates (St. John's) And Non-Affiliates (IBEX).

The SEC Web site at https://www.sec.gov/info/smallbus/secg/rules144-145-secg.htm reflects the different rules under Rule 144 for affiliates and non-affiliates, as follows:

"The following chart summarizes the revised conditions applicable to affiliates and non-affiliates selling restricted securities under Rule 144:

	Affiliate or Person Selling on Behalf of an Affiliate	**Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)**
Restricted Securities of Reporting Issuers	During six-month holding period — no resales under Rule 144 permitted. After six-month holding period — may resell in accordance with all Rule 144 requirements including: • Current public information, • Volume limitations,	During six-month holding period — no resales under Rule 144 permitted. After six-month holding period but before one year — unlimited public resales under Rule 144 except that the current public information requirement still applies. After one-year holding period — unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.

	• Manner of sale requirements for equity securities, and • Filing of Form 144.	
Restricted Securities of Non-Reporting Issuers	During one-year holding period — no resales under Rule 144 permitted. After one-year holding period — may resell in accordance with all Rule 144 requirements, including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	During one-year holding period — no resales under Rule 144 permitted. After one-year holding period — unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements. "

IBEX is not an affiliate, and St. John's is an affiliate. Accordingly, IBEX need only comply with the requirements in the right hand column of the foregoing chart, while St. John's must prove compliance with the requirements in the middle column.

3. Andrew Whelan Did Not Control IBEX And Was Never In Common Control Of BIEL and IBEX With Kelly Whelan.

The Division argues that IBEX is an affiliate of BIEL because BIEL and IBEX were "under common control of [Andrew] Whelan, or, at the least, the common control of [Andrew] Whelan and Kelly Whelan." OIP, ¶15. The Division is wrong. Its allegation purposefully conflates two separate companies with two separate and distinct principals.

Andrew Whelan, at the direction of the board, controlled BIEL, only, and Kelly Whelan controlled IBEX, only. They were not in "common control" of any company, in that Kelly Whelan and Andrew Whelan never controlled the same company. Steve Jobs controlled Apple

and Bill Gates controlled Microsoft. It would be inaccurate to allege that Apple and Microsoft were under the "common control" of both Steve Jobs and Bill Gates.

Footnote 3 to paragraph 15 of the OIP explains:

> Rule 144 defines 'affiliate' as 'a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.' 17 C.F.R. § 230.144(a)(1). Although the rule does not define 'control,' courts borrow the definition from Rule 405, which defines it as '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.' 17 C.F.R. § 230.405.

Emphasis added. *See also, Pennaluna & Co. v. SEC*, 410 F.2d 861, 864 (9th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970); *SEC v. Micro-Moisture Controls, Inc.*, 148 F. Supp. 558, 562 (S.D.N.Y. 1957). Control persons are generally officers, directors and/or larger shareholders of the issuer. *U.S. v. Wolfson*, 269 F. Supp. 621, 626 (1967). Courts do not find persons to be "control" when they do not have the ***power*** to control the issuer. *U.S. v. Sherwood*, 175 F. Supp. 480, 483 (S.D.N.Y. 1959) (8% stockholder did not have the power to control the issuer).

Andrew Whelan controlled BIEL, subject to its Board of Directors and shareholders. Kelly Whelan, the sole member of IBEX LLC, exclusively controlled IBEX. Kelly Whelan owned IBEX and retained, at all times, plenary and exclusive power to decide its activities. Andrew Whelan did not control and had no power to control IBEX or his daughter, Kelly Whelan. Andrew Whelan could only ask Kelly Whelan (or any other potential investor) if she would be willing to loan BIEL money at an acceptable rate and conditions. Kelly Whelan had the exclusive decision-making power to invest or not invest.

