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 RONDALD L. WHEET

Defendant Rondald L. Wheet ("Wheet") submits this brief in support of his Motion for Summary Judgment.[1]

INTRODUCTION

This is a civil enforcement action brought by Plaintiff Securities and Exchange Commission ("the SEC") against RMC and Wheet, its chief executive officer, alleging violations of §17 of the Securities Act of 1933, 15 U.S.C. §77q(a)(1)("the 1933 Act"), §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b)("the 1934 Act"), and Rule 10b-5 thereunder, 17 C.F.R. §240.10b-5.

[1] Wheet and Revolutions Medical Corp. ("RMC") have jointly submitted a statement of material facts in support of their separate motions. RMC has submitted a separate brief in support of its Motion for Summary Judgement ("RMC Brief")

The genesis of the SEC's action arises from testimony given it by Richard Theriault ("Theriault"). Theriault and his companies, Medical Investment Group, Inc. ("MIG") and Strategic Product Development, Inc. ("SPD"), were engaged by RMC to find a manufacturer for its syringe. Theriault is a con-man and fraudster. When RMC discovered in September, 2011, that Theriault had stolen money it paid him to manufacture its syringe in China, it terminated him. In revenge, Theriault then began a campaign to misappropriate RMC's syringe technology and enlisted the assistance of the SEC. As shown below, Theriault:

(a) Lied to the SEC under oath during two pre-filing investigation depositions to gain some measure of revenge against RMC and Wheet;

(b) Lied repeatedly to RMC while working for or on its behalf;

(c) Lied to others with whom he was working on behalf of RMC; and,

(d) Was found by an experienced American Arbitration Association arbitration panel[2] to have lied to and defrauded RMC in connection with the very same transactions and matters that were the subject of his testimony to the SEC and which are involved in this case.

[2] On September 20, 2011, Theriault/MIG filed arbitration case no. 31 122 Y 00253 11 with the American Arbitration Association ("the AAA Arbitration") against RMC. *Defendants' Appendix, #1* (*"App."*). The panel included an attorney and former long-time North Carolina state court judge admitted to the bar in 1972 (Chase B. Saunders), a North Carolina attorney practicing since 1969 with AAA arbitration experience (Pender R. McElroy), and an attorney with extensive experience in intellectual property issues (Edward Dreyfus). *App. #2.*

THE ALLEGATIONS AGAINST DEFENDANTS

RMC is a Charleston, South Carolina corporation that designs, develops and commercializes retractable safety needle devices referred to as the RevVac™ safety syringe. The SEC alleges that five press releases issued between August 24, 2010 and September 22, 2010 and an additional press release issued on July 8, 2011[3] relating to RMC's 3ml syringe[4] were false and misleading because they: (1) omitted to disclose that "market samples" came from a small batch of pre-production, "not-for-human-use" pilot molds;[5] (2) omitted to disclose that RMC did not have a syringe that could be commercially manufactured or sold;[6] (3) omitted to disclose that even with the completion of "market samples," RMC still had testing, regulatory, packaging and logistical hurdles to mount before its syringe would be ready for sale and it could "finalize negotiations" with manufacturers or distributors and that it would be impossible to do so "over the coming weeks";[7] and (4) misrepresented the status of "preliminary sales orders" and distribution agreements with third parties.[8] *App. #30 - #1, #3, #5, #7, #9.*[9]

[3] The press releases were issued on August 24, 2010, September 1, 2010, September 10, 2010, September 17, 2010, September 22, 2010 and July 8, 2011.
[4] Unless otherwise noted, all references to "syringe" or "syringes" refers to the 3ml syringe.
[5] August 24, *PX 32 at 155-156*; and September 1, *PX 32 at 151-152*.
[6] August 24, *PX 32 at 155-156*; September 1, *PX 32 at 151-152*; September 10, *PX 32 at 140-142*; September 17, *PX 32 at 138-139*;
September 22, *PX 32 at 134-135*; and July 8, 2011, *PX 32 at 87-88*.
[7] August 24, *PX 32 at 155-156*; September 1, *PX 32 at 151-152*; September 10, *PX 32 at 140-142*; and September 17, *PX 32 at 138-139*.
[8] August 24, *PX 32 at 155-156*; September 1, *PX 32 at 151-152*; September 17, *PX 32 at 138-139*; and September 22, *PX 32 at 134-135*.
[9] App. #30 contains the SEC Response to Defendants' First Interrogatories.

With respect to the September 10, press release, the SEC alleges RMC never had an actual or prospective "contract" with the U.S. Department of Defense as stated in the press release. *App. #30 - #5.*[10] With respect to the July 8, 2011 press release, the SEC claims it was false because RMC (1) lacked the capacity to mass manufacture a syringe suitable for human use that could be sold or distributed, (2) could not actually fill any orders for its safety syringes, and, (3) did not have a final product in the "supply chain" but 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. *App. #30 - #11.*[11] Although RMC issued 22 press releases in 2009, 20 in 2010 and 33 in 2011, no others are alleged to contain omissions or misrepresentations. *App. #30 - #13, #14.*

The SEC claims the false press releases caused RMC's stock price to be artificially inflated and enabled it to sell millions of shares of its stock to Auctus Private Equity Fund, LLC ("Auctus") at a price higher than what the real price of the stock should have been. *Complaint, ¶31*.

