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' REPLY RE MOTION FOR SUMMARY DISPOSITION

Stanley C. Morris, Esq.
Brian T. Corrigan, Esq.
CORRIGAN & MORRIS LLP
201 Santa Monica Boulevard, Suite 475
Santa Monica, California 90401-2212
Telephone: 310-394-2828
Facsimile: 310-394-2825
scm@cormorllp.com
bcorrigan@cormorllp.com

Counsel for Respondents,
Bioelectronics Corporation; IBEX, LLC; St. John's, LLC; Andrew J. Whelan; and Kelly A. Whelan

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I. INTRODUCTION.

Respondents, BioElectronics Corporation ("BIEL"), IBEX, LLC ("IBEX"), St. John's, LLC ("St. John's"), Andrew J. Whelan and Kelly A. Whelan (collectively, "Respondents"), hereby reply to the Division of Enforcement's Memorandum of Law in Opposition to Respondents' Motion for Summary Disposition (the "Opposition").

The Opposition starts with a "Counterstatement of Facts" which includes a host of false and misleading statements, detailed below. There are no *genuine* issues of fact. Summary disposition of all issues should be granted in favor of Respondents.[1] The Opposition attempts to manufacture *genuine* issues of fact by asserting false facts without evidentiary support. Because the record cited in the Division's Opposition belies the facts asserted, the Court should ignore such factual contentions. A review of the record, as opposed to the Division's gross distortion of that record, supports summary disposition on all claims against the Respondents.

II. RESPONDENTS' REPLY TO COUNTERSTATEMENT OF FACTS.

A. The Division's Misrepresentations In A Stacked Deck Proceeding.

The Division's Counterstatement of Facts reflects an abuse of power, consistent with the lengthy investigation and prosecution of this civil case in this Administrative Proceeding. In or around 2012, the SEC, armed with an overwhelming force of financial resources, legal, investigative and accounting professionals and broad statutory investigative powers, embarked on a multi-year investigation of BIEL. BIEL, a lightly financed micro-cap company, its

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[1] **The "mere existence of a scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary judgment; "there must be evidence on which the jury could reasonably find for the" nonmoving party.** ***Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).***

executive, Andrew Whelan, and his family members, have expended an inordinate amount of their resources in an effort to cooperate and survive the attack.

The SEC conducted its investigation over a number of years behind the curtain of investigative secrecy, not identifying for the witnesses it deposed who the targets of the investigation were, much less the SEC's documentation, legal claims, potential legal claims or the facts supporting such claims. Outrageously, it obtained documents and interviewed BioElectronics' former lawyer, Drew Walker, who was involved in an active dispute with BioElectronics. Mr. Walker disclosed attorney-client confidences to the SEC in its investigation.[2] Although such communications clearly violated BIEL's attorney-client privilege, such disclosures went unchecked do to the secrecy of the SEC's investigation. Second Supplemental Declaration of Andrew Whelan filed herewith ("2d Supp. Dec. A. Whelan"), ¶3. Although in some cases counsel was notified and invited to some of the investigative depositions, such counsel had no opportunity properly to prepare the witness or otherwise defend the deposition, because such counsel was provided no statement of the claims and allegations against his client, no right to discovery and limited rights to object. The SEC subpoenaed witnesses, took many depositions, often of witnesses unrepresented by counsel, with no notice to the subjects of the

[2] During the deposition of BIEL chairman, Richard Staelin, one of the SEC's investigators admitted that he had spoken with Drew Walker, a person who had held himself out to be a lawyer and CPA for BIEL, who gained confidential information from BIEL and who was purposefully violating that confidence by disclosing that information to the SEC, while in a dispute with BIEL. Not only did Respondents consider him an attorney for BIEL, but the SEC itself addressed Mr. Walker as an attorney. Subsequent investigation revealed that Walker was actually a convicted felon who had never been admitted to the bar, and whose CPA licenses were revoked in both Maryland and Virginia. Nevertheless, the law is clear that because BIEL reasonably believed Walker to be BIEL's counsel, its communications with Walker were confidential and privileged. Walker had no right to waive that privilege for BIEL and the SEC attorneys and staff were not free to invade that privilege.

investigation or their counsel. At the depositions, the SEC attorneys, accountants and staff grilled the unsuspecting witnesses for hours before a court reporter, often with rapid fire questions lobbed by multiple lawyers and other staff.

Armed with a massive one-sided record of discovery, the SEC then enjoys the benefits of prosecuting a case in this Administrative Proceeding, the rules of which all but guaranty the Division's success. The Commission's rules allow it to appoint its own in-house judge to rule on the case. And, recognizing the Commission's gigantic head start on discovery over civil defendants, due to the unfettered rights to *ex-parte* discovery and unlimited resources of the federal government, the Commission enacted rules that provide defendants limited discovery rights, and very little time to prepare their defense.[3]

Unsatisfied with its built-in overwhelming advantages, the Division oversteps the bounds of legitimate advocacy by including a host of material false and misleading representations in its Opposition papers in the hope of creating a triable issue of fact. Based on false facts, the Division reaches otherwise unsupportable conclusions. If there is to be any hope of justice in this Administrative Proceeding, this Court must review, with skepticism, the record to which the Division cites in its papers.

B. St. John's And IBEX Transactions Are Exempt From Registration Under Section 4 of the Act Because They Complied With Rule 144; And Because Lengthy Holding Periods Cannot Be Squared With Being An Underwriter

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[3] See SEC Rules of Practice 232-234; and 360. Due to the strategically stacked deck, the SEC predictably enjoys great success in AP proceedings. See Morgenson, "At the S.E.C., a Question of Home-Court Edge," New York Times, October 5, 2013, at BUI, http://www.nytimes.com/2013110106/business/at-the-sec-aquestion-ofhome-court-edge.html?pagewanted=all& _r=O; and Jean Eaglesham, "SEC Takes Steps to Stem Courtroom Defeats," The Wall Street Journal Feb. 13, 2014, http://online.wsj.com/newslarticles/SB10001424052702304703804579381310253258641ast accessed July 25, 2014 (discussing recent slip in SEC's win rate in federal district courts).

The Section 5 charges hinge on whether the transactions were exempt from registration under Section 4(1) of the Act. The long holding periods of two and three years or longer, and St. John's and IBEX's continued investment in BIEL, establish that St. John's and IBEX did not intend to make a distribution of securities to the public when they acquired such securities from BIEL. They were not underwriters. Thus, their transactions were exempt under Section 4(1).

