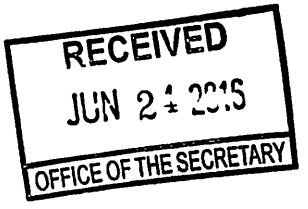
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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' OPPOSITION TO SUMMARY DISPOSITION

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I. INTRODUCTION.

Respondent, BioElectronics Corporation ("BIEL"), opposes the Division's motion for summary disposition on the Division's 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]. BIEL's opposition is based on this Memorandum of Law, the Declarations filed by BIEL on May 27, 2016 in support of Respondents' motion for Summary Disposition, including, without limitation, the declarations of Mary Whelan, Andrew Whelan and Joseph Noel, as well as the Supplemental Declarations of Andrew Whelan and Mary Whelan filed herewith and such further evidence and argument as may be presented by BIEL at or before the Court decides the motion.

The Division's motion is based on its mistaken representation that it is "undisputed that BIEL should not have recorded either transaction under Generally Accepted Accounting Principles (GAAP) and BIEL's own revenue recognition requirements." The Division of Enforcement's Memorandum of Law ("Division's Memo"), p. 1. BIEL adamantly disputes such contention. BIEL did not violate Section 13 and Rule 13a-1.

Indeed, as detailed below, BIEL contends that the Division has overreached the bounds of legitimate advocacy by distorting the record. For example, the Division cites the investigative testimony of Andrew Whelan for the proposition that the inventory sold to eMarkets was unfinished. But, the Division offers only selected and misleading excerpts of investigative testimony, taken out of context, in support of its contentions. As detailed below, a fulsome review of the entire transcript cited of Andrew Whelan and Mary Whelan reflect the opposite facts: namely that (1) the parties agreed on a shipment schedule (by the end of 2010); and (2) the goods sold were finished before the end of 2009; and that any customer specific shipping instructions and extra accessories that were added to the shipments at eMarkets' customers'

specific request, BIEL charged eMarkets and eMarkets paid BIEL separately. Provisions for special orders and additional products sold with eMarkets' finished products does not render eMarkets' finished products any less finished. Title and ownership can and does pass on work-in-process. Product completion is not mandatory for title to pass from the seller to the buyer. See Supplemental Declarations of Mary Whelan and Andrew Whelan, filed herewith.

Even assuming, *arguendo*, the Court finds that some portion of the modest and one-time transactions should have been recorded in 2010 or some later year, instead of 2009 (which it should not), any such timing difference would be immaterial to any reasonable objective investor.

Indeed, BIEL has moved concurrently for summary disposition based on BIEL's position that it properly reported such transactions and that, in any event, they were immaterial. There is no question that the revenue was actually received. The challenge mounted by the Division relates only to the *timing* of the revenue recognition. The Division has not identified what portion, if any, of the $366,000 revenue recorded should have been recorded in subsequent years, much less proven that such amount would be material to investors.

BIEL took great care in filing its 2009 Form 10K. It hired experienced and competent securities compliance counsel, an independent certified accounting firm and competent independent SEC accounting consultants to compile the Financial Statements. BIEL's officers and Board of Directors cooperated with the audit fully and presented the facts pertaining to these two isolated transactions fully, fairly and accurately. Before publishing its Form 10-K for 2009, BIEL ensured that such financial statements were accompanied by an independent certified public accountant's certification that financial statements fairly and accurately reflected the financial condition of BIEL. BIEL's SEC Form 10K and Form 10Q filed March 31, 2010 and

May 12, 2010, respectively, expressly identified these transactions, the related party status of one of the two buyers, and the fact that BIEL held the inventory sold for the buyers.

