

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

REVOLUTIONS MEDICAL CORP.
and RONDALD L. WHEET,

Defendants.

Civil Action No. 1:12-cv-03298-TCB

**BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
OF DEFENDANT REVOLUTIONS MEDICAL CORP.**

Defendant Revolutions Medical Corp. (“RMC”) submits this brief in support of its Motion for Summary Judgment.¹

RMC incorporates herein by express reference the sections entitled “Introduction”, “Allegations Against Defendants”, “Factual Background” and “Argument and Citation of Authority – Applicable Legal Standards” contained in the Wheat brief.

A. RMC Is Entitled To Summary Judgment

1. The Press Releases - Generally

¹ RMC and Rondald L. Wheat (“Wheat”) have jointly submitted a statement of material facts in support of their separate motions. Wheat has submitted a separate brief in support of his Motion for Summary Judgment (“Wheat Brief”).

Each press release had a section called the “Investor Resource Center” that contained click throughs to RMC’s website, a demonstration video for the syringe and other information for investors and also contained a broad safe harbor disclaimer for forward-looking statements.² Before August 2010, the last press release was issued in May, 2010 because RMC had filed an S-1 registration statement on May 24, 2010 and was in a quiet period.³ *App. #6, cover sheet; Key SEC⁴ 80/2-9; PX 32 at 164-165.*

2. The Statements In The Press Releases Were True And Accurate When Made Or There Was A Reasonable Basis To Believe They Were True And Accurate When Made

a. The Phrase “Market Samples” Was Not Misleading – August 24 and September 1

The SEC claims that the use of the phrase “market samples” is inherently misleading without further explanation that it does not mean syringes being commercially manufactured and suitable for human use. The August 24 press release is clear in its title and in the body of the release that the syringes were market samples. It never states, suggests or implies that the syringes were from a final production run or for human use. In fact, it uses the word “pilot” to describe the run of syringes as opposed to “final”, “mass produced”, “ready for sale”, or another phrase. The Oxford Dictionary defines “pilot” as “done as an experiment

² See, e.g., *PX 32 at 155-156*. The July 8, 2011 press release did not contain the last sentence.

³ See <http://www.sec.gov/answers/quiet.htm>.

⁴ Deposition of Byron Scott Key on September 7, 2011 in the SEC Investigation styled “*In the Matter of Revolutions Medical Corp.*”, SEC File No. A-03288, which preceded the filing of this case (“SEC Inv.”).

or test before introducing something more widely.”⁵ That is exactly the meaning in the press release. It also refers to “final[izing] negotiations with manufacturers” which clearly tells the reader there are none at that time. The September 1 press release likewise refers to market samples, not syringes from a final production run, and does not refer to them as ready for human use. There is no basis to believe that a reader would be misled by the use of the phrase “market samples”, and the SEC has provided no evidence to the contrary. Moreover, there is certainly no requirement that a company provide every detail about a product in every press release when what is stated about the product is entirely accurate.

Any press release also must be read in the context of the other press releases issued at or about the same time. As discussed more fully below, on September less than three weeks later on September 17 RMC announces its first manufacturing agreement. It is absurd to think that one might have final syringes ready for human use before it even manufactures them. The statements with respect to the “market syringes” were true, accurate and complete when made.

b. RMC Did Not Misrepresent The Status Of Manufacturing - August 24, September 1, September 10, September 17, September 22 and July 8

⁵ http://www.oxforddictionaries.com/us/definition/american_english

It is undisputed that since February 13, 2009, RMC had a 3ml syringe (“the blue syringe” – *DX I*) that was fit for human use, cleared by the FDA and available to be sold in the U.S. So RMC did have a syringe that was ready to be commercially manufactured and sold at any time. The real issue is whether RMC was required to go further and state that the redesigned syringe was not being commercially manufactured and sold at the time of these releases. Again, the context of these releases is that they are discussing the development of the redesigned syringe, and nowhere does RMC state, suggest or imply it is currently mass producing this syringe or selling it right now. In fact, the press releases talk about being able to finalize negotiations with manufacturers⁶ and distributors⁷, including “potential future”⁸, “initial global”⁹ and “initial” distributors¹⁰ and “preliminary” (not final) sales orders¹¹. The September 22 press release discusses a presentation to “new prospective distributors” and plans “to interview and engage new prospective distributors”.¹² The September 17 press release¹³ states RMC has now finalized its manufacturing agreement with MIG which is its “first manufacturing relationship” which would lead any reasonable reader to understand that commercial manufacturing has not yet begun and quotes Wheet as stating this

⁶ August 24, *PX 32 at 155-156*.

⁷ August 24, *PX 32 at 155-156*.

⁸ September 1, *PX 32 151-152*.

⁹ September 1, *PX 32 151-152*.

¹⁰ September 17, *PX 32 at 138-139*.

¹¹ August 24, *PX 32 at 155-156*; September 17, *PX 32 at 138-139*.

¹² September 22, *PX 32 at 134-135*.

¹³ *PX 32 at 138-139*.

is the first manufacturing relationship. RMC also issued press releases on September 3 and September 7 in which it specifically discussed its negotiations with MIG to manufacture the syringe.¹⁴

There is no basis to believe that a reasonable reader might be misled as to the status of manufacturing when RMC is repeatedly stating it is negotiating with a potential manufacturer and then just concluding “its first manufacturing relationship”. This allegation is simply without any factual support.

c. RMC Did Not Misrepresent Anything Related To Testing, Regulatory, Packaging And Logistics - August 24, September 1, September 10, September 17

First, the SEC misrepresents what was stated in the August 24 and September 1 press releases when it states RMC stated that all testing, regulatory, packaging, and logistical hurdles would be met and it would have a syringe ready for commercial manufacture and distribution “over the coming weeks”. RMC actually stated in the August 24 press release it could “finalize negotiations with manufacturers, distributors and begin announcing preliminary sales orders over the coming weeks”,¹⁵ and in the September 1 press release stated “over the next several weeks, [it would] be sending out market samples, confirming interest and commitments, and signing distribution agreements”.¹⁶

Second, RMC, in fact, did do those things “over the coming weeks”. It

¹⁴ PX 32 at 147-148, 145-146.