The Division contends that factual issues exist with respect to St. John's and IBEX's exemption under Section 4(1) based on two false statements: (1) that St. John's did not file Form 144's; and (2) that IBEX was controlled by Andrew Whelan and BIEL because IBEX loaned money to BIEL upon Andrew Whelan's demand.

In truth, St. John's filed its Form 144s. Every transaction in question was executed through a broker, who knew about the affiliate status of St. John's and undoubtedly insisted that Form 144s were filed before trading the affiliate's unregistered shares. Declaration of Patricia Whelan, ¶7, Exhibit 3. Unfortunately, the records are not accessible by St. John's at this time. St. John's, in an abundance of caution, recently filed (or refiled) its Form 144 on all relevant transactions. See Declaration of Sariah Glosenger filed herewith, Exhibit 1.

Even if St. John's had not filed its Form 144, the Court should nevertheless find, based on the undisputed lengthy holding period of St. John's securities with respect to the stock sold, at least 34 months, and in most cases over 43 months, that St. John's was not an underwriter because St. John's must not have intended to distribute such securities into the public market at the time of acquisition. See Declaration of Patricia Whelan, ¶¶5-8. Rule 144 is a non-exclusive safe harbor provision. Section 4(1) exempts such transactions from the registration requirements.

The Division also misrepresents that Andrew Whelan and BIEL controlled Kelly Whelan and IBEX. They did not. See Declaration of Kelly Whelan, ¶¶176-186. Control means power to control. Andrew Whelan and BIEL never had any power to control Kelly Whelan and IBEX.

The Division has not offered a scintilla of evidence that they did. Instead, it attempts to build its case on the offensive and sexist implication that because Andrew Whelan is the father of Kelly Whelan, he must control her, despite the fact that she is in her late 40s and is a CPA. The fact that Kelly Whelan is a woman and the daughter of Andrew Whelan is simply not enough to establish control. Indeed, the sex of the parties should not be considered at all.

Separately, the Division contends that the fact that IBEX agreed to make many lucrative loans to BIEL upon request by Andrew Whelan, and never denied such request, is evidence that Andrew Whelan controlled Kelly Whelan and IBEX. IBEX, like any lender, was clearly and properly motivated by profits. Each loan involving BIEL was based on the conclusion that such transaction would be profitable for IBEX. *Id.* Although the profitability of such loans is undisputable based on the lucrative terms stated therein (e.g. conversions at a 50% discount to market at the time of investment), IBEX and BIEL offer expert evidence in the Declaration of David Robinson filed herewith which underscores the patent profit incentives behind such loans.

C. The eMarkets and YesDTC Transactions Were Recorded Accurately And, In Any Event, Were Immaterial.

The Division misrepresents that $366,000 in revenue reported on two bill and hold transactions in 2009 should **never** have been recorded in any year because: (1) there was no fixed delivery schedule for 2009 sales to eMarkets and YesDTC (SEC Opposition, pp. 5-6); (2) the sales were based on non-binding contracts; (3) the inventory sold was never shipped (SEC Opposition, p. 17); and (4) the inventory was not finished (SEC Opposition, p. 5).

In fact, (1) there was a fixed delivery schedule; (2) the contracts were binding; (3) the goods purchased by eMarkets did sell and were shipped and the goods sold to YesDTC were abandoned by YesDTC (which never sought a refund); and (4) all inventory sold was finished.

Respondents have separated the facts pertaining to YesDTC from those pertaining to eMarkets, as such facts and circumstances are materially different, and such differences critically impact the analysis. The Division conflates these two transactions to foster confusion.

1. YesDTC.

YesDTC entered into a Distribution Agreement with BIEL on December 30, 2009 (the "Distribution Agreement"). Noel Decl., ¶¶3-6, Exh. 1-2; and A. Whelan Decl., ¶19, Exh. 2. The Distribution Agreement obligated YesDTC to pay $100,000 to BIEL upon signing, and $50,000 within 90 days. *Id.* 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. *Id.*

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 filings 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 for 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 at YesDTC would not have been permitted by the FDA (21 CFR 820.70(f). Noel Decl., ¶¶ 9-13, Exh. 1; A. Whelan Decl., ¶22.

YesDTC paid $150,000 for (1) the initial product purchased; and (2) an exclusive license 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. Noel Decl., ¶13, Exh.1; and A. Whelan Decl., ¶20.

YesDTC attempted to obtain approval from Japan to sell BIEL's 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.

a. Agreement to Fixed Delivery Schedule.

In an email to Esther Ko, Joe Noel, YesDTC's President, confirmed that YesDTC anticipated taking possession of the inventory by December 31, 2010. See 2d Supp. Dec. A. Whelan, ¶5, Exhibit 2.

b. The Distribution Agreement with YesDTC Is A Binding Contract.

The YesDTC Distributorship Agreement dated December 30, 2009 is a written agreement governed by the laws of Maryland. See Noel Declaration, Exhibit 1; ¶16. If a court were to find a provision that rendered the contract unenforceable, the parties agreed that the court should amend the contract so as to validate the contract. *Id.* at ¶19.1.

Under Maryland law, the Distributorship Agreement constitutes a valid binding contract. Title 2, Sales, Maryland Commercial Code §2-106, provides:

> (1) In this title unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A

"sale" consists in the passing of title from the seller to the buyer for a price (§ 2-401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) ...

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

Maryland Commercial Code section 2-204 provides:

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

The Distributorship Agreement is clearly "sufficient to show agreement" between YesDTC and BIEL. Paragraph 19.1 makes clear that if any provision of the contract would render it unenforceable, a court is directed to amend the contract to achieve an enforceable contract. Both the Declaration of Andrew Whelan, at ¶19, and the Declaration of Joseph Noel, at ¶¶1-7 and Exhibit 1 confirm that the parties intended to enter into a binding agreement, and that they performed that agreement as intended. Finally, and perhaps most compelling, is that the parties' actions in fully performing the contract established a binding contract, even if one had not already been manifested by the parties' writings, and later confirmed by their declarations under oath. Maryland UCC section 2-204(1) "conduct by both parties which recognizes the existence of such a contract" is "sufficient to show agreement." There is no valid argument to

the contrary. Thus, it is nothing short of dishonest for the Division to state, over and over again, in its Opposition that the Distributorship Agreement is non-binding, invalid and improper.[4]

Section 5.2 of the Distributorship Agreement, titled Minimum Initial Purchase, provides: "The Distributor shall be required to purchase from the Company, as its initial purchase, no less than 15,000 units at the below specified prices." That purchase closed concurrently with signing the Distribution Agreement. The purchase price per unit, stated on Schedule A of the Distributorship Agreement, is $10. Thus, $150,000 became payable for the initial purchase under section 5.2 and section 7.2, $100,000 of which was payable immediately and $50,000 to be paid within 90 days. As both the Joseph Noel's and Andrew Whelan's declarations make clear, those payments were actually made. Moreover, Maryland UCC section 3-402 establishes that the sale occurred not upon shipment, as the Division contends, but when the contract was made ("A 'present sale' means a sale which is accomplished by the making of the contract.")