Wheet is entitled to summary judgment because:

(a) The statements in the press releases were true and accurate when made or there was a reasonable basis to believe they were;

[10] September 10, *PX 32 at 140-142.*
[11] July 8, 2011, *PX 32 at 87-88.*

(b) The statements were forward-looking and were accompanied by meaningful cautionary language;

(c) Any alleged misstatements were not material because they did not have a statistically significant positive impact on RMC's stock, and the SEC has not eliminated a number of other potential explanations for movement in the stock price during the same time period. There was a significant amount of other positive news about RMC issued during the same period, and there existed a short selling squeeze[12] which caused its stock price to move higher. The alleged misstatements also were not material to the allegedly defrauded third-party, Auctus, which made a profit on the sale of the stock. It did not matter to Auctus where the RMC stock price was, and it does not believe it was defrauded, cheated or taken advantage of in any way;

(d) The statements were, at most, corporate "puffery" and not actionable;

(e) Wheet did not act with the requisite scienter; and,

(f) Wheet was not negligent as required under §17(a)(2) and §17(a)(3) of the 1933 Act.

[12] Short selling is the selling of a stock that the seller does not own but promises to deliver. Typically, the seller's broker lends it to the seller from the brokerage firm's own inventory, from another one of the firm's customers or from another brokerage firm. Eventually, the seller must "close" the short by buying back the same number of shares (called "covering") and returning them to his/her broker. If the price drops, the seller can buy back the stock at a lower price and make a profit, but if the stock price rises, the seller has to buy it back at the higher price and loses money. When there is a substantial short position in a stock, and the stock price begins to go up, "shorters" will "cover" their sale which means they will buy back the shares they shorted. As more shorters do this, the price rises since more people are buying the stock, and it squeezes those shorters who have not yet "covered" their sale.

FACTUAL BACKGROUND

RMC's syringe is unique because it can be operated with one hand. When the operator pushes the plunger down into the patient, it creates a vacuum, and once the contents are delivered, the vacuum automatically draws the needle back up into the barrel so no one can be stuck, and it can never be used again. Because of this, it reduces accidental needle stick injuries and the spread of contagious diseases. *Compton SEC,*[13] *37/15-21; App. #6 at p. 30)*. RMC holds a number of patents with respect to its syringe technology. *Wheet 4/22/14,*[14] *21/14-22/9; DX 174; App. #6 at p. 31; PX 32 at 71-72, 169, 166-167*. A video of the syringe can be found at RMC's website at www.Revolutionsmedical.com.

Syringes are manufactured using injection molds. Pilot or test molds are inexpensive, but final or volume production molds are expensive and made of high quality polished steel and lined with chrome. *Wheet 4/22/14, 30/4-7, 30/13-21; Wheet 4/23/14,*[15] *89/23-90/8*. It is typical to first use pilot molds to prepare syringes. Once the molded parts are made, they are then fed into assembly equipment which is more generic and does not consist of proprietary information. *Wheet 4/22/14, 266/23-267/1*. After the product from the pilot mold is functional, final or volume production molds are made and mass production begins. *Wheet*

[13] Deposition of Ernest Compton on May 25, 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.")
[14] Deposition of Rondald Wheet on April 22, 2014 in this case.
[15] Deposition of Rondald Wheet on April 23, 2014 in this case.

4/22/14, 29/18-30/3. The difference between a sample syringe and a syringe that is ready for human use is that the latter has been cleared by the Food and Drug Administration ("FDA") and sterilized. *O'Brien,*[16] *252/1-9*.

When Theriault was first engaged, RMC already had a functioning syringe, called the "blue syringe" due to its color, *DX 1*, that had been cleared by the FDA.[17] Form 510(k) is the application to obtain FDA clearance to market a medical device in the United States and, with help of Rothkopf, RMC had already obtained 510(k) clearance for the blue syringe on February 13, 2009. *Rothkopf SEC, 15/15-24, 18/24-19/2, 20/8-15, 69/24-71/20, 71/-6-10; Wheet 4/22/14, 103/1-10, 223/2-15; PX 25; Complaint, ¶15; App. #7*. This meant RMC could market and sell it to the public in the U.S. *Rothkopf SEC, 22/15-19, 49/20-50/2*. Rothkopf was also prepared to implement what is called a quality system. Quality systems did not have to be in place in order for RMC to sell its syringe so long as it had them operational before an FDA audit was conducted or before it shipped syringes to an end user. *Wheet 4/22/14, 33/17-21, 166/25-168/4, 169/15-18*. These systems could be implemented within the time that it would take to ship the final product from China to Charleston. *Rothkopf SEC, 26/8-9, 30/19-31/4; Wheet 4/23/14, 52/8-10*.

[16] Deposition of Thomas O'Brien on 5/22/14 in this case.

[17] At the time of the recommendation, the blue syringe had been tested by RMC's FDA expert in compliance and regulatory matters, David Rothkopf ("Rothkopf"), and passed by him. *Deposition of David Rothkopf on December 14, 2011 in the SEC Inv. ("Rothkopf SEC"), 12/3-7, 15/12-20; Deposition of Richard Theriault on June 5, 2014 in this case ((Theriault"), 219/21-221/3; Deposition of Thomas O'Brien on November 11, 2011 in the SEC Inv. ("O'Brien SEC"), 22/4-14*.

