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

JOINT BRIEF OF DEFENDANTS REVOLUTIONS MEDICAL CORP. AND RONDALD L. WHEET IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Revolutions Medical Corp. ("RMC") and Rondald L. Wheet ("Wheet") submit this joint brief in opposition to the Motion for Partial Summary Judgment filed by Plaintiff Securities Exchange Commission ("SEC").

INTRODUCTION

Despite initially alleging that RMC issued five (5) press releases in 2010 and one (1) press release in 2011 that were allegedly false and misleading, the SEC only seeks partial summary judgment as to press releases issued on August 24, 2010 ("the August 24 press release") and September 10, 2010 ("the September 10 press release"). RMC and Wheet already have submitted briefs in support of their

separate Motions for Summary Judgment filed on August 15, 2014 that seek summary judgment on these two press releases and the other four at issue.[1] To the extent an issue raised in the SEC's motion has already been addressed in either the RMC Brief or the Wheet Brief, reference will be made to the pages in those briefs that respond to that argument.

The SEC is not entitled to summary judgment because:

(a) With respect to the August 24 press release:

(1) The SEC misstates the purpose of that press release, and there were no misstatements in it;

(2) The press release was not material and had no statistically significant positive impact on RMC's stock price;

(3) Statements in the press release regarding syringe development were forward-looking and accompanied by meaningful cautionary language;

(4) RMC and Wheet did not act with scienter;

(b) With respect to the September 10 press release:

(1) Referring to the DHAPP money as a "contract" as opposed to a "grant" was not a misrepresentation because RMC reasonably believed it was a contract and it was called a contract by Navy personnel themselves;

[1] The brief submitted by RMC [Doc. 44-1] is referred to herein as "RMC's Brief", and the brief submitted by Wheet [Doc. 43-1] is referred to herein as "Wheet's Brief". Defendants' Joint Statement of Material Facts as to Which There is no Genuine Issue to be Tried [Doc. 43-2, 44-2] is referred to herein as "Defs' SMF".

(2) The use of the word "contract" as opposed to "grant" was not material;

(3) The press release was not material and had no statistically significant positive impact on RMC's stock price;

(4) The statement that RMC was "to receive [a] contract" was a forward-looking statement and not actionable;

(5) RMC and Wheet did not act with scienter;

(6) RMC had no duty to disclose other information relating to DHAPP in the press release; and,

(7) RMC had no duty to update the press release after it learned DHAPP money would not be coming.

For all of these reasons, the SEC's motion should be denied. In addition, summary judgment should be granted to RMC and Wheet as to these press releases and the other four for the reasons discussed below and for the additional reasons discussed in RMC's Brief and Wheet's Brief.

THE SEC HAS NOT COMPLIED WITH THIS COURT'S INSTRUCTIONS TO PARTIES AND COUNSEL WITH RESPECT TO CITATIONS TO THE RECORD EVIDENCE

This Court's Instructions to Parties and Counsel require that:

> All citations to the record evidence should be contained in each party's brief, not just in the party's statement of undisputed (or disputed) facts. Thus, the party should include in the brief,

> immediately following the deposition reference, a citation indicating the page and line numbers of the transcript where the referenced testimony can be found.

Doc. 2, p. 16.

The SEC has not followed this instruction in either its brief or its statement of material facts.

RESPONSE TO THE SEC'S FACTUAL BACKGROUND STATEMENT

Much of the SEC's discussion focuses on issues that have no bearing on the issues before this Court. To the extent that a fact relates specifically to either the August 24 press release or the September 10 press release, it is discussed below in the sections specifically addressing each press release. However, there are other statements made by the SEC that do not relate directly to either of those press releases that are discussed here.

For example, the SEC states that before RMC could sell the 8-piece syringe, it had to finalize an FDA letter to file detailing the changes in the new syringe from the original blue syringe that was cleared by the FDA in February, 2009. *SEC Brief, p. 3*. That is not true. The internal "letter to file" documenting the changes was only needed in the event of an FDA audit. *Wheet 4/22/14,*[2] *31/11-33/2; 126/25-127/17, 169/4-14; Rothkopf SEC,*[3] *29/1-16, 54/24-55/19; O'Brien,*[4] *254/25-*

[2] Deposition of Rondald Wheet on April 22, 2014 in this case.
[3] Deposition of David Rothkopf on December 14, 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.").
[4] Deposition of Thomas O'Brien on May 22, 2014 in this case.

255/22. Likewise, a quality system did not have to be in place in order for RMC to sell its syringe so long as it was in place before an FDA audit was conducted or RMC shipped syringes to an end user. [5] *Wheet 4/22/14, 33/17-21, 166/25-168/4, 169/15-18.*

The SEC's Brief is also remarkable because it fails to mention two individuals and one entity who have played important roles until now. First, the SEC apparently seeks to simply wish away the existence of Richard Theriault ("Theriault"), the admitted liar and fraudster who convinced the SEC to bring this action through his false testimony. In fact, the extent to which the SEC now seeks to distance itself from Theriault is reflected by the fact that it never refers to him by name but, instead, simply refers to him as "SPD's President". *SEC Brief, p. 10; SEC Statement of Undisputed Material Facts [Doc. 45-2], ¶54*. Otherwise, the SEC's statement of undisputed material facts contains absolutely no mention of Theriault. As detailed in RMC's Brief and Wheet's Brief, Theriault through his entities SPD and MIG was the contractor charged with improving the syringe samples on behalf of RMC, was the person who dealt directly with the actual manufacturers of the syringes and was the sole source of information for RMC and

[5] RMC did have quality systems in place prior to selling syringes. *See Defs' SMF 29, 30.*

Wheet as to what was going on with the syringes throughout this period. Despite this, the SEC seeks to ignore him.[6]

Second, the SEC also attempts to run away from its relationship with Philip Maurice Hicks ("Hicks"), an individual who engaged in a scheme to short RMC stock, defamed RMC constantly on internet message boards, defamed RMC to the Navy after it had decided to award DHAPP to RMC, and who was ultimately found liable to RMC and Wheet for millions of dollars in damages as a result of these smear campaigns. Rather than look into the actions of Hicks, the SEC instead apparently relied on Hicks' complaints about RMC to pursue RMC. *See App. #36 for copies of some of the letters Hicks wrote to the SEC*. The SEC's brief and its statement of undisputed material facts contains no mention of Hicks.

