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United States Court of Appeals
Tenth Circuit

October 14, 2026

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff - Appellee,

v.

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

Defendants - Appellants,

and

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

Relief Defendants - Appellants.

No. 24-1235

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff - Appellee,

v.

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

Defendants - Appellants,

and

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

Relief Defendants - Appellants.

No. 24-1309

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:22-CV-03181-DDD-SBP)

John E. Schreiber, Winston & Strawn LLP, Los Angeles, California (Kevin P. Simpson, Winston & Strawn LLP, Los Angeles, California; Katherine A. Preston, Winston & Strawn LLP, Houston, Texas; and Dylan J. French, Winston & Strawn LLP, Dallas, Texas, with him on the briefs), for Defendants-Appellants.

Paul G. Álvarez, Senior Appellate Counsel (Daniel Staroselsky, Assistant General Counsel, with him on the brief), Securities and Exchange Commission, Office of the General Counsel, Washington, District of Columbia, for the Plaintiff-Appellee.

Before **HOLMES**, Chief Judge, **KELLY**, and **FEDERICO**, Circuit Judges.

HOLMES, Chief Judge.

Reven Holdings, Inc., its affiliated companies, and its three principals (collectively, "Appellants" or "Reven") appeal from the district court's order granting a preliminary injunction ("PI") and asset freeze against them at the behest of the U.S. Securities and Exchange Commission ("SEC") for alleged securities fraud. Appellants contend that the district court erred by preliminarily enjoining their business and freezing their assets because (1) the SEC did not satisfy the PI standards, including by failing to show evidence that Reven violated securities laws, and because (2) the district court's order destroyed the assets that it was designed to preserve. They also contend that (3) the district court should have at least held a hearing before deciding on the PI.

For the reasons that follow, we discern no error in the district court's decision to grant a PI and freeze Appellants' assets, or in its choice to do so without conducting a hearing. Exercising jurisdiction under 28 U.S.C. § 1292(a)(1), we therefore **affirm** the district court's orders granting the PI and maintaining the asset freeze.[1]

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[1] Additionally, we **grant** Appellants' unopposed motion for leave to file part of the appendix, Vol. XVI, under seal. The appendix contains confidential financial information about individuals and also business information that may plausibly be considered trade secrets. *See, e.g.*, *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1135–

Our opinion proceeds as follows. First, we detail the factual allegations upon which the SEC obtained the PI. Second, we summarize the procedural history of this case. Third, we provide an overview of the applicable legal standard of review. Fourth, we analyze Appellants' three challenges to the district court's order on appeal. We conclude that those challenges are unpersuasive: specifically, the district court was not obligated to conduct a hearing given that Appellants asked it to vacate a hearing that it had tried to schedule; the district court did not abuse its discretion in concluding that the SEC satisfied all four PI factors; and the district court imposed a reasonable and nuanced asset freeze.

I

We begin by describing the factual circumstances underlying the district court's PI determination. We note that, in doing so, we "have only considered the record as it stands at this early stage of the proceedings." *Fish v. Kobach*, 840 F.3d 710, 750 (10th Cir. 2016). As is always true in the PI context, "[f]urther discovery will presumably ensue," and additional "evidence [may] come[] to light." *Id.*

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36 (10th Cir. 2011) (sealing record containing confidential personal information); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 831 n.4 (10th Cir. 1993) (sealing record containing trade secret information).

Brian Denomme, Peter Lange, and Michael Volk (collectively, the "Reven principals") manage the biotechnology company Reven Holdings, Inc. and its affiliates. Since its founding, Reven has been attempting to develop and commercialize a "cardiovascular intravenous drug treatment" called RJX. Aplts.' App., Vol. XV, at 2761 ¶ 4.a (Scheduling Order, Apr. 5, 2023). Prior to this litigation, Reven obtained patents and conducted research and trials pertaining to RJX. RJX has not yet been approved by the U.S. Food and Drug Administration ("FDA").

This litigation concerns allegations by the SEC that Appellants committed securities fraud by making materially misleading statements to investors about three topics: (1) the Reven principals' annual compensation in 2019, 2020, and 2021; (2) the existence of audited financial statements and Reven's readiness to go public; and (3) Reven's involvement in other litigation. We provide the factual background and summarize Appellants' statements about each of those topics below, again noting that these findings are only preliminary, as they are based on the incomplete state of the litigation at the PI phase.

A

Appellants made multiple statements to investors representing the compensation that the Reven principals received from 2019 to 2021.

These communications primarily took the form of documents called "private placement memoranda" ("PPMs").

In a PPM that Appellants distributed to investors dated August 31, 2018, Appellants stated that Reven's "General Administrative and Payroll Operating costs" over the next eighteen months would be $2.5 million every six months, or approximately $5 million for 2019. Aplts.' App., Vol. I, at 232 (Priv. Placement Mem., Aug. 31, 2018). Although this figure included expenditures besides the compensation for the Reven principals, SEC accountant Donna Walker reviewed Reven's financial accounts and determined that these other expenditures totaled $2,716,023 for 2019.

Another PPM dated July 6, 2020, stated that the three Reven principals were paid $540,000 each (or $1.62 million total) for 2019 and $660,000 each (or $1.98 million total) for 2020.

A third PPM, this one from January 1, 2021, stated that the Reven principals were paid $600,000 each (or $1.8 million total) for 2020 and $720,000 each (or $2.16 million total) for 2021.

According to the SEC's accounting expert, Ms. Walker, a review of Reven's Wells Fargo banking records revealed that the Reven principals actually received $5.35 million in compensation in 2019, $3.36 million in 2020, and $6.65 million in 2021.

B

In their communications with investors, Appellants also made representations regarding the status of an audit and their readiness to take Reven public. The two topics are related because having audited financial statements is a requirement of taking a company public. *See What is a Registration Statement?*, explanation to *Going Public*, SEC, https://www.sec.gov/resources-small-businesses/going-public/what-registration-statement (Nov. 12, 2024) ("The prospectus must also include audited financial statements.").

On September 9, 2019, Mr. Lange emailed an investor named Leah Schaatt a slide deck listing three possible "[e]xit [s]trategies," for Reven, the first "[s]cenario" being to "[o]rganize and execute a public offering on a major financial exchange after October 1, 2020." Aplts.' App., Vol. IX, at 1129, 1224 (Email & Slide Deck sent from Peter Lange to Leah Schaatt, Sept. 9, 2019). Under this scenario, the slide read, "The 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 [("IPO")[2]] as early as October 2020." *Id.*

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[2] An "IPO" is an Initial Public Offering, which is the opening offering of theretofore private securities of a company for sale to investors who are members of the public on a public securities exchange. *See Going*

On December 9, 2019, Mr. Volk emailed investors, stating, "We are currently undergoing our first audit now." Aplts.' App., Vol. VI, at 507 (Email from Michael Volk to Lyndall Demere, Tom North, & Sharon Garber, Dec. 9, 2019).

On February 13, 2020, Mr. Lange emailed Ms. Schaatt and others saying:

> Well, we finally decided that we would comply with all the ("super smart") investment bankers and file an S1 (the SEC filing to do an IPO), and announce to the world that we were going public. We have since done that to allow the "super smart" people to tick that box . . . .

Aplts.' App., Vol. IX, at 1242 (Email from Peter Lange to Leah Schaatt, Liz Leeds, & Michael Volk, Feb. 13, 2020).

On July 8, 2020, Mr. Lange emailed Ms. Schaatt and others saying, "Our 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 [sic] next steps towards an IPO in 2021." Aplts.' App., Vol. IX, at 1244 (Email from Peter Lange to Leah Schaatt, Liz Leeds, & Matthew Provencher, July 8, 2020).

On November 18, 2021, Mr. Lange emailed a family of investors, including a woman named Lee-Ann Frost Corry, a slide deck that listed as

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Public, SEC, https://www.sec.gov/resources-small-businesses/going-public/what-registration-statement (Nov. 12, 2024).

one of three "paths & options going forward" the following route—"Organize and execute an Initial Public Offering"—and it stated that "[t]he Company has the minimum required two years of audited financial statements ending August 2021." Aplts.' App., Vol. X, at 1416, 1437 (Email & Slide Deck sent from Peter Lange to Daniel Frost, John Frost, Virginia Frost, & Lee-Ann Frost Corry, Nov. 18, 2021).

On December 6, 2021, Mr. Volk emailed an investment advisor a slide deck containing the same statement—that Reven "has the minimum required two years of audited financial statements ending August 2021"—and listing as one of three possible "Strategic Paths Forward," "Organize and execute an Initial Public Offering." Aplts.' App., Vol. VIII, at 853, 948 (Email & Slide Deck sent from Michael Volk to Monica Ryan, Dec. 6, 2021). This investment advisor forwarded the slide deck to a group of other investment advisors.

On December 16, 2021, Mr. Lange emailed Ms. Schaatt a new deck that again listed "Going Public" as one of three "Strategic Paths Forward" and stated, "[t]he Company has the minimum required two years of audited financial statements ending August 2021." Aplts.' App., Vol. XIV, at 2336, 2354 (Email & Slide Deck sent from Peter Lange to Leah Schaatt, Dec. 16, 2021). On September 14, 2022, Mr. Lange sent Ms. Schaatt the slide deck containing the same representation again.

Despite these representations, the record demonstrates that Reven never began an audit of its financial statements; indeed, it did not even retain an auditing firm. It was therefore nowhere near ready to undertake an IPO. *See What is a Registration Statement?*, explanation to *Going Public*, SEC, https://www.sec.gov/resources-small-businesses/going-public/what-registration-statement (Nov. 12, 2024).

C

Finally, in their investor communications, Appellants also represented that they were not engaged in litigation.

In his February 13, 2020, email to Ms. Schaatt, Mr. Lange stated, "we have no lawsuits from shareholders." Aplts.' App., Vol. IX, at 1242.

On April 20, 2020, Mr. Volk emailed a group of potential investors a slide deck and the August 31, 2018, PPM. He stated that he was attaching Reven's "OLD Private Placement Memorandum," but he noted, "There is not a whole lot that will change so it will serve as appropriate disclosure for compliance." Aplts.' App., Vol. VI, at 510 (Email & Slide Deck sent from Michael Volk to Jim Ervin, Scott Russo, Randolph Russo, John Anderson, Todd Brown, & Kenneth Easten, Apr. 20, 2020). The 2018 PPM contained the representation, "The Company is not currently the subject of any litigation." *Id.* at 574.

