

January 9, 2009

Ms. Florence E. Harmon
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: Release No. 34-58785 File No. S7-31-08;

Ms. Harmon:

Before I begin to respond to the proposal the Commission must first recognize that it is not my intent to eliminate the short seller role from our public markets. Short sellers, like long investors, play a significant role in the efficiency and price protections of our markets. I understand that this is likewise the belief of the Commission staff which is why the Commission had treaded so softly on reforms intended to curtail abusive short selling.

That being said, it is my belief that the Commission should expedite a rule change that not only requires short sellers of a threshold investment class to file their short positions with the Commission and that such positions should be made public. If the Commission is under the belief that short sellers play a significant role in the price discovery of a market such a role must be transparent to those who invest in such markets.

As I read the comment memos from the short interest community their responses centered entirely on the needs of their business model without concern over the overall integrity of the markets or the long investor who has likewise invested in that market. I ask, should a long investor be made aware that an investment they are about to engage in has been targeted by a common network of short sellers? Is there adequate transparency in an investor who sees a periodic short interest report detailing quantity but without defining what comprises that quantity?

As an investors taking on a long position, the investor can research who it is that has committed a capital investment in that market. In the decision making process the investor has the opportunity to use the reputation of those professionals who have already committed to this investment. The investor should similarly understand who has bet against the company and use their reputations to decide whether such an investment is safe.

Ultimately, investor safety is the primary role of the Commission and there can be no better investor protection than that of full transparency. Failing to define who it is that has targeted a company for a decline restricts the investor from making a fully sound decision on their investment. Unless the Commission can in good conscience determine that packs of short sellers do not target companies and that unethical tactics are not used to alter markets during the short sale process, the Commission must provide the highest level of transparency to the investing public and that includes short interest and long interest disclosures.

I believe that for the most part the concerns raised by investors regarding the tactics of short sellers are justified. Those short sellers who commented on this proposal have spoken in doubletalk similar to how they trade our public markets. The comments generalize on how liquidity is being provided and how price discovery is enhanced through their trade techniques. Never once did those that commented discuss how short sellers target certain companies in a pack and how they use computer trading algorithms to strip hundreds of millions in market capitalization in the blink of an eye.

To sum up the comments submitted by the short selling community they each focus on common key arguments that when looked at objectively are nothing more than smoke and mirrors.

1. *Public disclosure will cause competitive harm. Institutional investment managers filing Form SH could suffer competitive harm if their short sale positions were disclosed to the public.*¹

2. *Public disclosure of institutional investors' short sale activity may encourage other market participants to duplicate these transactions by easily identifying heavily shorted issuers or industries. In these situations, reported short sales and short positions would likely result in additional short selling, causing securities prices to fall further.*²

3. *The Commission's Cost Estimates of Preparing a Form SH is Not Realistic*
*The Release sets forth the Commission's estimates for the time and expense incurred by each Form SH filer as follows: (1) each filer will spend 20 hours for each filing, at an hourly rate of \$175 (for a total of \$3,500); (2) outside law firm legal costs will be \$1,000 per filing; and (3) the filing agent costs will be \$1,500 per week.¹² Based on these estimates, each filer will incur a weekly expense of \$6,000 (\$3,500 for internal cost plus \$2,500 for outside legal firm and filing agent fees). Pursuant to these estimates, we believe an undue burden is placed on managers, especially those with smaller portfolios.*³

4. *It will only restrict and hamper legitimate short sales, increase the possibility of issuer retaliation, and place a substantial burden on investment managers, exceeding any similar burden placed on long-side investors, at a time when such burdens are neither necessary nor beneficial to the securities markets.*⁴

I believe that much of these arguments used by the short selling community can be discredited by a single article written for the Wall Street Journal more than two decades ago and highlights one of the commenter's listed above. The information identified in this article provides a first hand look at how the short selling community existed some 23 years ago and with evidence before us today, how the short selling community continues to operate today.

Anybody who watches Wall Street has seen the tracks of the short sellers -- a deluge of selling that swamps a stock. But very few catch a glimpse of the people and forces triggering such price moves. What some critics label "collusion" is actually an ad hoc network of short sellers and others who share ideas, help one another avoid mistakes and sometimes hurt one another in the process. One active short seller estimates that the ideas for 80% of his investment "plays" come from the network.

*Often, the short sellers in the network brief one another in person. At other times, the information is spread by brokers, securities analysts, traders and even back-office workers in a small group of firms through which the shorts generally operate. The network is sometimes so efficient that short sellers often seem to be pouncing on a stock in highly orchestrated fashion. Though some of that occurs among cliques within the network, short sellers generally act independently and make their own decisions about whether to participate in a particular investment maneuver.*⁵

¹ Comment submitted by James Chanos

² Comment submitted by Wellington Management

³ Comment submitted by Seward & Kissel LLP

⁴ Comment submitted by Akin Gump Strauss Hauer & Feld on Behalf of David Einhorn

⁵ WSJ (1985): Market Hardball: Aggressive Methods Of Some Short Sellers Stir Critics to Cry Foul --- Loosely Allied Traders Pick A Stock, Then Sow Doubt In an Effort to Depress It --- Gray Area of Securities Law by Dean Rotbart

How can a short seller expect the protection of proprietary trading strategy when the short seller engages in an open discussion with a network of investment managers and will likewise solicit the support of brokers, analysts, traders, regulators, and members of the financial press to aid in the execution of the strategy?