The Distribution Agreement contemplated that YesDTC would seek and obtain approval to sell such product in Japan. See last sentence of paragraph 1 of the Distribution Agreement: "Should Distributor be unable to gain regulatory clearance within six months of contract execution, this agreement is voidable at the option of the Distributor."

The Division contends, based on paragraph 1, that no revenue should have ever been recognized on this contract because the entire agreement was contingent on Japan's approval. That is not true. It was "voidable", not void *ab initio*. The Distributorship Agreement is silent as to whether or not the $150,000 that YesDTC paid for the initial purchase would be refunded by BIEL to YesDTC in the event YesDTC exercised its right to void the contract. Where the contract is silent, we look to the parties' intentions and, if that cannot be proven, to applicable law to determine the intent of the parties.

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[4] Division's Opposition, "not legitimate sales" (p. 4); "improper" (p. 5); "invalid" (p. 6).

Here, there is mutual agreement as to the parties' intentions. The most objective evidence of the parties' mutual intention is their actual performance. YesDTC made the $150,000 payments, when due, and never sought the refund of such payments. Moreover, YesDTC's principal, Joe Noel, and BIEL's principal, Andrew Whelan, signed consistent declarations attesting under oath their mutual understanding that if YesDTC exercised its right to void the Distributorship Agreement within six months under paragraph 1, BIEL would be entitled to retain the cash paid to purchase the initial installment of product, which it did. See Noel Declaration, ¶¶11-15; and Andrew Whelan Declaration, ¶5.

Section 2-106(3) and (4) of Maryland's UCC are entirely consistent with the parties' mutual intent. Those provisions state that upon termination or cancellation of an agreement, "all obligations which are still executory on both sides are discharged **but any right based on prior breach or performance survives**." *Id.* Emphasis added. Because the initial purchase was no longer executory as to YesDTC (paid in full before YesDTC abandoned its inventory),[5] BIEL's rights in such sale (entitlement to keep the purchase price) survive.

The Division ignores such undisputed facts. Its argument that the agreement is not binding is based on a quote from an accountant's draft memo. Such statement clearly does not rise to the level of admissible evidence, because it is clearly hearsay and an expert opinion by a layperson. Nevertheless, even if that statement constituted admissible evidence, the entire statement, taken in context, belies the Division's contention. The Division misleads the Court using ellipses to eliminate from that accountant's quote the determinative language of the quote. At page 6, the Division contends that the "YesDTC Agreement was not a binding sales

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[5] **YesDTC never exercised its right to void the Distributorship Agreement. YesDTC simply abandoned its inventory and the parties understood, due to YesDTC's inability to secure approval to sell the inventory in its sole license territory, Japan, that YesDTC would not fulfill the remainder of its obligations under that contract.**

agreement between the parties. The agreement contained a material contingency that affected delivery and performance." The Division cites footnote 4 as its authority, which in turn cites a draft document which follows an undated Bill and Hold Memo,[6] whose author is not identified, stating that "'There is no additional performance obligation for the seller but there is a *contingency* listed in the Distribution Agreement...' (emphasis added.)" Critically missing from the quoted language is the remainder of that accountant's explanation, which proves that full and fair disclosure was made to the auditors pertaining to this provision. A complete quote of that footnote upon which the Division relies (which on its face is a draft attachment to an undated and unsigned document titled BioElectronics Bill and Hold Memo Audit of 2009), is as follows:

> There is no additional performance obligations for the seller but there is a contingency listed in the Distribution Agreement, which said "*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, the agreement is voidable at the option of Distributor.*" Per the Company's understanding, our products are classified as level one (with the least amount of scrutiny) in the Japanese regulatory clearance process. Therefore, it is not likely that the Distributor cannot obtain such clearance. **In [the] event that the clearance cannot be obtained, the Company's position is that this clause only applies to future sales and will not impact sales that have already [been] made.**

Italics in original; bold and underscore added. See 2d Supp. Dec. A. Whelan, Exhibit 1.

The footnote, upon which the Division rests much of its case, was not written by BIEL or Andrew Whelan. 2d Supp. Dec. A. Whelan, ¶5, Exhibit 2. It was a draft prepared by Esther Ko, an outside accountant engaged to assist the auditors in their efforts to complete the audit of

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[6] The Division asserts that the memo was drafted by Andrew Whelan, but knows differently. The Commission staff expressly asked Robert Bedwell: "Before we go any further, I would like to ask a question. Is it your belief that Andrew Whelan wrote this memo?" Mr. Bedwell responded: "No." See Bedwell Transcript excerpt of page 140, attached to the 2d Supp. Dec. A. Whelan, Exhibit 1.

the 2009 financial statement of BIEL. The document was prepared for Andrew Whelan and Robert Bedwell to update them as to the bill and hold transactions research.

The "contingency" comment upon which the Division relies does not speak to the finality of the 15,000 unit initial purchase. Instead, it references only *future* purchase commitments. The Bill and Hold Memo clearly discloses the company's position to the auditors, as well as the factual research performed by Ms. Ko. The bolded quote above is entirely consistent with the declarations of both YesDTC's principal, Joe Noel, and BIEL's principal, Andrew Whelan, consistent with the meeting of minds reflected in the Distributorship Agreement, and consistent with the actual performance of the parties to the agreement. This footnote confirms that all conditions to the recognition of such revenue were satisfied when the parties signed the Distributorship Agreement and the first $100,000 payment was made.

The Division's omission of such critical language from the quoted text is inexcusable.

c. Delivery Occurred, Although Not Shipped.

Although the product was delivered to YesDTC by BIEL, it was maintained at BIEL's warehouse for YesDTC's benefit. It is true that the product sold to YesDTC never **shipped** (although the product sold to eMarkets has been and continues to be shipped to this day). That is because YesDTC never obtained approval from Japan, its sole licensed territory, to sell the product in Japan, and abandoned the product at BIEL. 2d Supp. Dec. A. Whelan, ¶6.