Third, the SEC never mentions Auctus Private Equity Fund, LLC ("Auctus") – the purported victim of the alleged bad acts of RMC and Wheet. That gross failing is telling since when the SEC brought this case, it claimed that the ***only*** victim of RMC's alleged fraud was Auctus. The SEC brought this matter based on the sole theory that RMC issued the press releases to inflate the price of its stock price so it would need to use fewer shares to obtain the money from Auctus under the drawdown agreement between RMC and Auctus. *Complaint [Doc. 1]*, ¶¶*17-*

[6] Counsel for RMC and Wheet wrote to the SEC asking what its intentions were once it had been established that Theriault committed perjury when he testified to it. The SEC's response was essentially that it was not its concern and that RMC and Wheet should pursue an investigation through the U.S. Attorney's Office for this District. *See App. #11, 12.*

18, 31-33; App. #35 – Plaintiff's Initial Disclosures, p. 2; SEC Response to Defendants First Inter., App. #30 - #16, #20, #21, #22, #23, #24. However, when deposed, Auctus' principal testified that it did not matter to it where the RMC stock price was and it does not believe it was defrauded, cheated or taken advantage of in any way by RMC. *Sollami SEC,*[7] *34/17-23; Sollami,*[8] *48/4-15*. This is not surprising because: (1) the drawdown requests by RMC were not sent at or before a press release was issued so it could take advantage of an expected stock price increase; and (2) RMC only submitted requests for about 10% of what it could have submitted ($1 million of $10 million available), *Wheet 4/23/14,*[9] *64/15-66/22*, even though Auctus encouraged it 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.*[10] Moreover, Auctus made a profit on the RMC stock. *Sollami, 24/22-25/3, 42/20-43/12, 51/6-20; Sollami SEC, 29/19-22, 32/9-12; DX 81-84, 86*. That is not surprising because the agreement between Auctus and RMC only required Auctus to pay 97% of the ***lowest*** closing bid price during the five trading days following the date of the drawdown notice. *Sollami, 42/4-45/18; DX 76, 78*.

[7] Deposition of Alfred Sollami on October 6, 2011 in the SEC Inv.
[8] Deposition of Alfred Sollami on June 2, 2014 in this case.
[9] Deposition of Rondald Wheet on April 23, 2014 in this case.
[10] See RMC's Brief, pp. 28-30.

If, as the SEC claimed, RMC released these press releases to push its stock higher so it could benefit financially from them, one would expect drawdown notices to be sent no later than just before the press release was issued so that (at least in theory) the stock price would go up and stay up over the next five trading days used to calculate the price Auctus would pay RMC. If the stock price did not increase immediately or had one bad day out of five, RMC did not benefit under the payment formula. RMC did not do that. With respect to the six press releases at issue in this case, RMC sent the drawdown requests on the day a press release was issued only on two occasions[11], six days after one was released on two occasions[12] and seven days after one was released one time.[13] That evidence is totally inconsistent with the existence of scienter. Last, there is no evidence 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 to accept the drawdown requests. Having apparently realized that its original theory of the case has been destroyed by Auctus' own testimony, the SEC is now apparently adrift and has decided to smear RMC and Wheet rather than acknowledge that its case is lost.

[11] August 24, PX 32 at 155-156; and September 17, PX 32 at 138-139.
[12] September 1, PX 32 at 151-152; and September 22, PX 32 at 134-135.
[13] September 10, PX 32 at 140-142. No drawdown request was issued around the time of the July 8, 2011 press release because the equity line had been terminated several months before that date.

ARGUMENT AND CITATION OF AUTHORITY

A. The August 24 Press Release

1. The SEC Misstates The Purpose Of The August 24 Press Release Which Was Not About A Pilot Run But About The Status Of The Syringe

The SEC alleges that the August 24 press release falsely stated:

(1) There had been the "successful completion" of RMC's Pilot Run for its new manufacturing design changes to its syringe;

(2) The "market samples" had been successfully "completed" or would be very shortly; and,

(3) RMC would now be permitted to begin "finalizing negotiations" with distributors "over the coming weeks."

SEC Brief, pp. 5, 20-21.

These allegations are based either on a fundamental or intentional misunderstanding of the manufacturing process and myopic reading of the August 24 press release and are without merit.

a. The August 24 Press Release Did Not State The "Market Samples" Had Been Completed Or Would Be Completed Very Shortly

The SEC alleges RMC made a misstatement when it stated in the August 24 press release that "market samples" had been successfully "completed" or would be very shortly. However, the press release plainly states the opposite.

The August 24 press release was captioned RMC's "New Market Samples of the RevVac Safety Syringe ***to be*** Completed and Ready for Distribution". *PX 32*[14] *at 155-156 (emphasis added)*. Nothing could be plainer – something that is "to be completed" is not completed". The market samples were expected to be ready ***in the future***, and that is what the press release states. *PX 32 at 155-156 (emphasis added)*. The press release further states that RMC was working with a U.S. manufacturer ***to complete*** market samples which was true. That "U.S. manufacturer" was Precision Tool and Die ("Precision") which had been retained by either Theriault's company SPD or Andrew Goddard to make pilot or test molds for the redesigned syringe. *Driscoll,*[15] *72/12-17, 87/12-21, 142/16-18; Wheet 4/22/14, 27/3-18, 29/5-8*. That means the market samples were being manufactured, RMC was getting closer to having them ready, but they were not ready yet. The press release does not state that the market samples were completed nor does it state that RMC is ready for final mass production at that time which would indicate to any reasonable reader that there is still work to be done before the syringe was ready for mass production.

