V. *Activist Short Sellers: Market Manipulators or Market Protectors?*

A. Introduction

Unlike the stereotypical investor who purchases stock with the hope of profiting from the share's appreciated value, short sellers profit when the price of a company's stock declines.[1] A short seller "shorts" his position by borrowing shares from an investor-lender, and immediately selling the shares.[2] The short seller closes his "short" position when he repurchases the shares (at a lower price than he sold for, in order to gain a profit) and returns the shares to the investor-lender.[3] Reporters covering the financial industry monitor short positions because short sellers "make their money looking for targets of opportunity, and the existence of such targets is always newsworthy."[4]

On December 20, 2012 in a three-hour PowerPoint presentation,[5] Pershing Square Capital Market's William Ackman, a short seller and "activist investor," began his crusade to expose Herbalife Ltd. as an "unsustainable 'pyramid scheme.'"[6] Ackman's campaign launch caught the media's attention.[7] Herbalife attempted

---

[1] Christopher C. Faille, Book Review, FED. LAW., Nov.-Dec. 2003, at 57, 59 (reviewing REBECCA SMITH & JOHN R. EMSHWILLER, 24 DAYS: HOW TWO WALL STREET JOURNAL REPORTERS UNCOVERED THE LIES THAT DESTROYED FAITH IN CORPORATE AMERICA (2003)).

[2] *Short Sales*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/shortsale.htm (last visited Mar. 23, 2013).

[3] *Id*.

[4] Faille, *supra* note 1, at 59.

[5] *See* FACTS ABOUT HERBALIFE, http://factsaboutherbalife.com, (last visited Mar. 1, 2013). Pershing Square Capital Management compiles and hosts this website. Copies of Ackman's Executive Summary and slides from the Conference can be found here. *See id.*

[6] Svea Herbst-Bayliss & Sam Forgione, *Pershing Square's Ackman Escalates Fight with Herbalife*, REUTERS (Dec. 20, 2012, 06:30 PM), http://www.reuters.com/article/2012/12/20/us-ackman-herbalife-idUSBRE8BJ0W120121220.

[7] *See generally* Steven M. Davidoff, *Ackman, Herbalife, and Celebrity Short-Sellers*, N.Y. TIMES DEALBOOK (Jan. 1, 2013, 11:53 AM), http://dealbook.nytimes.com/2013/01/01/ackman-herbalife-and-celebrity-short-sellers/ ("The presentation and the stock's decline were widely covered in the financial media. Mr. Ackman's presentation was posted to

to curb the damaging allegations by highlighting Ackman's "misstatements and mistakes."[8] Michael Johnson, Herbalife Chief Executive Officer, equated Ackman's campaign to nothing more than market "manipulat[ion]" to reduce Herbalife's stock price for his own financial gain.[9] Unfortunately for the company, Herbalife's efforts were insufficient against Ackman's mammoth campaign as cautious investors sold their positions and share prices fell.[10]

The ensuing feud between Ackman and Herbalife has focused on the "enormous short position" Ackman held against Herbalife prior to the conference.[11] Analysts speculate that Ackman has already profited "hundreds of millions of dollars" from the decline in Herbalife's share prices.[12] Currently, United States' securities laws do not require short sellers to disclose their positions, so until Ackman chooses to disclose, no one knows how much Ackman shorted on Herbalife.[13] Given the motivation for market manipulation, as the Herbalife debacle exemplifies, some reporters recommend that Congress and the Securities and Exchange Commission ("SEC") explore whether to implement filing requirements for investors that hold large shorts positions.[14] This article, however, argues that the positive role that short sellers play in the market should be a factor that legislatures and regulators consider when deciding on regulation, as severe regulations could negate short seller's helpful effect. Section B outlines the controversy behind Herbalife, explains why some critics, such as Ackman, have labeled the company a "Ponzi scheme,"[15] and discusses short sellers'

Henry Blodget's Business Insider Web site, where it has been downloaded more than 2.8 million times.").

8 *Id*.

9 Liz Moyer & Juliet Chung, *Ackman: Why I'm Shorting Herbalife*, WALL ST. J. (Dec. 20, 2012, 02:48 PM), http://blogs.wsj.com/marketbeat/2012/12/20/ackman-why-im-shorting-herbalife/?KEYWORDS=%22Pershing+Square+Capital+Management+LP%22.