Mr. Whelan testified that YesDTC's rights in the product had been forfeited. Mr. Whelan, a non-lawyer, caught in an SEC investigation deposition, without knowledge of the charges the SEC was contemplating or an ability to prepare with his counsel adequately for such deposition, offered a layperson's unprepared answer. 2d Supp. Dec. A. Whelan, ¶7.

YesDTC's rights and obligations are set forth in the Distribution Agreement, and Mr. Whelan's testimony does not alter such terms. Under the Distribution Agreement, YesDTC

retained ownership rights in the product purchased with the initial purchase, but had no license to sell it having failed to obtain approval from Japan to do so in Japan, YesDTC's one and only exclusive territory. If YesDTC had a lawful use for such product, it had every right to ship it from BIEL to wherever such lawful use would occur. For example, had YesDTC purchased a license from BIEL for a different distribution area, it could have sold the product in such distribution area without having to purchase it a second time. 2d Supp. Dec. A. Whelan, ¶7.

Mr. Whelan's testimony was intended to convey that simple truth that in circumstances in which it was unlawful for YesDTC to sell its product, BIEL would not participate in such unlawful activity. That hypothetical never arose. YesDTC abandoned the product to BIEL. Accordingly, YesDTC never caused BIEL to ship that product. 2d Supp. Dec. A. Whelan, ¶6.

Nevertheless, delivery did occur on December 31, 2009, because the transfer of title and risk from BIEL to YesDTC occurred on December 31, 2009 and YesDTC had paid $100,000, and promised to pay the remaining $50,000 within 90 days under the terms of the Distributorship Agreement. The revenue recognized was actually received, as reported, and is retained to this day by BIEL. Recognition of such sale in the 2009 Form 10K filed by BIEL was appropriate. 2d Supp. Dec. A. Whelan, ¶9.

d. The Goods Sold Were Finished.

There goods sold to YesDTC were finished. 2d Supp. Dec. A. Whelan, ¶10. The Division has conflated the issue with issues pertaining to eMarkets' purchase, discussed below. There is no evidence, whatsoever, that the goods sold to YesDTC were unfinished.

2. eMarkets

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.

eMarkets stored 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 took exclusive ownership of the inventory, booked it as inventory, sold it, and shipped it to customers. At eMarkets' direction, BIEL 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 used by veterinarians for 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[7]

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

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.

a. There Was A Fixed Delivery Schedule.

Delivery from BIEL to eMarkets was made to eMarkets throughout 2009, and all such deliveries were completed on or before December 31, 2009. Delivery occurred when title and risk of loss passed, and the finished product was segregated in BIEL's inventory subject to eMarkets' instructions for shipment. 2d Supp. Dec. A. Whelan, ¶11. As Mary Whelan attested, and told Esther Ko at the time, eMarkets expected to have BIEL ship its product to customers before the end of 2010.

b. Sales Were Based On A Binding Contract Between BIEL and eMarkets.

eMarkets and BIEL entered into a written Distribution Agreement in February 2009. 2d Supp. Dec. A. Whelan, Exh. 3. Paragraph 19 states that Maryland law applies. The Distribution Agreement manifests, unequivocally, an intent to be bound. Included in that Distribution Agreement is a license to sell BIEL products, with minimum sales standards. Specifically, sections 2.3 and 2.4 provide that eMarkets must purchase 10,000 units the first year, 25,000 units the second year, 50,000 units the third year and 75,000 units the fourth year; and that failure to do so would permit BIEL to terminate the license to sell such products.

As detailed above, Maryland's UCC does not require a written agreement in order to create a binding agreement. "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Maryland UCC, §2-204(1). "A 'present sale' means a sale which is accomplished by the making of the contract." Maryland UCC, §2-106(1).

Here, the principals' declarations and their course of action, against the backdrop of their written Distribution Agreement, unequivocally manifests the existence of a binding contract.. The two principals have attested to the existence and terms of their agreement. eMarkets purchased the product in 2009, title passed to eMarkets in such products upon such purchase. eMarkets took all the risks associated with such product, and accepted delivery of such product at BIEL's warehouse. The purchase price promised was paid in full. Approximately $107,000 was paid before the end of 2009 and the remainder was paid within six months. There is no legitimate doubt that a binding contract existed under Maryland law as of December 31, 2009.

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. Under Maryland law, the foregoing facts establish a binding contract to sell BIEL's product to eMarkets.

c. The Product Was Delivered In 2009; and Shipped in 2009 And Thereafter.

It is important, when discussing "delivery", to separate the concepts of "delivery" with "shipment." Delivery occurs when title to the goods, along with risk of ownership, transfers. Delivery occurred when the parties had agreed to the terms of the sale and BIEL tendered finished product to eMarkets at BIEL's warehouse, as requested by eMarkets. Delivery was complete in 2009.

Shipment occurred when BIEL sent the products stored in its warehouse to eMarkets' customers or otherwise at eMarkets direction (eMarkets reimbursed BIEL for all related shipping costs and handling fees). In some cases, products were shipped to Mary Whelan for use in trade shows and other marketing endeavors. eMarkets directed BIEL to send product purchased by eMarkets' customers directly to such customers. Still other times after 2009, eMarkets donated some of the product to animal shelters.

The parties agreed that they anticipated that the inventory purchased and delivered throughout 2009 would be shipped by the end of 2010. Email exchanges from between Esther Ko and Mary Whelan confirmed such shipment schedule. 2d Supp. Dec. A. Whelan, Exhibit 2.

The Division conflates delivery and shipment to make its case. The Division's contention that the products were "never" delivered is false. The truth is that all of the product related to the eMarkets bill and hold transaction referenced in the 2009 Form 10K was delivered in 2009. As to shipments, BIEL made 89 shipments in 2009 alone to eMarkets' customers. To date, more than 10,000 have shipped. 2d Supp. Dec. A. Whelan, ¶15.

After delivery by BIEL to eMarkets, eMarkets' product was warehoused in a separate section of BIEL's warehouse. That does not render the contract invalid or the delivery ineffective. Indeed, such facts were fully disclosed to BIEL's auditor, Robert Bedwell, and BIEL's attorneys, and BIEL relied on such professionals in making such disclosures. A. Whelan Decl., ¶24; M. Whelan Exh. 2. See also p. 147 of Bedwell Investigative Deposition Testimony, at Exhibit 1 to 2d Supp. Dec. A. Whelan.

d. eMarkets' purchased finished product.

