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Hogging the Hedge? "Bulldog's" 13F Theory May Not Be So Lucky

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Cover Page Footnote

The Author thanks: Cleveland-Marshall Professor Michael H. Davis; and Fordham University School of Law Adjunct Professors Joan A. Caridi, Judith MacDonald, John F.X. Peloso, Barry W. Rashkover, and Jonathan S. Shapiro for their kind guidance and sage observations.

HOGGING THE HEDGE? “BULLDOG’S” 13F THEORY MAY NOT BE SO LUCKY

*Edward Pekarek**

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I. INTRODUCTION

Two-Thousand-Six was a year in which the opaque investment pools commonly known as “hedge funds”¹ provided frequent headline-fodder through scandals,² congressional testimony,³ and the collapse of Amaranth Advisors,⁴ a nine billion dollar hedge fund implosion that

1. Alfred Winslow Jones is credited with having coined this term to describe a pooled investment portfolio typically composed of a combination of long and short equity positions, and operated under the strategy that the short positions would presumably counter-balance the long positions in a manner that would offer capital growth opportunities while insuring, or “hedging,” against any significant risk of loss, irrespective of the market’s direction. Today, Mr. Jones’s coined phrase better describes the legal management structures of investment pools rather than the investment strategies employed, and these pooled investments typically issue unregistered securities in “private offerings,” which, in general, are privately held by a restricted number of “accredited” investors, and which in 2006 experienced record capital inflows of roughly \$126.5 billion. These pooled funds are typically either single or multiple strategy vehicles that employ an array of investment approaches ostensibly designed to generate above-market returns, including the hedge fund adviser’s quest for the premium compensation known in the industry as “alpha.” See David A. Vaughan, Partner, Dechert LLP, *Comments for the U.S. Securities and Exchange Commission Roundtable on Hedge Funds—Selected Definitions of “Hedge Fund”* (May 14-15, 2003), available at <http://www.sec.gov/spotlight/hedgefunds/hedge-vaughn.htm> (last visited Mar. 12, 2007); see also Ted Gogoll, *What’s Driving the Hedge Fund Boom?*, BUSINESSWEEK.COM, Oct. 13, 2006, available at http://www.businessweek.com/investor/content/oct2006/pi20061013_353103.htm (last visited Dec. 2, 2006); Complaint, *Goldstein v. SEC*, No. 1:04CV02216, 2004 WL 3633837 at 17 (D.C. Cir. Dec. 21, 2004) [hereinafter *Goldstein Complaint*]; Stephen J. Brown, Keynote Address at the PACAP/FMA Meeting, Melbourne, Australia, July 7, 2000, *Hedge Funds: Omniscient or Just Plain Wrong*, NYU Stern School of Business (Mar. 9, 2001), available at <http://pages.stern.nyu.edu/~sbrown/omniscient.pdf> (last visited Dec. 1, 2006).

2. See, e.g., Jenny Anderson, *Hedge Funds Draw Insider Scrutiny*, N.Y. TIMES, Oct. 16, 2006, available at <http://www.nytimes.com/2006/10/16/business/16hedge.html> (last visited Mar. 11, 2007); see also Katherine Burton and David Scheer, *Sandell Asset Management Draws SEC Scrutiny for Short Sales*, BLOOMBERG.COM, Oct. 31, 2006, available at <http://www.bloomberg.com/apps/news?pid=20670001&refer=funds&sid=aJoinHyJ.iyQ> (last visited Feb. 25, 2007).

3. See, e.g., Paul Tharp, *Senate Raises Heat on Funds in Panel Grilling*, N.Y. POST, Dec. 6, 2006, available at http://www.nypost.com/seven/12062006/business/senate_raises_heat_on_funds_in_panel_grilling_business_paul_tharp.htm (last visited Feb. 25, 2007) (“Wall Street is stacked tighter than ever against the little guy because secret investment pools that operate freely outside securities laws can actually rig stock trading, according to Senate testimony.”).

4. See, e.g., Christopher S. Rugaber, *Senator Urges Hedge Fund Transparency*,

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exceeded the financial scope of the Long Term Capital Management Asian currency debacle.⁵ Yet despite these swirling scandals and controversies, many of the broader equity indices established record levels and the domestic capital markets barely blinked. Among the luminaries of the 2006 hedge fund universe was Phillip Goldstein, a former New York City municipal employee⁶ who is now the activist

HOUSTON CHRONICLE (AP), Oct. 18, 2006, available at <http://www.chron.com/cs/CDA/printstory.mpl/ap/fn/4268516> (last visited Oct. 18, 2006).

[Senator] Charles Grassley [R-Iowa] said in the letter that ‘tens of millions of Americans may be unwittingly exposed to hedge fund investments’ through public and private pension plans that invest in hedge funds. As a result, significant future losses at hedge funds could put many workers’ retirement security at risk, Grassley wrote, and could cause losses at the federal pension insurance agency, the Pension Benefit Guaranty Corp.

Id.; see also Jennifer McCandless, *Pension Fund to Replace Advisor Post-Amaranth*, FIN. NEWS (UK), Oct. 24, 2006, available at <http://www.financialnews-us.com/?page=ushome&contentid=1045677634> (last visited Mar. 25, 2007) (“The San Diego County Employees Retirement Association, the Californian pension plan, is looking to replace the investment consultancy that recommended it put money in Amaranth Advisors, a move which lost the fund more than \$100m (€79.6m); Dane Hamilton, *UPDATE 3-San Diego pension fund sues Amaranth*, REUTERS, Mar. 30, 2007, available at http://today.reuters.com/misc/PrinterFriendlyPopup.aspx?type=etfNews&storyID=2007-03-30T195343Z_01_N30441455_RTRIDST_0_AMARARANTH-PENSIONFUND-UPDATE-3.XML (last visited Mar. 30, 2007). The suit against Amaranth stated that:

Amaranth repeatedly and “falsely misrepresented” that it was a “multi-strategy hedge fund” that invested in six different sectors, the suit said. “Instead [it] operated as a single-strategy natural gas fund that took very large and highly leveraged gambles and recklessly failed to apply even basic risk management techniques” “We are disappointed that SDCERA has chosen to undertake meritless litigation that will inevitably reduce its own recovery and, potentially, the recovery of other investors,” said Amaranth attorney David Boies of Boies, Schiller & Flexner LLP in a statement.

Id.

5. See, e.g., Roger Lowenstein, *When Genius Failed: The Rise and Fall of Long-Term Capital Management—How One Small Bank Created a Trillion-Dollar Hole*, (Fourth Estate Publishing 2001); see also 1999 Report of the President’s Working Group (“PWG”) on Financial Markets, *Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management* (April 1999), available at <http://www.treasury.gov/press/releases/reports/hedgfund.pdf> (last visited Mar. 25, 2007).

6. See Jay Loomis, *Activist Investing on the Rise*, THE JOURNAL NEWS, Feb. 18, 2007, available at <http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20070218/BUSINESS01/702180320/1066> (last visited Feb. 18, 2007) (“[Phillip Goldstein] previously worked 25 years as a civil engineer for New York City.”); see also 15 U.S.C.

manager of a group of pooled investments operating under the moniker “Bulldog Investors.”⁷ Mr. Goldstein took the Securities and Exchange Commission (“SEC”) to task in a successful challenge⁸ of the so-called “Hedge-Fund Rule.”⁹ The United States Court of Appeals for the District of Columbia Circuit was apparently persuaded by Mr. Goldstein’s definitional theory as to the term “client,”¹⁰ and vacated the

§ 78m(f)(2).

7. See, e.g., *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006); see generally <http://www.bulldoginvestors.com/>.

8. See, e.g., Statement of Chairman Cox Concerning the Decision of the U.S. Court of Appeals in Phillip Goldstein et al. v. SEC (Aug. 7, 2006), available at <http://sec.gov/news/press/2006/2006-135.htm> (last visited Nov. 29, 2006); see also Amanda Cantrell, *SEC Faces Hedge Fund Deadline*, CNNMONEY.COM, Aug. 4, 2006, available at http://money.cnn.com/2006/08/04/markets/hedge_returns/ (last visited Jan. 2, 2007).

9. The Respondent SEC apparently took umbrage with the *Goldstein* petitioners’ use of this phrase because it created apparent confusion in that the Rule itself governed hedge fund investment advisers, rather than the funds under management. See Brief of Respondent at 5 n.1, *Goldstein v. SEC*, No. 04-1434 (D.C. Cir. June 23, 2005), available at 2005 WL 1636146 [hereinafter SEC’s Appell. Brief] (“[P]etitioners’ pervasive references to the ‘Hedge Fund Rule’ create a misleading impression.”). Despite these comments by the SEC in brief, the *Goldstein* court adopted the phrase coined by the petitioners and used it throughout its opinion, including in its ruling statement. See, e.g., *Goldstein v. SEC*, 451 F.3d 873, 874, 877, 880-81, 883-84 (D.C. Cir. 2006) (“The petition for review is granted, and the *Hedge Fund Rule* is vacated and remanded.”) (emphasis added).

10. *Goldstein* Complaint, *supra* note 1 at ¶ 17, contended that in order to determine whether a hedge fund adviser was eligible for the “private adviser” exemption, one must first interpret the essence of the definition of the term “client,” and discern the legislative intent of the statutory construction within the Investment Advisers Act of 1940 (the “Advisers Act”) of the term “client.” The *Goldstein* petitioners asserted the legislative intent was consistent with that articulated in the 1985 U.S. Supreme Court decision in *Lowe v. SEC*, 472 U.S. 181 (1985), and that it necessarily (albeit somewhat circularly) turns on whether an adviser “directly” provides “personalized advice attuned to a client’s concerns.” The *Goldstein* Complaint further asserted that, with respect to the 1985 “safe harbor” provision that afforded most hedge fund managers the “private adviser” exemption at issue in *Goldstein v. SEC*, the SEC

proposed the safe harbor rule to make clear that it would not take the position that the limited partners of a limited partnership are ‘clients’ of the general partner, as long as the general partner provided advice to the limited partnership and did not provide individualized personal investment advice to the limited partners [and t]he safe harbor rule thus reflected not only the *universally accepted* meaning of the term ‘client,’ but also Congress’ desire to regulate only those persons who render personalized investment advice attuned to a client’s concerns.