10 Davidoff, *Ackman, Herbalife, and Celebrity Short-Sellers, supra* note 7.

11 Herbst-Bayliss *&* Forgione, *supra* note 6.

12 Davidoff, *Ackman, Herbalife, and Celebrity Short-Sellers, supra* note 7.

13 *See id.*

14 *See id.* ("It is hard to stop shareholders from acting out of fear, but perhaps it is time for the Securities and Exchange Commission to require short-sellers with significant positions to disclose them as they are required to do for long positions, or those bets that a company's stock will go up.").

15 *See Ponzi Schemes – Frequently Asked Questions*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/ponzi.htm (last visited March 24,

negative reputation as market manipulators.[16] Next, Section C provides examples of short sellers contributing to the market.[17] Finally, Sections D and E discuss current regulations applicable to short sellers and potential future regulations.[18]

B. Short Sellers, the Market Manipulators

The Herbalife case study demonstrates the powerful sway active short sellers hold over share prices in the stock market.[19] Herbalife has been developing and marketing nutrient-enhancing products since 1980, but over the years, critics have focused on Herbalife's business model and practices instead of its products.[20] Because Herbalife utilizes a multi-level marketing ("MLM") structure, its products are not sold in stores, but rather are available solely through direct sales from "independent distributors."[21] A company that operates under the MLM structure compensates a distributor both from his "personal sales" to consumers and those from distributors that he recruits and trains.[22]

Because distributors profit not just from their sales but from the sales of people that they recruit under the commission arrangement, some, such as Ackman, have criticized Herbalife as a "pyramid scheme."[23] Ackman went as far as to compare Herbalife's commission structure to "a modern-day version of a Ponzi scheme."[24] Since independent distributors have the potential to earn far more from recruitment than personal sales, the commission system wrongly motivates independent distributors to sell the

---

2013) ("A Ponzi scheme is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors.").

[16] *See infra* Part B.

[17] *See infra* Part C.

[18] *See infra* Parts D, E.

[19] *See supra* Part A.

[20] *Investor Relations*, HERBALIFE LTD., http://ir.herbalife.com/ (last visited Feb. 18, 2013); *see generally FAQ on MLM Companies*, HERBALIFE LTD., http://ir.herbalife.com/MLM-faqs.cfm (last visited Feb. 18, 2013).

[21] *FAQ on MLM Companies*, *supra* note 20; *Multilevel Marketing*, BUREAU OF CONSUMER PROT. BUS. CTR., http://business.ftc.gov/documents/inv08-bottom-line-about-multi-level-marketing-plans (last visited Feb. 2, 2013).

[22] *FAQ on MLM Companies*, *supra* note 20.

[23] Herbst-Bayliss & Forgione, *supra* note 6.

[24] *Id*.

Herbalife system to new recruits rather than the Herbalife products to new customers, thereby turning the company into a pyramid scheme.[25] Ackman supported his allegations with calculations derived from Herbalife's "complicated system of recruitment and financial rewards and incentives."[26]

Because the investing community views Ackman as a celebrity, the financial media closely follows and analyzes his actions.[27] Due to the wide exposure of his presentation, which induced fear and panic among some investors, Herbalife's stock prices plummeted 38% in one week alone.[28] Such a plummet in targeted companies is not uncommon—Herbalife faced a similar situation just last year with another prominent investor, David Einhorn.[29] In May 2012, Einhorn, an investor at hedge fund firm Greenlight Capital Inc., participated on Herbalife's earnings call.[30] Because of his "investor celebrity" status, a few of Einhorn's questions prompted share prices to drop as "investors fear[ed] he ha[d] discovered something wrong."[31] As predicted, his questions generated a loss of almost three billion dollars in Herbalife's market value.[32] Involuntarily drawn into scandal, Herbalife will be hard-pressed to regain normalcy.[33]

---

[25] PERSHING SQUARE CAPITAL MANAGEMENT, L.P., AN EXECUTIVE SUMMARY OF PERSHING SQUARE CAPITAL MANAGEMENTS, L.P.'S PRESENTATION OF "WHO WANTS TO BE A MILLIONAIRE?": A SHORT THESIS ON HERBALIFE, LTD. 1 (2012), http://factsaboutherbalife.com/wp-content/uploads/2012/12/Final-Exec-Summary-1.pdf.

