UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	**SECURITIES ACT OF 1933**
	:	**Release No. 10036 / February 5, 2016**
BioElectronics Corp.,	:	
IBEX, LLC,	:	**SECURITIES EXCHANGE ACT OF 1934**
St. John's, LLC,	:	**Release No. 77073 / February 5, 2016**
Andrew J. Whelan	:	
Kelly A. Whelan, CPA, and	:	**ACCOUNTING AND AUDITING ENF.**
Robert P. Bedwell, CPA,	:	**Release No. 3740 / February 5, 2016**
	:	
Respondents.	:	**ADMINISTRATIVE PROCEEDING**
	:	**File No. 3-17104**

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DISPOSITION AGAINST BIOELECTRONICS CORP.

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The Division of Enforcement ("Division"), pursuant to Rule 250 of the Commission's Rules of Practice, moves for an order of summary disposition on the non-scienter based reporting violation claims raised against respondent BioElectronics Corp. ("BioElectronics or BIEL"). As there is no genuine issue with regard to any material fact, the Division is entitled to summary disposition as a matter of law on its claims against BIEL for violating Section 13(a) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78m(a)], and Rule 13a-1 thereunder [C.F.R. 240.13a-1].

INTRODUCTION

This motion addresses BioElectroncs's improper recording of revenue on two invalid "bill and hold" transactions. On March 31, 2010, BIEL filed with the Commission a Form 10-K for the period ending December 31, 2009, improperly recognizing revenue from two sales transactions in which the products never left BioElectronics' warehouse: one with a company owned by the sister of the CEO; the other with a close associate of BIEL. Through these invalid transactions, recorded on the last day of BIEL's fiscal year, when there was no delivery of products, no fixed delivery schedule, and other fatal flaws, BIEL materially overstated its revenue by $366,000, or 47% of its annual revenue.

As we show below, the evidence is undisputed that BIEL should not have recorded either transaction under Generally Accepted Accounting Principles (GAAP) and BIEL's own revenue recognition requirements. Neither qualified for revenue recognition as straightforward traditional sales agreements, nor did they qualify as non-traditional bill and hold transactions, a fact that BIEL has since admitted. Accordingly, BIEL violated Section 13 and Rule 13a-1 by issuing false and inaccurate annual reports in its 2009 Form 10-K.

FACTUAL BACKGROUND

BioElectronics is a Maryland corporation located in Frederick, Maryland. The company is engaged in the business of making inexpensive, anti-inflammatory medical devices and patches which use electromagnetic energy.[1] BIEL has a class of equity securities, previously registered with the Commission pursuant to Exchange Act Section 12(g).[2] On April 18, 2011, BIEL voluntarily withdrew its registration. BIEL shares currently trade on OTC Link, operated by OTC Markets Group, Inc.

On a Form 10-K filed with the Commission on March 31, 2010 ("2009 10-K"), BIEL recorded revenue from two purported "bill and hold" transactions in which the products never left BIEL's warehouse.[3] These transactions, which totaled approximately $366,000, represented 47% of BIEL's revenue in 2009.[4] As the Division shows below, both transactions were not legitimate sales under GAAP and BIEL's own revenue recognition criteria.

I. The eMarkets Transaction.

BIEL's first improper bill and hold transaction involved eMarkets Group, LLC ("eMarkets"), a company owned by Whelan's sister, Mary Whelan, who was its sole employee and shareholder. Mary Whelan is also on BIEL's board of directors and a major shareholder, and at various times, was an oficer and employee of BIEL.[5] eMarkets purported to act as a distributor of BIEL's veterinary products.[6]

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1 *See* BIEL's 2009 Form 10-K ("2009 10-K") [Ex. 51] at 4.

2 BioElectronics' Section 12 reporting obligation arose as a result of its filing a Form 8A-12g on February 12, 2006 in conjunction with a registration statement on Form SB-2. The Form 8A-12g went effective by operation of law under Section 12(g) 60 days after filing, even though the Form SB-2 was subsequently withdrawn.

3 *See* 2009 10-K [Ex. 51] at 20-21 (describing bill and hold transactions).

4 *See id.* [$366,000/(1,145,647 – 366,000)] = .47 = 47 percent.

5 *See* 2009 10-K at 36; SEC Testimony of Andrew Whelan dated November 26, 2013 ("Whelan Test.") at 12:23.

