Nos. 24-1235, 24-1309

In the United States Court of Appeals for the Tenth Circuit

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

REVEN HOLDINGS, INC., *ET AL.*,

Defendants-Appellants.

Appeal from the U.S. District Court for the District of Colorado,
Case No. 1:22-cv-03181-DDD-SBP,
The Honorable Judge Daniel D. Domenico

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STATEMENT OF PRIOR OR RELATED APPEALS

None.

INTRODUCTION

Reven is a group of Denver-based biotechnology and pharmaceutical companies. For the majority of Reven's existence, the Company has focused on a singular pursuit – the development and commercialization of Rejuveinix ("RJX"), a breakthrough treatment for several life-threatening health conditions resulting from chronic inflammation. And in the years preceding the initiation of this SEC enforcement action against it, Reven had made remarkable progress toward obtaining FDA approval of RJX and bringing it to market.

In early 2023, however, the SEC persuaded the district court on an *ex parte* basis to enter a temporary restraining order ("TRO") against Reven and its principals that included a wide-ranging, deleterious corporate and personal asset freeze. The SEC was not concerned about the viability of RJX or any of Reven's statements to investors about the curative effects of the drug. Rather, the gravamen of the SEC's complaint and TRO application was that Reven had purportedly "bilked" its investors out of over $8.8 million and that Reven's three founders – Brian Denomme, Peter Lange, and Michael Volk (the "Reven Principals") – were "misappropriating" these funds for their own personal use.

But uncontroverted expert forensic accounting evidence subsequently presented to the district court in connection with the SEC's motion to convert the TRO and asset freeze into a preliminary injunction conclusively refuted these reckless and defamatory assertions. The evidence showed that there had been no "misappropriation." On the contrary, the forensic accounting analysis – by Alvarez & Marsal, a renowned global consulting firm – confirmed that the Reven Principals had taken significantly less in compensation than they were contractually entitled to receive; that they were rightfully owed far more by the Company than they were accused of "misappropriating" from it; and that they regularly contributed their own personal funds to the Company to ensure its survival and progress.

The district court was also presented with evidence showing that the meritless "whistleblower" accusations – which formed the basis for the *ex parte* TRO – were based on unsubstantiated allegations by self-interested sources with clear ulterior motives. Discovery revealed that these individuals were insurgent Reven investors who had coordinated with the Company's disgruntled former chief technology officer in an effort to tie up Reven in protracted litigation with the SEC,

misappropriate Reven's intellectual property, and start their own competing biopharmaceutical company. Indeed, these insurgent investors even went so far as to later attempt to intervene in this case in an unsuccessful effort to force a sale of Reven's intellectual property to themselves.

Reven further presented evidence on the preliminary injunction motion demonstrating that, far from preserving the status quo – the traditional purpose of a TRO – the TRO and asset freeze here were destroying Reven's most valuable assets and, with every day that the asset freeze remained in place, Reven's investors (whom the SEC claimed to be seeking to protect) were seeing the value of their investment further threatened and diminished as the Company was unable to preserve and protect its intellectual property and critical clinical data.

Remarkably, in the face of this evidence, the district court refused to even conduct a hearing (evidentiary or otherwise) and instead – after a delay of more than six months following the close of briefing on this ostensibly "emergency" motion – simply granted the SEC's preliminary injunction motion and continued the asset freeze. The district court's opinion did not so much as mention the uncontroverted expert forensic

accounting evidence conclusively establishing that there had been no "bilking" or "misappropriation," nor did it acknowledge the evidence demonstrating that the SEC's principal sources had ulterior motives.

Rather, following the SEC's lead, the court pivoted away from the original theory of outright theft and focused instead on the SEC's fallback criticisms of certain of Reven's disclosures to investors concerning (1) the Reven Principals' compensation, (2) the status of Reven's efforts to complete audited financial statements in connection with the goal of taking the Company public, and (3) the status of an on-again, off-again (and since resolved) litigation in Florida. The district court erroneously concluded that the SEC had made both a "clear showing" that Reven violated the federal securities laws in connection with such statements and a "substantial showing" that Reven was likely to do so again. In a footnote in a subsequent order, the court further concluded that the SEC had shown that both the balance of hardships and public interest also favored issuing the injunction and maintaining the asset freeze.

As demonstrated below, the SEC did not meet its high burden on any of these inquiries – not even close – and the district court abused its discretion in concluding otherwise, especially without permitting an

evidentiary hearing. After retreating from its claims of intentional misappropriation, the SEC was left with garden-variety claims of inadequate disclosures. But none of the challenged statements violated the federal securities laws because the statements were neither material nor false or misleading, as demonstrated below.

The district court further abused its discretion in concluding that the SEC had made a "substantial showing" that these purported violations of the securities laws would reoccur – an inquiry that requires a clear showing of scienter. The alleged misstatements at issue here (even assuming, *arguendo*, they could be deemed both material and false or misleading, which they cannot) were at most negligent, and negligence is insufficient to justify the draconian remedy imposed in this case. The balance of harms also strongly favored denying the injunction and letting the asset freeze expire, given the devastating harm – by all accounts – that the asset freeze was already having on the Company and its investors. The injunction and asset freeze had also negatively impacted the public good, as they have effectively eliminated any possibility of bringing RJX to market. For each of these reasons, the district court abused its discretion in granting the preliminary injunction, and its

decision should be reversed in its entirety.

Alternatively, even if this Court were to determine that the district court did not err in granting a preliminary injunction, it should nonetheless conclude that the district court abused its discretion in maintaining the asset freeze as part of the injunction, given the demonstrated and undisputed harm that the asset freeze had – by that time – already caused to Reven, its investors, and the very assets that the freeze was supposed to preserve. The district court's later, minor modifications did not remedy the problem, let alone undo the devastating harm already caused by the asset freeze.[1]

Finally, at a minimum, the district court abused its discretion and committed reversible error by not holding an evidentiary hearing on the SEC's motion for a preliminary injunction. While an evidentiary hearing is not always required before the issuance of a preliminary injunction, such a hearing is required when the injunction turns on the resolution of bitterly disputed factual issues. That is precisely the case here as the

[1] The district court's Order Granting Plaintiff's Motion for Preliminary Injunction and Asset Freeze and Order Lifting Asset Freeze in Part are attached to this brief as Attachments 1 and 2; they are also included in a separate appendix. 10th Cir. R. 10.3(D)(5).

facts at issue on the motion for preliminary injunction were fiercely contested and, in many instances, turned on credibility determinations. This provides an independent basis to reverse the decisions below.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because this appeal relates to the district court's granting of, and refusal to modify, a preliminary injunction. 28 U.S.C. § 1292(a)(1) (granting courts of appeals jurisdiction over "interlocutory orders of the district courts of the United States . . . granting . . . or refusing to dissolve or modify injunctions"); *AT&T Broadband v. Tech Commc'ns, Inc.*, 381 F.3d 1309, 1314–15 (11th Cir. 2004) (equating denial of motion to modify asset freeze with denial of motion to modify preliminary injunction).

ISSUES PRESENTED

1. The SEC sought a preliminary injunction and asset freeze upending the status quo – a historically disfavored remedy – based on alleged intentional "misappropriation" and purported material misstatements or omissions in violation of the federal securities laws. To obtain its requested injunction and asset freeze, the SEC was required, *inter alia*, not only to make a "clear showing" of a violation of the federal securities laws, but also a "substantial showing" that the alleged

violation would likely occur again. The SEC was further required to demonstrate a favorable balance of harms resulting from the requested relief – including the continuation of the asset freeze – and to show that the requested relief is not adverse to the public interest.

Did the district court abuse its discretion in granting the requested preliminary injunction and asset freeze – without a hearing and without live testimony – in the face of (1) uncontroverted expert forensic accounting evidence demonstrating that no actual "misappropriation" occurred, (2) undisputed evidence that the asset freeze had already harmed, and would in time destroy, Reven's assets – not preserve them – while also likely preventing RJX from ever getting to market, and (3) no evidence that any purported misstatements or omissions, even if otherwise actionable under the federal securities laws (and they are not), were made with the requisite scienter that would allow the court to conclude that such purported violations

would reoccur? *See* App. Vol. 14 at 2414–16, 2420–26, 2428–30, 2432–33.[2]

2. The ostensible purpose of an asset freeze is to ensure that any funds that may become due can be collected. The district court maintained the SEC's requested asset freeze – with only minimal modifications – despite evidence that the freeze was destroying Reven's most valuable asset (its intellectual property) and would likely put Reven out of business if not lifted. ***Did the district court abuse its discretion when it granted the SEC's request to continue the asset freeze and thereafter refused Reven's request to lift the asset freeze in its entirety?*** *See* App. Vol. 15 at 2562–63.

3. Where, as here, material facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, district courts are required to hold an evidentiary hearing. ***Did the district court err in not permitting an evidentiary hearing on the SEC's motion for a preliminary injunction?*** *See* App. Vol. 10 at 1473–74; App. Vol. 15 at 2734.

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[2] Record references are to the volume and page numbers of the accompanying Appendices. For instance, "App. Vol.1 at 10" refers to Volume 1 of the Appendix at page 10.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Lange, Denomme, and Volk Start Reven with a Mission of Bringing Potentially Life-Changing Pharmaceutical Products to the Public.

Reven is a group of biotechnology and pharmaceutical companies with a singular purpose of developing pharmaceutical assets. *See* App. Vol. 15 at 2761–63 § 4.a, 4.i. It was founded in 1999 by Brian Denomme, Peter Lange, and Michael Volk (the Reven Principals), with a mission of bringing potentially life-changing therapies to the public. App. Vol. 15 at 2761 § 4.a. The Company has experienced significant growth over the years and has received support from thousands of investors. *See* App. Vol. 12 at 1687–88. The Reven Principals have also invested heavily in the Company, often (and increasingly in recent years) deferring their own pay so that Reven can continue to progress. *See* App. Vol. 12 at 1683, 1688.

The current Reven structure includes multiple entities. Reven Holdings, Inc. ("Reven Holdings") is at the top of the corporate structure as the successor to Reven Pharmaceuticals, Inc., the original entity formed in 1999. App. Vol. 1 at 128; App. Vol. 15 at 2761 § 4.a-b. Denomme is the President of Reven Holdings; Lange is the Chief

Executive Officer; and Volk is the Chief Strategy Officer. App. Vol. 15 at 2761–63 § 4.c-e. All three are members of Reven Holding's board. *Id.* They are also the largest shareholders. *Id.* §§ 4.n-o.

Below Reven Holdings, Inc. is Reven, LLC, a wholly owned subsidiary that functions as the operating arm for Reven Holdings, Inc. *id.* § 4.f. Reven IP Holdco, LLC and Reven Oncology stand alongside Reven, LLC, with each holding a portion of Reven's assets. *Id.* § 4.g-h. Outside the Reven corporate umbrella is Health Analytics & Research Services, LLC. *Id.* § 4.h. This entity provides consulting services to Reven and is sometimes used – for tax purposes – to pay the Reven Principals compensation that would otherwise be paid to them directly. *See* App. Vol. 14 at 2264–65.

B. Reven Makes Remarkable Progress Toward Bringing RJX to the Public.

Since its founding, Reven has focused on developing and commercializing one primary asset – a cardiovascular and anti-inflammatory intravenous drug treatment called RJX. App. Vol. 15 at 2761 § 4.a. And prior to this litigation, Reven made significant progress toward achieving its ultimate goal of bringing RJX to market.

That progress occurred at an astonishing rate. By 2021, Reven had 12 patents granted in two families in the United States, with applications made for 28 patents in five families; globally, Reven had been issued 21 patents, with 98 other applications in the filing, application, and prosecution process. *See* App. Vol. 12 at 1797. Reven had completed 30+ pre-clinical animal studies, 13 published articles, six peer-reviewed publications, and seven clinical white papers, and developed over 50 protocols. *Id.* The FDA had approved two Phase 2 investigational new drug applications, the European Medicines Agency had approved Phase 2 human trials, and Reven had completed Phase 1 human trials in Australia and the United States for its breakthrough drug, RJX. *Id.* By November 2021, Phase 2 human trials were 75% completed in the United States, and Reven had met with dozens of investment banks and financial institutions regarding a public offering. *Id.*

C. A Small Group of Reven Investors Work with Reven's Disgruntled Former Chief Technology Officer to Form a Competing Business Based on Misappropriated Reven Intellectual Property.

While Reven achieved remarkable progress in the years preceding the SEC's intervention, that progress did not come without cost. Reven experienced financial difficulties. Reven also suffered from employee

turnover. But at all times, Reven kept its investors informed. This transparency eventually created its own problems.

1. After Learning of Reven's Financial Difficulties, Schaatt and Frost Devise a Hostile Plan.

As discovery in this case has revealed, several Reven investors coordinated with Reven's disgruntled former Chief Technology Officer, Jim Ervin, to hamstring Reven in a legal morass while they built a competing business based on Reven's misappropriated intellectual property. Indeed, as early as May or June 2022, two Reven investors – Leah Schaatt and Lee-Ann Frost – had begun working on a plan to usurp Reven's management and seize Reven's intellectual property. *See* App. Vol. 13 at 1982. Accordingly, right after a Zoom call in October 2022, during which the Reven Principals told a small group of Reven's largest investors that the Company was in dire financial straits, Frost sent Schaatt a text message proposing that they "put together a good team" to "intervene." App. Vol. 13 at 2254–57; *see also* App. Vol. 14 at 2310 (Tr. 136:21–137:22). Schaatt agreed and suggested they "make a plan to move forward," noting how they would "need time and good legal counsel[,] [a]nd money, of course." App. Vol. 13 at 2256–57. Days later, on October 15, 2022, Schaatt reached out to the SEC for the first time

and, together with Frost, began working as the principal witnesses against Reven in this proceeding. *See* App. Vol. 14 at 2309 (Tr. 126:9–128:8).

2. Schaatt and Frost Push the SEC's Case Against Reven While Working with Ervin to Develop a Competing Business.

While Schaatt and Frost were working with the SEC to build a case against Reven, they were also actively working with Ervin to develop a competing business. *See* App. Vol. 13 at 1982–83; *see also* App. Vol. 14 at 2330 (Tr. 205:13–22). According to Ervin's business plan, Schaatt and Frost were to provide "[c]apital" and "business plan review[] and oversight" in exchange for 25% of the new venture's "stock" and "profit split." *See* App. Vol. 16 at 2987, 3010, 3018

They all contributed to the effort of creating "an alternative to Reven, to RJX." App. Vol. 16 at 3009. Schaatt and Frost retained IP counsel to explore their new entity's "freedom to operate" around Reven's intellectual property. *See* App. Vol. 14 at 2312 (Tr. 151:3–15), 2330 (Tr. 203:21–204:19). Ervin meanwhile began misappropriating Reven's intellectual property and recruiting Reven's most valuable personnel. S*ee* App. Vol. 16 at 2967–68; *see also* App. Vol. 13 at 1983. Indeed, Ervin

tried to recruit Reven's Chief Scientist, Henk van Wyk, and Head of Quality Assurance, Mariette van Wyk, to participate in the new venture. *See* App. Vol. 13 at 1982–83. Ervin boasted to Mr. and Mrs. van Wyk that Reven and its Principals would now be "tied up" by the SEC's present enforcement action for years, and thus unable to thwart the group's hostile efforts. *See* App. Vol. 13 at 1983.

II. PROCEDURAL HISTORY

A. The District Court Grants the SEC's Application for an *Ex Parte* TRO and a Burdensome Asset Freeze Based in Large Part on Schaatt and Frost's Self-Serving Narrative.

On December 9, 2022, the SEC filed a sealed complaint seeking "emergency enforcement" to "stop an ongoing offering fraud and misappropriation of investor assets" (App. Vol. 1 at 20) and an *ex parte* emergency motion for a temporary restraining order and asset freeze. App. Vol. 1 at 53. The SEC requested an order (1) prohibiting Reven from violating the anti-fraud provisions of federal securities laws; (2) prohibiting Denomme, Lange, and Volk from offering or selling securities; (3) freezing Reven's and the Reven Principals' assets; and (4) providing other ancillary relief. App. Vol. 1 at 51, 102–03.

In its initial filings, the SEC claimed that Reven and the Reven Principals had "bilked investors out of over $8.8 million" and "misappropriated" these funds for their own personal use. App. Vol. 1 at 67. The SEC alleged that the Reven Principals understated their compensation for three years – 2019, 2020, and 2021 – in the Company's private placement memorandums ("PPMs"). App. Vol. 1 at 30–31. And the SEC said that Reven made several other misstatements in communications to investors relating to the status of an audit, use of investors' funds, and a then-pending (since resolved) litigation in Florida. App. Vol. 1 at 44–46.

The district court granted the SEC's request for a temporary restraining order and asset freeze on an *ex parte* basis on January 3, 2023. App. Vol. 10 at 1450–75 (as subsequently modified by App. Vol. 15 at 2734–35, 2747). The district court's temporary restraining order stated that "[a]ll assets, funds, or other property of any kind, including without limitation intellectual property, including patents or trademarks . . . are frozen and will not be sold, transferred, or encumbered in any way[.]" Further, "[a]ny bank, financial, brokerage institution, corporation, licensor/licensee, or other person or entity holding any funds

. . . in the name of, for the benefit of, or under the control of [Reven or the Reven Principals] . . . must hold and retain within their control and prohibit the withdrawal, removal, transfer or other disposal of any such funds[.]" App. Vol. 10 at 1464–66.

B. Without Permitting a Hearing, the District Court Issues a Preliminary Injunction and Extends the Asset Freeze Despite Evidence That the Freeze Was Destroying Reven's Assets and Business Prospects.

After it became aware of the asset freeze, Reven worked quickly and diligently to respond to the SEC's serious allegations. Reven immediately provided sworn accountings of its finances (App10_1476) and sought specific, limited modifications of the asset freeze. *See* App. Vol. 15 at 2736–46, 2748–57. Crucially, in March 2023, the Reven Principals moved for permission to spend $100,000 of their own frozen funds to make critical payments and preserve one of Reven's most valuable assets, its intellectual property. App. Vol. 15 at 2748–57. During discovery, Reven produced tens of thousands of documents, responded to interrogatories, and sat for depositions of all Reven Principals, all while under a debilitating asset freeze.

On June 12, 2023, Reven filed its opposition to the SEC's request for a preliminary injunction. App. Vol. 12 at 1677–1727. As part of its

opposition, Reven presented a forensic accounting analysis from Jon Ahern of Alvarez & Marsal, a leading forensic accounting investigations expert. Mr. Ahern's analysis showed that far from "misappropriating" funds they were not owed, the Reven Principals were entitled to far more compensation (that remained unpaid) than the SEC was accusing them of having misappropriated. For the three-year period on which the SEC bases its allegations, Mr. Ahern established that Reven's Principals were owed a combined $23.25 million in compensation. *See* App. Vol. 12 at 1746–49. These amounts were unpaid because of the Reven Principals' decisions to defer compensation and allow Reven to reserve cash, invest in the Company, and continue to make progress toward the commercialization of RJX. *See* App. Vol. 12 at 1683, 1688.