[26] Moyer & Chung, *supra* note 9.

[27] *See* Davidoff, *Ackman, Herbalife, and Celebrity Short-Sellers*, *supra* note 7 and accompanying text.

[28] *Id*.

[29] Juliet Chung, *Einhorn Profited on Bet Against Herbalife*, WALL ST. J. (Jan. 23, 2013, 07:18 PM), http://online.wsj.com/article/SB10001424127887323539804578260023090699616.html?KEYWORDS=+Einhorn+Profited+on+Bet+Against+Herbalife.

[30] *Id*.

[31] *Id*.

[32] Steven M. Davidoff, *Disclosure by Short-Sellers Would Improve Market Clarity*, N.Y. TIMES DEALBOOK (May 22, 2012, 05:49 PM), http://dealbook.nytimes.com/2012/05/22/disclosure-by-short-sellers-would-improve-market-clarity/.

[33] Davidoff, *Ackman, Herbalife, and Celebrity Short-Sellers*, *supra* note 7 ("But Herbalife is mired in a public relations drama when it just wants to get back to normal. It is doing the customary things in a war against a short-seller: trying to depict the investor as misguided while correcting the facts -

Ackman, on the other hand, appears to have "shorted well over $1 billion in Herbalife stock and is already up hundreds of millions of dollars on his bet" as a result of his presentation.[34] These scenarios, as demonstrated by the Herbalife case, contrast the immense incentive for market manipulation by active short sellers.[35] When viewing the potential multi-million dollar profits available to short selling investors juxtaposed against the devastating damage posed to targeted companies in terms of reputation, falling stock prices, and cost of damage control, events like these have led to calls for some sort of regulation of short sellers.[36]

C. Short Sellers, the Market Protectors

In defense of the short sellers, some analysts and investment reporters have argued that these investors have provided positive benefits to the market.[37] Short sellers select target companies based on their suspicion that there is something afoot that has resulted in an overvaluation of the company; often times, what is afoot is corporate fraud.[38] For instance, active short sellers have spotted fraud from

---

or putting its own spin on them. Herbalife has also accelerated a stock buyback, almost Step 1 in any such campaign, and it has hired the investment bank Moelis & Company to represent it. In the end, though, Herbalife will be lucky if it gets back to where it was before Mr. Ackman's presentation, and it will be a struggle to do so.").

[34] *Id*.

[35] *See generally id*.

[36] *See generally id*.

[37] Christopher A. Stanley, *The Panic Effect: Possible Unintended Consequences of the Temporary Bans on Short Selling Enacted during the 2008 Financial Crisis*, 4 ENTREPRENEURIAL BUS. L.J. 267, 268 (2009) ("[B]anning short selling actually has the exact opposite effect: increasing volatility and hindering investor confidence . . . the temporary short selling bans of 2008 were rushed and will likely delay, rather than expedite, economic recovery.").

[38] *See generally id*. at 270 ("Short selling also improves market efficiency by providing information about the perceived value of securities. Short sellers, by borrowing high and covering low, employ a strategy that instills information into the stock markets that would otherwise be lacking."); Davidoff, *Ackman, Herbalife, and Celebrity Short-Sellers*, *supra* note 7 ("Of course, these stocks may be falling because these investors are right. Muddy Waters, for example, made its name by exposing what regulators have since said was outright fraud at the Sino-Forest Corporation, a Chinese

companies that have recently suffered major corporate scandals, such as Enron, Lehman Brothers, and MBIA, Inc., long before the scandals erupted.[39] Short sellers spotted numerous inconsistencies with Enron's books as early as 2000.[40] In a 2001 conference call with Enron officers, short seller Richard Grubman doggedly questioned the officers as to "whether the company had taken any reserves against certain liabilities associated with a water company subsidiary."[41] Rather than provide a definitive answer, Kenneth Lay, Enron's CEO, accused Grubman of seeking to "drive the stock prices down."[42] The dialogue between Grubman and the Enron officers demonstrated their intent was not malicious, but rather they had detected actual problems within the company's financial statements, which is why "Lay had to avoid their queries."[43] Until Enron's downfall, and even during the subsequent prosecution against Enron executives, Lay and Enron's former executives continued to maintain that the short selling "vultures" caused the company to petition for bankruptcy.[44]