The father/daughter relationship, standing alone, is not enough to establish control. Rule 144(a)(2) explains that under Rule 144 a person includes "[a]ny relative or spouse of such person, or any relative of such spouse, any one of whom **has the same home as such person.**" Emphasis added. 17 CFR 230.144(a)(2). Notably, if the Commission had intended that all

immediate relatives would be affiliates, it could easily have stated such a rule. By way of contrast, see the Bankruptcy Code's definition of insiders, which expressly includes any "relative of the debtor." 11 USC §101(31)(A)(i). Thus, it is clear that Rule 144 was not intended to treat fathers and daughters as affiliates for purposes of Rule 144 unless they lived in the same home. Andrew and Kelly Whelan had not lived in the same home for more than 30 years! Kelly Whelan is a 48 year old CPA and independent investor in BIEL through her company IBEX who has not lived with her father since she was 17 years old. The Division's self-serving and baseless conclusion that Andrew Whelan controlled Kelly Whelan is belied by the plain language of the applicable statutes, smacks of sexism, and is without evidentiary support.

BIEL needed money, requested loans from IBEX, and IBEX, believing it stood to profit from such loans, agreed to make them. Profit motivated Kelly Whelan. Because she believed the loans to be lawful and profitable, she decided to make them. Andrew Whelan had no power to cause her to make the loans, had she chosen not to do so.

The Division hangs its case on the fact that Kelly Whelan never refused a BIEL loan. Rather than proving control, that proves only that Kelly Whelan believed each loan offered by BIEL would be profitable for IBEX. A server selling Starbucks coffee does not refuse a customer's coffee order. That is not because the customer has the power to control Starbucks or its servers. It is because Starbucks makes a profit each time it sells a cup of coffee. American Express does not refuse to honor a credit worthy customer's charge. That is not because the customer controls American Express, but because American Express has decided that it would make a profit every charge it honors for that customer. A retailer does not refuse to purchase more of a manufacturer's product if it is offered a quantity discount, not because the manufacturer has the power to make the retailer purchase more, but because the retailer believes by purchasing the extra product at a lower cost, it can make more profit. All of these transactions

are incentive compatible, i.e., the exchange terms are agreeable to both parties and thus the transaction occurs. Such transactions are not evidence of control or power.

Because Andrew Whelan did not have the power to control Kelly Whelan, and Kelly Whelan did not have the power to control BIEL, Kelly Whelan and IBEX are not affiliates of BIEL. The consequence of that determination is that IBEX's transactions must comply with the right column above, applicable to non-affiliates, rather than the left column, applicable to affiliates, in order to enjoy the safe harbor provisions of Rule 144.

4. Rule 144 Holding Periods Were Satisfied.

Rule 144(d) provides, in pertinent part: "If the **securities sold** are restricted securities, the following provisions apply:

> (1) General rule. (i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of six months must elapse between the later of **the date of the acquisition of the securities from the issuer**, or from an affiliate of the issuer, **and any resale of such securities** in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.
> (ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of one year must elapse between the later of **the date of the acquisition of the securities from the issuer**, or from an affiliate of the issuer, **and any resale of such securities** in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.

Emphasis added. 17 CFR 230.144(d).

Thus, Rule 144(d) expressly applies to the "securities sold". It requires the Court to compare the "date of the acquisition of the securities" to the date of "any resale of such securities." The drafters clearly intended the court to look to the securities involved in the sale. The drafters did not look beyond the sale to endeavor to tie the sale to the date the funds from that sale would be reinvested in a new security, as the Division invites the Court to do.

a. IBEX – Holding Periods.

The Division's More Definitive Statement pairs the date IBEX sold its BIEL note with the date, shortly thereafter, that IBEX made a new loan to BIEL and BIEL issued a new note to IBEX. The Division implies that IBEX had virtually no holding period for the notes that it sold – in fact that the note it sold was acquired **after** it was sold. The Division invites the Court to interpret the story starting from the middle of the book, rather than from its beginning and, in doing so, to misapply the plain language of Rule 144(d).

To calculate correctly an investor's holding period, it is necessary to ascertain precisely when the period begins. The SEC has interpreted "date of acquisition" to start when the full risk of economic loss was assumed by the transferee. See SEC Rel. 33-6099 (1979) (Question 23). Here, the holding period commenced when IBEX first exchanged its cash for a convertible note.

The new notes issued to IBEX after selling its notes to a third party was, obviously, not the same security that was sold. The new notes are separate instruments based on new cash loans. Each new note started its own holding period upon which Rule 144 would apply. Such holding period has nothing whatsoever to do with the holding period of the pre-existing note that was resold. Because the date of acquisition is, by the clear language of Rule 144, starts the holding period, the Division's construction fails scrutiny.