Goldstein Complaint, *supra* note 1, at ¶ 22 (emphasis added).

entire investment adviser registration regime as “arbitrary.”¹¹

The SEC correctly noted in its brief that when the Advisers Act was promulgated, Congress did not establish how one could (or should) count “clients” for the purposes of the “private adviser” exemption, suggesting that the *Goldstein* petitioners’ asserted notion that the meaning of “client” was somehow “universally accepted” was somewhat disingenuous. SEC’s Appell. Brief, *supra* note 9, at 2. In fact, the SEC presented a plausible interpretation of the term that, despite the history of the SEC’s previous use of “client,” could have possibly persuaded Congress to amend the Act. *Id.* at 2-3 (“[T]he proper construction of the statute might well require an adviser to count as its clients the investors whose assets were brought under management through an investment vehicle operated by the adviser, *rather than counting only the vehicle itself.*”) (emphasis added). Moreover, the SEC specifically “recognized in proposing the [1985] safe harbor that ‘a different approach could be followed in counting clients.’” *Id.* at 3 (quoting Investment Advisers Act Release No. 956 (Feb. 22, 1985), 50 Fed. Reg. 8740, 8741 (Mar. 5, 1985) (JA 001, 002)). The same year that the SEC adopted the “safe harbor” for general partners of investment limited partnerships, the U.S. Supreme Court decided *Lowe v. SEC*, 472 U.S. 181(1985). The SEC correctly noted in its final brief that the discussion in *Lowe* regarding “‘personalized’ versus ‘impersonal’ advice . . . is solely for the purposes of determining which type of publishers fall within the definition of an investment adviser.” SEC’s Appell. Brief, *supra* note 9, at 17, 34-36 (citing *Lowe v. SEC*, 472 U.S. 181, 188-89 (1985)). According to the *Goldstein* petitioners’ definitional theory of the case, the Rule’s “look through” method of counting “clients” was inconsistent with legislative intent, with the Supreme Court’s interpretation of the term in *Lowe*, and with the SEC’s prior use of the term. The *Goldstein* court identified past instances of SEC interpretations of the term “client” that substantially undermined the government’s theory of that case. *See Goldstein v. SEC*, 451 F.3d 873, 876 (D.C. Cir. 2006) (citing 17 C.F.R. § 275.203(b)(3)-1) (“[T]he Commission has interpreted this provision to refer to the partnership or entity itself as the adviser’s ‘client.’”). The *Goldstein* court also specifically noted with regard to the definition of “investment adviser,” that

[h]edge fund general partners meet the definition of “investment adviser” in the Advisers Act [which itself defines] “investment adviser” as one who ‘for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities,

Id. The *Goldstein* court also acknowledged that such hedge fund partners “usually satisfy the ‘private adviser exemption’ from registration in § 203(b)(3) of the Act.” *Id.* *See also* SEC’s Appell. Brief, *supra* note 9, at 5 n.1; Opening Brief of Petitioner in *Goldstein v. SEC*, No. 04-1434, 2005 WL 1666937 (D.C. Cir. July 23, 2005) at 16, 25, 38-39 (citing Advisers Act Release No. 983, Definition of “client” of Investment Adviser for Certain Purposes Relating to Limited Partnerships, 50 Fed. Reg. 29,206 (July 18, 1985)) [hereinafter *Goldstein* Opening Brief]; *see also* Edward Pekarek, *Pruning the Hedge: Who is a “Client” and Whom Does an Adviser Advise?*, 12 *Fordham J. Corp. & Fin. L.* 913 (2007).

11. *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006); *see also* Pekarek, *supra*

Apparently emboldened by his appellate victory, Mr. Goldstein again tilted at regulatory windmills months later and petitioned the SEC to exempt his “Bulldog” hedge funds from certain portfolio reporting requirements.¹² This Article analyzes Section 13(f) of the Securities Exchange Act of 1934 and Mr. Goldstein’s effort to avoid the Section 13 reporting regime through an intellectual property and due process theory. Mr. Goldstein has asserted that compulsory disclosure pursuant to Section 13(f) is an unconstitutional regulatory taking in violation of the Fifth Amendment because he contends that his hedge fund portfolio positions are trade secrets. Mr. Goldstein, however, has reportedly admitted his petition is merely a “pretext for a lawsuit,”¹³ and that petition failed to articulate the substance of these purported trade secrets with the required measure of particularity to properly assert a trade secrets claim. “Bulldog’s” October 24, 2006 petitioned to the SEC for an order pursuant to §13(f)(2) of the Exchange Act of 1934 that would exempt the “Bulldog” funds from the reporting requirements embodied in Rule 13f-1 (the “Goldstein Application” or the “Application”) is also flawed due to the absence of any demonstration that he or his “Bulldog” funds utilized “reasonable efforts” to ensure that the portfolio holdings at issue remained secret. Mr. Goldstein’s trade secret theory is also

note 10. Iowa Senator Charles Grassley has introduced a terse, two page bill aiming to amend Section 203(b)(3) of the Advisers Act titled, “The Hedge Fund Registration Act of 2007” which effectively seeks to replace the term “client” with “investor” in order reverse the effect of the court of appeals ruling in *Goldstein*, and expressly authorize the SEC to compel hedge fund advisor registration. A copy of the Grassley Bill is available at <http://grassley.senate.gov/releases/2007/05152007.pdf> (last visited May 21, 2007).

12. A copy of the Goldstein Application for 13F Exemption filed with the SEC on October 24, 2006 is available at http://nakedshorts.typepad.com/nakedshorts/files/request_for_exemption_from_rule_13f1.pdf (last visited Feb. 24, 2007) [hereinafter Goldstein Application].

13. See *Victorious Goldstein Aims For A Second Regulatory Win*, FINALTERNATIVES.COM, Sept. 13, 2006, available at <http://www.finalalternatives.com/node/403> (last visited Feb. 24, 2007). Describing Mr. Goldstein as:

The man who more or less single-handedly (with an assist from the federal courts) killed the Securities and Exchange Commission’s hedge fund registration requirement has *seemingly developed a taste for blood*. Phillip Goldstein of Bulldog Investors, who filed the registration suit against the SEC, is taking aim at the regulator’s portfolio disclosure requirement. . . . According to Goldstein, the rule forces funds to give up their trade secrets, and “investors are relying on your trade secrets to earn money.” *He said he would seek an exemption from the requirement as a pretext for a lawsuit, since the SEC is unlikely to take the bait and make his fund an exception.*

Id. (emphasis added).

significantly undermined because he and his funds have made public disclosures that could eliminate any trade secret status, which, among other facts and issues discussed herein, erode the theory of the Goldstein Application to such an extent that the SEC may properly deny the requested relief.

II. GOLDSTEIN SEEKS SECTION 13(F) HEDGE FUND PORTFOLIO DISCLOSURE EXEMPTION

For approximately three decades, institutional investment managers,¹⁴ including certain hedge fund managers, broker-dealers, banks, and insurance companies have been required to file disclosure statements with the SEC on Form 13F if they possess investment discretion over at least \$100 million worth of certain designated equity securities listed on domestic exchanges or quoted on Nasdaq.¹⁵ These

14. See 15 U.S.C. § 78m(f)(5)(A) ("For purposes of this subsection the term 'institutional investment manager' includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person."). *Id.* See also Division of Investment Management: Frequently Asked Questions About Form 13F, May 2005, available at <http://www.sec.gov/divisions/investment/13ffaq.htm> (last visited Nov. 29, 2006). A more elaborative definition is available on this website:

An institutional investment manager is an entity that either invests in, or buys and sells, securities for its own account. For example, banks, insurance companies, and broker/dealers are institutional investment managers. So are corporations and pension funds that manage their own investment portfolios. An institutional investment manager is also a natural person or an entity that exercises investment discretion over the account of any other natural person or entity. For example, an investment adviser that manages private accounts, mutual fund assets, or pension plan assets is an institutional investment manager. So is the trust department of a bank. A trustee is an institutional investment manager, but a natural person who exercises investment discretion over his or her own account is not an institutional investment manager.

Id. (citing Exchange Act §§ 3(a)(9), 13(f)(5)(A)).

15. See 15 U.S.C. § 78m(f)(1). Section (f) states that:

Every institutional investment manager which uses the mails, or any means or instrumentality of interstate commerce in the course of its business as an institutional investment manager and which exercises investment discretion with respect to accounts holding equity securities of a class described in subsection (d)(1) of this section having an aggregate fair market value on the last trading day in any of the preceding twelve months of at least \$100,000,000 or such lesser amount (but in no case less than \$10,000,000) as the Commission, by rule, may determine, shall file reports with the Commission in such form, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe, but in no event shall such reports be filed for periods longer than one year or shorter than one quarter.

disclosures reveal to the public certain aspects of a non-exempt investment manager's portfolio holdings in a "snapshot" format,¹⁶ as authorized by Section 13 of the Securities Exchange Act of 1934, and articulated by SEC Rule.¹⁷

The disclosures required by non-exempt investment managers are to be submitted to the SEC on the proscribed Form 13F.¹⁸ Disclosures must be filed no later than forty-five (45) days after the close of each calendar quarter,¹⁹ commencing with any quarter within any calendar year during which the investment manager maintained discretion over a minimum of \$100 million worth of Section 13(f) securities holdings.²⁰ The securities holdings to be disclosed on Form 13F are specifically identified on a "13(f) securities list" published quarterly by the SEC.²¹

Phillip Goldstein, SEC gadfly and Pleasantville, New York-based

Such reports shall include for each such equity security held on the last day of the reporting period by accounts (in aggregate or by type as the Commission, by rule, may prescribe) with respect to which the institutional investment manager exercises investment discretion (other than securities held in amounts which the Commission, by rule, determines to be insignificant for purposes of this subsection), the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value of each such security.

Id.

16. *See id.* The snapshot format is comprised of the following:

Such reports shall include for each such equity security held on the last day of the reporting period by accounts (in aggregate or by type as the Commission, by rule, may prescribe) with respect to which the institutional investment manager exercises investment discretion (other than securities held in amounts which the Commission, by rule, determines to be insignificant for purposes of this subsection), the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value of each such security.

Id.

17. Rule 13f-1 under § 13(f) of the Exchange Act; *see also* 17 C.F.R. § 240.13f-1.

18. Rulemaking for Edgar System, Exchange Act Release No. 40934, 68 SEC Docket 2814 (Jan. 12, 1999), *available at* <http://sec.gov/rules/final/34-40934.htm> (last visited Mar. 12, 2007). On January 12, 1999, the SEC required institutional investment managers to file reports on Form 13F with the SEC via EDGAR, the SEC's electronic filing system. *See also* 17 C.F.R. § 249.325.