Theriault was introduced to RMC through its president, Thomas O'Brien. O'Brien had more than 25 years of senior management experience in the medical device industry and special expertise in domestic and international sales, marketing and distribution of high technology medical systems. *O'Brien, 14/2-22/1; 28/25-29/3, 35/23-36/5, 40/14-41/14, 44/24-46/11, 54/10-18, 64/3-16; O'Brien SEC, 10/24-11/8, 14/21-16/3; Wheet 4/23/14, 98/21-24; DX 17 at RMCP 1204; Theriault 8/24/11 SEC,*[18] *35/7-18.*

Theriault recommended that the blue syringe be reworked to reduce the number of parts which, in turn, would save money in production costs. *Theriault, 59/13-17; Wheet 4/22/14, 25/10-22; Wheet 4/23/14, 79/8-16; Goddard,*[19] *61/1-22*. There were no changes to any patented parts of the syringe, its vacuum structure or its functionality. *Wheet 4/22/14, 25/10-22*. To accomplish the parts reduction, Theriault engaged Andrew Goddard ("Goddard") of Goddard Technologies, an engineering design firm. *Goddard, 41/22-43/9; Wheet 4/22/14, 24/22-25/1*.

Rothkopf determined that the redesigned syringe did not require any further FDA clearance. Instead, he would prepare an internal "letter to file" documenting the changes in the event of an FDA audit. *Wheet 4/22/14, 31/11-33/2; 126/25-127/17, 169/4-14; Rothkopf SEC, 29/1-16, 54/24-55/19; O'Brien, 254/25-255/22*. The redesigned syringe did not replace the blue syringe but was just the next stage

[18] Deposition of Richard Theriault on August 24, 2011 in the SEC Inv.
[19] Deposition of Andrew Goddard on June 10, 2014 in this case.

of development or evolution of it from a manufacturing standpoint, and RMC always was able to use and sell it because it was suitable for human use and remained the basis for the FDA clearance and patents. *Wheet 4/22/14, 26/3-27/2, 131/24-132/1;Wheet 4/23/14, 59/11-22, 78/18-79/7; Rothkopf SEC, 41/1-11*.

Theriault through SPD was supposed to identify at least two pre-qualified contract manufacturers who would be potential manufacturers of the syringe. *DX 43*. In August, 2010, before entering into the manufacturing agreement discussed below, Theriault/SPD obtained an offer from a Chinese manufacturer to prepare the necessary molds and tooling for $80,300. *Theriault Bank.,*[20] *44/15-45/17, 46/17-25*. On September 17, 2010, in the middle of the period when five of the six press releases at issued were released, RMC entered into a Manufacture, Supply, Distribution and Licensing Agreement ("Manufacturing Agreement") with Theriault/MIG with respect to the syringe and later on January 6, 2011 entered into an Amended Manufacture, Supply, Distribution and Licensing Agreement ("Amended Manufacturing Agreement") with MIG. *DX 111, 49; App. #27; Theriault, 58/23-59/3, 115/12-116/7, 232/18-23; O'Brien, 185/7-10*. The agreements obligated MIG to be production ready and able to meet minimum standing orders of 2.5 million syringes per month by May 17, 2011. *DX 111 - §III, G, 1; §IV, A, 1*. In exchange, MIG was to be paid approximately $800,000 by

[20] Section 341 deposition of Richard Theriault on March 11, 2013 in "*In the Matter of Richard H. Theriault, et al.*", U.S. Bankruptcy Court, E.D. Mass., Case Nos. 13-10610, 13-10611, 13-10612 and 13-10613.

RMC.[21] *Theriault, 121/11-122/1; DX 112*.

Theriault repeatedly represented during negotiations for these agreements that the value of the proprietary tooling, including the final production molds, would be between $1.8 and $2.4 million with $600,000 to be paid by RMC and the other $1.2 million or more to be paid by "investors" he had. *Wheet 4/22/14, 273/15-274/3; Theriault Bank., 47/8-13; O'Brien, 204/9-19, 300/10-18*. That representation was false because Theriault knew by August, 2010 that the cost of the molds and tooling was $80,300. *Theriault Bank., 45/4-17; 46/17-48/9*. RMC paid $1,360,380 total to SPD for all the work it performed according to an accounting given by Theriault and his own records. *DX 162*. RMC made all payments to MIG required under the manufacturing agreements and paid approximately $800,000 to MIG. *DX 112; Theriault, 121/11-122/7*.

RMC did not know that three secret agreements had been executed before the Manufacturing Agreement was even executed under which Theriault/MIG had assigned its manufacturing obligations even though it was prohibited from doing so to a third party without RMC's prior written approval. *DX 111 - §I, B, 9; §II, C, 18; §III, A, 2; O'Brien, 175/2-7, 197/22-198/13; DX 54; App. #8*.[22]

[21] RMC was to pay MIG $600,000 as pre-production funding to complete the final production molds and $5,000 per month for in country support and initial, temporary molds beginning October 1, 2010 and continuing until production, not to exceed 8 months. *DX 111 - §III, A, 4*.