On April 6, 2021, Mr. Volk emailed an investor with the July 6, 2020, PPM. In the email, Mr. Volk cautioned that "the PPM is definitely outdated, but [it] gives good history and compliance information." Aplts.' App., Vol. VII, at 603 (Email & Slide Deck sent from Michael Volk to J. Nicholas Shevillo, Apr. 6, 2021). The document stated, "As of the date of this Memorandum we are not aware of potential dispute [sic] 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." *Id.* at 712.

Finally, in Mr. Volk's December 6, 2021, email to an investment advisor, he included the January 1, 2021, PPM, which stated, "As of the date of this Memorandum we are not aware of potential dispute [sic] 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." Aplts.' App., Vol. VIII, at 918.

Despite Appellants' representations, however, they were engaged in pending litigation. On August 8, 2016, the guardian of an elderly man sued Reven Pharmaceuticals, Inc. and Mr. Lange in Florida state court for fraudulently inducing his ward to invest in Reven. On December 26, 2019,

the plaintiff in this Florida lawsuit amended his complaint to add Reven, LLC; Reven Holdings, Inc.; and Mr. Volk as defendants. Appellants ultimately settled the lawsuit for $2.75 million on October 5, 2021.

II

On approximately October 15, 2022, one investor, Ms. Schaatt, emailed the SEC to initiate a conversation about concerns she and another investor, Ms. Frost Corry, had regarding the management and finances of Reven. From there, Ms. Schaatt and Ms. Frost Corry provided information to the SEC about Reven.

A

On December 9, 2022, the SEC filed a sealed complaint and jury demand against Appellants in the U.S. District Court for the District of Colorado. The complaint alleged that Defendants were engaging in "ongoing offering fraud and misappropriation of investor assets." Aplts.' App., Vol. I, at 20 (Compl. & Jury Demand, Dec. 9, 2022). It charged Appellants with violating Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)) ("the Securities Act") and Section 10(b) (and corresponding Rule 10b-5) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5) ("the Exchange Act").

Alongside its sealed complaint, the SEC filed an *ex parte* motion for a temporary restraining order ("TRO"), an asset freeze, and other

"emergency relief." The SEC requested that the court enter an order (a) restraining Appellants from violating parts of the Securities and Exchange Acts; (b) prohibiting Appellants from participating in the issuance, purchase, offer, or sale of any security; (c) preventing Appellants from altering or destroying any relevant documents; (d) requiring an accounting of Appellants' assets; (e) permitting expedited discovery; (f) transforming the TRO into a PI following a hearing; and (g) freezing Appellants' assets.

On January 3, 2023, the district court granted the SEC's motion, issuing a TRO and freezing Appellants' assets. The district court also invited Appellants to file a response opposing the SEC's requested PI and set a PI hearing for January 13, 2023.

On January 11, 2023, the parties jointly moved to (1) extend the TRO until the district court ruled on the PI and (2) vacate the PI hearing set for January 13 "without prejudice to any future request by the [SEC], the Defendants, and/or the Relief Defendants to reset such hearing." *See* Aplee.'s Suppl. App. at 27–29 (Jt. Mot. & Stipulation to Extend TRO & Vacate PI Hr'g, Jan. 11, 2023). The parties made this request because Appellants' counsel had just been retained and needed "additional time to learn the facts of the case." *Id.* at 29.

That day, the district court granted the parties' joint motion to extend the TRO and vacate the PI hearing. To accommodate Appellants'

counsel, the court extended the time permitted for Appellants to respond to the motion for the PI. In granting the parties' motion, the court stated, "After 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." Aplts.' App., Vol. XV, at 2734 (Order, Jan. 11, 2023).

From January through April 2023, the district court granted Appellants extensions of time to brief the PI motion.

The district court also granted Appellants' unopposed motions to modify the asset freeze provisions of the TRO to allow them to pay for living expenses and to pay attorneys to maintain Reven's intellectual property assets "otherwise at risk of abandonment or expiration." Aplts.' App., Vol. XI, at 1651–53 (Order, Mar. 27, 2023).

On June 12, 2023, Appellants filed their brief opposing the SEC's motion for a PI. Appellants argued that the SEC had not met the PI standard because (1) it had not shown that they had misappropriated investor funds; (2) it had not shown that they had made material misstatements with scienter about the Reven principals' compensation, the existence of an audit, or Reven's involvement in other litigation; and

(3) it had not shown that any violation of securities laws was likely to recur.

B

On March 29, 2024, the district court granted the SEC's motion and issued a PI that extended the terms of the TRO, including the asset freeze. The court first determined that the proper standard it needed to apply to determine whether a PI was appropriate came from the Securities and Exchange Acts, which called for "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." Aplts.' App., Vol. XIV, at 2410 (Order Granting Pl.'s Mot. for PI & Asset Freeze, Mar. 29, 2024) (quoting *Aaron v. SEC*, 446 U.S. 680, 700–01 (1980)). The court believed that this legislation-specific standard displaced the "traditional four-factor test for a preliminary injunction." *Id.* The court also determined that because the particular PI that the SEC sought "mandate[d] action or alter[ed] the status quo," the SEC had to meet the additional requirement of showing "(1) its likelihood of proving the alleged statutory violation, and (2) the likelihood that a violation will occur again in the future." *Id.* at 2411.

The court applied this legal standard and concluded that the SEC had satisfied it with regard to each of the three categories of fraudulent misrepresentations alleged.

1

The court determined that the SEC "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." *Id.* at 2414. The court credited the SEC's preliminary showing that between 2019 and 2021, the Reven principals were paid $8.92 million to $9.78 million more than Appellants disclosed in their PPMs, and even accommodating Appellants' objections to the SEC's numbers, "the Reven Principals took in $4.89 to $5.75 million more than they disclosed to investors" during this three-year period. *Id.* at 2415. The court determined that the SEC had shown it was likely to prove that Appellants made these misrepresentations "recklessly," or, "at a minimum negligently." *Id.* at 2418.

2

Similarly, the court concluded that the SEC had "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[3]," *id.* at 2420–21, and did so "recklessly and negligently," *id.* at 2427.

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[3] A "DPO" is a Direct Public Offering, which is also sometimes known as a Direct Listing. It is similar to an IPO in that it is the process

The court noted the following:

(1) Mr. Volk's December 9, 2019, email to an investor stating, "We are currently undergoing our first audit now," Aplts.' App., Vol. VI, at 507;

(2) Mr. Lange's November 18, 2021, emailed slide deck stating, "[t]he Company *has* the minimum required two years of audited financial statements ending August 2021," Aplts.' App., Vol. X, at 1437 (emphasis added)—which was a change from language in the slide deck Mr. Lange emailed an investor on September 9, 2019, that stated, "[t]he [C]ompany *will have* the minimum required two years of audited financial statements ending September 30, 2020," Aplts.' App., Vol. IX, at 1224 (emphasis added);

(3) Mr. Volk's December 6, 2021, emailed slide deck containing the same representation as the November 18, 2021, email;

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through which a previously privately held company becomes a public company. The difference is that in a DPO, the private company typically does not raise new funds but instead simply allows existing private shareholders to sell shares directly to the public. *See Types of Registered Offerings*, SEC, https://www.sec.gov/resources-small-businesses/capital-raising-building-blocks/types-registered-offerings (Dec. 17, 2024).

(4) Mr. Lange's December 16, 2021, emailed slide deck containing the same representation;

(5) Mr. Lange's September 14, 2022, emailed slide deck containing the same representation; *and*

(6) the fact that Reven never even retained a firm to *begin* an audit of its financial statements.

With regard to Reven's readiness to go public and specifically with regard to its filing of an SEC Form S-1—i.e., one of the documents required to engage in a public offering—the court noted (1) Mr. Lange's February 13, 2020 email stating "we finally decided that we would comply with all the ('super smart') investment bankers and file an S1 (the SEC filing to do an IPO), and announce to the world that we were going public. We have since done that . . . . ," *id.* at 1242; in the face of (2) Reven's acknowledgement that it had not filed a Form S-1 at the time, which was shown through Mr. Lange's July 8, 2020, email to an investor stating, "Our 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 [sic] next steps towards an IPO in 2021," *id.* at 1244.

3

Third, the court concluded that the SEC had "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," Aplts.' App., Vol. XIV, at 2428—having done so "at a minimum recklessly," *id.* at 2431. The court determined that despite the pendency of the Florida lawsuit by the guardian of the Reven shareholder from August 8, 2016, to October 5, 2021, which eventually ended in a settlement of $2.75 million, Reven had repeatedly told investors that the company was not subject to any litigation.

The court noted the following:

> (1) Mr. Lange's February 13, 2020, email to investors stating, "we have no lawsuits from shareholders," Aplts.' App., Vol. IX, at 1242;
>
> (2) Mr. Volk's April 20, 2020, email containing the August 31, 2018, PPM, which stated, "The Company is not currently the subject of any litigation," Aplts.' App., Vol. VI, at 574;
>
> (3) Mr. Volk's April 6, 2021, email containing the July 6, 2020, PPM, which stated, "As of the date of this Memorandum we are not aware of potential dispute [sic] 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," Aplts.' App., Vol. VII, at 712; *and*

(4) Mr. Volk's December 6, 2021, email containing the January 1, 2021, PPM, which contained the same representation.

4

After evaluating each of the three alleged violations, the court concluded that in light of the seriousness of the violations—which was evinced by the "millions of dollars of misappropriated investor funds" at issue—the "substantial evidence that the various misstatements were made knowingly and with intent to hide material facts," and the fact that "the Reven Principals ha[d] not recognized their wrongful conduct,"—that "the defendants w[ould] likely continue their statutory violations in the future if they [we]re not enjoined." Aplts.' App., Vol. XIV, at 2432–33.

The court therefore determined that all of the terms in the TRO, including the asset freeze, were appropriate measures to preserve the status quo, and it incorporated them into the PI. However, the court invited Appellants to "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." *Id.* at 2435.

