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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MARK JOSEPH NEJMEH, Plaintiff, v. **THERIVA BIOLOGICS, INC., STEVEN A. SHALLCROSS, JEFFREY J. KRAWS, JEFFREY WOLF and JOHN MONAHAN,** Defendants.	**Case No. 3:26-cv-00705-ART-CSD** **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (ECF NO. 42)** **ORAL ARGUMENT REQUESTED**

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I. OPENING

Fair corporate suffrage "is an important right that should attach to every equity security bought on a public exchange." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (quoting H.R. Rep. No. 1383, 73d Cong., 2d Sess., 13); *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964). And "Congress, the Executive Branch, and this Court ... have 'recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions ....'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013) (Ginsburg, J.) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007)).

In Plaintiff's view, the question in a case of this kind is not the company or its potential. In a market marked by undisclosed and complex financing arrangements, the question is the conduct of the corporate fiduciaries, and the course of dealing of the parties they select, and whether that conduct protects or impairs shareholder value.

Theriva calls Plaintiff "a disgruntled retail investor" who is trying "to hijack how Theriva ... governs itself." (ECF No. 50 at 2.) Plaintiff is a dissatisfied stockholder. He alleges that he was misled and manipulated for four years. He further alleges that the financiers and management here breached their fiduciary duties to shareholders through a scheme to raise capital and reduce market capitalization by offering discounted shares to select investors, and that a trial on the merits will show it.

This motion asks for far less than a trial. It asks the Court to postpone one vote for 34 days, until after Theriva answers the complaint, so stockholders can vote on the facts. Theriva's response treats this as a dispute about the mechanics of a meeting and a "scrivener's error." The facts below, nearly all from Theriva's own filings and sworn in the First Amended Verified Complaint (ECF No. 46, Ex. A) ("Compl."), show what the vote is really about. "Proxy" means Theriva's October 20, 2026 proxy statement (ECF No. 50-2), cited by the page numbers printed on it. "Nejmeh Decl." means Plaintiff's

declaration filed with this reply, and "Reply Ex." means an exhibit to it, cited by the page number stamped on the exhibit.

II. PLAINTIFF

Plaintiff was not gambling on a penny stock. He bought this stock in August 2021 after he thought he had C. difficile, and he found that the company then named Synthetic Biologics held a patent for it: U.S. Patent No. 9,290,754, issued March 22, 2016, which claims a method "for treating or preventing an antibiotic induced C. difficile infection (CDI) and/or a C. difficile-associated disease." (Nejmeh Decl. ¶ 3; Reply Ex. 1 at 2-3 (claim 18); Compl. ¶ 6.) He attended stockholder meetings in person on September 21, 2021, September 30, 2022, October 2, 2023 and December 15, 2025. (Compl. ¶ 6.) He reviewed the company's filings, which he contends were intentionally opaque, and he followed the company closely.

Plaintiff moved into his truck in August 2024 believing in the future of the drugs, on the strength of the company's endless good news over the years. (Nejmeh Decl. ¶ 3.) He did not sell out. He holds 90,191 shares today. (Id. ¶ 2.) He relied on the company and was prepared to hold his shares until the company became profitable. He retained that belief until he came to understand what he now alleges was the actual plan, concealed by favorable announcements and opaque financing transactions. That is the source of his dissatisfaction. Plaintiff contends that he was defrauded.

III. THE COURSE OF CONDUCT ALLEGED

Theriva says Plaintiff has not pointed "to a single cognizable claim of wrongdoing." (ECF No. 50 at 2.) Plaintiff points to the following.

1. Preferred stock issued to obtain the vote on a share increase. In July 2022 Theriva sold MSD Credit Opportunity Master Fund preferred stock for about $3.0 million, with A.G.P./Alliance Global Partners as adviser. The Series D carried 2,000,000,000 votes on three proposals. The proxy explained why: "to assist with procuring the vote necessary" to raise authorized shares from 20 million to 350 million.

By Plaintiff's calculation, at most 34.8% of the common stock voted for the increase. It passed only with the preferred stock's votes. (Compl. ¶¶ 18-20.) MSD was not new. In January 2021 Theriva had cut the conversion price of MSD's 2017 preferred stock "from $18.90 per share to $1.50 per share" and "removed the redemption upon change of control." (Id. ¶ 17.) MSD reports its holdings together with Michael S. Dell, the controlling member of MSD Capital Management. (Id. ¶ 16.) Why did a fund that reports with Michael Dell pay about $3 million for 2,000,000,000 votes? (Id. ¶ 1.)