[22] MIG entered into an agreement with Designturn, Inc. ("Designturn") under which Designturn was to manufacture the syringes for RMC. *DX 115; Theriault, 123/9-13, 123/20-124/2, 128/13-129/24; Theriault 8/24/11 SEC, 17/9-18/4, 24/16-25/10*. At the same time, Designturn entered into an agreement with a Chinese company called Allways Design & Engineering Co., Ltd. ("Allways") under which Allways would manufacture the syringes, *DX 113;*

In the Fall, 2010, samples were to be produced by Precision Tool & Die under agreements it had with SPD and Goddard but not RMC. *Driscoll,*[23] *72/12-17, 87/12-21, 142/16-18*. It was Wheet's understanding as of November 2010, that:

(a) The test molds producing samples based on the redesign by Goddard Technologies had been shipped to China;

(b) Production molds were then being made by MIG in China;

(c) MIG was starting test molds and samples at the factory in China;

(d) Any problems encountered so far were minor or nuances which had to do with the resin or lubricant and the polishing of the molds and that these changes would be made at the factory in China rather than on the pilot molds themselves;

(e) Any problems with any samples of the syringes would be solved by having the samples run off the final production or volume manufacturing molds; and,

(f) RMC would have several thousand samples by February, 2011.

Wheet 4/22/14, 157/7-163/6; Wheet 4/23/14, 75/23, 77/3-78/1, 82/7-83/6.

Throughout the Fall of 2010 and the Spring of 2011, Theriault continued to assure RMC that MIG was still on target for the May 17, 2011 production readiness date and that samples would be coming in February. *DX 56.* He adjusted

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Theriault, 123/14-16, 130/1-131/7; Theriault 8/24/11 SEC, 18/1-4. Last, Allways entered into an agreement with another Chinese company called Wuxi Yushou Medical Applicances Co., Ltd. ("Yeso-med") under which Yeso-med would manufacture the syringes. *DX 114; Theriault, 123/17-19, 131/8-132/3*.

[23] Deposition of Michael Driscoll on April 28, 2014 in this case.

that date a bit but still claimed that MIG was production ready from June 9, 2011 forward and that RMC had an obligation to place a minimum order of 2.5 million units each month or be in default under the Amended Manufacturing Agreement. *O'Brien, 205/9-19; Theriault, 120/22-121/4*.

During the first part of 2011, RMC understood there were still some problems with the redesigned syringe but, again, based on what Theriault was telling them, the problems would be resolved with a little adjusting and tinkering. As a result, on April 1, 2011, RMC submitted a purchase order for 2.5 million syringes to MIG. *App. #9; PX 32 at 103-104*. Some of the samples delivered in February or March, 2011 did not work properly, so they did not pass Rothkopf's tests. *Rothkopf SEC, 35/11-12; Wheet 4/23/14, 86/8-88/22*. Additional samples in April, 2011 looked beautiful, but there was a problem with a hook and failed. The solution was to make the hook sturdier through a material change. *Rothkopf SEC, 44/11-24; Wheet 4/23/14, 91/23-92/23*. Samples sent in May, 2011 had problems with the hook which was now too rigid and required another material change. *Rothkopf SEC, 62/2-7; Wheet 4/23/14, 92/24-94/4*. On May 16, 2011, Theriault told Wheet and Vincent Olmo ("Olmo"), another RMC officer:

> We got 18 samples today. ***They all worked 100% perfect. The speed of retraction improved and is at least as fast as the blue syringes. They pop. I believe we have nailed it.***
>
> ***150 samples out of 950 were tested at the factory as well. 2 failed. When reassembled the two worked.***

> The nice thing is ***we used mostly production molds for the run***. In a couple of weeks the remaining molds will come online. At that point – other than the logistics, regulatory and support systems required on this end ***we are all set***. *DX 122 (emphasis added); Theriault, 145/17-147/12*.

Theriault consistently told RMC any problems were minor or related to the lubricant or certain materials and would be fixed. *DX 119-121; Theriault, 140/3-145/6*. Throughout this period, Theriault knew he was not production ready because the syringes had serious problems as shown by emails between him and his partners in China. Although he was informing RMC that everything was fine and MIG was production ready, he and his co-conspirators were writing each other and telling quite a different story.

On May 10, 2011, just before Theriault sent the email quoted above, Jerry Liou ("Liou") from Allways told him, for example, that 50, not 150 syringes, had been tested and that 2 of the 50 failed. *DX 123; Theriault, 147/15-148/9*. On May 29, 2011, Theriault emailed Matt Kressy ("Kressy") from Designturn and Liou:

> ***The situation with RevMed is critical. Unless we can demonstrate our ability to perform by shipping them a substantial batch of 100pct working syringes this week we risk losing their business.***
> ***We were initially scheduled to have delivered these parts by the end of February. We are 3 months late.***
> I already have been forced to make serious financial concessions to them as the result of these delays. It has cost me very much.
> ***My contract with them allows them to step in and take over everything if we can't perform. We are close to this point. This means we all lose.***
> We are at a point that we must deliver without exception or excuse.