C

On April 12, 2024, Appellants moved to narrow the PI by lifting the asset freeze. Appellants argued that, rather than "protecting existing and potential investors," the asset freeze was having "the exact opposite effect, threatening Reven's ability to maintain its existing intellectual property and other assets, wasting valuable patent life, and blocking the Company's ability to move forward with critical drug trials, thereby decimating (not preserving) investor assets." Aplts.' App., Vol. XIV, at 2438–39 (Defs.' & Relief Defs.' Mot. to Narrow PI to Lift Asset Freeze, Apr. 12, 2024). The SEC opposed the motion, arguing that lifting the asset freeze would "give [Appellants] a blank check to deplete the frozen assets, incur mountains of debt, and resume paying themselves with investor proceeds without any review by th[e] Court." Aplts.' App., Vol. XIV, at 2450 (Pl. U.S. SEC's Opp'n to Defs.' Mot. to Narrow PI to Lift Asset Freeze, April 26, 2024).

On May 10, 2024, Ms. Schaatt and Ms. Frost Corry moved to intervene in the case "to seek appointment of a General Receiver to marshal and sell the assets of Reven for the benefit of all of the 175 innocent investors who were harmed." *See* Aplts.' App., Vol. XIV, at 2476–77 (Intervenor Investor Grp.'s Mot. to Intervene, May 10, 2024). They later narrowed their request to seek the appointment of a liquidation

agent rather than a general receiver. The SEC did not object to this narrower request.

On May 17, 2024, the district court preliminarily denied Appellants' motion to narrow the PI by lifting the asset freeze. The court stated that it was "[a]t present[,] . . . not persuaded by the defendants' arguments that it [wa]s appropriate to lift the asset freeze in its entirety." Aplts.' App., Vol. XV, at 2562 (Order, May 17, 2024). The court noted that it would entertain "a more specific plan regarding the amount of funds or particular assets as to which the asset freeze should be lifted," if Appellants had one to offer alongside their response to Ms. Schaatt and Ms. Frost Corry's motion to intervene. *See id.*

On May 24, 2024, Appellants filed a notice that they were appealing to this Court "(1) the Order Granting Plaintiff's Motion for Preliminary Injunction and Asset Freeze entered on March 29, 2024 (ECF No. 122) and (2) the Order re: Defendants and Relief Defendants' Motion to Narrow Preliminary Injunction to Lift Asset Freeze entered on May 17, 2024." Aplts.' App., Vol. XV, at 2564–65 (Notice of Appeal, May 24, 2024). They also filed a motion for a stay pending the appeal. The appeal was received in our Court on May 28, 2024, as case number 24-1235.

Back in the district court, on May 31, Appellants filed their response opposing Ms. Schaatt and Ms. Frost Corry's motion to intervene and

supplying a narrower proposal for partially lifting the asset freeze as the court requested in its May 17 order. The proposal called for the court to partially lift the asset freeze to permit third parties to pay expenses on behalf of Reven, permit the Reven principals to earn new individual income unrelated to Reven, permit the Reven principals to incur new debt (including for the purpose of funding the maintenance of Reven's intellectual property), and unfreeze individual bank accounts not containing funds attributable to Appellants.

On June 17, 2024, we abated Appellants' first appeal (24-1235) because we determined that, while the district court "appear[ed] to have partially ruled on" Appellants' April 12 motion to narrow the PI by lifting the asset freeze in the court's May 17 order, "it d[id] not appear that the motion ha[d] been fully decided." Order, No. 24-1235, at *1–2 (10th Cir., filed June 17, 2024).

On July 26, 2024, the district court ruled on several of the pending motions. The district court denied Ms. Schaatt and Ms. Frost Corry's motion to intervene because it determined that the SEC adequately represented the investors' interests.[4] However, because the SEC

[4] No party challenges the district court's decision on this matter, so it is not before us on appeal.

supported the would-be-intervenors' narrowed proposal for the appointment of a liquidation agent, the district court considered the request to appoint a liquidation agent as attributed to the SEC. The court refused to appoint a liquidation agent to sell Reven's assets because it determined that such a remedy "would effectively put [Reven] out of business entirely," which would be "quite harsh" relative to its "preliminary findings" in the case.[5] Aplts.' App., Vol. XV, at 2696–97 (Order Lifting Asset Freeze in Part, July 26, 2024). The court also refused to lift the asset freeze in its entirety because it determined that it would not be "appropriate" to "restore [Appellants'] free reign [sic] over Reven's assets based only on a vague plan" given that the court had preliminarily found that "the Reven Principals made a number of material misstatements or omissions to prospective investors." *Id.* at 2697.

However, the court did partially grant Appellants' second proposal to lift parts of the asset freeze. Specifically, it permitted the following:

(1) "third parties to pay expenses on behalf of Reven and its affiliates,"

(2) Reven to "license their intellectual property" with notice to the SEC and the court's approval if the SEC were to object,

[5] No party challenges the district court's decision on this matter, so it is not before us on appeal.

(3) "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" for intellectual property maintenance and legal fees,

(4) "the Reven Principals to incur new debt on an individual basis" with the court's approval to pay for intellectual property maintenance and legal fees, and

(5) a "motion to the Court to unfreeze individual bank accounts that do not contain funds attributable to the defendants, after conferral with the [SEC] to identify such accounts."

Id. at 2699–70.

Finally, the district court denied Appellants' motion to stay the asset freeze pending their appeal of the PI. The court also added a footnote explaining that its previous determination that the relevant PI standard was a unique securities-statute-based test had since been "called into question by the Supreme Court's recent decision in *Starbucks Corp. v. McKinney*, [602 U.S. 339 (2024)]." *Id.* at 2702 n.12. Accordingly, the court performed a brief alternative analysis under the traditional four-factor standard required for most PIs and concluded that the PI was proper under this alternative standard as well.

On August 6, 2024, Appellants filed a second notice of appeal, initiating case no. 24-1309. This time, they appealed the district court's July 26 order lifting the asset freeze in part.

On August 9, 2024, we lifted the abatement of 24-1235 (Appellants' premature first appeal) and consolidated it with their second appeal (24-1309). As the case stands before us, Appellants appeal from the district court's March 29, 2024, order granting the PI and the asset freeze and the part of the district court's July 26, 2024, order that denied their motion to eliminate the asset freeze in its entirety.

III

We review a district court's grant of a PI, including an asset freeze, as well as a court's order modifying or refusing to modify a PI, for an abuse of discretion. *See Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1117 (10th Cir. 2010). "A court abuses its discretion if its decision is 'arbitrary, capricious, or whimsical.'" *Cablevision of Tex. III, L.P. v. Okla. W. Tel. Co.*, 993 F.2d 208, 210 (10th Cir. 1993) (quoting *Cox v. Sandia Corp.*, 941 F.2d 1124, 1125 (10th Cir. 1991)). "An abuse of discretion occurs where a decision is premised on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *SEC v. GenAudio Inc.*, 32 F.4th 902, 944 (10th Cir. 2022) (quoting *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1223 (10th Cir. 2018)).

We will not disturb the district court's ruling unless the court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) (quoting *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003)). Similarly, we review a district court's decision not to hold an evidentiary hearing for an abuse of discretion. *See Robinson v. City of Edmond*, 160 F.3d 1275, 1286 (10th Cir. 1998).

IV

We now evaluate Appellants' three challenges on appeal. Appellants first argue that the district court abused its discretion by ruling on the SEC's PI motion without conducting an evidentiary hearing. Second, Appellants contend that the district court's decision to grant the PI was an abuse of discretion because the SEC did not satisfy the conditions for obtaining such an injunction. Third, Appellants argue that the district court's imposition of the asset freeze was an abuse of discretion. We are not persuaded by Appellants' arguments and conclude that the district court did not abuse its discretion at any point.

A

Appellants first argue that the district court committed a procedural error by deciding the SEC's motion for a PI without conducting an evidentiary hearing. We quickly dispense with this argument because

Appellants *requested the district court cancel the PI hearing* it had scheduled, and Appellants *chose not to request* that the district court schedule a new hearing.

1

The Federal Rules of Civil Procedure provide that "[a] court may establish regular times and places for oral hearings on motions." Fed. R. Civ. P. 78(a). It is common practice for courts to hold hearings about whether to grant PIs. *See, e.g.*, *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1153–54 (10th Cir. 2001). However, the Federal Rules of Civil Procedure also provide that "[b]y rule or order, the court may provide for submitting and determining motions on briefs, *without oral hearings*." Fed. R. Civ. P. 78(b) (emphasis added).

2

Appellants argue that the district court should have at least conducted a hearing before deciding whether to issue the PI and maintain the asset freeze given the fact-intensive credibility determinations at issue. Appellants describe the district court as "revers[ing] course" on its plan to hold a hearing and "*sua sponte* stat[ing] in an order" that it would evaluate the parties' written submissions on the PI before deciding whether to reschedule the hearing. Aplts.' Opening Br. at 63. Appellants also argue that the court's choice to decide the issue on the briefing

occurred "during [a] period [in which] Reven inquired with the court about a possible hearing and ultimately made a supplemental submission." *Id.* at 63.

On the other hand, the SEC contends that the court "acted within its discretion" when it opted not to hold a hearing on the PI. Aplee.'s Resp. Br. at 63 (bold-face font omitted). The SEC disagrees with Appellants' account of the proceedings: it contends that both Appellants and the SEC *jointly* requested that the court vacate the hearing originally and that after the court granted that request, Appellants never requested to reschedule the hearing.

In their Reply Brief, Appellants insist that they did inquire with the court about holding a hearing after the first hearing was cancelled; they point to an email exchange with the district court that they seek, in a separate motion discussed *infra*, to add to their appendix.

3

To support their hearing argument, Appellants move to supplement their appendix by adding an email exchange with the district court. The SEC opposes the motion.

In the email exchange at issue, counsel for Appellants sent the district court the following message:

> We wanted to inquire whether the Court has everything it needs concerning the pending motion for preliminary injunction, as we understood Your Honor's earlier order . . . to mean that the Court may request supplemental briefing or other follow-up from the parties after the submission of response and reply briefs.
>
> If our understanding is incorrect and/or the Court has everything it needs, please disregard our request and forgive the intrusion.

Attach. to Aplts.' Opposed Mot. to Amend the R., No. 24-1235, at *7 (10th Cir., filed Jan. 24, 2025) (moving to supplement the record on appeal with email exchange).

The court replied: "The Court will issue an order or contact the parties if it believes supplemental briefing or a preliminary-injunction hearing is necessary or would be helpful." *Id.*

We **deny** Appellants' motion to supplement their appendix with this exchange for two reasons.