After consideration of all of the foregoing and the entire financial condition of BIEL as fully disclosed in detail, the Division's claims cannot prevail. The Division would have to prove that (1) BIEL's qualified professionals, in certifying and causing to be published BIEL's 2009 Form 10K, made an accounting error in that the revenue recognized from the transactions was not in accordance with Generally Accepted Accounting Principles and SEC Staff Accounting Bulletin: No. 101 – Revenue Recognition in Financial Statements and that the additional voluntary bill and hold disclosure of the transactions in its 2009 Form 10-K was misleading; (2) such accounting error resulted in an actual overstatement of revenue that was material to the overall financial condition of BIEL; and (3) BIEL's clarification of such transactions in its Form 10Q published only one month later did not sufficiently mitigate any perceived misstatement of the financial condition of BIEL. For the reasons detailed below, the Division cannot meet that burden at trial, much less on summary disposition. Indeed, it is so clear that the Division will be unable to meet that burden at trial that the Court should grant summary disposition in favor of BIEL as BIEL has moved concurrently.

II. FACTUAL HISTORY.

A. BioElectronics.

BIEL is a development stage start-up company. As with many start-up companies, BIEL faced two major challenges. The first was getting the FDA to approve its applications for market clearance. The second was to have its stock listed for public trading. BIEL attempted to accomplish the latter by engaging competent professionals to file the appropriate documents with the SEC. Part of this approval process was to obtain audited financial statements. Since BIEL did not have an accounting department, but only a bookkeeper, it engaged the auditing

firms of Berenfeld, Spritzer Shechter & Sheer LLP and later, Cherry Bekaert, to conduct the audit. It also engaged John Glass and his SEC accounting consulting firm to ensure that the books and records of BIEL were in order so that Berenfeld, Spritzer *et al.* and later, Cherry Bekaert, could conduct the audit. John Glass assigned Ester Ko, Certified Public Accountant (CPA), Certified Internal Auditor (CIA), Certified Fraud Examiner (CFE) and Certified in Financial Forensics (CFF) to the project. Supplemental Declaration of Andrew Whelan, filed herewith, paragraph 2.

One of the issues that came up during the auditing process was how to recognize the revenues (and accounts receivable) associated with two sales to two of BIEL's distributors, eMarkets and YesDTC. BIEL looked to its experts for guidance as to when to recognize the approximately $366,000 associated with these sales. These experts got it right. Over $207,000 of the $366,000 recognized in 2009 was actually paid in 2009 and has never been refunded. The remainder was paid completely within the first six months of 2010 and has never been refunded. The investors received every bit as much money into the Company as was disclosed. The hyper-technical accounting issues raised by the Division are a *red herring* and are entirely immaterial to any reasonable investor.

B. 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 to BIEL upon signing, and $50,000 within 90 days. 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, confirmed under oath his understanding that the $150,000 paid to BIEL could not be refunded and was not a conditional or refundable payment.

YesDTC also took exclusive ownership of the inventory as documented in the firm's SEC fillings which indicated an inventory valued at $150,000. In addition Noel stated explicitly that he took the total risk associated with this purchase. 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, Cal.) 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 shall be of suitable design and contain sufficient space to perform necessary operations, prevent mixups, and assure orderly handling." 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 initial product purchased; and (2) an exclusive license (franchise) fee for the territorial rights to sell the product into Japan. If product was not purchased in sufficient levels, then YesDTC would lose its license rights. In any event, the $150,000 would not be refundable. YesDTC had no expectation that monies for the products purchased under the Distribution Agreement would be refundable if YesDTC proved to be unsuccessful. Noel Decl., paragraphs 9-13. 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 and YesDTC understood that YesDTC was not entitled to a refund of any part of its initial purchase order for $150,000. Noel Decl., ¶14, Exh. 1-2; and A. Whelan Decl., ¶20.

C. Mary Whelan and eMarkets

Prior to her involvement with BIEL, Mary Whelan served as a Vice President at Lucent Technologies, Inc., where she ran global marketing operations, including marketing communications, customer programs, and sales support for the worldwide sales force. Before that, she had a long 23 year career with AT&T in various marketing and public relations roles. See Supplemental Declaration of Mary Whelan, ¶7.

After leaving AT&T and Lucent, Mary Whelan formed eMarkets Group, which had several clients other than BIEL, including KPMG, NJIT - New Jersey Institute of Technology and a number of small start-up firms. M. Whelan Decl., ¶3.