2. Reverse splits without a stockholder vote, followed by increases in authorized shares. The board effected reverse splits of 1-for-35 in 2018, 1-for-10 in 2022 and 1-for-25 in 2024 without a stockholder vote, each time telling stockholders it was to meet "the per share price requirements of the NYSE American." When the exchange cited its stockholders' equity, Theriva reported the notices under Item 3.01, followed the plan procedure, and regained compliance. Every reported notice concerned stockholders' equity. None concerned share price, and none has been reported since August 5, 2020. (Compl. ¶¶ 22-27.) On the day it approved the 2022 split, the board cut the meeting quorum to one-third. (Id. ¶ 28.) After each split the authorized shares went back up: 10 million to 200 million in 2018, 20 million to 350 million in 2022, 14 million to 350 million in 2024. (Id. ¶¶ 1, 35-36.) Two months after the 2018 split, an A.G.P. offering created rights to about nine times the shares outstanding. (Id. ¶ 33.) One share today is 8,750 shares before those three splits. On August 30, 2024, four days after the last split, 26,144,100 shares traded, about twenty-six times the shares outstanding; the price reached $7.15 and closed at $5.90. Theriva issued no press release. On September 26, with A.G.P., it priced 1,428,600 shares and pre-funded warrants, with a warrant for each, at $1.75, for about $2.5 million, and the stock closed at $1.49 the next day. (Id. ¶ 34.) By Plaintiff's calculation, the same number at the August 30 close would have been about $8.4 million. Plaintiff contends that Theriva could have raised materially more that August, and that its course of conduct depressed shareholder value.

3. Capital raised on the C. diff program without the Phase 3 trial. In February 2018 it called SYN-004 "poised for Phase 3 development." In November 2020 it wrote that it would "not be feasible for us to initiate and complete this trial at this time without a partner." In a February 2021 prospectus for up to $50 million it again listed SYN-004 among its "lead candidates poised for Phase 3 development." Its cash went from $6.227 million on December 31, 2020 to $76.887 million on March 31, 2021, $74.291 million on June 30 and $72.135 million on September 30. It raised about $66 million net that year. It did not run the Phase 3. In December 2021, with A.G.P. as exclusive adviser, it announced the purchase of VCN Biosciences. (Reply Ex. 6 at 3; Reply Ex. 7 at 3; Reply Ex. 8 at 2-3; Reply Ex. 9 at 3-4, 6, 8, 10; Reply Ex. 10 at 3-4.) Theriva has said the trial would cost more than it held. (Reply Ex. 19 at 3.) Plaintiff contends that, with more than $70 million in cash and access to the equity markets, Theriva had the means to proceed to Phase 3 and elected not to. Plaintiff offers this as what stockholders were told and what they paid for, not as a separate claim.

4. Nondisclosure of issued patents. U.S. Patent No. 12,178,917 issued December 31, 2024 and No. 12,274,740 issued April 15, 2025, both for SYN-004, and No. 12,318,434 issued June 3, 2025. (Compl. ¶ 38.) Of 41 U.S. patents issued for the C. difficile program, none was announced by press release after July 2017. Of 10 for SYN-020, none was ever announced. (Id. ¶ 39.) When Plaintiff asked why, the chief executive told him, in words to the effect, that they did not matter. (Id. ¶ 40.)

5. May 7, 2025. Theriva announced its VIRAGE trial results and, the same day, priced an offering of about $7.5 million through A.G.P. at $1.10, a share and a warrant together, under an agreement that restricted the buyers' short sales only until the deal was announced. The stock closed at $1.36 the day before and $0.81 that day. 2,803,100 shares were reported to FINRA as sold short. Failures to deliver went from no more than 2,961 shares to 2,246,939. (Compl. ¶¶ 50-52.) Eight days earlier the board had granted itself options at $1.4144. (Id. ¶ 53.)

6. October 2025. Five months later the board cut those warrants, and others, to $0.54 and gave their holders two new warrants for each one exercised: 16,184,560 New Warrants, with no notice to stockholders before it was agreed. Theriva itself measured "$5.9 million" of value transferred for about $4.4 million in cash, and booked a "deemed dividend" that "increased net loss available to common shareholders." (Compl. ¶¶ 55-56.) The holders are Armistice, Empery, Hudson Bay, Anson, CVI, Intracoastal and Robert Forster. (Id. ¶ 58.) The agreement required that "all management-appointed proxyholders shall vote their proxies in favor." (Id. ¶ 57.)

In those same weeks Theriva sold 15,342,601 shares through A.G.P. Shares outstanding went from 10,304,762 to 33,739,643 before the October 30 record date for the vote on those warrants, and no press release or Form 8-K stated the new count. (Id. ¶¶ 60, 63-64.) On October 24, more than 540 million shares traded. Theriva's release that day said there was no "material development ... not previously disclosed," and did not mention the new shares. Public sites still showed 9.6 million to about 17.7 million shares. (Id. ¶¶ 61-62, 64.) Plaintiff alleges that this was a pump-and-dump scheme that allowed new shares to be sold into the market. (Id. ¶ 62.) Failures to deliver went from no more than 21,788 shares a day to 509,611 on October 16, and to 299,802, 328,264 and 333,088 on October 29, 30 and 31. October 30 was the record date. (Id. ¶ 65.)

Then came a holder Plaintiff has not been able to verify. On November 10, 2025, the day Theriva mailed the proxy for the first vote on those warrants, a first-time filer, the Jeffrey Matthew Gryga Irrevocable Trust, reported owning 739,211 shares as "7.7%" of Theriva. That is the percentage those shares were of the old count of 9,597,952, not of the more than 33 million shares Theriva then had. (Id. ¶ 64.) Plaintiff alleges the filing does not reflect a real, independent investor. (Id.) Plaintiff contends that the filing appeared only after the October trading and served to suggest to stockholders that this holder was the buyer.