The Division at pages 5, 7 and 26 of its Opposition, misrepresents that the products purchased by eMarkets were not finished, relying on excerpts of deposition transcript testimony of Mary Whelan and Andrew Whelan, quoted out of context. The products sold by BIEL and purchased by eMarkets in 2009 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 particular eMarkets customers, per each customer's specifications, BIEL separately charged eMarkets and eMarkets separately compensated BIEL 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. Supplemental Declaration of Mary Whelan, ¶¶4-6. Although Andrew Whelan's testimony indicated that adhesive components were added, such comment would not apply to eMarkets' veterinary products. Because eMarkets' customers intended to use such products on animals with fur or hair, adhesives were not regularly, if ever, a component that was added to the eMarkets product that had been purchased from BIEL and was segregated in BIEL's warehouse.

Consistently, in the very same deposition transcript, at pages 219-221, Andrew Whelan clears up the record as follows:

> 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
> Page 220
> 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
Page 221
1 because I looked at it yesterday as a matter of fact.
2 Some of it's already boxed.

D. All Revenues Recognized in 2009 Complied Were Received, Never Refunded, and Fully Complied with GAAP.

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.

The Division contends, at pages 4, 5 and 17, that BIEL made no attempt to prove that it complied with GAAP. That is simply not true. 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 eMarkets and YesDTC transactions.

The second option was to book these transactions as "bill and hold" transactions. Based on the advice of BIEL's experts, Esther 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.

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, both YesDTC andeMarkets made initial purchases 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 as being in compliance with GAAP, 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 original Andrew Whelan Decl., Exhibit 2.

E. Other False and Misleading Statements in the Division's Opposition.

Consistently, the Division's Opposition makes the following false and misleading statements to the Court:

1. **False statement**: That "Kelly Whelan was an employee" of BIEL. Opposition, 2. **Truth**: She was not. See 2d Supp. Dec. A. Whelan, ¶17. The evidence cited by the Division at footnote 4 on page 2 (pp. 22-24 of Kelly Whelan's investigative testimony transcript), does not support the accusation. Kelly Whelan was a consultant, at times, for BIEL, but never an employee. Kelly Whelan never received a salary or a W2 from BioElectronics. One of the critical issues in this case is whether BIEL controlled IBEX and Kelly Whelan. If so, IBEX becomes an affiliate and IBEX's sales of convertible notes then would be tested on the much more stringent Rule 144 tests applicable only to affiliates. An employee arguably would be under the control of her employer. Accordingly, the false statement that Kelly Whelan was

employed by BIEL is intended to present a false basis for finding control. Accepting such false statement could undermine IBEX's entire defense under Rule 144 and Section 4(1) of the Securities Exchange Act.

2. **False statement**: That "as further incentive, a lump sum of free trading BIEL shares" were paid to IBEX in exchange for making a loan. Opposition at 2. **Truth:** No such lump sum of free trading BIEL shares was made to IBEX as part of IBEX making a loan to BIEL. 2d Supp. Dec. A. Whelan, ¶18,

3. **False statement:** That IBEX "amassed hundreds of millions of free trading shares". The Division cites Kelly Whelan's Investigative Transcript at p. 26. Division's Opposition, p. 3. **Truth:** That is not what the transcript says. See Stodghill Declaration, Exhibit 2, pp. 24-26. Instead, Kelly Whelan testified that she did not know how many shares IBEX held. *Id.* at 24. Pressed by the SEC counsel, she provided an estimate of more than 1 million. *Id.* at 26. 1 million is a fraction of 1% of "hundreds of millions." When asked how many shares of BioElectronics Corp had been issued to her or IBEX over the years, she responded that she did not know. *Id.* at 26. When asked whether it is more than 100 million, again she responded that she did not know. When asked if she or IBEX had sold over 100 million shares, she said yes. *Id.* at 27. Clearly, having sold over 100 million shares, is not the same as having "amassed" hundreds of millions of shares, as misrepresented by the Division. The former statement would not render the seller an affiliate, a critical issue in the case, while the misstatement by the Division might and was clearly calculated to leave the impression that IBEX was an affiliate based on a false statement that it had amassed massive stockholdings in BIEL.

4. **Misleading statement:** IBEX sold shares to "Liquidating Entities." Opposition, p. 3; Declaration of William D. Park ("Park Dec."), ¶9.[8] **Truth:** There is no liquidating entity identified or that exists with respect to the transactions at issue in this case. There were only private investors who did not identify themselves as liquidators and who were interested in purchasing IBEX's debt. These were private persons and entities who paid cash for debt, after IBEX had held that debt for, in most cases, many years. IBEX did not want such investors to liquidate such debt and IBEX and did not benefit from any such liquidation. IBEX was unaware what those entities would do with such debt, much less when, if ever, they would convert that debt to stock, and when, if ever, such entities would sell that stock into the public market. Obviously, IBEX did not seek out such investors to liquidate its stock. It would not need to do so. If IBEX had been interested in liquidating stock, it would have simply converted its debt, then sold the stock into the public market. No liquidator would be necessary in this case because there was already a liquid market for such stock in the public marketplace. It would not have sold its notes to a liquidating entity at a substantial discount to the public market because IBEX was entitled to convert and sell those shares in any event. The defined term, "Liquidating Entities", is intended to mislead the Court into believing that IBEX found professional liquidators to liquidate securities into the public market. There is no proof of such fact, because that is not what occurred.

5. **False statement:** IBEX's convertible loan agreements "grant[ed] IBEX twice the number of free trading shares it had sold for BIEL's benefit." Opposition, at 3. **Truth:** IBEX

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[8] Several of the Division's false statements mirror language contained in the "made to order" Declaration of William D. Park. Mr. Park's bias as a Senior Director of Enforcement Department for FINRA is obvious. He works for a body heavily regulated by the SEC as a fraud examiner, and thus works hand in hand with the Division in the enforcement efforts of FINRA and the SEC. The false statements cited herein from the Park Declaration should undermine any credibility that this Court otherwise would have for Mr. Park's expert opinion in this proceeding.

never sold shares for BIEL's benefit. IBEX sold stock for IBEX's benefit; and later sold convertible notes for IBEX's benefit. Declaration of Kelly Whelan, ¶¶1-176; Exhs. 1-167. The convertible notes did not grant IBEX any shares – and certainly not "twice the number of free trading shares" sold. IBEX received only a convertible note for its loan. That convertible note allowed IBEX to convert debt into stock at a 50% discount to the market on the date of conversion. The convertible note did not state that such shares would be free trading. Instead, the shares would only become free trading after the convertible note and stock to be issued thereunder had been held for at least the statutory period required under Rule 144. At no time did BIEL grant IBEX twice the number of free trading shares that IBEX had sold in order to fund the loan. That simply never happened. Kelly Whelan Declaration, ¶¶1-176; Exh. 1-167.