Mary Whelan has served as a director of BioElectronics since April 2002, and is the sister of Andrew Whelan. In addition to her work as a director, Mary Whelan, through her consulting firm, eMarkets Group, helped BioElectronics launch and create its ActiPatch Therapy; and created its initial 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. In total, eMarkets' expenses totaled about $302,000, which were all invested in the then private company.

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's drug-free devices could also be used for horses, cats, and dogs to reduce swelling and pain in many conditions. M. Whelan Decl., ¶6.

In February 2009, eMarkets 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 February 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 Purchased	Product Purchased	Date Paid	Amount
2/4/2009	1,500 Squares	2/13/2009	$15,750
6/24/2009	502 Squares	various	$940.
6/30/2009	12,200 Crescents	9/30/2009	$91,500
12/15/2009	10,000 Squares	6/23/2010	$75,000
12/15/2009	4,778 Crescents	6/23/2010	$35,835
Total	12,002 – Squares 16,978 - Crescents		$219,025[1]

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.

The Division at pages 4-5 of its Memorandum of Law relies on excerpts of deposition transcript testimony of Andrew Whelan, quoted out of context, to support its distortion that the goods sold by BIEL to eMarkets were not finished. The products sold by BIEL and purchased by eMarkets in 2009 as reflected in the 2009 Form 10K were in finished form. To the extent additional product components, shipping services and shipping costs were added to such finished products in connection with shipping them to eMarkets' customers, per each customer's specifications, BIEL separately charged eMarkets and eMarkets separately compensated BIEL

[1] This total is slightly greater than the $216,000 disclosed in BIEL's 2009 Form 10K by $3025.

on case by case basis. These additional sales and charges are not included in the revenues recorded in the 2009 financial statements. In approximately 75% of the cases, no additional products or components were added to shipments made to eMarkets' customers because, in those cases, no additional components were requested by the customer. Although Andrew Whelan's testimony indicated that adhesive components could be added with a wrap as they are in all the boxes for human use, because eMarkets' customers use the products on cats and dogs with fur, no adhesives other than Velcro strips on coats, were ever included in any eMarkets package. These coats for cats and dogs are supplemental products that were in 2009 and still are boxed and segregated in the Maryland warehouse.

Consistently, in the very same deposition transcript, at pages 219-221, Andrew Whelan clears up the record in a manner that, alone, should defeat the motion for summary disposition.

Page 219:

16 MR. MORRIS: And there was some discussion

17 about whether or not the product was finished as of

18 December 31, 2009. And do you remember that discussion?

19 THE WITNESS: Yes.

20 MR. MORRIS: Okay. And I don't want to -- can

21 you describe what you meant by that testimony earlier?

22 Was the product finished?

23 THE WITNESS: Yeah. It's -- it's encapsulated

24 in foam, and it can be applied directly to --

25 particularly in veterinary patients -- I mean

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1 veterinarians. We sell to veterinarians, and they just

2 put their own tape on and use it. It's finished.

3 MR. MORRIS: So the product could be used at

4 the state it was in on December 31, 2009?

5 THE WITNESS: Yes.

6 MR. MORRIS: And what did you do when -- by

7 finishing the product -- what was involved in that?

8 THE WITNESS: Well, most of the orders that she

9 gets -- they go out in a box, in a retail box, which is

10 really unnecessary for that market. So we put a coat or

11 adhesives depending on what that product is. But for

12 like a horse, they just go out with the directions for

13 use in a clear plastic bag.

14 MR. MORRIS: So it could have been shipped and

15 used as of December 31, 2009?

16 THE WITNESS: Yes.

17 BY MR. ROGERS:

18 Q But was it?

19 MR. MORRIS: Yeah. My next question -- yeah,

20 that was my next question.

21 BY MR. ROGERS:

22 Q But in actuality an additional step was taken

23 with the product. It was put in a bag and instructions

24 were included, and then it was shipped. Is that correct?

25 A No, it -- well, some of it's already boxed

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1 because I looked at it yesterday as a matter of fact.

2 Some of it's already boxed.

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 the fact and to provide full disclosure as to the actual rate of eMarkets sales 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.