Lehman Brothers' demise presents another example in which active short sellers aided the market by shedding light on a company's true financial health.[45] Einhorn earned his "investor celebrity" status after he accurately assessed the true financial condition of Lehman Brothers well before its very public and infamous downfall.[46] James Chanos, a notable short seller who helped discover Enron's fraud,[47] described Lehman's strategy of explaining their stock price drops by blaming the short sellers who

---

company. And shorting is an important part of the market, helping ensure that stocks are priced correctly.").

[39] *See supra* Part C.

[40] Letter from James Chanos, Chairman, Coal. of Private Inv. Co., to Mary L. Shapiro, Chairman, U.S. Sec. & Exch. Comm'n (June 23, 2011), *available at* http://www.sec.gov/comments/4-627/4-627.shtml.

[41] Faille, *supra* note 1, at 59.

[42] *Id*.

[43] *Id*.

[44] *Lay Blames Enron Failure on Attack of Short-Sellers*, N.Y. TIMES (Apr. 27, 2006), http://www.nytimes.com/2006/04/27/business/worldbusiness/ 27iht-enron.html.

[45] *See generally* Letter from James Chanos, *supra* note 40.

[46] Davidoff, *Disclosure by Short-Sellers Would Improve Market Clarity*, *supra* note 32.

[47] *Id*.

questioned their accounting practices.[48]

In these high-stakes situations, short sellers also have much to lose on their bet, as illustrated by Ackman's short of MBIA stock.[49] In 2002, Gotham Partners, Ackman's hedge fund, betted the triple-A rated bond insurer MBIA would collapse; Ackman's gamble had the potential to produce a lucrative two billion dollar profit if MBIA became bankrupt.[50] Ackman assessed MBIA as a "financial institution [with] inadequate reserves, undisclosed credit-quality problems, aggressive accounting, and substantial unconsolidated indebtedness contained in off-balance-sheet special-purpose vehicles."[51] MBIA was highly leveraged at "$1 of capital for every $140 of debt it guaranteed," which meant the company could not afford any errors or defaults.[52] Ackman's short against the giant financial institution backfired so extensively that by January 8, 2003, as Gotham began closing its main funds, the *Wall Street Journal* published Ackman's "fall-from-grace story."[53] To make matters worse, Ackman's campaign also drew the attention of former New York Attorney General Eliot Spitzer, who began investigating allegations of impropriety from Gotham Partners.[54] It was not until March 2005 that Ackman finally succeeded in profiting from his bold risk.[55] During that month, MBIA amended its prior financial statements to account for a transaction that Ackman claimed was problematic in 2002, and then the company announced that it had "received subpoenas covering a range of issues from both the SEC and . . . Spitzer's office."[56]

---

[48] Letter from James Chanos, *supra* note 40.

[49] *See generally* CHRISTINE S. RICHARD, CONFIDENCE GAME: HOW HEDGE FUND MANAGER BILL ACKMAN CALLED WALL STREET'S BLUFF (2010).

[50] *Id*. at 1–2.

[51] *Id*.

[52] *Id*. at 2.

[53] *Id*. at 40. *See generally* Henny Sender & Gregory Zuckerman, *New York Examines Research by Gotham Partners on MBIA*, WALL ST. J. (Jan. 10, 2003), http://online.wsj.com/article/SB1042170892871569424.html.

[54] Sender & Zuckerman, *supra* note 53.

[55] Alistair Barr, *Ackman's Bets Against MBIA, Ambac Paid Off in October*, MARKETWATCH (Nov. 28, 2007), http://articles.marketwatch.com/2007-11-28/news/30753929_1_bond-insurers-mbia-and-ambac-ambac-financial.

[56] Bethany McLean, *The Mystery of the $890 Billion Insurer*, CNN MONEY (May 16, 2005), http://money.cnn.com/magazines/fortune/fortune_archive/2005/05/16/8260164/index.htm.