6. **Misleading statement:** "IBEX was not the only entity used for these transactions. Starting in mid-2010, St. John's entered into similar transactions." Opposition, p. 3. The false implication is that only IBEX and St. John's loaned money to BIEL. **Truth:** BIEL borrowed substantial funds from several other lenders, including those not related in any way to Andrew Whelan, on substantially similar terms. See 2d Supp. Dec. A. Whelan, ¶20.

7. **False statement**: "IBEX sold approximately 3.5 billion shares of BIEL stock to third party purchasers." Opposition, p. 3; Park Dec., ¶¶10, 16. (See footnote 7, above). **Truth:** As the Division concedes on page 4, "[i]n the majority of these transactions, IBEX simply sold to these Liquidating Entities the convertible notes it received from BIEL." As explained above, there were no liquidating entities involved in the transactions at issue in this case. Moreover, by equating the sale of convertible notes to the sale of stock, the Division misleads the Court by conflating transactions in which IBEX was a party (where it sold its notes privately to third parties), with transactions as to which IBEX played no role whatsoever (where those third parties allegedly decided to convert the notes sold by IBEX to them into BIEL stock and, after

conversion, sell those shares into the public market). Once IBEX sold its notes to third parties unrelated to it, it had no control over when those notes were converted or when the shares issued upon conversion would be sold or even notice that such third party was doing so. IBEX received none of the proceeds of such sales. If IBEX wanted to sell the stock, it could have legally done so by converting and selling into the public market in plain compliance with Rule 144, having held those notes for years before selling them to the third parties.

8. **False statement:** "Whelan directed the issuance of BIEL shares to IBEX and St. John's from BIEL's transfer agent, ordering that the shares be issued without restriction and attesting to the 'private placement' nature of those sales." Opposition, p. 4. **Truth**: First, Andrew Whelan never had any authority to order the transfer agent to issue shares without restriction. Transfer agents have independent duties that require them to conduct due diligence regarding issuing shares without restriction. In each case, BIEL's transfer agent required, among other things, a formal written legal opinion letter opining that issuance of the shares without restriction was lawful. St. John's never sold shares to any so-called "Liquidating Entities" or in any manner described as a "private placement." IBEX sold its convertible debt to private third parties. St. John's sold its stock through a registered broker.

9. **False Statement:** The Division falsely claims that the products sold to eMarkets were unfinished because they failed to include customized adhesive and Velcro straps "necessary to make the product complete and ready for shipment." Opposition, pp. 5-6. **Truth:** As detailed above and in the Supplemental Declarations of Andrew Whelan and Mary Whelan, the products sold to eMarkets were finished.

10. **Misleading statement:** "YesDTC paid BIEL $150,000 for these products by early 2010." Opposition, p. 6. **Truth:** Technically, the statement is not false. But, the implication of the statement, that the entire $150,000 was paid in 2010, rather than the year the

revenue was recognized, 2009, is inaccurate. $100,000 was paid on December 31, 2009; and $50,000 was paid on March 31, 2010. Noel Declaration, ¶¶4-6, Exhibit 2.

11. **Misleading statement:** "When describing the transactions to BIEL's auditors in the Bill and Hold Memo [footnote omitted], Whelan referenced the contingency in the YesDTC Agreement, but did not tell the auditors that BIEL *would not deliver* products to YesDTC without Japanese regulatory approval." Opposition, p. 7. **Truth:** First, the statement falsely implies that Andrew Whelan prepared the statements contained in the "Bill and Hold Memo". Second, that "Bill and Hold Memo" appears to be a draft. Third, the Division falsely implies that the "Bill and Hold Memo" constituted the only statements made to the auditors by BIEL and Andrew Whelan, such that if something was not stated in this draft memo, then it was never disclosed. None of the foregoing is remotely proven by the document upon which the Division relies. Indeed, the opposite is true. The auditors knew that Mr. Whelan did not prepare that memo, and were provided with the YesDTC Distributorship Agreement, which includes therein all of the relevant terms necessary to such disclosures. See Transcript of Investigative Deposition of Robert Bedwell, pp. 140-148, attached to the 2d Supp. Dec. A. Whelan, at Exhibit 1. Of course, BIEL would not have delivered the product purchased if YesDTC had intended to sell the product illegally, as BIEL would not knowingly participate in the commission of a violation of applicable law. The auditors presumably know that, and should presume that BIEL would not violate applicable law. Not telling the auditor that BIEL would not violate the law is not a material omission. Finally, there was no fact to disclose in terms of whether and when YesDTC could ship its purchased product, as the circumstances under which such products would be shipped are simply -- when doing so would be lawful. Had YesDTC sought possession of its products for legal and permissible use, such as Mr. Noel's own personal use, or, upon acquisition by YesDTC of another territory, use at a trade show or for sale of such products in

that territory, BIEL would, of course, have delivered such product. 2d Supp. Dec. A. Whelan, ¶23.

12. **False statement:** "IBEX retained a percentage of the money from the sales but funneled the rest to BIEL, and, in return, BIEL provided both a 'convertible loan' to IBEX and a new grant of unrestricted shares, which, in effect, replaced the shares IBEX sold." Opposition, p. 12. **Truth:** IBEX loaned money under the terms of convertible notes, held those notes often for three years or more, then sold some of that debt off to third parties in private sales. IBEX still holds a great deal of BIEL debt. IBEX used the proceeds of such sales as IBEX saw fit. In some cases, IBEX loaned money to BIEL in exchange for new convertible debt, most of which IBEX still holds. IBEX never funneled any money to BIEL. IBEX did not receive "a new grant of unrestricted shares" when such loan was made. IBEX received convertible debt only. It would have the right to shares only upon conversion and, if IBEX chose not to convert, it would have the right to cash on redemption. The new convertible note did not "replace[] the shares IBEX sold." IBEX sold its long-held convertible note. And, any new convertible note was not a replacement of the note sold, but a new convertible debt instrument issued in exchange and in the amount of any new loan made.

