2020R00482/SMS/LER

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Hon.
	:	
v.	:	Criminal No. 22-
	:	
MARC SCHESSEL	:	Count 1
	:	15 U.S.C. §§ 78j(b) & 78ff;
	:	17 C.F.R. § 240.10b-5;
	:	18 U.S.C. § 2
	:	(Securities Fraud)
	:	
	:	Count 2
	:	18 U.S.C. § 1348
	:	(Securities Fraud)

INDICTMENT

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

COUNT 1
(Securities Fraud — 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5)

Overview of the Securities Fraud Scheme

1. From in or about March 2020 to in or about April 2020, the defendant MARC SCHESSEL ("SCHESSEL"), used his position as the Chief Executive Officer ("CEO") of a publicly traded company ("Company-1") to engage in a securities fraud scheme by making material misrepresentations and omissions to investors, potential investors, and the Securities and Exchange Commission ("SEC"), leading to investor losses of at least approximately $116 million.

Relevant Individuals and Entities

2. At all times relevant to this Indictment:

a. Company-1 was a publicly traded health care company whose shares traded on the NASDAQ national securities exchange. Company-1 was required to file reports with the SEC pursuant to Section 12 of the Securities Exchange Act of 1934.

b. SCHESSEL was a resident of Connecticut and the CEO of Company-1.

c. The "Supply Company" was a company based in Australia. Prior to the onset of the novel coronavirus 2019 ("COVID-19") pandemic, the Supply Company sold health and fitness equipment, including cryogenic, massage, and erectile dysfunction therapy devices. During the COVID-19 pandemic, the Supply Company began to represent that it was able to distribute COVID-19 testing kits ("COVID-19 Tests").

d. The "Purchasing Company" was a company based in Fairfield, New Jersey and founded in or about August 2018. According to its website, the Purchasing Company provided a variety of online medical-related services, including therapy, psychiatry, and physician-telehealth visits for assistance with common medical issues such as colds, fevers, and sinus infections.

e. Individual-1, a resident of New Jersey, was an agent of Company-1 and a consultant for the Purchasing Company.

The Scheme to Defraud

3. From as early as in or about March 2020 to in or about April 2020, in the District of New Jersey and elsewhere, defendant

MARC SCHESSEL

knowingly and willfully, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, the mails, and the facilities of national securities exchanges, in connection with the purchase and sale of securities, did use and employ manipulative and deceptive devices and contrivances, and aided and abetted others known and unknown to the grand jury, and attempted to do so by: (a) employing devices, schemes, and artifices to defraud; (b) making, and causing others to make, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon persons—that is, by defrauding purchasers and sellers of Company-1 securities through issuing and causing to be issued public statements that contained material misrepresentations and omissions about Company-1's procurement of COVID-19 Tests.

Goal of the Scheme to Defraud

4. The goal of the scheme was for SCHESSEL to fraudulently increase and maintain the share price of Company-1's securities by issuing and causing to be issued public statements containing material misrepresentations and omissions about Company-1's purchase and sale of COVID-19 Tests.

Manner and Means of the Scheme to Defraud

5. It was part of the scheme to defraud that:

The COVID-19 Pandemic and Company-1's Weak Financial Condition

a. In or about late 2019 and early 2020, COVID-19 spread systematically across the world. Based on a shortage of adequate COVID-19 testing capabilities, the U.S. Food and Drug Administration ("FDA"), which was the primary regulator of medical devices in the United States, began reviewing COVID-19 test applications for "emergency use authorization" and permission to distribute in the United States. But in or about March and April 2020, COVID-19 Tests were still scarce.

b. In or about the same time period, Company-1 was experiencing significant financial difficulties, with the share price of its securities dropping from approximately $2.11 on or about March 16, 2020, to approximately $1.56 on or about March 17, 2020.

c. On or about March 17, 2020, SCHESSEL received a text message from a Company-1 consultant and investor, stating, "Marc maybe we need something in the market?? a must...the stock needs a boost for sure...its a real issue now."

Company-1's Efforts to Buy and Sell COVID-19 Tests

d. In or about late March 2020, SCHESSEL was introduced to Individual-1, and they agreed that Individual-1 would attempt to broker deals for COVID-19 Tests on behalf of Company-1.

e. On or about April 3, 2020, Individual-1, acting on behalf of Company-1, contacted the Supply Company, a potential supplier of COVID-19 Tests. After a few brief exchanges, on or about April 6, 2020, the Supply Company sent Individual-1 a "Supply Agreement" in which the Supply Company offered to provide Company-1 with two million COVID-19 Tests per week for six months, beginning on or about April 24, 2020. According to the Supply Agreement, the COVID-19 Tests would cost approximately $13 each, for a total price of approximately $676 million.