Certainly, when a short seller solicits members of the financial media to craft articles on a particular issuer is that not disclosing the very 'proprietary research' each claim to have committed capital to obtain? Are the public articles themselves not intended to be the catalysts to drive markets down and thus part of a trade strategy that includes disseminating information to the public?

The attached e-Mail thread certainly exposes how some short sellers have willingly given up their trade secrets to members of the financial media in order to move a market. As seen below is an e-Mail exchange held between short seller Marc Cohodes and Fortune Reporter Bethany McLean.

*From: Marc Cohodes
Sent: Thursday, December 7, 2006 3:21:12 PM
To: Bethany McLean
Subject: ffh
FFH is the Canadian Enron and it could even be worse... We are sending you stuff.. I suggest since [Copper River employee and former SEC attorney Richard] Sauer is on the East Coast (for now) that you 2 meet, and soon... there is an "enterprise" here and he can lay it out clear as day.*

*From: Bethany McLean
Sent: Thursday, December 7, 2006 3:48:43 PM
To: Marc Cohodes
Subject: Re: ffh
Makes sense. Send me whatever you can think of - the more documents the better!*

*From: Marc Cohodes
Sent: Thursday, December 7, 2006 3:51:37 PM
To: Bethany McLean
Subject: Re: ffh
don't you worry...where do you want the stuff fed-exed to... I would set up a time for Sauer to come and see ya.. His code name is "Lavaman"...*

*From: Marc Cohodes
Sent: Wednesday, March 21, 2007 9:51 AM
To: Bethany McLean
Subject: ffh
you hear anything there??? the stock is up 45 points since your piece and I dont understand it...*

*From: Bethany McLean
Sent: Wednesday, March 21, 2007 11:51:57 AM
To: Marc Cohodes
Subject: Re: ffh
I'm getting the same question from other people. No, I don't have a clue. I'm worried they've gotten the SEC or the Southern District to take them seriously - the Spyro [Contogouris] stuff makes you realize anything is possible - and they're leaking the news to shareholders ahead of time. What do you think?*

*From: Marc Cohodes
Sent: Thursday, March 22, 2007 5:12 PM*

*To: Bethany McLean
Subject: Re: ffh
415-350-88***

*From: Bethany McLean
Sent: Thursday, March 22, 2007 6:12:48 PM
To: Marc Cohodes
Subject: Re: ffh*

Sorry to be a little bad-tempered. This FFH story almost killed me, so I hate hearing that it was pointless. Maybe it'll be a long, slow thing..⁶

What exactly does the Commission staff believe Bethany McLean meant when she declared "I hate hearing that it was pointless"? Is McLean disappointed in that she drafted a copy with the intention of driving the market in Fairfax down and the market did not respond accordingly? If the financial media has been solicited to transact a proprietary trade strategy into the public domain, is it not fair to assume that the public has a right to understand who and what may be behind such a story?

If the intent of the Fortune article was to drive the market in Fairfax Financial down, and the arguments used for the article were based entirely on the opinion of a specific short seller, under what proprietary status does such an investor have to the trade strategy? What we have come to realize through court discovery is that Marc Cohodes initiated a \$4 Million short position in Fairfax Financial shortly after McLean reached out and met Mr. Sauer but before her article was published.

It has been likewise widely recognized that short seller James Chanos has held annual conferences soliciting a network of other investment managers of the short sale persuasion. The agenda for the conference has been to discuss targeted business sectors and companies to review as investment strategies for the year. Such conferences fly in the face of any claim that public disclosure would eliminate competitive advantage as the peers solicited for the conference are in most cases the closest competition these investors have. With the larger players all gathered in a conference to discuss trade secrets, who exactly are these short sellers in fear of gaining their competitive advantage, the smaller short sellers?

In yet another package of e-Mails uncovered the evidence exposes that hedge funds work closely with analysts to discuss trade strategies and communicate information gathered to other hedge fund competitors.

***From: Mark Heiman
Sent: December 11, 2002 11:06 PM
To: James Chanos; Douglas Millett
Subject: Fairfax***

I just got off the phone with ZBI's insurance analyst, Michael Ting. He just talked to a new insurance analyst at Morgan Keegan, and apparently that analyst is about to initiate FFRX at "Underperform," with the thesis being that they are extremely under-reserved into the \$3-\$5 BN area. Also, there may be an article in Forbes or Fortune soon that will be similarly critical. Ting said he thought that analyst was one of the best P&C analysts he has talked to, and wanted to give us the heads-up, as well as hear how we're coming at it.