Mr. Ahern also showed that at least roughly half of the funds the SEC claimed were "misappropriated" were actually used for Reven business purposes. App. Vol. 12 at 1732 ("[M]ost of the American Express activity was for Reven business purposes, including charges by other Reven employees (non-Reven Principals) and charges for marketing, research [and] development, office expenses, travel, and other Reven expenses."). The SEC did not attempt to controvert this evidence in its

reply and declined to even depose Mr. Ahern. *See* App. Vol. 14 at 2358–84. Rather, as the district court subsequently acknowledged, in response to this evidence, the SEC simply pivoted from its initial claims of deliberate misappropriation to arguing that the Reven Principals took more compensation "than they disclosed to investors." App. Vol. 14 at 2415, 2419–20.

In its opposition, Reven also pointed out that rather than serving an asset freeze's purpose of preserving value for possible disgorgement, the freeze in this case was (1) preventing Reven from making payments necessary to preserve its intellectual property assets, (2) wasting valuable patent life, and (3) blocking Reven's ability to proceed with critical drug trials. While awaiting the district court's decision on the asset freeze, Reven filed a supplemental declaration that elaborated on the ongoing harms caused by the asset freeze. App. Vol. 14 at 2385–89.

Despite Reven's showing – and without holding any hearing (evidentiary or otherwise) on the evidence presented – on March 29, 2024, seven full months after briefing had been completed, the district court

granted the preliminary injunction.[3] The district court, without addressing Mr. Ahern's uncontroverted expert forensic accounting analysis or the evidence of ulterior motives on the part of the SEC's main sources, concluded that the SEC had carried its burden of making a "strong showing" that certain statements by Reven were material misrepresentations in violation of the securities laws and a "substantial showing" that such purported violations were likely to reoccur. App. Vol. 14 at 2432–33. The court therefore granted the SEC's motion to convert the TRO into a preliminary injunction and to continue the asset freeze. In doing so, however, the court acknowledged the ongoing harm from the asset freeze and invited Reven to "promptly file a motion addressing the scope of the preliminary equitable relief in light of this Order, including

[3] The district court originally agreed to hold a hearing on the SEC's preliminary injunction motion at which "each side [was to] be allotted time for an opening statement, cross-examination and redirect examination of witnesses, and closing argument." App. Vol. 10 at 1473–74. The court subsequently reversed course, prior to the filing of Reven's opposition papers, and *sua sponte* stated in an order that "[a]fter reviewing the defendants' and relief defendants' response(s) and the plaintiff's reply, if any, I will determine whether to (a) reset a preliminary-injunction hearing, (b) request supplemental briefing from the parties on specific legal or factual questions, or (c) decide the motion on the papers submitted." App. Vol. 15 at 2734.

whether a more narrow preliminary remedy or lifting of the asset freeze in whole or in part is appropriate pending final resolution of this case." App. Vol. 14 at 2435.

C. The Court Refuses to Lift the Asset Freeze (or Make Any Meaningful Changes to It), Despite Reven's Continued Loss of Assets and the Resulting Harm to Reven's Investors.

Reven promptly moved to modify the preliminary injunction to lift the asset freeze so Reven would have flexibility to take on debt, license its intellectual property, and preserve the Reven Principals' personal property. App. Vol. 14 at 2437–48. Reven emphasized that the requested relief from the asset freeze "would *not* involve soliciting investors or paying salaries to the Reven Principals while the Preliminary Injunction remains in place." *Id.* (emphasis in original).

On May 10, 2024, in the midst of briefing on Reven's request to lift or at least narrow the asset freeze, the SEC's primary (and opportunistic) informants – Schaatt and Frost – moved to intervene in this SEC enforcement action for the purpose of seeking to have the court appoint a receiver or liquidation agent of their choosing to "marshal and sell the assets of Reven" presumably to themselves, in a pre-brokered deal

intended to effectuate their long-desired goal, discussed below, of appropriating Reven's intellectual property.[4] App. Vol. 14 at 2476–92.

Schaatt's and Frost's applications were correctly denied, but their submissions to the district court underscored the devastating impact that the misguided asset freeze was having on Reven's investors, *i.e.*, the very group that the SEC was ostensibly seeking to protect. As noted above, in its order granting the SEC's preliminary injunction motion, the court acknowledged Reven's distress, stating that "rather than preserving their assets [the asset freeze] is causing them to dissipate due to ongoing harm to their ability to protect their intellectual property, finalize clinical data, and eventually secure approval for their products." App. Vol. 14 at 2434–35. The would-be intervenors (Schaatt and Frost) underscored these very same concerns, stressing that "***the Asset Freeze and injunction by their own terms prevent any operations by Reven, including those operations that would otherwise be necessary to preserve value***" for investors. App. Vol. 14 at 2486 (emphasis added).

[4] Remarkably – in a stunning abdication of its of its own duties and role in this government enforcement action – the SEC endorsed Schaatt and Frost's unsuccessful motion to intervene, tacitly acknowledging in so doing that the SEC was incapable of adequately protecting the interests of Reven's investors. *See* App. Vol. 15 at 2633–34, 2657–59.

Most detrimentally, Schaatt and Frost noted, the asset freeze has had the "effect of preventing Reven from maintaining its patent portfolio and advancing its pharmaceutical candidates." App. Vol. 14 at 2482. Simply put, "***the pending Asset Freeze . . . hinders, not helps, preserve Reven's value***" because "[w]ithout the ability to spend money, Reven cannot make the necessary patent maintenance payments," and "[w]ithout the ability to operate, Reven cannot continue to advance its pharmaceutical candidates through the FDA approval process, exposing Reven's . . . investors to potentially a complete loss of their investment as Reven's IP portfolio continues to decline in value." App. Vol. 14 at 2483 (emphasis added).

Defendants could not have said it any better themselves. The district court nevertheless refused to lift the asset freeze.[5] App. Vol. 15 at 2562.

Now, nearly two years after the district court first imposed the misguided and destructive asset freeze, and as the SEC's own investor-

[5] Following further submissions, the district later agreed to modify certain aspects of the asset freeze to, *inter alia*, allow the Reven Principals to earn money to pay expenses and to allow third parties to pay Reven's expenses. App. Vol. 15 at 2682–2703.

informants feared, Reven's substantial growth and once near-complete FDA trials are languishing without progress, and much of the data generated by Reven in previous trials will need to be duplicated. App Vol. 12 at 1803. Further, much of the experienced and knowledgeable staff that were previously devoted to Reven's clinical trials and development of intellectual property have departed given Reven's inability to raise money to pay salaries. *Id.* Vendors have also severed ties, and Reven has lost substantial credibility with existing investors, potential future investors, and, critically, the FDA. *Id.* It has now escalated to the point where Reven's patents are largely useless, leaving little, if any, value to preserve.

SUMMARY OF THE ARGUMENT

1. The district court abused its discretion in granting the SEC's motion for a preliminary injunction. To grant such relief, the court was required to conclude that (1) the SEC had made a "strong showing" that Reven's purported misstatements were actionable under the federal securities laws, (2) there was a "substantial" likelihood that such purported violations would reoccur, a finding that requires a strong showing of scienter, (3) the balance of hardships weighed in favor of

granting the injunctive relief sought (which, here, included continuation of the ill-fated asset freeze), and (4) the public interest would not be harmed if the relief sought were granted. As shown below, the SEC met none of these four requirements (let alone all), and the district court's conclusions to the contrary constitute an abuse of discretion.

2. Even if this Court were to conclude that the requirements for an injunction were otherwise met here (and they have not been), it should still conclude that the district court abused its discretion in including the asset freeze as a component of the injunction given the undisputed and devastating impacts – rather than benefits – that the asset freeze had already had, and was continuing to have, on Reven's assets and investors.

3. At a minimum, the district court committed reversible error by refusing to hold an evidentiary hearing on the SEC's motion for a preliminary injunction given the fiercely disputed evidence and necessary credibility determinations at issue.

LEGAL STANDARD FOR RELIEF GRANTED BELOW

The Securities Act and the Exchange Act authorize the SEC to move for an injunction when it appears that a party "is engaged or about to engage in acts" in violation of federal securities laws. 15 U.S.C. § 77t(b)

(the Securities Act); *id.* § 78u(d)(1) (similar language in Exchange Act). To obtain a preliminary injunction (or an asset freeze) based on this statutory authority, the SEC must make (1) a "clear showing" that a violation of the federal securities laws has occurred, and (2) a "substantial showing" that the violation is likely to occur again. *See S.E.C. v. Scoville*, 913 F.3d 1204, 1214 (10th Cir. 2019) (stating that the SEC was required to make a "clear showing" of its entitlement to the requested preliminary injunction); *S.E.C. v. Curshen*, 372 F. App'x 872, 882 (10th Cir. 2010) (stating that the SEC must "demonstrate a reasonable and substantial likelihood" of future violations); *see also U.S. Sec. & Exch. Comm'n v. Cell>Point, LLC*, No. 21-cv-01574-PAB-KLM, 2022 WL 444397, at *8 (D. Colo. Feb. 2, 2022) (detailing the above two requirements and collecting cases supporting the same).

The Supreme Court's recent decision in *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570 (2024), and subsequent circuit court case law applying that decision, have clarified that the above two requirements do not displace the four traditional equitable factors a party generally must satisfy to obtain a preliminary injunction. *See S.E.C. v. Chappell*, 107 F.4th 114, 126–27 (3rd Cir. 2024) (holding that, under *Starbucks*, all four

traditional preliminary-injunction factors apply in SEC enforcement actions). That is, the SEC must also still show (1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the court denies the requested relief; (3) its threatened injury without the injunction outweighs the opposing party's under it; and (4) the requested relief is not adverse to the public interest. *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir. 2019); *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

This already demanding burden is heightened when the SEC seeks one of three historically disfavored injunctions. *See State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 883 (10th Cir. 2021); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004). This includes where, as here, the SEC seeks an injunction that alters the status quo and disturbs the relative positions of the parties – the antithesis of the historical purpose of injunctions. *U.S. Evn't Prot. Agency*, 989 F.3d at 883; *O Centro*, 389 F.3d at 975–76 (noting that such injunctions "must be more closely scrutinized [by this Court] to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course"). In such cases, the SEC must

make a "strong showing" regarding both the likelihood of success on the merits and the balance of harms resulting from the requested injunction. *Scoville*, 913 F.3d at 1214 (quoting *McDonnell v. City & Cty. of Denver*, 878 F.3d 1247, 1252 (10th Cir. 2018)).

STANDARD OF APPELLATE REVIEW

This Court reviews orders granting preliminary injunctions for an abuse of discretion. *First W. Cap. Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1140 (10th Cir. 2017). Orders freezing assets or modifying an asset freeze are likewise reviewed for an abuse of discretion. *Smith v. S.E.C.*, 653 F.3d 121, 127 (2d Cir. 2011); 29A Fed. Proc., L. Ed. § 70:255 (Aug. 2024 ed.). Where, as here, a district court "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence," it "necessarily abuse[s] its discretion," requiring reversal. *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 554 n.2 (2014) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

ARGUMENT

The district court abused its discretion in granting the SEC's requested preliminary injunction, including maintaining the asset freeze, without a hearing and without live testimony. This Court can reverse for any one of several reasons. *First*, the SEC failed to make a "clear

showing" that Reven violated the federal securities laws through the alleged inadequate disclosures – the theory the SEC retreated to after Reven debunked the SEC's original "misappropriation" claims. *Second*, even if the SEC had clearly shown a violation of the federal securities laws (it did not), the district court nonetheless erred in concluding that any such violation is likely to occur again given the utter lack of evidence of scienter. *Third*, the balance of hardships and public interest both clearly favored denying – not granting – the injunction and asset freeze, providing an independent basis for reversing the district court's grant of the injunction.

Even if this Court were to conclude, however, that the preliminary injunction was correctly granted (and it was not), it should still conclude that the district court abused its discretion in maintaining the asset freeze, particularly given the undisputed and irreparable harm that it was causing to Reven and its investors. Finally, at a minimum, the district court committed reversible error by refusing to permit an evidentiary hearing on the SEC's motion for a preliminary injunction given the existential threat that the asset freeze posed to Reven, the hotly

contested evidence and issues in dispute, and the need for credibility determinations. Each of these points is addressed, in turn, below.

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION AND ASSET FREEZE.

The district court granted the SEC's requested preliminary injunction and asset freeze based on purported violations of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (and Rule 10b-5 promulgated thereunder, 17 CFR § 240.10b-5), and Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a). According to the SEC, Reven allegedly violated the above sections of the federal securities laws by making material misstatements to prospective investors concerning (1) the Reven Principals' compensation, (2) the status of the Company's efforts to prepare audited financial statements, and (3) the status of a since resolved litigation in Florida.

As demonstrated below, the district court abused its discretion in concluding that the SEC carried its burden of (1) making a "clear showing" of a violation of the securities laws, (2) making a "substantial showing" that any such violation was likely to reoccur, and (3) demonstrating that the balance of hardships and public interest both

favored granting the injunction and maintaining the devastating and misguided asset freeze. The failure of the SEC to carry its heavy burden on any one of these requirements required denial of the injunction.

A. The District Court Erred in Finding That the SEC Had "Clearly Shown" Material Misstatements or Omissions in Violation of the Securities Laws.

To satisfy the first element of its Rule 10b-5 and Section 17(a) claims for purposes of the SEC's preliminary injunction motion, the SEC was required to make a strong showing that "defendant[s] made an untrue statement of material fact, or failed to state a material fact necessary to make the statements that were made not misleading." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997) (quoting 17 C.F.R. § 240.10b-5); *see also* 15 U.S.C. § 77q(a)(2). "A statement or omission is only material if a reasonable investor would consider it important in determining whether to buy or sell stock." *Id.* (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) and *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988)). "Whether information is material also depends on other information already available to the market; unless the statement significantly altered the total mix of

information available, it will not be considered material." *Id.* (internal quotation marks omitted) (quoting *TSC Indus. Inc.*, 426 U.S. at 449).

As discussed above, the scope of the allegations in this case has changed considerably since the district court first granted the TRO and asset freeze in January 2023. The SEC's original theory was one of "misappropriation": that the Reven Principals "bilked investors out of over $8.8 million" and stole those funds from the Company. *See, e.g.*, App. Vol. 1 at 67 (asserting that Reven Principals "misappropriated" funds for their own personal use); *see also Misappropriate*, Cambridge Learner's Dictionary (4th ed. 2021) (defining "misappropriate" as "to steal something that you have been trusted to take care of and use it for your own good"; "synonym: embezzle"). As the district court observed, however, the SEC's new, watered-down theory is simply that "the Reven Principals took . . . more [in compensation] than they disclosed to investors." App. Vol. 15 at 2562 (alteration in original). In other words, the focus is now on the accuracy and completeness of Reven's disclosures in private placement memoranda and investor correspondence.

Regarding this narrower hypothesis, there are three main categories of alleged misstatements on which the district court relied in

issuing the preliminary injunction: (1) statements relating to Reven executives' compensation, (2) statements relating to Reven's plans to go public, including completing audited financial statements, and (3) statements regarding a then-pending litigation in Florida state court.[6] App. Vol. 14 at 2414. For the reasons set out below, the SEC failed to make a "clear showing" that the challenged statements were material, let alone false or misleading.

1. Statements Regarding Compensation

First, the SEC alleged that Reven made misstatements regarding the amount of compensation paid to Reven's executives. As already discussed, after initially starting out as a "misappropriation" case – based on reckless assertions of outright "bilking" and theft – the SEC retreated to a more pedestrian case where the only remaining issues relate to the accuracy and completeness of Reven's disclosures to investors. *Compare* App. Vol. 1 at 67, *with* App. Vol. 15 at 2562. There is good reason for this strategic retreat, as Reven's uncontroverted expert forensic accounting evidence conclusively demonstrated not only that the Reven Principals

[6] The SEC initially also claimed that Reven made misstatements regarding how investor funds would be used, but that theory was not addressed in the district court's order. App. Vol. 14 at 2414 at n.6.

took significantly less in compensation than they were entitled to receive under their employment agreements, but also that they regularly contributed their own personal funds to Reven to pay vendors and employees. App. Vol. 12 at 1746–48; *see also, e.g.*, App. Vol. 16 at 2870, 2873, 2876, 2878. Despite bearing the burden to produce evidence to support its claims, the SEC has put forward no evidence to controvert these facts, did not dispute that the Reven Principals had contractual rights to the money they received, and even declined to depose Reven's forensic accounting expert. *See generally* App. Vol. 14 at 2358–84; *see also* App. Vol. 15 at 2578.

The evidence – again undisputed – shows that the Reven Principals' employment agreements, which detail the amounts earned in both base compensation and annual target bonuses, were readily available to investors. App. Vol. 12 at 1805–1966. Furthermore, the two Reven investors key to the SEC's case – Schaatt and Frost – have already testified that (1) they do not recall having any understanding (mistaken or otherwise) as to the amount of compensation to which the Reven Principals were entitled (*see* App. Vol. 14 at 2299–300 (Tr. 53:20–54:21), 2325 (Tr. 121:2–123:18, 124:23–25, 125:23–130:11); App. Vol. 16 at 3002–

3006 (Tr. 67:25–69:12, 91:17–94:22, 123:19–124:25)), and (2) neither they nor their advisors (who conducted detailed diligence on other aspects of the Company) ever asked about, let alone requested to see, the governing employment agreements. App. Vol. 14 at 2308 (Tr. 115:7–12), 2325 (Tr. 123:19–124:3, 125:1–22).

While acknowledging (as it had to) that the actual compensation owed to the Reven Principals was correctly reflected in their employment agreements and that those agreements were available to current and prospective Reven investors, the district court nevertheless concluded that Reven's PPMs were materially false and misleading because those documents reflected amounts less than what the Reven Principals had actually received. App. Vol. 14 at 2415–16. This conclusion is at odds with controlling law providing that whether or not a statement is false or misleading under the securities laws depends on the specific context, including consideration of "other information already available" to investors. *See Grossman*, 120 F.3d at 1119.

Nor, in any event, were the disclosures regarding compensation in the PPMs material. As noted above, "a statement or omission is only material if a reasonable investor would consider it important in

determining whether to buy or sell stock." *Id.* (citing *TSC Indus., Inc.*, 426 U.S. at 449). Here, it is unchallenged that no investor (or potential investor) was ever denied access to the employment contracts or any other information about the Reven Principals' compensation. App. Vol. 12 at 1798; *see also* App. Vol. 13 at 1973 ("I always felt the Founders were an open book in providing information."); *see Grossman*, 120 F.3d at 1119 ("Whether information is material also depends on other information already available to the market.") (citing *TSC Indus., Inc.*, 426 U.S. at 449).

