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 REPLY BRIEF IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS REVOLUTIONS MEDICAL CORP. AND RONDALD L. WHEET

Defendants Revolutions Medical Corp. ("RMC") and Rondald L. Wheet ("Wheet") submit this joint reply brief in support of their separate Motions for Summary Judgment [Docs. 43, 44].[1]

A. THE TWO CORE ISSUES IN THIS CASE

This case presents two core issues for resolution by the Court – Did any of the six press releases identified by the SEC[2] contain any misstatements, and, if so, is there any evidence that any alleged misstatements were material?[3] The record evidence makes it clear that the press releases at issue did not contain any misstatements that were material to anyone, let alone any reasonable investor.

B. THE SEC'S CONSTANTLY SHIFTING CLAIMS AND THEORIES AND ITS FALSE STATEMENTS

The SEC's arguments in this case: (1) Reflect it has completely abandoned its original theory of the case which was the only one alleged in the complaint and its discovery responses; (2) Consist of repeated, unfounded claims that RMC represented in press releases issued in August and September, 2010, that it had a fully working syringe ready for immediate sale and distribution when no such statement was ever made; (3) Consist in part of brand new claims made for the first time, some two years

[1] The SEC's original response to these motions was Doc. 93-1. It later filed Doc. 97-2 because its original response did not comply with this Court's instructions with respect to citations to the record and to include additional citations. Doc. 97-2 is referred to as "SEC [Doc. 97-2]".

[2] The six are August 24, 2010, PX 32 [Doc. 45-15] at 155-156; September 1, 2010, PX 32 [Doc. 45-15] at 151-152; September 10, 2010, PX 32 [Doc. 45-15] at 140-141; September 17, 2010, PX 32 [Doc. 45-15] at 138-139; September 22, 2010, PX 32 [Doc. 45-15] at 134-135; and July 8, 2011, PX 32 [Doc. 45-15] at 87-88. App. #30 [Doc. 56-30] - #13, #14.

[3] To the extent arguments have been addressed in prior briefs, RMC and Wheet incorporate them herein by reference. RMC and Wheet will reference the brief by RMC [Doc. 44-1] in support of its Motion for Summary Judgment [Doc. 44] ("RMC [Doc. 44-1]"), the brief by Wheet [Doc. 43-1] in support of his Motion for Summary Judgment [Doc. 43] ("Wheet [Doc. 43-1]"), and the joint brief by them [Doc. 89] in opposition to the SEC's Motion for Partial Summary Judgment [Doc. 45] ("Defs' Jt. [Doc. 89]").

after this case was filed and well after its interrogatory answers listed the press releases at issue, that certain other press releases were false; (4) Purport to impose entirely new legal duties on RMC and Wheet that simply do not exist; (5) Avoid virtually all the arguments relating to materiality on which it has the burden of proof; and, (6) Attempt to wish away the existence of Richard Theriault ("Theriault") and Philip Maurice Hicks ("Hicks") on whom the SEC originally based its case.

These developments appear to reflect that the SEC belatedly recognizes the weakness of its claims and hopes to shore them up with anything it can.

1. The SEC Has Abandoned Its Only Theory Of The Case

When this case was first filed, the SEC's ***sole theory*** was that RMC issued the press releases to artificially inflate the price of its stock price so it would need to use fewer shares to obtain money it was borrowing from Auctus Private Equity Fund, LLC ("Auctus") under an agreement between it and Auctus.[4] The SEC ***alleged that Auctus was the only victim of RMC's alleged fraud*** even though it knew when it filed the complaint that it did not matter to Auctus where the RMC stock price was, that it did not believe it was defrauded, cheated or taken advantage of in any way by RMC, that it profited on RMC's stock, and that it did not rely on any press release to make any decision.[5] There is no victim in this case because there was no fraud.

[4] Complaint [Doc. 1], ¶¶17-18, 31-33; App. #35 [Doc. 92-1] – Plaintiff's Initial Disclosures, p. 2; SEC Response to Defendants First Inter., App. #30 [Doc. 56-30] – #16, #20, #21, #22, #23, #24.
[5] Defs' Jt. [Doc. 89], pp. 6-8; RMC [Doc. 44-1], pp. 14-15.

2. RMC Never Claimed In Any August Or September Press Release That It Had A Fully Functional Syringe Immediately Ready For Sale Or Distribution

The SEC argues repeatedly that: (1) RMC claimed in the August and September press releases it had a fully functioning syringe immediately ready for distribution or sale; (2) the redesigned syringe had to have FDA 510(k) clearance and did not in 2010; and, (3) the redesigned syringe could not be sold because it never passed tests conducted in 2011 by David Rothkopf, RMC's FDA expert.