6 *See* SEC Testimony of Mary Whelan dated February 20, 2013 ("Mary Whelan Test.") at 21:19-20.

On February 9, 2009, eMarkets and BIEL signed a distribution agreement granting eMarkets the right to sell a veterinary product line for BIEL (the "eMarkets Agreement").[7] The eMarkets Agreement required that eMarkets make an initial minimum purchase of 1,500 products @ $10.50, for a total of $15,750. The agreement then listed certain "target" amounts of BIEL product that eMarkets was to attempt to purchase and sell in the following four years.[8] For all purchased products, the distributor, eMarkets, was to submit *written* purchase orders to BIEL, and only orders accepted and confirmed *in writing* by BIEL would be deemed valid and binding on the parties.[9] In 2009 and 2010, eMarkets paid BIEL approximately $216,000 for products,[10] though at the time, the company did not have clients or orders for the purchases. Mary Whelan testified that she had "some orders," for some of the products,[11] but as the record confirms, eMarkets was unable to sell even a fraction of $216,000 worth of BIEL products, even after years of trying.

Despite eMarkets up-front payment of $216,000 to BIEL, the eMarkets Agreement was not a traditional sale in the ordinary course of business.[12] Other than a few large invoices that BIEL issued to eMarkets in 2009, and a few sporadic purchase orders that eMarkets issued to BIEL as it received orders from 2009 through 2011 (many for less than $20), there were no bills of lading, shipping manifests, receiving documents, insurance policies or riders, or any other contemporaneous document issued in the ordinary course of business to indicate that eMarkets took delivery or possession, or assumed ownership or risk of loss of $216,000 worth of products by December 31, 2009, or at anytime thereafter. In fact, Mary Whelan confirmed in her testifmony

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7 *See* February 9, 2009 Distribution Agreement between BIEL and eMarkets [Ex. 18] ("eMarkets Agreement").

8 eMarkets Agreement [Ex. 18] at ¶ 2.3.

9 *Id.* at ¶ 4.1.

10 *See* Mary Whelan Test. at 71-72. eMarket's record of payment to BIEL is not clearly documented, but Mary Whelan testified that eMarkets paid $105,000 to BIEL in 2009, and another $111,000 in 2010. She also testified that eMarkets borrowered money from Whelan's daughter, Kelly Lorenz, to make the 2010 payments. *Id.*

11 Mary Whelan Test. at 56:13-15 ("I did not have orders equal to the size of the inventory I was buying."); 57:1-3 ("I did not have an order for the entire product line or the entire inventory...").

12 As outlined below, payment only relates to one of the four requirements for revenue recognition under GAAP.

that eMarkets failed to "take possession" of the products by the end of 2010, as she had represented to BIEL's accounting consultant.[13]

The eMarkets Agreement also contained no fixed delivery schedule for the products. Mary Whelan testified frankly, "[t]here was no fixed delivery schedule developed for when I was taking possession of the goods."[14] And, in fact, other than a few orders shipped out to end-users, the products stayed in BIEL's warehouse throughout the term of the agreement, and thereafter.[15] As of November 2013, Whelan testified that the products were *still* in BIEL's warehouse.[16]

The items allegedly sold to eMarkets by December 31, 2009 also were not finished and ready for shipment at the time the sale was recorded. BIEL had not performed certain critical finishing activities, such as attaching customized adhesive and Velcro strips to the electronic devices, which were used to attach the devices to the injured animal. As Whelan testified, these steps were "necessary to make the product complete and ready for shipment":

> Q Okay. When you say you add other components, what do you mean?
> A Well, the veterinary product has coats that go with it, adhesive strips that go with it, and we put in directions for use and put it in the box and seal the boxes.
> Q Okay. So did you add those components after you had entered into this agreement?
> A Yes. Q Okay. So were those components necessary to make the product complete and ready for shipment?
> A Yes.
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> ***
>
> Q Okay. But essentially you were adding additional components to these items to make them ready for shipment and use?
> A Finish them, yes.
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> ***
>
> Q Okay. But did the eMarket agreement call for that Velcro strap to be affixed? Did it call for it to be finished?

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[13] *See* Mary Whelan Test. at 64:24-65:2.

[14] *See* Mary Whelan Test. at 66:11-12.

[15] Mary Whelan Test. at 67:8-11 ("Q Did these goods ever go in your basement or did they stay in the warehouse at BioElectronics? A They stayed in the warehouse. For the most part, they stayed in the warehouse at BioElectronics.")