DX 125 (emphasis added); Theriault, 149/19-151/3. The very next day, Theriault emailed Kressy and Liou again:

> ***If RevMed makes me reduce the price because of 3 month delays we all (including factory) will have to take a hit. I am fighting hard to prevent this but I have no more wiggle room.***

DX 126 (emphasis added); Theriault, 153/6-152/4. Again, just a week later on June 8, 2011, Theriault emailed Kressy:

> ***We continue to have execution problems – some self inflicted and others unavoidable – that have put us beyond where I can wiggle.***
> ***In order to maintain any hope of pre-empting RevMed from flying over to China and nailing us big time*** I believe we need to offer them a temporary price reduction. You, Jerry, the factory and I all have to be willing to consider doing this. I am open to other suggestions but I am out of runway on this.
> ***Please get back to me asap as I need some salve to put on RevMed's wound. It is burning.***

DX 128 (emphasis added); Theriault, 153/22-156/21. Yet he told RMC three days later on June 11, 2011 that he got "perfect results in 20 out of 20" syringes tested and that all prior problems were now corrected. *App. #34*. On July 9, 2011, Theriault emailed Liou:

> ***This latest fiasco on the late delivery of the remaining samples is approaching a ridiculous level.***
> ***Based on past performance of promised vs actual deliveries I would expect delivery sometime in mid August.***
> I can't conduct business this way. It does not work.
> Please figure out what can be done.
> Also the samples I reviewed with Matt do not appear to have lubricant on the piston seal. They also retract visibly slower than previous

> samples. Can you please follow up with Matt on his questions concerning lubricant that he sent you.
> ***It appears that much more direct involvement is required by you in order to fix these avoidable problems and maintain a level of control necessary to reliably ship product.***
> Please advise.

DX 132 (emphasis added); Theriault, 173/7-174/11. These communications and this information were never disclosed to RMC or Wheet.

To the contrary, Theriault continued to lie to RMC. When RMC was preparing its second quarter 2011 filing with the SEC it wanted to include the proprietary tooling as an asset on its balance sheet so it requested documentation from Theriault/MIG to support their statement that the proprietary tooling, including the production molds, had a value of $1.8 million. *Wheet 4/23/14, 83/23-84/11*. Theriault provided a letter on MIG stationary dated June 4, 2011 in which he represented that (a) the molds and associated equipment were not encumbered by any third-party other than the ownership position MIG had under the Amended Manufacturing Agreement, (b) the molds were made of stainless steel and fitted with chrome linings; and, (c) the value of the proprietary tooling, including the final production molds, was $1.8 million. *App. #33; Wheet 4/23/14, 84/3-11*. All of these statements were false, and Theriault knew they were false.

In fact, as his lies mounted, Theriault admitted he did not want Wheet flying to China and visiting the Yeso-med factory. *Theriault, 155/6-12, 156/17-21; DX*

128 ("In order to maintain any hope of pre-empting RevMed from flying over to China and nailing us big time . . . .").

But the end game for Theriault soon began. On August 3, 2011, Olmo received an email from Rothkopf that the most recent syringes from MIG in China failed. *Wheet 4/22/14, 166/7-21; Wheet 4/23/14, 85/6-17*. On August 5, 2011, Luo sent an email to Theriault telling him that sample syringes were still not passing the various ISO tests, *DX 133; Theriault, 174/16-175/11*, yet Theriault still told RMC in August, 2011 that new samples had passed tests conducted by Rothkopf. *Wheet 4/23/14, 50/1-10, 85/7-17*. On August 29, 2011, Luo told Theriault they still had problems with the syringes, particularly the seal. *DX 131, 135; Theriault, 178/2-10*. Theriault conceded that unless the seal problem was resolved, the syringe would not be ready for mass manufacturing, *Theriault, 162/20-163/7, 178/7-10*, but he still did not think it was that serious of a problem. *Theriault, 171/5-12*.

Consistent with the misrepresentations Theriault was making to RMC, he also told Goddard on August 17, 2011 that he was "in production on the syringe" and that he "may have an investor interested in funding the development of the new IP". *DX 159; Goddard, 174/24-176/15*.[24]

[24] Goddard summed up Theriault when he testified:

Q: Yes. He's a weasel, right?

A: ***Right. I think it's clear***.

At this point, although RMC did not know the true status of manufacturing in China because Theriault kept the failures secret from it, it terminated the Amended Manufacturing Agreement with MIG on September 2, 2011 because of MIG's failure to timely perform and because of MIG's inability to deliver syringes that passed ISO testing. *Wheet 4/22/14, 163/11-13, 165/18-21; Wheet 4/23/14, 50/25-51/18, 74/1-6; Theriault Bank., 65/10-13; App. #32.*

After terminating Theriault/MIG/SPD, Wheet and Olmo flew to China on September 4, 2011, *Wheet 4/23/14, 50/25-51/21,* and met with the principals from Yeso-med. RMC learned for the first time (1) that RMC had been defrauded by Theriault, (2) that Theriault and MIG were nowhere near being production ready, (3) that MIG did not have any final production molds completed because Yeso-med had only been paid a total of $40,000 for temporary molds, (4) that the problems with the redesigned syringe were far more serious and widespread than RMC had been told, and, (5) that Theriault had spent only about $45,000-$50,000 of the $800,000 paid to him on the development of the syringe and its manufacture and had literally stolen the rest of the money.[25] Shortly after that, on September 8, 2011, Feng Zhiling sent RMC a letter on Yeso-med stationary that stated in part:

Goddard, 289/11-13 (emphasis added).
Goddard believes now that Theriault was not being truthful with him in his interactions with him and that Theriault "certainly [was] not telling the truth" to Goddard. *Goddard, 176/16-24.*

[25] Additional details of Theriault's fraud are detailed in RMC's closing brief submitted to the panel in the AAA Arbitration which is at App. #26.