¹⁵ PX 32 at 155-156.

¹⁶ PX 32 at 151-152.

entered into the Manufacturing Agreement with MIG on September 17, and worked to develop a distribution network. By September 17, O'Brien had already identified more than 200 distributors worldwide. *O'Brien SEC*,¹⁷ 76/15-19. RMC was waiting to send them packages with sample syringes. *O'Brien SEC*, 76/17-19. O'Brien sent letters and packages to these potential distributors and received a lot of responses and interest ("they really loved it"). *O'Brien SEC*, 123/4-11. Most responses inquired as to when RMC could come see them and set up for an order. *O'Brien SEC*, 123/14-16. O'Brien also had his own network of primarily international distributors that he worked with for 15-20 years who were interested in the syringe, the distributor list from Becton Dickinson, and a distributor list from another one of RMC's competitors, which were public information. *O'Brien SEC*, 122/22-25, 123/1-7. In November, 2010, RMC had a booth at the world's largest medical show called Medica in Dusseldorf, Germany, and Wheet, Theriault, O'Brien and Key met with potential distributors there. *PX 32 at 128-129, 132-133, 133-135; Wheet 4/23/14*,¹⁸ 76/14-21, 78/10-15; *O'Brien SEC*, 104/19-105/2; *Key SEC*, 39/6-16, 65/17-66/25. After Medica, several of them went to London and met with additional potential distributors there. *Theriault 8/24/11 SEC*,¹⁹ 125/18-24; *PX 32 at 130-131*. Prior to going to Medica, RMC sent out a letter to certain potential distributors to determine what kinds of orders those distributors would

¹⁷ Deposition of Thomas O'Brien on November 11, 2011 in the SEC Inv.

¹⁸ Deposition of Rondald Wheet on April 23, 2014 in this case.

¹⁹ Deposition of Richard Theriault on August 24, 2011 in the SEC Inv.

give RMC if RMC had the syringe available for sale at that time. *O'Brien SEC, 102/19-103/7*. Among the responses received was one from Israel for probably 10 million syringes. *O'Brien SEC, 103/2-4*. RMC also received pre-production commitment letters in November, 2010, which indicated an intent to distribute once the syringes became available, from a number of potential distributors. *Wheet 4/22/14,*²⁰ *170/25; O'Brien,*²¹ *80/1-82/1; DX 19*. Last, in RMC had communications with other potential distributors throughout the world, including distributors in Israel, South Africa, Panama, Costa Rica, Nicaragua, Chile, Kuwait, Russia and the Middle East. *O'Brien, 81/5-82/1; DX 19*. RMC did all of these things “over the coming weeks”.

Third, there was no “regulatory” hurdle to be cleared because RMC already had FDA clearance for the syringe. Rothkopf had decided a letter to file for the redesigned syringe would suffice, and Theriault had repeatedly assured RMC that the syringes produced by MIG would easily pass Rothkopf’s tests.

Fourth, RMC did have quality system documentation by the time it was expecting syringes in 2011, and Rothkopf testified that it would only take 60-90 days to implement them, *Rothkopf SEC,*²² *26/8-9, 30/19-31/4*, which is about the same time it takes to order, manufacture and ship the syringes to Charleston. *Wheet 4/23/14, 52/8-10*.

²⁰ Deposition of Rondald Wheet on April 22, 2014 in this case.

²¹ Deposition of Thomas O’Brien on May 22, 2014 in this case.

²² Deposition of David Rothkopf on December 14, 2011 in the SEC Inv.

Fifth, that these items could be readily accomplished is evidenced by the fact that once RMC discovered Theriault's fraud in late 2011, and despite having to start literally from the beginning with only the blue syringe, RMC had Yeso-med reverse engineer the blue syringe, produce final syringes, complete all required testing, set up all necessary quality systems, have final syringes shipped to Charleston and have them pass an FDA audit in Charleston in less than a year. *Wheet* 4/23/14, 51/14-52/10, 54/25-55/6, 56/14-57/5; *PX 32* at 61-62, 77-78; *Stephen Wheet*,²³ 92/13-21.

This allegation by the SEC is without merit.

d. RMC Did Not Represent The Status Of "Preliminary Sales Orders" And Distribution Agreements With Third Parties - August 24, September 1, September 17, September 22

This claim by the SEC is refuted by the language of the press releases themselves which state that RMC could now finalize negotiations with manufacturers and distributors,²⁴ that it was planning to interview and engage new prospective distributors,²⁵ that it was in a position to sign initial distributors and gauge preliminary sales volume,²⁶ that it could begin announcing preliminary sales orders over the coming weeks,²⁷ that it was entering the final stage of the process

²³ Deposition of Stephen Wheet on May 2, 2014 on in this case.

²⁴ August 24, *PX 32* at 155-156.

²⁵ September 22, *PX 32* at 134-135.

²⁶ September 17, *PX 32* at 140-141.