The SEC's argument that the pilot run had not resulted in syringes that were ready for human use is just a "straw man" argument. All of the evidence establishes that the pilot run was never intended to yield a final product for human

[14] PX 32 can be found at Exhibit 12 [Doc. 45-15] to the Nana Jorjoladze declaration [Doc. 45-3],
[15] Deposition of Michael Driscoll on April 28, 2014 in this case.

use. Moreover, contrary to the SEC's argument, the August 24 press release did not state that the syringe being produced was intended for human use. It stated that RMC was working with a U.S. manufacturer to complete market samples.

In brief, the August 24 press release never claimed that RMC presently had syringes that were being commercially manufactured and suitable for human use. Importantly, the August 24 press release never states, suggests or implies that the syringes were completed or from a final production run or for human use. The title of the August 24 press release – RMC's "New Market Samples of the RevVac Safety Syringe ***to be*** Completed and Ready for Distribution" (emphasis added) – makes it clear to any reasonable reader that the syringes were market samples, not syringes ready for human use. Thus, this argument by the SEC should be rejected.

b. <u>The Pilot Run Was Successful In Several Important Respects</u>

The SEC's attempt to make this press release about whether the pilot run was successful misses the point of the press release which was to give a status report with respect to the progress of the syringe manufacturing process as of that date. The SEC's focus is further inconsistent with the title of the press release and the other information in it described above. It further ignores the fact that the press release was simply one of a series of press releases issued during this time on the progress of the syringe as it moved through the development process. *See discussion below at pp. 13-14, 17-18, 31-32*.

Regardless, the pilot run was successful in several respects. First, before the pilot run, RMC did not know if the newly designed syringe and its reduced number of pieces could be manufactured at all. The pilot run established that the redesigned syringe could be manufactured with fewer pieces which, in turn, would save money in future production costs. Second, before the pilot run, RMC did not know whether once manufactured, the parts would work together and function as the blue syringe functioned. The pilot run showed that even with a reduced number of parts, the redesigned syringe functioned like the blue syringe.

The fact that there were some syringes that had problems does not mean that the pilot run was unsuccessful. As the aluminum prototype molds were finished, Precision began manufacturing samples. *Driscoll, 31/14-23, 89/23-90/5*. When Precision assembled the first samples, they noticed ***some*** (not all) of the components were not sliding together correctly and fitting the way they thought they should. *Driscoll, 46/18-23*. As Driscoll put it, they were working but were not perfect yet. *Driscoll, 32/8-9*. So Precision made some adjustments to the parts so that they performed better. *Driscoll, 46/24-47/2*. The tooling was then finished, and the syringes were functional. *Driscoll, 34/17-20*. Driscoll testified that this was not unusual because normally in a new project, there are bugs to be worked out, and projects may require adjustments and refining to make things work. *Driscoll, 76/12-24, 138/13-23*.

By way of analogy, vehicle or product manufacturers may have problems with parts or components that necessitate a recall, but that does not make the vehicle or product a complete failure or unsuccessful. The SEC's argument that any syringe not perfect makes an entire production a failure is simply unfounded.

The SEC is really arguing over how many angels can fit on the head of a pin in the sense that it has unilaterally declared that – in its view – having a few syringes that do not work to perfection in a pilot run causes the run to be "unsuccessful". The SEC has no expertise or basis to make such a determination, and its unilateral proclamation certainly cannot support summary judgment. This is particularly true where, as here, RMC spent over $800,000 to manufacture the syringe in China based upon the success of the pilot run. *DX 112; Theriault,*[16] *121/11-122/7*.

Therefore, this argument by the SEC should be rejected.

c. RMC Did Not Misrepresent The Status Of "Preliminary Sales Orders" And Distribution Agreements With Third Parties

Last, the SEC alleges that RMC made a misstatement when it stated in the August 24 press release it could "finalize negotiations with manufacturers, distributors and begin announcing preliminary sales orders over the coming weeks". That statement is a clear expression of future intent. Further, it was true and correct because RMC, in fact, did do those things "over the coming weeks".

[16] Deposition of Richard Theriault on June 5, 2014 in this case.

On September 1, RMC announced developments relating to preliminary sales orders and distribution agreements. *PX 32 at 151-152*. On September 3, RMC 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*. On September 7, RMC announced it had secured a five year contract for MIG to produce its syringe. *PX 32 at 145-146*. On September 17, RMC announced it had finalized its manufacturing agreement with MIG. *PX 32 at 138-139*. It also worked to develop a distribution network during this same time period as described in detail at pages 6-7 of RMC's Brief. RMC did all those things "over the coming weeks" after the August 24 press release.

This contention by the SEC is refuted by the language of the August 24 press release itself which states RMC could now finalize negotiations with manufacturers and distributors, that it could begin announcing preliminary sales orders over the coming weeks, and that the timing could not be better.[17] The phrases and words "can now finalize" and "preliminary" make it clear to any reader that these actions have not yet occurred. Nowhere 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 release are future looking statements about what it expected to do in the

[17] PX 32 at 155-156.

future which, in fact, RMC did do with respect to distributors and sales as discussed immediately above.

Last, the statements that RMC could now finalize negotiations with manufacturers and distributors, that it could begin announcing preliminary sales orders over the coming weeks, and that the timing could not be better[18] were, at most, vague and generalized statements – several of which are expressly based on the opinions, "feel[ings]," "belie[fs]," "hope[s]," and "want[s]" of management – that this Court found constituted inactionable corporate "puffery" in *HomeBanc Corp. Sec. Litigation*, 706 F.Supp.2d 1336, 1352 (N.D. Ga.)(Batten, J.).[19]

The SEC also argues that even if RMC's disclosures were true, which they were, they conveyed "an overall misimpression that the syringe had reached a final stage in its development." *SEC Brief, p. 21*. That claim is simply absurd given that RMC's press releases throughout this period consistently stated only that it was developing a market sample syringe, that it had no actual manufacturing capacity yet, that it had only just signed a manufacturing agreement with MIG, and that it had no distribution agreements in place and was just beginning discussions with potential distributors. *See RMC Brief, pp. 4-6, 8-9*. The August 24 press release conveyed a truthful picture of where RMC stood in the development of the syringe.