> (5) ***As of this date, we are unable to consistently produce the product, using the production molds, to meet the ISO and FDA standards required to sell the product for human use.***
>
> We are confident we understand the steps required to achieve the objective of being production-ready and ***believe we will be able to consistently produce the product in sufficient volume to meet our production requirements and of sufficient quality to satisfy government regulations. We expect to meet these goals in October, 2011.*** *DX 136 (emphasis added).*

Thereafter, RMC entered into a direct agreement with Yeso-med to manufacture the syringes which had to be reverse engineered from the blue syringe. *Wheet 4/23/14, 51/14-52/6; PX 32 at 61-62, 77-78*. By April, 2012, though, Yeso-med was producing syringes that passed ISO standards and were ready for human use based on the original blue design approved by the FDA. *Wheet 4/23/14, 52/1-10, 54/25-55/6, 56/14-57/5; Stephen Wheet,*[26] *92/13-21*. Two containers of syringes were shipped from China to RMC in Charleston in August, 2012. *Wheet 4/23/14, 52/8-10*. Since then, syringes have been sold to distributors or customers both in the United States and internationally. *Wheet 4/23/14, 52/11-19; Stephen Wheet, 63/18-65/13*. What makes Theriault's misrepresentations so damaging is that throughout this period, RMC always had the blue syringe that was already cleared by the FDA that it could have sold.

Throughout 2011, Theriault consistently told RMC (1) MIG had bought the final production molds with the money RMC had paid it and the money his

[26] Deposition of Stephen Wheet on May 2, 2014 in this case.

"investors" were contributing, (2) MIG was production ready with respect to the syringes which were being produced from final production molds, (3) MIG would be able to produce syringes that would pass any tests administered by Rothkopf, and, (4) MIG would be able to meet its obligations under the Amended Manufacturing Agreement. *Wheet 4/23/14, 49/1-51/21*. Theriault constantly used these imaginary "investors" to pressure RMC and try and extort more money out of RMC. *DX 57, 129; Theriault, 157/2-158/1; O'Brien, 203/21-204/2*. The first time Theriault admitted he never had any "investors" was when he was deposed in the AAA Arbitration in April, 2012. *Theriault Bank., 47/8-17, 48/10-14; Theriault AAA,*[27] *391/13-394/16; Theriault, 96/5-7, 157/14-158/1, 177/11-16; O'Brien, 168/8-22, 300/6-18; DX 44, 45, 57, 129, 130, 184*.

In response to being terminated, Theriault/MIG on September 20, 2011 initiated the AAA Arbitration claiming that RMC had breached the Amended Manufacturing Agreement. MIG claimed damages of over $7.5 million and sought a declaration that it owned all of RMC intellectual property rights with respect to the syringes. *App. #1*. In response, RMC filed a counterclaim to recover the monies it had paid to MIG for which no work was performed. *App. #3*. During discovery, Theriault was deposed and produced documents, including emails between himself and his Chinese partners. Those documents revealed the full extent of Theriault's

[27] Deposition of Richard Theriault on April 16 and April 17, 2012 in the AAA Arbitration.

fraud and were the first time RMC learned that Theriault had been consistently lying to it since at least 2009. It also learned that of the approximately $800,000 paid to MIG, only about $45,000-$50,000 was paid to third parties by MIG. *Theriault, 125/12-126/11*. Theriault admitted that MIG had hundreds of thousands of dollars in its bank accounts that it did not disburse to subcontractors as it was supposed to do. *Theriault, 126/5-127/4*.

Beginning on the second day of a scheduled three-day deposition, when asked about documents evidencing his fraud, Theriault repeatedly refused to answer the questions and invoked the Fifth Amendment privilege against self-incrimination more than 100 times. *Theriault AAA, 394/19 through 444/2*. After a hearing that same day with the AAA panel chairperson, *Theriault AAA, 397/7-403/13,* an order was entered under which Theriault/MIG dismissed their claims with prejudice. *App. #4*. Theriault then refused to appear for the last day of his deposition. After a final hearing in Charleston at which Wheet and Theriault testified, the AAA panel issued its award in January, 2013 and ruled:

(a) That Theriault "was and is the alter ego of [MIG]";

(b) That Theriault/MIG breached the Amended Manufacturing Agreement because MIG was never production ready;

(c) That Theriault engaged in fraud in the inducement with respect to the statements he made to RMC to induce it to enter into the manufacturing agreements and the other agreements with SPD and MIG;

(d) That Theriault had to pay back all money he received from RMC which totaled $770,000, plus interest, which consisted of $600,000 and another $160,000 in pre-production payments MIG received and $10,000 paid by RMC for trial molds;

(e) That Theriault had to pay attorney's fees in the amount of $62,656.55 and costs due the AAA; and,

(f) That Theriault/MIG had "no rights of ownership or control, nor any other rights, to any intellectual property, trade secrets, proprietary information, trademarks or 3ml and 1ml syringes or any other product, production equipment or designs related to the issues arbitrated.[28] *App. #5*.

When Theriault first testified to the SEC on August 24, 2011, MIG had not yet been terminated, but Theriault knew he was in trouble because he was not production ready, had done nothing to manufacture the final production molds and had decided to pocket the money paid to him by RMC because of other financial

[28] RMC and Wheet filed a complaint to confirm the AAA Arbitration award in the United States District Court for South Carolina, and judgment was entered on their behalf on December 4, 2013. *App. #10* - Docket sheet, Civil Action No. 2:13-cv-00116-RMG.

problems he had. If he told the SEC the truth with respect to these issues, it would confirm what RMC suspected but did not yet know.