²⁷ August 24, *PX 32* at 155-156.

to determine its initial global distributors,²⁸ that potential future distributors had been narrowed down,²⁹ that over the next several weeks, it would be confirming interest and commitments,³⁰ and that the timing could not be better.³¹ The phrases and words “could now finalize”, “planning to”, “new prospective”, “potential future”, “initial” and “preliminary” make it clear to any reader that these actions have not yet occurred. Nowhere in these press releases does RMC state, suggest or imply that it has entered into any binding agreements with distributors or that it has received any “final”, “binding” or “firm” sales orders. The statements in the press releases are future looking statements about what it was going to do in the future. In fact, the evidence is that RMC then did these things with respect to distributors and sales as discussed immediately above. These press releases were accurate in all respects.

e. RMC Had An Actual Or Prospective Contract With The U.S. Department Of Defense As Of September 10 – September 10

The SEC’s allegation is refuted by the emails between RMC and the Navy group administering the program at issue. First, the press release states that RMC is “to receive contract with the United States Department of Defense HIV/AIDS Prevention Program (DHAPP) for multiple countries for its proprietary 3cc

²⁸ September 1, PX 32 at 151-152.

²⁹ September 1, PX 32 at 151-152.

³⁰ September 1, PX 32 at 151-152.

³¹ August 24, PX 32 at 155-156.

RevVac Safety Syringe.” That references an event that clearly is to occur in the future so it is obviously a future looking statement.

Second, it was a truthful statement. DHAPP was designed to help stop the spread of HIV/AIDS among the 80 militaries participating in it and was overseen by the Navy. *Compton SEC*,³² 27/19-23. On July 27, 2010, the Navy told RMC that its proposal had been “approved”. *App. #13*. The next day the Navy said it would receive official notification in the next few days and that the base year revenue would be \$175,000 with option years at higher amounts. *App. #13*. RMC received official notification on August 3, 2010 that the Navy review panel had conditionally approved its proposal and provided specifics regarding it.³³ *App. #14; Wheat 4/23/14, 150/21-151/5, 156/7-9, 175/16-22; Compton SEC, 23/18-25, 26/11-16, 27/7-12, 28/11-15, 103/15-18.*

Before the September 10 press release was issued, there was a conference call between RMC, Brodine and another Navy person during which Brodine congratulated RMC on being awarded the “contract”. *Wheat 4/23/14, 151/6-10, 159/10-160/21*. On September 9, 2010, the Navy told RMC “the award will come electronically and I’m looking at an award date on or before 30 September 2010.” *App. #15; Wheat 4/23/14, 154/1-9.*

³² Deposition of Ernest Compton on May 25, 2011 in the SEC Inv.

³³ RMC was told Dr. Stephanie Brodine (“Brodine”), was being assigned to work with it, that it needed to submit a statement of work for \$175,000, that it would involve the countries of India, Vietnam, Uganda and Botswana and that the total number of syringes needed would be approximately 600,000.

The first indication that the money might not be coming was when RMC was told on September 28 that “Unfortunately, there are no FY10 funds remaining [for DHAPP].” *App. #15*. RMC was formally told on October 13, 2010 that its grant would not be funded. *App. #16 at RTE0000557*.

Over the next several months and into 2011, RMC contacted the Navy to determine what happened, contacted the office of Senator Jim DeMint (S.C.) for help which, in turn, contacted the Navy, and wrote letters to both DeMint’s office and the Navy. *App. #17-19*. RMC was given hope that funding would still be coming and told by the Navy that it would be glad to see RMC reapply in the next fiscal year, but the funds were spent elsewhere. *App. #16 at RTE0000557; Wheat 4/23/14, 194/23-195/3; O’Brien SEC, 41/18-42/18, 70/23-71/5, 99/25-100/4; Key SEC, 74/10-23; Compton SEC, 25/3-16, 32/14-33/4, 34/18-24*.

Between when the September 10 press release was announced and September 30, RMC’s stock was attacked electronically by short sellers who also contacted the Navy to attack RMC. *Compton SEC, 24/16-25/5, 29/1-7, 78/21-79/11, 95/21-96-1, 98/1-5*. Brodine told RMC that as soon as the press release was issued, the Navy was flooded with telephone calls from people claiming, among other things, that RMC was not a real company, that it had no patents, and that it operated out of a trailer down by the river in Charleston and that these telephone calls damaged it in the eyes of the Navy and caused it to be defunded. *Key SEC,*

68/24-69/10, 71/14-18, 74/15-17; *Compton SEC*, 24/23-25/5, 27/1-6, 30/19-23, 31/12-32/7, 80/5-12, 95/21-96/1; *Wheet* 4/23/14, 140/1-23.

There was, in fact, significant shorting taking place in RMC's stock during this period. *PX* 58; *App.* #20. Two individuals, Philip Maurice Hicks ("Hicks")³⁴ and Timothy Sykes ("Sykes"), had been posting negative and derogatory comments about RMC on internet message boards during this period. *See App.* #29 *for examples*. They also published who to call at the Navy and their telephone numbers and encouraged short sellers to contact the Navy to denigrate RMC to drive down its stock price. *Key SEC*, 69/1-6, 76/25-77/16, 78/2-24, 80/12-20; *Compton SEC*, 27/2-6, 79/24-80/11. Hicks also sent a letter to the Charleston Post and Courier which then published an article on September 15, 2010 about Hicks and Sykes shorting RMC's stock. *O'Brien SEC*, 42/22-43/21; *Key SEC*, 71/14-19; *App.* #22. Hicks' actions were so egregious and damaging that RMC and Wheet sued him in September, 2010, in the Court of Common Pleas in the County of Charleston, South Carolina, for libel and defamation as a result of engaging in an internet cyber smear campaign to destroy RMC and Wheet. *App.* #23; *PX* 32 *at* 136-137. RMC obtained a judgment against Hicks for \$5.1 million, and Wheet