7. Four failed meetings, and Spain. Stockholders did not approve the warrants. Meetings drew 4,414,253, 8,159,606, 4,097,159 and 4,388,641 shares, and none reached a quorum. (Compl. ¶ 67.) Plaintiff and two other stockholders came to Rockville on December 15, 2025. Every meeting after that was set in person only in Spain. (Id. ¶¶ 66, 68, 71.) At that meeting Mr. Shallcross announced December 22 as the date to continue it, and Plaintiff and Mr. Bernhardt said they would attend. (Id. ¶ 73.) Later that day, while Plaintiff was driving through Virginia, Theriva's counsel called him. His telephone record is before the Court. (Compl. Ex. 27.) She pressed him to agree that the December 22 meeting not be held, telling him, in substance, "You don't really want to have the meeting on December 22nd." Plaintiff never agreed. (Compl. ¶ 74.) No meeting was held on December 22. (Id. ¶ 75.) Mr. Shallcross has sworn only that representatives "discussed the possibility" of that date. (Id. ¶ 73.) Theriva's chief executive swore that meeting was "called to order"; its counsel wrote, "Because the Special Meeting did not occur, there are no minutes." (Id. ¶ 76.) Twenty-one days after a failed meeting, the directors received options at $0.241. (Id. ¶ 123.)

8. February 2026. Theriva licensed SYN-020, with its 10 unannounced patents, to Rasayana for $300,000 upfront. Its own papers give three different dates for it. On February 19, about 274 million shares traded with no Theriva announcement. Its annual report names no prior relationship with Rasayana's founder, who says she worked on SYN-020 during her postdoctoral training. (Compl. ¶¶ 39, 44-47.) The only related person it names is MaryAnn Shallcross, the chief executive's wife, with her pay and options. (Id. ¶¶ 47, 53.) Plaintiff contends that this disclosure diverted attention from any relationship between Rasayana and Theriva. All 10,204,319 shares it sold that quarter were out by the February 27 record date. (Id. ¶¶ 87, 108.)

9. August 3, 2026. The warrants finally passed 3,665,312 to 2,267,592. There was a quorum only because of 10,823,826 uninstructed broker shares. Without them, 13.2% of the company was present. The proxy told stockholders brokers could vote on

the warrant proposal as "routine," announced "seven (7) items," listed six, and named a "Proposal 7" that did not exist. The four directors were elected with about 8.8% of the outstanding shares. (Compl. ¶¶ 77-80.) Theriva calls this a "scrivener's error" in "two passages." (ECF No. 50 at 2, 12.) The Proxy itself says "errors." (Proxy at 11.)

10. The reverse merger. On July 24, ten days before the vote, the board made options vest on signing a merger agreement. On August 10, seven days after it, the chief executive's agreement was rewritten so that "the Company's execution of a definitive agreement" is a change in control, capturing "all reverse merger structures." The August 10-Q reports "ongoing discussions" on "a range of strategic alternatives that may include a business combination, merger or reverse merger." (Compl. ¶¶ 88-89.)

11. October 9, 2026. Theriva set the record date for this vote on the same day it first announced the meeting and the 500,000,000-share proposal. It mailed the definitive proxy "on or about October 20." (Compl. ¶ 107; ECF No. 50-1 ¶ 4.)

12. October 30, 2026. Eight days after Plaintiff asked this Court to postpone the vote, Theriva signed and closed, in a single day, the sale of SYN-004, its drug with FDA Breakthrough Therapy designation and a completed 412-patient Phase 2b trial, with SYN-007 and SYN-006 assets, for $350,000 upfront. It paid $140,000 of that to PREV ABR LLC and kept $210,000. Its 8-K says there is "no assurance ... that the Company will receive any payments beyond the upfront payment." The assets do not come back even on the buyer's breach. (Reply Ex. 2 at 4-5, 10; Reply Ex. 6 at 4.) That program had been the reason Plaintiff bought. The buyer, Biossil Labs Inc., is a private company reported to be backed by Peter Thiel and OpenAI; about a month earlier it was reported to have raised $153 million at a $1 billion valuation. (Reply Ex. 3 at 2; Reply Ex. 4 at 3.) Plaintiff does not claim Biossil or its investors did anything wrong. The one link Plaintiff has found so far, through Theriva's chairman, is set out in Part IX.

13. Overlapping directors. Plaintiff then learned that the same individuals had engaged in similar conduct for years. Wolf founded Heat Biologics (HTBX), later

NightHawk and Scorpius, and was its chief executive while sitting on Theriva's board. Monahan sat on both boards and in 2023 on both audit committees. Thirteen days apart in March 2023, with the same auditor, both companies told the public their same two quarterly reports could not be relied on. (Compl. ¶¶ 11-12, 94.) A.G.P. was Heat's banker too. In December 2023 that company sold its Elusys subsidiary and the NightHawk name to "a company controlled by" Wolf, its own chief executive, for $500,000 in cash and the assumption of about $40 million of liabilities, with a royalty later replaced by a $2.5 million payment, which was then cancelled for $500,000. Its stock was delisted in 2025, and its lenders foreclosed on substantially all its non-cash assets in December 2025. (Id.; Reply Ex. 13 at 3, 5, 7, 9; Reply Ex. 14 at 2, 4.) Plaintiff contends that company's value was dissipated through questionable transactions and that its assets were disposed of for inadequate consideration. The Court called "similar patterns in other corporations" tangential. (ECF No. 33 at 7.) Plaintiff offers this for one thing: two of the four directors soliciting this vote had direct knowledge of the consequences of that course of conduct. (Compl. ¶ 101.)