[16] Whelan Test. at 119:22-24.

A By -- when the customer orders it? Yeah. You don't ship it incomplete.[17]

II. The YesDTC Transaction.

BIEL recorded the second of its two invalid bill and hold transactions on December 21, 2009 with YesDTC Holdings, Inc. ("YesDTC"), a Nevada corporation owned by Joseph Noel ("Noel"), a former business associate BIEL.[18] From 2009 through 2011 Noel acted as an investor relations and strategic planning consultant with BIEL, and received more than 20 millions of shares of BIEL stock as compensation.[19]

On December 31, 2009, the final day of BIEL's fiscal year, BIEL entered into a distribution agreement with YesDTC (the "YesDTC Agreement").[20] The purpose of the YesDTC Agreement was for YesDTC to have the rights to sell BIEL human-related (not vetinary) products in Japan. The contract provided that YesDTC had to purchase an initial 15,000 products @ $10.00, for a total of $150,000, and set forth minimum purchase amounts for three years in the future.[21] BIEL issued an invoice to YesDTC for $150,000, and YesDTC paid BIEL $150,000 for these products by early 2011.[22] BIEL recorded $150,000 in revenue for the transaction in in its 2009 10-K.[23]

In spite of YesDTC's up-front $150,000 payment to BIEL, the YesDTC Agreement was not a binding sales agreement between a seller and buyer. First and foremost, the agreement

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17 Whelan Test. at 124:7-18; 125:15-18; 127:10-13.

18 *See* 2009 10-K at 21 ("Revenues from international ssales for the year ended December 31,2009 included $150,000 of sales related to a bill and hold transaction. The units will be shipped in 2010 to help meet the distribution 2010 purchase obligation.")

19 *See* Whelan Test. at 156:10-16; 170-6:-10 (describing Noel's work for the company and stock he received).

20 *See* December 31, 2009 Distributorship Agreement [Ex. 67] (the "YesDTC Agreement").

21 *Id.* at ¶¶ 5.1-5.2.

22 The YesDTC Agreement contains the same provision in 4.1 as in the eMarkets Agreement concerning written purchase orders and written confirmation by BIEL. As with the eMarkets transaction, however, the record contains no evidence of either purchase orders or written confirmation by BIEL.

23 2009 10-K at 21.

contained a material contingency that affected both delivery and performance.[24] The parties knew and recognized that before YesDTC was able to sell any of BIEL's products in Japan, YesDTC first had to obtain regulatory approval from Japan's food and drug regulator – not an easy task. As Whelan described, Japan had "inordinate clearance requirements."[25] The parties thus agreed in the YesDTC Agreement that YesDTC had a right to cancel the agreement for a period of six months pending Japanese regulatory approval. If YesDTC was unable to obtain regulatory clearance from Japan authorities, YesDTC could void the contract.[26] Whelan confirmed this cancelation provision in his testimony:

> Q Under Appointment and Acceptance, the fourth paragraph down says, "The rights granted by company to distributor are made under the assumption that regulatory clearance to sell the company's products in Japan can be relatively easily obtained. Should distributor be unable to gain regulatory clearance within six months of contract execution, this agreement is voidable at the option of distributor."
> A Right.
> Q Is that the agreement that was made?
> A Yes.
>
> ***
>
> Q So for the next six months after the execution of the contract, the agreement was voidable at the option of the distributor, as the contract says?
> A Right.[27]

Not only did YesDTC have the right to cancel the agreement if it could not obtain Japanese regulatory clearance in six months, but this regulatory clearance was a *condition for delivery.* Whelan testified repeatedly that if YesDTC was unable to obtain regulatory clearance, BIEL *would not deliver* the goods to YesDTC:

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[24] *See* Whelan (undated) Memo to Work paper, Bill and Hold Memo, Audit of 2009 [Ex. 19] at 3, note* ("There is no additional performance obligation for the seller but there is a *contingency* listed in the Distribution Agreement...") (emphasis added).

[25] Whelan Test. at 134:21-23 ("Japan is one of the few countries that has inordinate clearance requirements. We still don't have it done.")

[26] YesDTC Agreement [Ex. 67], ¶ 1 Appointment and Acceptance, fourth paragraph.

[27] Whelan Test. at 105:25-106:23. *See also* January 17, 2011 letter from BIEL to SEC Division of Corporation Finance [excerpted from Ex. 83] ("January 17, 2011 Letter") at 17 (response to Comment 16) ("The Contract *was voidable* but not voided by the terms of the agreement.") (emphasis added).

