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SEC Cases Offer Insight into Its Approach to Alleged COVID-19 Securities Fraud

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A remote status conference was held June 28 for *United States v. Mark Schena*, currently pending in the U.S. District Court for the Northern District of California. In the recently unsealed superseding indictment, the SEC alleges that Mr. Schena, who serves as the president and chief science officer of biotechnology company Arrayit Corporation (Arrayit), made false and misleading statements regarding a COVID-19 antibody test being developed by the company in early 2020. Mr. Schena is charged with health care fraud, securities fraud, offering illegal kickbacks, as well as conspiracy to commit health care fraud and pay illegal kickbacks.

Public statements relating to Arrayit's COVID-19 test also are the subject of at least three civil actions brought by the U.S. Securities and Exchange Commission (SEC). The three actions — one of which is stayed, one is ongoing, and one has settled — offer some insight into how the SEC is approaching alleged misrepresentations concerning the COVID-19 pandemic.

The first of these cases is brought against Mr. Schena. Specifically, the SEC alleges that Mr. Schena represented to investors, among other things: (1) that Arrayit had all of the materials and components necessary to manufacture a COVID-19 test when it had not yet ordered some of the necessary materials; and (2) that Arrayit's COVID-19 test was pending emergency approval by the U.S. Food and Drug Administration (FDA) when it had not yet been submitted for authorization. The SEC claims this resulted in dramatic increases in both Arrayit's stock price and trading volume. On April 23, the SEC's civil action against Mr. Schena was stayed, pending the resolution of the criminal case against Mr. Schena, noted above, which is proceeding before the same judge.

The second case was brought against Jason Nielsen, an individual who bought and sold Arrayit stock in March and April 2020. Throughout this time period, the SEC alleges that Mr. Nielsen made public statements promoting Arrayit stock on Investors Hub, including representations that Arrayit had a viable COVID-19 test and that the test was pending FDA approval. The SEC further alleges that Mr. Nielsen placed, and cancelled, large orders of stock but attributed the purchases to someone else in a practice frequently referred to as "spoofing." When the Arrayit stock price rose, Mr. Nielsen sold his shares for a considerable profit. The SEC's case against Mr. Nielsen is currently pending.

Additionally, in February 2021, while the cases against Mr. Schena and Mr. Nielsen had already been pending for several months, the SEC brought and settled a third case against Arrayit itself, as well as Rene Schena, Mark Schena's wife and one of Arrayit's original founders, who served as its CEO, CFO, and chairman for over a decade. Filed on February 11 of this year, the claims against Arrayit included the COVID-19 testing allegations at the heart of the other SEC litigations, while those involving Ms. Schena primarily concerned Arrayit's financial

statements in 2017 and 2018; claims relating to these older financial statements have been brought against Mr. Schena as well. Under the settlements entered the following day, Ms. Schena agreed to a three-year officer and director bar, to pay a \$50,000 penalty, and to an injunction against further violations.

The three cases here provide some insight into how the SEC may handle other instances involving COVID-19-related securities fraud and can be considered “message” cases. As seen [previously](#), the SEC has pursued corporations that allegedly made false statements related to the COVID-19 pandemic. Here, where the statements were made to investors, the SEC has indicated a willingness to pursue individuals who make such statements to investors, as well as those who profit from them.

In the meantime, however, the SEC may also proceed with an enforcement action against the company itself, as well as other officers, directors, or employees. We expect additional cases, alleging misrepresentations relating to COVID-19 testing, as well as those relating to COVID-19 vaccine development, methods of COVID-19 prevention, and so-called cures for COVID-19 symptoms. We further expect the SEC to look at companies that announced losses or impairments due to COVID-19, but in fact such were occurring completely unrelated to COVID-19. We will continue to monitor further COVID-19-related SEC enforcement actions to see whether other companies and their officers become the targets of similar actions as well.

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