14. Overlapping investors. Empery reported 9.99% of Theriva as of June 30, 2025 and 4.99% as of September 30, 2025, just before the inducement. (Compl. ¶ 59.) In July 2025 every New Warrant holder except Armistice (Robert Forster, if the same person) invested in a placement of about $500 million at Volcon, where Empery's founder became Chairman and Co-Chief Executive Officer. (Id. ¶¶ 92-93.) Empery has reported holdings in 178 companies; at least 60 effected a reverse split within twenty-four months of its first report. (Id. ¶ 96.) Several of the same funds appear at Ocugen, and Empery at Timber. (Id. ¶¶ 97-98.) Sabby held more than 5% of Theriva in 2018. (Id. ¶ 99.) Mr. Kraws has taken part in reverse mergers at GridIron and Saleen. (Id. ¶ 95.) Plaintiff believes this is a pattern, and that the directors who saw it knew where it led. (Id. ¶ 101.)

This action began with the issuance of warrants. Plaintiff has since come to allege that those events are the final stage of an undisclosed plan to take this company private, raise private capital, and then return it to the public market or sell it. (See id. ¶ 102.) Plaintiff believes Theriva's anti-takeover provisions work as a poison pill that stops a takeover (id. ¶ 90), and that if they were removed, a drug company might be willing to buy it. Plaintiff does not ask for that here. He raises it because it is why this vote matters.

Theriva reports an accumulated deficit of approximately $364 million. (Reply Ex. 11 at 3-4.) Stockholder capital funded those studies. Plaintiff alleges all of this was a planned pattern to take the value for the financiers and insiders. (Compl. ¶¶ 100-102.) Whether it was is for trial. What is not in dispute is that nearly every step is in Theriva's own filings or in public records. Justice Ginsburg wrote that a court's job "is not to scrutinize each allegation in isolation but to assess all the allegations holistically." Cf. *Tellabs*, 551 U.S. at 326.

IV. ALLEGATIONS THERIVA DOES NOT ADDRESS

Theriva's 19-page response says this motion "re-packages" old theories. (ECF No. 50 at 3.) It does not address any of the following allegations, all sworn in the verified complaint. Plaintiff respectfully asks the Court to note each one.

1. Why did a fund that reports with Michael Dell buy 2,000,000,000 votes, after Theriva cut its conversion price from $18.90 to $1.50? (Compl. ¶¶ 1, 16-20.)

2. Why split the stock three times for a price rule no reported exchange notice cited? (Id. ¶¶ 24-29.)

3. What was the trading of August 30, 2024, and why the $1.75 offering four weeks later? (Id. ¶ 34.)

4. Why were those patents not announced? (Id. ¶¶ 38-40.) Theriva mentions them in one clause. (ECF No. 50 at 10.)

5. What of the May 7, 2025 short sales and failures to deliver, and options granted eight days earlier? (Compl. ¶¶ 50-54.)

6. Why $5.9 million of value for $4.4 million in cash? (Id. ¶¶ 55-56.)

7. Why were 23,434,881 new shares issued before the record date with no press release or Form 8-K stating the count? (Id. ¶¶ 60, 63-64.)

8. Why did the October 24, 2025 release say nothing of them? (Id. ¶ 62.)

9. Who is the Gryga trust, and why the "7.7%"? (Id. ¶ 64.)

10. What of the failures to deliver around the October 30, 2025 record date? (Id. ¶ 65.)

11. Why was every meeting after three stockholders came to Rockville set in person only in Spain? (Id. ¶¶ 66-68.) Theriva says no rule prevents it and that stockholders may vote from home. (ECF No. 50 at 11, 16-17.)

12. Why did Theriva's counsel call Plaintiff to press him on December 22, and what became of that meeting? (Compl. ¶¶ 73-75.)

13. How can a meeting be "called to order" and also "did not occur"? (Id. ¶ 76.)

14. Which date is true for Rasayana, who is behind it, and where did its $300,000 come from? (Id. ¶¶ 44-47.)

15. Could the August 3 vote have had a quorum without 10,823,826 uninstructed shares? (Id. ¶ 79.)

16. Why was the chief executive's agreement rewritten seven days after that vote so that signing a reverse merger is a change in control? (Id. ¶ 89.)

17. What of Empery and the same funds at other companies? (Id. ¶¶ 58-59, 92-99.)

18. What of the same directors, the same auditor and the same non-reliance statements at Heat, and the sale to Wolf's own company? (Id. ¶ 94.)

Theriva offers no explanation for any of them. Its answer is not due until December 1. (ECF No. 40.) That is its right. But it asks that this vote go forward thirteen days before it must respond to these allegations. That is why the vote should be postponed.