13. **False statement:** "The large number of transactions, coupled with the timing of IBEX's sales of BIEL shares and the transfer to BIEL of a substantial portion of the proceeds from those sales strongly indicates that Respondents engaged in a scheme to distribute unregistered shares into the public market." Opposition, p. 12; see also Park Dec., ¶17. **Truth:** The Respondents went to great lengths to document such transactions, secure legal opinion letters, disclose in public filings and otherwise comply with the federal securities laws applicable to such transactions. The large number of transactions, coupled with IBEX's dutiful compliance with the federal securities laws and timely reporting to the SEC of such transactions, strongly

indicates that Respondents engaged in a "scheme" to comply with the securities laws, not evade them. It is also noteworthy, again, that IBEX did not sell stock into the public market, as misrepresented, but sold convertible notes to private investors at a discount. If IBEX wanted to sell its shares into the public market, it would not have offered a discount. It would have converted the debt into stock and sold that stock into the public market, as it was entitled to do after holding such debt for more than two years. Another compelling fact against a conclusion that a scheme existed is the absence of any of the so-called liquidating entities from this proceedings. If a scheme existed, which it did not, it could not have been carried out without the unrelated so-called liquidating entities. It was those third party purchasers of IBEX's notes who converted the notes and sold the conversion shares into the public market. If IBEX's transactions with those persons violated the securities laws, so too did those third parties violate the securities laws when they sold such purportedly restricted shares into the public market. So, why are they not part of the case? Because the Division has no evidence of any such a scheme, other than the patently biased and self-serving declaration of Mr. Park.

14. **False statement:** "Given that the parties filed cross motions for these non-scienter claims, the parties are in agreement that the Court may decide the issues in advance of the hearing, based on the evidentiary record and the applicable law." Opposition, pp. 16-17. **Truth:** The Respondents do not agree that the Court may summarily dispose of any portion of this action in favor of the Division. Respondents contend only that the evidence establishes that no errors were made in such reporting, and/or that such errors, if any, were immaterial.

15. **False statement:** Respondents "concede that BIEL made a 'mistake' in recording the sales." Opposition, pp. 17-18. **Truth:** Again, the statement is false. The Division's citation in support of such statement is to Respondent's motion for summary judgment, at p. 2, where Respondents contend, in the alternative, that "[i]f there was a mistake"

that mistake would be immaterial. Emphasis added. Explaining the consequences of a mistake, assuming for argument's sake a mistake was made, does not admit that a mistake was made.

16. **False statement:** "[T]hey had no orders or customers." Opposition, p. 18, fn. 65. **Truth:** eMarkets had been purchasing and selling BIEL products throughout 2009, had existing customers at the time of the 2009 purchases from BIEL, and was actively negotiating to sell to large retail pet stores. In 2012, the Division was provided with over 400 emails in Mary Whelan's documents with the details of shipments and copies of customer orders and invoices. 89 sales and shipments were made in 2009 from BIEL's warehouse of eMarkets' inventory to eMarkets' customers. 2d Supp. Dec. A. Whelan, ¶15.

17. **Misleading statement:** The Division falsely implies that Respondents have fabricated evidence of delivery, shipment, possession, passing of title, transfer of risk of loans and a final binding agreement among the parties. Opposition, p. 18. **Truth:** That is simply not true. The outrageous accusation, devoid of evidentiary support, should be stricken.

While the Respondents are reluctant to accuse the drafter of the Opposition of sinister motives in making the foregoing blatant misrepresentations, it is noteworthy that if the Division's false and misleading statements to this Court were tested using the same unbridled prosecutorial zeal that has fueled this case, and the Division was forced to defend such false and misleading statements in the same stacked deck proceedings that Respondents are compelled to face in this proceeding, the Division could not successfully defend a charge that it attempted to defraud this Court.

III. LEGAL ARGUMENT.

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

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).

The Supreme Court in *Basic Inc. v. Levinson,* 485 U.S. 224 (1988) rejected the use of numerical formula to determine materiality:

> A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.

Id. at 236, n. 14; and *Ganino v. Citizens Utilities Company* 228 F. 3d 154, 162 (2nd Cir. 2000).

> Under the governing principles, an assessment of materiality requires that one views the facts in the context of the "surrounding circumstances," as the accounting literature puts it, or the "total mix" of information, in the words of the Supreme Court. In the context of a misstatement of a financial statement item, while the "total mix" includes the size in numerical or percentage terms of the misstatement, it also includes the factual context in which the user of financial statements would view the financial statement item. The shorthand in the accounting and auditing literature for this analysis is that financial management and the auditor must consider both "quantitative" and "qualitative" factors in assessing an item's materiality.[fn omitted] Court decisions, Commission rules and enforcement actions, and accounting and auditing literature [footnote omitted] have all considered "qualitative" factors in various contexts.

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While paying lip service to the foregoing standard, the Division claims that because the bill and hold transaction revenue was 47% of the gross revenues of BIEL in 2009, it must have been material. Such a bright-line rule is inconsistent with the *Basic* and *Ganino* decisions.

As detailed in the Motion for Summary Disposition, the revenue was properly recorded in 2009. Even assuming, *arguendo*, some portion of that $366,000 revenue is determined to have

been prematurely reported in 2009, and instead belonged in later years, the first question that the Court would need to address is: how much? That number would then have to be compared to the massive cash flow shortfalls and sustained eight figure losses suffered by BIEL, and the detailed disclosures in the same 2009 Form 10-K warning about BIEL's viability as a going concern. In light of all of the circumstances, this Court should find that such sum, if any, would be immaterial.

B. Books and Records And Internal Controls Claims.

Section 13(b)(2), upon which the Division's claims are based, applies only to "Every issuer which has a class of securities registered pursuant to section 12 [15 USC §78l] of this Act and every issuer which is required to file reports pursuant to section 15(d) [15 USC §78o(d)] of this Act." 15 U.S.C. §78m. Because BIEL does not have a class of securities registered pursuant to section 12 of the Act and is not required to file reports pursuant to section 15(d) of the Act, Section 13(b)(2) does not apply.

Footnote 1 of page 1 of the Opposition, and footnote 2 of page 2 of the Order instituting this proceeding, argues: "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." Notably, the Division cites no law and offers no evidence to support its assertion. BIEL's registration was withdrawn formally on March 18, 2007, well before any of the alleged transactions and disclosures made in this case. It is axiomatic that when BIEL withdrew its registration statement, it was no longer effective for any purpose, including to impose future reporting requirements arising from Section 13(b)(2).

The premise of the books and records and internal controls claims is that the two isolated transactions in 2009 characterized as bill and hold transactions were improperly recorded. Even

if Section 13(b)(2) was applicable, which it is not, because those transactions were properly booked, in accordance with GAAP, there was no Section 13(b)(2) violation.