This argument is a house of cards. First, ***RMC never claimed during August and September that the redesigned syringe was ready for distribution or sale, and no one reading the press releases issued during that period could possibly conclude otherwise***. Here is what RMC actually said in the press releases:

(1) August 24 – It was titled "New Market Samples of the RevVac Safety Syringe to be Completed and Ready for Distribution" and stated that "market samples", not final syringes, were "to be completed";[6]

(2) September 1 – It stated that over the next several weeks, RMC would be sending out ***market samples***; not final syringes;[7]

(3) September 3 – It stated RMC had signed a letter of intent with MIG for the future manufacturing of its syringe and that the final terms were expected to be completed no later than September 17, 2010;[8]

[6] PX 32 [Doc. 45-15] at 155-156.
[7] PX 32 [Doc. 45-15] at 151-152.
[8] PX 32 [Doc. 45-15] at 147-148.

(4) September 7 – It stated RMC had secured a 5 year contract with MIG to produce syringes;[9] and,

(5) September 17 – It stated RMC had finalized a manufacturing agreement with MIG and Wheet stated this is RMC's "***first manufacturing relationship***".[10]

Given that any single press release must be read in the context of other press releases issued at or about the same time, there is no basis for the SEC to claim that a reasonable reader might be misled as to the status of syringe development or manufacturing when RMC is ***repeatedly*** stating it is working on developing market sample syringes, has no actual manufacturing capacity yet and has just concluded "its first manufacturing relationship" with MIG.[11] Nowhere does RMC state these are final syringes, that they are suitable for human use or that they are ready for commercial production. So the entire premise underlying the SEC's argument, that RMC said its redesigned syringe was immediately ready for distribution or sale is clearly false, and there is no need to consider this line of argument further.

Rather than discussing the specific words in the press releases, the SEC makes vague and non-substantive assertions about them. For example, it claims that they generally give "misimpression[s]".[12] With respect to the September 1 press release, it claims RMC "perpetuate[d]" prior misrepresentations "by omission" and that in the

[9] PX 32 [Doc. 45-15] at 145-146.
[10] PX 32 [Doc. 45-15] at 138-139 (emphasis added).
[11] RMC [Doc. 44-1], pp. 4-6, 8-9.
[12] SEC [Doc. 97-2], p. 29.

September 17 press release it "implicitly reiterated" its then-existing readiness to finalize agreements with distributors.[13] With respect to the September 22 press release, the SEC claims RMC "suggest[ed]" that the syringe was in an advanced stage of development when it was not.[14] These words used by the SEC lack any substance and reflect its ongoing effort to try and avoid discussing the specific content of the press releases.

Second, the SEC's argument that the redesigned syringe needed FDA clearance to be sold is inaccurate. Even the SEC concedes the FDA had already cleared the blue syringe on which the redesigned syringe was based.[15] The redesigned syringe ***did not need further FDA clearance*** because Rothkopf concluded it embodied no real new technology and the performance was not being changed that great.[16] Instead, all that would be required would be an internal "letter to file" documenting the changes in the event of an FDA audit.[17] Rothkopf further told the SEC during his investigation deposition there are companies (not RMC) that sell a product even though it has failed process validation and there is nothing to stop those companies from selling the product.[18] Rothkopf also testified systems were not required before a sale could be made and gave an example of a client that had no such systems in place when the

[13] SEC [Doc. 97-2], p. 32.
[14] SEC [Doc. 97-2], p. 33.
[15] Complaint, ¶15; App. #7 [Doc. 56-7].
[16] Wheet [Doc. 43-1], pp. 8-9.
[17] Defs' Jt. [Doc. 89], p. 4.
[18] Rothkopf [oc. 75-1], 47/11-49/5, 49/20-50/2.

FDA audited it. The FDA gave the client a warning letter but did not stop the client from selling the product.[19]

The SEC's claim that the redesigned syringe had to have FDA clearance in 2010 is false.

The SEC argues Rothkopf did not decide this though until late 2010 or early 2011.[20] But that argument misses the point. In 2010, when the press releases were issued, it did not matter whether the redesigned syringe needed FDA clearance (as the SEC wrongly claims) or just needed a letter to file (as Rothkopf decided) ***because RMC was not telling the public at that time that it had a final production ready syringe ready to be sold***. No decision had to be made until there were syringes that were considered production ready. Moreover, Rothkopf ultimately was able to decide a letter to file would be sufficient based on what he knew about the redesign.[21]

Related to this, the SEC argues RMC was not in position to sell any syringe when the August and September press releases were issued because it never had a working prototype that could pass tests by Rothkopf.[22] But the tests by Rothkopf ***did not occur in 2010*** when the press releases were issued. They were done, instead, in 2011 when it is undisputed that Theriault was lying consistently to RMC (and the SEC

[19] Rothkopf [Doc. 75-1], 53/9-54/7.
[20] SEC [Doc. 97-2], pp. 7-8.
[21] Wheet [Doc. 43-1], pp. 8-9.
[22] SEC [Doc. 97-2], p. 8. It also claims in note 6 on page 9, for example, that "zero" samples tested by Rothkopf passed his tests. This is a clear misrepresentation of Rothkopf's testimony in which he said "zero" was the acceptable rate of failures for him and that there were only "some" failures. Rothkopf [Doc. 75-1], 61/12-61/23.

for that matter) about the status of syringe manufacturing in China.[23] The fact that those tests occurred long after the August and September press releases were issued makes them irrelevant to the central issue in this case which focuses on the August and September, 2010 press releases.