[18] PX 32 at 155-156.
[19] See RMC's Brief, pp. 23-24.

All arguments by the SEC with respect to the August 24 press release are without merit, and it should be denied summary judgment on the August 24 press release. In addition, RMC and Wheet should be granted summary judgment on this press release for the reasons set forth in Wheet's Brief and RMC's Brief.

2. The August 24 Press Release Was Not Material And Had No Statistically Significant Positive Impact On RMC's Stock Price

The SEC is also not entitled to summary judgment on the August 24 press release because it was not material and had no statistically significant positive impact on RMC's stock price.

The SEC has the burden of proving that 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); *SEC v. Morgan Keegan*, 678 F.3d 1233, 1245 (11th Cir. 2012). Materiality is an "objective" inquiry involving the significance of an omitted or misrepresented fact to a reasonable investor. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 445, 96 S.Ct. 2126, 2130 (1976); *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; *SEC v. Goble*, 682 F.3d 934, 943 (11th Cir. 2012); *HomeBanc*, 706 F.Supp.2d at 1352.

The SEC has failed to do so. First, it is important to remember that the SEC has alleged that the only party negatively impacted by any of the press releases was Auctus because Auctus was required to pay a higher price for RMC stock. As discussed above at pages 6-7, that claim is without any support in the record and has now apparently been abandoned by the SEC.

Second, the SEC has introduced no evidence to carry its burden of proving the August 24 press release had a statistically significant positive impact on RMC's stock price. The SEC has failed to submit 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 the August 24 press release.

Third, as discussed in RMC's Brief at pages 24-26, 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. Despite this being the usual course of action in these matters, the SEC has not submitted a company-specific event study that established the August 24 press release was material and impacted RMC's stock price.

Fourth, the SEC has not even addressed several other more likely explanations for any activity in RMC's stock. For example, the August 24 press release was 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. On August 16, RMC 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*. On August 18, RMC announced it had detailed studies to expand the value of its proprietary MRI imaging tools. *PX 32 at 160-161*. On August 20, RMC announced additional details regarding clinical studies related to its MRI technology and the presentation of a related paper by one of the doctors working with RMC on it. *PX 32 at 157-158*.

After the August 24 press release was issued, additional press releases were issued. On August 30, RMC described an award for medical design excellence that should properly have been attributed to RMC. *PX 32 at 153-154*. On September 1, RMC announced developments relating to preliminary sales orders and distribution agreements. *PX 32 at 151-152*. On September 3, RMC 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*. On September 7, RMC announced it had secured a five year contract for MIG to produce its syringe. *PX 32 at 145-146*. As a result, press releases containing positive news were announced on three of six trade dates immediately prior to August 24 and on three of nine trade dates immediately after August 24. In short, the August 24 press release was but one press release issued in the middle of a series of press releases

which contained positive news about RMC. The SEC has made no effort to differentiate the impact these others press releases had on RMC's stock price.

Fifth, what happened to RMC's stock after the August 24 press release reinforces the conclusion it had no statistically significant positive impact on RMC's stock price. Here is what RMC's stock price did during that period:

Date	Open	High	Low	Close	Volume
8/16/2010	$0.29	$0.31	$0.29	$0.30	66,700
8/17/2010	$0.31	$0.33	$0.29	$0.31	105,800
8/18/2010	$0.31	$0.40	$0.30	$0.40	32,700
8/19/2010	$0.30	$0.38	$0.30	$0.38	5,900
8/20/2010	$0.30	$0.38	$0.26	$0.27	136,000
8/23/2010	$0.30	$0.35	$0.27	$0.28	38,000
8/24/2010	**$0.28**	**$0.28**	**$0.28**	**$0.28**	**0**
8/25/2010	$0.30	$0.38	$0.28	$0.29	87,300
8/26/2010	$0.38	$0.40	$0.35	$0.38	160,900
8/27/2010	$0.38	$0.45	$0.38	$0.39	273,900
8/30/2010	$0.43	$0.50	$0.38	$0.50	411,300
8/31/2010	$0.60	$0.70	$0.50	$0.69	706,100
9/1/2010	$0.67	$0.75	$0.56	$0.68	1,451,700
9/2/2010	$0.69	$0.69	$0.55	$0.59	999,200
9/3/2010	$0.60	$0.75	$0.58	$0.75	734,200
9/7/2010	$0.76	$0.87	$0.76	$0.76	1,340,900

App. #25. The market had no response to the August 24 press release – it closed that day at the same price as it had on August 23 and closed up only $.01 the next day. That hardly constitutes a statistically significant positive impact on RMC's stock price.

The stock price only started to increase several days after the August 24 press release was issued, and a far more likely explanation for that is the sheer

number of other press releases containing positive news issued throughout this period and/or the substantial short selling and accompanying short squeeze that began in August and peaked during the months of August and September. *Ronk Dec.*, ¶¶*10-12 and Exhibit B thereto*. The Buyins.net March 21, 2011 report was forwarded to the SEC on February 12, 2012, but the SEC has apparently ignored it. *See RMC's Brief, pp. 22-23*.

The SEC says Wheet told the local Charleston newspaper that the increase in RMC's stock price likely stemmed from the many pieces of positive news issued by RMC since mid-August. *SEC Brief, p. 7*. That may well be true, but that is not the same thing as stating that a specific price increase was due to a single, specific press release (i.e., the one issued on August 24) which is what the SEC must prove to carry its burden of proof in this case.

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 in *HomeBanc* 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. Even the SEC concedes that movement of a company's stock price, ***or lack thereof***, is a factor that may evidence materiality.

SEC Brief, p. 18. 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 the August 24 press release.

Therefore, the SEC is not entitled to summary judgment, and, instead, RMC and Wheet should be granted summary judgment as to the August 24 press release.

3. The Statements In The August 24 Press Release Were Forward-Looking Statements And Were Accompanied By Meaningful Cautionary Language

As discussed in RMC's Brief at pages 27-28, forward-looking statements may be rendered immaterial by accompanying cautionary language under the judicially created "bespeaks caution" doctrine.