IBEX satisfied all holding period requirements, having held all notes sold for more than two years in every case; and many for more than three and even more than four years. K. Whelan Decl., ¶¶1-167; Exh. 1-167. There is no justification for restarting the clock on long held securities. That the same long term investor acquired new securities after selling a portion of its original securities by making a new cash investment only confirms the investor's confidence in the long term investment. The Division's construction of Rule 144 is inconsistent with the legislative trend in to encourage investment in start-up companies by reducing the requisite

holding periods (previously 2 years, and now only 6 months). The Division's construction also undermines the purpose of Rule 144 to provide certainty in securities transactions involving unregistered securities by setting forth easily calculable holding periods.

b. St. John's

St. John's shortest holding period was 34 months, **22 months longer than** Rule 144(d) requires. St. John's held convertible notes from June and August 2010 through June 2012, then converted and remained in possession of the securities until March 26, 2013, when it began trickling out conversion shares in amounts far less than what was legally permissible.

The Court should compute the holding period from the time the convertible notes were purchased, not from the date of conversion. As the SEC noted in its release adopting Rule 144, "Certain securities acquired in connection with, or as a result of ownership or acquisition of, other securities, are deemed to have been acquired when such other securities were acquired."

5. BIEL's Issuer Information Satisfied Rule 144.

Rule 144 imposes a public information requirement on affiliate transactions. If the issuer of the securities to be resold is an Exchange Act reporting company, its periodic reports and required Interactive Data Files must be current for the preceding 12 months. Rule 144(c)(1).[1] According to Rule 144(c)(2) and the SEC's Web Site, current public information "[f]or non-reporting companies, ...means that certain company information, including information regarding the nature of its business, the identity of its officers and directors, and its financial statements, is publicly available." BIEL and St. John's satisfied the issuer information

[1] The reporting requirement under Rule 144(c) do not apply to non-affiliate, IBEX, who had held securities for more than one year. Rule 144(b)(1): "The requirements of paragraph (c)(1) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of one year has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer."

requirement. BIEL had either SEC annual and periodic statements on file with the Commission and/or 15c211 information with the Pink Sheets OTC Exchange. A. Whelan Decl., ¶14; Exh. 2.

6. St. John's Complied With Rule 144's Manner of Sale Requirements.

Under Rule 144(f)(3)(ii), St. John's Rule 144 transactions must be executed in a permissible manner, including through "brokers' transactions" pursuant to Section 4(a)(4) of the Securities Act. St. John's complied with the manner of sale requirement. Each sale was executed through a registered broker-dealer. P. Whelan Decl., ¶15; and Exh. 2-3.

7. St. John's Complied With Rule 144's Volume Limitation.

Rule 144(e)(1) requires that St. John's sales of BIEL shares, when taken together with all of St. John's sales of BIEL stock within the preceding three months, not exceed the greatest of:

> (i) One percent of the shares ... as shown by the most recent report or statement published by the issuer, or (ii) The average weekly reported volume of trading in such securities on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the four calendar weeks preceding the filing of notice required by paragraph (h), or if no such notice is required the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker...."

St. John's complied with such volume limitations. P. Whelan Decl., ¶¶7-13; Exh. 3.

8. Form 144 Filings.

St. John's has filed its Form 144 with respect to each of the sales referenced in the More Definite Statement. P. Whelan Decl. ¶16; and Exh. 4.

9. Rule 144 Is A Non-Exclusive Exemption.

Rule 144 is a "nonexclusive safe harbor provision" for unregistered securities. *SEC v. Cavanagh*, 445 F.3d 105, 114 (2d Cir. 2006). Although Rule 144 was intended to provide a safe harbor, a person who falls short of Rule 144 may nevertheless be entitled to the exemption of

Section 4(1). See 17 C.F.R. § 230.144(j); Adoption of Rule 144, *supra,* at 591-92; Resales of Securities, Securities Act Release No. 5980, 1978 WL 195944, at *2 n.8 (Sept. 20, 1978).