Indeed, no known investor ever expressed an interest in the compensation of the Reven Principals. App. Vol. 12 at 1798; *see also* App. Vol. 13 at 1978 ("I did not have any discussions with the Founders regarding their compensation prior to investing; from my perspective, their compensation did not impact my decision to invest."); App. Vol. 13 at 1973; App. Vol. 14 at 2308 (Tr.115:7–12), 2325 (Tr. 123:19–124:3, 125:1–22) (showing that neither Schaatt, Frost nor any of their advisors ever asked about, let alone requested to see, the governing employment agreements). Had any investor(s) asked for this information, Reven

would readily have shared it with them. App. Vol. 12 at 1798. But no one did. *Id.*

While acknowledging that "[t]he fact that certain information was or was not important to a particular investor is relevant" to determining materiality (App. Vol. 14 at 2417 at n.8), the district court wholly disregarded the above evidence and instead appeared to conclude that any and all disclosures that in any way touch on "executive compensation" are material as a matter of law. *See* App. Vol. 14 at 2417. In so doing, the court not only dismissed the evidence *actually submitted* in this case, but also ignored controlling case law holding that materiality is generally a question of fact "only to be resolved as a matter of law where the information is 'so obviously important [or unimportant] to an investor, that reasonable minds cannot differ on the question of materiality.'" *Garcia v. Cordova*, 930 F.2d 826, 829 (10th Cir. 1991) (quoting *TSC Indus., Inc.*, 426 U.S. at 450). It was reversible error for the district court to decide this question as a matter of law rather than hold an evidentiary hearing to weigh the competing evidence going to materiality (and other issues) and make the necessary credibility determinations. *See infra* Argument Section III.

2. Statements Regarding Taking Reven Public

Second, the district court found that the SEC made a "clear showing" that Reven made misstatements regarding future plans to take the Company public. Throughout Reven's history, Reven and its Principals took several necessary steps to prepare Reven for a potential public offering. For instance, in 2018, Reven completed a corporate reorganization, and afterward began the process of filing tax returns, obtaining audited financial statements, preparing an S-1 registration statement with the SEC, obtaining a third-party valuation, and meeting certain market targets. App. Vol. 12 at 1709–11; *id.* at 1798–1800 ¶¶ 9–15; App. Vol. 14 at 2263. Each of these items required several preliminary steps. For example, prior to filing a tax return, Reven's bookkeeping records needed to be reconciled. App. Vol. 12 at 1799–1800.

Between 2019 and 2021, Reven took several steps toward the eventual goal of completing an external audit and a public offering. In 2019, Reven contacted Eide Bailly LLP ("Eide Bailly"), a CPA and business advisory firm, to begin working on reconciling Reven's books and pursuing an audit. App. Vol. 12 at 1799 ¶ 11. During this time, Reven also engaged a vendor called CARTA to properly document

shareholders and communicate with them consistently, started to formalize its accounting procedures and processes, and initiated relationships with institutional and investment firms in the biotech and pharmaceutical spaces. *Id.*

In early 2020, Reven continued to make progress toward its goals, including by engaging Jeff Halverson as its CFO and tasking him with helping to complete tax returns for Reven and associated entities in preparation for an eventual audit. *Id.* ¶ 12. Reven also contacted several additional firms – including Stifel Healthcare, which generated work product for Reven in late 2020 – to begin working together on a potential public offering. *Id.* ¶ 13. In 2021, Reven resumed conversations with Eide Bailly regarding preparing tax returns for Reven and its affiliates, including giving Eide Bailly access to Reven's QuickBooks. App. Vol. 15 at 2245–46, 2724–25, 2732. That summer, Reven also hired 180 Accounting to help reconcile its bookkeeping records, and in late 2021, Reven began working with VMLY&R, an advertising company, to help prepare public offering-focused slide decks. App. Vol. 12 at 1800 ¶ 14; App. Vol. 13 at 2250 (Tr. 211:15–19).

Each of these steps resulted in incremental progress toward the monumental goal of obtaining audited financial statements and potentially pursuing a public offering. By the end of 2021, Reven had worked with SEC counsel, established a shareholder register in CARTA, engaged multiple external consultants to develop financial controls and procedures, hired a full-time staff member to help with bookkeeping, and contacted representatives from reputable audit firms (including Grant Thornton) about a potential external audit. App. Vol. 12 at 1800.

While acknowledging that many of the Company's statements regarding the status of this effort "contained disclaimers regarding forward-looking statements, and that those decks did not promise a public offering, presenting that as only one of three potential paths forward (the others being licensing and organic growth)" (App. Vol. 14 at 2425), the district court erroneously concluded that the SEC had made a "clear showing" that Reven made material misstatements concerning the status and progress of the steps required to take the Company public. The court focused on statements in slide decks circulated in November and December 2021 that stated "[t]he company has the minimum required two years of audited financial statements ending August 2021."

See App. Vol. 14 at 2425–36 (citing App. Vol. 8 at 948; App. Vol. 10 at 1368, 1482; App. Vol. 14 at 2354). Here again, the court ignored the relevant context, as well as testimony from Mr. Denomme, who explained that the slide's intent was to show the requirements that ***will be met*** "[w]hen we organize and executive the initial public offering." App. Vol. 13 at 2251 (Tr. 214:15–216:14) (emphasis added). The district court's emphasis on the statements in the slide decks also ignored testimony from Schaatt – again, one of the SEC's investor informants – explaining that investors believed "that financial statements were in the process of being prepared and finalized," ***not*** that they already existed. App. Vol. 14 at 2301 (Tr. 63:19–64:5); *see also* App. Vol. 14 at 2306 (Tr. 101:11–24) (confirming Schaatt's understanding that Reven had not filed an S-1 for the current offering as of July 2021).

The district court ignored other evidence on this issue as well. For example, the SEC claimed that Mr. Lange misrepresented to Schaatt in a February 2020 email that Reven had already filed an S-1 statement, but two different communications to Schaatt in July 2020 made perfectly clear that this had not happened yet. *Compare* App. Vol. 8 at 1115–16, ¶ 15 (citing App. Vol. 9 at 1242), *with* App. Vol. 8 at 1117–19 ¶¶ 18–19

(citing App. Vol. 9 at 1244, 1256); *see also* App. Vol. 14 at 2306 (Tr. 101:11–24). It is also clear that these statements did not influence investors' decisions. Indeed, even Frost and Schaatt conceded that they did not rely on the statements at issue when they invested (App. Vol. 14 at 2302–03 (Tr. 73:14–17, 74:8–13)), and other investors likewise confirmed that they understood that a public offering was possible, but by no means guaranteed. App. Vol. 13 at 1974, 1978–79; App. Vol. 14 at 2324 (Tr. 102:10–24). *See Grossman*, 120 F.3d at 1119 ("A statement or omission is only material if a reasonable investor would consider it important in determining whether to buy or sell stock.") (citing *TSC Indus., Inc.*, 426 U.S. at 449).

In a single cursory paragraph in its decision, the district court disregarded all of the foregoing evidence in favor of competing declarations of other investors submitted by the SEC. App. Vol. 14 at 2426–27 (citing App. Vol. 8 at 1123–24 ¶ 31; App. Vol. 10 at 1384 ¶ 15; App. Vol. 15 at 2723 ¶ 10). But at best, these competing declarations raised a question of disputed fact that hinged on credibility

determinations that should have been explored in an evidentiary hearing with live testimony.[7]

3. Statements Regarding the Florida Litigation

The final category of statements at issue concerned a lawsuit initiated in Florida state court in August 2016 by Dawn Van Beck, a court-appointed guardian of a former Reven shareholder. *See* App. Vol. 13 at 1989–2013. The initial defendants were Reven Pharmaceuticals, Mr. Lange, and two non-parties to this litigation. *See id.* In June 2017, Beck amended her complaint. App. Vol. 13 at 2015. At that time, she alleged five causes of action against the same four defendants: sale of unregistered securities; securities fraud (under Florida state law); common law fraud; unjust enrichment; and exploitation of the elderly. *See* App. Vol. 13 at 2020–24. A few months later, the securities fraud,

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[7] *See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007) ("Where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held."); *Medeco Sec. Locks, Inc. v. Swiderek*, 680 F.2d 37, 38 (7th Cir. 1981) ("The trial court's reading of [a] deposition is an inadequate substitute for the hearing of oral testimony and the observing of a witness'[s] demeanor in these highly contested cases where the proper characterization of the factual occurrences is crucial and where credibility is a major determinative factor."); *see also infra* Argument Section III.

common law fraud, and exploitation of the elderly claims were dismissed by the court. *See id.* at 2047–55.

In December 2017, Beck filed a Second Amended Complaint alleging the same causes of action (except exploitation of the elderly) against the same four defendants. *See* App. Vol. 13 at 2062–67. It was not until December 2019, two years later, that Marie Renton, who succeeded Beck as guardian, filed a Third Amended Complaint naming additional defendants, including Reven, LLC. *See* App13_2100–02. On June 22, 2020, the court dismissed two counts of the Third Amended Complaint without prejudice. *See* App. Vol. 13 at 2163–64. On July 6, 2020, a Fourth Amended Complaint was filed, and the case was eventually settled in 2021. *See* App. Vol. 13 at 2166.

Much of the court's analysis of whether statements made by the Reven Principals regarding the Florida litigation assumes the Reven Principals' knowledge of technical and procedural details that many non-lawyers would not be aware of. For instance, Reven noted below that the 2018 PPM was issued by Reven Holdings and Reven, LLC, neither of which were parties to the Florida lawsuit at the time the PPM was drafted and sent. App. Vol. 12 at 1721–22. Reven Pharmaceuticals

(which was a party to the lawsuit) transferred all its asset and liabilities to Reven Holdings 10 days prior to the issuance of the PPM; Reven Holdings was not added as a party to the lawsuit until December 2019, a period of over a year that the court dismisses as "shortly thereafter." App. Vol. 14 at 2430. Neither the SEC nor the court pointed to any evidence to support the notion that the Reven Principals knew that "Reven Holdings had assumed the liabilities of a party to the lawsuit as of the time of PPM issuance," a fact that would likely be lost on non-lawyers. *Id.* Yet the court dismissed this perfectly understandable, if incorrect, distinction made by the Reven Principals as "hyperliteral," concluding instead – without holding a hearing to weigh credibility – that this constituted a materially false statement in violation of the securities laws. *Id.*

Next, the court determined that Mr. Lange's statement that "we have no lawsuits from shareholders" as of February 13, 2020 was a deliberate misrepresentation, even after acknowledging Mr. Lange's lack of understanding that a suit brought by a guardian acting on behalf of a shareholder could be considered a "lawsuit from [a] shareholder[]." *Id.* The court found that this was an actionable misstatement under the

federal securities laws based on its conclusion that Mr. Lange's understanding "does not appear to be a correct interpretation of the plaintiff's role in the Florida lawsuit." *Id.* But again, there is no evidence that the Reven Principals understood this procedural nicety with respect to guardianship standing. The court then made the baseless leap to suggesting that, rather than being a simple mistake, this error somehow constituted "evidence that [Mr. Lange] was trying to hide the fact of this lawsuit from potential investors with deceiving statements." *Id.*

Here, again, if the court was going to make a credibility determination in deciding critical and disputed issues of fact related to the issuance of an injunction and asset freeze, it should have at least held a hearing with live testimony. *See Certified Restoration*, 511 F.3d at 553; *Medeco*, 680 F.2d at 39; *see also infra* Argument Section III.

The final alleged misrepresentation on this topic relates to a statement in a 2020 PPM to the effect that there was no pending litigation that, in management's opinion, was material to the companies' financial condition. Obviously, whether a statement is considered materially false or misleading under the federal securities laws is based on the facts as they exist ***at the time the statement was made***. *See,*

e.g., *City of Philadelphia v. Fleming Cos., Inc.*, 264 F.3d 1245, 1260 (10th Cir.2001) ("[A] plaintiff must set forth, as part of the circumstances constituting fraud, an explanation as to why the disputed statement was untrue or misleading ***when made***." (emphasis added)); *see also Bristol Cty. Ret. Sys. v. Adient PLC*, No. 20-3846-CV, 2022 WL 2824260, at *1 (2d Cir. July 20, 2022) (holding that "a statement is false for the purpose of Section 10(b) and Rule 10b-5 if it was false ***at the time it was made***" (emphasis added)). Here, however, the court disregarded deposition testimony that the Reven Principals genuinely believed at the time they made the statement in question that the lawsuit was baseless, and instead based its finding that the statement in the PPM was both material and false and misleading ***when made*** solely on the fact that the case was later settled – ***the next year*** – for $2.75 million. *See* App. Vol. 14 at 2428. This is a clear legal error requiring reversal.

B. Even if the SEC Had Made a "Clear Showing" of Any Material Misstatement or Omission, the District Court Still Abused Its Discretion in Finding That Any Such Violation Would Reoccur.

Without a hearing and without live testimony – even in the face of fiercely disputed evidence, much of which turned on credibility determinations – the district court not only concluded that the SEC had

made a "clear showing" of material misstatements and omissions in violation of the securities laws, but also found a substantial likelihood that Reven would repeat such violations of the securities laws in the future. App. Vol. 14 at 2428, 2432–33. On this point, the district court simply recited – without any citation to the record – that "there is substantial evidence that the various misstatements were made knowingly and with intent to hide material facts from investors to induce them to invest." App. Vol. 14 at 2433. It is unclear to what evidence the district court was referring. What is clear is that the district court's conclusion in this regard does not withstand scrutiny. This provides an independent basis for reversal.

A determination regarding the likelihood of future violations of the securities laws "requires analysis of several factors," including "the seriousness of the violation" and "the degree of scienter." *S.E.C. v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993); *see also U.S. Sec. & Exch. Comm'n v. Cell>Point, LLC*, No. 21-cv-01574-PAB-KLM, 2022 WL 444397, at *8 (D. Colo. Feb. 2, 2022). As this Court has explained, while no single factor is determinative, "the degree of scienter 'bears heavily' on the decision." *S.E.C. v. Curshen*, 372 F. App'x 872, 882–83 (10th Cir.

2010); *accord S.E.C. v. Haswell*, 654 F.2d 698, 699–700 (10th Cir. 1981) ("[I]t will almost always be necessary for the Commission to demonstrate that the defendant's past sins have been the result of more than negligence. . . .").

Contrary to the district court's conclusion, there is no evidence in the record demonstrating that any purported violation of the federal securities laws here would occur again, and, in fact, there is substantial evidence to the contrary. The fact and record evidence demonstrated that the Reven Principals were indisputably entitled to – and just as importantly for purposes of this appeal, believed they were entitled to – far more in compensation under their employment agreements (over $23 million combined) than the SEC originally accused them of "misappropriating" ($8.8 million). App. Vol. 12 at 1745–49. The evidence further shows that the Reven Principals also frequently put their own funds into the Company to pay employees and fulfill staffing agreements. App. Vol. 12 at 1746–48; *see also, e.g.*, App. Vol. 16 at 2870, 2873, 2876, 2878. What's more, since the district court implemented the crippling asset freeze in January 2023, the Reven Principals have not only foregone compensation, but they have also sought permission from the Court to

access their personal funds to keep the Company alive. *See* App. Vol. 15 at 2748–57. Such activity is entirely inconsistent with any intent to "bilk" investors and "misappropriate" Company funds, as the SEC originally asserted.

The evidence is also clear that Reven did not intentionally or knowingly misrepresent the status of Reven's independent audit or the Florida litigation. At the absolute most, these were negligent misstatements of questionable materiality. As discussed above, Reven repeatedly told investors the audit was not complete, and Volk's declaration confirms that Reven never intended to misrepresent the status of the audit. *E.g.*, App. Vol. 9 at 1244, 1320; App. Vol. 10 at 1400–01; App. Vol. 12 at 1800–01; App. Vol. 13 at 1968–69. Lange's and Volk's declarations likewise rebutted any intentional or knowing misrepresentation relating to the Florida litigation. App. Vol. 13 at 1969; App. Vol. 12 at 1801; *see also supra* at Argument Section I.A.3. (discussing fact that district court's decision with respect to statements relating to Florida litigation was improperly based on hindsight).[8]

[8] Again, to the extent the district court questioned the sincerity of the statements in the Reven Principals' declarations and/or deposition

C. The District Court Also Abused Its Discretion in Concluding That the Balance of Hardships and Public Interest Both Favored the Injunctive Relief Sought, Including the Continuation of the Asset Freeze.

For the reasons detailed above, the district court abused its discretion in issuing the preliminary injunction because the SEC failed to make a "clear showing" of a violation of the federal securities laws, let alone a "substantial showing" of the likelihood that such violation would reoccur. As the district court acknowledged, however, even if the SEC had made both of the above showings (and it did not), the court was still required to deny the injunction unless the SEC also demonstrated that both the balance of hardships and public interest favor the injunctive relief sought, including continuation of the asset freeze. App. Vol. 15 at 2702 at n.12. The district court addressed these factors only in cursory fashion in a footnote. *Id.* Neither was satisfied – not even close.

As detailed above and further below, by the time the district court entered the orders at issue on this appeal, the asset freeze had been in place for over a year and had already destroyed millions in value for Reven investors and was stripping Reven of its intellectual property. As

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testimony, it should have held an evidentiary hearing to evaluate their credibility. *See infra* Argument Section III.

the SEC's own informants – Schaatt and Frost – implored the district court, "***the pending Asset Freeze . . . hinders, not helps, preserve Reven's value***" because "[w]ithout the ability to spend money, Reven cannot make the necessary patent maintenance payments," and "[w]ithout the ability to operate, Reven cannot continue to advance its pharmaceutical candidates through the FDA approval process, exposing Reven's . . . investors to potentially a complete loss of their investment as Reven's IP portfolio continues to decline in value." App. Vol. 14 at 2483 (emphasis added). In other words, Schaatt and Frost explained to the district court, "***the Asset Freeze and injunction by their own terms prevent any operations by Reven, including those operations that would otherwise be necessary to preserve value***" for investors. App. Vol. 14 at 2486 (emphasis added).[9]

In short, both Reven and the SEC's own investor informants implored the district court that the asset freeze was causing – not preventing – hardship to Reven's investors, the group that the SEC is charged with protecting. Nevertheless, in the face of this unanimous

[9] Additional evidence relating to the hardships imposed by the asset freeze are discussed immediately below in Argument Section II.

sentiment, the district court simply rubber-stamped the SEC's injunction motion and agreed to continue the destructive asset freeze. *Cf. S.E.C. v. Digital Licensing Inc.*, No. 2:23-cv-00482-RJS-DBP, 2023 WL 8283613, at *4–6 (D. Utah Nov.30, 2023) (discussing how the court's *ex parte* TRO was improvidently issued due, in part, to the SEC's inaccurate presentation of the evidence and inaccurate representations relating to irreparable harm).