The Division contends that BIEL lacks sufficient internal controls, and cites as proof of that fact the voluntary statements made by Andrew Whelan and BIEL in the 2009 Form 10K. But, the same form explains why there are not more internal controls, such as more outside directors and audit committee staff. It is because there are insufficient resources to pay for such personnel. In light of BIEL's financial limitations, and complete and accurate financial reporting, this Court should find that there is no violation of Section 13(b)(2), even if it finds that Section 13(b)(2) applies, which it does not.

BIEL's countermeasures to ensure proper accounting, despite the financial inability to engage additional personnel, was to hire John Glass, CPA and Esther Ko, CPA as well as purported lawyer, Drew Walker, to assist BIEL's executive, Andrew Whelan, to compile the financial statements in accordance with GAAP. BIEL used outside competent accountants to prepare the financial statements. Those financial statements were then audited by Robert Bedwell's independent accounting firm through 2010 and were scrutinized by the OTCMarkets examiners thereafter to assure compliance with applicable reporting guidelines. The financial statements are accompanied by either a completed audit certification attesting to the disclosures' compliance with GAAP, or with an Opinion Letter attesting to the disclosures from BIEL's Securities Attorney.

Independent director, Richard Staelin, a highly qualified member of BIEL's Board, and a former Deputy Dean of the Fuqua School of Business at Duke University, provided meaningful oversight to BIEL's sole executive, Andrew Whelan, as well as BIEL's accountants and auditor. BIEL's internal controls were adequate under the circumstances of a company with sparse

resources and few transactions and resulted in accurate financial statements. 2d Supp. Dec. A. Whelan, ¶¶30-31.

The Division contends that Andrew Whelan, individually, is liable for the Section 13(b) violations. In order to allege a claim against Defendants for aiding and abetting a company's violation of these provisions, the SEC must allege facts demonstrating that: (1) Countrywide violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder; (2) Defendants had knowledge of the primary violation and of his or her own role in furthering it; and (3) Defendants provided substantial assistance in the primary violation. See *Ponce v. SEC*, 345 F.3d 722, 737 (9th Cir. 2003).

First, as stated above, Section 13(b) is inapplicable to BIEL's financial statements. Moreover, BIEL's books and records are accurate and its internal controls were adequate. Thus, there can be no personal liability of Andrew Whelan.

The Division alleges that Andrew Whelan committed wrongful acts in connection with the premature recordation of the eMarkets and YesDTC transactions; and by failing to ensure that BIEL had sufficient internal controls, despite its inability to pay for them. Both arguments fail scrutiny. As detailed above, the eMarkets and YesDTC transactions were properly reported. The internal controls were adequate to ensure that the books and records were accurate.

Moreover, the evidence discussed above reflects that Andrew Whelan had no knowledge of the primary violation alleged, because the issues are complex and he reasonably relied on his accounting professionals in making the disclosures at issue. The Division contends that Andrew Whelan cannot defend his actions based on his good faith reliance on his accountants and auditors because Andrew Whelan did not make full disclosure that, for example, the eMarkets and YesDTC transactions were invalid and that the delivery schedule was insufficient. For the reasons discussed above, the transactions were, in fact, legally binding and an adequate delivery

schedule was subject to the parties' mutual agreement. The disclosures to BIEL's auditor, Mr. Bedwell, were open and accurate. He and his firm worked closely with Esther Ko and Andrew Whelan to determine the facts, reviewed emails with eMarkets and YesDTC confirming the delivery schedule, reviewed the contracts at issue, and came to the correct conclusion as to the proper booking of that revenue. At paged 140 through 148 of the Bedwell Deposition transcript (2d Supp. A. Whelan Dec, Exhibit 1), Mr. Bedwell confirmed that where the customer says that he or she expects to ship the product before a date certain, that is sufficient, under some circumstances, such as these, to constitute a fixed delivery schedule. Mr. Whelan reasonably relied on Mr. Bedwell's advice. Mr. Bedwell testified as follows, starting at page 14:

14 Q I understand. I am just trying to be more general.
15 And just generally speaking, would more -- would it be necessary
16 to be more specific, in your opinion, in terms of a delivery
17 date, to meet that fixed delivery schedule criteria; without
18 regards to this transaction, just generally speaking?
19 A Again, I would want to see a specific schedule that
20 says we're going to take delivery or such-and-such number of
21 units by such-and-such date.
22 Q Okay. And so, in your opinion, that would constitute
23 a fixed delivery schedule?
24 A I'm not sure what you are asking me there.
25 Q Well, let me put it to you -- it's not a trick
[148]
1 question. Let me put it to you like this: If I say I'm going
2 to take 100 units within the next three months, would that
3 constitute a fixed delivery schedule in your opinion?
4 A No. It has to be taken in the context of a
5 transaction, as it's been explained to us. So if, for whatever
6 reason, the customer, for example, has their own customers that
7 say, okay, we'll take X number of units by such-and-such a date,
8 and the customer doesn't have the warehouse to store the goods,
9 you know, my client's customer, then I may be willing to accept
10 an explanation that I am taking delivery of X number of units by
11 this date, because the resale customer won't take delivery until
12 a certain point in time.
13 So if you're talking in a theoretical standpoint, then

14 that would be, I believe, an acceptable explanation --
15 Q Okay.
16 A -- for why the customer would request a bill and hold
17 transaction.
18 Q And in your opinion that would -- the scenario that
19 you outlined, that would meet bill and hold transaction
20 criteria?
21 A Again, it's a fixed schedule for delivery of the
22 goods, it must be reasonable. The reasonableness, from that
23 standpoint, would be in the context of the transaction; the
24 resale customer doesn't want to take possession of the goods
25 until a certain date. I think it's very common.

Mr. Bedwell's testimony was not hypothetical. He testified consistently with his advice to BIEL that because eMarkets and YesDTC could not take shipment of the goods due to warehouse restrictions of this medical product, it was reasonable to accept their representation that they expected to take shipment by the end of 2010 as a fixed delivery schedule. Andrew Whelan received the same advice, after giving Mr. Bedwell the agreements and any and all other documents and information sought, and reasonably relied on that advice in signing the 2009 Form 10k on behalf of BIEL.

IV. CONCLUSION.

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

Dated: Santa Monica, California
July 11, 2016

CORRIGAN & MORRIS LLP
By: _____
Stanley C. Morris
Attorneys for Respondents