From the caption of the August 24 press release which talked about new market samples "to be completed" to the substance of that press release which talked about events to occur in the future, it was clear to any reasonable reader that these are not statements of current fact but what RMC believed would occur in the future. Moreover, they were accompanied by a broad safe harbor disclaimer for forward-looking statements.

For this additional reason, the SEC is not entitled to summary judgment on the August 24 press release, and, instead, RMC and Wheet should be granted summary judgment as to the August 24 press release.

4. RMC And Wheet Did Not Act With Scienter

Summary judgment is also not proper for the SEC because RMC and Wheet did not act with the requisite scienter.

In most cases involving press releases, there is a clear motive for issuing the false press release. The press release is then issued, and, predictably, the stock's price goes up. The individuals who were responsible for issuing the press release then capitalize financially on the increase in the stock's price. That never happened with respect to the August 24 press release. Neither RMC nor Wheet, who never sold any of his stock during the August and September, 2010 period, *Wheet 4/23/14, 45/23-46/1*, capitalized financially during this time.

As discussed in RMC's Brief at pages 28-30, courts may consider the timing and volume of stock trades by insiders to determine whether the complaint gives rise to an inference of scienter. But because there were no sales of stock by Wheet during August and September, 2010, the only reasonable conclusion is that RMC and Wheet did not act with scienter.

Second, the only motive the SEC originally identified was that RMC was trying to inflate the price of its stock so it would be required to sell fewer shares to

Auctus. As discussed above at pages 7-8, what RMC and Wheet did is totally inconsistent with any notion that they acted with scienter in issuing the press releases. Not surprisingly, the SEC's original theory has apparently now been abandoned by it as discussed above and in RMC's Brief at pages 28-30.

In the absence of any evidence of scienter, the SEC is not entitled to summary judgment on the August 24 press release, and, instead, RMC and Wheet should be granted summary judgment as to the August 24 press release.

B. The September 10 Press Release

1. There Was No Misstatement In The September 10 Press Release Because RMC Believed It Had An Actual Or Prospective Contract With The U.S. Department Of Defense As Of September 10

The SEC alleges the September 10 press release was false because it stated RMC was "to receive [a] contract" when it had only received preliminary approval for a "grant".

The undisputed facts based on written emails between RMC and the Navy group administering the DHAPP program are that:

(a) On July 27, 2010, the Navy told RMC its proposal had been "approved". *App. #13 at RMCP000017*;

(b) On July 28, 2010, the Navy told RMC 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 at RMCP000017-18*;

(c) On August 3, 2010, RMC received official notification that the Navy review panel had conditionally approved its proposal and provided specifics regarding it.[20] *App. #14 at RTE0004071-72; Wheet 4/23/14, 150/21-151/5, 156/7-9, 175/16-22; Compton SEC,*[21] *23/18-25, 26/11-16, 27/7-12, 28/11-15, 103/15-18*;

(d) 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". *Wheet 4/23/14, 151/6-10, 159/10-160/21*; and,

(e) On September 9, 2010, the Navy told RMC "the award will come electronically and I'm [Latrice Rubenstein] looking at an award date on or before 30 September 2010." *App. #15 at RMCP000046; Wheet 4/23/14, 154/1-9.*

This shows that as of the date of the press release, what RMC said was true – it expected "to receive [a] contract" for DHAPP. That frankly ends the inquiry and is not only grounds for denying the SEC's motion but is also the basis for granting RMC and Wheet summary judgment as discussed in RMC's Brief at pages 9-12.

The fact that RMC did not ultimately receive the contract after September 10 is irrelevant. The first indication DHAPP money might not be coming was when RMC was told on September 28, ***18 days after the September 10 press release was***

[20] 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.
[21] Deposition of Ernest Compton on May 25, 2011 in the SEC Inv.

issued, that "Unfortunately, there are no FY10 funds remaining [for DHAPP]." *App. #15 at RMCP000045*. It was not until October 13, 2010, ***over a month after the September 10 press release was issued***, that RMC was formally notified that its grant would not be funded. *App. #16 at RTE0000557*.

Over the next several months and into 2011, RMC continued to try and reverse the Navy decision, was given hope that funding would still be coming and was 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; App. #17-19; Wheet 4/23/14, 194/23-195/3; O'Brien SEC,*[22] *41/18-42/18, 70/23-71/5, 99/25-100/4; Key SEC,*[23] *74/10-23; Compton SEC, 25/3-16, 32/14-33/4, 34/18-24*.

RMC has provided the Court with the evidence showing that 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. *See RMC Brief, pp. 11-13*. But the undisputed facts are that prior to the September 10 press release:

(a) RMC was told its application had been approved;

(b) RMC was congratulated by the Navy on being awarded the "contract"; and,

(c) RMC was told the award would come on or before September 30.

[22] Deposition of Thomas O'Brien on November 11, 2011 in the SEC Inv.
[23] Deposition of Byron Scott Key on September 7, 2011 in the SEC Inv.

Therefore, the statement in the September 10 press release that RMC was "to receive [a] contract" for DHAPP was true or reasonably believed to be true when made. Therefore, the SEC's motion as to this press release should be denied, and the motion for summary judgment by RMC and Wheet as to this press release should be granted.

2. The Use Of The Word "Contract" As Opposed To "Grant" Was Not Material

Even assuming the SEC is correct and RMC erred in using the word "contract" rather than the word "grant", the SEC has submitted no evidence that there is a "substantial likelihood that the disclosure of the omitted fact [the word "grant"] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Matrixx*, 131 S.Ct. at 1318; *Basic*, 485 U.S. at 231-232; *Morgan Keegan*, 678 F.3d at 1245.

The issue then is whether a reader of the September 10 press release would conclude something more positively about RMC and its financial prospects because it saw the phrase that RMC was "to receive [a] contract" rather than "was to receive [a] grant".