The district court's decision in this regard was also a disservice to the public interest as it prevented – or at least severely hindered – the development and commercialization of RJX, denying the public of a breakthrough treatment for several life-threatening health conditions resulting from chronic inflammation.

The above points provide another independent basis for reversing and vacating the district court's decision granting the preliminary injunction.

II. IN THE ALTERNATIVE, THIS COURT SHOULD CONCLUDE THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO MODIFY THE INJUNCTION TO LIFT THE ASSET FREEZE.

Even assuming the preliminary injunction was not improvidently granted, the district court still abused its discretion in maintaining the

asset freeze as part of the injunction in the face of uncontradicted evidence that (a) there had been no "misappropriation" (as the SEC originally asserted), and (b) the asset freeze was depleting the very assets it was supposed to preserve.

"The purpose of an asset freeze is to ensure 'that any funds that may become due can be collected.'" *Smith*, 653 F.3d at 127 (quoting *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990)); *see also S.E.C. v. Infinity Grp. Co.*, 212 F.3d 180, 197 (3d Cir. 2000) ("A freeze of assets is designed to preserve the status quo by preventing the dissipation and diversion of assets."); *see also Unifund SAL*, 910 F.2d at 1041 (describing asset freeze as "ancillary relief to facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation [of securities laws] is established at trial").

The asset freeze in this case achieves no such purpose. The freeze did not preserve the status quo, and this was already abundantly clear by the time the district court issued its decisions that are challenged on this appeal. Instead, the asset freeze has decimated the very assets it was intended to preserve. Reven is losing, and has possibly already lost, its most valuable asset – its intellectual property – as a result of the

freeze. App. Vol. 15 at 2692. In the 21 months since the freeze, Reven has lost four of its five patent families and has been forced to abandon prosecution of numerous patent applications. App. Vol. 14 at 2443. Reven has also lost the benefit of at least $20 million in out-of-pocket expenses incurred on its prior Phase 2 trials for RJX. *Id.* Because of the delay caused by the district court's asset freeze, the data generated as part of those Phase 2 trials is now useless and in need of duplication. App. Vol. 12 at 1803. This loss of intellectual property and clinical data has in turn damaged Reven's existing investors in the form of a staggering diminution of the value of the Company, likely exceeding nine figures. *See S.E.C. v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1297 (D. Utah 2017) (finding asset freeze may be "particularly burdensome" if it would "harm the continuing viability of the enterprise").

This evidence was before the district court when it decided the preliminary injunction motion and continued the asset freeze, and when it subsequently denied Reven's motion to lift the asset freeze.

Although the district court acknowledged that the asset freeze it originally imposed at the behest of the SEC caused, and was continuing to cause, substantial damage to Reven's assets – rather than preserving

them – it refused to lift the asset freeze. Instead, the district court modified the asset freeze in only four limited and highly restrictive ways:

- permitting "third parties to pay expenses on behalf of Reven and its affiliates (including operating expenses, intellectual property maintenance and prosecution expenses, and legal expenses, but expressly excluding payment of compensation to the Reven Principals)";

- allowing Reven to license its intellectual property but only after conferring with the SEC and receiving the district court's approval if the SEC objects to the form of any license agreement;

- allowing the Reven Principals to incur new debt on an individual basis through their remaining real or personal property and to use such funds for certain specified purposes; and

- permitting Reven – after conferring with the SEC – to move the district court to unfreeze certain individual bank accounts.

App. Vol. 15 at 2699–2700.

These modifications are a band-aid on a bullet wound. First, to preserve assets, action needed to be taken quickly in the face of rapidly approaching deadlines, and to require conferral with the SEC and approval by the court, wastes precious time. Second, because of the SEC's failure to properly identify and place *lis pendens* on the Reven Principals' property, they have already lost valuable property, leaving little as collateral for Reven to incur new debt; for instance, Mr. Volk's real property in Minnesota was sold in a foreclosure auction due to the SEC's

missteps. App. Vol. 14 at 2444, 2452. Moreover, these modifications were too little and too late to have any meaningful effect as Reven has lost much of its U.S. patent protection already. App. Vol. 12 at 1802; App. Vol. 14 at 2394, 2443.

None of the cases cited in the district court's decision justify maintaining the asset freeze as the circumstances in those cases hardly resemble those present here. If anything, the facts in those cases only further underscore the inappropriateness of an asset freeze in this case. Take, for instance, *S.E.C. v. Smith*, which the district court suggested was analogous to the situation here. No. 10-CV-457 (GLS/DRH), 2011 WL 9528138 (N.D.N.Y. Feb. 1, 2011). Hardly. In that case, the defendant asked for relief from an asset freeze to pay for expenses associated with the maintenance of a second vacation home, which had nothing to do with the underlying business. *Id.* at *1. The defendant reasoned that the house could go up in value and thus benefit the defrauded investors in the event of a judgment. *See id.* at *4–5. Unsurprisingly, the court rejected that argument, noting that additional debts "might make sense if there existed ***any reasonable likelihood*** that the value of the property would appreciate sufficiently in the foreseeable future to

compensate for the expenses" associated with maintaining the multi-million-dollar home. *Id.* at *4 (emphasis added).

The analogy does not work. Unlike the defendant in *Smith* – who sought relief for a personal asset unrelated to the business at issue – Reven sought relief from the asset freeze to maintain its core asset based on tangible results and an established track record of success in the path to commercializing RJX. That includes two FDA approved Phase 2 investigational new drug applications, three Orphan Drug Apps filed with FDA, TGA Registration in Australia, 12 patents granted in two families, 28 patents applied for in five families, 30+ pre-clinical animal studies, 13 published articles, six peer-reviewed publications, seven clinical white papers, 50+ protocols developed, a Phase 2 human trial approved in Europe, Phase 1 human trials done in Australia and the United States, and a Phase 2 human trial 75% complete in the United States. App. Vol. 12 at 1797. Given these established results, there exists at least a reasonable likelihood that RJX can be commercialized, which would allow any expenses incurred as part of its continued development to be returned by several multiples. App. Vol. 14 at 2444–45.

Securities and Exchange Commission v. International Network, Inc., 770 F. Supp. 678 (D.D.C. 1991), is similarly inapplicable to the circumstances here. That case involved an alleged pyramid scheme by a company "which produced no significant products or services but ma[de] its money almost solely through the sale of new memberships in the organization." *Id.* at 680–81. The court noted that the defendants' "[p]rograms as described in testimony and in written material [were] frequently incomprehensible," and the entire premise of the business was not sustainable. *Id.* at 681. Based on these facts, the court continued the "draconian" asset freeze that would almost certainly assure the defendant could not continue its business. *Id.* at 697. Again, that is not the case here. Reven is not relying on an incomprehensible morass of misstatements to conceal a lack of significant products or services. RJX is a life-changing technology that, when approved, will transform the lives of those suffering with critical limb-threatening conditions. *See* App. Vol. 12 at 1687; App. Vol. 13 at 1972–73. And Reven seeks relief to continue the pursuit of a legitimate commercial enterprise – *i.e.*, bringing RJX to market – one that is so promising that insurgent Reven investors,

turned opportunistic SEC "whistleblowers" have been attempting to usurp Reven and misappropriate its intellectual property.

This commercial legitimacy further differentiates this case from *Securities and Exchange Commission v. Current Financial Services*, 783 F. Supp. 1441 (D.D.C. 1992). That case involved a medical accounts receivable factoring business, as to which the SEC presented "overwhelming evidence of misguided (if not fraudulent)" practices. *Id.* at 1442–43, 1446. Citing concerns about the defendant's "manner of conducting business" – which had included regular failings to verify insurance, extending loans to company officers, and the creation of fictional receivables to inflate the company's results – the court maintained the asset freeze over the defendant's objection, concluding that the "business [wa]s not lucrative enough to warrant the risk of further depleting" the minimal assets it possessed. *Id.* at 1444–45.

While the nature of the defendant's business in *Current Financial Services* warranted a continuation of the asset freeze, the nature of Reven's business did not. Reven possessed valuable intellectual property, which the asset freeze had already depleted in the 14 months it was in place before the district court doubled down by extending it as

part of the SEC's requested preliminary injunction. App. Vol. 14 at 2385–89, 2392–95. The SEC's watered-down allegations against Reven concern the adequacy of disclosures that are entirely unrelated to the viability of RJX or Reven's ability to bring RJX to market. And even though there is an inherent risk with bringing any new drug to market, that inherent risk presents a highly lucrative reward if successful. Regardless, this inherent risk is not sufficient reason to maintain the asset freeze.[10]

In sum, the "draconian" remedy the district court imposed here is reserved for a special class of cases in which the freeze is necessary to preserve assets in the case of an eventual judgment. And that is simply not the case here, as the district court's cited cases demonstrate. There is no colorable, let alone overwhelming, evidence of fraud here. There is no pyramid scheme, no fictional accounts or made-up results. Reven is a legitimate business, with a legitimate product that can provide substantial value to Reven's investors and to the public at large if brought to market. Rather than preserving the business and its assets,

[10] The district court pointed to the additional expenses Reven would incur to regenerate data from a previous trial as justification for maintaining the asset freeze. App. Vol. 15 at 2698. But that is entirely circular as Reven only lost that data because the district court imposed the improper freeze in the first place.

the district court's asset freeze was already, at the time the court decided to maintain it, decimating this business and continuing to deplete the Company of any value should the case reach trial. Accordingly, regardless of how this Court evaluates the district court's imposition of the preliminary injunction, it should reverse the district court's decision to maintain the asset freeze as an abuse of discretion.

III. AT A MINIMUM, THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO HOLD AN EVIDENTIARY HEARING IN THIS CONTEXT.

"Where," as here, "facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held." *Certified Restoration*, 511 F.3d at 553; *see also Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1212 (11th Cir. 2003) ("[When] the material facts underlying the complaint and the injunction are disputed, the district court is required to hold a hearing which affords both parties an adequate opportunity to present their arguments and educate the court about the complex issues involved."); *Medeco*, 680 F.2d at 38 ("The trial court's reading of [a] deposition is an inadequate substitute for the hearing of oral testimony and the observing of a witness'[s] demeanor in

these highly contested cases where the proper characterization of the factual occurrences is crucial and where credibility is a major determinative factor."); 11A Fed. Prac. & Proc. Civ. § 2949 (3d ed. 2024) (collecting cases).

As noted above, here, the district court originally agreed to hold a hearing on the SEC's preliminary injunction motion at which "each side [was to] be allotted time for an opening statement, cross-examination and redirect examination of witnesses, and closing argument." App. Vol. 10 at 1474. The court subsequently reversed course, however, prior to the filing of Reven's opposition papers, and *sua sponte* stated in an order that "[a]fter reviewing the defendants' and relief defendants' response(s) and the plaintiff's reply, if any, I will determine whether to (a) reset a preliminary-injunction hearing, (b) request supplemental briefing from the parties on specific legal or factual questions, or (c) decide the motion on the papers submitted." App. Vol. 15 at 2734.

Nearly seven months following the filing of the SEC's reply – during which period Reven inquired with the court about a possible hearing and ultimately made a supplemental submission – the district court simply decided the motion on the papers and did not permit a hearing. App. Vol.

14 at 2407–36. The failure to hold a hearing under the circumstances of this case constituted an abuse of discretion that provides an independent basis for reversal. *See Certified Restoration*, 511 F.3d at 553; *cf. Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) ("[W]hen a court must make credibility determinations to resolve key factual disputes in favor of the moving party, it is an abuse of discretion for the court to settle the question on the basis of documents alone, without an evidentiary hearing.").

CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the district court's grant of the preliminary injunction and its refusal to modify the injunction to lift the asset freeze in its entirety.

Dated: October 21, 2024

Respectfully Submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Considering the various legal and factual issues in this case, Appellants respectfully suggest that oral argument will assist the Court in analyzing this appeal.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 12,994 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) all required privacy redactions have been made from this brief per Tenth Circuit Rule 25.5; and (2) this Status Report has been scanned for viruses by the CrowdStrike Falcon anti-virus software program, last updated on October 21, 2024, and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on all counsel of record by notice of electronic filing with the Court's CM/ECF system.

Dated: October 21, 2024

/s/ Dylan French
Dylan French
Counsel for Appellants

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:22-cv-03181-DDD-KLM

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

REVEN HOLDINGS, INC. d/b/a Reven Pharmaceuticals;
REVEN PHARMACEUTICALS, INC.;
BRIAN D. DENOMME;
PETER B. LANGE; and
MICHAEL A. VOLK,

Defendants, and

REVEN, LLC;
REVEN IP HOLDCO, LLC;
REVEN ONCOLOGY LICENSING, LLC; and
HEALTH ANALYTICS AND RESEARCH SERVICES, LLC,

Relief Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND ASSET FREEZE

Plaintiff U.S. Securities and Exchange Commission previously moved for a temporary restraining order (1) prohibiting the defendants from violating the anti-fraud provisions of federal securities laws; (2) prohibiting Defendants Brian D. Denomme, Peter B. Lange, and Michael A. Volk (the "Reven Principals") from offering or selling securities; (3) freezing the defendants' and relief defendants' assets; and (4) providing other ancillary relief. Doc. 3. I granted that motion, Doc. 28, and the parties agreed to extend the temporary restraining order pending my ruling as to a preliminary injunction, Docs. 35, 36.

Having considered the parties' preliminary-injunction briefing and the evidence of record, and I find that the Commission has made a clear showing that it will likely be successful in proving that the defendants have violated federal securities laws and will likely do so again if they are not enjoined. Accordingly, the Commission's motion for a preliminary injunction is granted, and the terms of the temporary restraining order (as modified, *see* Docs. 55, 65, 68, 72, 74, 117) are extended pending a final adjudication of this case on the merits.

BACKGROUND

Defendant Reven Holdings, Inc. was formed in 2018 as a privately held biotechnology and pharmaceutical holding company. Doc. 96 at 11. According to the defendants, "Reven's primary focus has been developing and commercializing a cardiovascular and anti-inflammatory intravenous drug treatment called Rejuveinix ('RJX')." *Id.* Reven Holdings is a successor to Defendant Reven Pharmaceuticals, Inc., which was formed in 1999. Doc. 7-1 at 2; Doc. 7-4 at 1. Relief Defendant Reven, LLC is a wholly owned subsidiary of Reven Holdings. Doc. 7-4 at 1. In August 2018, Reven Pharmaceuticals transferred all of its assets and liabilities to Reven, LLC. *Id.* Relief Defendants Reven IP Holdco, LLC and Reven Oncology Licensing, LLC also now hold some Reven assets. Doc. 96 at 11; Doc. 7 ¶¶ 17-18.

Defendant Denomme is a co-founder, member of the board, and the current President and former Chief Operating Officer of Reven Holdings. Doc. 96 at 12. Defendant Lange is a co-founder, member of the board, and the current Chief Executive Officer of Reven Holdings. *Id.* Defendant Volk is a co-founder, member of the board, and the current Chief Strategy Officer and former Chief Financial Officer of Reven Holdings. *Id.* Collectively, the Reven Principals control the majority of the

stock of Reven Holdings. Doc. 7 ¶¶ 38-39; Doc. 7-13 at 2; 7-17 at 9. Relief Defendant Health Analytics & Research Services, LLC is another company owned by the Reven Principals. Doc. 7-12 at 2. According to the defendants, this company "provided consulting services to both Reven and other entities," and "was also sometimes used, for tax purposes, to pay the Reven Principals." Doc. 96 at 21.

The defendants state that "[t]ogether, the Reven Principals have brought in thousands of investors to the company." *Id.* at 12. The Commission alleges that the Reven Principals did so by making a number of false or misleading statements to prospective investors in violation of federal securities laws. *See generally* Doc. 1; Doc. 3. Specifically, the Commission contends that the defendants violated the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), and argues that the defendants will continue to do so unless they are preliminarily enjoined.

APPLICABLE LAW

I. Preliminary-Injunction Standard

Ordinarily, a party seeking a preliminary injunction must show: (1) that it is substantially likely to succeed on the merits; (2) that it will suffer irreparable injury if the court denies the requested relief; (3) that its threatened injury without the injunction outweighs the opposing party's under it; and (4) that the requested relief is not adverse to the public interest. *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir. 2019); *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

But when "defendants are engaged in, or about to be engaged in, [acts] or practices prohibited by a statute which provides for injunctive

relief to prevent such violations," the traditional equitable factors, including irreparable harm, need not be shown. *Mical Commc'ns, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035 (10th Cir. 1993); *see also Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981) (collecting cases and noting that other courts have applied this rule to Securities Act and Exchange Act); *Commodity Futures Trading Comm'n v. Wall Street Underground, Inc.*, 128 F. App'x 726, 728 (10th Cir. 2005) (applying rule to Commodity Exchange Act). Such is the case here. The Commission seeks injunctive relief pursuant to the Securities Act and the Exchange Act, which provide that:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of [securities laws], the Commission may . . . bring an action in any district court of the United States . . . to enjoin such acts or practices, and upon a proper showing, a . . . temporary injunction . . . shall be granted without bond.

15 U.S.C. § 77t(b) (Securities Act); *accord* 15 U.S.C. § 78u(d)(1), (5) (Exchange Act). The Commission therefore "need only show that the statutory conditions for the issuance of an injunction [are] met." *Mical*, 1 F.3d at 1036; *accord SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808-09 (2d Cir. 1975). The "proper showing" required by the Securities Act and the Exchange Act "include[s], at a minimum, proof that a person is engaged in or is about to engage in a substantive violation of either one of the Acts or of the regulations promulgated thereunder." *Aaron v. SEC*, 446 U.S. 680, 700-01 (1980).

While the traditional four-factor test for a preliminary injunction does not apply here, that does not mean a court should not take equitable considerations into account when deciding whether to grant injunctive relief. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1035-40 (2d Cir. 1990). "[T]he Commission should be obliged to make a more

persuasive showing of its entitlement to [injunctive relief] the more onerous are the burdens of the injunction it seeks." *Id.* at 1039. Where, as here, the Commission seeks injunctive relief that mandates action or alters the status quo, it must make a "clear showing" as to (1) its likelihood of proving the alleged statutory violation, and (2) the likelihood that a violation will occur again in the future. *Id.* at 1039-40; *cf. Mrs. Fields*, 941 F.3d at 1232 (to obtain preliminary relief that mandates action or changes status quo, movant must make "strong showing" of likelihood of success on merits).

II. Securities Act and Exchange Act

The Commission alleges the following statutory violations: (1) the defendants, by making false and misleading statements to prospective investors, violated Exchange Act Section 10(b),[1] Exchange Act

[1] Exchange Act Section 10(b) provides that:

> It shall be unlawful for any person . . . by the use of any means or instrumentality of interstate commerce or of the mails . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Rule 10b-5(b),[2] and Securities Act Section 17(a)(2),[3] and (2) the defendants, by engaging in deceptive conduct, violated Exchange Act Section 10(b), Exchange Act Rules 10b-5(a) and (c), and Securities Act Sections 17(a)(1) and (3).