³⁴ Hicks states on his website, www.hammondhicks.com, that he is a retired certified public accountant. *App.* #21. In fact, his license is listed as "forfeited" by the North Carolina State Board of CPA Examiners. If he had retired, his license would be listed as "retired", "retired status" or "inactive" per the Glossary at the website of the North Carolina State Board of CPA Examiners. Hicks also states on his website that he is "a correspondent for the SEC and the National Office of the IRS fighting White Collar crimes." *App.* #21.

obtained a judgment for \$15.01 million on June 25, 2013. *App. #24; PX 32 at 1-2, 79-80.*

With respect to the September 10 press release, the undisputed facts are that RMC was told it had been approved, was congratulated on being awarded the “contract” and was told the award would come on or before September 30. Equally important is that it did not receive any indication that the money might not be coming until September 28 and was not formally told that it would not receive the money until October 13, both of which were obviously after the press release was issued. Even after that, though, it continued to work to obtain the money. When the September 10 press release was issued, RMC accurately stated it expected “to receive” the contract in the future. That statement was true.

f. RMC Did Not Misrepresent Its Relationship With Respect To The Department Of Defense Logistics Agency – July 8, 2011

The last press release at issue was issued on July 8, 2011. The SEC claims that rather than having a final product in the “supply chain,” RMC had merely applied for and received a unique identification number that allowed the company to include its products in a catalog for the Department of Defense Logistics Agency (“DLA”).

Based on the information it received from Theriault, RMC believed MIG was production ready. That meant syringes would be available for purchase

through the DLA for anyone placing an order. Therefore, that statement had a reasonable basis when it was made and is not actionable.

3. The Alleged Misstatements Or Omissions Were Not Material And Did Not Have A Statistically Significant Positive Impact On RMC's Stock

a. The Press Releases Had No Statistically Significant Positive Impact On RMC's Stock

There is no evidence that the press releases had a statistically significant positive impact on RMC's stock price. In fact, it establishes that they did not. Under the equity credit line agreement with Auctus, DX 76, 78, RMC could sell stock to Auctus up to a total of \$10 million. *Sollami*,³⁵ 17/15-18/8, 21/11-21; *Sollami SEC*,³⁶ 37/13-18; *Wheat* 4/23/14, 64/12-65/8; DX 76, 78. RMC submitted a drawdown notice that requested it be paid a certain amount, and Auctus would review it and, subject to certain conditions, give RMC money up to the amount requested. *Sollami*, 17/3-14, 22/9-23/19, 24/14-16, 28/1-4, 29/1-30/1, 38/2-15; *Sollami SEC*, 28/13-21, 37/13-18; DX 79, 80, 86, 87; DX 76 – Ex. A; DX 78 – Ex. A. In return, Auctus would receive RMC stock. *Sollami*, 24/14-25/3, 42/4-45/18; *Sollami SEC*, 28/13-21. The purchase price Auctus paid was equal to 97% of *lowest* closing bid price during the five trading days following the date of the drawdown notice. *Sollami*, 42/4-45/18; DX 76, 78. Auctus expected to and did make a profit selling the RMC stock. *Sollami*, 24/22-25/3, 42/20-43/12, 51/6-20;

³⁵ Deposition of Alfred Sollami on June 2, 2014 in this case.

³⁶ Deposition of Alfred Sollami on October 6, 2011 in the SEC Inv.

Sollami SEC, 29/19-22, 32/9-12; *DX* 81-84, 86. In all, RMC received \$1,111,228. *Sollami*, 38/2-15, 53/10-20; *DX* 79, 86. The last notice was submitted on May 3, 2011. *Sollami*, 28/17-19; *DX* 86. Importantly, it did not matter to Auctus where the RMC stock price was. *Sollami SEC*, 34/17-23. Auctus does not believe it was defrauded, cheated or taken advantage of in any way by RMC. *Sollami*, 48/4-15.

If, as claimed, RMC really was trying to push its stock higher through the release of a press release, it would want to issue a drawdown notice at or about the same time as the press release and would want its stock price to increase significantly immediately after it was issued and then stay at that level or continue increase for the next five trading days. If it did not increase immediately or had one bad day out of five, RMC did not benefit under the payment formula.

The August 24 press release and the drawdown notice submitted the same day (*DX* 86) were preceded by other press releases issued on three of six prior trading days that contained positive news which could have positively impacted RMC's stock price.³⁷ During the five day trading period after the August 24 drawdown notice, another press release containing positive news was issued.³⁸ But

³⁷ The August 16 press release announced it had begun clinical applications and the validation process of its MRI software tools which was another product it was developing. *PX* 32 at 162-163. The August 18 press release announced it had detailed studies to expand the value of its proprietary MRI imaging tools. *PX* 32 at 160-161. The August 20 press release announced additional details regarding clinical studies related to the MRI technology and the presentation of a related paper by one of the doctors working with RMC on it. *PX* 32 at 157-158.

³⁸ The August 30 press release described an award for medical design excellence that should properly have been attributed to RMC. *PX* 32 at 153-154.

even after all this positive news, RMC received less than a fraction of a penny (\$.0013) above the August 24 closing price. *App. #25*.

After the September 1 press release was issued, RMC did not even submit a drawdown notice to Auctus until six days later on September 7. *DX 86*. In addition to the September 1 press release and the press releases issued on August 16, 18, 20, 24, and 30, additional press releases were issued on September 3 and September 7³⁹ in the period right before the September 7 drawdown notice was sent. That means press releases containing positive news were announced on four of five trade dates and nine of seventeen trade dates immediately prior to the September 7 drawdown notice. Two more press releases were issued after the drawdown notice was sent during the five day valuation period.⁴⁰ The immediate market reaction to the September 1 press release was that the stock price ***dropped*** from \$.68 to \$.59 or 13%. *App. #25*. Moreover, at the end of all of this, RMC received only \$.0742 above the closing price on the date the September 7 drawdown notice was sent. *App. #25*. The immediate drop in price and the subsequent closing prices hardly constitutes a statistically significant positive impact on the stock price.