By the time Theriault testified before the SEC on November 3, 2011, MIG had been terminated, but Theriault had initiated the AAA Arbitration in which he claimed MIG had done everything required of it under the manufacturing agreements and was production ready and that RMC was the breaching party. On the days he testified, Theriaut falsely told it that:

(a) MIG was "ready to produce [syringes] a couple of months ago, three months ago, so June [2011]", "they could be selling the product two months ago, a month ago"; *Theriault 8/24/11 SEC, 31/1-3*;

(b) As of August 24, 2011, he had not been able to run tests on any manufactured samples of the syringe because Revolutions had not placed an order yet; *Theriault 8/24/11 SEC, 44/11-15*;

(c) "So there's no reason, from a manufacturing point of view – from a manufacturing point of view, from a manufacturing quality point of view, from a manufacturing regulatory point of view, that they couldn't be selling product now. Really, there's no reason"; *Theriault 8/24/11 SEC, 60/18-22*;

(d) "Right" in response to the question: "And you testified earlier that you – meaning MIG – had declared to Revolutions Medical that you all were – that the factory was production ready"; *Theriault 8/24/11 SEC, 63/12-15*;

(e) "We've already run [the syringes] against the ISO tests so we know they all pass"; *Theriault 8/24/11 SEC, 97/11-14*;

(f) MIG "could be delivering them, you know – I mean, continuously starting in like, you know, two to four weeks"; *Theriault 8/24/11 SEC, 97/21-24*;

(g) "So [Revolutions] should be able to get continuous delivery really starting probably in two to four weeks, and then I think it should be pretty continuous after that";*Theriault 8/24/11 SEC, 98/10-13*;

(h) When asked about the risk of quality control, he said "Extremely low for the following reasons. One is, we have the goal [gold] standard ISO test there already – and the [syringes are] coming out clean as a whistle"; *Theriault 8/24/11 SEC, 99/10-15*;

(i) "Technically, without getting into the minutia, you know, we've really – we've really nailed the product solid. I mean, I know all the manufacturing issues, we've really nailed them. There's been three or four manufacturing issues, we nailed them . . . ."; *Theriault 8/24/11 SEC, 100/1-6*;

(j) "But as far as quality coming out of the factory, I don't see – I see it's a very low risk [associated with quality control]; *Theriault 8/24/11 SEC, 100/22-23*;

(k) "Samples were approved as of – I think as of early June [2011], okay, . . . I believe early June"; *Theriault 11/3/11 SEC, 22/15-16, 34/2-13*; and,

(l) "[T]he knowledge that I have is that [Yeso-med and Revolutions] have not consummated any kind of final agreement" and that Yeso-med was "awaiting the outcome of [Theriault's] litigation against Revolutions to make a determination about what their action was going to be"; *Theriault 11/3/11 SEC, 20/23-21/4, 29/14-30/6*.

Theriault's motivation to lie to the SEC was twofold. The Amended Manufacturing Agreement provided that if RMC defaulted, MIG would own the intellectual property and worldwide distribution rights for the syringe which it could sell or use to manufacture syringes that he would personally market, and RMC would be required to pay MIG a substantial penalty in excess of $1 million. *DX 111 - §III, A, 5; §IV, A, 2; §IV, B, 4*. Conversely, if MIG was not production ready by May 17, 2011, MIG would have been in default which would have allowed RMC to look elsewhere for manufacturing and destroyed Theriault's ability to get control of the intellectual property relating to RMC's syringe technology.

Theriault understood that if he told the SEC the truth on August 24, it would contradict what he had been consistently telling RMC throughout 2011 and provide justification for RMC to terminate MIG. If he told the SEC the truth on November 3, it would contradict his claiming in the AAA Arbitration that MIG had fully complied with the Amended Manufacturing Agreement and RMC was the

breaching party. Theriault hoped to use the SEC as a tool to go after RMC and Wheet which he believed would damage RMC to the point that he could prevail in the AAA Arbitration and obtain the syringe intellectual property and technology. Theriault has admitted that he does not like Wheet, *Theriault, 97/10-14*, and Goddard remembers Theriault telling him in or about October, 2011 that he "was going to stick it to Mr. Wheet through that SEC investigation" and that Theriault had no love lost for Wheet". *Goddard, 182/12-183/3*. As Goddard testified:

> Q: And is it fair to say that based upon what Mr. Theriault was telling you, it was clear that ***he had some pretty deep-seated hatred for Mr. Wheet and Revolutions?***
> A: ***I think yes, I received that idea***. . . .

Goddard, 276/6-13 (emphasis added).

Theriault was partially successful though because the SEC bought his false testimony and instituted this action. But he was wrong in his assessment of RMC's resolve to fight back and erred in thinking that RMC would not figure out from the documents produced that he had consistently lied to it. When it did, he crumbled, pleaded the Fifth Amendment at his deposition, dismissed with prejudice his claims in the AAA Arbitration that same day, testified at the hearing, and the AAA panel found based on his testimony that he defrauded RMC and Wheet.

In this case, after Theriault was deposed, and it was confirmed that he lied to the SEC, counsel for RMC sent a letter dated July 17, 2014 to counsel for the SEC identifying just some of false testimony Theriault gave the SEC and requesting that

the SEC take steps under 18 U.S.C. §1621 with respect to Theriault. *App. #11*. By letter dated July 29, 2014, the SEC responded and stated it had no jurisdiction over any perjury offense and that RMC should take the matter up with the U.S. Attorney's Office for this District. *App. #12*. Interestingly, individuals who have provided false testimony to the SEC in an investigation have been prosecuted before. *App. #28*. Importantly, the SEC did not attempt to defend Theriault's testimony or claim in any way that he was not being deceitful. It is certainly a fair inference from the SEC's response that even it now realizes that Theriault lied to it when he testified the two times in 2011.