To establish a violation under Exchange Act Section 10(b) or Rule 10b-5,[4] the Commission must prove that the defendants (1) made a misrepresentation or omission of material fact, or committed a deceptive or manipulative act, in furtherance of a scheme to defraud, (2) with

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[2] Exchange Act Rule 10b-5 provides that:

> It shall be unlawful for any person . . . by the use of any means or instrumentality of interstate commerce, or of the mails . . . (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

[3] Securities Act Section 17(a) provides that:

> It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails . . . (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a).

[4] The coverage of Rule 10b-5 is coextensive with that of Section 10(b). *SEC v. Smart*, 678 F.3d 850, 856 n.7 (10th Cir. 2012).

scienter, (3) in connection with the purchase or sale of securities, (4) by means of interstate commerce or the mail. *Smart*, 678 F.3d at 856; *SEC v. Wolfson*, 539 F.3d 1249, 1255-66 (10th Cir. 2008); *SEC v. McDuffie*, No. 12-cv-02939, 2014 WL 4548723, at *8, *10 (D. Colo. Sept. 15, 2014). Sections 17(a)(1) to (3) of the Securities Act require substantially similar proof with respect to the offer or sale of securities.[5] *Smart*, 678 F.3d at 857. The primary difference between Section 10(b) and Sections 17(a)(1) to (3) is in the scienter element. *Id.* Section 10(b) and Section 17(a)(1) require the Commission to establish at least recklessness, whereas negligence is sufficient for Sections 17(a)(2) and (3). *Id.*

DISCUSSION

I. Likelihood of Proving a Statutory Violation

I have examined the allegations in the Commission's complaint, Doc. 1; the arguments in the parties' briefs, Docs. 3, 96, 107, 113, 114, 115; and the associated declarations and exhibits in the record, Docs. 7 to 7-30, 8 to 8-3, 9 to 9-15, 10, 11 to 11-2, 12 to 12-8, 13 to 13-11, 14 to 14-1, 96-1 to 96-32, 97-1 to 97-7, 104-1, 107-1 to 107-3, 113-1. The evidence clearly shows that the Commission is likely to prove the alleged statutory violations.

The parties' preliminary-injunction briefing is focused on the defendants' solicitation of investors between 2019 and 2021. *See* Doc. 3 at 26-35; Doc. 96 at 19-25, 29-47. The Commission alleges that during this period, the Reven Principals made false or misleading statements

[5] Although Section 10(b) requires that the fraud be committed "in connection with the purchase or sale of any security," while Section 17(a) requires that the fraud be committed "in the offer or sale of any securities," these phrases are often used interchangeably. *Wolfson*, 539 F.3d at 1263.

to prospective investors regarding (1) executive compensation, Doc. 3 at 26-29; (2) the existence of audited financial statements and Reven's readiness for an initial public offering and/or direct public offering, *id.* at 29-33; and (3) the fact that some of the defendants were the subject of a lawsuit in which a Reven Holdings shareholder alleged they had committed securities fraud, *id.* at 34-35.[6] As noted above, the Commission must prove that the defendants (1) made a misrepresentation or omission of material fact, or committed a deceptive or manipulative act, in furtherance of a scheme to defraud, (2) with scienter, (3) in connection with the purchase or sale of securities, (4) by means of interstate commerce or the mail. The defendants do not contest the third and fourth elements. They dispute, however, whether they made any misrepresentation, whether any alleged misrepresentation or omission was material, and whether they acted with the requisite scienter.

A. Executive Compensation

1. Misrepresentations or Omissions

The Commission has made a clear showing that it is likely to prove the defendants made false and misleading statements or omissions to investors regarding the Reven Principals' annual compensation.

In Private Placement Memoranda ("PPMs") dated August 2018, July 2020, and January 2021, the defendants disclosed the following

[6] The Commission also alleges that the Reven Principals made false or misleading statements regarding how certain investor funds would be used. Doc. 3 at 33-34. I need not address the parties' disputes regarding those allegations, because the other false or misleading statements discussed in this Order are sufficient to support the issuance of a preliminary injunction.

collective total annual compensation for the Reven Principals, while in reality, the Commission says, they took much more:

Year	Disclosed Compensation	Alleged Actual Compensation	Alleged Misappropriation
2019	$1.62 to $2.3 million	$5.35 million	$3.05 to $3.73 million
2020	$1.8 to $1.98 million	$3.36 million	$1.38 to $1.56 million
2021	$2.16 million	$6.65 million	$4.49 million
Total	$5.58 to $6.44 million	$15.36 million	$8.92 to $9.78 million

Doc. 7-8 at 30; 7-17 at 7; Doc. 7-20 at 13; Doc. 8 ¶¶ 18-19 & n.10; Doc. 3 at 27.

The defendants argue that the Commission's alleged "actual compensation" numbers are inflated, because they include payments that were not made for the Reven Principals' personal benefit, specifically: payments made toward Mr. Volk's American Express card that was used for business expenses, payments of an "auto allowance" set forth in the Principals' employment agreements, and payments to Health Analytics & Research Services for marketing services provided to Reven. Doc. 96 at 22-24. According to the defendants, the Reven Principals' collective total compensation for this three-year period was only $11.33 million, not $15.36 million. *See id.* at 24; Doc. 97-1 ¶¶ 7, 10-30. This, however, still means that the Reven Principals took in $4.89 to $5.75 million more than they disclosed to investors.

The defendants argue that they were entitled to the compensation they took (and in fact more) under the terms of their employment agreements, and that they made no misrepresentation or omission to investors because the PPMs expressly gave prospective investors the ability to request and review those employment agreements, which provided for

annual base compensation of $900,000, $1 million, and $1.2 million in 2019, 2020, and 2021, respectively, plus annual bonuses if certain targets were met.[7] Doc. 96 at 13-14, 20-24, 30-31. But the compensation disclosure tables in the July 2020 and January 2021 PPMs specifically included "Bonus" and "All Other Compensation" columns, in which no amounts were disclosed. Doc. 7-17 at 7 (disclosing amounts only in "Salary" column for Reven Principals); Doc. 7-20 at 13 (same). And those PPMs included disclosure of the actual compensation paid to the Reven Principals in past years, not just estimates of future compensation or amounts the Principals might be entitled to under their employment agreements. The disclosed amounts were less than what the Principals had actually received, even under the defendants' own calculations. Those disclosures—which omitted any "bonus" or "other" compensation the Reven Principals had received beyond their base monthly draws—were misrepresentations.

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[7] The defendants also state that the 2020 and 2021 PPMs contain typographical errors, listing incorrect years in the compensation tables. Doc. 96 at 29. But correcting for these alleged errors still results in the defendants having taken in more than was disclosed:

Year	Corrected Disclosed Compensation	Alleged Actual Compensation
2019	$1.8 to $2.3 million	$5.35 million
2020	$2.16 million	$3.36 million
Total	$3.96 to $4.46 million	$8.71 million

See Doc. 7-17 at 7; Doc. 7-20 at 13; Doc. 8 ¶¶ 18-19; Doc. 3 at 27. The defendants' accountant did not break his calculations down by year, *see* Doc. 97-1, but reducing the $8.71 million total compensation alleged by the Commission for 2019-2020 by the same amount the defendants' accountant did for 2019-2021 ($11.33 / $15.36 x $8.71 = $6.42) results in the Reven Principals having taken in roughly $1.96 to $2.46 million more than disclosed for 2019-2020. *See* Doc. 107 at 9 n.2.

2. Materiality

The Commission has also made a clear showing that it is likely to prove the defendants' misrepresentations regarding the Reven Principals' compensation were material.

A statement or omission is material if "a reasonable investor would consider it important in determining whether to buy or sell stock," and if it would have "significantly altered the total mix of information available" to current and potential investors. *City of Phila. v. Fleming Cos.*, 264 F.3d 1245, 1265 (10th Cir. 2001) (quoting *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997)). "A false statement or omission need not be outcome determinative for it to be considered material; rather it simply must be significant to the investor's decision." *SEC v. LottoNet Operating Corp.*, No. 17-21033-CIV-LENARD/GOODMAN, 2017 WL 6949289, at *13 (S.D. Fla. Mar. 31, 2017) (R. & R.), *adopted by* 2017 WL 6989148 (S.D. Fla. Apr. 6, 2017). Misrepresentations regarding the use of investor funds are material. *SEC v. Cell>Point, LLC*, No. 21-cv-01574-PAB-KLM, 2022 WL 444397, at *7 (D. Colo. Feb. 14, 2022); *accord LottoNet*, 2017 WL 6949289, at *13 (collecting cases).

Multiple courts have found that misrepresentations regarding executive compensation like those in this case are material.[8] *See SEC v. Benson*, 657 F. Supp. 1122, 1130-31 (S.D.N.Y. 1997) (failure to disclose amounts misappropriated by corporate officials, including unearned

[8] Both sides have presented declarations from investors stating that knowledge of the Reven Principals' compensation was, or was not, important to their decision to invest. *Compare* Doc. 9 ¶ 43, *with* Doc. 96-13 ¶ 8, *and* Doc. 96-14 ¶ 6. The fact that certain information was or was not important to a particular investor is relevant to, but not dispositive of, whether that information would have been material to a reasonable investor. *SEC v. Trujillo*, No. 09-cv-00403-MSK-KMT, 2010 WL 3790817, at *4 (D. Colo. Sept. 22, 2010).

commissions); *LottoNet*, 2017 WL 6949289, at *6, *11 to *12 (statements (1) in PPM that CEO would receive $10k per month, when in fact he took average of $23.2k per month, and (2) in SEC Form D that total executive compensation was approximately $200k when in fact it was at least $580k); *see also SEC v. Rsch. Automation Corp.*, 585 F.2d 31, 35 (2d Cir. 1978) ("What reasonable investor would not wish to know that the money raised by stock sales would not be used for working capital but be diverted to RAC's officers?"). The defendants argue that their statements regarding executive compensation were not material because they "came with disclaimers about forward-looking expectations and management's discretion regarding the use of funds, and specifically explained that any potential investor could 'obtain additional information and/or documents in connection with making an investment decision.'" Doc. 96 at 31. But as noted above, at least some (or all, if there were typographical errors as the defendants state) of the disclosed compensation in the 2020 and 2021 PPMs was presented as actual compensation for past years, not "forward-looking" estimated compensation. The defendants' arguments regarding a lack of materiality are not persuasive.

3. Scienter

The Commission has shown that it is likely to prove that the misrepresentations in the PPMs regarding the Reven Principals' compensation were made recklessly, and has made a clear showing that those misrepresentations were made at a minimum negligently.[9]

[9] The Reven Principals' scienter can be attributed to Reven Holdings itself. *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1106 (10th Cir. 2003) (scienter of senior controlling officers acting within scope of their apparent authority may be attributed to corporation itself).

Recklessness is defined as "conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *City of Phila.*, 264 F.3d at 1258. Recklessness may be established by showing a defendant's knowledge of a fact "that was so obviously material that the defendant must have been aware both of its materiality and that its non-disclosure would likely mislead investors." *SEC v. Curshen*, 372 F. App'x 872, 881 (10th Cir. 2010).

The Reven Principals knew their own salaries, the possibility of receiving bonuses, and whether they had met the metrics required to receive a bonus in any given year. *See* Doc. 107-1 at 5-7 (Mr. Denomme). They also knew they received compensation other than their salaries during the relevant time period, and that that other compensation was not disclosed in the PPMs. Doc. 107-1 at 9 (Mr. Denomme, travel and car allowances not disclosed); Doc. 107-2 at 6 (Mr. Lange, same); *see also* Doc. 7-17 at 7 (listing "Salary" amounts but no amounts for "Bonus" or "All Other Compensation"); Doc. 7-20 at 13 (same).

They thus knew or must have known that the PPMs presented a danger of misleading prospective investors as to their compensation. The defendants argue that they "intended the compensation figures in the PPMs . . . to reflect the monthly draws that were then being paid to the Reven Principals, rather than the total amounts the Reven Principals were entitled to earn under their employment agreements," and that "[t]his was not due to any intent to mislead investors about the terms of the Reven Principals' employment agreements or the amounts of compensation actually being paid to the Reven Principals." Doc. 96-2 ¶ 8. But the PPMs expressly state that they "set[] forth the annual and long-term compensation paid to our Chief Executive Officer and the other

executive officers," Doc. 7-17 at 7; Doc. 7-20 at 13, *i.e.*, "the amounts of compensation actually being paid," which only reinforces that the Reven Principals must have known these disclosure tables had the potential to be misleading.

The Commission is also likely to show that the Reven Principals must have known that disclosures regarding their compensation would be material to a reasonable investor. As noted above, even under the defendants' calculations, the Reven Principals took in at least $4.89 million more than they disclosed for 2019-2021. That amount constitutes over 10% of the total investor funds that Reven raised during that period. *See* Doc. 8 ¶ 14. The Reven Principals at the very least should have known that this misrepresentation regarding the use of investor funds was material. But even if the Commission is not successful in proving that the misrepresentations regarding compensation were "so obviously material that the [Reven Principals] must have been aware . . . of [their] materiality," *i.e.*, that they were made recklessly, the Commission is clearly likely to show that the misrepresentations were at a minimum made negligently. The defendants do not even attempt to argue that they were not negligent. *See* Doc. 96 at 10, 32 ("[A]ny purported misstatement or omission . . . was at most the product of simple negligence, not deliberate fraud."; The Commission "does not have evidence reflecting intentional (or even sufficiently reckless) conduct for the purported misstatements.")

B. Audited Financial Statements and Public Offering

1. Misrepresentations or Omissions

The Commission has made a clear showing that it is likely to prove the defendants made false and misleading statements or omissions to

investors regarding the existence of audited financial statements and Reven's readiness for an IPO or DPO.

The parties have submitted the following evidence regarding Reven's progress toward audited financial statements and making a public offering during the 2019 to 2021 time period and what the Reven Principals communicated to prospective investors during that time:

- **2019** – "Reven made several efforts to make progress toward completing an audit, including steps to make the firm easier to audit, such as engaging CARTA to properly document shareholders and communicate with them consistently, and also by formalizing accounting procedures and processes, which Reven engaged Eide Bailly [a CPA and business advisory firm] to assist with." Doc. 96-2 ¶ 11.

- **September 9 2019** – Mr. Lange emailed a prospective investor, Leah Schaatt, a slide deck dated August 2019 that included a slide titled "Pathway to IPO," which projected that an S-1 statement could be filed with five to eight months' preparation time, and a slide listing as one of three possible "exit strategies" for Reven to "Organize and execute a public offering on a major financial exchange after October 1, 2020" and stating that "*[t]he company will have the minimum required two years of audited financial statements ending September 30, 2020* making it eligible to offer its shares for sale in an Initial Public Offering as early as October 2020." Doc. 9-1 at 1, 83, 96 (emphases added). Ms. Schaatt invested in Reven on September 13, 2019. Doc. 9 ¶ 9.

- **December 9, 2019** – Mr. Volk emailed an investor, Sharon Garber, stating that "[w]e are working directly with a very reputable firm for SEC compliance in preparation for an IPO to hopefully happen sometime during 2020—it will NOT be prior to October since we need a minimum of 2 years audited financials which will be at the end of September 2020 due to the restructure we did last year. *We are currently undergoing our first audit now*." Doc. 7-22 at 3 (emphasis added).

- **April 2020** – "Reven hired a new CFO, Jeff Halverson . . . specifically to work on bookkeeping and preparing for an audit. Reven also began working through internal accounting deficiencies that would need to be corrected before a public listing could happen." Doc. 96-2 ¶ 12.

- **April 20, 2020** – Mr. Volk emailed a group of prospective investors a slide deck dated April 2020 that included a slide listing as one of three possible "exit strategies" for Reven to "Organize and execute an initial public offering (IPO) after October 1, 2020" and stating that "*[t]he company will have the minimum required two years of audited financial statements ending September 30, 2020 making it eligible to offer its shares for sale in an Initial Public Offering as early as October 2020*." Doc. 7-23 at 1, 16 (emphases added).

- **Mid-2020** – "Reven . . . contacted a number of additional firms regarding working together on a public offering. . . . Many of these relationships continued through the majority of 2022." Doc. 96-2 ¶ 13.

- **July 8, 2020** – Mr. Lange emailed Ms. Schaatt with the subject line "Reven next 90 day pathway to Covid-19 FDA approval and IPO," stating that "*[o]ur audit should be completed in mid-September early October which will allow us to file our S1 sometime before the end of the year and taking next steps towards an IPO in 2021*." Doc. 9-6 at 1 (emphasis added). Mr. Lange and Mr. Volk solicited Ms. Schaatt for additional investments throughout 2020. Doc. 9 ¶ 21.

- **April 6, 2021** – Mr. Halverson engaged Rudy Rudolph of Eide Bailly to prepare tax returns for Reven, LLC and its related entities for the years 2018, 2019, and 2020, which needed to be filed before Reven's financial statements could be audited. Doc. 13 ¶¶ 3, 5, 7.

- **April 6, 2021** – Mr. Volk emailed a prospective investor, Nicholas Shevillo, a slide deck dated December 2020 that included a slide listing as one of three possible "exit strategies" for Reven to "Organize and execute an initial public offering (IPO) early 2021" and stating that "*[t]he company will have the required minimum required [sic] two years of audited financial statements ending 2020*." Doc. 7-24 at 1, 14 (emphases added).

- **June 9, 2021** – Mr. Lange emailed a CPA for a group of investors (the Frost family), stating that

> Our timeline is to launch the DPO in September . . . . It[']s important to know that *our S1 is essentially already finished which requires our audit to be completed which should be finished in the next 45-60 days*. Our projection is July 15th but with summer holidays I really think we will not hit that date. Here is an update with respect to our pursuit of a public listing subsequent to *completion and filing of our S-1 registration statement being filed with the SEC within the next 3-5 weeks*.

Doc. 12-2 at 2 (emphasis added). Thereafter, Mr. Lange solicited Lee-Ann Frost and her family for additional investments. Doc. 12 ¶¶ 10-13. Ms. Frost and her family members made an additional investment on September 24, 2021. *Id.* ¶ 14.

- **July 2021** – "Reven hired 180 Accounting to reconcile its accounting and bookkeeping records in advance of a potential audit." Doc. 96-2 ¶ 14.

- **July 14, 2021** – Mr. Volk emailed Ms. Schaatt a document titled "Pre-Direct Public Offering Brief and Deal Structure" "regarding the shares we are looking to place to raise the final funds prior to our Direct Public Offering." Doc. 9-8. That document stated that

> Reven is currently preparing for a Direct Public Offering of their stock on a major stock exchange to occur September/October 2021. The company intends on filing its S-1 registration statement as early as August as a required final step . . . . *Reven has completed all the necessary groundwork to accomplish a listing and public offering of its shares with the exception of the completion of its financial audit.*

Id. at 2 (emphasis added). The previous day, Mr. Volk and Mr. Lange had solicited Ms. Schaatt for an additional investment. Doc. 9 ¶ 22. Ms. Schaatt made an additional investment on July 16, 2021. *Id.* ¶ 25.

