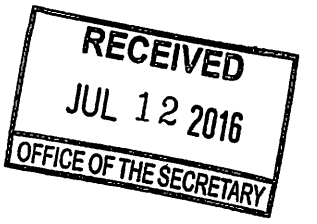
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



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 REPLY IN FURTHER SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DISPOSITION AGAINST BIOELECTRONICS CORP.

The Division of Enforcement ("Division"), hereby submits its reply memorandum in further support of its motion for summary disposition, and in response to the opposition memorandum submitted by Respondent Bioelectronics Corp. ("BIEL") ("Resp. Opp. Br.").

INTRODUCTION

BIEL has conceded that the two "bill and hold" transactions that it recorded with eMarkets Group, LLC ("eMarkets") and YesDTC Holdings, Inc. ("YesDTC") were not bill and hold transactions, as the company had represented to investors in its 2009 Form 10-K ("2009 10-K").[1] BIEL thus concedes that it misstated the nature of the transactions in the 2009 10-K. Years after making these admitted misstatements, however, the company has attempted to recast the bill and hold transactions as traditional distribution agreements entered in the ordinary course of business. Yet after two rounds of briefing in cross-motions, BIEL has not shown, and indeed cannot show

[1] *See* the Division's Memorandum in Support of its Motion for Partial Summary Disposition as to BIEL ("opening memorandum" or "Div. Mem.") at 8-9, citing January 17, 2011 Letter from BIEL to the SEC [Ex. 83] at 13; Whelan Test. at 98:21-25.

under the facts of the case, that the transactions complied with Generally Accepted Accounting Principles (GAAP). At the time BIEL recorded the transactions, December 2009, there was (a) no persuasive evidence of an arrangement with either eMarkets or YesDTC; and (b) no delivery of product to either party. *See* Staff Accounting Bulletin (SAB) 104 at 10-11, and 2009 10-K at 26 (adopting four requirements of SAB 104).

In its opposition papers, BIEL has not come forward with a shred of *contemporaneous* evidence that YesDTC and eMarkets were obligated to purchase $366,000 worth of product by December 31, 2009, or thereafter. Nor has BIEL come forward with any *contemporaneous* evidence that BIEL delivered products to eMarkets or YesDTC in 2009, or that title somehow passed to these parties without delivery. After the fact affidavits submitted by closely related and interested parties do not represent persuasive evidence; nor does an unauthenticated printout from BIEL's admittedly unreliable internal accounting system; nor do bold argumentative statements without any support from accounting literature or case law.

As there is no genuine issue of material fact to dispute the Division's showing that BIEL materially overstated $366,000 worth of revenue in its 2009 10-K, the Court should enter summary disposition as to BIEL on the non-scienter claims brought under Exchange Act Section 13a and Rule 13a-1.

ARGUMENT

I. BIEL Has Not Submitted Any Contemporaneous Evidence To Satisfy The Elements of GAAP: Persuasive Evidence of An Arrangement and Delivery.

In the opening memorandum, the Division demonstrated that the eMarkets and YesDTC transactions failed at least two of the four requirements for traditional sales under GAAP, and five of the seven requirments for "bill and hold" transactions.[2] As BIEL has conceded that the

[2] *See* Div. Mem. at 12-16.

transactions were not bill and hold transactions, the only remaining issue before the Court under Rule 250 is whether BIEL submitted sufficient evidence to demonstrate that the products were valid traditional sales under SAB 104. BIEL has failed to satisfy its burden. In its opposition papers, the company has not introduced any contemporaneous evidence showing that at the time BIEL recorded the transactions (a) there was persuasive evidence of binding agreements with either YesDTC or eMarkets; and (b) BIEL delivered the products to either of the parties.

A. BIEL Has Submitted No Contemporaneous Evidence Of A Binding Agreement With eMarkets or YesDTC.

To satisfy BIEL's burden for the first element of SAB 104, persuasive evidence of an agreement, BIEL must show that the parties exchanged sales documentation in 2009, in the ordinary course of business, memorializing binding commitments for the purchase of $366,000 worth of product. *See* SAB 104 at 12-14; *Provenz v. Miller,* 102 F.3d 1478, 1485 (9th Cir. 1996); *SEC v. Retail Pro, Inc.,* 2011 WL 2532501, *4 (S.D. Cal. June 23, 2011) (denying motion for directed verdict, finding no persuasive evidence of an arrangement). As the Division outlined in the opening memorandum at 3-5, BIEL's customary business practices required that the company exchange written orders and written confirmations with its distributors. As stated in the eMarkets distribution agreement ("eMarkets Agreement") [Ex. 18]:

> 4.1 Orders. The Distributor will submit its orders for Covered Products in writing to the company, whether by U.S. mail, facsimle, electronic communication or as otherwise mutually agreed. Only orders accepted and confirmed in writing by the Company will be deemed valid and binding on the Parties.