At the time of the August and September press releases, RMC had a working sample produced by Precision Tool & Die that was being adjusted and refined since it was not perfect yet according to Precision's testimony.[24] RMC never issued a press release during August and September in which it claimed the redesigned syringe was ready for distribution or sale, and no one reading the press releases issued during this period could reasonably conclude otherwise.

The SEC also claims RMC did not have the ability to sell the blue syringe because it did not have the design drawings or the molds to manufacture it.[25] That statement is false as conclusively shown by what actually happened when RMC discovered Theriault's fraud in 2011. Despite having to start literally from the beginning with only the blue syringe: (1) the blue syringe was reverse engineered by Yeso-med; (2) Yeso-med manufactured ready for human use syringes; (3) all required testing was completed; (4) all necessary quality systems were set up; (5) the syringes were shipped to Charleston where they passed an FDA audit; and (6) the syringes were thereafter sold to distributors or customers in the United States and

[23] Wheet [Doc. 43-1], pp. 11-19.
[24] Defs' Jt. [Doc. 89], pp. 12-13.
[25] SEC [Doc. 97-2], pp. 2-3.

internationally.[26] Thus, the SEC's claims that without the designs or molds RMC could not manufacture the blue syringe, or that using the blue syringe was never an option, or that RMC could not generate revenue from the blue syringe,[27] are wrong.

3. The SEC Should Not Be Allowed To Interject New Press Releases That Were Not Identified In Interrogatory Answers Into This Case At This Late Hour

The SEC's interrogatory answers stated that the only press releases allegedly misleading were the five in 2010 and the one in 2011.[28] Now, ***for the first time***, it claims it "believes that **all** of Defendants' press releases are tainted by deception" because they somehow "perpetuated" earlier alleged misrepresentations and non-disclosures.[29] It also now apparently claims that two 2009 press releases and one from November 23, 2010 were false.[30] The SEC argues that in the two 2009 press releases, RMC "effectively claim[ed]" that the redesigned syringe had been cleared by the FDA.[31] What was or was not said in 2009 is irrelevant to and has no bearing on this case since the SEC never previously alleged they were false.[32] More importantly, though, that it would attempt to interject these other press releases into this case well after discovery has been closed speaks volumes about the weakness of its claims

[26] RMC [44-1], p. 8; Wheet [Doc. 43-1], p. 18..
[27] SEC [Doc. 97-2], pp. 3-4
[28] App. #30 [Doc. 56-30] - #13, #14.
[29] SEC [Doc. 97-2], pp. 12 (emphasis in original), 29-30.
[30] SEC [Doc. 97-2], pp. 5-6, 33.
[31] SEC [Doc. 97-2], pp. 5-6.
[32] To the extent required, RMC and Wheet formally object to any attempt by the SEC to make these 2009 press releases part of this case since the SEC's own interrogatory answers foreclose their inclusion and the SEC has never moved to amend the complaint or its interrogatory answers. The November 23, 2010 press release is discussed below at pages 17-18.

relating to the August and September press releases and its unwillingness to deal with whether any of them contained any misstatements.[33]

4. RMC And Wheet Had No Ongoing Disclosure Duties

Indicative of the SEC's shifting arguments is its repeated claim RMC and Wheet had a duty to continually "disclose all material facts concerning the syringe and those agreements."[34] The cases cited by the SEC, *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282 (11th Cir. 2011), and *Backman v. Polaroid Corp.*, 910 F.2d 10, 16 (1st Cir. 1990)(*en banc*), both actually support RMC and Wheet because they state that additional facts only need to be disclosed "as are necessary to ensure that what was revealed is not "so incomplete as to mislead" which does not mean "that by revealing one fact about a product, one must reveal all others that, too, would be interesting, market-wise." *FindWhat*, 658 F.3d at 1305; *Backman*, 910 F.2d at 16.[35] *Accord, Mogensen v. Body Central Corp.*, 2014 WL 1509577, *13 (M.D. Fla. 2014)(*quoting FindWhat* and then stating "[a] corporation has a duty to neutralize only the *natural and normal implication* of its statements")(emphasis in original).

There is nothing misleading or additional that needs to be disclosed when it is stated market samples are being manufactured, RMC is getting closer to having them ready, but they are not yet completed or ready for final mass production.

[33] The September 9, 2009 and December 14, 2009 press releases had no positive impact on RMC's stock price. RMC's stock closed at $.54 on September 9. It closed lower on the next 17 consecutive trading days. App. #25 [Doc. 56-25]. RMC's stock closed at $.49 on December 14, 2009. It did not close at a higher price until August 30, 2010, a span covering 178 consecutive trading days. App. #25 [Doc. 56-25].
[34] SEC [Doc. 97-2], pp. 29-30.
[35] Defs' Jt. [Doc. 89], pp. 35-38.