19. Filing and Reporting Requirements Relating to Institutional Investment Managers, Exchange Act Release No. 15461 (Jan. 5, 1979), *available at* 1979 WL 173407 [hereinafter Final Rule 1979].

20. *See* 15 U.S.C. § 78m(f)(1).

21. The "Section 13(f) securities," as defined by Rule 13f-1(c) [17 C.F.R. § 240.13f-1(c)], are made available to the public pursuant to § 13(f)(3) of the Exchange Act [15 U.S.C. § 78m(f)(3)]; *see also* SEC List of Section 13 F Securities, 3rd Quarter, FY 2006, <http://www.sec.gov/divisions/investment/13f/13flist2006q3.pdf>.

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investment manager for the “Bulldog” hedge funds, revealed to *BusinessWeek* his intent to challenge the 13F disclosure requirement with an application to the SEC, not for mere confidential treatment but rather seeking a full exemption from Section 13(f) disclosure requirements.²² Seemingly sanguine from his widely reported victory in the D.C. Appellate Circuit, which vacated the “arbitrary” registration requirement for certain hedge fund managers pursuant to the so-called “Hedge Fund Rule” on June 23, 2006.²³ The “Bulldog” made good on his threat with the Goldstein Application.²⁴

The Goldstein Application asserted that the very information required to be disclosed in a Form 13F is a protectable private property interest subject to the boundaries of the Fifth Amendment of the U.S. Constitution.²⁵ The Application further contends that the SEC

22. Karyn McCormack, *Do Hedge Funds Hold ‘Trade Secrets’?*, BUS. WK, Sept. 12, 2006 (*Bulldog Investors’ Phillip Goldstein says yes, and he’s preparing to launch a battle with the SEC over its 13F disclosure rule*). See also Judith Burns, *UPDATE: Hedge Fund Manager Goldstein Takes On SEC Again*, MORNINGSTAR/DOW JONES NEWSWIRE, Oct. 24, 2006.

23. 17 C.F.R. § 275.203(b)(3)-2(a) (2004). The so-called “Hedge Fund Rule” specified that for purposes of § 203(b)(3) of the Advisers Act, 15 U.S.C. § 80b-1 (2005), investment managers were required to count as “clients” the shareholders, limited partners, members, or beneficiaries of the fund in order to determine whether the adviser was eligible as a “private” fund adviser for exemption from SEC registration requirements. *Id.* See also *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006); Pekarek, *supra* note 10.

24. See 15 U.S.C. § 78m(f).

25. See McCormack, *supra* note 22.

[Q:] Do you think you’ll win? Why would you file this if you don’t think you have a chance?

[A:] I think we have a chance. We have a good case. I thought we were going to win the hedge fund lawsuit. The judges are human beings. Are they going to see it your way? Are they going to try to find a way to give the SEC a victory? If you go on the merits, I think we’ll win. That’s the same thing I said about the hedge fund case.

Anybody that actually read our briefs [on the hedge fund lawsuit] thought we had a good case. But they nevertheless thought we were going to lose because they thought the court would say the SEC is the expert, let them do what they want. Thankfully, the court didn’t. Whether hedge funds register is not the biggest issue in this country. But it’s important that you know that the federal courts are incorruptible. Really, to a large extent, they are [parenthetical in original].

Id. (internal citations omitted); see also, Cantrell, *SEC Faces Hedge Fund Deadline*, *supra* note 8:

Jedd Wider, a partner in law firm Morgan Lewis, also believes it is highly unlikely that the SEC will appeal to the Supreme Court, but that doesn’t mean the agency will

disclosure requirements embodied in Section 13(f) (and Rule 13f-1 thereunder) are nothing more than a regulatory “taking” that deprives his hedge funds of due process, and that the SEC is constitutionally obliged to compensate his “Bulldog” funds for the allegedly unconstitutional appropriation of private property.²⁶

This Article details the background of Section 13(f) legislation, the purposes and public benefits of the disclosures required by the Rule at issue, details notable market participants’ confidential treatment requests for their portfolio disclosures, evaluates arguments made in the Goldstein Application regarding the putative trade secret status of the “Bulldog” hedge fund holdings, and the related due process challenge to Section 13(f) reporting regime. Furthermore, it concludes that Goldstein’s attack of the Section 13 reporting regime is unavailing for multiple factual and legal reasons.

III. PROMULGATION OF SECTION 13 AND RULE 13-F

Congress granted the SEC broad authority to implement the Section 13 reporting requirements with ample regulatory and public policy purposes. The 1934 Securities Exchange Act was amended in 1975 to include subsection (f) to Section 13 of the 1934 Act,²⁷ which “authorizes the Commission to require the disclosure of certain institutional

abandon its plans to regulate hedge funds. ‘A tremendous amount of time and energy and focus was spent by the SEC over the past several years on this issue,’ said Wider. *Id.*; see also Goldstein Application, *supra* note 12; and, U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

26. See McCormack, *supra* note 22. Goldstein told *BusinessWeek* magazine, “Where does the government have this authority to make people disclose what basically are trade secrets—the source of their earnings power—without paying for it? Of course, no one pays for it and there’s no way to know what it’s worth.” See also Goldstein Application, *supra* note 12.

27. Senate Conference Report of the Securities Acts Amendments of 1975, to accompany S. 249, S. Rep. No. 94-75, at 87 (1975) [hereinafter Conference Report]; see also Pub. L. No. 94-29, 89 Stat. 97 (1975) (codified as amended in various sections of 15 U.S.C.).

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portfolio holdings and transactions.”²⁸ Congress also noted that one of the “important purposes of the bill . . . [was] dissemination of the institutional disclosure data to the public.”²⁹ Among the primary objectives of the amended Section 13 was to empower the SEC to “create a central depository of historical and current data about the investment activities of institutional investment managers,” with the intent to advance the spirit of disclosure in the U.S. securities markets.³⁰ The SEC was specifically granted “ultimate authority” for administration of the institutional disclosure program by the amended Section 13.³¹ Implementation of the amended Section 13 advanced at least two significant regulatory and policy objectives: (i) it placed responsibility for “gathering, processing, and disseminating the institutional disclosure data” with one federal agency, and (ii) it dramatically improved the availability of “factual data about large investment managers,” for federal and state regulatory agencies, other institutional investment managers, and the public.³²

Despite Goldstein’s dubious contentions that no valid reasons exist for the disclosure regime,³³ Congress articulated completely sound bases for amending Section 13. Legislative rationale for promulgation of the 13(f) reporting regime included reasoned considerations which focused on disclosure and transparency of information, the very foundation of U.S. securities law. Specific legislative concerns included the increasing trend toward voluntary³⁴ and required disclosures³⁵ by banks and other corporate fiduciaries;³⁶ the material increase (in the mid to late 1960s) in

28. *Id.* at 77-78.

29. *Id.* at 87. It was this Amendment which amended “Section 13 of the Securities Exchange Act by adding a new Subsection (f), which would authorize the Commission to require the disclosure of certain institutional portfolio holdings and transactions.” *Id.* at 77-78.

30. See Conference Report, *supra* note 27, at 85 (arguing that it will “permit reasoned discussion and decisions about the influence and impact of the large institutional investment managers on the securities markets”).

31. *Id.* at 85 (citing § 13(f)(4) of the Exchange Act, 15 U.S.C. § 78m(f)(4) (2002)).

32. *Id.* (arguing that “the lack of such data has prevented and inhibited careful consideration by interested persons of the public policy implications”).

33. See, e.g., Goldstein Application, *supra* note 12.

34. *Id.* at 80.

35. *Id.*

36. *Id.* (arguing that the growing trend of voluntary disclosure began in 1971, e.g. banks began disclosing details of their large securities transactions and holding by their

the sheer volume of securities held and traded by institutional investment managers;³⁷ the absence of any centralized data depository regarding institutional portfolio transactions and holdings; and growing concern about potential adverse effects “upon the securities markets, the

trust department); *see also id.* (stating that the Comptroller of the Currency in 1974 required disclosure of certain securities transactions and holding by certain national banks); *see also id.* (stating that President Nixon’s Commission on Financial Structure and Regulation in 1971 recommended that “all corporate fiduciaries” be required to file a report of holdings and other information, with the appropriate regulatory agency). The “Hunt Commission” recommended in 1971 that all corporate fiduciaries be required to file with the appropriate regulatory agency a report detailing: (1) the twenty largest stock holdings, in terms of market value, unless they do not exceed \$10 million; (2) all holdings which constitute 5 percent or more of the outstanding shares of a corporation registered with the SEC; (3) dollar values with respect to each holding broken down into categories reflecting the degree of voting responsibility; (4) interlocked officers or directors with portfolio companies where the bank had sole voting responsibility; and (5) instances where the bank voted against management. *Id.*; *see also id.* (stating that a 1968 congressional report “recommended that bank trust departments annually disclose their aggregate holdings of securities and . . . proxy voting of those securities of corporations . . . registered with the SEC.”). In 1968

the Subcommittee on Domestic Finance of the House Committee on Banking and Currency issued its staff’s report on Commercial Banks and Their Trust Activities: Emerging Influence on the American Economy (90th Cong., 2d Sess., Comm. Print 1968), which recommended that bank trust departments annually disclose their aggregate holdings of securities and their proxy voting of those securities of corporations which were registered with the SEC. Section 12 of the Banking Reform Act of 1971. (H.R. 5700, 92nd Cong., 1st Sess. (1971)) would have required all insured banks to report annually to the Federal Deposit Insurance Corporation all securities held in a fiduciary capacity (aggregated without regard to investment responsibilities) and all voting authority, indicating the extent and manner exercised.

Id.

37. *See* Conference Report, *supra* note 27, at 77-79 (“The Institutional Investor Study also concluded ‘that the course of future developments could not be accurately gauged, or reasoned regulatory policies be determined, without a continuing flow of such information.’”). The SEC study concluded that future and historical growth of Institutional Investment Managers necessitated continuous timely collection of information about equity security markets’ institutional holdings and tradings. *Id.* Based upon the SEC’s study, it “recommended that the Exchange Act be amended to provide it with authority to require reports and disclosure of securities holdings and transactions from all types of institutional investment managers.” *Id.* *See also id.* at 80 n.3 (citing Report of the Subcommittee on Intergovernmental Relations and of the Subcommittee on Budgeting, Management, and Expenditures of the Senate Committee on Government Operations. Disclosure of Corporate Ownership, 93d Cong., 1st Sess. (Comm. Print 1973) (arguing that the need for disclosure by institutional investment managers of their securities holdings and transactions is the need for the management of individual companies to be able to identify the holders of their stock).