The first drawdown notice after the September 10 press release was not even sent by RMC to Auctus until seven days later on September 17 after the price had

³⁹ The September 3 press release announced it had signed a letter of intent with MIG to manufacture the syringe and that final terms were expected to be completed by September 17. *PX 32 at 147-148*. The September 7 press release announced it had secured a five year contract for MIG to produce its syringe. *PX 32 at 145-146*.

⁴⁰ *PX 32 at 143-144; PX 32 at 140-142*.

declined each of previous three days and had declined by almost 30% since the September 10 press release was issued. *DX 86*. The issuance of the press release that same day on September 17 clearly had no statistically significant positive impact on the stock price since it closed *substantially lower* on all five days following the September 17 press release and drawdown notice, *dropping* from \$.91 to \$.58, a *decrease* of over 36%, *App. #25*, despite two more press releases issued during the drawdown period.⁴¹ Moreover, the amount RMC received as a result of the September 17 drawdown notice represented a *decrease* of \$.3571 from the closing price on the date of the September 17 drawdown notice. *App. #25*.

There are two important points to understand with respect to the September 10 press release. First, the lapse of time between the date of the press release and the drawdown notice is significant because much can and did happen in that interim that could have affected the stock price. Second, RMC's stock price had already increased from September 2 to September 3 (\$.59 to \$.75), increased another \$0.01 to \$.76 the next trading day (September 7), increased another \$.10 to close at \$.86 on September 8, and increased another \$.11 to close at \$.97 on September 9. So even before the September 10 press release was issued, the stock price had increased substantially from \$.59 to \$.97 or 64% over the four prior trading days. On the morning of September 10, before the press release was

⁴¹ The September 20 press release announced RMC had filed a libel suit against Hicks for engaging in an internet cyber smear campaign to destroy it. *PX 32 at 136-137*. The other on September 22 is discussed below.

issued, the stock opened above what it closed at the day before. *App. #25*. After the September 10 press release was issued, the stock continued to go up on the next trading day (September 13), but then ***dropped substantially*** over the next five weeks going from \$1.44 on September 13 to \$.46 on October 18. In the immediate days after September 13, it ***dropped*** in value on four of the next five trading days.⁴² *App. #25*. What happened to the stock price on September 10 was simply a continuation of what had been going on for several days already, but then it went down substantially. Because these numbers that apply to the September 10 press release also apply to the September 17 press release since the first drawdown notice was sent on the same day, the net effect is that RMC received \$.3571 ***less*** than the closing price for the September 17 drawdown notice sent after the September 10 and September 17 press releases. There is certainly no evidence here from which to conclude that the September 10 press release had any statistically significant positive impact on the stock price.

The first drawdown notice after the September 22, 2010 press release was sent by RMC six days later on September 28. *DX 86*. The immediate impact of the press release was that the stock ***went down*** from \$.67 at the close on September 22 to lower closing prices for the next 20 trading days with the exception of one day during that period when it closed at the same price of \$.67. *App. #25*. In fact, it was

⁴² It declined on September 14, 15, 16 and 20 and only increased on September 17. *App. #25*.

not until a month later on October 21 that it closed above the price on September 22. It also closed *substantially lower* on all five trading days after the drawdown notice when compared to the price on the day of the press release. *App. #25*. The net result was that RMC received \$.0174 *less* than the closing price for the September 28 drawdown notice sent after the September 22 press release. *App. #25*. In sum, the September 22 press release had no statistically significant positive impact on the stock price.

The July 8, 2011 press release is totally irrelevant because by that time, the Auctus equity line had been closed since May, 2011, and RMC no drawdown notice was sent after it was issued. Even if it had still been in place and RMC was still selling stock to Auctus, RMC would have received *less* than the closing price on July 8, 2011 because the stock price remained essentially flat during the five day trading period. The closing price on July 8, 2011 was \$.31, and it closed at \$.32, just a penny higher, on each of the next three days before falling on the fifth day to \$.28. *App. #25*. The July 8 press release is important for another reason. It discussed in detail what happened relating to DHAPP and the loss of that funding. If as the SEC claims, the runup in the stock price on September 10 was due to the September 10 press release, presumably the stock would have plunged significantly after the July 8 press release was issued when it became clear DHAPP money was not coming. It did not. On the day it was issued, the stock closed at

\$0.31. The next five trading days, it closed at \$0.32, \$0.32, \$0.32, \$0.38 and \$0.27. *App.* #25. The lack of any corrective impact on the stock price after this press release is further evidence that the September 10 press release did not impact the stock price in a statistically significant positive way when issued.⁴³

In the five day trading period after each press release, here is what occurred:

Press Release	Days Closed Above Issuance Closing Price	Days Closed At Or Below Issuance Closing Price
August 24, 2010	5 days	0 days
September 1, 2010	4 days	1 day
September 10, 2010	1 day	4 days
September 17, 2010	0 days	5 days
September 22, 2010	0 days	5 days
July 8, 2011	3 days	2 days
Total	13 days	17 days

The last four press releases clearly had no statistically significant positive impact on the stock price since it had a consistent and long-term price decline after each was issued. What happened after the August 24 and September 1 stock releases is far more likely due to the many other pieces of positive news that came out right before and after those releases. There were three positive press releases in the six days prior to August 24 and the September 1 press release was preceded by those same releases plus another positive one on August 30. The immediate market