As noted above, Section 2(a)(11) defines an "underwriter" as any person who purchases with a view to distribution, offers or sells for an issuer in connection with a distribution, or participates in any distribution or underwriting. 15 U.S.C. §77b(a)(11). Given the statutory definition of "underwriter," the exemption is available if: (1) the acquisition of the securities was not made "with a view to" distribution; or (2) the sale was not made "for an issuer in connection with" a distribution. See 15 U.S.C. § 77b(11) (1988); ABA Report, The Section "4(1 1/2)" Phenomenon: Private Resales of "Restricted" Securities, 34 Bus. Law 1961, 1975 (July 1979); Hazen, The Law of Securities Regulation at § 4.23, at 138. Relevant to both inquiries are whether the securities have come to rest in the hands of the security holder and whether the sale involves a public offering. The best objective evidence of whether a sale is "for an issuer" is whether the shares have come to rest. See ABA Report, 34 Bus.Law. at 1975. While this determination would at first seem to be a fact-specific inquiry into the security holder's subjective intent at the time of acquisition, courts have considered the more objective criterion of whether the securities have come to rest. That is, courts look to whether the security holder has held the securities long enough to negate any inference that his intention at the time of acquisition was to distribute them to the public.

Decades ago, courts accepted a two-year rule of thumb to determine whether the securities have come to rest. *See United States v. Sherwood*, 175 F. Supp. 480, 483 (S.D.N.Y. 1959) ("The passage of two years before the commencement of distribution of any of these shares is an insuperable obstacle to my finding that Sherwood took these shares with a view to distribution thereof."). This two-year rule was reflected in early versions of Rule 144, and then later reduced to the six month and one year periods discussed above. 17 C.F.R. § 230.144(b)(1).

Here, the holding periods were all in excess of two years, and often more than three or even four years. The lengthy holding periods establish beyond any rational doubt that the notes came to rest in the hands of IBEX and St. John's. Neither acquired the securities "'with a view to' distribution". These acquisitions made with cash years before the securities were resold were not made for an issuer in connection with a distribution.

To the extent IBEX or BIEL did fall short of Rule 144's requirements, it was an honest mistake, made after dutiful engagement of professionals and reliance on their advice. Each and every transaction was made pursuant to written documents, fully disclosed by BIEL in its public filings, in reliance of formal written opinions of counsel, and, in the case of St. John's, executed through a reputable registered broker-dealer, pursuant to safe harbor Rule 144(b)(1).

Under these circumstances, the Court should find that both IBEX and St. John's transactions are exempt under Section 4(1) of the Securities Act, whether or not the Court finds strict compliance with Rule 144.

C. Serial Compliance Does Not Constitute A Scheme To Evade.

Serial compliance of law does not establish a plan to evade that law. Just as driving to work every day under the speed limit does not prove a plan to evade that speed limit, the fact that IBEX and St. John's complied with Rule 144 in dozens of transactions does not establish a plan to evade the registration requirements. Instead, IBEX's and St. John's steadfast compliance with applicable safe harbor provisions, designed to provide IBEX and St. John's the certainty they relied on to make such loans, reflects a careful, lawful and honest effort to comply with the letter of the law.

The Division complains that there are many millions of shares in the public market, without any such shares ever having been registered. But, applicable law does not limit the number of unregistered shares that may be sold. Indeed, Rule 144 was intended to provide

certainty with respect to the sale and resale of unregistered shares and its limits have been steadily reduced. Presumably, it was the intention of the Commission to permit, if not promote, an active and reliable marketplace for both registered and unregistered shares. If the Commission intended a limitation not already incorporated into Rule 144, it should enact changes to Rule 144. The Division's role is not to make such law. The Division is not free to change the speed limit after the driver passes by, to manufacture the basis for issuing a ticket. IBEX and St. John's executed their transactions, on advice of counsel, with every intention to comply with existing law, and did so. The transactions were steadfastly and, without exception, compliant with Rule 144. The sum of those compliant transactions is not evasion.

D. There is No Basis for a Claim Under Section 13 of the Exchange Act.

The Division alleges violations of Sections 13(a) and 13(b)(2)(A) and (B) of the Exchange Act, and Rule 13a-14; 13b2-1; and 13b2-2. To establish violations of these provisions, the Division alleges only one set of misstatements in a single 2009 Form 10-K pertaining to the *timing only* of the recognition of revenue on two bill and hold transactions.