BIEL has not satisfied its burden for this element. The company has not come forward with any *contemporaneous* evidence showing that eMarkets agreed to buy $216,000 worth of BIEL products by December 31, 2009, or thereafter. *See SEC v. Forman,* No. 07-11151, 2101 WL 2367372, *5 (D. Mass. June 9, 2010) (finding that documents and email submitted by

defendant "is not persuasive evidence of the transaction and the GAAP requirements have not been satisfied.") Other than the eMarkets Agreement that requires eMarkets to make an initial order of $15,000 worth of products, BIEL has not identified one order from eMarkets, or one confirmation from BIEL, covering the remaining $201,000 in revenue that the company recorded in the 2009 10-K.

The June 22, 2016 supplemental declaration submitted by Mary Whelan ("M Whelan Decl.") certainly does not represent persuasive evidence of an agreement that transpired in 2009. Ms. Whelan's declaration includes a table that she cobbled together from an unidentified source, purporting to represent eMarkets' 2009 purchases.[3] But the table does not cite or identify any sales documents executed by the parties in 2009. Moreover, the documents that Ms. Whelan refers to in Exhibit 2 to "evidence the foregoing payments," certainly do not represent persuasive evidence under GAAP. Exhibit 2 contains bank statements and checks showing that eMarkets paid for the product -- a point that is not disputed -- and an unidentified and unauthenticated ledger, apparently generated by BIEL's internal accounting system, titled "Customer Balance Detail as of December 31, 2009." But the Customer Balance Detail similarly does not reference or attach any orders from eMarkets, or confirmations from BIEL.[4] Moreover, as the Customer Balance Detail apparently was generated by BIEL's internal accounting system that suffered from material weaknesses in internal controls, it hardly represents persuasive evidence of anything.[5]

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[3] M Whelan Decl. at ¶ 14.

[4] The Customer Balance Detail purports to list invoices for sales to eMarkets, but it does not attach or include any invoices, nor does it provide any indication that eMarkets ever received or approved any of the invoices, or that they were otherwise accurate or enforceable.

[5] *See* 2009 10-K at 31-33; BIEL's May 12, 2010 10-Q at 26-27 (listing material weaknesses in internal controls over financial reporting including a deficiency that, "creates certain incompatible duties and a lack of review over the financial reporting process that would likely result in a failure to detect errors in

BIEL also has not submitted persuasive evidence of a binding agreement with YesDTC. There is nothing that BIEL can do to erase the material contingency in the contract. 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.[6] This contingency defeated revenue recogniztion under GAAP. *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). Whatever Joseph Noel, a close associate of the company, stated in his 2014 affidavit about his understanding of the agreement he executed in 2009, does not eliminate the legal effect of the plain language of the contract, and the contingency that the parties set in place at the time that precluded revenue recognition.

B. BIEL Has Submitted No Evidence That BIEL Delivered Products to eMarkets or YesDTC.

BIEL also has not submitted evidence to satisfy the delivery requirement of SAB 104. The company concedes that the products were not physically delivered to eMarkets or YesDTC.[7] The company also does not try to walk away from Andrew Whelan's testimony that BIEL *would not deliver* the products to YesDTC without regulatory approval.[8] Absent physical delivery,

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spreadsheets, calculations, or assumptions used to compile the financial statements and related disclosures as filed with the SEC.")

[6] *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).

[7] *See* Div. Mem. at 14-15, citing BIEL's May 12, 2010 10Q at 21; Whelan Test. at 109:1-13, 19:22-24.

[8] BIEL has, however, stridently attempted to walk away from Andrew Whelan's testimony that the eMarkets products were not finished, and required additional work prior to shipment. *See* Resp. Opp. Br. at 1-2, 8-9. For the sake of this motion, however, whether the products were completed and ready to ship to eMarkets' customers (if and when eMarkets ever obtained orders), is not a pertinent issue, as the eMarkets transaction fails other requirements under GAAP.