As demonstrated in the three previous cases, short sellers risk retaliation from target companies, investigations by attorneys general, and insolvency on their short.[57] However, these cases also illustrate how short sellers have uncovered serious fraud perpetuated by the companies, thereby aiding the market to adjust over-inflated share prices to reflect a company's true value.[58] If the SEC requires short seller disclosures, these investors would likely face greater hurdles convincing wary analysts, as the value of their potential profits may speak louder than the truth of their claims.[59]

D. Current Regulation of Active Short Sellers

While Herbalife and Pershing Square Capital continue to wage a battle over the market, their feud illustrates a need for short sellers to disclose their positions in companies, especially when a short seller publically campaigns against the company.[60] Under federal securities laws, short sellers do not need to disclose their trading positions.[61] However, the Securities Exchange Act of 1934[62] prohibits persons from making any statement that is "false or misleading with respect to any material fact, and which that person knew or had reasonable ground to believe was so false or misleading" in order to facilitate a stock transaction through its "[m]anipulation of security prices" section.[63] Another section of the 1934 Act specifically forbids manipulating securities through short sales, and explicitly grants the SEC Commissioner the power to issue "rules as are necessary or appropriate to ensure that the appropriate enforcement options and remedies are available for violations of this subsection in the public interest or for the protection of investors."[64]

---

[57] *See infra* Part C.
[58] *See infra* Part C.
[59] *Lay Blames Enron Failure on Attack of Short-Sellers*, *supra* note 44; *see generally* Davidoff, *Ackman, Herbalife, and Celebrity Short-Sellers*, *supra* note 7.
[60] *See generally* Davidoff, *Disclosure by Short-Sellers Would Improve Market Clarity*, *supra* note 32.
[61] *Id*.
[62] 15 U.S.C. § 78i (2006 & Supp. V 2011).
[63] *Id*. § 78i(a)(4) (Supp. V. 2011).
[64] *Id*. § 78i(d) ("It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange to effect, alone or with one or more other

These provisions grant the SEC the power to investigate anyone suspected of improperly manipulating a company's stock price through use of "false or misleading statements," a provision that targeted companies of active short sellers often use to attract the SEC's attention.[65] In September 2008, the SEC announced it would focus on "possible manipulation of the stock of financial firms through the spread of false rumors" by announcing a "sweeping expansion of its investigation."[66] While the statutes provide for severe penalties for violations, they also burden the SEC by requiring the agency to prove the short seller made a statement that was "false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading."[67] As a result, the SEC has filed few actions compared to complaints submitted by targeted companies.[68] Thus, the current regulatory landscape is ineffective.

E. Are Future Regulations on the Horizon And Should They Be?

The SEC's current policy requires disclosure of any and all information pertinent to an investor.[69] Section 13(d) of the Williams Act of 1968, which amended the Securities Exchange Act of 1934, originally required any person who acquired more than 10% of shares of a company to file a statement with the SEC.[70] Now, a

---

persons, a manipulative short sale of any security. The Commission shall issue such other rules as are necessary or appropriate to ensure that the appropriate enforcement options and remedies are available for violations of this subsection in the public interest or for the protection of investors.").

[65] Peter J. Henning, *Fate of Herbalife's Stock May Lie with Government Agencies*, N.Y. TIMES DEALBOOK (Jan. 14, 2013, 11:54 AM), http://dealbook.nytimes.com/2013/01/14/fate-of-herbalifes-stock-may-lie-with-government-agencies.

[66] *Id*.

[67] *See supra* note 63 and accompanying text.

[68] Henning, *supra* note 65.

[69] *The Laws that Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/laws.shtml (last visited Mar. 1, 2013).

[70] Williams Act of 1968, Pub. L. No. 90-439, § 13(d), 82 Stat. 454, 454 (codified as amended at 15 U.S.C. § 78m(d) (2006)) ("Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title or any equity security issued by a closed-end investment company registered

company must report to the SEC if it owns a mere 5% of shares.[71] There are no similar requirements for short sellers.[72]

Recently, Congress has begun considering the feasibility of short sale reporting disclosures.[73] Under section 417 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress commissioned the SEC to study "the feasibility, benefits, and costs of requiring reporting . . . [of] short sale positions of publicly listed securities." [74] Although the 2010 Act required the SEC to report the results from the study and any recommendations to Congress within one year's time,[75] the SEC has yet to publish the study's results and concludes that no "responsive information exists" upon a Freedom of Information Act request.[76]

Proponents for disclosure requirements argue that when "investment celebrities" such as Ackman and Einhorn campaign against targeted companies without fully disclosing their position, they "[push] investors to make decisions based not on the

---

under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 10 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors.").