First, this document is not part of the record on appeal, so it could not have been properly considered even if it had been timely filed with Appellants' appendix to begin with. Federal Rule of Appellate Procedure 10(a) unambiguously states, "The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." An email with the district court that is not

part of the docket is not one of these items, so it is not part of the record on appeal. The appendix is designed to be a subset of the record on appeal that is "sufficient for considering and deciding the issues on appeal." *Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1231 (10th Cir. 2008) (quoting 10th Cir. R. 30.1(A)(1)). Accordingly, it must include the items listed in Rule 28.2(A)(1) of the Tenth Circuit rules: "copies of all pertinent written findings, conclusions, opinions, or orders of a district judge." Informal email correspondence with the court is outside the scope of these rules.

Second, even if this email could be considered part of the record on appeal, we deny the motion because it should have been submitted by Appellants in the original appendix. Rule 30.1(B)(3) of our rules states that we "need not remedy any failure of counsel to provide an adequate appendix." In *WildEarth Guardians v. U.S. Fish & Wildlife Service*, 784 F.3d 677 (10th Cir. 2015), we denied a litigant's motion to file a supplemental appendix under this rule because we concluded that the documents that the party wanted to add in the supplemental appendix "could and should have been included in their original appendix if they wanted to rely upon them." *WildEarth*, 784 F.3d at 702. If Appellants had wanted to rely on the email on appeal, they should have tried to include it in their original appendix. For

these two independent reasons, we deny Appellants' opposed motion to supplement their appendix with the email exchange.

4

Appellants cannot show that the district court abused its discretion by declining to hold a hearing on the SEC's PI motion because they themselves (along with the SEC) requested that the district court cancel the PI hearing that the court had scheduled, and Appellants never requested that the court schedule a new PI hearing.

The court initially scheduled a hearing to evaluate the necessity of a PI for January 13, 2023. Appellants (along with the SEC) then requested that the court "vacate the preliminary injunction hearing currently set for 9:30 a.m. on January 13, 2023, without prejudice to any future request by the [SEC], the Defendants, and/or the Relief Defendants to reset such hearing." Aplee.'s Suppl. App. at 28. Appellants did not state that they *would* submit a future request, nor did they seek a *delay*. Accordingly, the court merely granted the parties' joint motion when it vacated the PI hearing scheduled for January 13. From that point on, *Appellants never requested that the district court reschedule an evidentiary hearing*.

Although Appellants assert in their Opening Brief that during the seven months prior to the district court's ruling on the PI, "Reven inquired with the court about a possible hearing," Aplts.' Opening Br. at 63, this claim

is unsupported. *See United States v. Abdenbi*, 361 F.3d 1282, 1288 (10th Cir. 2004) (declining to credit a litigant's assertion of a fact in his brief because "there is absolutely no record support for [the] assertion"). The inquiry that Appellants are referring to is the email exchange that Appellants sought to supplement their appendix with, which, as explained *supra*, we will not consider.

What's more, even if we were to consider the email exchange, its actual text reveals that Appellants *did not* request that the court hold an evidentiary hearing or even inquire about whether the court would hold one. Rather, the email shows Appellants merely asking whether the court had everything it needed to make a decision. In the email, Appellants only allude to supplemental briefing, not a hearing. Appellants certainly did not request that the court hold an evidentiary hearing. "Ordinarily, a district court does not abuse its discretion in deciding not to hold an evidentiary hearing when no such request is ever made." *Robinson v. City of Edmond*, 160 F.3d 1275, 1286 (10th Cir. 1998). Accordingly, the court did not abuse its discretion by not electing, *sua sponte*, to hold a hearing after the *parties* requested that it vacate the first one.

B

Appellants' primary argument on appeal is that the district court abused its discretion by concluding that the SEC had satisfied the conditions

for a PI. Our analysis of this argument proceeds as follows. In the first subsection, we discuss the correct legal standard for granting PIs based on allegations of securities-law violations. As we will explain, this test involves peering into the likely merits of the SEC's allegations of securities-law violations, which we undertake in the second subsection. In the third subsection, we analyze the district court's evaluation of the remaining factors that comprise the applicable PI standard. We conclude that the district court applied the correct PI standard and permissibly determined that the SEC had satisfied that standard.

1

This first subsection explains the applicable legal standard to obtain a PI under the Securities Act and the Exchange Act.

a

The standard for an ordinary PI in a typical civil suit that preserves the status quo is well-established:

> To succeed on a typical preliminary-injunction motion, the moving party needs to prove four things: (1) that [it is] "substantially likely to succeed on the merits[;]" (2) that [it will] "suffer irreparable injury" if the court denies the injunction; (3) that [its] "threatened injury" (without the injunction) outweighs the opposing party's under the injunction[;] and (4) that the injunction isn't ["]adverse to the public interest."

Mrs. Fields Franchising, LLC v. MFGPC, 941 F.3d 1221, 1232 (10th Cir. 2019) (quoting *Free the Nipple—Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019)). These four factors come from the Supreme Court's opinion in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). We refer to these four factors as the *Winter* factors.

However, the Securities and Exchange Acts also provide their own terms for when courts may grant PIs in cases involving probable securities-law violations. Under Section 20 of the Securities Act, a district court may grant a PI "upon a proper showing" that "any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof." 15 U.S.C. § 77t(b). Similarly, under Section 21 of the Exchange Act, a district court may grant a PI "upon a proper showing" that "any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, [or] the rules or regulations thereunder." 15 U.S.C. § 78u(d)(1).

b

Appellants contend that the proper standard for evaluating whether to grant a PI under securities laws includes six total factors: the four *Winter* factors and two securities-specific factors, which it defines as "(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." Aplts.' Opening Br. at 26. Furthermore, Appellants contend that because the PI at issue "alters the status quo," the SEC's burden is "heightened" in that 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"—two of the *Winter* factors. *Id.* at 27–28.

The SEC agrees with Appellants that it must establish the four *Winter* factors. However, it argues that the two securities-related factors Appellants propound are not additional requirements for a securities-fraud-related PI. Additionally, it contends that the asset freeze component of the PI preserves the status quo rather than altering it, so the type of PI at issue is "not 'historically disfavored'" and does not trigger a heightened burden. Aplee.'s Resp. Br. at 31.

c

The traditional four-factor test from *Winter*, rather than the six-factor test posited by Appellants, remains the applicable PI standard for this case.

Appellants cite two Tenth Circuit cases as the source of the two securities-related factors it believes the SEC must prove on top of the four equitable factors of *Winter*. The first case, *SEC v. Scoville*, 913 F.3d 1204 (10th Cir. 2019), merely quotes *Winter* for the proposition that "[b]ecause the grant of a preliminary injunction is 'an extraordinary remedy,' the movant

must make a 'clear showing' that he is entitled to the injunction." *Scoville*, 913 F.3d at 1213. *Scoville* does not establish that, as a *fifth* PI factor, a plaintiff must make a "'clear showing' that a violation of the federal securities laws has occurred." Aplts.' Opening Br. at 26. Nor does it establish that a plaintiff must make a "'substantial showing' that the violation is likely to occur again." *Id.*

The second Tenth Circuit case Appellants cite, *SEC v. Curshen*, 372 F. App'x 872 (10th Cir. 2010), is an unpublished order and judgment, and so it cannot establish a legal standard for our court. *Curshen* does cite to a published opinion, *SEC v. Pros International, Inc.*, 994 F.2d 767 (10th Cir. 1993), in which we stated, "An injunction based on the violation of securities laws is appropriate if the SEC demonstrates a reasonable and substantial likelihood that the defendant, if not enjoined, will violate securities laws in the future." *Pros Int'l*, 994 F.2d at 769. However, *Pros International* and *Curshen* both concerned permanent injunctions following definitive determinations of liability, not preliminary injunctions.

Regardless, the recent Supreme Court case *Starbucks Corp. v. McKinney*, 602 U.S. 339 (2024), definitively clarifies that a PI, even one used to enforce securities laws, is governed by the traditional four-factor *Winter* test. In *Starbucks Corp.*, the Supreme Court evaluated the validity of a two-factor test the Sixth Circuit had established for PIs pertaining to a particular

kind of labor dispute, which the Sixth Circuit had gleaned from language in the National Labor Relations Act ("NLRA") that provided for such PIs "as [a district court] deems just and proper." *Starbucks Corp.*, 602 U.S. at 343.

Working from the notion that "[w]hen Congress empowers courts to grant equitable relief, there is a strong presumption that courts will exercise that authority in a manner consistent with traditional principles of equity," the Supreme Court determined that "[f]or preliminary injunctions, the four criteria identified in *Winter* encompass the relevant equitable principles." *Id.* at 345. The Court explained that "absent a clear command from Congress, courts must adhere to the traditional four-factor test." *Id.* at 346. Looking to the language in the NLRA, the Court decided that "[n]othing in [the relevant part of the NLRA] displaces the presumption that . . . traditional principles govern" adjudication of equitable relief. *Id.* at 345. Accordingly, the Court concluded "that district courts must use the traditional four-part test when evaluating [a] request for a preliminary injunction under [the relevant part of the NLRA]," not the court-created two-factor test. *Id.* at 345.

Starbucks Corp. shows that the relevant PI standard here also consists of the four equitable factors from *Winter*. *Starbucks Corp.* directs us to look for "a clear command from Congress" in the statute authorizing the PI at issue that would "overcome[] the presumption that the four traditional criteria govern." *Id.* at 346. Neither of the relevant sections—Section 20 of

the Securities Act or Section 21 of the Exchange Act—contains such a clear command. They merely state the first equitable *Winter* factor—that is, a clear showing that the plaintiff is likely to succeed on the merits—with specificity, by stating what success on the merits means (i.e., a showing that "any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof"). *See* 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d)(1). While they also permit PIs upon a showing that a person is "about to engage" in violations of the securities laws, *see id.*; 15 U.S.C. § 77t(b), they do not set out a requirement that the SEC demonstrate "a reasonable and substantial likelihood that the defendant, if not enjoined, will violate securities laws in the future," *Pros Int'l, Inc.*, 994 F.2d at 769.

This conclusion is bolstered by the Supreme Court's opinion in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), which the Court cited in *Starbucks Corp.* In *Hecht*, the Court evaluated the language in the Emergency Price Control Act of 1942, which, in almost identical language to the operative sections of the Securities and Exchange Acts, provided that courts can and should grant an injunction if the regulator "shows that a defendant 'has engaged or is about to engage' in a prohibited act." *Starbucks Corp.*, 602 U.S. at 347 (quoting *Hecht*, 321 U.S. at 322). The Supreme Court determined that this

language did not "create such 'a major departure from th[e] long tradition' of equity" that it displaced the four-factor PI standard from *Winter*. *Id.* (alteration in original) (quoting *Hecht*, 321 U.S. at 330). Accordingly, the nearly identical language in the Securities and Exchange Acts similarly does not displace the four-factor PI standard from *Winter*.