⁴³ It is well-established that a private plaintiff can demonstrate loss causation by (1) identifying a corrective disclosure, (2) showing that the price dropped soon after the corrective disclosure, and (3) eliminating other possible explanations for the price drop. *See Meyer v. Greene*, 710 F.3d 1189, 1196-1197 (11th Cir. 2013); *Sapssov v. Health Management Assoc., Inc.*, 2014 WL 2118868, *16 (M.D. Fla. 2014).

reaction after September 1 was that the stock *dropped* from \$.68 to \$.59 or over 13%. *App. #25*. It only rebounded on September 3 and continued to increase for the next nine trading days after RMC announced on September 3 that it had signed a letter of intent with MIG to manufacture the syringe and that final terms were expected to be completed by September 17. That news was bolstered by another press release on September 7 that RMC had secured a five year contract for MIG to produce its syringe.

Another far more likely explanation for the stock price increases after the August 24 and September 1 press releases is the short selling and accompanying short squeeze in RMC's stock during the same time as discussed above. As the stock started to rise with good news, a short squeeze resulted with short sellers having to execute cover purchases which in turn increased the stock's volatility. The short attack clearly had a material impact on RMC's stock and drove the price up.

This Court recognized in *HomeBanc* that logic suggests that to be actionable the alleged false statements must cause an increase in the company's stock price and further suggests that such a factor is relevant in the court's materiality analysis. 706 F.Supp.2d at 1353. This Court went on to state that though not dispositive, the absence of any increase in a company's stock price following allegedly false statements undercuts the inference that the alleged misstatements were material.

706 F.Supp.2d at 1353. The disclosure of the alleged omissions would not have been viewed by a reasonable investor as having significantly altered the total mix of information made available because it would have simply been duplicative of what was already said in the press releases. There is simply no evidence establishing that a statistically significant positive stock movement occurred in response to any of the six press releases.

On March 18, 2011, RMC retained Buyins.net⁴⁴ to monitor trading in its stock and determine the extent of any shorting in it. *Ronk Dec.*,⁴⁵ ¶8; *Wheet 4/22/14, 233/19-234/3; Wheet 4/23/14, 138/17-139/20*. Buyins issued its report on March 21, 2011, *Ronk Dec.*, ¶9, *Exhibit A; PX 32 at 107-113*, which found that starting in August, 2010, short sellers began actively shorting RMC's stock, and the shorting peaked during the months of August, September and October, 2010 and then continued into the first quarter of 2011. *Ronk Dec.*, ¶10; *Wheet 4/23/14, 141/7-10; PX 32 at 107-113*. It further found that short sellers consistently shorted RMC's stock on a daily basis and that the daily trading volume attributable to short selling was 36.5% over the period from August 3, 2009 through March 18, 2011. *Ronk Dec.*,

⁴⁴ Buyins' data center aggregates data feeds from all 13 trade reporting facilities or exchanges in the United States. Every day it monitors every trade, the type of trade (e.g., buy, sell, sell short), the number of shares and the price at which the trade was executed. The data is then put into a relational database, and proprietary algorithms are run that accurately describe what is going on in a stock.

⁴⁵ Declaration of Thomas Ronk.

¶12. RMC forwarded the Buyins report to the SEC on February 12, 2012. *Wheet* 4/23/14, 139/14-15. As far as can be determined, the SEC did nothing with it.⁴⁶

b. RMC's Statements Were, At Most, Corporate "Puffery" And Not Actionable

RMC also is entitled to summary judgment because its statements were, at most, inactionable corporate "puffery". This Court has stated:

Statements classified as 'corporate optimism' or 'mere puffing' are typically forward-looking statements, or are generalized statements of optimism that are not capable of objective verification. Vague, optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions.

HomeBanc, 706 F.Supp.2d at 1352, quoting *In re SI Corp. Sec. Litig.*, 173 F.Supp.2d 1334, 1350 (N.D. Ga. 2001)(Martin, J.). Thus, vague and generalized statements – several of which are expressly based on the opinions, "feel[ings]," "belie[fs]," "hope[s]," and "want[s]" of management – cannot give rise to a securities fraud claim because no reasonable investor would rely on them in making a decision to buy or sell a company's stock, or view them as having significantly altered the total mix of information made available.

⁴⁶ During its investigation, the SEC took sworn testimony or interviewed (10) witnesses and obtained documents from at least 31 persons or entities. *SEC Response to Defendants' First Inter.*, App. #30 - #26, #27. Interestingly, the SEC chose not to interview or depose Hicks or Sykes. It says it had no communications of any type with Sykes, and its enforcement attorneys have had no oral communications with Hicks. *SEC Response to Defendants' First Inter.*, App. #30 - #34. Last, there is no evidence that the SEC requested any documentation to determine the trading activity of Hicks or Sykes to determine if they were shorting RMC's stock.

The statements in the press releases clearly fall into the category of vague and generalized statements of optimism not capable of objective verification. These include the statements that it could now finalize negotiations with manufacturers and distributors,⁴⁷ that it was planning to interview and engage new prospective distributors,⁴⁸ that it was in a position to sign initial distributors and gauge preliminary sales volume,⁴⁹ that it could begin announcing preliminary sales orders over the coming weeks,⁵⁰ that it was entering the final stage of the process to determine its initial global distributors,⁵¹ that potential future distributors had been narrowed down,⁵² that over the next several weeks, it would be confirming interest and commitments,⁵³ and that the timing could not be better.⁵⁴

These statements are classic examples of “puffery”, and are not capable of objective verification. Just as this Court stated in *HomeBanc*, at bottom, the gravamen of the SEC’s complaint is that RMC’s public statements expressed an overly optimistic view of the future. 706 F.Supp.2d at 1357. There can be no liability for these statements, and RMC is entitled to summary judgment.

c. The SEC Has Not Eliminated Other Potential Explanations For Any Movement In RMC’s Stock Price

⁴⁷ August 24, PX 32 at 155-156.