D. All Revenues Reported Were Received in 2009 and 2010 – No Refunds.

There is no dispute that BIEL actually received and kept the $366,000. Only the timing of when BIEL should have recognized that revenue is disputed. Exhibit 2 of the Declaration of Joseph Noel includes documentary evidence of payments of $100,000 and $50,000 made by YesDTC on December 31, 2009 and March 31, 2010, respectively, for BIEL's product. See also Declaration of Joseph Noel, ¶¶5-6.

The eMarkets payments totaling slightly more than the $216,000 reported are detailed in the chart above. The last of such payments was June 23, 2010. See Supplemental Declaration of Mary Whelan, paragraph 14, filed herewith, and Exhibits 1 and 2.

Thus, as to the entire $366,000 bill and hold transactions revenue at issue, over $207,000 was received in 2009, and the balance was received on or before June 23, 2010. Neither of these transactions was cancelled, voided or terminated and no refunds have been requested or paid.

BIEL followed its accounting experts' advice in electing to report such transactions, between two imperfect means of reporting. One was to use the GAAP guidelines that stated that in order to recognize the revenues a) an arrangement would exist (here, there were formal written distribution agreements), b) the prices would be fixed (here, one sale price was for $10.50 per unit as specified in the distributor contract, and the other was for $10.00), c) collection would be reasonably assured (here, over $207,000 already had been received and the remainder was expected and was in fact paid within the six months following the 2009 year-end close), and d) title of the goods and the risks associated with these goods would be transferred to the buyers (here, title to all products at issue had been transferred to the buyers and the buyers indicated they assumed all the risk). Thus, under GAAP, the revenue was properly recorded for both the eMarket and YesDTC transactions.

The second option was to book these transactions as "bill and hold" transactions. Based on the advice of BIEL's experts, Ester Ko and the accounting firm, Berenfeld, Spritzer, Shechter & Sheer LLP, BIEL decided to disclose the accounting under the Bill and hold guidelines. Thus, under GAAP, the revenue was properly recorded under either recording method for both the eMarkets and YesDTC transactions, and was.

1. SEC Staff Accounting Bulletin: No. 101 – Revenue Recognition Financial Statements revenue recognition conditions are:

- Persuasive evidence of an arrangement exists. [Both the YesDTC and eMarkets transactions were reflected in formal distribution agreements; and each entity accounted for the transaction as having been consummated in 2009].]

- Delivery has occurred or services have been rendered. [All parties agree that distributors, YesDTC and eMarkets, made non-refundable purchases and accepted beneficial and legal title to the goods and all risks associated with such goods, but that YesDTC and eMarkets requested that BIEL store their purchased inventory in BIEL's warehouse as a convenience to YesDTC and eMarkets. In addition, as to YesDTC's purchase, its initial

purchase was made as a condition of the territorial license rights secured pursuant to the terms of its distribution agreement.]

- The seller's price to the buyer is fixed or determinable. [The selling prices were fixed and paid.]

- Collectability is reasonably assured. [More than $207,000 of the $366,000 contract price had already been paid, and each buyer had sufficient assets to pay.]

Notably, both methods ended with the same result – recordation of all revenue in 2009. BIEL's auditors were well aware of these transactions and confirmed independently the terms thereof with eMarkets and YesDTC. See Bedwell Deposition Transcript, at p. 40. Audited financial statements, certified by BIEL's qualified certified public accountant and BIEL's executives, were filed by BIEL with the SEC in its 2009 Form 10K on March 31, 2010. Consistently, on the advice of its counsel and its public accounting firm, BIEL provided further clarifying details regarding such transactions in its Form 10-Q filed six weeks later, on May 12, 2010. See Whelan Decl., Exhibit 2.

III. LEGAL ARGUMENT.

A. Standard For Summary Disposition.

Rule 250 of the SEC's Rules of Practice: "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 a summary disposition as a matter of law." 17 CFR 201.250(

B. The Division Was Inexplicably Predisposed To Find Fault With These Isolated and Immaterial Bill And Hold Transactions.