Not surprisingly, the SEC does not say what "all material facts" should have been disclosed. Would that information include the cost of manufacturing and selling, information as to margins and profitability of the syringe, information as to exact materials used in the syringe and the sourcing of those materials, details of contracts relating to sourcing materials and manufacturing, details as to product improvements considered, and the like? The information the SEC would apparently require to be disclosed in each press release would cause a public company to opt for less, not more disclosure because no press release would be less than several pages each time, and would disclose information otherwise considered trade secrets or confidential at the very least. Not surprisingly, the SEC cites no case holding this.

5. The SEC Has Failed To Address The Objective Evidence Showing That The Press Releases Were Not Material

The SEC also tries to ignore all the objective evidence proving that the press releases were not material which is discussed in detail at pages 18-24 below.

6. Theriault's Played A Significant Role In The Underlying Matters And In Convincing The SEC To File This Case

Last, the SEC wishes Theriault and Hicks would just go away and try to portray any discussion of Theriault and his extensive role in all of this as a "red herring".[36] Until the SEC learned Theriault lied to it, it thought he was important enough to depose him on two separate occasion during its pre-filing investigation. Only when it

[36] SEC [Doc. 97-2], p. 13. At least the SEC has now acknowledged Theriault's existence, something it did not do in Doc. 45-1.

learned that he lied repeatedly to it did it start to back away from him. Theriault is relevant for three reasons. First, he was charged with improving the syringe for RMC, was the person who dealt directly with Precision regarding the samples and the Chinese manufacturer of the final syringe and was the sole source of information for RMC with respect to development of the syringe. Second, RMC relied on him for information put in the press releases because of his critical role with respect to the underlying matters mentioned in the press releases. Third, he played a critical role in causing this action to be filed because of his repeatedly false testimony given to the SEC. Had Theriault's sworn testimony been true, it may well have supported an enforcement action.[37] But once he admitted that his testimony as to being production ready was false during his AAA deposition,[38] the SEC was faced with a choice – acknowledge he lied and dismiss this case or start throwing everything and anything against RMC and Wheet in the hope that something, anything, would stick. It chose the latter.

The SEC also tries to run away from its relationship with Hicks, the short seller who defamed RMC constantly on internet message boards and to the Navy after it decided to award the DHAPP money to RMC.[39] Rather than investigate Hicks as part

[37] Wheet [Doc. 43-1], pp. 22-24.
[38] Wheet [Doc. 43-1], pp. 20-21.
[39] Defs' Jt. [Doc. 89], p. 6.

of its stated mission to "maintain fair, orderly, and efficient markets," the SEC instead pursued RMC.[40]

The shifting theories of the case, the hiding of the ball and the attempted legal sleight of hand by the SEC reveals a basic truth – this case was filed based on the false testimony of Theriault and the SEC's theory that Auctus was defrauded, and ever since both have been discredited, the SEC has been scrambling. It is time for this case to be ended. RMC is a small company with a tremendous product that has been battered and damaged by having this litigation hanging over its head.

C. THE STATEMENTS IN THE PRESS RELEASES WERE TRUE AND ACCURATE OR THERE WAS A REASONABLE BASIS TO BELIEVE THEY WERE WHEN MADE

1. The August 24, 2010 Press Release

The SEC claims RMC led the public to believe that it "had a working product".[41] This press release plainly states the opposite. Its title states that market samples, not even final syringes, are still ***to be*** completed and that RMC was working with a U.S. manufacturer ***to complete market samples***, not a final, ready for production syringe.[42] That means the market samples were being manufactured, RMC was getting closer to having them ready, but they were not yet completed or ready for final mass production. That falls well short of a representation that it had a "working

[40] App. #36 [Doc. 92-2] (letters Hicks wrote to the SEC).
[41] SEC [Doc. 97-2], p. 29.
[42] PX 32 [Doc. 45-15] at 155-156.

product". The other argument by the SEC, that RMC had an obligation to disclose all material facts as to the syringe, is discussed above at pages 10-11.

2. The September 1, 2010 Press Release

The SEC makes the vague and non-specific claim that this press release "perpetuate[d]" prior misrepresentations "by omission" and "perpetuate[d]" misrepresentations by claiming it would be sending out market samples and signing distribution agreements over the next several weeks and that it had received inquiries to distribute its syringe.[43] As discussed in prior briefs, no misrepresentations were made in this press release which was accurate.[44]

3. The September 10, 2010 Press Release

The SEC alleges RMC "claimed to have a "contract" with the U.S. government."[45] That itself is a misstatement. This press release states its syringe had been selected by the U.S. government (which was true) and that it expected to receive a contract for DHAPP (which was true). RMC and Wheet have already identified for the Court the specific emails received from the Navy stating RMC was to receive money for the DHAPP program and the conference call in which the Navy persons congratulated RMC on being awarded the "contract".[46] What RMC said in this press release was true – it expected to receive a contract for DHAPP, and ***the SEC does not***