⁴⁸ September 22, PX 32 at 134-135.

⁴⁹ September 17, PX 32 at 140-141.

⁵⁰ August 24, PX 32 at 155-156.

⁵¹ September 1, PX 32 at 151-152.

⁵² September 1, PX 32 at 151-152.

⁵³ September 1, PX 32 at 151-152.

⁵⁴ August 24, PX 32 at 155-156.

As discussed above, the SEC has not eliminated several other more likely explanations for any activity in RMC's stock. Courts have consistently recognized and the SEC itself has argued in other cases that a company-specific event study is the "best measure" of materiality. An event study is a statistical regression analysis that examines the effect of an event like the release of information, on a dependent variable, such as a corporation's stock price. *See, e.g., FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282, 1313 (11th Cir. 2011); *U.S. v. Schiff*, 602 F.3d 152, 173 n.29 (3d Cir. 2010). Courts have held that an event study provides the best evidence as to whether a reasonable investor would have viewed the information as significant. *See, e.g., Schiff*, 602 F.3d at 174 n.31; *SEC v. Berlacher*, 2010 WL 3566790 at *8 (E.D. Pa. 2010); *In re World Access, Inc. Sec. Litig.*, 310 F.Supp.2d 1281, 1298 n.10 (N.D. Ga. 2004)(Evans, J.).⁵⁵ It "analyzes the responsiveness of a security's price (or, equivalently, a security's return) to announcements that contain new information, and is the preferred and predominant method for assessing the . . . efficiency of any market." *In re Scientific Atlanta, Inc. Sec. Litig.*, 571 F.Supp.2d 1315, 1339 n.19 (N.D. Ga. 2007)(Story, J.). It tests whether the movement in a stock price was due to market or industry movements, stock-specific news, or whether it was just noise and whether the movement was

⁵⁵ The SEC itself has presented event studies as evidence of materiality in enforcement cases. *See, e.g., SEC v. Leslie*, 2010 WL 2991038, at *11 (N.D. Cal. 2010); *SEC v. Sabhlok*, 2010 WL 2944255, at *6-7 (N.D. Cal. 2010); *SEC v. Mangan*, 598 F.Supp.2d 731, 734 (W.D.N.C. 2008); *SEC v. Koenig*, 557 F.3d 736, 743 (7th Cir. 2009)(SEC introduced event study of defendant's expert when it supported its argument on materiality).

statistically significant. If the specific information did not affect the stock price by a statistically significant amount, that is objective evidence of a lack of materiality.

The SEC did not do an event study, failed to provide any expert testimony on the issue of materiality and failed to present any competent evidence establishing that a statistically significant positive stock movement occurred in response to any of the six press releases. Under these circumstances, RMC is entitled to summary judgment.

d. The Alleged Misstatements Were Not Material To Auctus

Summary judgment should also be granted because what was said in the press releases was immaterial as a matter of law to Auctus, RMC's alleged victim. As discussed at page 14 above, it did not matter to Auctus where the RMC stock price was, and it sold all stock it received at a profit. There is no evidence that Auctus relied on anything said in any press release to make any investment decision, and all evidence is to the contrary because once Auctus executed the drawdown agreements and the registration statement became effective, it was contractually bound, subject to certain non-market conditions, to accept the drawdown requests.

The press releases and the statements in them were not material to Auctus. Summary judgment is proper for this additional reason.

4. RMC Is Not Liable Because The Alleged Misstatements Were Forward-Looking And Were Accompanied By Meaningful Cautionary Language

Summary judgment is also proper because the statements were forward looking, did not represent statements of historical fact and were accompanied by meaningful cautionary language within the “bespeaks caution” doctrine.

Statements may be rendered immaterial by accompanying cautionary language under the judicially created “bespeaks caution” doctrine. *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 767 (11th Cir. 2007). “The bespeaks caution doctrine is ultimately simply ‘shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law.’ ” *Merchant Capital*, 483 F.3d at 767-768. The statements alleged by the SEC to be false and misleading are unquestionably forward-looking since they relate to (1) future development of the redesigned version of the syringe, (2) finalizing negotiations with potential manufacturers and the eventual agreement with MIG, (3) discussions with potential distributors, and, (4) obtaining preliminary sales orders.

RMC’s use of qualifying words and phrases throughout the press releases makes it clear to any reasonable reader that these are not statements of current fact but what it believes will occur in the future. Consistent with this, nowhere did RMC state that it had entered into any binding agreements with distributors, that it

had received any “final”, “binding” or “firm” sales orders or that it is currently in final production of syringes suitable for human use. The statement in the September 10 press release that it was “to receive contract” is indicative of this.

Instructive although not directly applicable since this is an SEC action, the Private Securities Litigation Reform Act safe harbor identifies as a forward-looking statement “(B) a statement of plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer”. 15 U.S.C. U.S.C. §77z-2(i)(1)(B). The statements by RMC in the press releases fall precisely within this definition because they describe management’s *future* plans for manufacturing and distribution, *future* syringe development, possible *future* sales and a contract expected in the *future* with the Navy. These press releases were also accompanied by cautionary language that the statements related to future events and involved various risks, uncertainties and other factors that could negatively impact its activity, performance or achievements. This further supports summary judgment for RMC.