- "You don't get the clearances; we're not shipping that product to you. It's a violation of the laws."[28]
- "A Upon clearance, we would give him 15,000 units to get started. Q And what do you mean "upon clearance"? A He has to get regulatory clearance from the Japanese food and drug administration."[29]
- "Q And if he didn't obtain that clearance, what would happen? A He gave them back to us ...Q Essentially you just wouldn't deliver them, right? A We would not deliver them."[30]
- "We're not delivering that product to you until you have regulatory clearance....Until you have authority to take that product. If you don't take that product and you don't get clearance, we're terminating the agreement. We're going to keep it. And you can't take it."[31]

Finally, the YesDTC Agreement, just like the eMarkets Agreement, contained no fixed delivery schedule. Paragraph 4.7 of the Distribution Agreement states that products will be shipped on *"mutual future agreement."* As Noel explained to BIEL's accounting consultant, "We will draw the investory [sic] *as needed.*"[32] Drawing inventory pursuant to a *"mutual future agreement"* or *"as needed"* is not a fixed delivery schedule.

As it turned out, YesDTC (and BIEL) was never able to obtain regulatory clearance from Japanese authorities.[33] Because YesDTC never obtained a license to sell the products in Japan, BIEL never delivered the products to YesDTC.[34] They remained in BIEL's warehouse for the entire period of the contract.[35] On November 2, 2010, the parties terminated the YesDTC

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28 Whelan Test. at 112:16-18.

29 Whelan Test. at 113:4-8.

30 Whelan Test. at 113:20-114:1.

31 Whelan Test. at 114:12-18.

32 *See* March 18, 2010 email exchange between Noel and BIEL's accounting consultant, Ester Ko [Ex. 86] at 4.

33 *See* Whelan Test. at 108:3-6; 134:23 ("Japan is one of the few countries that has inordinate clearance requirements. We still don't have it done.")

34 *See* Whelan Test. at 108:18-23 ("A The problem is if you don't have a license to be a distributor, you can't hold the property. Q Okay. Did they have a licence to be a distributor? No they didn't get a license."), 109:11-13 ("Q [D]id YesDTC ever sell any product to the end user under the terms of this agreement? A They never got a license. They can't sell.")

35 *See* Whelan Test. at 109:2-9 ("A [W]e didn't...send the product. Q Okay. So the product was in your warehouse the entrie time? A Yes.")

Agreement,[36] and BIEL kept all of the money, and all of the products that supposedly belonged to YesDTC,[37] claiming that YesDTC had "abandoned" them.[38] There is no evidence of "abandonment," however. Just as with the eMarkets Agreement, the record contains no contemporaneous documents prepared in the ordinary course of business evidencing that YesDTC ever took delivery or possession, or assumed title, ownership, or risk of loss of the products, as of December 31, 2009, or at anytime thereafter.

III. BIEL Admitted That Both Transactions Were Not Valid Bill and Hold Transactions.

Months after filing the 2009 10-K, BIEL admitted to the SEC that the eMarkets and YesDTC agreements did not represent valid bill and hold agreements, as the company had represented in its public filing.[39] Whelan admitted the same in his November 2013 testimony:

> Q. Okay. So it's the company's position that these transactions were valid revenue, but they were incorrectly termed bill and hold transactions. Is that correct?
> A. Yes.[40]

Despite having mischaracterized these transactions as bill and hold sales, BIEL never reversed or restated its revenue for these sales.[41] Instead, BIEL attempted to recast the transactions as traditional distribution agreements, made in the ordinary course of businsess.[42] But as is clear from the record, and as set forth further below, these transactions were not standard sales

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36 *See* November 10, 2010 termination letter [Ex. 52]; Whelan Test. at 197-98.

37 Whelan Test. at 112-13.

38 Whelan Test. at 119:5-8, discussing January 17, 2011 Letter [Ex. 83] at 15.

39 *See* January 17, 2011 Letter [Ex. 83] at 13, 18 (response to SEC Comments 15, 17): "The Company intends to revise its terminology in the Amended Form 10-K by removing the term "bill-and-hold" since the term was used interchangeable and for convenience. The phrase *is not indicative of the accounting pronouncement definition* and was used to describe the type of agreement but the definition under accounting literature. As such, the management believes all requirements have been met for revenue recognition as a distributor agreement, *but not as "bill-and-hold"* transaction as defined in FASB ASC 605." (emphasis added).