In early 2012, the SEC Division began investigating these two bill and hold transactions along with other issues alleged in the Complaint in this action. Initially, the Division stated in its Wells letter dated August 22, 2014 that BIEL had committed fraud associated with the two bill

and hold transactions. There was no fraud, as the Division learned during its prolonged investigation. Nevertheless, determined to make something out of their four years of unfettered investigation, the Division rests on a non-scienter claim that BIEL violated Exchange Act Section 13(a) and Rule 13a-1 on the grounds that BIEL's accounting firm made an error. Because the claim is based on a non-scienter violation, the Division must carry a heavy burden of establishing that BIEL included false and misleading facts that are ***material*** to BIEL's financial condition as reported in BIEL's 2009 Form 10K. A holistic review of BIEL's financial disclosures and its overall financial condition establishes that the Division cannot do so.

C. Materiality

1. The Division Bears The Burden of Proving Materiality.

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).

BIEL simply reported the facts to its accountants and followed the advice of its accountants, third party consultants, lawyers and independent CPA auditor to record these immaterial transactions in a manner that it was persuaded complied with Generally Accepted Accounting Standards. Section 13(a) was not enacted to prohibit such honest and accurate reporting.

2. The Timing of Revenue Recognition on Two Isolated One-Time 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 transactions did occur and did generate all of the $366,000 that BIEL disclosed had been generated. The dispute focuses only on the *timing* of recognition of that revenue – not that such revenue was received and recorded in the reported amounts. That dispute 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 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.**"

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, BIEL disclosed: "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. Whelan Decl. 37, Exh. 2.

This Court should find, based on the foregoing disclosures, that 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.

3. BIEL's Stock Price Was Unaffected By 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.

4. The Division's Focus On 47% Of Revenue Grossly Overstates The Amount Of Any Overstated Revenue And Its Impact On Investors.

The Division concludes that an undetermined amount of overstatement of revenue in 2009 (at most $366,000) and, presumably, the equal understatement of such revenue in the first half of 2010, if any, would have been material to BIEL's financial condition because the recognized revenue represented 47% of the total revenue of 2009. The Division is wrong.

The Division has not offered any evidence upon which this Court could conclude how much, if any, of the $366,000 in revenue recognized in BIEL's 2009 10K should have been recorded in 2010 or why. It is undisputed that over $207,000 of such revenue was actually received in 2009, and the remainder was actually received in the first half of 2010. Under any standard, most, if not all, of such revenue was properly recorded in 2009. Thus, the Court's focus should only be on the proven portion of that revenue that should not have been recorded in 2009, which BIEL contends was none.

BIEL contends that BIEL's 2009 10K properly recorded such revenue under GAAP. BIEL further contends that even if 100% of the $366,000 should have been recorded after 2009, instead of 2009, such timing difference would be immaterial to any reasonable investor in BIEL. A holistic view of the 2009 Form 10K and the Events Study submitted by BIEL establish that the timing of the reporting of these two isolated transactions would not be and was not actually material to any reasonable investor.

BIEL was a start-up company, had suffered millions of dollars in losses, and was almost entirely dependent on outside funding for its past and immediate future survival. The mere timing of the relatively nominal sum of revenue (only that portion that represents an overstatement of revenue in 2009 and understatement of the same amount in 2010) was patently immaterial. BIEL's events study, attached to the Declaration of Yue Qin, filed in support of Respondents' Motion for Summary Disposition, reveals that the stock price was unaffected by the 2009 Form 10K filing, much less any overstatement in the isolated and nominal revenue events pertaining to these two isolated transactions. Moreover, further details provided by BIEL's 2010 first quarter Form 10Q, detailed below, filed only a month later, again fairly stated the details of these transactions.