The Ninth Circuit has stated that in order to prove a violation of section 13, "the SEC must establish that the alleged misstatement or omission was material." *SEC v. Gillespie,* 349 Fed. App'x 129, 131 (9th Cir. 2009); *see also*, e.g., *SEC v. Yuen*, No. CV 03-4376 MRP, 2006 WL 1390828, at *41 (C.D. Cal. Mar. 16, 2006).

Section 13(b)(2) of the Foreign Corrupt Practices Act ("FCPA") requires that every issuer of securities registered under Section 12 of the Exchange Act 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 and to prepare its financial statements in conformity with Generally Accepted Accounting Principles. Accuracy of books and records is not a precise term. In the legislative comment to Section 13(b)(2) (A) Congress indicated "the term accurately in the

bill does not mean exact precision as measured by some abstract principal. Rather it means that an issuer's records should reflect transactions in conformity with accepted methods of recording economic events." S. Rep. No.94-1031, 94th Cong., 2d Sess. 1976.

Section 13(b)(7) imposes a prudent man standard in evaluating whether records have been kept properly. Regulations 13b2-1 and 13b2-2 were promulgated under Section 13(b) to prohibit the falsification of accounting records or the presentation of misleading information in reports or documents filed with the Commission by directors or officers of an issuer. The Commission's interpretation of Section 13(b) and its implementing regulations specifies a scienter standard for violation of these provisions. In the Commission's statement of policy concerning the accounting provisions of the FCPA dated January 29, 1981 (Exchange Act Rel. No. 34- 17500), Chairman Harold M. Williams explained that it is important to recognize that nothing in the Congressional objectives of the accounting provisions requires that inadvertent recordkeeping inaccuracies be treated as violations of the Act's recordkeeping provision.

> The Act's principal purpose is to reach knowing or reckless misconduct. ...this remedy would not be expected to be available upon a showing of only past inadvertent conduct.... Given human nature, regardless of the adequacy of the system, a bookkeeper may still erroneously post entries, an overzealous agent may make unauthorized payments, or an employee may falsify records for his own purposes ... And, the Act's accounting provisions do not require a company or its senior officials to be the guarantors of the conduct of every company employee.

3 Fed. Sec. L. Rep. (CCH) Para. 23,632H (1992).

Andrew Whelan was not the guarantor of information provided by others. Based on the information available to Andrew Whelan, Andrew Whelan's actions did not violate the accounting provisions. Faced with unusual bill and hold contracts, Andrew 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 to record these immaterial transactions in a manner that he believed complied with Generally Accepted Accounting Standards.

E. The Timing Of Revenue Recognition On Two Isolated Bill and Hold Transactions Was Immaterial To BIEL's Financial Condition.

A holistic view of BIEL's financial condition reported in its 2009 Form 10K reflects that the timing and even the existence of the YesDTC and eMarkets bill and hold transactions was not material. The mere timing of $366,000 of revenue that was actually received would not affect any objectively reasonable investor's understanding of his or her investment in BIEL. The financial condition of BIEL, a start-up company with a history of losses totaling over $10 million, no prior earnings, and whose survival had been dependent on obtaining financing, would not be materially impacted by the timing of this insignificant and isolated set of transactions.

It is undisputed that the bill and hold transactions did occur and did generate all of the $366,000 that BIEL disclosed had been generated. The bill and hold transactions dispute focuses only on the *timing* of recognition of that revenue – not that such revenue was received and recorded in the reported amounts. That disputes must start with a presumption in favor of BIEL, whose Form 10K was audited and certified as fairly stated in compliance with GAAP.

The Division makes much of the fact that the bill and hold transactions constituted 47% of the total revenue generated by BIEL in 2009. OIP, ¶19. But, that allegation distorts the insignificance of such revenue to BIEL's overall financial condition. The large percentage is a byproduct of the undisputed fact that BIEL was just starting up and had little revenue in 2009. Neither total revenue – nor that portion of total revenue related to the bill and hold transactions -- was material to BIEL's financial condition. For example, the revenue numbers did not remotely assure the company's survival. The revenue numbers did not move the company from the red

into the black; did not provide sufficient cash flow to operate in 2009; and were nominal in comparison to the $2.6 million in cash generated from loans necessary to maintain operations.