The SEC's contention with respect to the word "contract" is not only unfounded but also simply quibbling and nitpicking at its worst. The SEC has the burden of proving materiality, and it has submitted no evidence that such a change would be material to a reasonable investor. First, as discussed above at pages 6-7,

it is important to remember the SEC originally alleged that the only party negatively impacted by any of the press releases was Auctus. As discussed above, that claim is without any support in the record and has now apparently been abandoned by the SEC.

Second, even the Navy people administering DHAPP did not always refer to the money as a "grant" and, in fact, used other terms to describe the money coming from the Navy to RMC.[24] *App. #15 at RMCP000046* ("The ***award*** will come electronically and I'm looking at an ***award*** date on or before 30 September 2010.")(emphasis added).

Third, even the United States Government recognizes that grants and contracts are identical in many respects. *See United States General Accounting Office, Principles of Federal Appropriations Law*, 3d Ed., eBook Version, March, 2014 ("*Principles of Federal Appropriations Law*"), pp. 1426-1612. As stated in *Principles of Federal Appropriations Law*, a federal grant is a form of assistance authorized by statute in which a federal agency (the grantor) transfers something of value, usually money, to a party (the grantee) for a purpose, undertaking, or activity of the grantee that the government has chosen to assist. *Principles of Federal Appropriations Law*, p. 1427. It goes on to acknowledge that courts have looked to contract law to define the rights and obligations of parties to a federal

[24] This, of course, contradicts the SEC's claim at page 15 of its brief that "DOD/DHAPP always referred to the award as a "grant".

grant. It further notes that this "grant as a type of contract" approach goes back to a Supreme Court decision from 1866 and that other courts have applied contract principles to grants in various contexts. *Principles of Federal Appropriations Law*, pp. 1429-1430, quoting *McGee v. Mathis*, 71 U.S. (4 Wall.) 143, 155 (1866). In addition, courts have held that a grant could give rise to contract rights enforceable under the Tucker Act, 28 U.S.C. §1491(a)(1), which gives the Court of Federal Claims jurisdiction over claims against the United States "founded . . . upon any express or implied contract with the United States." *See, e.g., Thermalon Ind., Inc. v. U.S.*, 34 Fed.Cl. 411 (1995). As the court stated in *Mayor and City Council of Baltimore v. Browner*, 866 F.Supp. 249, 252 (D. Md. 1992), "Essentially, grants are contracts with statutory and regulatory terms superimposed upon them."

The point is that whether called a grant or a contract, RMC believed as of September 10 that it was to receive money under DHAPP, and that is what it stated in its September 10 press release. No reasonable reader of that press release would assign any greater significance to the press release because the word "contract" was used rather than the word "grant". Both indicate money was expected to be paid by the federal government to RMC.

Therefore, in the absence of any evidence that the use of the word "contract" was somehow material, the SEC's motion as to the September 10 press release

should be denied and the motion for summary judgment by RMC and Wheet as to the September 10 press release should be granted.

3. The September 10 Press Release Was Not Material And Had No Statistically Significant Positive Impact On RMC's Stock Price

Equally important, the SEC has introduced no evidence to carry its burden of proving that the September 10 press release had a statistically significant positive impact on RMC's stock price.

In addition to the fact that the September 10 press release was not material to Auctus, the SEC has failed to submit any expert testimony on the issue of materiality, has failed to present any competent evidence establishing that a statistically significant positive stock movement occurred in response to the September 10 press release and has failed to submit a company-specific event study to establish that the September 10 press release was material and impacted RMC's stock price even though courts and the SEC itself have recognized that a company-specific event study is the "best measure" of materiality.

Despite not providing a company-specific event study or any expert testimony on materiality, the SEC claims that "Following the September 10 press release, RMCP's stock price and volume increased dramatically." *SEC Brief, p.* 13. The fact is RMC's stock price and volume ***had been increasing dramatically since well before the release of the September 10 press release***, and the SEC has simply

chosen to ignore what occurred before September 10. Here is what RMC's stock price did in the weeks before and after the September 10 press release was issued:

Date	Open	High	Low	Close	Volume
8/11/2010	$0.31	$0.31	$0.28	$0.28	5,100
8/12/2010	$0.30	$0.30	$0.26	$0.28	30,300
8/13/2010	$0.26	$0.28	$0.26	$0.28	5,600
8/16/2010	$0.29	$0.31	$0.29	$0.30	66,700
8/17/2010	$0.31	$0.33	$0.29	$0.31	105,800
8/18/2010	$0.31	$0.40	$0.30	$0.40	32,700
8/19/2010	$0.30	$0.38	$0.30	$0.38	5,900
8/20/2010	$0.30	$0.38	$0.26	$0.27	136,000
8/23/2010	$0.30	$0.35	$0.27	$0.28	38,000
8/24/2010	$0.28	$0.28	$0.28	$0.28	0
8/25/2010	$0.30	$0.38	$0.28	$0.29	87,300
8/26/2010	$0.38	$0.40	$0.35	$0.38	160,900
8/27/2010	$0.38	$0.45	$0.38	$0.39	273,900
8/30/2010	$0.43	$0.50	$0.38	$0.50	411,300
8/31/2010	$0.60	$0.70	$0.50	$0.69	706,100
9/1/2010	$0.67	$0.75	$0.56	$0.68	1,451,700
9/2/2010	$0.69	$0.69	$0.55	$0.59	999,200
9/3/2010	$0.60	$0.75	$0.58	$0.75	734,200
9/7/2010	$0.76	$0.87	$0.76	$0.76	1,340,900
9/8/2010	$0.80	$0.88	$0.73	$0.86	908,300
9/9/2010	$0.97	$0.98	$0.82	$0.97	1,332,900
9/10/2010	**$1.00**	**$1.28**	**$0.88**	**$1.28**	**1,331,800**
9/13/2010	$1.33	$1.74	$1.22	$1.44	3,209,400
9/14/2010	$1.42	$1.47	$1.09	$1.15	2,713,900
9/15/2010	$1.07	$1.12	$0.87	$0.94	2,403,100
9/16/2010	$0.88	$0.97	$0.82	$0.89	1,065,600
9/17/2010	$0.92	$1.04	$0.87	$0.91	653,900

App. #25. This shows that **before** the September 10 press release was issued, RMC's stock:

(a) Had been trading on heavy volume throughout August and early September;

(b) Had closed up on each of the four days before the press release was issued increasing from September 2 to September 3 ($.59 to $.75), increasing another $0.01 to $.76 the next trading day (September 7), increasing another $.10 to close at $.86 on September 8, and increasing another $.11 to close at $.97 on September 9; and,

(c) Had doubled in price just in the last eight trading days and essentially tripled in price in the last 10 trading days.