V. WHY THE VOTE CAUSES IRREPARABLE HARM

In this District, "the denial or frustration of the right of shareholders to vote their shares or obtain representation on the board of directors amounts to an irreparable injury." *Shoen v. AMERCO*, 885 F. Supp. 1332, 1352 (D. Nev. 1994). Theriva answers that *Shoen* involved a contest for control. (ECF No. 50 at 11.) So it did, as Plaintiff told the Court. (ECF No. 42 at 7-8.) But the right belongs to the shareholder, and it does not depend on a control fight. A court may adjourn a meeting where that is "more equitable to the stockholders of the company ... to further inform the stockholders." *Willoughby v. Port*, 277 F.2d 149, 150 (2d Cir. 1960). Theriva told this Court that if Plaintiff disagrees, "his remedy is to sell his shares." (ECF No. 32 at 2.) Theriva's own case says otherwise. It quotes *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1351 (D. Nev. 1997), for its statement that corporate boards have "great latitude." (ECF No. 50 at 4.) The same paragraph goes on: "shareholders generally have only two protections .... They may sell their stock or vote to replace incumbent board members. For this reason, interference with the shareholder franchise is especially serious. It is not to be left to the board's business judgment." *Id.* Nevada's high court says directors must "fully disclose material information to the shareholders before a vote is taken on a proposed merger," and that such challenges should be brought before completion, by "bringing an action to enjoin the merger." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 12, 14 (2003).

The Court denied the first motion on irreparable harm alone, relying on four things. (ECF No. 33 at 6-8.) Each has changed.

A. The proposed cure. The Court relied on a re-vote "using corrected proxy materials," because a valid proxy statement "would cure." (Id. at 6.) Theriva says that, as promised, it "has now done exactly" that. (ECF No. 50 at 3, 9.) The sworn promise was a vote "on Warrant Exercise Approval using corrected proxy materials." (ECF No. 15-1 ¶ 21.) It repeated that on October 7. (ECF No. 32 at 5.) On October 9 it added 500,000,000

shares and Spain. On October 13 the Court ruled, "given that Defendant is shortly planning on holding a re-vote." (ECF No. 33 at 7.)

It is not a cure, because it cut stockholders off on October 9 and gave them no notice to act. No stockholder could buy shares, move shares into his own name, or otherwise preserve votes against the warrants before the list closed. It took Plaintiff about six weeks to register his own shares. (Compl. ¶¶ 82, 109.) On October 12 alone, the first trading day after the announcement, 1,621,100 shares traded, and those buyers cannot vote. (Reply Ex. 18 at 2.) Theriva answers that NRS 78.350 allows this date, that every record date excludes later buyers, and that Plaintiff held on October 9. (ECF No. 50 at 10-11, 16.) The date is within the statute's days. But a correction exists so that people told the truth can act on it, and Plaintiff's vote against the warrants counts only inside a base frozen before anyone could join it. Theriva has fixed record dates around share counts before. (Part III, items 6 and 8.) That is why ECF No. 42 asks to change the cut-off, not just the meeting date: a record date of November 30, within the days NRS 78.350(2) allows for a December 22 meeting. (ECF No. 42 at 1-2; Compl. ¶ 110.) Moving the meeting alone would leave the same frozen list.

It also keeps what carried August 3. Theriva is right that the labels are now consistent. (ECF No. 50 at 15.) But in its own words, the failed meetings had "no routine matters to be voted upon." (ECF No. 21-1 at 7.) Now Proposal 1 and the adjournment are "routine," so uninstructed shares fill the room again. (Proxy at 7.) Theriva's response never mentions the quorum. The "corrected" proxy lists three failed meetings and leaves out June 5. (Proxy at 11.) Theriva's chief executive swore to that meeting, and Broadridge tabulated it at 4,388,641 shares. (ECF No. 15-1 ¶¶ 13-15; ECF No. 15-11 at 2.) And the Proxy, dated before the sale, says nothing of it. Plaintiff has found no supplement. Stockholders are being asked for shares for "strategic transactions" without being told in the proxy materials that one had just closed. A stockholder would want to know that. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). The statute calls

for "explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Mills*, 396 U.S. at 381.

B. Money damages. The Court relied on money damages. (ECF No. 33 at 6.) Theriva holds three positions at once. There is no loss: "there are no damages and nothing to rescind." (ECF No. 21-1 at 19; see ECF No. 50 at 12.) Any loss is "compensable by monetary damages." (ECF No. 50 at 12.) And the claims are "moot." (Id. at 4, 9, 12.) If the claims are moot, there is no money to collect for them. Nor is it clear from whom damages could be collected. Theriva says it "depends on outside financing to survive" and that a restraint "risks putting the Company out of business." (ECF No. 32 at 2, 5.) Its auditor has raised substantial doubt, and in the last nine months it has let go of two of its programs. (Reply Ex. 19 at 4; Reply Ex. 11 at 4-5; Part III, items 8 and 12.) The Court's order did not address this, and Theriva's response does not either. A party seeking an asset freeze may show "other inability to recover monetary damages." *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009). Loss already suffered is what damages are for. What damages cannot do is give back a vote, or a drug, or a company left able to pay.