[43] SEC [Doc. 97-2], pp. 30-31.
[44] RMC [Doc. 44-1], pp. 2-9.
[45] SEC [Doc. 97-2], p. 31.
[46] RMC [Doc. 44-1], p. 10; Defs' Jt. [Doc. 89], pp. 23-26.

try to refute what those documents state. That frankly ends the inquiry. That RMC did not ultimately receive the funding because of events that occurred after September 10 is irrelevant. Second, this press release also clearly states RMC is "***to receive*** [a] contract" which is obviously a future looking statement and not actionable.[47] ***The SEC does not address this point in its brief***, let alone refute it. Third, the SEC ***does not respond*** to how the use of the word "contract" as opposed to "grant" is material and has submitted no evidence that a reader would conclude something more positively about RMC's financial prospects because the word "contract" was used rather than "grant". Fourth, the SEC ***does not respond*** to the fact even the Navy people administering DHAPP did not always refer to the money as a "grant" and themselves used other terms to describe the money coming from the Navy to RMC.[48] Sixth, the SEC ***does not respond*** to the fact that even the United States Government itself in its own publications recognizes that grants and contracts are identical in many respects.[49] Fifth, the SEC ***does not respond*** to the evidence showing that the attack by the short sellers in September caused the Navy to defund the award to RMC.[50] Last, the SEC originally alleged that the only party negatively impacted by any of the press releases was Auctus, a claim it has now abandoned.

Whether called a grant or contract, RMC had a reasonable basis to believe it

[47] Defs' Jt. [Doc. 89], p. 34.
[48] Defs' Jt. [Doc. 89], p. 27.
[49] Defs' Jt. [Doc. 89], pp. 27-28.
[50] RMC [Doc. 44-1], pp. 11-13.

was to receive money under DHAPP, which is what it stated in this press release, and no reasonable reader would assign any greater significance to the press release because the word "contract" was used rather than the word "grant".

4. The September 17, 2010 Press Release

The SEC claims that RMC's statement that it was in a position to sign initial distributors and begin to gauge preliminary sales volume "implicitly reiterated" its then-existing readiness to finalize agreements with distributors.[51] Setting aside the question of what that phrase even means, it is hard to respond since the underlying assumption is that if a company is talking with potential distributors, it is impliedly representing that it has a finished product to sell at that time. That assumption is simply unfounded. Moreover, the SEC totally ignores and fails to disclose to the Court the RMC press releases on September 3 and September 7 discussed above at pages 4-5 and that ***this very same September 17 press release stated RMC has now "finalized a manufacturing agreement . . . with [MIG]" which was RMC's "first manufacturing relationship."***[52] Given the content of these press releases, no one can credibly argue that a reasonable reader would have concluded that commercial manufacturing had begun.

5. The September 22, 2010 Press Release

Unable to identify any fact that was allegedly misrepresented, the SEC is

[51] SEC [Doc. 97-2], pp. 30-31.
[52] PX 32 [Doc. 45-15] at 138-139.

reduced to claiming it falsely "suggest[ed]" the syringe was in an advanced stage of development when it was not.[53] First, there is no record evidence that anyone, including any reasonable investor, thought this was "suggested", particularly given that the September 3, 7 and 17 press releases made it clear where syringe development stood. Second, the SEC cites no case holding that a "suggestion" rises to the level of a misrepresentation of material fact. Incredibly, the SEC contends RMC should have disclosed in this September 22 press release information as to what occurred at the Medica medical show in Dusseldorf, Germany, ***two months later in November***.[54] That obviously makes no sense, but it is indicative of the complete lack of any substantive argument the SEC has as to these press releases. Last, the SEC tries to interject a November 23, 2010 press release into the case for the first time despite its interrogatory answers that failed to identify this press release as one at issue.[55] The SEC should not be allowed to do so at this late hour.[56]

There is no evidence and the SEC cites none to show that as of the date of this press release (September 22) and based on what Theriault told it, RMC did not expect to have functioning redesigned syringes available when it went to the Medica medical

[53] SEC [Doc. 97-2], p. 33.
[54] SEC [Doc. 97-2], p. 33.
[55] SEC [Doc. 97-2], p. 33.
[56] As discussed above at pages 9-10 with respect to the 2009 press releases, to the extent required, RMC and Wheet formally object to any attempt by the SEC to make this press release part of this case since its own interrogatory answers foreclose their inclusion and the SEC has never moved to amend the complaint or its interrogatory answers. Interestingly, though, the November 23 press release had no positive impact on the stock price: it closed at $.60 on November 23 and ***has never closed at or higher than $.60 since that date***. App. #25 [Doc 56-25].

show in Dusseldorf, Germany, later in November. That fact has not been disputed by the SEC and is the only fact relevant to the September 22 press release.