- **July 28, 2021** – Eide Bailly reported to Mr. Halverson and Mr. Volk that Reven had not provided all of the necessary documents needed to complete the tax returns. Doc. 13 ¶ 18. Mr. Halverson communicated this information to Mr. Denomme and Mr. Lange within a week. *Id.* ¶ 24. Eide Bailly did not do any more work on Reven's tax returns after this because Reven still needed to reconcile its bookkeeping entries. *Id.* ¶ 20.

- **September 14, 2021** – Mr. Volk had a conversation with a prospective investor, Jeffrey Green, in which he stated that a DPO was "inevitable" and going to happen in the next month to the next few months. Doc. 11 ¶ 5. Mr. Green invested in Reven on September 15, 2021. *Id.* ¶ 9.

- **November 18, 2021** – Mr. Lange emailed the Frost family a "final draft" slide deck that included a slide listing as one of three "Multiple paths & options going forward" for Reven to "Organize and execute an Initial Public Offering" and stating that "*[t]he Company has the minimum required two years of audited financial statements ending August 2021*." Doc. 12-7 at 1, 22 (emphasis added). Mr. Lange solicited the Frost family for an additional investment in September 2022. Doc. 12 ¶ 17; Doc. 12-8.

- **December 6, 2021** – Mr. Volk emailed an investment advisor, Monica Ryan, a slide deck dated December 1, 2021 that included a slide listing as one of three possible "Strategic Paths Forward" for Reven to "Organize and execute an initial Public Offering" and stating that "*[t]he Company has the minimum required two years of audited financial statements ending August 2021*." Doc. 7-25 at 1, 96 (emphasis added). Ms. Ryan forwarded that slide deck to a group of prospective investors. *Id.* at 1.

- **December 16, 2021** – Mr. Lange emailed Ms. Schaatt a "new deck" that included a slide listing "Going Public" as one of three "Strategic Paths Forward" for Reven and stating that "*[t]he Company has the minimum required two years of audited financial statements ending August 2021*." Doc. 104-1 at 1, 19 (emphasis added). The Reven Principals solicited Ms. Schaatt for an additional investment in September and October 2022. Doc. 9 ¶ 33; *see also* Doc. 9-11 at 1-2, 22 (Sept. 14, 2022 email attaching slide deck with same statement re audited financial statements).

The defendants acknowledge that "[t]o be eligible for a direct public offering ('DPO'), Reven had to file tax returns, obtain audited financial

statements, prepare an S-1 registration statement with the SEC, obtain a third-party valuation, and meet certain market targets, among other things," and that "before Reven could file tax returns or complete an audit, it had several more steps to complete . . . [including] bookkeeping records needed to be reconciled, a considerable undertaking." Doc. 96 at 33. And they do not dispute that Reven never completed or filed its 2018-2020 tax returns and that no firm was ever retained to audit Reven's financial statements. Doc. 13 ¶¶ 21-22. Indeed, they acknowledge that 180 Accounting did not come close to completing the reconciliation of Reven's bookkeeping records, which was a prerequisite to filing tax returns and obtaining audited financial statements, until shortly before the temporary restraining order was issued in this case on January 3, 2023. Doc. 96-2 ¶ 14; Doc. 96 at 34 n.6. According to the Commission, Reven also did not meet the financial metrics required by the listing rules of the stock exchanges it had represented to investors it would list on. Doc. 7 ¶ 52.

The defendants argue that they made no misrepresentations because they made only "forward-looking statements to investors about the steps they were taking, or planning to take, to accomplish the[] goals" of obtaining audited financial statements and preparing for a public offering, which "did not, nor were they intended to, communicate with exact certainty a timeframe for completing certain specific benchmarks." Doc. 96 at 35. It is true that the slide decks distributed to investors and prospective investors contained disclaimers regarding forward-looking statements, and that those decks did not promise a public offering, presenting that as only one of three potential paths forward (the others being licensing and organic growth).

But the November and December 2021 slide decks contained the non-forward-looking statement that "[t]he Company has the minimum

required two years of audited financial statements ending August 2021," which was plainly untrue, and falsely indicated that if the public-offering path was chosen, Reven had completed all the necessary groundwork to file an S-1 statement and accomplish a listing and public offering of its shares. Doc. 12-7 at 22; Doc. 7-25 at 96; Doc. 104-1 at 19. Those decks were sent to prospective investors and to existing investors who the Reven Principals continued to solicit for additional investments. The defendants' argument that the statement that Reven "has" audited financial statements really meant that Reven "will have" such statements is not persuasive, as previous versions of those slide decks expressly used "will have." Changing "will have" to "has," if not an intentional falsehood, was certainly misleading.

Even as to any statements that truly were forward-looking, such opinion statements "must rest on a factual basis that justifies them as accurate, the absence of which renders them misleading." *See Hampton v. root9B Tech., Inc.*, 897 F.3d 1291, 1299 (10th Cir. 2018). As discussed above, the Commission is likely to show that defendants never hired an audit firm or had a reasonable expectation of completing an audit within the time frame relayed in some of their statements. *E.g.*, Doc. 12-2 at 2 (containing Mr. Lange's statement that an audit would be completed in the next 45-60 days). Attempting to cast all statements as mere forward-looking opinions in this context is insufficient given the known lack of a sufficient factual basis to make such statements.

2. Materiality

The Commission has made a clear showing that it is likely to prove the defendants' misrepresentations regarding the existence of audited financial statements and Reven's readiness for a public offering were material. The Commission has provided declarations from investors

stating that the defendants' representations that a public offering was imminent were important to their decision to invest. Doc. 9 ¶ 31; Doc. 11 ¶ 10; Doc. 12 ¶ 15. Though the defendants have provided declarations from investors stating that they understood that a public offering was not guaranteed, Doc. 96-13 ¶ 10; Doc. 96-14 ¶ 7, even one of those investors stated that "[a]n important part of my decision to invest was the potential exit strategy in the form of a Direct Public Offering." Doc. 96-14 ¶ 7. The defendants' misstatements regarding Reven's progress toward a public offering would be material to a reasonable investor. *Cell>Point*, 2022 WL 444397, at *7.

3. Scienter

The Commission has made a clear showing that it is likely to prove that the misrepresentations regarding the existence of audited financial statements and Reven's readiness for a public offering were made recklessly and negligently.

As to the statements regarding audits and a potential public offering, defendants argue that (1) they made statements contradicting the alleged misstatements to investors, as the SEC's own documents show, and (2) Mr. Volk has stated in his declaration that he never intended to misrepresent investors that an independent audit had already begun, stating instead that he "sincerely believed" that what he said was true. Doc. 96 at 40; Doc. 96-2 ¶¶ 16-18. Mr. Volk elaborates that when he stated that Reven was "currently undergoing our first audit now," that he instead meant that Reven was "beginning a process that would ultimately lead to audited financial statements." *Id.* ¶ 18.

These rationalizations are not persuasive. Taking Mr. Volk's statement, for example, that Reven was "currently undergoing our first audit now," the Reven Principals knew that there was no pending audit at

that time. Doc. 7-22 at 3. There is nothing ambiguous about this sort of statement, and it's not reasonable to expect an investor to think that Mr. Volk didn't mean what he said. So, too, for the many other statements listed above, including those stating that Reven "has" the audited financial statements. And as discussed above, these statements were material, and the Reven Principals knew that or recklessly disregarded that fact when making these statements to investors. The SEC therefore has clearly shown that it is likely to prove scienter as to this class of statements as well.

C. Shareholder Lawsuit

1. Misrepresentations or Omissions

The Commission has also made a clear showing that it is likely to prove the defendants made false and misleading statements or omissions to investors regarding a shareholder lawsuit. In 2016, a shareholder filed a securities lawsuit in state court in Florida against Reven Pharmaceuticals and Mr. Lange, alleging that they made false statements regarding the company's inducement of an investor with diminished capacity to invest millions of dollars. Doc. 7 ¶ 53. By 2019, the plaintiff filed a third amended complaint, adding Reven, LLC, Reven Holdings, and Michael Volk as parties. *Id.* ¶ 55. The plaintiff voluntarily dismissed the case on October 5, 2021. *Id.* The defendants in that case, including Mr. Lange and Mr. Volk, settled for $2.75 million, using investors' money to make that payment. Doc. 3 at 21.

The parties have submitted the following evidence regarding Reven's statements regarding this shareholder litigation:

- **February 13, 2020** – Mr. Lange sent Ms. Schaatt an email stating that "we have no lawsuits from shareholders." Doc. 9-5 at 2. Mr. Lange and Mr. Volk solicited Ms. Schaatt for additional investments throughout 2020. Doc. 9 ¶ 21.

- **April 20, 2020** – Mr. Volk emailed a group of prospective investors "our OLD Private Placement Memorandum" from August 2018, noting that a "new one is being worked on," but also that "there is not a whole lot that will change so it will serve as appropriate disclosure for compliance." The attached 2018 PPM states that "The Company [Reven Holdings, Inc.] is not currently the subject of any litigation." Doc. 7-23 at 1, 65.

- **April 6, 2021** – Mr. Volk emailed Mr. Shevillo the July 2020 PPM, noting that it "is definitely outdated," but also that it "gives good history and compliance information." The attached 2020 PPM states that "As of the date of this Memorandum we are not aware of potential dispute or pending litigation and are not currently involved in a litigation proceeding . . . the outcome of which in management's opinion would be material to our financial condition or results of operations." Doc. 7-24 at 1, 110.

- **December 6, 2021** – Mr. Volk emailed Ms. Ryan a draft PPM dated August 2021, which states that "As of the date of this Memorandum we are not aware of potential dispute or pending litigation and are not currently involved in a litigation proceeding or governmental actions the outcome of which in management's opinion would be material to our financial condition or results of operations." Doc. 7-25 at 1, 66. Ms. Ryan forwarded that draft PPM to a group of prospective investors. *Id.* at 1.

The defendants argue that none of these statements amounted to misrepresentations. As to the statement made in the 2018 PPM, they argue that that PPM was issued by Reven Holdings and Reven, LLC, which, at that time, were not parties to the underlying Florida lawsuit. But as Plaintiff points out, 10 days prior to the issuance of the PPM, Reven Pharmaceuticals—a party to that lawsuit—transferred all of its assets and liabilities to Reven Holdings, prompting an amendment to

the complaint in that lawsuit shortly thereafter that added Reven Holdings as a party. Doc. 7 ¶ 12. So Reven Holdings had assumed the liabilities of a party to the lawsuit as of the time of the PPM issuance, and the defendants failed to disclose that litigation. Even under their hyper-literal interpretation of the statement in the PPM, it was likely false, or at least misleading.

Next, the defendants argue that Mr. Lange's statement that, "we have no lawsuits from shareholders" as of February 13, 2020 was literally true. This is so, according to the defendants, because, at least in Mr. Lange's view, the plaintiff in the Florida suit was a "guardian" acting on behalf of a shareholder. That does not appear to be a correct interpretation of the plaintiff's role in the Florida lawsuit, and even if so, the "guardian" was suing on behalf of a shareholder. Rather than absolving Mr. Lange, these suggestions are only further evidence that he was trying to hide the fact of this lawsuit from potential investors with deceiving statements.

Finally, the defendants argue that the July 6, 2020 PPM had a disclaimer stating that there was no pending litigation that, in management's opinion, was material to the companies' financial condition. And because management thought the lawsuit was "baseless" (despite it having gone on for years at this point), there was no misstatement, the argument goes. This, too, is unpersuasive. In fact, the defendants settled the case for millions of dollars shortly thereafter—an amount totaling nearly a third of the money Reven had raised in 2020. Doc. 107 at 17. These were therefore misleading misstatements made to prospective investors.

2. Materiality

As touched on above, the Commission has made a clear showing that it is likely to prove the defendants' misrepresentations regarding the underlying Florida lawsuit were misleading. That lawsuit involved claims of fraud against the companies and management relating to inducement of an incapacitated individual to invest millions of dollars in the companies. And the lawsuit resulted in a nearly $3 million settlement in 2021.

Again, the defendants cite some investor testimony suggesting that this particular lawsuit was not material to their investment decisions, while the Commission cites an investor stating that the Reven Principals' representation that there were no shareholder lawsuits was important to hers. *Compare* Doc. 9 ¶ 17, *with* Doc. 96-13 ¶ 11, *and* Doc. 96-14 ¶ 9. But that is not dispositive, and a pending, multi-million dollar suit for alleged securities fraud was certainly material for a company or group of companies of Reven's size at the time.

3. Scienter

The Commission has also made a clear showing that it is likely to prove that the misrepresentations regarding the Florida litigation were made at a minimum recklessly. The defendants' too-cute-by-half rationalizations for the statements only undermine their argument as to scienter. The attempt to use overly literal (yet still incorrect or misleading) statements to hide the existence of the lawsuit shows that Mr. Lange and others attempted to hide the existence of the lawsuit from investors, as discussed above. And the suggestion that management did not think the case was "material" to the companies' financial condition is dubious given the ultimate settlement amount relative to the size of the

companies. The Commission has therefore met its burden as to this element as to the Florida litigation misstatements.

In sum, the Commission has clearly shown that the defendants violated federal securities laws via their misstatements regarding (1) executive compensation, (2) the audit status of the companies and their potential public offering, and (3) the underlying Florida fraud lawsuit.

II. Likelihood that a Violation Will Recur

The evidence clearly shows that the defendants will likely continue their statutory violations in the future if they are not enjoined.

Determination of the likelihood of future violations "requires analysis of several factors, such as the seriousness of the violation, the degree of scienter, whether [the] defendant's occupation will present opportunities for future violations[,] and whether [the] defendant has recognized his wrongful conduct and gives sincere assurances against future violations." *SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993). The degree of scienter "bears heavily" on the analysis, and a knowing violation of the securities laws will justify an injunction more readily than a reckless or negligent one. *Id.*; *accord SEC v. Haswell*, 654 F.2d 698, 699-700 (10th Cir. 1981) ("An important factor . . . is the degree of intentional wrongdoing evident in a defendant's past conduct. . . . [I]t will almost always be necessary for the Commission to demonstrate that the defendant's past sins have been the result of more than negligence. . . . [D]efendants whose past actions have been in good faith are not likely to be enjoined."). But "if there is a sufficient showing that the violation is likely to recur, an injunction may be justified even for a negligent violation of 17(a)(2) or (3)." *Curshen*, 372 F. App'x at 882 (10th Cir. 2010) (quoting *Pros Int'l*, 994 F.2d at 769). Misstatements made after the filing of the lawsuit may further weigh in favor of an injunction.

See Cell>Point, 2022 WL 444397, at *8 ("These misstatements, made after the filing of the lawsuit, demonstrate that, without further intervention, defendants are likely to continue to violate the law."). And failure to admit to misstatements during the pendency of the lawsuit may further weigh in favor of injunctive relief. *Id.* ("Given that Terry Colip did not admit at the hearing he has made misstatements, the Court finds that Terry Colip, acting on behalf of Cell>Point, refuses to recognize his wrongful conduct," and therefore was likely to commit future violations.).

The evidence indicates that the Reven Principals made material misstatements to potential investors regarding multiple topics over a period of years. The alleged violations here are serious, resulting in millions of dollars of misappropriated investor funds. There is substantial evidence that the various misstatements were made knowingly and with intent to hide material facts from investors to induce them to invest. And the Reven Principals have not recognized their wrongful conduct—they continued to make misrepresentations to investors as recently as September 2022. Doc. 9 ¶¶ 33-36. Given these facts, I find there is a substantial likelihood that the defendants will violate securities laws in the future. I will therefore grant the Commission's request for a preliminary injunction.

III. Scope of Injunctive Relief

The temporary restraining order currently in place (1) prohibits the defendants from violating the anti-fraud provisions of the Securities Act and the Exchange Act; (2) prohibits the Reven Principals from offering or selling securities, except in their own personal accounts; and (3) freezes the defendants' and relief defendants' assets to ensure that

any disgorgement or civil penalties that may become due can be collected, among other things. Doc. 28 at 13-23.

The Commission's clear showing that it will likely prove the alleged statutory violations and that the defendants are likely to continue such violations warrants a prohibition against future violations. 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d)(1); *Unifund*, 910 F.3d at 1040. A prohibition against offering or selling Reven Holdings securities will protect existing investors and potential new investors from being subject to additional fraudulent activities while the litigation is pending. And an asset freeze is usually appropriate to facilitate enforcement of any remedy that might be ordered in the event a violation is established on summary judgment or at trial. *Unifund*, 910 F.3d at 1041; *SEC v. End of Rainbow Partners, LLC*, No. 17-cv-02670-MSK-NYW, 2017 WL 5404199, at *2 (D. Colo. Nov. 14, 2017) (purpose of asset freeze is to advance public interest in ensuring ill-gotten funds can be secured to satisfy potential future judgment); *Commodity Futures Trading Comm'n v. Walsh*, 618 F.3d 218, 225 (2d Cir. 2010) (court may freeze assets of relief defendant if plaintiff is likely to succeed in showing that relief defendant possesses ill-gotten funds to which it lacks a legitimate claim).

The parties dispute, however, whether the asset freeze should remain in place. The defendants argue that the asset freeze should be lifted, at least in part, because rather than preserving their assets it is causing them to dissipate due to ongoing harm to their ability to protect their intellectual property, finalize clinical data, and eventually secure approval for their products. Much of the defendants' argument on this point, however, is closely intertwined with their merits arguments and suggestions that a preliminary injunction should not be granted at all. As discussed above, an injunction here is necessary to prevent future violations of the securities laws. But the scope of the asset freeze may

be narrowed if the defendants can show that doing so will help maximize the funds available to satisfy any potential future judgment. *See SEC v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1297 (D. Utah 2017) (noting that asset freeze may be "particularly burdensome" if it would "harm the continuing viability of the enterprise" or deny innocent individuals "access to much needed funds").

Given the current state of the briefing on this issue, I will convert the temporary restraining order into a preliminary injunction with the same provisions for now. But the defendants may promptly file a motion addressing the scope of the preliminary equitable relief in light of this Order, including whether a more narrow preliminary remedy or lifting of the asset freeze in whole or in part is appropriate pending final resolution of this case.