Starbucks Corp. makes clear that courts must apply the four *Winter* factors when deciding whether to grant a PI absent a "clear command from Congress" to the contrary. 602 U.S. at 346. The securities laws at issue contain no such clear command, so the traditional four-factor test applies.

However, Appellants are correct that a heightened PI standard for status quo-altering PIs applies in this case. As a matter of law, "courts 'disfavor' some preliminary injunctions and so require more of the parties who request them." *Mrs. Fields Franchising, LLC*, 941 F.3d at 1232 (quoting *Free the Nipple—Fort Collins*, 916 F.3d at 797). For such injunctions, "the moving party faces a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors: [it] must make a 'strong showing' that these tilt in [its] favor." *Free the Nipple—Fort Collins*, 916 F.3d at 797 (quoting *Fish*, 840 F.3d at 724). "[A] disfavored injunction may exhibit any of three characteristics: (1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party

could expect from a trial win." *Mrs. Fields Franchising, LLC*, 941 F.3d at 1232 (quoting *Free the Nipple—Fort Collins*, 916 F.3d at 797).

The PI at issue falls into the second category. Although the asset freeze here is designed to preserve the status quo, that is not the only component of the district court's PI. Persuasive authority from the Second Circuit establishes that a "prohibition against future securities law violations . . . . accomplishes significantly more than preservation of the status quo." *SEC v. Unifund SAL*, 910 F.2d 1028, 1040 (2d Cir. 1990). The PI at issue includes this forward-looking prohibition. It therefore alters the status quo and triggers the heighted PI standard. Consequently, the SEC "faces a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors: [it] must make a 'strong showing' that these tilt in [its] favor." *Free the Nipple—Fort Collins*, 916 F.3d at 797 (quoting *Fish*, 840 F.3d at 724).

In sum, the proper standard for evaluating whether a PI to enforce the securities laws at issue is merited remains the four equitable factors articulated in *Winter*. These factors are: a showing that the plaintiff "is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

d

Because the first *Winter* factor requires the plaintiff to show that it is likely to succeed on the merits, we now summarize the relevant securities laws that the SEC accuses Appellants of violating.

First, the SEC alleges that Appellants violated Section 17(a) of the Securities Act. This section provides that:

> It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—(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).

The SEC also alleges that Appellants violated Section 10(b) of the Exchange Act. This section provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— . . . (b) To 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, or any securities-based swap agreement[,] any manipulative or deceptive device or

> contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Finally, Rule 10b-5, which the SEC enacted pursuant to the Exchange Act, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (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 (2024).

"The scope of Rule 10b-5 is coextensive with the coverage of [Exchange Act] § 10(b)." *SEC v. Wolfson*, 539 F.3d 1249, 1256 n.11 (10th Cir. 2008) (quoting *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002)).

"To establish a § 10(b) or Rule 10b-5 violation, the SEC must prove that [the defendant] made: (1) 'a misrepresentation or omission (2) of material fact, (3) with scienter, (4) in connection with the purchase or sale of securities, and (5) by [means of interstate commerce]." *SEC v. Smart*, 678 F.3d 850, 856 (10th Cir. 2012) (second alteration in original) (footnote

omitted) (quoting *Wolfson*, 539 F.3d at 1256). "Section 17(a)(1)–(3) requires substantially similar proof with respect to the offer or sale of securities." *Id.* at 857.

"The primary 'difference between § 17(a) and § 10(b) lies in the element of scienter.'" *Id.* (quoting *Wolfson*, 539 F.3d at 1256). We have said that "Section 10(b) and § 17(a)(1) require the SEC to establish at least recklessness, whereas negligence is sufficient for § 17(a)(2) and § 17(a)(3)."[6] *Id.* In the securities law context, recklessness means "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."[7] *GenAudio*, 32 F.4th at 923 (quoting *City of Philadelphia v. Fleming Cos., Inc.*, 264 F.3d 1245, 1258 (10th Cir. 2001)).

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[6] By the language of its complaint, the SEC alleges that Appellants violated § 17(a)(1), § 17(a)(2), *and* § 17(a)(3). *See* Aplts.' App., Vol. I, at 48–49.

[7] The district court assessed that the SEC had shown it would likely be able to prove that Appellants made their statements recklessly. Because we agree, we do not further examine whether the SEC made a sufficient showing of probable negligence. In other words, we assess the SEC's ability to establish the five elements listed in *SEC v. Smart* for a violation of Section 10(b), including recklessness. A sufficient showing on this more exacting test is sufficient to satisfy the lower test for negligence.

"A statement or omission is only material if a reasonable investor would consider it important in determining whether to buy or sell stock." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997). "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.* (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

2

The district court reasonably determined that the SEC had made a strong showing that the first *Winter* factor tilted in its favor. More specifically, the district court did not abuse its discretion in concluding that the SEC was likely to succeed on the merits of its claims that Appellants committed securities fraud by making material omissions or misrepresentations with the requisite mens rea about three topics: (1) executive compensation, (2) the existence of audited financial statements and Reven's readiness to go public, and (3) Reven's involvement in other litigation.[8]

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[8] We again emphasize that because we are evaluating the case at the PI stage, we are not reaching binding conclusions about Appellants' conduct. Such conclusions are appropriate for the fact-finder in the district court to make in the first instance during the actual merits litigation of the SEC's enforcement action, which may come at a later date. Accordingly, our preceding discussion should not be taken as authoritative

a

First, we examine the district court's conclusion that the SEC had "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," Aplts.' App., Vol. XIV, at 2414, and that it also is "likely to prove that the misrepresentations in the PPMs regarding the Reven Principals' compensation were made recklessly," and that, in any event, the SEC had made "a clear showing that those misrepresentations were made at a minimum negligently," *id.* at 2418.

More specifically, the district court found that the SEC was likely to prove that, in PPMs dated August 2018, July 2020, and January 2021, Appellants disclosed to investors that the Reven principals received $4.89 to $9.78 million less in compensation than they actually received. We see no abuse of discretion in the court's determination that the SEC had shown that it was likely to prove on the merits that Appellants recklessly made false and

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pronouncements of Appellants' liability. We merely analyze whether the first cut of the evidence presented by the SEC could support the district court's conclusion that the SEC was likely to be able to show at a future time that Appellants violated securities laws.

misleading material statements to investors about the Reven principals' compensation from 2019 to 2021.

i

Appellants' argument on appeal is that the compensation the Reven principals received was correctly reflected in the principals' employment agreements, which would have been made available to investors if the investors had asked for them. Appellants argue that because the principals' actual compensation was in line with their employment agreements, the compensation statements in the PPMs were not, in context, (1) "false or misleading" or (2) "material." Appellants further argue that executive compensation in any amount was not material to investors. Appellants additionally argue that the district court had no basis to conclude that any misrepresentations were made with scienter.

The SEC responds that Appellants' statements in the PPMs were both false and material. It contends that Appellants' reliance on the employment contracts is "a meritless distraction" and that the contracts do not affect the falsity of the PPM statements. Aplee.'s Resp. Br. at 34–35. It also points to evidence that compensation is material to investors. Finally, the SEC argues that Appellants' arguments against scienter are "a series of irrelevant assertions that do not undermine the court's findings." *Id.* at 40.

ii

The SEC presented a sufficient showing of the statements' falsity. Appellants' false statements in the PPMs were not made true by the existence of the employment agreements. Appellants reported to investors through their PPMs that the Reven principals were compensated $1.62 million for 2019, $1.98 million for 2020, and $2.16 million for 2021. These figures are significantly smaller than the actual compensation the Reven principals received those three years. The figures in the PPMs were therefore false representations of the Reven principals' compensation. That other documents that investors could have asked for stated that the principals could have been compensated at a higher rate does not change the false nature of the PPMs.

iii

Second, the SEC presented sufficient evidence that would likely prove that these misrepresentations were material.

Appellants are correct that other information available in the market alongside misrepresentations is relevant to our analysis of the materiality of the misrepresentations. *See Grossman*, 120 F.3d at 1119 ("Whether information is material also depends on other information already available to the market . . . ."). In this regard, we assume without deciding that the employment agreements are relevant to the materiality determination.

However, ultimately, the agreements do not lessen the material impact of the (false) representations in the PPMs. The employment agreements prospectively provided that the Reven principals would receive certain amounts of compensation. As Appellants describe in their Opening Brief, the agreements established that "the Reven Principals had contractual rights to the money they received." Aplts.' Opening Br. at 34. However, the agreements did not purport to convey the actual recorded compensation that the Reven principals received, as the PPMs did. The employment agreements provided no reason for an investor to doubt that the Reven principals were being compensated the amounts reported in the PPMs.

Appellants' argument that executive compensation as a whole is not material is unpersuasive. Appellants presented evidence that at least one investor did not consider the Reven principals' compensation material to his decision to invest. However, the SEC presented evidence that another investor did consider the Reven principals' compensation material to her decision to invest. Therefore, we cannot say that it was an abuse of discretion for the court—after assessing the merits of these dueling evidentiary showings—to determine that executive compensation statements were material to Reven's investors. *Cf. United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007) (observing in the context of applying the abuse of discretion standard of review that "we recognize that in many cases there will

be a range of possible outcomes the facts and law at issue can fairly support; rather than pick and choose among them ourselves, we will defer to the district court's judgment so long as it falls within the realm of these rationally available choices").