5. RMC Did Not Act With The Requisite Scienter

Summary judgment should also be granted because RMC did not act with the requisite scienter. Courts may consider the timing and volume of stock trades by insiders to determine whether the complaint gives rise to an inference of

scienter. *Mizzaro*, 544 F.3d at 1253; *Mogensen v. Body Central Corp.*, 2014 WL 1509577, *27 (M.D. Fla. 2014).

Indeed, the Eleventh Circuit has expressly noted that any inference of scienter is particularly weak where, as here, the complaint fails to allege inside stock sales intended to take advantage of the company's purportedly inflated stock price.

HomeBanc., 706 F.Supp.2d at 1359 and cases cited therein.

Since there were no sales of stock by Wheat during the August and September, 2010 period, *Wheat 4/23/14, 45/23-46/1*, the only motive the SEC has identified is that RMC was trying to inflate the price of its stock so it would be required to sell fewer shares to Auctus. That theory, when considered against the actual facts in the record though, simply fails for two basic reasons.

First, if RMC was trying to take advantage of the press releases, one would expect drawdown requests to be sent at or before a press release was issued so it could take advantage of an expected stock price increase. RMC sent the drawdown requests on the day a press release was issued only on two occasions⁵⁶, six days after one was released on two occasions⁵⁷ and seven days after one was released one time.⁵⁸ That evidence is totally inconsistent with the existence of scienter. Second, if RMC was acting to defraud Auctus, it would have submitted request after request until it obtained the total allowed amount of \$10 million. Instead, it

⁵⁶ August 24, *PX 32 at 155-156*; and September 17, *PX 32 at 138-139*.

⁵⁷ September 1, *PX 32 at 151-152*; and September 22, *PX 32 at 134-135*.

⁵⁸ September 10, *PX 32 at 140-142*.

only submitted requests sufficient to get it to sales. *Wheet* 4/23/14, 64/15-66/22. Auctus was encouraging RMC to use more of the equity credit line and ask for more, especially during that September period when the stock was active. *Sollami*, 23/3-24/13, 45/21-47/8; *Sollami SEC*, 40/12-41/21; *DX* 88. But RMC did not. This evidence again is inconsistent with acting with scienter.

As this Court stated in *HomeBanc*,

It is counterintuitive to think that one would fraudulently inflate a stock price without a concomitant intent to sell the stock at an artificially high price. Typical securities fraud complaints detail how and by how much the corporate officers profited by timing purchases and sales of company stock to take advantage of fraud. The fact that Defendants did not take advantage of the purportedly inflated price to sell their holdings overwhelms the inference that they were knowingly withholding from the public damaging and material information about HomeBanc.

706 F.Supp.2d at 1359.

RMC did not act with scienter and should be granted summary judgment for this additional reason.

6. *RMC Is Not Liable Under §17(a) Of The 1933 Act*

Last, RMC is entitled to summary judgment on the claims brought under §17(a)(2) and §17(a)(3) of the 1933 Act because there is no evidence RMC acted without reasonable prudence or was negligent with respect to the matters alleged to be violations. RMC made inquiries and acted diligently and was simply lied to by Theriault. Summary judgment for RMC should be entered on these claims.

CONCLUSION

For all reason set forth above, RMC requests that its motion be granted and that summary judgment be entered on its behalf as to all claims brought against it.

Dated this 15th day of August, 2014.

By: /s/ Frank A. Lightmas, Jr.
Frank A. Lightmas, Jr.
Georgia Bar No. 452325
The Law Offices of Frank A. Lightmas Jr.,
LLC
Suite 1150, The Peachtree
1355 Peachtree St., N.E.
Atlanta, GA 30309
(404) 876-3335 (Telephone)
(404) 876-3338 (Facsimile)
franklightmas@mindspring.com
Attorneys for Defendant Revolutions
Medical Corp.

By: /s/ John M. Deitch
John M. Deitch
New Jersey Bar No. 048411996
Coughlin Duffy LLP
350 Mount Kemble Avenue
P.O. Box 1917
Morristown, NJ 07962
(973)267-0058 (Telephone)
(973) 267-6442 (Facsimile)
jdeitch@coughlindiffy.com
Attorneys for Defendant Revolutions
Medical Corp.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

REVOLUTIONS MEDICAL CORP.
and RONDALD L. WHEET,

Defendants.

Civil Action No. 1:12-cv-03298-TCB

CERTIFICATE OF COMPLIANCE OF N.D. GA.L.R. 5.1

Pursuant to Local Rule 7.1, D, I certify that this brief in support complies with the font and point selections set forth in Local Rule 5.1. This motion has been prepared using Times New Roman font (14 point).

This 15th day of August, 2015.

/s/ Frank A. Lightmas, Jr.

Frank A. Lightmas, Jr.

Georgia Bar No. 452325

Suite 1150, The Peachtree

1355 Peachtree St., N.E.

Atlanta, GA 30309

(404) 876-3335 (Telephone)

(404) 876-3338 (Facsimile)

franklightmas@mindspring.com

Attorneys for Defendants Revolutions

Medical Corp. and Rondald L. Wheet

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2014, I served a copy of the foregoing by filing it with the Court's CM/ECF system, which provided copies electronically to all counsel of record.

/s/ Frank A. Lightmas, Jr.
Frank A. Lightmas, Jr.
Georgia Bar No. 452325
Suite 1150, The Peachtree
1355 Peachtree St., N.E.
Atlanta, GA 30309
(404) 876-3335 (Telephone)
(404) 876-3338 (Facsimile)
franklightmas@mindspring.com
Attorneys for Defendants Revolutions
Medical Corp. and Rondald L. Wheet