Theriva also says the meeting changes no status quo. (ECF No. 50 at 8.) Today there is no 500,000,000-share approval, no ratification, and no new approval of a lower warrant price. After November 18 there are all three.

C. Dilution. The Court considered warrants that might never be exercised and "an already limited shareholder's voting power." (ECF No. 33 at 6-7.) Plaintiff's harm is not the size of his holding. It is what this vote opens, measured against every holder. Theriva's chief executive swears the stock is $0.17, "well below" $0.54. (ECF No. 50-1 ¶ 8.) But the board may, with the holder's consent and subject to NYSE American rules, "reduce the then current exercise price to any amount and for any period of time," and a yes vote is "a new approval of the issuance of the New Warrant Shares at a lower

exercise price ....” (Proxy at 11.) It already cut the May warrants from $1.10 to $0.54. (Compl. ¶ 55.)

The Court did not have the 500,000,000 at all. It “will not be adjusted for any fundamental transactions, including any proportionate reverse stock split ... the timing of which shall be in the Board’s discretion.” (Proxy at 9.) The stated reason: “if we should effect a reverse stock split ... as allowed under Nevada law without stockholder approval, the number of shares of Common Stock authorized will decrease and we do not believe the number will be sufficient ....” (Id.) That is the cycle in Part III, item 2, written into the ballot. At the last ratio, today’s holders would keep about 0.37% if those shares were issued. (Compl. ¶ 85.) That is the ceiling the vote authorizes, not a prediction, and authorized shares are not issued shares. (ECF No. 50 at 16.) But the Proxy says the point is to “act quickly ... in most cases without the necessity of obtaining further stockholder approval and holding a special stockholders’ meeting ....” (Proxy at 10.) No appraisal rights apply. (Id. at 8.) The Proxy warns the shares could help “perpetuate our management,” while saying that is not its purpose. (Id. at 10.) November 18 is the last point at which stockholders decide. See *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 233-34 (9th Cir. 1975); *Telestrata, LLC v. NetTalk.com, Inc.*, 126 F. Supp. 3d 1344, 1353 (S.D. Fla. 2015) (a much larger holder).

D. The harm is not speculative. The Court asked for something concrete. (ECF No. 33 at 7.) Theriva calls a reverse split or merger “speculation.” (ECF No. 50 at 4, 16.) Its Proxy names “reverse mergers” as a use of the shares and warns that failure could hurt “other strategic transactions, such as a reverse merger.” (Proxy at 9, 10.) Part III, item 10 is its own record. The date is certain. The proposal is written. The numbers are Theriva’s.

E. Theriva’s need for capital. Theriva says it “depends on investor capital to fund its cancer research.” (ECF No. 50 at 3, 17.) Its chart shows 281,262,379 authorized but unissued shares today, against 45,892,668 outstanding. (Proxy at 9.) Stockholders

approved 450,000,000 on August 3, and Theriva has not filed it. If Proposal 1 fails, the board "can still effect an increase ... to 450,000,000 shares." (Id. at 9.) It has no "definitive commitments." (Id. at 9.) On November 6 it told this Court about its cancer research, and its chief executive swore to the stock price as of November 5. Neither the brief nor the declaration mentions that a week earlier it sold the C. diff program. (ECF No. 50; ECF No. 50-1.) On November 7 its website still listed SYN-004 as "On-going." (Reply Ex. 5 at 3.) Plaintiff contends that the company's assets are being disposed of while this motion is pending before the Court. Plaintiff does not ask the Court, by this motion, to stop or undo any transaction. (ECF No. 42 at 2.) He asks that stockholders be told before they vote, and he reserves the sale itself for an amended pleading.

F. Whether the harm can be undone. Theriva says, "There is no egg to unscramble here." (ECF No. 50 at 15.) Plaintiff disagrees. The voter list closed on October 9, the day the meeting was announced. Theriva knows who owned shares on that date, it knows who it has to reach, and its solicitation "is underway," while anyone who bought afterward cannot vote. (ECF No. 50-1 ¶ 4; Proxy at 6, 8; Compl. ¶ 107.) The vote approves a lower warrant price and 500,000,000 authorized shares that will not be adjusted for a reverse split. (Proxy at 9, 11.) Once those shares are issued and traded, the vote cannot be held again with the same stockholders (Compl. ¶ 106), and Theriva already calls Counts I and II moot. (ECF No. 50 at 12.)

Theriva's acknowledgment of "errors" does not change that. Plaintiff contends that the acknowledgment does not cure a pattern of similar conduct. Theriva's own corrections go back years: a wrong year and a wrong proxy card in August 2021, a wrong voting web address in August 2023, a 34% quorum in the proxy for the December 2025 meeting that its chief executive swore was "inadvertently stated," and the routine labels in June 2026. (Reply Ex. 15 at 3, 5, 7; ECF No. 15-1 ¶ 11; Compl. ¶ 77.)