Moreover, Appellants have not identified any cases in which statements about the amount of executive compensation have been found immaterial. On the other hand, as the district court accurately found, several cases from outside our circuit have found that misstatements about executive compensation *are* material. *See, e.g.*, Aplts.' App., Vol. XIV, at 2417–18 (citing *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 [the company]'s officers?")). Additionally, at least one precedential case, *Smart*, confirms that "it would be material to a reasonable investor that his or her money was not being used as represented," i.e., to pay the principals rather than for other productive purposes. 678 F.3d at 857.

iv

Finally, the district court reasonably concluded that the SEC made a sufficient showing that it is likely to prove scienter for these statements. As the SEC accurately points out, Appellants only offer "a series of irrelevant assertions" regarding the court's conclusion that Appellants possessed the

requisite scienter when making the compensation-related misrepresentations. Aplee.'s Resp. Br. at 40–42. Appellants reiterate 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" than they actually received. Aplts.' Opening Br. at 49. And they reemphasize that "the Reven Principals also frequently put their own funds into the Company to pay employees and fulfill staffing agreements." *Id.*

Neither of these two statements provides a reason to depart from the district court's commonsensical finding that the Reven principals knew how much compensation they were receiving and knew the content of the PPMs they were providing to investors. *See* Aplts.' App., Vol. XIV, at 2418–20; *City of Philadelphia*, 264 F.3d at 1258 (explaining that scienter can be satisfied for securities fraud when the defendant's conduct presents a danger of misleading buyers that is "so obvious that the actor must have been aware of it" (quoting *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1232 (10th Cir. 1996))); *GenAudio*, 32 F.4th at 924 ("The securities laws impose a personal obligation on corporate executives . . . to sufficiently ground their communications in facts.").

In conclusion, the district court properly concluded that the SEC was likely to be able to show, through three PPMs that Appellants made

misrepresentations about the amount of compensation the Reven principals received from 2019 to 2021; that these misrepresentations were material to investors; and that these misrepresentations were made with the requisite scienter.

b

Next, we examine the district court's determination that the SEC had shown that it was likely to prove that Appellants made material misstatements with scienter about the status of audited financial statements and Appellants' readiness to go public. Here too we see no abuse of discretion in the district court's assessment.

i

Appellants contend that the district court's analysis of their representations about audited financial statements and their preparedness to go public went awry on three elements: falsity, materiality, and scienter. Appellants argue that their statements about obtaining an audit were understood to be prospective rather than contemporaneously descriptive. They also contend that these statements "did not influence investors' decisions" and that investors "understood that a public offering was possible, but by no means guaranteed," making those statements not material. Aplts.' Opening Br. at 42. Finally, Appellants contend that the statements were, "[a]t the absolute most," negligent

rather than reckless misrepresentations because Appellants did not intend to mislead or know that they were misleading investors. *Id.* at 50.

The SEC defends the district court's reasoning on all three elements. The SEC contends that there was "nothing ambiguous" in Appellants' clear representations that they were "'currently undergoing' [their] first audit" and that they "ha[d]" audited financial statements. Aplee.'s Resp. Br. at 44. The SEC also argues that Appellants' intentional decision to change the tense of the key statements from "will have" (as in, Appellants will have audited financial statements in the future) in the September 9, 2019, email to "has" (as in, Reven has audited financial statements now) in later emails proves scienter.

What's more, the SEC argues that characterizing Appellants' statements about an upcoming IPO as prospective cannot protect those statements because Appellants knew the plans communicated lacked "a sufficient factual basis" in reality. *Id.* at 45–46 (citing *GenAudio*, 32 F.4th at 930–31). On materiality, the SEC argues that readiness and plans for a public offering are plainly material to investors, as proven by several investors' statements.

In their Reply Brief, Appellants home in on scienter and attempt to distinguish their prospective statements about the company's readiness to go public from the Panglossian representations in *GenAudio* on the basis that

they had taken multiple steps towards going public. They also reiterate their argument that the Reven principals' declarations and subsequent clarifying statements show the absence of an intent to mislead.

ii

We are unpersuaded by Appellants' arguments. First, the district court reasonably concluded that the SEC sufficiently showed that it was likely to prove Appellants' statements about the audit were clearly false because no audit ever occurred. In multiple emails, Appellants distributed a slide deck stating, "The Company has the minimum required two years of audited financial statements ending August 2021." *See* Aplts.' App., Vol. VIII, at 948; Aplts.' App., Vol. X, at 1368, 1437; Aplts.' App., Vol. XIV, at 2354. Similarly, on December 9, 2019, Mr. Volk emailed an investor stating, "We are currently undergoing our first audit now." Aplts.' App., Vol. VI, at 507. Yet, the evidence shows—and Appellants do not refute—that Appellants never even retained a firm to begin an audit of Reven's financial statements.

Appellants' only counterargument is that the statements were meant to be prospective. However, the plain meaning of these statements belies this argument. Consider Mr. Volk's December 9, 2019, email—"We are *currently* undergoing our first audit *now*." *Id.* (emphasis added). A prospective reading of this statement is simply not possible.

It is true that the slide decks contained a "[d]isclaimer" stating that "[c]ertain statements in this presentation deck constitute 'forward-looking statements.'" *See, e.g.*, Aplts.' App., Vol. VIII, at 934. However, the disclaimer itself likely proves, by linguistic contrast, that the key statements, which are unambiguous, were not prospective. The disclaimer explains that the "forward-looking statements" in the slide deck "can be identified by the use of forward-looking terminology, such as the words 'will,' 'anticipate,' 'believe,' 'estimate,' 'expect' and similar expressions." *Id.* The key statements at issue contain no such "forward-looking terminology." In fact, Appellants *removed* such forward-looking terminology ("will have") from the statement in the period between the September 2019 slide deck distribution, Aplts.' App., Vol. IX, at 1224, and the November 2021 slide deck distribution, Aplts.' App., Vol. X, at 1437 (changing the tense to "has").

The SEC will likely show that Appellants' representation about filing a Form S-1 was also false. On February 13, 2020, Mr. Lange emailed Ms. Schaatt that Reven had "finally decided that we would comply with all the ('super smart') investment bankers and file an S1 . . . . *We have since done that* . . . ." Aplts.' App., Vol. IX, at 1242 (emphasis added). Appellants unambiguously represented to an investor

that they *had* filed an S-1. However, the evidence shows that Appellants *had not done so*.

iii

The district court reasonably determined that the SEC will also likely be able to show that these misrepresentations were material. They concern Reven's ability to conduct a public offering, which Appellants do not dispute is one of the most impactful events on the status and financial health of a company. *See GenAudio*, 32 F.4th at 933 (favorably citing the Second Circuit's assertion in *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968), that "[m]aterial facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities"). The SEC has also presented persuasive caselaw showing the importance to investors of audited financial statements specifically. *See* Aplee.'s Resp. Br. at 42–43 (first citing *McCurdy v. SEC*, 396 F.3d 1258, 1261 (D.C. Cir. 2005); then citing *United States v. Arthur Young & Co.*, 465 U.S. 805, 819 n.15 (1984); and then citing *New Eng. Carpenters Guaranteed Annuity & Pension Funds v. DeCarlo*, 122 F.4th 28, 53 (2d Cir. 2023), *as amended* (Oct. 31, 2024)).

Appellants offer two retorts. First, they claim that they brought out evidence that investors did not rely on the representations in the slide deck. Second, they claim that investors confirmed that they understood a public offering was not guaranteed. The SEC correctly responds to Appellants' first counterargument by pointing out that actual reliance by specific investors is not part of the materiality inquiry. *See GenAudio*, 32 F.4th at 953 (quoting *Wolfson*, 539 F.3d at 1256).

And Appellants' second argument is inapposite. The alleged misrepresentation was not that Reven was about to engage in a public offering, so investors' statements that they understood a public offering was not guaranteed are simply beside the point. Rather, Appellants' misrepresentation pertained to more granular and concrete matters—specifically, matters relating to Reven's *ability* to go public: *viz.*, information conveying that Reven had the pieces in place, including audited financial statements, to imminently go public if it decided to do so. And there is evidence that investors were influenced in making their investment decisions by Reven's *ability* to go public. *See, e.g.*, Aplts.' App., Vol. XIII, at 1978 ¶ 7 (Decl. of Geoff Leopold, June 10, 2023) ("An important part of my view of Reven and my decision to invest was the potential exit strategy in the form of a Direct Public Offering ('DPO') or Initial Public Offering ('IPO')."); Aplts.' App., Vol. XIV, at 2308, Tr. 117:6–

9 ("[I]f I had known that they were not doing all of the things that they told me that they were doing to prepare for a DPO, I would not have made the investment.").

In sum, the evidence supports a showing that Appellants' misrepresentations about the status of audited financial statements and their readiness to conduct a public offering were material.

iv

Third and finally, the district court reasonably determined that the SEC will likely be able to show that Appellants' misrepresentations were made with scienter. Appellants rely on Mr. Volk's declaration stating that he did not intend to mislead investors and on subsequent statements Appellants made to investors showing that an audit clearly was not completed. But, as the district court found, these points are simply not enough to overcome the conclusion that Appellants made misrepresentations recklessly. There is no ambiguity in the representations, particularly those about the audit, so it was "not reasonable to expect an investor to think" that the statements "didn't mean what [they] said." Aplts.' App., Vol. XIV, at 2427–28. In other words, despite Appellants' purported intent to represent the prospective state of affairs, the risk of misleading a reasonable investor was "so obvious that the actor must have been aware of it." *City of Philadelphia*,

264 F.3d at 1260 (quoting *Anixter*, 77 F.3d at 1232); *see GenAudio*, 32 F.4th at 924 ("The securities laws impose a personal obligation on corporate executives . . . to sufficiently ground their communications in facts.").

In conclusion, the district court did not abuse its discretion when it concluded that the SEC was likely to be able to show that Appellants made multiple material misrepresentations about a nonexistent audit and about Reven's readiness to go public with the requisite scienter.

c

The final category of representations that the district court concluded the SEC would likely show were fraudulent pertain to Reven's involvement in litigation. We discern no abuse of discretion in the district court's findings that the SEC made a sufficient showing as to these statements.

i

Appellants argue that the court's conclusion improperly penalized them for a "perfectly understandable, if incorrect" understanding of the law. Aplts.' Opening Br. at 44–45. Appellants explain that they did not believe the Florida lawsuit qualified as the type of litigation that they claimed they were not engaged in because until December 26, 2019, the Florida lawsuit was only against Reven Pharmaceuticals, Inc. and Mr. Lange. They claim they had no reason to know that Reven Holdings, Inc.

and Reven, LLC—that is, the entities that submitted the 2018 PPM—were liable for Reven Pharmaceuticals, Inc.'s litigation. Similarly, they defend Mr. Lange's February 13, 2020, statement that Reven had "no lawsuits from shareholders" by saying that Mr. Lange did not understand that a suit by the *guardian* of a shareholder counted. *See id.* at 45–46. Finally, they defend their 2021 statements that management did not believe there was any pending litigation that was material by arguing that the district court incorrectly assessed materiality based on the final settlement amount of the lawsuit rather than the conditions existing at the time; the latter, they claim, supported management's belief that the lawsuit was baseless.