f. On or about April 8, 2020, after receiving a copy of the Supply Agreement from Individual-1, SCHESSEL directed it to be executed on his behalf. Later that day, SCHESSEL and Individual-1 had a phone call with the Supply Company's CEO, during which the Supply Company's CEO represented, among other things, that the Supply Company was distributing COVID-19 Tests manufactured by a Chinese manufacturer ("Manufacturer-1"), had the FDA's permission to distribute Manufacturer-1's COVID-19 Tests in the United States, and was already distributing COVID-19 Tests. On or about the same day, SCHESSEL and Individual-1 each reviewed the FDA's website, which indicated that the Supply Company had permission to distribute Manufacturer-1's COVID-19 Tests in the United States. The

Supply Company did not have permission from the FDA to distribute any other COVID-19 Tests in the United States.

g. On or about April 9, 2020, Individual-1 sent an executed Supply Agreement to the Supply Company on behalf of Company-1.

h. On or about the same day, SCHESSEL received a purchase order from the Purchasing Company for two million COVID-19 Tests at a unit price of $17.50, totaling $35 million (the "Purchase Order"). The Purchase Order provided it was a "revolving order for the next 6 months. Weekly Delivery of 2MM pieces. For Government Programs. Total pieces 48MM."

SCHESSEL Causes the False and Misleading Statements

i. On or about April 11, 2020, SCHESSEL learned from Individual-1 new information that called into question whether the Supply Company had COVID-19 Tests to sell to Company-1 that could be distributed in the United States. Specifically, SCHESSEL learned that the Supply Company had a dispute with Manufacturer-1 and was no longer authorized to distribute Manufacturer-1's COVID-19 Tests. This new information indicated that Company-1 would not have COVID-19 Tests that could be distributed in the United States, meaning that Company-1 could not fulfill its agreement to sell COVID-19 Tests to the Purchasing Company in accordance with the terms of the Purchase Order.

j. Nonetheless, SCHESSEL made and caused to be made at least four false and misleading statements to shareholders and to the public regarding Company-1's deals to purchase and resell COVID-19 Tests.

(1) The April 13 Announcement

k. On or about April 13, 2020, SCHESSEL caused Company-1 to issue a materially misleading press release (the "April 13 Announcement") announcing, without qualification, that Company-1 "received a committed purchase order" for "2 million" COVID-19 Tests "valued at $35M per week." The April 13 Announcement also falsely claimed that Company-1 "anticipates receiving the first 2 million [COVID-19 Tests] within approximately two weeks." These statements were false and misleading because at the time SCHESSEL did not know—in light of the Supply Company's dispute with Manufacturer-1—whether the Supply Company had any COVID-19 Tests permitted to be sold in the United States, let alone COVID-19 Tests that could be provided within two weeks.

l. Immediately following the April 13 Announcement, Company-1's stock price skyrocketed. The day before the announcement, shares of the company closed at approximately $2.25 per share. On or about April 13, 2020, shares closed at approximately $12.02 per share, an increase of approximately 434%. On or about April 13, 2020, Company-1's stock reached an intraday high of $14.88 per share.

m. Within an hour of the April 13 Announcement, Individual-1 contacted SCHESSEL and asked why, in light of learning on or about April 11, 2020, that the Supply Company was not authorized to distribute Manufacturer-1's COVID-19 Tests, SCHESSEL would cause Company-1 to make the false and misleading statements in the April 13 Announcement. SCHESSEL falsely told Individual-1 that

an attorney for Company-1 had directed SCHESSEL to issue the April 13 Announcement.

n. The same day, SCHESSEL apologized to Company-1's Board of Directors (the "Board") for not providing advance notice of the April 13 Announcement, falsely telling the Board that he did not tell them about the April 13 Announcement "due to the sensitivity of the information [and] the potential risk of damage to many many powerful people."

o. The sudden rapid increase in Company-1's share price enabled SCHESSEL to improve Company-1's weak financial position. For example, on or about April 14, 2020—the day after the April 13 Announcement—SCHESSEL advised the Board that because Company-1's stock price had increased significantly, Company-1 could pay off the entire balance of a debt owed to one of its vendors. Subsequently, on or about April 16, 2020, Company-1 issued approximately 100,000 shares to the vendor that were worth significantly more than they would have been prior to the April 13 Announcement.