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issuer of the securities, and the interests of individual investors.”³⁸ Mr. Goldstein’s position that no legitimate government interests exist for the Section 13 disclosure regime simply lacks credibility.

A. Section 13(f) Benefits Cited in Legislative History

Congress forecasted that a variety of public uses and benefits would result from institutional disclosure and data dissemination.³⁹ Those stated benefits included: (i) a “higher degree of [market] confidence;”⁴⁰ (ii) companies may have interest in acquiring 13F “data for subsequent sale to interested persons;”⁴¹ (iii) investors would find 13F holdings

38. Conference Report, *supra* note 27, at 77-78 (1975) (There was “no centrally located body of data. . . . S. 249 would amend Section 13 of the Exchange Act by adding a new Subsection (f), which would authorize the Commission to require the disclosure of certain institutional portfolio holdings and transactions.”).

39. Conference Report, *supra* note 27, at 82-83.

40. *Id.* at 82. Dissemination of data for public use about institutional investment managers may stimulate a higher degree of confidence in the integrity of the securities markets:

Many people believe that it is not possible to make informed investment decisions on a security without information related to the likely market activity and the degree of institutional concentration in the security. Institutional concentration may suggest a number of things to a variety of investors. For example, to some it may be a good sign because it may suggest that sophisticated investors believe the security is a good investment. To others, it may be a danger sign indicating a potential depressing “overhang,” market illiquidity, or high price volatility. That different investors may draw different conclusions from the data is not important; rather, what is important is that information about the securities holdings and certain transactions of institutional investment managers be available to all investors—both institutional and individual—so that they can all have it, whatever its relative usefulness in making their independent judgments.

Id.

41. *See id.* Firms with computer processing capabilities may be interested in obtaining institutional disclosure data for subsequent sale:

Several such firms now offer to their subscribers an analysis of the investment data disclosed by registered investment companies and an analysis of the investment data disclosed by bank-managed common trust funds. It is generally understood that many persons in the securities and banking industries find those analyses very informative and useful. A number of pension fund managers subscribe to such services for assistance in planning their investment return objectives and evaluating the investment performances of their investment manager. Interpretation of the institutional disclosure data by private service firms and institutional investment managers would tend to sharpen competition among investment managers by providing consumers with detailed comparative data about their investment activities. As levels of investment through institutional investment management intermediaries rise,

helpful to “track[] institutional investor holdings in their investments;”⁴² and (iv) issuers would find “institutional investor holdings useful because much of their shareholder list may reflect holdings in ‘street name’ rather than beneficial ownership.”⁴³ Congress apparently expected these and other benefits from disclosure to be realized by the market, issuers, investors, and the general public.

According to Congress, various benefits were also expected to flow to regulatory agencies from 13(f) disclosures, including: (i) data to develop standards and protect the public interest;⁴⁴ (ii) SEC analysis of the “characteristics of institutional investment managers,” and “impact of institutional investment managers on the securities markets;”⁴⁵ (iii) block trading data to evaluate “market-making and specialist functions, and differences in discounts obtainable in various markets;”⁴⁶ (iv) regulatory ability to “identify areas for close attention during examinations or inspections by the regulatory agency;”⁴⁷ and, v) 13F data to benchmark “comparisons of one institutional investment

especially in view of the new pension reform legislation, the need for such information becomes increasingly important.

Id. at 82-83.

42. Rulemaking for Edgar System, Exchange Act Release No. 40,934, Investment Company Act Release No. 23,640 (Jan. 12, 1999).

43. *See id.*

44. Conference Report, *supra* note 27, at 83.

45. *See id.*

46. *Id.* at 84 (noting an additional “phenomenon related to a national market system in the increasing amount of block trading”). The Institutional Investor Study Report concluded that the combination of block trading with investment management was troublesome because of the potential conflict of interest when a block trade assembler has accounts over which it exercises investment discretion and which participate in its block trades. Not only direct participants in the block trade, but also other investors trading in the same securities in the same and other markets, can be affected by block purchases and sales by large institutions.

Institutional trading also has an impact on brokerage services and on the securities industry, and continuing information about equity securities transactions and securities holdings could be helpful in analyzing the extent to which institutional investment manager business: (1) is distributed across or concentrated in various members of the securities industry; (2) affects commission rates; (3) affects the execution, clearance, and settlement functions of firms in the securities industry; (4) affects broker-dealer financial responsibility rules; and (5) affects or encourages the existence of any reciprocal practices. Many other such uses connected with implementation of the central market system may appear when the SEC has gained sufficient administrative experience with the institutional disclosure data.

Id.

47. *See id.*

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manager with comparable institutional managers such comparisons might focus on the relative avoidance or use of specific securities markets or any dramatically different choices, in the aggregate, of brokers for execution.”⁴⁸ The SEC has also stated that “information required on Form 13F can be of value to the marketplace and investors in evaluating the demand for a stock, and assessing the motivations of those holding or recommending a stock.”⁴⁹ Goldstein’s view that no legitimate reasons exist for the 13F reporting requirements is less than credible in the face of these many stated bases for the disclosure framework.

B. Expanded Form 13F Filing Frequency

Form 13F disclosures were initially required on an annual basis;⁵⁰ but the SEC increased the disclosure frequency⁵¹ when it adopted Rule

48. *See id.*

49. *See In re Cabot Money Mgmt., Inc.*, Exchange Act Release No. 37,573, 62 SEC Docket 1562 (Aug. 15, 1996), *available at* <http://sec.gov/litigation/admin/ia1577.txt> (last visited Dec. 1, 2006).

50. Filing And Reporting Requirements Relating To Institutional Investment Managers, Exchange Act Release No. 14,852, 43 Fed. Reg. 26,700 (June 22, 1978) [hereinafter Final Rule 1978] (amending Parts 240 and 249 of Title 17 of the Code of Federal Regulations by adding §§ 240.13f-1 and 249.325). The summary of Release No. 14,852 is as follows:

The Commission announces the adoption of a rule and form governing the reporting requirements of institutional investment managers exercising investment discretion over accounts having in the aggregate more than \$100,000,000 in exchange-traded or NASDAQ [n.a1] quoted equity securities. Under the rule, as adopted, such managers are required to file a report within 45 days after the end of each calendar year, identifying those securities, the aggregate amounts thereof held, the nature of such investment discretion and any voting authority. The rule and form will implement the institutional investment disclosure program as mandated by Congress and establish the Commission as the central repository for data concerning the influence and impact of institutional investment managers on the securities markets. The Commission is also soliciting comments concerning the usefulness and burdens associated with quarterly reporting.

Id. at *1.

51. *See id.* The SEC announced:

the amendment of Securities Exchange Act Rule 13f-1 [17 C.F.R. § 240.13f-1] and related Form 13F [17 C.F.R. § 249.325], pursuant to Section 13(f) of the Securities Exchange Act of 1934 [15 U.S.C. §§ 78a as amended by Pub. L. No. 94-29 (June 4, 1975)] (the ‘Exchange Act’). The amendment to the Rule and Form adopted today requires that institutional investment managers, subject to the reporting requirements

13-f and Form 13F in 1978⁵² and required quarterly reporting.⁵³ During the relevant rule making period, the SEC also considered potential ramifications on market competition which might arise from more frequent 13(f) disclosures, and noted that “requiring the filing of Form 13F on a quarterly basis will not significantly burden competition.”⁵⁴ House Representative John Dingell wrote in 1998 that this

under the Rule, file a report on a quarterly basis rather than annually as originally adopted on June 15, 1978, and announced in Exchange Act Release No. 14852 [43 FR 26700]. *Id.*; see also Final Rule 1979, *supra* note 19. The Final Rule provides:

1. 17 C.F.R. Part 240 is amended by revising paragraph (a) of § 240.13f-1 to read as follows:

§ 240.13f-1 Reporting by institutional investment managers of information with respect to accounts over which they exercise investment discretion.

(a) Every institutional investment manager which exercises investment discretion with respect to accounts holding section 13(f) securities, as defined in paragraph (c) of this section, having an aggregate fair market value on the last trading day of any month of any calendar year of at least \$100,000,000 shall file a report on Form 13F [§ 249.325 of this Chapter] with the Commission within 45 days after the last day of such calendar year and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year.

On February 5, 1979 the SEC amended the rules to require annual filing to be filed to quarterly. See also Final Rule 1979, *supra* note 19 (“The amendments to Rule 13f-1 and Form 13F require an institutional investment manager subject to the reporting requirements for a particular calendar year to file Form 13F within 45 days after the last day of such calendar year and within 45 days after the last day of each of the first three calendar quarters in the subsequent calendar year.”); see also *id.* The SEC, pursuant to its authority set forth in Sections 13(f) and 23 of the Exchange Act [15 U.S.C. §§ 78m(f) and 78w] adopted amendments to Rule 13f-1 and Form 13F and amended 17 C.F.R. § 240 which revised paragraph (a) of Section 240.13f-1.

Id.

52. See Final Rule 1978, *supra* note 50. The Rule, as adopted on June 15, 1978, required:

[A]n institutional investment manager exercising investment discretion (as defined in section 3(a)(35) of the Exchange Act [15 U.S.C. 78(c)(a)(35)]) with respect to accounts having more than \$100,000,000 or more in exchange-traded or NASDAQ-quoted equity securities on the last trading day of any of the twelve months of a calendar year must file annually with the Commission, and, if a bank, with the appropriate banking agency, within 45 days after the last day of such calendar year, five copies of Form 13F. The form requires the reporting of the name of the issuer, and the title, class, CUSIP number, number of shares or principal amount in the case of convertible debt, and aggregate fair market value of each such equity security held. The form also requires information concerning the nature of investment discretion and voting authority possessed.

Id. at 2; see also Final Rule 1979, *supra* note 19.