BIEL was a development level company. It had developed a number of patented pain relieving products that it hoped to market to the US consumers. Interest in the Company was substantial since the potential for the firm was high if it could get FDA approval. In fact, in 2009 the stock price surged after the Company announced that it had filed for FDA approval. The Division maintains that "any reasonable investor would want to know that nearly one half of the company's revenue was falsely recorded". Division's Memorandum of Law, p. 17. The Division offers no proof to support this assertion. Instead, the assertion is belied by the Events Study and any rational valuation of BIEL. What the Events Study and a holistic review of BIEL's financial statements in its 2009 Form 10K reveal, is that rational investors understood that these two isolated bill and hold transactions were not material to the survival of BIEL – they were focused instead on the only thing that would ensure BIEL's survival and prosperity -- the outcome of the FDA application. Investors presumably were concerned with the cash position of the firm, since it had a history of being cash poor, had lost hundreds of thousands of dollars in 2009, even after accounting for the bill and hold transactions, and its survival depended on uncommitted outside investments. For that reason, there was no significant movement in the stock price when such transactions were reported in BIEL's 2009 10K. In fact, as documented by the four events studied in the Events Study attached to the Qin Declaration, there was no movement in the stock price associated with any of these events. Thus, there is no indication that "a reasonable investor would want to know that nearly one half of the company's revenue was falsely recorded", as the Division alleges.

D. GAAP reporting – Delivery Requires Transfer of Title and Risk – Not Physical Shipment.

As noted above, BIEL engaged and relied on its accounting experts to help it submit all required financial reports to the SEC (and investors) in compliance with applicable legal and

accounting standards. Out of all the reporting that the firm has filed with the SEC over the years, the SEC has only objected to these two isolated and unimportant bill and hold transactions. It claims that the two transactions should not have been recorded in 2009 because: (1) they were not final and binding; and (2) there was no delivery.

On the issue of the binding nature of the contracts, the Division faces an impossible burden because (1) both parties to the contract have attested under oath that they believed the contracts were binding, non-contingent and non-refundable as to the revenues recorded in 2009 (see Mary Whelan Decl., ¶10; Joseph Noel Decl., ¶¶7-12); (2) neither YesDTC nor eMarkets has ever made any claim for a refund (*Id.*); (3) all revenue reported was actually paid, as detailed above; (4) BIEL's financial statements were audited and accompanied by a certification by BIEL's licensed and qualified accountants that the statements fairly and accurately reflected the financial affairs of BIEL; and (5) YesDTC's publicly filed financial statements consistently reflected its purchase and ownership of the same inventory. See Andrew Whelan Decl., Exhibit 3, bates stamp p. 000402; and Noel Decl., Exhibit 2. The Division cannot overcome the weight of that evidence by citing its self-serving construction of the distribution agreements and incomplete hypotheticals that we know, ***six years later***, never came to pass. The Division's concerns are not material because, in fact, investors' expectations that the reported revenues had been and would be received were fully and timely satisfied.

The Division is left resting unsteadily on the issue of delivery. But, the accounting descriptions of "delivery" and its use are vague and flexible. While the Division and witnesses confuse and conflate the words "delivery" and "shipment", it is clear that delivery does NOT require physical shipment. 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." Emphasis added. Division's

Motion, p. 14, fn. 53; citing SAB 104 at 20. "*Typically*, this occurs when a product is delivered to the customer's delivery site ... or shipped to the customer..." *Id.* See also SEC Division 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.

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. By using terms like "generally", "typically", "substantially" and "usually", the expertise of auditors and accountants to apply the specific facts of these extraordinary transactions is necessary and, BIEL's reliance on such expertise is reasonable.

Notably, these accounting guidelines do not REQUIRE that the product be delivered to the customer's delivery site or shipped to the customer, as the Division would have it. They only say that physical delivery "generally" that "typically" occurs. Thus, the word delivery has several factors to be considered by the accounting professional: primarily (1) whether title and risks have passed to the buyer; and (2) whether the product was physically moved from the seller to the buyer. Only the former is required in the GAAP definition. The latter generally and typically occurs. The testimony and record clearly indicate that both title and risk were passed on to the buyer.

In the case of YesDTC, the Distribution Agreement states, at paragraph 5.2: "The Distributor shall be required to purchase from the Company, as its initial purchase, not less than 15,000 units at the below specified prices." See Noel Decl., Exhibit 1. The prices attached to that document are $10 per unit. Thus, Distributor was required to pay $150,000 for the initial purchase, as expressly provided in section 7.2: "The initial order of 15,000 units will be paid for

by Distributor as follows: $100,000 to be paid immediately and prior to the end of calendar year 2009. The remaining balance will be paid to Company within 90 days." In addition, Minimum Annual Purchases were required to be made over time, pursuant to section 5.1, ranging from 150,000 in 2010 to 259,000 units in 2013.