40 Whelan Test. at 98:21-25.

41 BIEL's accounting firm recommended that the company reverse or restate the revenue. *See* Whelan Test. at 81:9, 100:1-101:1.

42 *See* January 17, 2011 Letter [Ex. 83] at 13-14.

agreements. They were suspect arrangements between closely associated parties, recorded at the end of the fiscal year, representing almost one half of the company's sales revenue, and the $150,000 and $216,000 that BIEL recorded for the sales was invalid under both GAAP and BIEL's own sales requirements.

STANDARD OF REVIEW

The Commission's Rules of Practice permit motions for summary disposition after a respondent has filed an answer and after the Division has made the investigative file available to the respondent. 17 C.F.R. § 201.250. BIEL filed an answer to the OIP on March 11, 2016. The Division has made its investigative file available to the respondents.

Rule 250 provides that the hearing officer "may grant the motion for summary disposition 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). By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. *David G. Ghysels, et al.*, No. 3-13481, 2009 WL 4731400, *2 (Dec. 11, 2009) (*"Ghysels"*) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.*, citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon the mere allegations or denials of its pleadings. *Id.*

ARGUMENT

I. Elements of Section 13(a) and Rule 13a-1.

Section 13(a) of the Exchange Act requires issuers subject to the Exchange Act's reporting provisions (such as BIEL) to file reports, documents, and other information. Issuers

must file annual reports as required by Exchange Act Rule 13a-1. *Albert Glenn Yesner, CPA,* 75 SEC Docket 156, 2001 WL 587989, *30 (May 22, 2001) (*"Yesner").* An issuer violates these provisions if it files a report that contains materially false or misleading information. *SEC v. Yuen,* No. CV 03-437, 2006 WL 1390828, at *41 (C.D. Cal. Mar. 16, 2006). *See also SEC v. Blackburn,* No. 15-2451, 2015 WL 9459976, *10 (E.D. La. Dec. 28, 2015) ("The reporting provisions of the Exchange Act are 'clear and unequivocal,' and satisfied only by the filing of complete, accurate, and timely reports.") (citation omitted).

Section 13(a) and Rule 13a-1 require the filing of financial statements that are prepared in conformity with GAAP. *Huntington Bancshares, Inc., et al.,* 85 SEC Docket 1433, 2005 WL 1307747, *10 (June 2, 2005). *See also Ponce v. SEC,* 345 F.3d 772, 735 (9th Cir. 2003). Financial reports that are not in accordance with GAAP are presumed to be misleading. *Yesner,* 2001 WL 587989, *31, citing 17 C.F.R. § 210.4-01(a)(4). It is misleading to anyone trying to analyze an issuer's financial statements when they are published if those financial statements do not comply with GAAP. *Id.,* citing *In re Baan Securities Litigation,* 103 F. Supp.2d 1, 14-15 (D.D.C. 2000).

Scienter is not an element under Section 13 or Rule 13a-1. *See Yesner,* 2001 WL 587989, *30, citing *SEC v. McNulty,* 137 F.3d 732, 740-41 (2d Cir. 1998). *See also Left Behind Games, Inc.,* 107 SEC Docket 2404, 2014 WL 117593, *5 (Jan. 13, 2014); *Huntington Bancshares,*2005 WL 1307747, *10.

II. Requirements For Recording The eMarkets And YesDTC Transactions.

BIEL disclosed an accounting policy in its 10-K filed on March 31, 2010 that it "recognize[d] revenue when evidence of an arrangement exists, such as the presence of an executed sales agreement, pricing is fixed and determinable, collection is reasonably assured and

shipment has occurred or title of the goods has been transferred to our buyers."[43] These four criteria match the revenue recognition requirements of GAAP, as summarized in the SEC's Staff Accounting Bulletin (SAB) 101 and 104.[44] *See Casula v. Athenahealth, Inc.*, No. 10-10477, 2011 WL 456115, *5 (D. Mass. Sept. 30, 2011) (discussing SAB 101/104 criteria); *Yuen,* 2006 WL 1390828, *8 (same). Each requirement must be met in order for a transaction to satisfy GAAP.