VI. THE COMPLAINT AND THE MERITS

Theriva argues against ECF No. 41, which it says "pleads four counts." (ECF No. 50 at 4, 10.) The Court granted leave on ECF No. 46 and will decide on "the first amended complaint." (ECF No. 49.) It has five counts and 128 paragraphs. It pleads the October proxy (Compl. ¶¶ 83-91), the harm (¶¶ 103-106), the record date (¶¶ 107-111), and Spain and the record date as breaches of duty (¶ 123), and it asks for this relief (Relief B, C, D, E, K). Theriva acknowledges the prayer "seeks some of same relief," while denying any connection. (ECF No. 50 at 10 n.2.) The same relief, on the same conduct, is the required relationship. *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015). Plaintiff told the Court the amendment "pleads the November 18 proxy" (ECF No. 46 at 2), and the Court calls this "the challenged shareholder meeting." (ECF No. 49.) Proposal 2 asks stockholders to "ratify and confirm" the very approval Count I attacks. (Proxy at 11.) Count I rests on the June proxy, and Plaintiff does not say otherwise. The relief keeps that claim from being voted away before Theriva answers it.

Theriva says Count IV is not against Theriva. (ECF No. 50 at 14.) Count V is. It seeks a declaration under NRS 78.310 and 78.320 and Theriva's bylaws on the calling, quorum and adjournment of Theriva's stockholder meetings. (Compl. ¶¶ 125-128.) Theriva's brief never addresses Count V, because it answers the old complaint. An order also reaches a party's officers and agents. Fed. R. Civ. P. 65(d)(2)(B).

Serious questions suffice with likely harm and a balance tipping sharply. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Theriva says the vote was "tabulated exactly." (ECF No. 50 at 12.) The question is not the tally. It is whether the classification, and the structure around it, produced the quorum. (Compl. ¶¶ 79, 114.) Theriva's December 2025 proxy had the classification right. (Id. ¶ 83.)

Theriva says there is no economic loss. (ECF No. 50 at 12.) *N.Y.C. Emps.' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1023-24 (9th Cir. 2010), requires it. By his brokerage

records, Plaintiff's stock is worth $759,000 less than he paid for it. (Compl. ¶ 7.) Theriva measured $5.9 million transferred for $4.4 million. (Id. ¶ 56.) Plaintiff has pleaded that the approvals authorized the dilution of his shares and that he suffered economic loss. (Id. ¶¶ 115, 124.)

Count III. Theriva devotes two pages to a count that, it acknowledges, this motion does not rely on. (ECF No. 50 at 13-14.) Plaintiff responds briefly so that the argument is not deemed conceded.

Theriva argues that a "reasonably diligent plaintiff would have known" (id. at 13) that what its chief executive told Plaintiff, in person, at its own annual meeting, was false. Plaintiff attended the meeting and asked. That is reasonable diligence. No filing could disclose what Mr. Shallcross knew when he made the statement, and facts showing scienter are among those that constitute the violation. *Merck & Co. v. Reynolds*, 559 U.S. 633, 649 (2010). Inquiry notice does not by itself start the clock, *id.* at 653, and the burden is on the defendant. *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1206 (9th Cir. 2012). Theriva starts its count at the August 26, 2024 split and the September 18, 2024 proposal. (ECF No. 50 at 13.) A proposal is not an increase. Stockholders approved that increase on October 31, 2024. (Compl. ¶¶ 35, 120.) This action was filed September 16, 2026, and Count III was lodged October 19, 2026 (ECF No. 46 at 1), within two years of that approval.

This is not "fraud by hindsight." (ECF No. 50 at 14.) The statement was false when made, because Theriva had already raised its authorized shares after a reverse split, from 10 million to 200 million in 2018. (Compl. ¶¶ 36, 119.) Theriva says it did so only with stockholder approval. (ECF No. 50 at 14.) The remark was that it could not. And in 2022 the approval came from 2,000,000,000 votes it sold. (Compl. ¶¶ 19-20.) What a company is able to do today is a statement of present fact, not a forecast.

Theriva says Plaintiff pleads no loss causation, citing *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1209 (9th Cir. 2016). (ECF No. 50 at 14.) *Lloyd* reversed on that very

point. Loss causation is a "context-dependent" inquiry, a disclosure need "not precisely mirror the earlier misrepresentation," and the court held the complaint "adequately pleads loss causation." *Id.* at 1210. The remark here was that Theriva could not raise its shares after a split. When it did, that was the truth coming out, and Plaintiff lost money as it did. (Compl. ¶ 120.)

Theriva asked earlier that any injunction be decided "on a complete complaint, on a regular briefing schedule, after a full hearing." (ECF No. 21-1 at 18.) There is now a complete complaint. Plaintiff requests oral argument.

VII. BALANCE OF HARDSHIPS, THE CONDITIONS, AND PUBLIC INTEREST

Theriva says the cost is real and offers no number. Its chief executive's new declaration does not mention cost. (ECF No. 50-1.) Its solicitor's fee is "not more than $10,000 plus expense reimbursement." (Proxy at 8.) Its own Proposal 3 asks permission to "adjourn or postpone" this very meeting "to solicit additional proxies," even to ask holders who voted against to "change their vote." (Id. at 13.) Its cash runs into the first quarter of 2027. (Reply Ex. 12 at 2.) December 22 in Rockville, its headquarters, falls within all of that.