(2) The April 15 Call

p. Between on or about April 13, 2020 and April 14, 2020, SCHESSEL received additional confirmation that the Supply Company was not authorized to distribute Manufacturer-1's COVID-19 Tests and could not provide Company-1 with COVID-19 Tests that had the appropriate FDA permission to be distributed in the United States.

q. On or about April 14, 2020, SCHESSEL learned from the Supply Company's CEO that the initial shipment of COVID-19 Tests from the Supply Company—even if the Supply Company could obtain the requisite FDA permission—would be 1.5 million COVID-19 Tests, and not two million, as described in the April 13 Announcement. On or about the morning of April 15, 2020, SCHESSEL received a revised invoice from the Supply Company for 1.5 million COVID-19 Tests.

r. On or about April 14, 2020, SCHESSEL received a cease-and-desist letter from the Purchasing Company stating that the Purchase Order was a "preliminary draft" and that there was no binding agreement between Company-1 and the Purchasing Company, as reported in the April 13 Announcement.

s. Nevertheless, on or about April 15, 2020, during a Company-1 conference call (the "April 15 Call") with shareholders, prospective investors, and others, SCHESSEL made several materially false and misleading representations about the status of the agreements with the Supply Company and the Purchasing Company, among them:

i. SCHESSEL claimed that the COVID-19 Test to be sold by Company-1 "had the proper FDA authorizations under the emergency authorization act, was not a Chinese or South Korean manufacturer, [and] was well on its way towards getting full FDA clearance." These statements were false and misleading because, at the time, SCHESSEL did not know—in light of the Supply Company's dispute with Manufacturer-1—whether the Supply Company had any FDA-

authorized COVID-19 Tests, and because he did know that Manufacturer-1 was a Chinese manufacturer.

ii. SCHESSEL claimed that Company-1 would be "receiving the first 2 million rapid detection kits in about two weeks and thereafter 2 million tests per week." SCHESSEL knew at the time that the first shipment of COVID-19 Tests, if any were to be permitted to be distributed in the United States, would be 1.5 million tests. In light of the Supply Company's inability to provide Company-1 with COVID-19 Tests that were permitted by the FDA to be distributed in the United States, SCHESSEL also had no reason to believe that Company-1 would receive two million COVID-19 Tests per week beginning in two weeks.

iii. SCHESSEL reiterated, as first claimed in the April 13 Announcement, that Company-1 had a "committed purchase order from [the Purchasing Company]" even though SCHESSEL knew that he had received a cease-and-desist letter indicating that the Purchasing Company disputed that there was a binding agreement between the Purchasing Company and Company-1. SCHESSEL also knew that, because of the issues with the COVID-19 Tests to be provided by the Supply Company, Company-1 did not have a source of COVID-19 Tests that could be sold to the Purchasing Company in fulfillment of the Purchase Order.

(3) The April 16 8-K

t. From on or about April 15, 2020 through on or about April 16, 2020, SCHESSEL continued to receive additional information confirming that the Supply Company could not provide COVID-19 Tests to Company-1.

u. Nevertheless, SCHESSEL approved and signed an SEC Form 8-K ("8-K") announcement issued by Company-1 on or about April 16, 2020 (the "April 16 8-K"), which reiterated the terms of the April 13 Announcement, even though SCHESSEL knew that the statements that it contained were materially false and misleading, among them:

i. The April 16 8-K stated that Company-1 had entered into the Supply Agreement with the Supply Company, "comprised of 2 million units per week" and "commencing April 24, 2020." SCHESSEL knew at the time that the Supply Company did not have permission from the FDA to distribute COVID-19 Tests and that the first shipment of COVID-19 Tests, if any were to be permitted to be distributed in the United States, would be 1.5 million tests. In light of the Supply Company's inability to provide Company-1 with COVID-19 Tests that were permitted by the FDA to be distributed in the United States, SCHESSEL also had no reason to believe that Company-1 would receive two million COVID-19 Tests per week beginning one week later on April 24, 2020.

ii. The April 16 8-K further stated that Company-1 had previously "accepted a purchase order" from the Purchasing Company. SCHESSEL knew that he had received a cease-and-desist letter indicating that the Purchasing Company disputed that there was a binding agreement between the Purchasing Company and Company-1. SCHESSEL also knew that, because of the issues with the COVID-19 Tests to be provided by the Supply Company, Company-1 did not have a

source of COVID-19 Tests that could be sold to the Purchasing Company in fulfillment of the Purchase Order.