BIEL further disclosed its policy for recognizing revenue from non-traditional bill and hold transactions in the 2009 10-K:

> We recognize revenue on bill and hold arrangements when the following 7 criteria have been met: 1) the risk of ownership has passed to the buyer; 2) the buyer has made a fixed commitment to purchase the goods, preferably in writing; 3) the buyer, and not the seller, has requested that the transaction is on a bill and hold basis; 4) there is a fixed schedule for delivery of the goods, indicating a delivery date that is reasonable and consistent with the buyer's business purpose; 5) the buyer has not retained any specific performance obligations such that the earnings process is not complete; 6) the ordered goods are segregated from the seller's inventory and is not being used to fill other orders; and 7) the product must be complete and ready for shipment. In addition, payment must be received and/or fixed payment dates be agreed with the customer pursuant to which the risk of collection is reduced to a minimal level.[45]

These seven bill and hold transaction criteria are also in line with GAAP's seven requirements for bill and hold transactions, as provided in SAB 104 at 20-21.

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[43] 2009 10-K at 26.

[44] The SEC's Office of Chief Accountant provides guidance regarding accounting and disclosures in the form of Staff Accounting Bulletins that represent interpretations and policies that the SEC follows in administering disclosure requirements. On December 3, 1999, the SEC issued SAB No. 101, Revenue Recognition in Financial Statements ("SAB 101"), 17 CFR Part 211 (Dec. 3, 1999) [available at https://www.sec.gov/interps/account/sab101.htm] that summarized and explained existing revenue recognition rules under GAAP. On December 17, 2003, the SEC Staff issued SAB 104 [available at https://www.sec.gov/interps/account/sab104rev.pdf] that provided certain revisions to SAB 101 not relevant here.

[45] 2009 10-K at 27.

III. The eMarkets And YesDTC Transactions Did Not Comply With GAAP Or BIEL's Own Revenue Recognition Requirements.

The undisputed facts in the record concerning the YesDTC and eMarkets transactions establish that both transactions violated GAAP, as well as BIEL's own revenue recognition requirements. The transactions were not valid standard sales transactions (or distribution agreements, as claimed by BIEL), as they did not comply with at least two of the four revenue recognition criteria set forth in SAB 104 at 10-11. They also did not comply with at least five of the seven criteria for bill and hold transactions, as set forth in SAB 104 at 20-21. BIEL admitted that it mistakenly designated the transactions as bill and hold transactions after the fact, but never reversed or restated the revenue for the transactions.

A. The Transactions Are Not Valid Traditional Sales Agreements.

The undisputed evidence establishes that the eMarkets and YesDTC transactions failed at least two of the four revenue recognition criteria for traditional sales under GAAP, as summarized in SAB 101 and 104. There was no persuasive evidence of a final, binding agreement betweent the parties, and there was no delivery.

1. There is No Persuasive Evidence of a Binding Sales Arrangement with Either eMarkets or YesDTC.

Both the eMarkets and YesDTC contracts are invalid because there is no persuasive evidence of a final binding arrangement between buyer and seller. "Persuasive evidence" under GAAP generally means that the parties exchanged written sales documentation in the ordinary course of business memorializing the terms of their agreement. *See* SAB 104 at 12-14 (discussing customary business practices for documenting sales). An "arrangement" means "the final understanding between the parties to the specific nature and terms of the agreed-upon transaction." SAB 104 at 10, n. 3. An issuer thus violates this element of GAAP if it

"recognize[s] revenue before binding agreements existed and before contract requirements were complete." *Provenz* v. *Miller,* 102 F.3d 1478, 1485 (9th Cir. 1996).

The eMarkets transaction lacks documentary evidence that eMarkets agreed to buy $216,000 worth of BIEL products by December 31, 2009, and at anytime thereafter. The eMarkets Agreement provides that eMarkets make an initial order of $15,000, but it contains no subsequent order requirements.[46] And though the SEC issued subpoenas to BIEL, eMarkets, and Mary Whelan demanding all documents relating to BIEL's dealings with eMarkets, there is a dearth in the record of documents establishing that eMarkets ever received or owned any BIEL products, at any time. There are no written purchase orders, as required in the eMarkets Agreement covering even a fraction of $216,000 worth of product,[47] nor any documents in which BIEL accepted and confirmed eMarkets' orders, as required.[48] BIEL and eMarkets also did not produce shipping documents, bills of lading, warehouse receipts, or anything else resembling standard sales documents for this large sale. Whelan also testified that the products he sold to eMarkets were not finished, and that additional work had to be done before they could be shipped.[49] There was thus no final binding arrangement by December 31, 2009.