6. The July 8, 2011 Press Release

The SEC claims this press release was false because RMC (1) lacked the capacity to mass manufacture a syringe suitable for human use that could be sold or distributed, and (2) could not actually fill any orders for its safety syringes.[57]

Theriault told RMC MIG was or would soon be production ready and, just like the SEC, RMC believed him.[58] That meant syringes would be available for purchase through the DLA for anyone placing an order. Therefore, that statement had a reasonable basis when made and is not actionable.

D. NONE OF THE PRESS RELEASES WERE MATERIAL AND HAD A MATERIAL, POSITIVE IMPACT ON RMC'S STOCK PRICE

Even if this Court assumes the press releases were false, the SEC has failed to carry its burden to prove that with respect to each individual press release 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."[59]

First, the SEC ***has now abandoned its original theory of the case*** that the press releases were material to Auctus. Second, the SEC ***has not submitted any expert***

[57] SEC [Doc. 97-2], p. 35.
[58] Wheet [Doc. 43-1], pp. 11-17, 21-24.
[59] Wheet [Doc. 43-1], pp. 27-29.

testimony on materiality.[60] Third, the SEC ***has not submitted a company-specific event study*** to establish the press releases were material and impacted RMC's stock price even though courts and the SEC itself have recognized that such a study is the "best measure" of materiality and best evidence as to whether a reasonable investor would have viewed information as significant.[61] Fourth, the SEC ***has not submitted any evidence*** showing that a statistically significant positive stock movement occurred in response to any of the press releases. The record evidence ***conclusively establishes the press releases had no positive impact on RMC's stock price, and the SEC has submitted no evidence to contradict this.***

(1) August 24. The market had no response to it since it closed up only $.01 the next day.[62]

(2) September 1. The immediate market reaction to it was that ***the stock price dropped 13%*** from $.68 to $.59.[63]

(3) September 10. RMC's stock had already runup substantially in the days before this press release.[64] On the morning of September 10, ***before*** the press release was issued at 2:20 p.m. that day,[65] the stock opened at $1.28, $.31 (32%) above what it closed at the day before.[66] After it was issued, the stock continued to go up the next

[60] Defs' Jt. [Doc. 89], pp. 17, 29.
[61] RMC [Doc. 44-1], pp. 25-26; Defs' Jt. [Doc. 89], pp. 17, 29.
[62] App. #25 [Doc. 56-25]; Defs' Jt. [Doc. 89], pp. 19-20.
[63] App. #25 [Doc. 56-25]; RMC [Doc. 44-1], p. 16.
[64] App. #25 [Doc. 56-25]; RMC [Doc. 44-1], pp. 17-18; Defs' Jt. [Doc. 89], pp. 29-32.
[65] App. #37 [Doc. 92-3].
[66] App. #25 [Doc. 56-25]; Defs' Jt. [Doc. 89], p. 31.

trading day (September 13), but then ***dropped*** in value on four of the next five trading days and ***dropped substantially*** over the next five weeks from $1.44 on September 13 to $.46 on October 18.[67] Thus, what happened to the stock price on September 10 was simply a continuation of what had been going on for several days already, but then it dropped substantially.

(4) September 17. The ***stock plummeted*** from $.91 that day to $.69 on the next trading day (September 20), a drop of 24%.[68] It closed at $.72 on September 21 and did not close higher the next 22 trading days through October 21.[69]

(5) September 22 press release. The ***stock went down*** from $.67 at the close on September 22 to ***lower closing prices for the next 20 trading days*** with the exception of one day during that period when it closed at that same $.67.[70] It was not until a month later on October 21 that it closed above the price on September 22.[71]

(6) July 8, 2011 press release. Even though it discussed in detail what happened relating to the loss of DHAPP funding, it had no impact on the stock price which remained flat during the next five trading days.[72] If as the SEC claims, the runup on September 10 was due to that press release alone, the stock should have plunged significantly after this press release was issued when it became clear DHAPP

[67] App. #25 [Doc. 56-25].
[68] App. #25 [Doc. 56-25].
[69] App. #25 [Doc. 56-25].
[70] App. #25 [Doc. 56-25]; RMC [Doc. 44-1], pp. 18-19.
[71] App. #25 [Doc. 56-25]; RMC [Doc. 44-1], pp. 18-19.
[72] On the day it was issued, the stock closed at $.31. On the next five trading days, it closed at $.32, $.32, $.32, $.38 and $.27. App. #25 [Doc. 56-25]; RMC [Doc. 44-1], pp. 19-20; Defs' Jt. [Doc. 89], pp. 39-40.

money was not coming. It did not.[73] 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.[74]

Thus, the response of the market to these press releases was certainly not positive, but was, instead, actually negative or at most neutral.