CONCLUSION

It is **ORDERED** that:

Defendants' and Relief Defendants' Opposed Motion to Supplement Opposition to Plaintiff's Motion for Preliminary Injunction, **Doc. 113**, is **GRANTED**. I have considered the supplemental declaration, Doc. 113-1, and the plaintiff's arguments concerning its relevance, Doc. 114, in evaluating the plaintiff's request for a preliminary injunction;

Plaintiff United States Securities and Exchange Commission's Motion for a Rule 65 Preliminary Injunction, an Asset Freeze, and Other Relief, **Doc. 3**, is **GRANTED**. Pursuant to Federal Rule of Civil Procedure 65(a)-(b), 15 U.S.C. § 77t(b), and 15 U.S.C. § 78u(d)(1), the Temporary Restraining Order and Asset Freeze, Doc. 28, as subsequently modified, *see* Docs. 55, 65, 68, 72, 74, 117, is converted into a preliminary injunction, and its terms are extended pending final adjudication of this

case on the merits. Pursuant to Federal Rule of Civil Procedure 65(c), 15 U.S.C. § 77t(b), and 15 U.S.C. § 78u(d)(1), the Commission is not required to give security;

The defendants may file a motion seeking to narrow the scope of the preliminary injunction or asset freeze on or before April 12, 2024. The plaintiff must file a response on or before April 26, 2024. And the defendants may file a reply on or before May 3, 2024. The motion and response must not exceed 5,000 words, and any reply must not exceed 2,500 words; and

The Partially Opposed Motion of Defendants and Relief Defendants to Extend Deadlines, **Doc. 118**, is **GRANTED IN PART**. The deadline for service of interrogatories and requests for production of documents and/or admissions is extended to June 6, 2024; the fact-discovery deadline is extended to July 25, 2024; the deadline to designate experts is extended to September 26, 2024; the deadline to designate rebuttal experts is extended to October 29, 2024; the expert-discovery deadline is extended to December 30, 2024; and the dispositive-motions deadline is extended to February 3, 2025. The request to postpone document production until after the Court's preliminary-injunction ruling is **DENIED AS MOOT**. The parties are directed to jointly contact Magistrate Judge Susan Prose's chambers in accordance with her Practice Standards for Civil Cases regarding any discovery disputes. The Emergency Unopposed Motion of Defendants and Relief Defendants to Extend Deadlines, **Doc. 121**, is **DENIED AS MOOT**.

DATED: March 29, 2024

BY THE COURT:

Daniel D. Domenico
United States District Judge

ATTACHMENT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:22-cv-03181-DDD-KLM

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

REVEN HOLDINGS, INC. d/b/a Reven Pharmaceuticals;
REVEN PHARMACEUTICALS, INC.;
BRIAN D. DENOMME;
PETER B. LANGE; and
MICHAEL A. VOLK,

Defendants, and

REVEN, LLC;
REVEN IP HOLDCO, LLC;
REVEN ONCOLOGY LICENSING, LLC; and
HEALTH ANALYTICS AND RESEARCH SERVICES, LLC,

Relief Defendants.

ORDER LIFTING ASSET FREEZE IN PART

I previously granted Plaintiff U.S. Securities and Exchange Commission's motion for a preliminary injunction (1) prohibiting the defendants from violating the anti-fraud provisions of federal securities laws; (2) prohibiting Defendants Brian D. Denomme, Peter B. Lange, and Michael A. Volk from offering or selling securities; and (3) freezing the defendants' and relief defendants' assets. Doc. 122. Now before me are several motions relating to the asset freeze. Docs. 124, 133, 135, 153. For the following reasons, (1) the motions of non-party investors Leah Schaat and Lee Ann Frost (the "Investor Group") to intervene and appoint a receiver or liquidation agent are denied; (2) the defendants'

motion to lift the asset freeze is granted in part, and the asset freeze is narrowed as set forth below; and (3) the defendants' request to stay the asset freeze pending appeal is denied.

BACKGROUND

Defendant Reven Holdings, Inc. (a successor to Defendant Reven Pharmaceuticals, Inc.) is a privately held biotechnology and pharmaceutical holding company focused on developing and commercializing a cardiovascular and anti-inflammatory drug called Rejuveinix ("RJX"). Doc. 122 at 2. Defendants Denomme, Lange, and Volk (the "Reven Principals") are co-founders, members of the board, and executive officers of Reven Holdings, and they collectively control the majority of Reven Holdings' stock. *Id.* at 2-3. Relief Defendants Reven, LLC; Reven IP Holdco, LLC; Reven Oncology Licensing, LLC; and Health Analytics & Research Services, LLC are related entities (either subsidiaries of Reven Holdings or companies owned by the Reven Principals) that hold Reven intellectual property and other assets. *Id.* at 3.

The Commission contends that the defendants violated the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") by making a number of false or misleading statements to prospective investors. *See generally* Doc. 1; Doc. 3. I previously found that the preliminary-injunction evidence clearly shows the Commission is likely to prove violations of the Securities Act and Exchange Act—specifically, that the defendants violated these laws by knowingly, recklessly, or negligently making materially false or misleading statements or omissions to prospective investors regarding (1) executive compensation, (2) Reven's readiness for a public offering, and (3) a separate lawsuit alleging that some of the defendants had committed securities fraud. Doc. 122 at 7-26. I also found that statutory violations were likely to recur if the defendants were not preliminarily

enjoined, and that an asset freeze was appropriate to preserve the defendants' funds to satisfy any future judgment. *Id.* at 27-28.

The parties now agree, however, that a broad asset freeze is not the best way to preserve the value of the defendants' assets pending a final adjudication on the merits. The asset freeze in its current form[1] is causing the value of the defendants' assets to dissipate, rather than preserving it as intended, because the defendants do not have sufficient liquidity to maintain their IP portfolio by paying patent maintenance and prosecution fees, or to proceed with the clinical trials necessary to obtain

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[1] The terms of the asset freeze provide that:

> All assets, funds, or other property of any kind, including without limitation intellectual property, including patents or trademarks, held by, or under the direct control of [the defendants] . . . wherever located or by whomever held, and whether acquired before or after institution of this action, are frozen and will not be sold, transferred, or encumbered in any way . . . [and]
>
> [The defendants] . . . must hold and retain within their control, and otherwise prevent any disposition, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal whatsoever (including the use of any credit cards or other incurring of debt) of any of their funds, property (including money, virtual currency or other digital asset, real or personal property, tangible assets, securities, commodities, choses in action, or other property of any kind whatsoever, in whatever form such assets may exist and wherever located), intellectual property, including patents or trademarks, or other assets or things of value held by them, under their control or over which they exercise actual or apparent investment or other authority, in whatever form such assets may presently exist and wherever located[.]

Doc. 28 at 15-16 (TRO); *see also* Docs. 55, 65, 68, 72, 74, 117 (orders granting requested modifications to and exclusions from asset freeze); Doc. 122 at 28-29 (converting asset freeze in TRO to preliminary injunction with same terms).

FDA approval of RJX before their patents expire. But the parties disagree on the appropriate solution to this problem.

The defendants move to lift the asset freeze in its entirety, arguing that Reven can achieve liquidity and move forward with clinical trials by taking on debt and/or licensing its intellectual property while the defendants remain preliminarily enjoined from raising funds by selling Reven stock. Doc. 124. Alternatively, they request that the asset freeze be lifted in part to (1) permit third parties to pay Reven's operating expenses; (2) permit the Reven Principals to earn new income unrelated to Reven and use that income to pay both personal expenses and Reven's expenses; (3) permit the Reven Principals to incur new individual debt; and (4) unfreeze bank accounts that "do not currently contain funds attributable to the Defendants or Relief Defendants." Doc. 145 at 16-17. The Investor Group moves to intervene in the case and, together with the Commission, argues that the best course of action is to instead appoint a liquidation agent to sell the defendants' intellectual property and then freeze the proceeds of that sale.[2] Docs. 133, 144, 149, 150. The defendants have also appealed my preliminary-injunction order to the Tenth Circuit, Doc. 138, and they move to stay the asset freeze and further proceedings in this Court pending resolution of their appeal. Doc. 153.

DISCUSSION

I. Investor Group's Motion to Intervene

The Investor Group moves to intervene "in a limited capacity solely to seek appointment of a [liquidation agent] to marshal and sell the

[2] The Investor Group previously moved to appoint a general receiver (rather than a liquidation agent) with broader powers to take over Reven's business operations, Doc. 135, but the Group has since narrowed the scope of its original request, Doc. 149 at 2 n.1.

assets of Reven for the benefit of all of the 175 innocent investors who were harmed by [the defendants'] misappropriation and misuse of investor funds." Doc. 133 at 1-2; *see also* Doc. 149 at 2 n.1. The Investor Group argues that it is entitled to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a), Doc. 133 at 5-11, or in the alternative, that it should be allowed to intervene permissively under Rule 24(b), *id.* at 11-14. The defendants oppose intervention, Doc. 145, but the Commission does not, Doc. 133 at 1.

A. Intervention of Right

A court must permit a non-party to intervene as of right if (1) the non-party files a timely motion, (2) the non-party "claims an interest relating to the property or transaction that is the subject of the action," (3) the non-party "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (4) the existing parties do not "adequately represent that interest." Fed. R. Civ. P. 24(a)(2); *accord W. Energy Alliance v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017). "Failure to satisfy even one of these requirements is sufficient to warrant denial of a motion to intervene as a matter of right." *Maynard v. Colo. Supreme Ct. Office of Att'y Regul. Couns.*, No. 09-cv-02052-WYD-KMT, 2010 WL 2775569, at *3 (D. Colo. July 14, 2010).

Here, the Investor Group is not entitled to intervene as of right because the Commission adequately represents the investors' interests.[3] Although a proposed intervenor's burden to show inadequate

[3] The parties do not dispute whether the Investor Group has satisfied the first three requirements for intervention of right, and I therefore presume without deciding that the Group's motion is timely and that the Group has an interest in Reven's frozen assets that may be impaired or impeded by disposition of this action.

representation by the existing parties is "minimal," adequate representation is presumed when the would-be intervenor's interest is identical to that of one of the parties. *Kane County v. United States* (*Kane IV*), 94 F.4th 1017, 1030 (10th Cir. 2024); *accord San Juan County v. United States*, 503 F.3d 1163, 1204, 1227 & n.1 (10th Cir. 2007) (majority op. & Ebel, J., concurring in part), *abrogated in part on other grounds by Hollingsworth v. Perry*, 570 U.S. 693 (2013). When the presumptively adequate representative is a governmental entity, the presumption can be rebutted if "the public interest the government is obligated to represent may differ from the would-be intervenor's particular interest." *Kane County v. United States* (*Kane III*), 928 F.3d 877, 892 (10th Cir. 2019).

The Investor Group's stated interest in intervention—to prevent dissipation of Reven's assets and diminution of its value, for the benefit of themselves and Reven's other investors, Doc. 133 at 2, 7, 8, 14; Doc. 149 at 7—is identical to the Commission's goal with regard to the asset freeze. *See, e.g.*, *SEC v. Callahan*, 193 F. Supp. 3d 177, 206 (E.D.N.Y. 2016) ("[G]overnment entities, like the SEC, that bring enforcement proceedings are mandated to act in the interest of maximizing the recovery to all defrauded individuals . . . ."). The Commission must therefore be presumed to adequately represent the Investor Group's interest. *See, e.g.*, *id.* (SEC is "often presumed to be adequately representing the interests of non-party investors"); *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 467-68 (S.D.N.Y. 2000) (majority of courts deny investor intervention as of right in enforcement actions because SEC or other government agency sufficiently represents investor interests (collecting cases)).

The Group's arguments do not overcome that presumption. This is not a case where "the government . . . has multiple interests to pursue, [and] will not adequately pursue the particular interest of the applicant

for intervention." *San Juan County*, 503 F.3d at 1203-04. It is true that the Commission may have multiple, broader interests at stake in the case as a whole, beyond maximizing the amount of Reven's assets available to compensate investors—for example, protecting the public and deterring future violations of securities laws. But the Investor Group expressly does not seek to "fully intervene" in the case as a whole and "actively participate as full litigants in the proceeding" on behalf of some individualized interest of Ms. Schaat or Ms. Frost. Doc. 149 at 8; *see also* Doc. 133 at 14. The Group instead seeks "minimal intervention" for the specific, limited purpose "of preserving the value of Reven's remaining assets pending the outcome of the litigation." Doc. 149 at 8. With respect to that issue, the Commission shares the identical purpose. *Cf. W. Energy Alliance*, 877 F.3d at 1168-69 (representation may be adequate where government and proposed intervenor share same objective with respect to single issue at stake). And the Group provides no reason to believe that the goal of maximizing the funds ultimately available to all investors is at odds with the particular interests of any individual investor or with the other broader goals the Commission may have with respect to the case as a whole. *See SEC v. BIC Real Est. Dev. Corp.*, No. 1:16-cv-344-LJO-JLT, 2017 WL 85789, at *3 (E.D. Cal. Jan. 10, 2017) ("[C]ourts routinely find that defrauded investors are not entitled under Rule 24 to intervene as of right in SEC enforcement actions . . . . when a defrauded investor has the same ultimate goal as the SEC, such as maximizing the recovery for investors.");[4] *cf. SEC v. Kings Real Est. Inv.*

[4] *Accord SEC v. Santillo*, 327 F.R.D. 49, 51 (S.D.N.Y. 2018) ("The SEC seeks to obtain a judgment on behalf of all injured investors, and to maximize that judgment. Thus, the movant's legitimate interests are adequately protected."); *CFTC v. Linton*, 786 F. Supp. 2d 1374, 1379 (D. Ariz. 2011) ("[T]he CFTC is equally representing all of the victims to the extent it is attempting to maximize the recovery of assets for all of them."); *SEC v. TLC Invs. & Trade Co.*, 147 F. Supp. 2d 1031, 1041 (C.D.

Tr., 222 F.R.D. 660, 669 (D. Kan. 2004) (if SEC or receiver advocates for proportionate distribution of assets that total less than all funds invested, SEC's interest is adverse to that of individual investor who seeks 100% return of investment).

Nor has the Investor Group demonstrated that the Commission may fail to zealously or effectively pursue the parties' shared interest. The Group argues that "the SEC is not in the business of managing intellectual property portfolios and operating pharmaceutical companies," Doc. 149 at 7, and the "preliminary injunction and Asset Freeze are the primary tools the SEC has in its toolbox to prevent dissipation of assets and ongoing harm to investors," Doc. 133 at 10-11. Yet the Group acknowledges that the Commission has a variety of equitable tools at its disposal beyond a simple asset freeze. *See* Doc. 135 at 6-7, 13-14 (asserting that appointment of receivers is a common remedy in SEC enforcement actions); *see also* Doc. 145 at 14 (defendants noting courts may appoint corporate monitor in lieu of general receiver); Doc. 144 (Commission arguing for appointment of liquidation agent); *SEC v. Bartlett*, 422 F.2d 475, 477-78 & n.6 (8th Cir. 1970) (courts have broad equitable power to appoint receivers to maintain status quo and conserve defendants' assets (collecting cases)). Though the Investor Group correctly notes that the Commission's request to appoint a liquidation agent "was not before the Court until the Investor Group filed its motions," Doc. 149

Cal. 2001) ("Here, the Receiver's goal is to maximize distributions to defrauded investors. The Applicants have the same goal."); *SEC v. Byers*, No. 08 Civ. 7104(DC), 2008 WL 5102017, at *1 (S.D.N.Y. Nov. 25, 2008) (SEC and receiver adequately represented investors' interests because "it is in all their interests to maximize the value of the assets under the receivership" and "[t]his is what the Receiver is charged with doing"); *CFTC v. Lofgren*, No. 02 C 6222, 2003 WL 21639118, at *3 (N.D. Ill. 2003) ("[T]he CFTC will adequately represent [the individual investor's] interests insofar as they are primarily concerned with preventing defendants from further dissipating the funds.").

at 7-8, a difference in strategy regarding how to best accomplish the Investor Group's and the Commission's shared goal of preventing dissipation of Reven's assets does not amount to inadequate representation. *BIC*, 2017 WL 85789, at *3 ("[A] mere difference in *how* that goal may be attained . . . [does not] rebut[] the presumption that the SEC . . . adequately represents the investor's interests.").[5] And that the Commission has been receptive to the Investor Group's ideas,[6] and those parties now both request the same relief, only reinforces the conclusion that the Commission is an adequate representative of the Group's interests.[7]

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[5] *Accord Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) ("[R]epresentation is not inadequate simply because the applicant and the representative disagree regarding the facts or law of the case."); *SEC v. Am. Pension Servs. Inc.*, No. 2:14-cv-00309-RJS-DBP, 2015 WL 248575, at *5 (D. Utah Jan. 20, 2015) ("Courts have held that '[t]he intervention test is not met when the applicant presents only a difference in strategy.'").

[6] *See* Doc. 135 at 14 ("The Investor Group will continue to work with counsel for the SEC on refinements and revisions to the proposal, as needed, in order to reach a mutually agreeable proposal that achieves both the SEC and the Investor Group's aims."); Doc. 144 at 8 ("The SEC has been conferring with the Intervenor Investor Group about preserving the Reven IP . . . . [and] expects to continue these discussions and agree on a modified proposal to submit to the Court . . . ."); Doc. 149 at 16 ("[C]ounsel for the SEC has continued to confer with counsel for the Intervenor Investor Group on a more limited proposal to preserve the value of Reven's intellectual property assets . . . .").

[7] *Cf. Kane County v. United States* (*Kane I*), 597 F.3d 1129, 1135 (10th Cir. 2010) (government displayed no reluctance to pursue would-be intervenor's shared interest and there was no basis to predict government would fail to present arguments that would-be intervenor would make); *Kane III*, 928 F.3d at 895 (government's opposition to intervention suggested it did not fully intend to represent proposed intervenor's interests); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 997 (10th Cir. 2009) (finding inadequate representation in part because government objected to any requirement to "coordinate filings with" intervenor); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th

The Investor Group is not entitled to intervene as of right because the Commission shares its interest in preventing dissipation of Reven's assets, and the Group has not overcome the presumption that its interest is adequately represented by the Commission.

B. Permissive Intervention

A court may permit a non-party who does not meet the test for intervention of right under Rule 24(a) to intervene if (1) the non-party files a timely motion, and (2) the non-party "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). A court may also consider whether the non-party's rights are adequately represented by an existing party. *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regul. Comm'n*, 787 F.3d 1068, 1075 (10th Cir. 2015).

Permissive intervention in in cases like this one "has been traditionally disfavored, given courts' hesitation to allow scores of investors and other interested persons from becoming full-fledged parties to governmental enforcement actions." *Credit Bancorp*, 194 F.R.D. at 468; *accord Byers*, 2008 WL 5102017, at *1 ("As a practical matter, it does not make sense to allow individual victims and creditors to intervene as parties."). Though the Investor Group seeks to intervene only in a limited capacity, and it does not appear that permitting intervention would unduly delay the proceedings or prejudice the Commission or the defendants,[8] intervention would unnecessarily complicate the proceedings. *See SEC v.*

Cir. 2001) (government's "silence on any intent to defend the intervenors' special interests is deafening").

[8] I presume without deciding that the Investor Group has a claim that shares a common question with the main action.