The SEC defends the "reasonabl[eness]" of the district court's conclusions regarding the Florida litigation. *See* Aplee.'s Resp. Br. at 48–50. The SEC underscores the district court's assessment that Mr. Lange's "hair-splitting" statement that there were no pending suits by *shareholders* was, in fact, evidence that he was intentionally trying to hide the suit. *See id.* at 49. It also points out that Reven Holdings, Inc. had assumed the liabilities of Reven Pharmaceuticals, Inc. ten days before the first PPM, so the Reven principals should have known that Reven Holdings, Inc. had assumed responsibility for the litigation. And the SEC echoes the court's conclusion that Appellants' justification for their 2021

statements (that they did not believe the litigation was material) is not credible given how long the litigation had been going on and the final settlement amount of the litigation.

ii

The district court's conclusion regarding Appellants' misrepresentations about litigation was not an abuse of discretion. Appellants acknowledge that Reven Pharmaceuticals, Inc. "transferred all its asset[s] and liabilities to Reven Holdings[, Inc.] 10 days prior to the issuance of the [first] PPM." Aplts.' Opening Br. at 45. Therefore, even though Reven Holdings, Inc. was not a party to the lawsuit from the suit's inception, throughout all of the PPMs, as well as during Mr. Lange's February 13, 2020, email, Reven Holdings, Inc. was liable for the lawsuit. Therefore, the SEC will likely be able to show that Appellants' statements that the Reven Holdings, Inc. was not facing litigation were materially misleading.

Additionally, it was reasonable for the court to conclude that Reven's executives, presumably the individuals who decided to transfer all of Reven Pharmaceuticals, Inc.'s assets and liabilities to Reven Holdings, Inc., would have known that they were not off the hook from the lawsuit. *See GenAudio*, 32 F.4th at 924 ("The securities laws impose a personal obligation on corporate executives . . . to sufficiently ground their

communications in facts. . . . Thus, . . . corporate executives . . . cannot make material representations to shareholders in disregard or contravention of obvious facts, nor can they find absolution in the failures of others to disabuse them of their magical thinking regarding obvious facts.”).

Additionally, Appellants are correct that the final amount of the settlement is of limited relevance, but in the initial suit the plaintiff sought damages for his charge’s entire investment in the company, which was over $2.83 million. Consequently, millions of dollars were at stake in the litigation from the beginning of the suit, not just during settlement talks at the suit’s conclusion.

Putting these facts together, it was not an abuse of discretion for the court to conclude that the SEC was likely to be able to show that Appellants’ repeated statements that they were not subject to litigation that could have a material impact on the company “present[ed] a danger of misleading buyers or sellers that [was] . . . so obvious that the actor must have been aware of it.” *GenAudio*, 32 F.4th at 923 (quoting *City of Philadelphia*, 264 F.3d at 1258).

* * *

Based upon the record as found by the district court at the PI stage, the district court did not abuse its discretion when it determined that the

SEC had made a sufficient showing on the first *Winter* factor—*viz.*, a likelihood of success on the merits of its securities fraud claims against Appellants.

3

In this subsection, we turn to the district court's evaluation of the remaining three *Winter* factors. Those three factors require the SEC to show that it "is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Although our analysis is somewhat hindered by the brevity of the district court's reasoning,[9] we determine that the district court's conclusion that the SEC

[9] In its initial order granting the PI, the district court did not use the four-factor standard from *Winter*. However, in its subsequent order denying the motion to lift the asset freeze in its entirety, the district court noted that its previous approach from the initial order had since been "called into question by the Supreme Court's recent decision in *Starbucks Corp. v. McKinney*, [602 U.S. 339 (2024)]." Aplts.' App., Vol. XV, at 2702 n.12. The district court therefore performed a brief alternative analysis under the four traditional *Winter* factors, finding that they were all satisfied by the SEC. Because we agree that *Starbucks* directs courts to apply the four-factor *Winter* standard to evaluate if a PI is merited, the district court's later analysis under the *Winter* test is the basis for our evaluation. The court's analysis is not as fulsome as it could be, but it is sufficient here, particularly given that the *Winter* factors overlap significantly with the test the district court applied when it first granted the PI.

had shown all three of these remaining *Winter* factors was not an abuse of discretion.

a

We first determine that the district court's conclusion that the second *Winter* factor was satisfied was not an abuse of discretion.

The district court offered two reasons to conclude that the second *Winter* factor, a showing that the SEC, acting on investors' behalf, was "likely to suffer irreparable harm in the absence of preliminary relief," 555 U.S. at 20, had been satisfied. First, the court stated, "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." Aplts.' App., Vol. XV, at 2702 n.12. Second, the court assessed that "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.*

Appellants argue that the court's conclusion that violations were likely to recur was based on the court's belief that the alleged preexisting violations had been committed with scienter, and Appellants contend that this belief was incorrect. Appellants also argue that the asset freeze could

not be justified by a desire to protect the assets because it had the opposite effect.

The SEC responds that the district court properly granted the PI to preserve Appellants' assets for the court's jurisdiction. The SEC contends that the court appropriately found that, absent the freeze, Reven's assets would be dissipated, which would deprive investors of the value of their investments and remove the funds from the court's jurisdiction.

The court's conclusion that the SEC had shown it was likely to suffer irreparable harm in the absence of preliminary relief was not an abuse of discretion. Appellants rest their challenge on their criticism of the court's finding of probable scienter, but, for the reasons explained *supra*, there was sufficient record evidence for the court to find probable scienter. Accordingly, the court's assessment that violations were likely to recur unless it enjoined Appellants was supported by the PI record. The necessity of the asset freeze is discussed further *infra*, but we similarly conclude that it was a reasonable determination supported by the district court's preliminary factual findings. We therefore accept the court's conclusion that the second *Winter* factor was satisfied. Stated otherwise, the district court did not abuse its discretion in reaching this conclusion.

b

Second, we believe that the district court's determination that the third *Winter* factor was satisfied also did not evince an abuse of discretion.

The district court determined that the balance of equities favored the PI because the proposed PI entailed a modified asset freeze that protected investors and the SEC while mitigating, to the extent reasonable, harm to Appellants.

Appellants argue that the balance of equities did not support the PI. Their central argument is that the asset freeze was diminishing the value of Reven's assets because it was preventing Reven from maintaining its intellectual property and continuing to develop its invention, thereby damaging the interests of Reven's investors. Essentially, Appellants' argument is that the PI hurt those on both sides, so it was not supported by the balance of the parties' equities.

The SEC responds that the district court appropriately created a narrowly tailored asset freeze that properly balanced the need to maintain Reven's assets *and* the need for the individual Appellants to maintain their living expenses, *with* the need to protect Reven's shareholders.

The district court did not abuse its discretion by determining that the third *Winter* factor favored the PI. The district court granted the PI, including the asset freeze, to "facilitate enforcement of any remedy that

might be ordered." Aplts.' App., Vol. XIV, at 2434. The freeze protected the assets of the investors because it prevented Appellants from dispersing those assets during the pendency of the litigation. Other components of the PI did the same. For example, as the court explained, the "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." *Id.* Therefore, the PI clearly benefited the equities of the SEC (and the public whose interests it was charged with protecting).

However, the district court also narrowed the asset freeze in ways that protected the equities of Appellants. Upon a second submission by Appellants (at the court's invitation), the court narrowed the asset freeze to permit "third parties to pay expenses on behalf of Reven and its affiliates," Reven to "license their intellectual property," "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" for intellectual property maintenance and legal fees, "the Reven Principals to incur new debt on an individual basis" with the court's approval to pay for intellectual property maintenance and legal fees, and to "motion to the Court to unfreeze individual bank accounts that do not contain funds attributable to the defendants, after conferral with the

[SEC] to identify such accounts." Aplts.' App., Vol. XV, at 2699–70. The PI also continued the exception in the TRO that permitted funds to be used to pay "necessary and reasonable living expenses" for Appellants. Aplts.' App., Vol. X, at 1465. Appellants have not shown that these measures were insufficient to protect their equities to the extent required by law given the SEC's showing that they likely violated securities laws. Accordingly, the district court adequately balanced the interests of all the parties involved.

c

Finally, because it does not evince an abuse of discretion, the district court's decision that the fourth *Winter* factor supported the PI also should be upheld.

The district court determined that the fourth *Winter* factor was established because the PI was "not adverse to the public interest." Aplts.' App., Vol. XV, at 2702 n.12.

Appellants challenge the court's conclusion by arguing that the PI was a "disservice to the public interest" because 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." Aplts.' Opening Br. at 53.

The SEC responds that the district court correctly considered the public interest. It argues that the PI was specifically designed to protect the integrity of the securities markets and investments in Reven. Additionally, the SEC contends that the carve-outs the district court built into the asset freeze enabled the continued development of RJX and so did not harm the public interest by stopping progress on the drug, and that any financial shortfalls were a result of Appellants' financial shortcomings prior to the asset freeze.

The district court did not abuse its discretion when it concluded that the public interest weighed in favor of granting the PI, including the asset freeze. Given its conclusion that the SEC was likely to be able to show that Appellants had violated securities laws, the court reasonably concluded that Appellants' control over the companies' assets and abilities to further engage with the securities markets should be halted.

In any event, Appellants' only argument on this point is that the asset freeze stopped the development of RJX, which hurt the public's ability to access this allegedly beneficial drug at some point in the future. The SEC does not dispute Appellants' claim that RJX could benefit the public. However, ultimately Appellants' argument does not prevail regardless because the modifications to the asset freeze sufficiently enabled Appellants to continue developing RJX to the best of *their* ability. Short of arguing that

the asset freeze as a whole should be done away with, Appellants never requested additional modifications that could have better facilitated the drug's development. In sum, the district court did not abuse its discretion when it concluded that the PI, including numerous modifications to protect Appellants and facilitate the continued progress of RJX, was in the public interest.

* * *

In sum, the district court did not abuse its discretion when it concluded that the SEC had made a sufficient showing on all four *Winter* factors and awarded the SEC a PI on that basis. This is so even though, as Appellants have alleged, a heightened PI standard for status quo-altering PIs applies in this case.