53. Final Rule 1979, *supra* note 19.

54. *Id.*

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"information . . . does not reveal much about the trading activities of hedge funds or the ways in which they raise capital or their risk profiles."⁵⁵ A determined investment adviser can overcome any perceived "burden" in most instances by employing sophisticated derivative hedging techniques to create or enhance portfolio opacity, and circumvent Section 13(f), because, "holdings of other options and derivatives need not be disclosed in one's 13(f) filings. As a result, hedge funds can use derivatives to accumulate large economic positions in portfolio companies without disclosure unless they become subject to the disclosure requirements under Section 13(d)."⁵⁶

The SEC determined that any potential competitive burdens for 13F filers were necessary and appropriate in order to achieve proper legislative objectives, and would be outweighed by the benefits of an informed marketplace.⁵⁷ The SEC perceived no "significant obstacle" or "undue hardship" from the regulatory regime and concluded that the quarterly filings requirement was a matter of public interest in furtherance of the protection of investors.⁵⁸ At a minimum, increased 13F filing frequency appears to be rationally related to legitimate government interests and the requirements should certainly pass "rational basis" muster.

During the proposal period to increase the frequency of 13(f) disclosure intervals from annually to quarterly, the SEC received several comments which "argu[ed] in favor of quarterly rather than annual reporting."⁵⁹ The SEC also noted that numerous comments were received which expressed interest in receipt of quarterly 13(f) data,⁶⁰ and

55. Letter from Rep. John D. Dingell to Treasury Secretary Robert Rubin (Sept. 25, 1998), available at http://www.house.gov/commerce_democrats/comdem/press/105ltr88.htm (last visited Nov. 12, 2006).

56. Marcel Kahan and Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 31 U. Pa. Inst. for L. & Econ., Research Paper No. 06-16 (2006), available at <http://www.law.upenn.edu/ile/CorpRT0406/06%200721%20Kahan%20and%20Rock%20SSRN.pdf> (last visited Dec. 19, 2006).

57. Final Rule 1979, *supra* note 19, at 12.

58. *Id.*

59. Final Rule 1978, *supra* note 50. However, "most favored reporting annually rather than quarterly." *Id.* See also *id.* ("Virtually all the responses to the Commission's request . . . for public views on the frequency of reports were in favor of annual rather than quarterly reporting.").

60. See Final Rule 1979, *supra* note 19, at 2 ("[T]he Commission solicited comment on the usefulness and practicality of quarterly reporting. The Commission

if quarterly reporting was not implemented, the data representing those periods “might be lost altogether thereby creating gaps in the continuous flow of information which may be utilized for future policy decisions.”⁶¹ The SEC also received numerous 13(f)-related comments in 2004, when it adopted final rules regarding “Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies.”⁶² As part of that proposed rule, the SEC again⁶³ requested

received 124 letters of comment during the comment period which expired on August 31, 1978.”). The general scope of comments related to the usefulness of information and the attendant costs:

Many commentators felt quarterly information on the holders of common stock would be invaluable to a trading desk involved in block transactions and would facilitate the function of block trading and enhance the liquidity of the marketplace. A number of commentators pointed out that quarterly reporting would provide a greater basis for comparison shopping among investment managers. Such commentators emphasized that an evaluation of the investment philosophy and policies of a prospective manager is crucial in making an effective comparison and that such an evaluation is dependent upon a periodic examination of a manager’s investment decisions as reflected by his holdings and transactions. Both corporations and financial reporting services asserted that quarterly reporting is needed to provide corporate treasurers with current information concerning institutions owning their own stock. They pointed out that many stockholders take ownership in nominee or street name, making it difficult to trace such information and making it difficult to secure proxies on important corporate matters.

The comments in opposition to the usefulness of quarterly reporting took issue with the assertions that more frequent reports would be of utility to block traders or enhance market liquidity. Commentators opposed to quarterly reporting also disputed the usefulness of the reports as providing a basis for comparison among different investment managers. In addition, opponents to quarterly reporting believed that information about stock ownership was either currently available or more properly required under the beneficial ownership reporting requirements.

Id.

61. *Id.*

62. Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, 17 C.F.R. §§ 210, 239, 249, 270, 277 (2004) [hereinafter Final Rule Shareholder Reports], available at <http://sec.gov/rules/final/33-8393.htm> (last visited Nov. 11, 2006). In the 2004 request for comments, the SEC announced the following:

We have also determined not to modify the reporting requirements for Form 13F, and stated that “concerns about predatory trading practices arising from Form 13F have surfaced recently in the context of the current proposal.” Commentators have not presented concrete evidence that quarterly disclosure of aggregate holdings by institutional investment managers on Form 13F has resulted in such trading practices.

Id.

63. Final Rule 1978, *supra* note 50, at 11; see also Final Rule Shareholder Reports, *supra* note 62.

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"comment[s] generally on whether more frequent portfolio holdings disclosure should be required. . . ."⁶⁴ There can be little debate that great public interest has been expressed in the disclosed data and its related benefits.

C. Broker-Dealer Section 13(f) Disclosure Required

Broker-dealers are not exempt⁶⁵ from Form 13F disclosure requirements if they exercise investment discretion⁶⁶ over aggregated Section 13(f) securities holdings worth at least \$100 million,⁶⁷ even

64. Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, Exchange Act Release Nos. 8,164 and 47,023, Investment Company Act Release No. 25,870, 68 Fed. Reg. 160, 167 (Jan. 2, 2003). The SEC's proposed rule:

[N]ote[d] that currently, fund managers and other institutional investment managers exercising investment discretion over \$100 million or more in certain equity securities must disclose information about portfolios that they manage on Form 13F within 45 days of the end of each quarter. Reports on Form 13F disclose a fund manager's aggregate holdings in each security required to be reported; the holdings of each individual mutual fund or other account over which an investment manager has discretion are not broken out separately.

Id. The SEC also requested comment on the following:

If we extended the time period for filing Form 13F to, for example, 60 days, would there continue to be a need for institutional investment managers to be able to request confidential treatment of filings on Form 13F on the basis of a manager's ongoing investment strategy? Are there other changes that should be made to Form 13F, such as, for example, modifying the \$100 million filing threshold?

Id. at 168.

65. SEC Division of Investment Management: FAQ About Form 13F (May 2005), available at <http://www.sec.gov/divisions/investment/13ffaq.htm> ("Broker-dealers (including those that do not manage advisory accounts, but that trade their own account and/or act as a market maker) are required to file. Broker-dealers are not exempt from filing Form 13F.")

66. *See id.* The definition of what constitutes 'investment discretion' is:

A person exercises "investment discretion" with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this chapter and the rules and regulations thereunder.

15 U.S.C. § 78c(a)(35) (2006).

67. *Id.* ("Section 13(f) securities are equity securities of a class described in Section 13(d)(1) of the Securities Exchange Act."). *See also* SEC, *List of Section 13F*

though broker-dealers are technically excluded from the definition of “investment adviser” in Section 202(a)(11) of the Investment Advisers Act of 1940 (the “Advisers Act”).⁶⁸ Broker-dealers who manage advisory accounts, trade proprietary accounts, execute block trades,⁶⁹ or

Securities, 3rd Quarter, FY 2006, Sept. 15, 2006, available at <http://www.sec.gov/divisions/investment/13f/13f1ist2006q3.pdf> (providing a list of 13(f) securities).

68. Division of Investment Management: Frequently Asked Questions About Form 13F, May 2005, available at <http://www.sec.gov/divisions/investment/13ffaq.htm> (last visited Dec. 1, 2005). Defining an institutional investment manager as

an entity that either invests in, or buys and sells, securities for its own account. For example, banks, insurance companies, and broker/dealers are institutional investment managers. So are corporations and pension funds that manage their own investment portfolios.

An institutional investment manager is also a natural person or an entity that exercises investment discretion over the account of any other natural person or entity. For example, an investment adviser that manages private accounts, mutual fund assets, or pension plan assets is an institutional investment manager. So is the trust department of a bank.

A trustee is an institutional investment manager, but a natural person who exercises investment discretion over his or her own account is not an institutional investment manager.

Id.; see also NASD Frequently Asked Question – Institutional Holdings, available at <http://holdings.nasdaq.com/asp/help/FAQ.asp> (last visited Dec. 2, 2006).

69. See Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40,760, 68 SEC Docket 2045, *11 (Dec. 8, 1998). Block trading desks do not use established, non-discretionary methods of handling orders because:

Block trading desks generally retain some discretion in determining how to execute a customer’s order, and frequently commit capital to satisfy their customers’ needs. For example, a block positioner may “shop” the order around in an attempt to find a contra-side interest with another investor. In some cases, the block positioner may take the other side of the order, keeping the block as a proprietary position. While block trading desks do cross customers’ orders, these crosses are not done according to fixed non-discretionary methods, but instead are based on the block trading desks’ ability to find a contra-side to the order. It may cross two customer orders, or it may assemble a block of several customer orders with completion dependent on its willingness to take a proprietary position for part of the block. Execution prices, size of the proprietary position and agency compensation may all be part of a single negotiated deal.

Id.; see also Edward F. Greene & Michael F. Rinzler, *Third-Party Web Sites Offering Financial Instruments*, in Current SEC and Cross-Border M&A Developments 284-85 (Practicing Law Institute) 2000. Further information on in-house block trading:

In order to accommodate investors’ desires to make block trades, a number of registered broker-dealers maintain block trading departments. Typically, block trades are privately negotiated transactions and are not auctioned on the exchange floor. Results of a privately negotiated block trade are made public after the consummation of the transaction. The terms of the trade—number of securities traded and price per

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even those who act as market makers, are all generally considered institutional investment managers for Section 13 purposes⁷⁰ and are required to file Form 13F quarterly.⁷¹

According to Congress, “[t]he SEC has the authority and responsibility to assure compliance by all broker-dealers with the legal requirements of the Exchange Act and of the rules which the SEC is authorized to promulgate under the Exchange Act.”⁷² Legislative history indicates that “institutional trading also has an impact on brokerage services and on the securities industry.”⁷³ It is reasonable to conclude that the Section 13(f) securities disclosures are a necessary and appropriate measure used by the SEC to foster a safer and more informed securities market.

share—are brought to the exchange floor to appear on the tape and to comply with Exchange Rule 394, which prohibits exchange members from engaging in off-board trading in shares listed on the New York Stock Exchange.

Id.; see also Carole B. Silver, *Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984*, 1985 Duke L.J. 960, 987 n.136 (1985) (citing J. Cohen, E. Zinbarg and A. Zeikel, *Investment Analysis and Portfolio Management*, 88-95 (4th ed., Irwin 1982) (1973)).

70. See SEC Division of Investment Management: FAQ About Form 13F (May 2005), available at <http://www.sec.gov/divisions/investment/13ffaq.htm>. For purposes of securities exchanges’ reports:

[T]he term “institutional investment manager” includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person.