The Division contends that the Distribution was not a final commitment because it was voidable by YesDTC pursuant to paragraph 1 ("Should Distributor be unable to gain regulatory clearance within six months of contract execution, this agreement is voidable at the option of Distributor.") See also section 9 of the Distribution Agreement. But, the Division does not and cannot point to any provision of the Distribution Agreement that would, in the event of its exercise of its right to void the contract, unwind the initial product purchase and recover the moneys paid for such purchase. Indeed, there is no provision in the Distribution Agreement that describes what would happen with respect to YesDTC's $150,000 initial purchase if YesDTC had elected to void the contract within six months, as permitted under paragraph 1. Both YesDTC and BIEL, however, have attested that they understood that the $150,000 was not refundable. In any event, YesDTC did not exercise such right during such six month period, rendering the hypothetical a moot point. Accordingly, the Division's hypothetical, upon which its entire motion is based, is unpersuasive, immaterial and inconsistent with the certification by BIEL's accounting firm which, after conducting a thorough audit, attested that the 2009 Form 10K fairly and accurately stated the financial affairs of BIEL. See A. Whelan Decl., Exhibit 3.

It is also noteworthy that the financial statements that were filed by YesDTC reported the purchase of 15,000 units as inventory and also acknowledged the payment of the product. Noel Decl., Exhibit 2.

As explained in the Declaration of Mary Whelan filed in support of Respondents' motion for summary disposition, at ¶¶7-13, eMarkets ordered, paid for and took title and all risks of

ownership of BIEL product based on minimum inventory requirements of large potential customers, PetSmart, QVC and Hartz Mountain.

The record is clear that neither distributor wanted the product to be physically "delivered" (shipped). In fact, given that the product is a medical device, they could not receive the product without having a certified storage area. Both parties asked BIEL to "hold" the product at the Company's certified warehouse. See Noel Decl., ¶¶9-10; M. Whelan Decl., ¶¶7-11.

E. Bill and Hold

Bill and hold transactions require seven conditions. As noted above, the accounting experts hired by BIEL felt that it was best to use this option for recognizing the revenue that was associated with these two transactions, since in both cases the materials were not physically delivered to the buyers, although the buyers took all ownership, title and risks to such inventory, as it was segregated in BIEL's facilities. Barenfeld Spritzer Shechter & Sheer, LLP, BIEL's licensed public accounting firm, audited these transactions and took special care to determine if all seven conditions were met. See, for example, deposition transcript of Robert Bedwell, p. 39: "I know that we received an agreement between eMarkets and with BioElectronics that called for certain minimum quantities that were going to be sold or distributed by eMarkets on BioElectronics behalf. We have a work paper and memorandum -- a work paper in the files there that as a technical memorandum related to the technical criteria that needed to be met in order for a bill and hold transaction to be recognized as revenue in the year in which it occurred. We went through the facts and circumstances of the arrangement between eMarkets and BioElectronics in terms of whether or not it met those criteria, and the conclusion was that it had."). Esther Ko, in her notes, took special care to verify these conditions and to report directly to auditors at Berenfeld, Spritzer, Shechter & Sheer LLP (and later Cherry Bekaert). Based on these

investigations and the Company's experts, the Company recognized the funds received as revenue under bill and hold transactions and so noted in their financial reports. Subsequently, it became evident that many of the assumptions of future events did not come to pass. Thus, again on the advice of its accounting experts, the Company decided to reclassify the revenues received and notified its investors in subsequent filings. As noted above, after each notification there was no movement of the stock price. In the end, BIEL received every penny that it expected to receive, and investors' expectations arising from BIEL's disclosures have been fully and timely achieved.

IV. CONCLUSION.

This Court should deny the Division's motion for summary disposition for the reasons stated herein.

Dated: Santa Monica, California
June 23, 2016

CORRIGAN & MORRIS LLP
By: _____
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