[71] 15 U.S.C. § 78m(d) (2006 & Supp. V 2011) ("Reports by persons acquiring more than five per centum of certain classes of securities.").

[72] Davidoff, *Ackman, Herbalife, and Celebrity Short-Sellers*, *supra* note 7; Davidoff, *Disclosure by Short-Sellers Would Improve Market Clarity*, *supra* note 32.

[73] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 417, 124 Stat. 1376 (2010) ("Commission Study and Report on Short Selling").

[74] *Id*.

[75] *Id*. at § 417(b) ("The Commission shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives—(1) on the results of the study required under subsection (a)(1), including recommendations for market improvements, not later than 2 years after the date of enactment of this Act; and (2) on the results of the study required under subsection (a)(2), not later than 1 year after the date of enactment of this Act.").

[76] Letter from Tina L. Churchman, FOIA Research Specialist, U.S. Sec. & Exch. Comm'n, to author (Feb. 19, 2013) (on file with author).

information but on fear."[77] Therefore, disclosures can assuage investor's apprehensions by providing investors with more information about these investor celebrities so analysts can fully evaluate negative information about the targeted company in light of the short seller's potential profit.[78] A short seller's disclosed position could enhance the credibility of the claims by showing that he has put his money where his mouth is.[79] However, while disclosures would help analysts and investors address some of the issues of market manipulation, it could also discount the credibility of short sellers whose reputations already suffer attacks by target companies.[80] Because investors and analysts weigh a short seller's claims against his potential profit, the perceived sincerity of the allegations about a company's conduct is diminished by the magnitude of the profit so that the short seller must struggle even more to convince investors and analysts.[81] Further, if a short seller does not have sufficient funds to support his claims, does that tarnish the accuracy of his claims?[82] On the one hand, there are short sellers with the insidious intention to manipulate the market by leveling accusations against otherwise healthy companies solely for personal gain.[83] On the other hand, short sellers may simply be reaping the benefits of years spent in "intensive research," poring over financial statements and crunching numbers to discover the fraud.[84]

F. Conclusion

Author Christopher Faille wrote the most befitting description of the short seller dilemma:

---

[77] Davidoff, *Ackman, Herbalife, and Celebrity Short-Sellers*, *supra* note 7 ("So when investment celebrities disclose their bets against companies, particularly in very public places like a Sohn Foundation event, they create momentum, pushing investors to make decisions based not on the information but on fear.").
[78] *Id*.
[79] Davidoff, *Disclosure by Short-Sellers Would Improve Market Clarity*, *supra* note 32.
[80] *See supra* Part D.
[81] *See supra* Part C.
[82] *See supra* note 79 and accompanying text.
[83] *See supra* Part B.
[84] *See supra* Part D; Richard, *supra* note 49, at 2.

> If short sellers are suddenly active in the stock of Denmark Inc., then reporters naturally wonder whether they know that something is rotten there and want to talk to them about it. Yet short sellers are tricky as sources because they may benefit not from any genuine rottenness but simply from the creation of an artificial stench in the neighborhood of Denmark Inc.—that is, enough bad press to scare off buyers. [85]

This article has identified when short sellers' actions have had the potential to be destructive to a company, on the one hand, yet beneficial for society at large, on the other.[86] The SEC and Congress together have the daunting task of finding a middle ground that provides adequate disclosure to investors in the market while retaining short sellers' incentive to continue their work without market manipulation.[87]

Joanna Lee[88]

[85] Faille, *supra* note 1 (analogizing the short seller's dilemma to Shakespeare's famous line in *Hamlet*, "Something is rotten in the state of Denmark.").
[86] *See supra* Parts B, C.
[87] *See supra* Part E.
[88] Student, Boston University School of Law (J.D. 2014).