15 U.S.C. § 78m(f)(5)(A) (2006). The term “person” means a natural person, company, government, or political subdivision, agency, or instrumentality of a government. 15 U.S.C. § 78c(a)(9) (2006).

71. SEC Division of Investment Management: FAQ About Form 13F (May 2005), available at <http://www.sec.gov/divisions/investment/13ffaq.htm> (last visited May 26, 2007). See also *supra* note 14.

72. Conference Report, *supra* note 27, at 22-23.

73. *Id.* at 84. The committee noted:

[C]ontinuing information about equity securities transactions and securities holdings could be helpful in analyzing the extent to which institutional investment manager business: (1) is distributed across or concentrated in various members of the securities industry; (2) affects commission rates; (3) affects the execution, clearance, and settlement functions of firms in the securities industry; (4) affects broker-dealer financial responsibility rules; and (5) affects or encourages the existence of any reciprocal practices. Many other such uses connected with implementation of the central market system may appear when the SEC has gained sufficient administrative experience with the institutional disclosure data.

Id.

1. Broker-Dealer Benefit or Detriment—Block Trading Disclosure
Required

Block trading⁷⁴ currently represents more than half of all NYSE trading.⁷⁵ Commentators have noted “quarterly data would provide information to brokers and institutional trading desks to facilitate the function of block trading and enhance the liquidity of the marketplace.”⁷⁶ Disclosure of block trades pose a potential detriment to holders of those securities, at least to the extent that “[p]remature disclosure of a block position could cause harm (e.g., competitors could trade against the position and impede the block positioner’s ability to liquidate unobtrusively and without loss).”⁷⁷ Nonetheless, this large segment of trading activity falls squarely within the Section 13 disclosure framework.

Congress and the SEC were apparently not persuaded that broker-dealers deserved extra protection from potential competitive losses due to disclosure of large concentrated equity positions. Legislative history

74. “A Block trade is a trade of 10,000 shares or greater.” Nasdaq Monthly Market Activity Reports Definitions & Data Fields, *available at* <http://www.nasdaqtrader.com/trader/defincludes/MktActdef.stm> (last visited Dec. 2, 2006). According to the NASD, a block trade is “a purchase or sale of a large quantity of stock, generally 10,000 shares or more.” NASD Glossary of Terms, *available at* http://www.nasd.com/Resources/Glossary/NASDW_010868 (last visited Dec. 2, 2006).

75. Joel Seligman, *Symposium on the Regulation of Capital Markets, Another Unspecial Study: The SEC’s Market 2000 Report and Competitive Developments in the United States Capital Markets.*, Feb. 1995, BUS. LAWYER, at 514.

76. Final Rule 1978, *supra* note 50.

The Commission announces the adoption of a rule and form governing the reporting requirements of institutional investment managers exercising investment discretion over accounts having in the aggregate more than \$100,000,000 in exchange-traded or NASDAQ [n.a1] quoted equity securities. Under the rule, as adopted, such managers are required to file a report within 45 days after the end of each calendar year, identifying those securities, the aggregate amounts thereof held, the nature of such investment discretion and any voting authority. The rule and form will implement the institutional investment disclosure program as mandated by Congress and establish the Commission as the central repository for data concerning the influence and impact of institutional investment managers on the securities markets. The Commission is also soliciting comments concerning the usefulness and burdens associated with quarterly reporting.

Id. at 1.

77. Requests for Confidential Treatment Filed by Institutional Investment Managers, 17 C.F.R. Part 249, Release No. 34-22038, 1985 SEC LEXIS 1549, May 14, 1985, at 12-13 (“Adoption of amendments to instructions to form.”) [hereinafter Requests for Confidential Treatment].

suggests that Congress and the SEC were concerned about block trading activity and concluded that disclosure of information would be beneficial. The Institutional Investor Study Report,⁷⁸ conducted by the SEC and authorized by Congress⁷⁹ concluded that “the combination of block trading with investment management was troublesome because of the potential conflict of interest when a block trade assembler has accounts over which it exercises investment discretion and which participate in its block trades.”⁸⁰

Not only direct participants in the block trade, but also other investors trading in the same securities in the same and other markets, can be affected by block purchases and sales by large institutions. Continuing information about large trades could be useful in analyzing, for example, market-making and specialist functions, and differences in discounts obtainable in various markets.⁸¹

2. Potential “Free Riders” and “Front-Runners”

Some commentators have argued that the Section 13(f) reporting is ultimately more harmful than beneficial. Fidelity Investments noted that frequent disclosure of an investment advisor’s account holdings gives an advantage to non-client investors, and would enable others to “discern” the advisor’s trading techniques and investments—“something the advisor naturally does not want revealed to other advisors.”⁸² Fidelity also suggested that:

[T]o assess empirically the costs of front-running, the Commission take advantage of expertise in its staff who supervise the activities of broker-dealers in the secondary markets. It is undisputed that holdings information has value to traders - they would not pay to

78. The Institutional Investor Study Report (H.R. Doc. No. 64, 92d Cong., 1st Sess. 1971). This Study was “directed and staffed largely by professional economists drawn from outside the SEC staff.” *Id.* See Conference Report *supra* note 27, at 78.

79. Conference Report, *supra* note 27, at 78.

80. *Id.* at 84.

81. *Id.*

82. Letter from Eric D. Roiter, Senior Vice President and General Counsel, Fidelity Investments, to Jonathan G. Katz, Secretary, SEC (Feb. 27, 2003), *available at* <http://sec.gov/rules/proposed/s75102/edroiter1.htm> (last visited Nov. 12, 2006).

have access to 13F information if it did not - although there is debate as to how much less valuable that information becomes with a long time lag.⁸³

Fidelity also recognized that information garnered from Form 13F filings can help investors to better understand a fund and make informed investment decisions, and that brokers acting on behalf of their clients, make practical use of holdings disclosures.⁸⁴ Fidelity further lobbied to enlarge the 13F reporting period time lag from forty-five to sixty days, because in Fidelity's view the current time lag permits others "who wish to trade on such information to their own benefit and to the detriment of [Fidelity] fund shareholders."⁸⁵ The current disclosure regime, according to Fidelity, "facilitate[s] free-riding and front-running behavior,"⁸⁶ which is ironically the same conduct Goldstein was accused of in a November 2006 civil action.⁸⁷ Goldstein has unapologetically admitted that if information is available in the public domain, he intends

83. *Id.*

84. *Id.*

85. *Id.* ("The saying 'put enough snapshots together and you have a movie' expresses the risk involved in frequent disclosure, even with a time lag, as well as the benefit of such disclosure to those who want to fully understand a fund's trading techniques.").

86. *Id.*; see also David Edwards, *Reverse Engineer Your Mutual Fund*, THESTREET.COM, May 6, 2002, available at <http://www.thestreet.com/funds/mutualfundmondaydedwards/10020715.html> (last visited Dec. 13, 2006) ("Generally, portfolio managers like to reveal as little about their strategies as possible to avoid Wall Street from 'front running' (taking positions in advance of a big order) their trades and to limit 'free riding' (one stock picker blindly copying another's trades).").

87. Complaint at 7; RMR Hospitality & Real Estate Fund v. Bulldog Investors Gen. P'ship et al., Nov. 13, 2006, Ex-99.1, attached to RMR 8k, available at www.sec.gov/Archives/edgar/data/1278038/000110465906076852/a06-23938_4ex99d1.htm (last visited Dec. 4, 2006).

Before the Defendants Bulldog Investors General Partnership, Opportunity Fund, Full Value Fund and Opportunity Plus Fund (the 'Goldstein Managed Funds') make a significant investment in a Bulldog target such as RHR, Defendant Goldstein often personally purchases shares in the target companies. Then, as the Goldstein Managed Funds purchase large quantities of additional shares in those same target companies, the share prices of the target companies increase. By regularly engaging in these so called 'front running' activities, Defendant Goldstein is able to personally profit from his personal share purchases without regard to whether the Goldstein Managed Funds and their investors are able to profit. This practice is evidence of the unethical and inequitable conduct associated with the activities of Defendant Goldstein and his Bulldog business.

Id.

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to use it to gain whatever advantage possible, and claimed throughout the Goldstein Application that 13F data has become a cottage industry for stealing investment ideas.⁸⁸

Possible by-products of 13F disclosures can include a price increase of disclosed stocks. For example, shares of Black & Decker Corp. rose 6 percent following a November 15, 2006 13F filing by activist hedge fund manger Bill Ackman of Pershing Square Capital, which disclosed that it owned 1.3 million shares of the power tool manufacturer.⁸⁹ Warren Buffet also commented in a 1984 Berkshire-Hathaway shareholder letter that revealing acquisition activity while in progress might result in a higher cost basis for that position.⁹⁰ The available

88. See McCormack, *supra* note 22:

There are services that say something like, why pay Carl Icahn or Warren Buffet their fees—why not just take their ideas and steal them and use them for yourself? To me, it’s the same as somebody illegally downloading something from the Internet. *I admit, I do it myself. I want to know what Carl Icahn is buying. And if he has to file, I’m going to look.*

But I don’t think I have a right to demand that he tell me. Where does the government have this authority to make people disclose what basically are trade secrets—the source of their earnings power—without paying for it? Of course, no one pays for it and there’s no way to know what it’s worth.

Id. (emphasis added); see also Ira Carnahan, *Bet With the Pros*, FORBES, May 13, 2002, available at 2002 WLNR 9085942:

Institutions spend \$50 billion a year selecting stocks. Here’s how to tap their knowledge for free. And you don’t have to limit your copying to funds available to the public. Anyone hired to manage \$100 million or more of stocks—and that includes hedge-fund operators—must file a 13F report on his holdings with the Securities & Exchange Commission within 45 days of the end of each quarter. Example: The 13F of hedgeie Jeffrey Vinik, the famed ex-Magellan Fund manager, shows that as of Dec. 31, 2001 he was partial to housing stocks, including Clayton Homes and Champion Enterprises.

You can check 13Fs on the Edgar service at [[http://www.](http://www.sec.gov)]sec.gov. If you don’t want to mimic just one fund, you can check all institutions’ holdings of a stock by entering its symbol at [[http://www.](http://www.multexinvestor.com)]multexinvestor.com. The thing to look for is not a large percentage of ownership by institutions but a recent increase. Stocks that institutions load up on outperform those they dump by 5% over the following year.

Id.