Fifth, the SEC ***has not responded in any way*** to the undisputed evidence that starting in August and continuing through October, 2010, short sellers began aggressively shorting RMC's stock.[75] Frankly, the SEC knows this occurred for two reasons: (1) because RMC sent it the Buyins.net March 21, 2011 report before this action was ever filed showing the stock was shorted consistently on a daily basis and that the daily trading volume attributable to short selling was 36.5% over the period from August 3, 2009 through March 18, 2011, [76] and (2) because it had documents available to it during that time showing there were significant fails-to-deliver in RMC's stock beginning on September 13 and continuing through September 28, 2010.[77] What

[73] App. #25 [Doc. 56-25]; RMC [Doc. 44-1], pp. 19-20; Defs' Jt. [Doc. 89], pp. 38-40.
[74] Defs' Jt. [Doc. 89], p. 40, n. 29.
[75] RMC [Doc. 44-1], pp. 22-23; Ronk Dec. [Doc. 43-3], ¶¶10-12 and the Buyins.net report attached as Exhibit B thereto.
[76] RMC [Doc. 44-1], pp. 22-23.
[77] As stated in the Ronk Declaration [Doc. 43-3], ¶7, under Reg SHO, a security is placed on a threshold list if it has a significant fail to deliver position for at least 5 business days. So the first day it appears on the list is actually the fifth day it has had a significant fail to deliver position which reflects the volume of naked shorting in a stock. *See* Wheet [Doc. 43-1], p. 5, n. 12. There were 12 days beginning September 13 and continuing through September 28, 2010 when there were significant fail to deliver positions in RMC's stock indicating significant shorting began at least 5 trading days prior to that which would be September 3, 2010. App. 38 filed herewith.

was the SEC's response to this evidence? ***It has had no response at all, has not disclosed it to this Court and has tried to ignore it completely***. Despite its stated mission to maintain fair, orderly, and efficient markets, the SEC turned a blind eye to this manipulative naked shorting.

Given this mountain of evidence against it, the SEC makes the vague claim that statements about the imminent sale or operations of its "flagship product" are "extraordinarily material to investors" and cites two inapposite cases in which representations were made that products were tested and ready for commercial production.[78] But RMC made no such statements. Instead, it said it was in the process of making market samples, not even final syringes, it had no actual manufacturing capacity yet, it had only just signed a manufacturing agreement with MIG, and it had no distribution agreements in place and was just beginning discussions with potential distributors.[79] The entire premise underlying the SEC's argument, that RMC was making statements about revenue from commercially ready syringes, is false and is supported by the fact that none of the press releases in August and September even mentioned revenue.[80]

Second, the SEC argues that "[s]tock price movement is not the sole or only

[78] SEC [Doc. 97-2], pp. 18-19.
[79] September 3, PX 32 [Doc. 45-15] at 147-148; September 7, PX 32 [Doc. 45-15] at 145-146; September 17, PX 32 [Doc. 45-15] at 138-139.
[80] Even when RMC issued the September 10 press release about the DHAPP money, it never mentioned what the expected revenue would be in the press release. PX 32 [Doc. 45-15] at 140-141.

determinant of materiality."[81] That is true, but as this Court itself recognized in *In re HomeBanc Corp. Sec. Litigation*, 706 F.Supp.2d 1336, 1352 (N.D. Ga.)(Batten, J.), the absence of any increase in a company's stock price following allegedly false statements undercuts the inference that the alleged misstatements were material and logic suggests that to be actionable the alleged false statements must cause an increase in the company's stock price. 706 F.Supp.2d at 1353. The SEC never addresses *HomeBanc* in its brief.

Third, the SEC makes the broad sweeping claim that "statements of the sort made by RMCP in its press releases would be highly material to an RMCP investor" and cites a Wheet interview with a local newspaper.[82] Wheet's quote makes it clear he was talking about ***all the different press releases containing positive news*** issued since mid-August.[83] In fact, between August 16 and the date of that interview (September 15), RMC issued 11 different press releases, all of which contained positive news which could have positively impacted the stock price.[84] Wheet never stated nor does the SEC claim he stated that any stock price increase was due to a single, specific press release which is what the SEC must prove to carry its burden of

[81] SEC [Doc. 97-2], p. 19. Interestingly, the SEC previously conceded in its brief in support of its motion for partial summary judgment that movement of a company's stock price, **or lack thereof**, is a factor that may evidence materiality. Doc. 45-1, p. 18.
[82] SEC [Doc. 97-2], pp. 20-21.
[83] Prior to August 2010, the last press release was issued in May, 2010, PX 32 [Doc. 45-15] at 164-165, because RMC had filed an S-1 registration statement on May 24, 2010 and was in a quiet period. App. #6 [Doc. 56-6], cover sheet.
[84] Between August 16 and October 18, RMC issued 15 press releases: August 16, PX 32 [Doc. 45-15] at 162-163; August 18, PX 32 [Doc. 45-15] at 160-161; August 20, PX 32 [Doc. 45-15] at 157-158; August 24, PX 32 [Doc. 45-15] at 155-156; August 30, PX 32 [Doc. 45-15] at 153-154; September 1, PX 32 [Doc. 45-15] at 151-152; September 2, PX 32 [Doc. 45-15] at 149-150; September 3, PX 32 [Doc. 45-15] at 147-148; September 7, PX 32 [Doc. 45-15] at 145-146; September 9, PX 32 [Doc. 45-15] at 143-144; September 10, PX 32 [Doc. 45-15] at 140-141; September 17, PX 32 [Doc. 45-15] at 138-139; September 20, PX 32 [Doc. 45-15] at 136-137; September 22, PX 32 [Doc. 45-15] at 134-135; October 18, PX 32 [Doc. 45-15] at 132-133].

proof on the issue of materiality. In fact, the SEC has made no effort to differentiate the impact these many other press releases had, either individually or cumulatively, on RMC's stock price from any alleged impact by the ones at issue.