Consequently, the INTRODUCTION of the Form 10K starting at page 17 makes no mention of revenue. A. Whelan Decl., ¶31; Exh. 2. Instead, the introduction summarizes what was material to investors:

> During 2009, our focus was on developing product, obtaining additional domestic and international distribution channels, conducting market research, completing additional clinical trials, eliminating debt, and strengthening the balance sheet. The motivations for continued clinical trials are marketing enrichment and obtaining additional U.S. Food and Drug Administration (FDA) approved therapeutic indication for existing and future products. Securing additional U.S. FDA approval is central to market entry and product acceptance.

The first mention of revenue is found in the RESULTS OF OPERATIONS section starting on page 20. A. Whelan Decl., ¶32; Exh. 2. On page 20, BIEL expressly discloses:

> Revenues from international sales for the year ended December 31, 2009 include $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 obligations....
>
> Veterinary revenues of $271,047 were recorded in connection with a distribution agreement signed on February 9, 2009 with eMarkets, a company owned and controlled by a member of the board of directors and sister of our president. The agreement provides for eMarkets to be the exclusive distributor of our veterinary products to customers in certain countries outside of the United States for a period of three years. The specialized veterinary products sold to eMarkets include approximately $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.

In the LIQUIDITY AND CAPITAL RESOURCES section, at page 23, BIEL explains:

> For every year since our inception, we have generated negative cash flow from operations. At December 31, 2009, our cash and cash equivalents were approximately $296,000. Since the end of fiscal 2008, the increase of approximately $241,000 in our cash and cash equivalents **resulted primarily from the issuance of related party notes payable during the year.**

> Since our inception on April 10, 2000, the majority of our financing has been provided by the Company's founders including the CEO, certain board members and their immediate family and associates. As of December 31, 2009, **all of the Company's financing was provided by these related parties through long-term notes payable. We present these notes payable as long-term liabilities in our financial statements, as the holders of these notes (who are related parties) have no current intention to pursue repayment of these amounts.**"
>
> On January 1, 2005, we entered into an unsecured revolving convertible promissory agreement ('the Revolver') with IBEX, LLC ('IBEX') a related party, for a maximum limit of $2,000,000, with interest at the Prime Rate plus 2%, and all accrued interest and principal due on or before January 1, 2015, whether by the payment of cash or by conversion into shares of our common stock. The Revolver is convertible at various conversion prices based on the VWAP for the 10 trading days preceding the conversion. IBEX, LLC is a limited liability company, whose President is the daughter of the President of the Company. As of December 31, 2009, an amount of approximately $1,288,000 was drawn from the Revolver.

Emphasis added. See also pp. 26, 44, 79, 88 n. 14.

At page 24, it adds:

> During the year ended December 31, 2009, the Company generated $2,597,860 in cash from financing activities through the issuance of notes payable to related parties (amounting to $1,725,360) and the sale of common shares to investors (amounting to $872,500). The proceeds received from these activities were used to repay certain notes payable (amounting to $994,025) and to fund operations during the year.

The Form 10-K expressly discloses its losses and its impact on the company as a going concern.

> We have incurred **substantial losses from operations in 2009 and prior years**, including a net loss of $259,977 for the year ended December 31, 2009. The Company also has **an accumulated deficit as of December 31, 2009 of $10,644,490**. ...
>
> We are currently looking for additional financing to provide funds for operations and complete our developmental activities. However, **we can provide no assurance that we will be able to obtain financing** on reasonable terms and at

> sufficient levels to enable us to complete developmental activities, receive U.S. FDA approval and develop sufficient sales revenue and achieve profitable operations....
>
> **[T]here exists substantial doubt as to our ability to continue as a going concern.**"

Id. at 24. Emphasis added.

BIEL's independent auditor reviewed and certified that the financial statements "present fairly, in all material respects, the financial position of BIEL as of December 31, 2009 and 2008 and the results of its operations and its cash flows for the three year period ended December 31, 2009 and for the period from April 10, 2000 (Inception) to December 31, 2009, in conformity with accounting principles generally accepted in the United States of America." *Id.* at 58.