Theriva says nothing authorizes a court to order remote attendance, an independent inspector, or notice of direct registration. (ECF No. 50 at 2-3, 11.) Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), does: "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Borak*, 377 U.S. at 433. In this District, *Hilton* enjoined a board's plan and ordered a meeting held by a date. 978 F. Supp. at 1351-52. Theriva agrees Nevada permits remote participation. (ECF No. 50 at 11.) Its "independent" tabulator (ECF No. 50 at 11; ECF No. 50-1 ¶ 6) is the vendor whose December 15 tabulation Theriva refused to give Plaintiff when he asked for the records of that meeting, answering that "there are no minutes." (Compl. ¶¶ 72, 76.) Each proposal voted separately answers only

half of item (e); the other half is reporting the broker votes separately, and Theriva's declaration does not address it. (ECF No. 50-1 ¶ 5.) That matters because 10,823,826 uninstructed shares made the last quorum. And the reason for notice of direct registration is in the record: it took Plaintiff about six weeks. (Compl. ¶¶ 82, 109.)

Theriva warns that any dissatisfied stockholder will seek the same relief. (ECF No. 50 at 17.) The Supreme Court has explained why few do: "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amgen*, 568 U.S. at 478 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)). The Exchange Act's "animating purpose" is "to insure honest securities markets and thereby promote investor confidence." *United States v. O'Hagan*, 521 U.S. 642, 658 (1997) (Ginsburg, J.).

VIII. THE CONFERENCE, THE BOND, AND THE PRE-FILING REQUEST

Theriva says Plaintiff did not confer in good faith because he said he would state his authority in his motion. (ECF No. 50 at 7 n.1.) Plaintiff put his requests in writing on October 17 and conferred by telephone on October 22. Theriva's counsel said rescheduling would not change the result and that, if the motion stated no legal basis, Theriva would move for sanctions. (ECF No. 42-1 ¶¶ 4, 6; ECF No. 42-3 at 2-3; ECF No. 42-4 at 2-3, 5.) The motion then stated the authority, as Plaintiff said it would.

Theriva asks for a "substantial" bond and names no figure. (ECF No. 50 at 17-18.) The Court may dispense with one where there is no realistic likelihood of harm. *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003). This Court has found Plaintiff "appears to be indigent," at least as to PACER fees. (ECF No. 44 at 2.)

Theriva also asks, inside an opposition, for a pre-filing order. That is a separate request in the wrong vehicle. LR IC 2-2(b). Such an order is "an extreme remedy that should rarely be used," "only after a cautious review." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007); *De Long v. Hennessey*, 912 F.2d 1144, 1147-48 (9th Cir. 1990). Molski had filed about 400 suits. Plaintiff has one. Plaintiff made

procedural errors early, acknowledged them (ECF No. 35; ECF No. 38 at 1), and has since obtained leave to amend and a schedule the Court set for responses before the meeting. (ECF No. 49.)

Theriva calls this motion "an unwarranted demand on the time and resources of this Court and of Theriva," says Plaintiff's filings "have consumed substantial resources," and asks that he file no further motion for injunctive relief without leave. (ECF No. 50 at 2, 18-19.) Plaintiff respectfully submits that this position shows a disregard for its shareholders, coming from a company that reports an accumulated deficit of approximately $364 million and that it has financed its activities "principally from the proceeds of the issuance of equity securities." (Reply Ex. 11 at 4.) Plaintiff is mindful of the demands on the Court's time and has confined this reply to what the motion requires. These filings are necessary.

IX. QUESTIONS THAT ARE OPEN

These are questions, not accusations. Theriva got the lowest upfront among Biossil's disclosed purchases: Galera, $3.5 million; GlycoMimetics, about $1 million "following extensive marketing efforts and discussion with multiple potentially interested parties"; Inventiva, $600,000; Summit, $500,000 for a Phase III C. diff drug. (Reply Ex. 16 at 3, 9, 11, 13.) Theriva's filing names no valuation, no adviser and no other bidder. GlycoMimetics and Galera each sold to Biossil on the way into a merger. (Id. at 5-6, 9.)

Mr. Kraws, Theriva's chairman, joined Kazia Therapeutics in February 2026. Ikarian Capital is a 5% or greater holder of Kazia, has held Theriva shares, and led an investment in Galera before Galera sold to Biossil. (Reply Ex. 17 at 3, 6-7; Reply Ex. 16 at 7.) Plaintiff does not say anyone arranged anything. The questions are: who introduced Theriva to Biossil; whether Mr. Kraws took part in approving the sale; whether the drug was offered to anyone else; and whether a merger or sale of the company is planned before November 18.

X. CONCLUSION

Each step here may appear ordinary standing alone. Plaintiff respectfully asks the Court to consider them together. Plaintiff contends that the pattern was deliberate, and that if such conduct goes unexamined, more investors will be harmed and confidence in fair markets will suffer.

Plaintiff respectfully requests that the Court grant ECF No. 42 and set oral argument before November 18, 2026.

Dated: November 7, 2026

Respectfully submitted,

/s/ Mark Joseph Nejmeh

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