The YesDTC agreement also fails the "persuasive evidence" test, not only because the transaction, like eMarkets, lacks documentary proof that YesDTC received, took title to, or owned product, but also because the transaction contains a material unsatisfied contingency:

> The rights granted by Company [BioElectronics] to Distributor [YesDTC] are made under the assumption that regulatory clearance to sell the Company's products in Japan can be relatively easily obtained. Should Distributor be unable to gain regulatory clearance within six months of

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46 *See* eMarkets Agreement [Ex. 18] at 2.3, 2.4.

47 *Id.* at 4.1.

48 *Id.*

49 *See* Whelan Test. at 124:7-18; 125:15-18 ("Q Okay. But essentially you were adding additional components to these items to make them ready for shipment and use? A Finish them, yes.").

> contract execution, this agreement is voidable at the option of Distributor.[50]

As BIEl and Whelan both admitted, the YesDTC Agreement was voidable by YesDTC if it was unable to obtain regulatory clearance from Japanese authorities in six months.[51] In addition, BIEL *would not deliver* the products to YesDTC, unless and until YesDTC obtained such regulatory clearance.[52] This unsatisfied contingency defeats revenue recogniztion under GAAP. If there are material contingencies in a sales contract, those contingencies must be satisfied before a company may recognize revenue. *Provenz,* 102 F.3d at 1484. *See also* SAB 104 at 12-13 (if arrangement is subject to subsequent approval or execution of another agreement, revenue recognition is inappropriate until subsequent approval or agreement is complete). BIEL should only have recorded the revenue with YesDTC after the company obtained regulatory clearance, which it never did.

2. BIEL Did Not Deliver Products to eMarkets or YesDTC.

"Delivery" has a precise definition under GAAP:

> Delivery generally is not considered to have occurred unless the customer has taken title and assumed the risks and rewards of ownership of the products specified in the customer's purchase order or sales agreement. Typically this occurs when a product is delivered to the customer's delivery site (if the terms of the sale are "FOB destination") or shipped to the customer (if the terms are "FOB shipping point."[53]

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[50] YesDTC Agreement [Ex. 67], Appointment and Acceptance at 1, ¶ 4.

[51] *See* Whelan Test. at 105:25-106:10; 106:20-23 ("Q So for the next six months after the execution of the contract, the agreement was voidable at the option of the distributor, as the contract says? A Right.") *See also* January 17, 2011 Letter [Ex. 83] at 17 ("The Contract *was voidable* but not voided by the terms of the agreement.") (emphasis added).

[52] *See* Whelan Test. at 112:16-18 ("You don't get the clearances; we're not shipping that product to you. It's a violation of the laws."). *See also id.* at 113:4-8; 113:20-114:1, 114:12-18.

[53] SAB 104 at 20.

The record is undipsuted that BIEL did not ship or deliver any products to YesDTC or eMarkets, by December 31, 2009, or thereafter.[54] The items remained in BIEL's warehouse.[55] As for BIEL's arguments that some kind of de facto or artificial delivery occurred within the four walls of BIEL's warehouse, the record does not support such a claim, and the accounting rules do not allow for it. The buyers did not prepare, sign, or exchange any documents indicating that they ever received, owned, or accepted title to any BIEL products. Mary Whelan admitted that she did not take possession of BIEL products on behalf of eMarkets.[56] Whelan admitted that he never delivered the products to YesDTC because YesDTC never obtained regulatory clearance in Japan.[57] The company cannot recreate terms of delivery after the fact in the hopes of justifying prior invalid sales.

B. The Transactions are Not Valid Bill and Hold Transactions.

Lacking delivery by the end of 2009, BIEL's only hope to record the transaction in its 2009 10-K was under some sort of a bill and hold agreement, a nontraditional arrangement in which the buyer requests that the seller delay shipping the goods, for a limited and defined period of time. *See* SAB 104 at 20-22 (describing bill and hold transactions and listing criteria).

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[54] In BIEL's 10Q filed May 2010, the company admitted there was no delivery: "[a]t 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." *See* BIEL's Answer and Affirmative Defenses at 8.

[55] *See* Whelan Test. at 109:1-13 (discussing YesDTC) ("A [W]e didn't send the product. Q Okay. So the product was in your warehouse the entrie time? A Yes.); Whelan Test. at 119:22-24 (discussing eMarkets) ("Q So the inventory remains in the warehouse of BioElectronics, is that correct? A Yes."); Mary Whelan Test. at 67:8-11 ("Q Did these goods ever go in your basement or did they stay in the warehouse at BioElectronics? A They stayed in the warehouse. For the most part, they stayed in the warehouse at BioElectronics.")