89. See *Black & Decker (BDK) Jumps as Activist Investor Bill Ackman Discloses Stake*, STREETINSIDER.COM, Nov. 15, 2006, available at [http://www.streetinsider.com/Insider+Trades/Black+&+Decker+\(BDK\)+Jumps+As+Activist+Investor+Bill+Ackman+Discloses+Stake/1356623.html](http://www.streetinsider.com/Insider+Trades/Black+&+Decker+(BDK)+Jumps+As+Activist+Investor+Bill+Ackman+Discloses+Stake/1356623.html) (last visited Dec. 8, 2006).

90. See, e.g., Chairman Warren Buffet, 1984 Letter to Berkshire Hathaway Shareholders, available at <http://www.berkshirehathaway.com/letters/1984.html> (last

confidential treatment application relief and the Section 13 reporting time lag mitigate risks related to “free riders” who might attempt to replicate a market participant’s securities acquisitions (or dispositions).

IV. PUBLIC USES AND BENEFITS OF FORM 13F DATA

As was expressly intended by Congress, data culled from 13F filings has become a significant facet of the “total mix” of information available to market participants, regulatory agencies, and the public in general. A great deal of statistical analysis and market data interpretation might not have been otherwise possible absent the Section 13(f) reporting regime. A wide variety of other entirely proper public uses of 13F data, many of which are discussed herein, would also have not been available to the securities market without the Section 13 reporting requirements. Nonetheless, the Goldstein Application incredulously insisted that the only reason for public disclosure is to facilitate “free riders,” who allegedly steal investment ideas.

A. Data Service Providers and Form 13F Information Utility

Market participants apparently do make investment interpretations based upon data gleaned from 13F filings. In fact, an entire cottage industry of subscription data services exists and depends heavily upon the reporting requirements to assemble statistics used by sophisticated market professionals. Thomson Financial, Inc. is among those 13F data providers, and investment industry professionals with information tools, data, and analysis through its “ShareWatchTM” and “BondWatchTM” data services,⁹¹ and derives holding statistics for its data services directly

visited Dec. 20, 2006):

If we decide to change our position, we will not inform shareholders until long after the change has been completed. (We may be buying or selling as you read this.) The buying and selling of securities is a competitive business, and even a modest amount of added competition on either side can cost us a great deal of money.

Id.

91. See Response of the Office of Chief Counsel, Division of Investment Management, July 10, 2002, IM Ref. No. 2002791136, Thomson Financial Inc., File No. 132-3, available at http://sec.gov/divisions/investment/noaction/thomson071002.htm#P18_1154 (last visited Dec. 2, 2006).

ShareWatch is a comprehensive password-protected, web-based tool designed to help institutional broker-dealers target the buyers, owners and sellers of equity securities, for whom the broker-dealers seek to execute securities transactions. Subscribers use this service to identify new business opportunities based on current holdings, and to

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from 13F filings.⁹² Thomson’s services are marketed to “help broker-dealers identify and communicate directly with buyers, owners, and sellers of securities for whom the broker-dealers seek to execute securities transactions.”⁹³ Thomson’s data services are also for the “exclusive” use of; (i) the institutional sales and trading desks of registered broker-dealers to streamline their communication with institutional investors for brokerage services, and (ii) a small number of fund managers who use Thomson’s services to monitor the portfolio holdings of competing funds with similar investment strategies.⁹⁴ The 13F data provided by Thomson has become an integrated part of the “efficient market.”

Various other services offer data interpretation for market participants based in part upon 13F information. Wm. Smith & Co., is a registered broker-dealer and investment research firm that “provid[es] fundamental research . . . exclusively to institutional clients,” which utilizes “four catalysts” to develop its “stock ideas.”⁹⁵ Two of the four data sources (“catalysts”) utilized by Wm. Smith & Co. are 13D and 13F filings. TheStreet.com operates a subscription-based data service called Lionshares.com that utilizes institutional securities ownership.⁹⁶

communicate directly with customers and potential customers through Thomson Financial’s global network. In this way, ShareWatch helps the institutional brokerage community structure communications with customers and prospects, as well as match research and investment ideas with the needs of professional money managers.

Id. (requesting the SEC’s assurance that it “would not recommend enforcement action to the Commission under Section 203(a) of the Investment Advisers against certain unregistered investment advisers if they provide biographical and contact information about themselves to Thomson Financial Inc. (‘Thomson’) for inclusion in password-protected Internet websites that Thomson maintains.”).

92. *See id.*

As for the service’s content, the equity holdings information contained in the ShareWatch database is drawn from 13F and 5% beneficial ownership filings in the U.S., UK share register data, Asia/Pacific fund reports and other global portfolio and declarable stakes data.

Id.

93. *Id.*

94. *Id.*

95. *See* Wm. Smith & Co., available at <http://www.hystead.com/design/WMSmith/> (last visited Dec. 10, 2006).

96. *See TheStreet.com to Offer Institutional Ownership Data*, 5 FIN. NET NEWS 32, Aug. 7, 2000, available at 2000 WLNR 3905578:

TheStreet.com has signed a deal with Lionshares.com, a New York-based provider of institutional securities ownership data. TheStreet.com will

Lionshares.com's information is "gathered from 13(f) filings."⁹⁷ And according to AMG Data Services ("AMG") correspondence with the SEC, it employs information culled from registered investment companies (including 13F data) and EDGAR filings in a relational database that seeks to "calculate investor demand."⁹⁸ The insights that can be gleaned from 13F data, whether individualized or analyzed in the

provide users of its free site with a smattering of data, but will reserve full use of Lionshares.com's data base to users of its new site, TheStreetPros.com, which was launched last week. The new Web site is designed to be a tool for financial professionals and active traders, said David Reilly, editor. Reilly said TheStreet.com chose Lionshares.com because it offered a cost advantage over competitors' offerings. Other companies offer comparable tools to institutions via bulk subscriptions, which may cost from \$50-80 per month per user, said an industry insider. TheStreet.com pays significantly less, Reilly said, declining to be more specific. TheStreet.com pays Lionshares.com a flat fee per subscriber to TheStreetPros.com.

Currently, Lionshares.com, which offers retail and professional variants of its tools, provides data to clients including National Discount Brokers Group and E*Trade Securities. NDB licenses the institutional caliber tool for its professional clients, whereas E*Trade offers the service to its retail clients through the password-protected area of its site.

The information Lionshares provides is gathered from 13[F] filings, which are required to be turned in quarterly to the Securities and Exchange Commission by all institutions that manage more than \$100 million in equities. Lionshares.com also offers the service directly to retail investors through its Web site (www.lionshares.com).

Id.

97. *Id.*

98. See Comment Letter, AMG Data Services, Feb. 14, 2003, Re: File No. S7-51-02 Proposed Rule: Shareholder Reports and Quarterly Disclosure of Registered Management Investment Companies, EN 9, available at <http://sec.gov/rules/proposed/s75102/rladler1.htm> (last visited Nov. 11, 2006) [hereinafter AMG Comment Letter]; see also, Lone Pine Capital 13Fs, available at <http://sec.gov/cgi-bin/browse-edgar?company=lone+pine&CIK=&filenum=&State=&SIC=&owner=include&action=getcompany> (last visited Nov. 30, 2006) (revealing the manner in which AMG utilized 13F data).

AMG maintains a relational database of security holdings in 13F and open-end company semiannual filings required on EDGAR Reports describe historical activity in an individual security, a ranking of fund activity in that security and the nature of that activity, and a positioning of activity in that security relative to other portfolios holding that security and others with a common investment style. Debt securities and non-domestic equities---sectors not disclosed in the 13F dataset--- can also be queried. Similar report types can be generated from the 13F dataset. Each security is identified and assigned industry, country, and currency codes, and can be related to other securities to build semiannual open-end and quarterly investment management portfolio datasets managed passively, actively, or created *ad hoc*.

Id.

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aggregate, ultimately provides greater market transparency, which is the touchstone of the U.S. approach to securities market regulation.

AMG’s 2003 comment letter provided a detailed list of its “best customers” for Form 13F data that conspicuously included a number of investment managers.⁹⁹ For example, among AMG’s clients is Forstmann-Leff, a 13F filer and boutique investment management firm serving high net-worth clients.¹⁰⁰ Other AMG clients (who also file 13Fs) include the Leuthold Group, “a division of Weeden & Co., LP, a Greenwich, Connecticut based institutional broker-dealer,”¹⁰¹ and the Greenwich-based hedge fund, Lone Pine Capital.¹⁰² AMG asserted that quarterly 13F filings increase transparency of portfolio activity and “empower[s] investors to make better informed decisions [and p]roviding responsible oversight of this kind will go far to protect investors and maintain the integrity of the securities markets.”¹⁰³ While Goldstein contends that no plausible legitimate uses exist for Form 13F

99. *See id.* at n.9.

Clients: Bank of America Securities; Barclays; BBV Latinvest Securities; Bear Stearns & Co.; Cantor Fitzgerald; Capital Growth Management; CIBC World Markets; Credit Suisse First Boston; Daiwa Securities; Deutschebank; Dresdner Kleinwort Wasserstein; Fidelity Management & Research; Forstmann-Leff; Goldman Sachs & Co.; Joint Library-International Monetary Fund/World Bank; J&W Seligman; JP Morgan Chase; Kingdon Capital; Lehman Brothers; Leuthold Group; Lone Pine Capital; Merrill Lynch; Moore Capital Management; Morgan Stanley; Prudential Securities; Salomon Smith Barney; Santander; Thomas Weisel Partners; Tiger Management; Toronto Dominion; UBS Warburg; Vinik Asset Management; Wachovia Securities; and Waddell & Reed.

Id.

100. *See* AMG Comment Letter, *supra* note 98; *see also* Forstmann-Leff 13F-HR, available

at <http://sec.gov/Archives/edgar/data/917297/000126967806000090/0001269678-06-000090-index.htm> (last visited Nov. 30, 2006); *see also* Forstmann-Leff, available at <http://www.forstmannleff.com/> (last visited Nov. 30, 2006) (stating that Forstmann-Leff is “[a] boutiques investment management firm specializing in alpha-generating small, mid and large capitalization equity investment strategies. Assets under management total over \$2 billion. Our clients include corporate & public pension plans, endowments, foundations, Taft-Hartley funds and high net worth individuals”).

101. AMG Comment Letter, *supra* note 98; *see also* Leuthold Group, available at <http://www.leutholdgroup.com/about.cfm> (last visited Nov. 30, 2006).

102. *See* Lone Pine Capital’s 13F filings, available at <http://sec.gov/cgi-bin/browse-edgar?company=lone+pine&CIK=&filenum=&State=&SIC=&owner=include&action=getcompany> (last visited Nov. 30, 2006).