BIEL is in a very tight corner. If a transaction lacks physical delivery, GAAP provides only one alternative method to record revnue – as a bill and hold transaction. *See* SAB 104 at 19-20 ("The Commission has set forth criteria to be met in order to recognize revenue when delivery has not occurred." (listing seven bill and hold critieria)). *See also SEC v. Dunn,* 587 F.Supp.2d 486, 491 (SDNY 2008):

> Though physical delivery is generally required before revenue may be recognized from the sale of a product, sellers are permitted to recognize revenue at the time of sale but before physical delivery for products sold on a bill and hold basis. *See* SEC Staff Accounting Bulletin No. 101, 64 Fed.Reg. 68936, 68938–39 (Dec. 9, 1999) (hereinafter "SAB No. 101"). The criteria required to classify a transaction as a bill and hold sale, and thus to recognize revenue on a product's sale before physical delivery, are explained by the Commission in SAB No. 101.

BIEL concedes that the eMarkets and YesDTC transactions were not bill and hold transactions, and the Division independently established that they failed to comply with bill and hold criteria, most notably, lacking fixed delivery schedules.[9] So BIEL has no valid argument to salvage the two transactions.

As much as BIEL would like to create its own rules of accounting, there are no other constructive or de facto or artificial delivery methods available for it under GAAP. The accounting rules simply do not permit a seller to record a sale to a buyer when there is no delivery, or at least a fixed delivery schedule within a reasonable time period. The reason for such a strict delivery requirement is clear – it precludes parties from parking goods indefinitely in warehouses and claiming revenue on imaginary sales and phantom sales prospects. The requirements also preclude sellers from booking revenue in questionable sales transactions, with related parties, at the end of a reporting period, in order to manage their earnings.

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[9] *See* Div. Mem. at 4, 7, citing Mary Whelan Test. at 66:11-12 ("There was no fixed delivery schedule developed for when I was taking possession of the goods."); YesDTC Agreement [Ex. 67] at ¶ 4.7 (products will be shipped on "mutual future agreement."); March 18, 2010 Noel email to Ko [Ex. 86] at 4 ("We will draw the investory [sic] as needed.").

Even if GAAP somehow allowed the recording of revenue on the two bill and hold transactions without delivery, BIEL has not identified a shred of *contemporaneous* evidence establisihg that title and risk of loss passed from seller to buyer on the products by the end of December 2009. Again, the post facto declarations of Mary Whelan and Joseph Noel do not provide evidence that these parties assumed legal title and risk of loss for thousands of items sitting in BIEL's warehouse in 2009.

II. BIEL Has Not Submitted Evidence to Establish That the Transactions Were Immaterial.

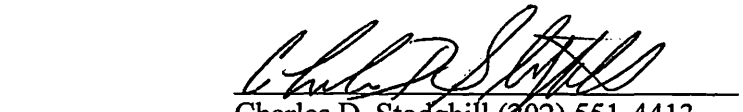
BIEL also contends that the bill and hold transactions were immaterial, reasserting the arguments the respondents raised in their motion for summary disposition. *See* Resp. Opp. Mem. at 14-21. In the Division's opposition to the respndents' motion for summary disposition at 18-23, the Division set forth the bases on whichany reasonable investor would find BIEL's overstatement of $366,000 critical in making its investment decisions. The Division explained how, on a quantitative basis, the misstatement of 47 percent of BIEL's annual revenue represented nearly ten times the typical benchmark applied for materiality. The Division also explained how, on a qualitative basis, the misstatements, that arose out of the core of the company's domestic and international distribution channels, and that directly tied into the company's "sales growth trajectory," are unquestionably material.

CONCLUSION

For the foregoing reasons, and as set forth in the Division's opening memorandum, the Division respectfully moves the Court for an order pursuant to Rule 250, granting summary disposition against respondent BioElectronics Corp. for the claims brought under Exchange Act Section 13(a) and Rule 13a-1.

Dated: July 12, 2016

Respectfully submitted,



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Certificate of Service

I declare that on July 12, 2016, the foregoing was served upon counsel to the respondents by electronic mail, per agreement of the parties, at the following addresses:

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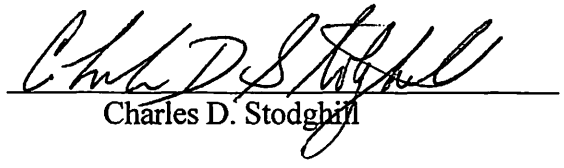

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