[56] Mary Whelan Test. at 64:24-65:2 ("Well, I failed to sell it by December 31, 2010, so I did not take possession of the product...").

[57] *See* Whelan Test. at 109:13 ("A They never got a license. They can't sell.")

Such bill and hold transactions are difficult to establish, and are viewed with much skepticism, as they have "long been associated with incidents of financial fraud." [58]

BIEL conceded after recording the sales that it made a mistake, and that the transactions were not valid bill and hold transactions.[59] They failed many of the seven GAAP requirements, as provided in SAB 104. There were no fixed written commitments from the buyers to purchase $366,000 worth of goods. There were no fixed delivery schedules. The eMarkets products were not finished and ready for shipment.[60] The YesDTC agrement had a material and unfulfilled contingency.[61] There were no written requests, prior to the sale, from either buyer, requesting that BIEL maintain possession. And even if eMarkets or YesDTC had submitted written requests before the end of the year, such requests are to be viewed with skepticism, as the seller may have induced the buyer to write the letters:[62]

> Although some companies may have provided letters signed by the customer that request a delayed shipment, such a letter does not itself provide adequate evidence that a revenue transaction has occurred, because the company may have persuaded the customer to write it.

Having failed to satisfy the GAAP criteria for traditional sales, and also the requirements for bill and hold sales, the eMarkets and YesDTC transactions were not valid sales transactions under GAAP and BIEL's own requirements, and BIEL should not have recorded either sale.

IV. BIEL Violated Section 13(a) And Rule 13a-1.

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[58] *See* Carmichael, Douglas R., *Hocus-Pocus Accounting – Where there's revenue-recognition deviation, there could be fraud,* AICPA Journal of Accountancy (October 1999) [Ex. 3] ("Although the bill and hold method is not in itself a GAAP violation, it's difficult to audit and has long been associated with incidents of financial fraud.")

[59] January 17, 2011 Letter [Ex.] at 13, 17; Whelan Test. at 98:21-25 ("Q Okay. So it's the company's position that these transactions were valid revenue, but they were incorrectly termed bill and hold transactions. Is that correct? A. Yes").

[60] Whelan Test. at 124-125.

[61] Whelan Test. at 112-114.

[62] *See* Martin, Jimmy W., *Auditor Skepticism and Revenue Transactions,* The CPA Journal (August 2002.) [Ex. 4].

In its 2009 10-K, BIEL recorded $366,000 in sales revenue for the eMarkets and YesDTC transactions.[63] Because the transactions failed GAAP and the company's own revenue recognition requirements, BIEL should not have recorded either transaction. By doing so, BIEL misstated its earnings by approximately $366,000. These misstatements were unquestionably material,[64] as they represented 47 percent of BIEL's annual revenue. Any reasonable investor would want to know that nearly one half of the company's revenue was falsely recorded.

Accordingly, there is no genuine issue in the record to dispute the Division's showing that BIEL violated Exchange Act Section 13(a) and Rule 13a-1. *See Huntington Bancshares,* 2005 WL 1307747, *11 (finding that Huntington violated Section 13a and 13a-1 by incorporating materially false and misleading financial statements in its annual reports. "The financial statements were false and misleading because they were not presented in conformity with GAAP.").

CONCLUSION

For the foregoing reasons, the Division respectfully moves the Court for an order pursuant to Rule 250, granting summary disposition against respondent BioElectroncis Corp. for the claims brought under Exchange Act Section 13(a) and Rule 13a-1. Following the issuuance of such an order, the Division would request an opportunity to move for appropriate injunctive and monetary relief as to BIEL.

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[63] *See* 2009 10-K [Ex. 51] at 20-21.

[64] A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision and if disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available. *Matrixx Initiatives Inc. v. Siracusano,* 131 S. Ct. 1309, 1318 (2011).

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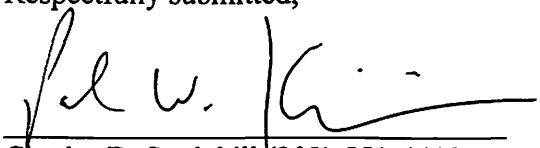
Respectfully submitted,



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