(4) The April 17 Press Release

v. On or about April 17, 2020, an article was published on the Internet alleging, among other things, that the Supply Company was not authorized to distribute COVID-19 Tests manufactured by Manufacturer-1 and did not have COVID-19 Tests that could be distributed in the United States.

w. Still, on or about April 17, 2020, SCHESSEL caused Company-1 to issue another press release (the "April 17 Press Release") that again falsely confirmed the terms of the April 13 Announcement, the April 15 Call, and the April 16 8-K, among them:

i. The April 17 Press Release confirmed that Company-1 had received a "committed purchase order" from the Purchasing Company. SCHESSEL knew that he had received a cease-and-desist letter indicating that the Purchasing Company disputed that there was a binding agreement between the Purchasing Company and Company-1. SCHESSEL also knew that, because of the issues with the COVID-19 Tests to be provided by the Supply Company, Company-1 did not have a source of COVID-19 Tests that could be sold to the Purchasing Company in fulfillment of the Purchase Order.

ii. The April 17 Press Release confirmed that the Purchase Order was for "two million COVID-19 Rapid Testing Units" with "provision for additional weekly orders of 2 million units for 23 weeks" and that Company-1 "continued to

anticipate receiving the first 2 million rapid detection kits within approximately two weeks." SCHESSEL knew at the time that the first shipment of COVID-19 Tests, if any were to be permitted to be distributed in the United States, would be 1.5 million tests. In light of the Supply Company's inability to provide Company-1 with COVID-19 Tests that were permitted by the FDA to be distributed in the United States, SCHESSEL also had no reason to believe that Company-1 would receive two million COVID-19 Tests per week beginning in two weeks.

iii. The April 17 Press Release provided that Company-1 had entered into the Supply Agreement with the Supply Company, "comprised of 2 million units per week" and "commencing April 24, 2020." SCHESSEL knew at the time that the Supply Company did not have permission from the FDA to distribute COVID-19 Tests and that the first shipment of COVID-19 Tests, if any were to be permitted to be distributed in the United States, would be 1.5 million tests. In light of the Supply Company's inability to provide Company-1 with COVID-19 Tests that were permitted by the FDA to be distributed in the United States, SCHESSEL also had no reason to believe that Company-1 would receive two million COVID-19 Tests per week beginning one week later on April 24, 2020.

x. On or about April 19, 2020, despite receiving an email forwarded from the FDA confirming that the Supply Company was not permitted to distribute COVID-19 Tests in the United States, SCHESSEL did not cause Company-1 to correct its prior false and misleading public statements until on or about April 30, 2020.

The SEC Suspends Trading in Company-1 Securities

y. On or about April 21, 2020, the SEC halted trading in the securities of Company-1.

z. As a result of SCHESSEL's fraudulent scheme, investors based in New Jersey and elsewhere lost at least approximately $116 million by, among other things, purchasing Company-1's common stock at artificially inflated prices and selling their shares at a loss.

In violation of Title 15, United States Code, Sections 78j(b) and 78ff, Title 17, Code of Federal Regulations, Section 240.10b-5, and Title 18, United States Code, Section 2.

Count 2
(Securities Fraud — 18 U.S.C. § 1348)

1. The allegations in paragraphs 1-2 and 4-5 of Count 1 are realleged here.

2. From as early as in or about March 2020 to in or about April 2020, in the District of New Jersey, and elsewhere, defendant

MARC SCHESSEL

did knowingly and intentionally execute and attempt to execute a scheme and artifice to (a) defraud persons in connection with securities of an issuer with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and that was required to file reports under Section 15(d) of the Securities Exchange Act of 1934; and (b) obtain, by means of false and fraudulent pretenses, representations, and promises, money and property in connection with the purchase and sale of securities of an issuer with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and that was required to file reports under Section 15(d) of the Securities Exchange Act of 1934, that is, by defrauding investors in Company-1 securities through issuing and causing to be issued public statements that contained material misrepresentations and omissions about Company-1's procurement of COVID-19 Tests.

In violation of Title 18, United States Code, Section 1348.

FORFEITURE ALLEGATIONS

1. The allegations in Counts 1 and 2 of this Indictment are realleged here for the purpose of noticing forfeiture.

2. As the result of committing the offenses constituting specified unlawful activity as defined in 18 U.S.C. § 1956(c)(7), as alleged in Count 1 and Count 2 of this Indictment, defendant MARC SCHESSEL shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c), all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the said securities fraud offenses, and all property traceable thereto.

3. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. Cannot be located upon the exercise of due diligence;

b. Has been transferred or sold to, or deposited with, a third person;

c. Has been placed beyond the jurisdiction of the Court;

d. Has been substantially diminished in value; or

e. Has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c), to seek forfeiture of any other property of the defendant up to the value of the above forfeitable property.

[redacted]
FOREPERSON

PHILIP R. SELLINGER
United States Attorney

JOSEPH S. BEEMSTERBOER
Acting Chief, Fraud Section
United States Department of Justice

CASE NUMBER: 22-

United States District Court
District of New Jersey

UNITED STATES OF AMERICA

v.

MARC SCHESSEL

INDICTMENT FOR

15 U.S.C. §§ 78j(b) & 78ff
17 C.F.R. § 240.10b-5, 18 U.S.C. § 2
18 U.S.C. § 1348

A True Bill,

[redacted]

Foreperson

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