Despite having the burden to prove materiality, the SEC has submitted no competent evidence establishing that a statistically significant positive stock movement occurred in response to any of the six press releases.

E. RMC AND WHEET ARE NOT LIABLE FOR FORWARD LOOKING STATEMENTS

The SEC's argument is overly simplistic – any statement by RMC in a press release must be a statement of "historical fact" notwithstanding the actual language used. The most egregious example of this concerns the September 10 press release in which the SEC distorts what was actually said. It claims RMC stated it was:

> "Selected by the U.S. Department of Defense" to receive a government "contract."

That is a blatant "cut and paste" job by the SEC. In fact, the word "selected" only appears in the title where it states:

> [RMC's] 3cc RevVac Safety Syringe Selected by the U.S. Department of Defense.

The statement that its syringe was selected is absolutely true, and even the SEC has not argued to the contrary. The word "selected" is not used in the body of the press release which states:

> [RMC] to receive contract with the United States Department of Defense HIV/AIDS Prevention Program (DHAPP) for multiple countries for its proprietary 3cc RevVac Safety Syringe.

Through its cut and paste job, the SEC wants to convey the impression RMC represented it was "selected" to receive the DHAPP contract so it can claim this was a statement of historical fact rather than the forward-looking statement actually made in the press release. This statement, along with the others, were textbook forward-looking statements which are not actionable since they describe management's (1) ***future*** plans for manufacturing and distribution of the redesigned version of the syringe,[85] (2) possible ***future*** sales orders,[86] and (3) expected ***to receive*** the DHAPP contract with the Navy.[87] The words "could now finalize", "planning to", "new prospective", "potential future", "initial" and "preliminary" in these press releases make it clear to any reasonable reader that these actions have not yet occurred but were what RMC believed would occur in the future. RMC never stated or suggested it had entered into any binding agreements with distributors, received any "final", "binding" or "firm" sales orders or was currently producing syringes suitable for human use.

F. THE STATEMENTS WERE AT MOST CORPORATE PUFFERY AND NOT ACTIONABLE

[85] August 24, PX 32 [Doc. 45-15] at 155-156; September 1, PX 32 [Doc. 45-15] at 151-152; September 17, PX 32 [Doc. 45-15] at 138-139; September 22, PX 32 [Doc. 45-15] at 134-135. Notwithstanding this, the uncontradicted evidence is that RMC did do these things over the next few weeks. RMC [Doc. 44-1], pp. 3-7.
[86] August 24, PX 32 [Doc. 45-15] at 155-156; September 17, PX 32 [Doc. 45-15] at 138-139; RMC [Doc. 44-1], pp. 8-9.
[87] September 10, PX 32 [Doc. 45-15] at 140-141; RMC [Doc. 44-1], pp. 9-13; Defs' Jt. [Doc. 89], pp. 23-25.

The SEC's response is to repeat the claims discussed elsewhere in this brief and then conclude that these are not corporate puffery. In contrast, RMC and Wheet have set out the specific statements that constitute the classic examples of "puffery", such as the statement in the August 24 press release that "timing could not be better".[88] These vague, optimistic statements are corporate puffery upon which no reasonable investor could rely and as to which there can be no liability.[89]

G. RMC AND WHEET DID NOT ACT WITH SCIENTER

The undisputed evidence is: (1) there were no stock sales by Wheet in August and September to give rise to an inference of scienter; (2) neither RMC nor Wheet profited or capitalized financially in any other way from stock sales during that time; (3) the SEC has abandoned its original claim RMC was trying to inflate the price of its stock so it would be required to sell fewer shares to Auctus; and, (4) the actions taken by RMC with respect to the timing, frequency and amounts requested under the Auctus equity credit line agreement are wholly inconsistent with the existence of any scienter.[90]

CONCLUSION

For all of these reasons and those discussed RMC [Doc. 44-1], Wheet [Doc. 43-1] and Defs' Jt. [Doc. 89], RMC and Wheet request that their separate Motions for Summary Judgment be granted and that the SEC's Motion for Partial Summary

[88] PX 32 [Doc. 45-15] at 155-156; RMC [Doc. 44-1], pp. 23-24.
[89] RMC [Doc. 44-1], 23-24; Defs' Jt. [Doc. 89], p. 15.
[90] RMC [Doc. 44-1], pp. 14-15, 28-30; Defs' Jt. [Doc. 89], pp. 7-8, 22-23. See also pages 3-4 above.

Judgment be denied.

Dated this 15th day of October, 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 October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on October 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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