The September 10 press release was not issued until 2:20 p.m. that day. *PX 6, p. 5.*[25] Before it was issued, the stock had already opened up that morning from what it closed at the day before. *App. #25*. After it 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. But in the immediate days after September 13, it ***dropped*** in value on four of the next five trading days.[26] *App. #25*. This evidence certainly does not support the conclusion that the September 10 press release had any statistically significant positive impact on RMC's stock price.

[25] PX 6 is submitted as App. #37 with this response.
[26] It declined on September 14, 15, 16 and 20 and only increased on September 17. *App. #25*.

The SEC also totally fails to account for what impact the numerous other press releases issued during the same period had on RMC's stock price. Press releases were issued on:

(a) August 16 announcing RMC 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*;

(b) August 18 announcing RMC had detailed studies to expand the value of its proprietary MRI imaging tools. *PX 32 at 160-161*;

(c) August 20 announcing additional details regarding clinical studies related to RMC's MRI technology and the presentation of a related paper by one of the doctors working with RMC on it. *PX 32 at 157-158*;

(d) August 24 discussed above;

(e) August 30 describing an award for medical design excellence that should properly have been attributed to RMC. *PX 32 at 153-154*;

(f) September 1 announcing developments relating to preliminary sales orders and distribution agreements. *PX 32 at 151-152*;

(g) September 3 announcing RMC 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*; and,

(h) September 7 announcing RMC had secured a five year contract for MIG to produce its syringe. *PX 32 at 145-146*.

The SEC says Wheet told the local Charleston newspaper that the increase in RMC's stock price likely stemmed from the many pieces of positive news issued by RMC since mid-August. *SEC Brief, p. 7.* As noted earlier, that may well be true, but that is not the same thing as stating that a specific price increase was due to a single, specific press release (i.e., the one issued on September 10) which is what the SEC must prove to carry its burden of proof in this case.

Last, the SEC makes no effort to account for the substantial short selling in RMC's stock that peaked during the months of August and September, 2010 and which is documented in the Buyins.net March 21, 2011 report forwarded to the SEC on February 12, 2012 and all but ignored by it. *See RMC's Brief, pp. 22-23;Ronk Dec.*, ¶¶*10-12 and Exhibit B thereto*.

As pointed out above at page 19-20, this Court recognized in *HomeBanc* 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. Even the SEC concedes that

movement of a company's stock price, ***or lack thereof***, is a factor that may evidence materiality. *SEC Brief, p. 18.*[27]

Therefore, in the absence of any evidence of materiality, the SEC's motion as to the September 10 press release should be denied, and the motion for summary judgment by RMC and Wheet as to it should be granted.

4. The Statement That RMC Is "To Receive [A] Contract" Is Clearly A Forward-Looking Statement And Not Actionable

The September 10 press release clearly states that RMC is "***to receive*** [a] contract" for DHAPP. That references an event that clearly is to occur in the future so it is obviously a future looking statement. Moreover, it was accompanied by a broad safe harbor disclaimer for forward-looking statements.

It is harder to imagine a statement more forward-looking that the statement in the September 10 press release. For this additional reason, the SEC is not entitled to summary judgment on the September 10 press release, and, instead, RMC and Wheet should be granted summary judgment as to it.

5. RMC And Wheet Did Not Act With Scienter

Summary judgment is also not proper for the SEC because RMC and Wheet did not act with the requisite scienter.

[27] Even Theriault testified to the SEC that he never saw a correlation between the issuance of any press release and RMC's stock price going up. *Theriault 8/24/11 testimony in the SEC Inv., 118/25-119/4.*

Having now apparently abandoned its original theory that RMC was trying to inflate the price of its stock so it would be required to sell fewer shares to Auctus, the SEC claims RMC and Wheet acted with scienter because the September 10 press release was issued to create a short squeeze. *SEC Brief, pp. 11-12, 29*. But the Eleventh Circuit has rejected the notion that "allegations of motive and opportunity to commit fraud, standing alone, are sufficient to establish scienter in this Circuit." *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282, 1303 (11th Cir. 2011); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285 (11th Cir. 1999). As a result, even assuming the SEC is correct that the September 10 press release was issued at that time to thwart short sellers, that does not constitute scienter because the statement in the September 10 press release that RMC was "to receive [a] contract" was true at that time.

Just as discussed above with respect to the August 24 press release, there is no evidence that RMC or Wheet benefitted financially from the September 10 press release. In the absence of any evidence of scienter, the SEC is not entitled to summary judgment on the September 10 press release, and, instead, RMC and Wheet should be granted summary judgment as to the September 10 press release.

6. RMC Had No Duty To Disclose Other Information In The September 10 Press Release Relating To DHAPP

The SEC now claims for the first time that RMC actually should have said more about the DHAPP contract. *SEC Brief, p. 26*. This claim indicates the extent

to which the SEC will apparently go in light of the fact that its basic premise – RMC never had a contract for DHAPP – is demonstrably wrong. It cites no case in which a court has so held in the context of a company making a future looking statement about a possible single future contract. The SEC cites the *FindWhat Investor* case, but that court actually held that by voluntarily revealing one fact about its operations, a duty arises for the corporation to disclose such other facts, if any, ***as are necessary to ensure that what was revealed is not "so incomplete as to mislead***." *FindWhat Investor*, 658 F.3d at 1305 (emphasis added). The Court went on to state that requiring disclosures to be " 'complete and accurate' . . . ***does not mean that by revealing one fact about a product, one must reveal all others that, too, would be interesting, market-wise***." 658 F.3d at 1305 (emphasis added).