Vesco, 58 F.R.D. 182, 183 (S.D.N.Y. 1973) ("This is a complex securities fraud action involving numerous individual and corporate defendants. To permit shareholders to intervene in the proceedings and participate in the fashioning of temporary and permanent relief would only serve to multiply the issues and the parties involved . . . ."). And as discussed above, the Investor Group's stated interest is adequately represented by the Commission at this stage of the proceedings. In my discretion, therefore, I do not find permissive intervention will serve the interests of justice. *See Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 249 (D.N.M. 2008) ("[A] court's finding that existing parties adequately protect prospective intervenors' interests will support a denial of permissive intervention.").

Because the Investor Group is not entitled to intervention of right and I decline to allow permissive intervention, the Group's motions to intervene and appoint a receiver or liquidation agent are denied.[9] But I will consider the Commission's request to appoint a liquidation agent in connection with the defendants' motion to lift the asset freeze.

II. Defendants' Motion to Lift the Asset Freeze

As noted above, the parties agree that the asset freeze is currently not having its intended effect. It is causing the defendants' most valuable asset—Reven's intellectual property—to decline in value, rather than preserving its value. The defendants cannot currently pay patent maintenance and prosecution fees, nor do they have the funds to proceed with the clinical trials necessary to obtain FDA approval of RJX before their patents expire.

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[9] The defendants request that the Investor Group's motions be denied with an award of fees and costs, but they fail to support that request with any authority or argument whatsoever. *See* Doc. 145 at 9, 13-14, 17. The defendants' conclusory request for fees and costs is denied.

The defendants move to lift the asset freeze in its entirety, arguing that Reven can resume its operations by taking on debt or licensing its intellectual property, though they will remain preliminarily enjoined from raising funds by selling Reven stock. Doc. 124. Alternatively, they request that the asset freeze be lifted in part to (1) permit third parties to pay Reven's operating expenses; (2) permit the Reven Principals to earn new income unrelated to Reven and use that income to pay both personal expenses and Reven's expenses; (3) permit the Reven Principals to incur new individual debt; and (4) unfreeze bank accounts that "do not currently contain funds attributable to the Defendants or Relief Defendants." Doc. 145 at 16-17.

The Commission opposes the defendants' motion to lift the asset freeze in its entirety, arguing that the defendants should not be given a "blank check" to deplete the frozen assets and "incur mountains of debt." Doc. 127 at 2. It notes that the Court has granted reasonable carve-outs from the asset freeze in the past when the defendants have come forward with a specific plan regarding the amount of funds or particular assets as to which the asset freeze should be lifted and a description of the planned transaction(s) in which such assets would be used, and it suggests that the parties and the Court could continue using this case-by-case approach (though it argues that the defendants' alternative request to narrow the asset freeze does not provide enough detail to assess the reasonableness of the new proposed carve-outs). *Id.* at 2-5, 8-13 (citing Docs. 55, 65, 72, 74, 117); Doc. 150 at 6-10. The Commission contends, however, that the best path forward is to appoint a liquidation agent to sell the defendants' intellectual property and then freeze the proceeds of that sale. Doc. 144; Doc. 150 at 3.

A. Applicable Law

"The purpose of an asset freeze is 'to preserve the status quo by preventing the dissipation and diversion of assets,'" and "[t]he authority temporarily to freeze a defendant's assets carries with it the 'corollary authority to release frozen . . . assets, or lower the amount frozen.'" *SEC v. Forte*, 598 F. Supp. 2d 689, 692 (E.D. Pa. 2009) (collecting cases). But before a court will unfreeze assets, a defendant must "establish that [the] modification is in the interest of the defrauded investors." *Id.* A modification may be appropriate where "maintaining a freeze 'might thwart the goal of compensating investors if the freeze were to cause such disruption of defendants' business affairs that they would be financially destroyed.'" *Id.* (quoting *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972)); *accord SEC v. End of the Rainbow Partners, LLC*, No. 17-cv-02670-MSK-NYW, 2019 WL 8348323, at *4 (D. Colo. Nov. 25, 2019) (R. & R.) ("[T]he disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief."), *adopted by* 2020 WL 597527 (D. Colo. Feb. 7, 2020); *SEC v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1297 (D. Utah 2017) (asset freeze may be "particularly burdensome" if it would "harm the continuing viability of the enterprise").

In evaluating whether to lift or modify an asset freeze, courts commonly consider a variety of factors, such as:

- The interests of the defrauded investors, including whether the frozen assets fall short of the amount necessary to compensate victims of the alleged fraud scheme, and whether unfreezing the assets would assist in returning funds to their rightful owners;
- The source of the funds to be released, including whether the assets are traceable to the allegedly fraudulent activity;

- The expenses the defendant seeks to pay; and
- The balance of interests.

See, e.g., *Forte*, 598 F. Supp. 2d at 692-94; *SEC v. Abdallah*, No. 1:14 CV 1155, 2017 WL 11680996, at *3 (N.D. Ohio Mar. 24, 2017) (collecting cases).

Aside from an asset freeze, courts have broad equitable power to grant other forms of preliminary relief. *SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984). Such relief "may include appointment of a receiver . . . or any measures that may be needed to make permanent relief possible." *FTC v. Skybiz.com, Inc.*, No. 01-CV-396-K(E), 2001 WL 1673645, at *8 (N.D. Okla. Aug. 31, 2001).

> Although there is no precise formula for determining when a receiver may be appointed, factors typically warranting appointment are a valid claim by the party seeking the appointment; the probability that fraudulent conduct has occurred or will occur to frustrate that claim; imminent danger that property will be concealed, lost, or diminished in value; inadequacy of legal remedies; lack of a less drastic equitable remedy; and likelihood that appointing the receiver will do more good than harm.

Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314, 316-17 (8th Cir. 1993); *see also SEC v. Current Fin. Servs., Inc.*, 783 F. Supp. 1441, 1443-46 (D.D.C. 1992) (discussing other relevant factors); *SEC v. ABS Manager, LLC*, No. 13cv319-GPC (JMA), 2013 WL 1164413, at *6 (S.D. Cal. Mar. 20, 2013) (same).

Preliminary equitable relief may also include liquidation of a defendant's assets. *See TLC*, 147 F. Supp. 2d at 1035-36; *see also Bartlett*, 422 F.2d at 477-78 & n.6. A court's power to order liquidation, however, should be exercised "sparingly," *Bartlett*, 422 F.2d at 478, and "[i]t is only in rare cases that it is appropriate for a receiver . . . particularly before judgment has been entered, to liquidate, rather than manage, the assets of a receivership," *TLC*, 147 F. Supp. 2d at 1036; *accord Current*

Fin. Servs., 783 F. Supp. at 1445. A court-ordered sale of a particular asset may be appropriate if its value is declining and likely to continue declining over the course of the proceedings such that a sale is the best option to preserve its value, or if the expense of maintaining the asset "is excessive or disproportionate." *Smith v. SEC*, 653 F.3d 121, 126-29 (2d Cir. 2011) (affirming order for interlocutory sale of relief defendant's vacation home "in light of its declining value and the diminishing equity in the property"). But "[w]here an asset sale is sought to preserve the value of the assets, the SEC should be required to make a substantial showing of the likelihood that it will be able to obtain an ultimate sale of the assets in question." *Id.* at 128.

B. Analysis

All parties agree that the value of the defendants' intellectual property is dissipating, and that the situation requires some resolution. *See, e.g.*, Doc. 124 (defendants); Doc. 150 at 3 (Commission); *see also* Doc. 133 (Investor Group). The question before me, then, is not *whether* to modify the asset freeze, but *how* to modify it in order to maximize and preserve the value of the assets at issue: (A) lift the freeze in whole or in part, or (B) appoint a liquidation agent to sell the assets that are currently diminishing in value?

The Commission's request to appoint a liquidation agent is not outlandish. Doing so would immediately realize the value of the defendants' intellectual property assets and preserve that value by freezing the proceeds of the sale. But "district courts must balance the competing concerns quite carefully" when considering whether to authorize liquidation of a defendant's assets. *TLC*, 147 F. Supp. 2d at 1035. I agree with the defendants that, at this stage of the case—based only on preliminary findings and while an appeal of those findings is pending—it is not appropriate to force a sale of the defendants' intellectual property. Though

the Commission presents the appointment of a liquidation agent as a more narrowly tailored remedy than appointment of a general receiver to oversee Reven's business operations, the result of liquidation would actually be quite harsh, as selling Reven's patents and other intellectual property would effectively put it out of business entirely. *Cf. Roederer v. Treister*, 2 F. Supp. 3d 1153, 1161 (D. Or. 2014) (company would be irreparably harmed if its software or related intellectual property was sold or transferred).

It appears to me that appointment of some kind of receiver or corporate monitor may be the wisest path forward at this point, at least until the defendants' appeal has been resolved. And I would entertain a specific proposal for such an appointment from the Commission (or from the defendants, if they believe such an appointment would allow them more flexibility in attempting to resume business operations and preserve their assets than they have under the asset freeze). But no such proposal is currently before me.

That leaves the defendants' request to lift the asset freeze in its entirety, or alternatively, to narrow it in certain ways. I agree with the Commission that lifting the freeze in its entirety is not appropriate. Having found that the Reven Principals made a number of material misstatements or omissions to prospective investors regarding Reven's operations and how millions of dollars of investor funds would be used, I cannot restore them free reign over Reven's assets based only on a vague plan "to avail themselves of options like taking on debt, licensing Reven's intellectual property, and otherwise continuing to work towards the successful deployment of [RJX]," Doc. 124 at 8-9, 10-11. *Cf. Current Fin. Servs.*, 783 F. Supp. at 1444-46 (permitting defendant "to resume operations in the face of the SEC's overwhelming evidence of misguided (if not fraudulent) practices would be reckless").

Authorizing Reven to take on more debt without any more specific plan or proposal would be especially imprudent. By all accounts, Reven would need to raise tens of millions of dollars in order to resume clinical trials. *See* Doc. 124 at 7 (expenses for Phase 2 FDA trials were "at least ***$20 million***, and possibly much more"); Doc. 149 at 12 (remaining clinical trials would be "twenty to fifty million dollars' worth of expense"). Though resuming clinical trials is necessary to realize the value of Reven's patent portfolio, it is speculative whether taking on large debts in order to do so would be in investors' best interests. *Cf. SEC v. Smith*, No. 10-CV-457 (GLS/DRH), 2011 WL 9528138, at *4 (N.D.N.Y. Feb. 1, 2011) (incurring additional debts "might make sense if there existed any reasonable likelihood that the value of the property would appreciate sufficiently in the foreseeable future to compensate for the expenses," but "[n]o such likelihood appears"), *aff'd* 653 F.3d 121 (2d Cir. 2011); *see also SEC v. Int'l Loan Network, Inc.*, 770 F. Supp. 678, 696-97 (D.D.C. 1991) (continuing asset freeze to protect assets for distribution to investors, despite risk that doing so "virtually would put [the defendant] out of business"); *Forte*, 598 F. Supp. 2d at 692 (defendant must establish that proposed asset-freeze modification is in the interest of defrauded investors). Obtaining FDA approval for RJX will take years, if successful, and success is uncertain. Taking on millions in debt could have the effect of leaving Reven worse off and taking its value down to zero. *Cf. Current Fin. Servs.*, 783 F. Supp. at 1444 ("[The defendant's] underlying business involves a high level of risk, and therefore resuming operations would jeopardize whatever assets [it] now has."); *see also Abdallah*, 2017 WL 11680996, at *3 ("[T]he court has a duty to ensure that funds are available to compensate the victims in this case.").

Some of the other relief from the asset freeze that the defendants request, however, is appropriate to allow them to explore alternative

methods of obtaining the financing necessary to preserve Reven's assets and keep the company afloat.[10] The asset freeze is hereby modified as follows:

- To permit third parties to pay expenses on behalf of Reven and its affiliates (including operating expenses, intellectual property maintenance and prosecution expenses, and legal expenses, but expressly excluding payment of compensation to the Reven Principals). The defendants may license their intellectual property, but they must give notice to the Commission before consummating any license agreement; if the Commission objects to the proposed agreement, it must file an objection with the Court within one week of receiving notice; if the Commission files an objection, the defendants must respond within one week and may not consummate the agreement absent Court approval. The defendants may not otherwise encumber their assets or incur new debt absent Court approval upon motion identifying the amount of debt and/or the specific asset(s) sought to be encumbered;
- To permit the Reven Principals to earn new individual income unrelated to Reven and the other defendants and use such income to pay for costs incurred by Reven and its affiliates (including intellectual property maintenance expenses) and legal expenses incurred in connection with this litigation. Use of such income to pay for other personal expenses still requires application to the Court pursuant to Paragraph I(D)(1) of the asset freeze, Doc. 28 at 15-16;
- To permit the Reven Principals to incur new debt on an individual basis, including by using their remaining real or personal property as collateral for such debt, following Court approval upon motion identifying the amount of debt and the specific property sought to be encumbered, and to use such funds to pay for costs incurred by Reven and its affiliates (including intellectual

[10] Though I will not force a sale of the defendants' intellectual property at this stage of the case, it would seem wise for them to seriously consider whether a sale may be in the best interests of the company and its shareholders. Given that, by the defendants' own admission, Reven was already "in dire financial straits" in early October 2022—months before this case was filed and the asset freeze was imposed—it seems that obtaining alternative financing and resuming business operations and clinical trials, though understandably the defendants' preference, may not be particularly realistic. Doc. 145 at 7.

property maintenance expenses) and legal expenses incurred in connection with this litigation; and

- To permit motion to the Court to unfreeze individual bank accounts that do not contain funds attributable to the defendants, after conferral with the Commission to identify such accounts.

The defendants' motion to lift the asset freeze is granted in part as set forth above, and the Commission's request to appoint a liquidation agent to sell the defendants' intellectual property and freeze the proceeds of that sale is denied without prejudice to refiling upon conclusion of the appeal.

III. Defendants' Motion to Stay Pending Appeal

The defendants move to stay the asset freeze pending their appeal of my preliminary-injunction order to the Tenth Circuit.[11] Doc. 153.

A. Applicable Law

In evaluating a motion to stay a preliminary injunction pending interlocutory appeal, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009). The first two of these factors are the most critical; the movant must show more than a possibility of success on appeal, and more than a possibility of irreparable injury in the absence of a stay. *Id.* at 434-35. If a movant satisfies the first two

[11] The defendants also seek to stay further discovery, pretrial deadlines, and trial in this case while their appeal is pending. Doc. 153 at 1, 5-7, 10. That aspect of the defendants' motion is taken under advisement and will be referred to United States Magistrate Judge Susan Prose for resolution.

factors, the court must then assess the potential harm to the opposing party and the public interest. *Id.* at 435. "There is substantial overlap between these and the factors governing preliminary injunctions, not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.* at 434 (citation omitted).

B. Analysis

The defendants have not made a strong showing that they are likely to succeed on the merits of their appeal. Though they acknowledge that a stay pending appeal requires such a showing, they make no argument as to their likelihood of success on appeal, and instead simply incorporate by reference the arguments made in their prior briefs. Doc. 153 at 2. But I have already rejected those arguments. *See Robertson v. REP Processing, LLC*, No. 19-cv-02910-PAB-NYW, 2021 WL 5354713, at*4 (D. Colo. Oct. 12, 2021) ("[A] party seeking a stay pending appeal may not simply 'attempt to re-hash the same argument(s)' that the party made previously, which 'does not demonstrate a likelihood of success on appeal.'"). Contrary to the defendants' repeated and strenuous insistence that the Commission has failed to demonstrate "misappropriation" or otherwise substantiate the allegations in its complaint, I have found that the Commission has made a clear showing it is likely to prove that the defendants violated securities laws by knowingly, recklessly, or negligently making materially false or misleading statements or omissions to prospective investors regarding (1) executive compensation (taking in at least $4.89 to $5.75 million more than they disclosed to investors), (2) Reven's readiness for a public offering, and (3) a lawsuit alleging that some of the defendants had committed securities fraud, and that such violations are likely to recur absent an injunction. Doc. 122 at 7-27.

The defendants have not made the required showing for a stay, particularly on the "critical" merits factor, and their request to stay the narrowed asset freeze pending appeal is therefore denied.[12]

CONCLUSION

It is **ORDERED** that:

Defendants' and Relief Defendants' Motion to Narrow Preliminary Injunction to Lift Asset Freeze, **Doc. 124**, is **GRANTED IN PART** and **DENIED IN PART**;

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[12] At the time of my preliminary-injunction order, governing Tenth Circuit law provided that the traditional equitable factors, including irreparable harm, need not be shown in cases where the Commission seeks preliminary injunctive relief under the Securities Act and Exchange Act. Doc. 122 at 3-4. The Commission notes that that body of law has been called into question by the Supreme Court's recent decision in *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570 (2024). Doc. 155 at 9 n.1 (citing *SEC v. Chappell*, — F.4th —, No. 23-2776, 2024 WL 3335652, at *6 to *10 (3d Cir. July 9, 2024) (citing *Starbucks* and holding that all four traditional preliminary-injunction factors apply in SEC cases)).

To the extent the Commission may now be required to demonstrate the traditional equitable factors—(1) a substantial likelihood of success on the merits, (2) irreparable injury in the absence of an injunction, (3) that its threatened injury without the injunction outweighs the defendants' under it, and (4) that the injunction is not adverse to the public interest—I find that those factors are satisfied in this case. *See* Doc. 122 at 3 (noting traditional factors). As discussed above, the Commission has made a clear showing of its likelihood of success on the merits. *Id.* at 7-26. Absent a prohibition against the offer and sale of securities by the Reven Principals, statutory violations are likely to recur, which could irreparably harm current and prospective investors. *Id.* at 26-28. And absent some kind of asset freeze, dissipation of the defendants' assets could irreparably harm existing investors and the availability of funds to pay any disgorgement or other future judgment. *Id.* at 27-28; Doc. 28 at 13. The partial lifting of the asset freeze as set forth in this Order balances the harm to the defendants of the injunction against the harm to the Commission and investors absent an injunction, and the injunction is not adverse to the public interest. *Cf. Chappell*, 2024 WL 3335652, at *17 to *18; *see also Nken*, 556 U.S. at 435 (government party's interests "merge" with public interest).

The Intervenor Investor Group's Motion to Intervene, **Doc. 133**, and Motion to Appoint General Receiver, **Doc. 135**, are **DENIED**; and

Defendants' and Relief Defendants' Opposed Motion for Stay Pending Appeal, **Doc. 153**, is **DENIED IN PART** as to the request to stay the asset freeze pending appeal, and **TAKEN UNDER ADVISEMENT** and **REFERRED** to Magistrate Judge Susan Prose as to the request to stay discovery and other proceedings pending appeal.

DATED: July 26, 2024

BY THE COURT:

~~Daniel D.~~ Domenico
United States District Judge