C

Appellants' final argument is that the district court abused its discretion when it decided to maintain the asset freeze. The court did not abuse its discretion here, however, because it modified the asset freeze, at Appellants' request, to avoid damaging the assets. It was not obligated to completely lift the freeze because its modifications sufficiently protected the assets.

1

Federal courts are permitted to freeze a defendant's assets as part of a PI during a pending securities enforcement action. *See, e.g.*, *Scoville*, 913 F.3d at 1209. "A freeze of assets is designed to preserve the status quo by preventing the dissipation and diversion of assets." *SEC v. Infinity Grp. Co.*, 212 F.3d 180, 197 (3d Cir. 2000); *see also SEC v. Young*, Nos. 21-1061, 21-1075, & 21-1322, 2022 WL 2977080, at *2 (10th Cir. July 28, 2022) (unpublished)[10] (acknowledging that "protecting the victims of that fraud is the primary purpose of the asset freeze").

2

The thrust of Appellants' challenge is that the freeze was destroying their assets, which contravened its supposed purpose (to preserve the assets so that the district court could utilize them to grant relief at a later date). Appellants contend that the modifications the court made to the asset freeze "were too little and too late to have any meaningful effect."

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[10] *See, e.g.*, *United States v. Engles*, 779 F.3d 1161, 1163 n.1 (10th Cir. 2015) ("Although unpublished orders and opinions generally are not considered binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel, such an order or opinion may be relied on for the purpose of disposing of the issue presented if it has persuasive value with respect to a material issue in a case and would assist the court in its disposition.").

Aplts.' Opening Br. at 57. Appellants argue that their assets should have been completely freed so they could be put to work continuing the development of RJX, which, they argue, would "present[] a highly lucrative reward if successful." *Id.* at 61.

The SEC defends the district court's "measured approach" to the asset freeze, including its multiple modifications. Aplee.'s Resp. Br. at 58–63. The SEC explains that the asset freeze was justified by the court's finding that injunctive relief was necessary to "preserve the status quo and protect Reven's assets from further dissipation," which, in turn, was supported by the court's valid findings that Appellants made multiple material misstatements to investors. *Id.* at 59. It also defends the modifications by arguing that Appellants are the ones who proposed those modifications.

3

We do not appear to have confronted a challenge to an asset freeze on this basis—*viz.*, on the theory that the asset freeze is diminishing the value of the assets rather than preserving them. Neither Appellants nor the SEC cite a single Tenth Circuit case, published or unpublished, during their analyses of the asset freeze. We must therefore look to persuasive authority from our sister circuits (and the animating principles from our doctrine that align with that authority) as well as the facts of this dispute

in order to evaluate Appellants' argument. This approach confirms that the district court's nuanced asset freeze was appropriate rather than "arbitrary, capricious, or whimsical." *Cablevision of Tex. III, L.P.*, 993 F.2d at 210 (quoting *Cox*, 941 F.2d at 1125).

The court modified the asset freeze in several significant ways at the request of Appellants: it permitted third parties to pay expenses on behalf of Reven, it permitted Appellants to license their intellectual property, it permitted the Reven principals to earn new individual income (which it allowed them to use for legal expenses, business expenses, and personal expenses with approval), and it permitted the Reven principals to incur new debt on an individual basis. In other words, the court permitted Appellants to use all means at their disposal—short of enticing other investors with securities—to obtain new financing and continue to fund the maintenance of Reven's intellectual property. The court therefore went to significant lengths to address the harms Appellants alleged and to protect the assets subject to the asset freeze. It did not release those assets to Appellants because, based on its findings of Appellants' securities violations, the court reasonably concluded that doing so would have risked dispersing them.

One of Appellants' criticisms of the court's modifications is that they require incremental court approval for specific expenditures, which

"wastes precious time" when Appellants are faced with "rapidly approaching deadlines." Aplts.' Opening Br. at 56. However, Appellants have provided no reason to believe that ad hoc court approval will be too slow to be effective. To the contrary, the record reveals that the district court has granted Appellants' ad hoc motions to release funds in an extremely prompt manner, sometimes even on the same day the request has been submitted. Therefore, we are not persuaded that the court's ad hoc approval process reflects a "clear error of judgment or exceed[s] the bounds of permissible choice." *Nacchio*, 555 F.3d at 1241 (quoting *Dodge*, 328 F.3d at 1223).

A Second Circuit case that Appellants discuss in their brief, *SEC v. Unifund SAL*, bolsters our affirmance of the district court's approach. In *Unifund*, the Second Circuit modified a district court's asset freeze because it found that the freeze was broader than necessary to achieve its purpose of "assur[ing] that any funds that may become due can be collected." 910 F.2d at 1041. The circuit court found that a restriction in the freeze order that prevented the appellants from any trading in accounts without the SEC's approval was too broad; instead, the court reasoned, the PI should only prevent the appellants from trading that would lower their accounts' balances to below the maximum penalty that they could be expected to pay. *See id.* at 1042.

Although Appellants seek to rely on *Unifund*, the case offers them no support. First, as a point of distinction, in *Unifund*, the Second Circuit found that the SEC had not even presented "sufficient evidence to warrant a preliminary injunction of traditional scope." *Id.* at 1041. Here, by contrast, as explained *supra*, the SEC has presented evidence that supports a traditional PI. In other words, there is evidence here that Appellants likely committed fraud, whereas in *Unifund*, the Second Circuit was not yet convinced that the defendants had committed such conduct. Therefore, the court's greater skepticism of the asset freeze in that case does not counsel greater skepticism here.

However, despite the case's distinction, the underlying principle in *Unifund* supports the court's modified approach here. In *Unifund*, the Second Circuit wanted to preserve the assets that were *at stake* in the litigation but found that additional restrictions on income *above the value of those assets* were unmerited. Here, by contrast, the district court implicitly concluded (and Appellants do not refute) that *all* Appellants' assets may be at stake in the litigation. Yet Appellants nevertheless want to lift the asset freeze to *spend* those assets, for example on patent prosecutions, research, and salaries. Therefore, like the Second Circuit's modification in *Unifund*, which ensured the base value of the assets and lifted a restriction on assets *above* that value, the district court's freeze

order here merely ensures that the base value of the assets is preserved. Indeed, the district court's conditions here, like permitting Appellants to earn additional income to spend, echo the extra trading that the Second Circuit permitted in *Unifund*. Therefore, *Unifund* does not counsel that we reverse the district court's determination.

A case the district court relied upon and Appellants attempt to distinguish, *SEC v. Current Financial Services, Inc.*, 783 F. Supp. 1441 (D.D.C. 1992), also confirms that the district court's approach here was correct. In *Current Financial Services*, the court decided to maintain a broad asset freeze of a company based on three factors:

> First, Current has not maintained accounting records sufficient to evidence its financial condition. . . . Second, to the extent Current's financial condition can be determined, the SEC has demonstrated that it is on the brink of insolvency. Third, Current's underlying business involves a high level of risk, and therefore resuming operations would jeopardize whatever assets Current now has.

783 F. Supp. at 1444. The first factor is not apparently present in the instant case, although Appellants' failure to have audited financial statements and the inconsistencies in their documentation about executive compensation suggest that their financial records are hardly in optimal condition. Regardless, the second factor *is* present in the instant case. Although Appellants properly respond that effects on Reven's finances

caused by the asset freeze cannot retroactively be used to justify the asset freeze, as the SEC points out, the district court correctly found that Reven was "in dire financial straits" *before* the SEC brought its suit. Aplts.' App., Vol. XV, at 2699 n.10 (quoting *id.* at 2582).

The third factor is also present in the instant case. Appellants acknowledge in their Opening Brief that "there is an inherent risk with bringing any new drug to market." Aplts.' Opening Br. at 61. At bottom, Appellants' business is a gamble (albeit one with conceivable public benefits if the gamble pays off). The court reasonably could conclude that investors' remaining assets should not be freed up to continue staking Appellants' gamble.

Therefore, although we do not adopt the *Current Financial Services* factors as authoritative conditions for an asset freeze, the case provides yet another reason to believe that the asset freeze here was within the "bounds of permissible choice" available to the district court "in the circumstances." *Nacchio*, 555 F.3d at 1241 (quoting *Dodge*, 328 F.3d at 1223).

Our unpublished decision in *SEC v. Young* further bolsters our conclusion that the district court did not abuse its discretion by taking a nuanced approach to modifying the asset freeze. In *Young*, we held that the district court did not abuse its discretion when it denied the

appellants' motion for partial relief from an asset freeze following the SEC's allegation of fraud. *See* 2022 WL 2977080, at *5–6. The appellants argued that the asset freeze included funds that had not been tainted by their alleged fraud, and they claimed they needed some of those non-tainted funds to pay for counsel of their choosing. *See id.* We determined that even if we credited their argument that the district court was required to take these assertions at face value, they had not shown that their request "for a six-figure sum" "bore [an] obvious connection to their preceding assertions about their assets and future needs." *Id.* at *6. We ultimately decided that we "c[ould not] say, in such circumstances, that the district court was constrained to exercise its discretion to give the movants what they asked for." *Id.*

Even though the appellants in *Young* mounted a different kind of challenge to the asset freeze in that case, the animating rationale of our reasoning is applicable to the instant dispute. Appellants' lament that the district court's order does not permit them to maintain their intellectual property or act on their research results before those results become unusably dated. Yet to remedy these supposed errors, they request relief of a staggering quantity—*viz.*, the complete unfreezing of all their assets, business and personal.

The district court here found that, even crediting Appellants' concerns, the significant relief they requested was not sufficiently supported by those concerns. Therefore, the court's basis for denying Appellants' motion was similar to the rationale we affirmed in *Young*: namely, that there was a mismatch between the appellants' specific concerns and their request for a large, unspecified amount of money to be released. We therefore conclude that here too the district court did not abuse its discretion when it concluded that Appellants' concerns did not justify returning control over all their assets to the same individuals who likely committed fraud.

In conclusion, the district court did not abuse its discretion when it refused to completely eliminate the asset freeze, and its measures to allow Appellants to maintain the value of the frozen assets were within "the bounds of permissible choice in the circumstances." *Nacchio*, 555 F.3d at 1241 (quoting *Dodge*, 328 F.3d at 1223).

IV

Based on the foregoing, we **AFFIRM** the district court's grant of the preliminary injunction, including the asset freeze and **REMAND** the case for further proceedings consistent with this opinion. We **DENY** Appellants' opposed motion to supplement their appendix with an email exchange between their counsel and the district court.