A month later, May 12, 2010, when BIEL filed its Form 10Q, BIEL again provided detailed disclosures of these same transactions. For example, at p. 21, discloses: "At March 31, 2010, the Company has not yet delivered 43,160 units, totaling approximately $366,000 bill and hold sales recognized for the year ended December 31, 2009. The units will be shipped during 2010 to help meet the distribution 2010 purchase obligation." A. Whalen Decl. 37, Exh. 2.

This Court should find, based on the foregoing disclosures, that Andrew Whelan and BIEL fairly disclosed the material facts pertaining to the bill and hold transactions, and that the mere timing of recordation of the $366,000 of revenues received from those transactions was immaterial to the financial condition of BIEL as described in its 2009 Form 10K.

Statistically significant stock price movements that occur because of new information have long been recognized as indicia of materiality. See, e.g., *U.S. v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991). Conversely, here there was no significant stock price movement that resulted from the disclosures of the bill and hold revenues because they were immaterial to investors in BIEL. See Events Study at Exhibit 1 to the Yue Qin Declaration.

IV. REMEDIES

A. A Penny Stock Bar Is Unwarranted.

The Division seeks extraordinary equitable relief against the Respondents without justification. If and to the extent the Respondents are deemed to have violated the securities laws, they did so in good-faith reliance on advice of qualified accountants and lawyers and in substantial compliance with the same securities laws. The paucity of any evidence of bad-faith conduct militate against the need for injunctive relief. *SEC v. Manor Nursing Centers, Inc., supra,* 458 F. 2d at 1101, *SEC v. Senex Corp.,* 399 F. Supp. 497, 507 (E.D. Key. 1975); *SEC v. Senex Corp., supra; United States v. Hill,* 298 F. Supp. 1221, 1235 (D. Conn. 1969).

Disgorgement is not to be used punitively. In this context, if used at all, it would have to be punitively imposed. Disgorgement against St. John's would punish Patricia and Andrew Whelan by denying them the relatively modest proceeds of the investment of Andrew Whelan's salary into BIEL. Andrew Whelan earned such salary through years of dedicated service, obtaining patents and FDA approvals. In light of the technical nature of the violations, if any, and the lack of any accusation that St. John's violated the anti-fraud provisions, no injunction is warranted. See *SEC v. Universal Major Industries Corp., supra*, 546 F. 2d at 1048.

Similarly, a disgorgement order against IBEX would be wholly inappropriate. IBEX invested and remains at risk to BIEL in the amount of millions of dollars. During the limited time period selected by the Commission, IBEX loaned more than $4 million, and hundreds of thousands of dollars more than it received in the transactions identified in the More Definitive Statement. K. Whelan Decl., ¶183. Much of that debt remains owed. If the Division is successful against BIEL, IBEX likely would never be repaid. IBEX has suffered more than enough from this action. No disgorgement is warranted.

As to BIEL, a cease and desist and disgorgement order would, quite simply, end its existence. The amount of the disgorgement order sought would dwarf the cash flow available to BIEL and render future financing impossible.

While none of the remedies are remotely warranted, the officer and director bar is perhaps the most egregious. It is undisputed that Kelly Whelan never served as an officer or director of any public company during the entire relevant time. Neither Kelly Whelan nor IBEX have ever been previously sanctioned by any regulator. The Division does not remotely contend that Kelly Whelan engaged in any fraud. There is no contention that she acted with scienter. Instead, the record is replete with facts about how Kelly Whelan acted in good faith, in reliance of counsel and the plain language of Rule 144.

More than the effect of the injunction would be the implied sentence that Kelly Whelan is not to be entrusted with moneys invested by public investors. Such implication is a career death sentence and would impugn Kelly Whelan's credibility as a CPA in innumerable ways for the rest of her life. Such a devastating result is normally reserved for individuals who have repeatedly and willfully violated the securities laws causing massive damages to investors. Kelly Whelan is not even accused of committing a fraud. Instead, the Division contends she committed a non-scienter based infraction of Section 5 of the Securities Act.

For the same reasons as above, a permanent penny stock bar is unwarranted and exceeds any possible justifiable sanction.

V. CONCLUSION.

This Court should dispose of this case summarily in favor of these Respondents, for the reasons stated herein.

Dated: Santa Monica, California
May 26, 2016

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