⁶ E-Mails obtained by Fairfax Financial under discovery in a civil case filed in New York (presented @ www.deepcapture.com)

From: Mark Heiman
Sent: December 16, 2002 4:46 PM
To: James Chanos; Douglas Millett; Charles Hobbs
Subject: Fairfax

Just spoke to John Gwinn at Morgan Keegan, and he was more critical of FFRX than I've ever heard a sell side analyst. It looks like his criticisms of from the top to the bottom—everything from underwriting to accounting to dishonesty. He gave me his basics, as he is somewhat restricted because he hasn't officially launched. It will be interesting to see how much of this the people who run the research department there will let him publish!

From: Mark Heiman
Sent: December 21, 2002 6:03 PM
To: James Chanos; Douglas Millett; Charles Hobbs
Subject: Fairfax

Last night John Gwinn at Morgan Keegan faxed over to me an outline detailing the issues at FFH, basically those he will be publishing on. He has been a huge help and even offered to talk to me from his home today. We can look at these and talk to him next week—I just wanted to come in today and take a look at what he sent to get a head start on what he sent.

From: Forrest Fontana
Sent: January 06, 2003 8:57 AM
To: John Gwynn
Subject: RE: hope you had a nice holiday!
you available to touch-base on Fairfax sometime this week?

From: John Gwynn
Sent: January 06, 2003 9:01 AM
To: Forrest Fontana
Subject: RE: hope you had a nice holiday!
Name the time.

Tuesday 1/14: Morgan Keegan expected to launch on Fairfax with sell rating - we will be covering into this.

Some of the names identified in these e-Mails include James Chanos, Investment Manager Kyinkos Investments; Douglas Millett Kyinkos Investments; John Gwynn, Analyst Morgan Keegan; Forrest Fontana, SAC Capital Portfolio Manager. Not included with the e-Mails published above were the forwarded e-Mails from the identified parties above to Steven Cohen, SAC Capital Investment Manager, Jeff Perry, SAC capital Analyst.

What is proprietary about passing along trade intentions and secrets to Wall Street analysts covering public companies and hedge funds that represent your competition? If availability of short interest shares is scarce, why disclose your intentions to other big position hedge funds?

As a retail investor my opportunity to swing a market is non-existent as compared to that of a major institution. Similarly, the ability of a small time short seller to swing a market or to adjust a strategy is non-existent when compared to the larger players involved in these conferences.

The Commission must consider whether the concerns raised by these investors regarding competitive advantage are with regards to other short sellers or are they with regards to maximizing profits for the 'network' of funds involved in the trade strategy. To what extent does such collusion between funds inject risk into the investing public when a bull's eye is placed on a targeted company? If a network of

investment managers is working towards a common trade strategy, can a claim of proprietary trading actually exist?

Definition of Proprietary. something that is used, produced, or marketed under exclusive legal right of the inventor or maker ; specifically : a drug (as a patent medicine) that is protected by secrecy, patent, or copyright against free competition as to name, product, composition, or process of manufacture.⁷

And as the Commission considers the comments by those that believe that the requirement to make these filings is unfair the commission should consider what management fees each of these funds receive from their clients and what level of compensation investment managers accrue each year. I believe by the analysis provided by David Einhorn, Mr. Einhorn considers a \$6,000 per week expense excessive.

Mr. Einhorn is estimating that the value of time to prepare this information would be \$175.00/hour representing an annual salary of \$365,000 for such an individual. The total annual cost of these filings, per Mr. Einhorn's own estimates would be \$312,000 or less than one additional member of the firm. I would contend that an employee rate of \$175/hour is not a rate representative of the industry but that of a fund with the stature of David Einhorn's. Smaller firms would incur lower costs based on less prestigious outside counsel and lower employee rates.

If what Einhorn is contesting is that his firm would incur a cost of \$312,000 annually I believe his annual profits and personal income from the fund could well support a fee of this nature. In addition, without the expense of hiring any additional labor, the \$175/hour for 20 hours is presently built into the funds cost structure and thus would only require the fund to be more efficient with the labor to absorb an additional 20 hours of work/week. Without such additional hiring, the outside costs to the firm actually drop down to a paltry \$130,000 a year.

Is \$130,000 in additional expense excessive? To a fund like David Einhorn's I would contend it is not. When considering the harm to other public investors, the \$130,000 is an investment in protection.

Mr. Chairman, members of the SEC staff I certainly hope that the recent events have focused your attention back on what is necessary and what is most important to our markets future success. Setting up policies that aid the affluent in manipulating our markets is not in the best interest of public investors and is not in the interests of the formation of our capital markets. I hope you consider carefully who exactly is responding to your proposal and where their allegiances are. Integrity of such individuals should also be considered when evaluating comments. Certainly comments and opinions of some identified above in the e-mails should be carefully scrutinized.

If short sellers are not required to report their short positions how will investors, issuers, and regulators formulate the necessary market insight that a conspiracy of collusion exists amongst groups of funds to drive a markets value down? Without this insight, how will the public report suspicions of fraud with enough background data to gain recognition within the SEC's Division of Enforcement? The Division certainly does not respond to unsubstantiated complaints and without transparency complaints are limited to speculation.

Dave Patch

⁷ Miriam Webster Dictionary