ARGUMENT AND CITATION OF AUTHORITY

A. Applicable Legal Standards

1. §10(b) of the 1934 Act, Rule 10b-5 and §17(a) of the 1933 Act

To prove a violation of §10(b) of the 1934 Act or Rule 10b-5, the SEC must prove the defendant made (1) a material misrepresentation or materially misleading omission, (2) in connection with the purchase or sale of a security, (3) with scienter. *SEC v. Goble*, 682 F.3d 934, 942-943 (11th Cir. 2012). To prove a violation of §17(a)(1), it must prove the defendant made (1) a material misrepresentation or materially misleading omission, (2) in the offer or sale of a security, (3) with scienter. *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012). Finally, to prove a violation of §17(a)(2) or §17(a)(3), it must

prove the defendant made (1) a material misrepresentation or materially misleading omission, (2) in the offer or sale of a security, (3) with negligence. *Morgan Keegan*, 678 F.3d at 1244. This negligence standard requires a showing that the defendant acted without reasonable prudence. *SEC v. Dain Rauscher, Inc*., 254 F.3d 852, 857 (9th Cir. 2001).

To show scienter, a defendant must have acted with either "intent to deceive, manipulate, or defraud" or "severe recklessness." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008); *Damian v. Montgomery County Bankshares, Inc.*, 981 F.Supp.2d 1368, 1380 (N.D. Ga. 2013)(Batten, J.). Severe recklessness is "limited to those highly unreasonable omissions or misrepresentations" involving "an extreme departure from the standards of ordinary care and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *Mizzaro*, 544 F.3d at 1238; *Damian*, 981 F.Supp.2d at 1380. A motive and opportunity to commit fraud, without more, cannot establish scienter. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285-1286 (11th Cir. 1999).

2. Materiality

A misstatement or omission is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made

available." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309, 1318 (2011); *Basic Inc. v. Levinson* , 485 U.S. 224, 231-232 (1988); *Morgan Keegan*, 678 F.3d at 1245. Materiality is an "objective" inquiry involving the significance of an omitted or misrepresented fact to a reasonable investor. *TSC*, 426 U.S. at 445, 96 S.Ct. at 2130; *Morgan Keegan*, 678 F.3d at 1245. The test is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action. *See Basic*, 485 U.S. at 231-232; *Goble*, 682 F.3d at 943; *In re HomeBanc Corp. Sec. Litigation*, 706 F.Supp.2d 1336, 1352 (N.D. Ga.)(Batten, J.).

The mere fact that "an investor might find information interesting or desirable is not sufficient to satisfy the materiality requirement." *Lucia v. Prospect St. High Income Portfolio, Inc*. 36 F.3d 170, 175 (1st Cir. 1994). The role of the materiality inquiry is "to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger 'mix' of factors to consider in making his investment decision." *Goble*, 682 F.3d at 943, n.5. "Course of action" means an investment decision. *Goble*, 682 F.3d at 943, and the relevant "mix" of information is those facts an investor would consider when making an investment decision. *Goble*, 682 F.3d at 943, n 5.

Although materiality is a mixed question of law and fact, *SEC v. Mayhew*, 121 F.3d 44, 51 (2d Cir. 1997), summary judgment is appropriate when the alleged misstatements and omissions are so obviously unimportant and immaterial as a

matter of law. *See, e.g., Kaufman v. Trump's Castle Funding*, 7 F.3d 357, 369 n.13 (3d Cir. 1993); *SEC v. Hoover*, 903 F.Supp. 1135, 1148 (S.D. Tex. 1995).

3. Aiding And Abetting Liability Under §20(e) Of The 1934 Act

Section 20(e) imposes liability against any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of the 1934 Act, or of any rule or regulation issued thereunder. 15 U.S.C. § 78t(e). The SEC must prove: (1) a primary violation of the securities laws; (2) that the aider and abettor had knowledge of the primary violation; and (3) the aider and abettor provided substantial assistance in the commission of the primary violation. *SEC v. Goble*, 682 F.3d 934, 947 (11th Cir. 2012).

B. Wheet is Entitled To Summary Judgment

1. Wheet Did Not Violate Either §10(b) Or §17(a) For The Same Reasons That RMC Is Not Liable

Wheet is entitled to summary judgment on the claims brought under §10(b) of the 1934 Act and §17(a) of the 1933 Act for the same reasons that RMC is not liable as set forth in the RMC Brief. Wheet incorporates those reasons herein by express reference herein.

2. Because There Was No Primary Violation Of The Securities Laws, Wheet Can Not Be Liable For Aiding And Abetting Liability

Because there was no primary violation of either §10(b) of the 1934 Act or §17(a) of the 1933 Act, Wheet cannot be liable for aiding and abetting, and is entitled to summary judgment on that claim.

CONCLUSION

For all of the reasons discussed in this brief and those set forth in RMC Brief, Wheet requests that his motion be granted and that summary judgment be entered on his behalf as to all claims brought against him.

Dated this 15th day of August, 2014.

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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.

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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.

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