The September 10 press release revealed that RMC "expected to receive [a] contract." That statement is complete in itself and needs no additional disclosures "to ensure that what was revealed is not "so incomplete as to mislead." *FindWhat Investor*, 658 F.3d at 1305. Frankly, it seems that no matter what RMC did or did not disclose in the September 10 press release, the SEC would have found fault with what it did. This argument by the SEC is without merit and should be rejected.

It is important to remember that the most significant aspect of the Navy contract was not the revenue it would provide RMC. It was the fact that RMC's

syringe had been selected over other syringes and that it presented an opportunity for more sales if this went well for RMC. *Wheet 4/23/14, 166/11-18, 175/3-15*. That is why the September 10 press release was headlined the way it was and why there was no discussion in the press release about any financial impact DHAPP might have on RMC. The fact that RMC's syringe was selected over competing syringes remained a fact that never changed even after DHAPP was not funded.

The fact that RMC revealed the expected DHAPP contract did not mean that it had a duty to reveal all other facts relating to it even if those facts might be "interesting, market-wise". *FindWhat Investor*, 658 F.3d at 1305. As a result, RMC had no duty to disclose more about the DHAPP contract.

Therefore, for this additional reason, the SEC is not entitled to summary judgment on the September 10 press release, and, instead, RMC and Wheet should be granted summary judgment as to the September 10 press release.

7. RMC Had No Duty To Update The September 10 Press Release

The SEC also argues RMC was required to issue another press release after learning it would not receive the DHAPP contract. *SEC Brief, p. 14*.

Of course, even the SEC has to concede that RMC issued a press release on July 8, 2011 that discussed in great detail what happened relating to DHAPP and the loss of that funding. Among other things, it described what DHAPP was, the purpose behind DHAPP, that RMC was to receive the money under DHAPP, the

four countries that were chosen for the demonstration, that it was supposed to be funded by September 30, 2010, that it went unfunded for that fiscal year, and that there was no available grant money for RMC under DHAPP in the current year's budget. *PX 32 at 87-88.*[28] The SEC claims the disclosure should have been sooner and in even more detail. *SEC Brief, p. 28*. The only questions then are (1) whether RMC had a duty to make an updated disclosure, (2) if it had such a duty, when that disclosure should have been made, and (3) whether that disclosure had a material impact on RMC's stock price.

First, RMC had no duty to make an updated disclosure. The Eleventh Circuit has held that a duty to update only applies to:

> statements that contain "an implicit factual representation that remain[s] 'alive' in the minds of investors as a continuing representation"

Finnerty v. Stiefel Laboratories, Inc., 756 F.3d 1310, 1317 (11th Cir. 2014), quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997). There is no evidence and the SEC has submitted none that establishes that RMC's statement that it "expected to receive [a] contract" "remained alive in the minds of investors as a continuing representation". As discussed immediately below, the complete lack of any positive response by investors to the July 8 press release describing what happened to DHAPP reinforces the conclusion that

[28] The SEC contends four points should have been disclosed. *SEC Brief, p. 28*. Numbers (1) and (4) are essentially the same which is that RMC was not going to receive any money from DHAPP. RMC made that clear in its July 8 press release. Numbers (2) and (3) are immaterial.

investors had long forgotten about the September 10 press release because if they had not, there would have been a significant and material negative impact on RMC's stock price when the July 8 press release was issued.

Second, the SEC never specifically states when the disclosure should have been made although it apparently suggests it should have been in February, 2010. *SEC Brief, p. 28*. That ignores the fact that RMC continued to try and get the funding throughout early 2011.

Third, even assuming it was made earlier, the SEC again has failed to introduce any evidence showing how a press release issued before July 8 would have impacted RMC's stock price. The only evidence that exists on this issue is what happened when RMC made the disclosure on July 8 which was that its stock price remained 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*. If as the SEC claims, the runup in the stock price after September 10 (a supposition that, as pointed out at pages 28-31, is questionable in the first place) was due to the September 10 press release, presumably the stock would have plunged significantly after the July 8 press release was issued after it became clear DHAPP money was not coming. It did not. The lack of any corrective impact on the stock price after this press release is further evidence that (1) the September 10 press release did not impact the stock

price in a statistically significant positive way when issued and (2) a corrective press release issued before July 8 would have had no material impact on RMC's stock price.[29]

This argument by the SEC is nothing other than Monday-morning quarterbacking and should be rejected by this Court.

RMC had no duty to update the September 10, and for this additional reason, the SEC is not entitled to summary judgment on the September 10 press release, and, instead, RMC and Wheet should be granted summary judgment as to the September 10 press release.[30]

CONCLUSION

For all of the reasons discussed in this brief and in RMC's Brief and Wheet's Brief, RMC and Wheet request that the SEC's motion be denied and that the motions for summary judgment filed by RMC and Wheet be granted on all claims brought against them by the SEC.

Dated this 15th day of September, 2014.

[29] 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).

[30] The SEC claims RMC was not permitted to earn a profit on the DHAPP contract. *SEC Brief, pp. 8-9.* Besides being irrelevant since the September 10 press release did not even mention revenue or expected profit from the contract, that statement is disingenuous at best. The contract did not require RMC to sell at the cost of production and allowed RMC to recapture a wide variety of costs, fees and expenses over and above the actual costs of manufacturing the syringes. See, e.g., Rubenstein declaration, Exhibit A [Doc. 45-39], p. SEC-RMC-RPD-E-1-0222592 (vi. Section III: Cost); SEC-RMC-E-1-0222596, SEC-RMC-RPD-E-1-0222602. Second, the SEC claims RMC supposedly misstated the number of syringes it could produce per month in its application for DHAPP. RMC did not have to have the current ability to produce those syringes. Under DHAPP, it simply needed to be able to provide them by April, 2011. As discussed in Wheet's Brief, Theriault consistently told RMC during 2010 and well into 2011 that MIG would be able to produce whatever amount RMC needed.

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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 September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on September 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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