103. *Id.*

data, the information has without question become a component of the efficient market, as was the stated intent of Congress when it promulgated the reporting regime.¹⁰⁴

B. Analytical Studies and Antitrust Actions

The Goldstein Application contended that “all evidence indicates that 13F filings are used by the public for only *one* reason: to obtain, without compensation, the trade secrets of successful filers.”¹⁰⁵ Despite the blustery rhetoric, Form 13F data quite clearly has an array of legitimate uses. For example, a variety of academic studies have employed empirical 13F data: one such study analyzed the relationship between default probability¹⁰⁶ and stock returns¹⁰⁷ based in no small part on 13F disclosures; another analyzed 13F data to interpret insurance mutual fund performance;¹⁰⁸ and a recent study evaluated merger-related

104. See Goldstein Application, *supra* note 12; Conference Report, *supra* note 27.

105. See Goldstein Application, *supra* note 12 (emphasis added).

106. Lorenzo Garlappi et al., *Default Risk, Shareholder Advantage, and Stock Returns* (Sept. 2005), available at <http://www.haas.berkeley.edu/finance/GSY-2005-09-22.pdf> (last visited Nov. 30, 2006) (“Default risk is usually defined as the possibility that a company will not be able to meet its financial obligations in the future.”).

107. See *id.* at Abstract.

Finally, because recent studies have found that institutional ownership of a stock can affect its market price efficiency (*see, e.g.*, Gompers and Metrick (2001)), we examine the effect of institutional holdings in a stock on the relationship between default risk and stock returns. We obtain institutional holdings data from Thomson Financial’s 13[F] database. Since institutional holding data are reported on a quarterly basis, we form portfolios every quarter, and examine the average monthly returns during the next three-month period.)

Id. at 26.

108. See Zuanjuan Chen et al., *Prudent Man or Agency Problem? On the Performance of Insurance Mutual Funds Abstract*, Univ. of Rhode Island, College of Business Administration, William A. Ome Working Paper, No. 2, 2005/2006, available at <http://207.36.165.114/Denver/Papers/Inst.%20Ownership%20and%20Bid-Ask%20Spread.pdf> (last visited Nov. 30, 2006):

Identifying Insurance Mutual Funds - The CDA dataset provides names of mutual fund management companies. Using a link provided by Thomson Financial, we identify those fund management companies in the Thomson Financial CDA/Spectrum 13F Institutional Holding data (the ‘13F data’). In the 13F data fund management firms are further classified into the following categories based on their ultimate ownership: (1) banks, (2) insurance companies, (3) investment companies and their managers (mutual funds), (4) independent investment advisors (consisting mainly of large brokerage firms), and (5) others (including pension funds and university endowments).

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arbitrage by way of 13F data analysis.¹⁰⁹ Data culled from Form 13F filings is also a component of the Herfindahl-Hirschman Index (“HHI”) that is utilized in a variety of analytical studies.¹¹⁰ HHI concentration of

Id. at 8.

109. Michah S. Officer, *Are Limited Arbitrage Effects Detectable? Evidence From Merger Arbitrage*, Univ. of Southern California, Marshall School of Business Department of Finance and Business Economics, Working Draft, Apr. 25, 2006, available at http://www-rcf.usc.edu/~officer/index_files/Limited_arbitrage_effects.pdf (last visited Dec. 19, 2006). The SEC requires that

institutions with investment discretion over more than \$100 million of investors’ money file form 13F to report their holdings of publicly-traded equity securities. While short-sales (of bidder stock, for example) are not included in these filings, long holdings of target stock should be for most large merger arbitrageurs (Except for instances in which arbitrageurs request an exemption from the SEC for the reporting of short-term arbitrage positions.)

Id. at 13 and n.15.

110. Kose John and Diana Knyazeva, *Governance and Conservatism in Investment Decisions* (May 2006), available at <http://robinson.gsu.edu/FEA2006/papers/GovernanceConservatismInvestment.pdf> (last visited Nov. 30, 2006) (“We use a measure of institutional ownership concentration—Herfindahl index of institutional ownership stakes—based on the data from the Thomson Financial database of 13[F] filings.”); see also Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance* (Sept. 22, 2006), available at http://www.fdic.gov/bank/analytical/cfr/2006/oct/hedge_fund.pdf (last visited Nov. 30, 2006); <http://www.fdic.gov/bank/analytical/cfr/2006/oct/workshop.html> (last visited Nov. 30, 2006) (stating that one can “track down the 1st quarter-end holding date of the hedge funds in the target companies using 13F filings of the funds from Thomson Financial . . .”); Sergey S. Barabanov and Michael J. McNamara, *Market Perception of Information Asymmetry: Ownership by Different Types of Institutions, Bid-Ask Spread, and Returns on Nasdaq Stocks*, (Sept. 2003), available at <http://207.36.165.114/Denver/Papers/Inst.%20Ownership%20and%20Bid-Ask%20Spread.pdf> (last visited Nov. 30, 2006) (“The CDA Spectrum database of 13F filings was obtained from Thomson Financial The database provides common stock holdings by institutional fund managers filing 13F Reports with the SEC each quarter”); Amir Rubin, Simon Fraser, and Amri Barne, *Corporate Social Responsibility as a Conflict between Shareholders* (Oct. 13, 2005), available at <http://www.olin.wustl.edu/jfi/pdf/csr.conflict.pdf> (last visited Dec. 13, 2006) (“The Herfindahl-Hirschman Index (HHI) of concentration of the top 15 institutional owners (as reported in 13[F]).”); Patrick Dennis and Deon Strickland, *The Determinants of Idiosyncratic Volatility* (Apr. 29, 2005), available at <http://lcb.uoregon.edu/departments/finl/idio.pdf> (last visited Nov. 30, 2006) (stating that 13F is also used to determine time-series trends, fixed effect idiosyncratic volatility regressions, and is used in summary statistics for the variables used in the analysis); Amir Rubin and Simon Fraser, *Political Views and Corporate Decision-Making: The case of Corporate Social Responsibility* (Sept. 12, 2005), available at <http://www.sfu>

ownership measurements that “account[s] for every institutional holding reported on the 13F disclosure form,”¹¹¹ have been used by the U.S. Department of Justice in a number of antitrust actions.¹¹² The Goldstein Application ignored the fact that an array of analytical techniques utilize 13F data in order to make interpretations of mergers and other securities market activities, a fact that directly rebuts Goldstein’s obtuse and incredulous theory that no legitimate reasons exist for the Section 13 disclosure framework.

C. SEC Section 13(f) Enforcement

A recent SEC securities fraud action against a hedge fund manager alleged 13(f) violations¹¹³ among a host of other alleged Advisers Act,

ca/~arubin/A12Sep05.pdf (last visited Nov. 30, 2006)

For institutional ownership, we use the Herfindahl-Hirschman Index (HHI) of concentration of the top 15 institutional owners gathered from Schedule 13F filings. This is defined as $\sum_{i=1}^{15} h_i^2$ where h_i is the percentage ownership of institution i . Shleifer and Vishney (1986) show that institutions have a greater influence when they are large shareholders, and Black (1992) shows they have a greater influence because they can form a coalition. Therefore, we use a measure that illustrates the concentration of institutional ownership.

Id.; see also LilyQiu, *Which Institutional Investors Monitor?* (Oct. 2003), available at <http://icf.som.yale.edu/pdf/seminar03-04/publicv3.pdf> (last visited Nov. 30, 2006).

111. Sergey S. Barabanov and Michael J. McNamara, *Market Perception of Information Asymmetry: Ownership by Different Types of Institutions, Bid-Ask Spread, and Returns on Nasdaq Stocks*, 1 (Sept. 2003), available at <http://207.36.165.114/Denver/Papers/Inst.%20Ownership%20and%20Bid-Ask%20Spread.pdf> (last visited Nov. 30, 2006).

112. See, e.g., *U.S. v. Connors Bros. Income Fund et al.*, Case No. 1:04CV01494 (D.C. Dist. Oct. 19, 2004) (“Using a measure of concentration called the Herfindahl-Hirschman Index (“HHI”), which is defined and explained in Exhibit A to the Complaint, the pre-transaction HHI was about 4200—well in excess of the 1800 point level for characterizing markets as highly concentrated.”); see also Dep’t of Justice Proposed Judgment in *U.S. v. Connor Bros.*, available at <http://www.usdoj.gov/atr/cases/f205900/205900.pdf> (last visited Nov. 30, 2006).

113. Complaint at 35, *SEC v. Sacane*, No. 3:05cv1575-SRU (D. Conn. Oct. 12, 2005), available at <http://sec.gov/litigation/complaints/comp19424.pdf> (last visited Feb. 24, 2007); see also Press Release, Dep’t of Justice, *Hedge Fund Officer Who Assisted in the Filing of False SEC Statements is Sentenced* (Mar. 6, 2006) (indicating “[i]t is our hope that this prosecution will send a message to hedge fund operators that the federal government is watching,” U.S. Attorney [Kevin J.] O’Connor stated. “The failure to obey securities laws, especially by making false statements in SEC filings on which investors rely, is a serious crime. Violators will be vigorously prosecuted.”).

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Exchange Act, and Securities Act violations.¹¹⁴ One of the defendants was "a registered representative associated with various broker-dealers registered with the Commission,"¹¹⁵ and others were investment advisers to two hedge funds.¹¹⁶ The SEC alleged the defendants orchestrated fraudulent schemes in order to manipulate the stock of two equity issues to "artificially inflate the performance and value of the hedge funds . . . which garnered increased fees."¹¹⁷ According to the SEC, the defendants not only defrauded investors, but also "breached their fiduciary duties to their advisers [sic] clients through the undisclosed manipulation, which had the end result of increasing the fees received paid by the clients and in the funds holding high concentrations of two thinly-traded stocks that defendants had manipulated."¹¹⁸ The investment adviser defendants allegedly filed false 13Fs that under-reported¹¹⁹ the investment company's ownership of the 13(f) issuers' shares and concealed the concentrated position.¹²⁰ Such undisclosed positions could be precursors to "pump and dump" schemes, and accurate 13F disclosure can alert investors to what might otherwise be lurking in the market's shadows.

The SEC also recently instituted administrative proceedings against the investment company Cabot Money Management,¹²¹ and its adviser, for "willful[]" violations of Section 13(f)(1) and Rule 13f-1 thereunder."¹²² The defendants were required to disclose quarterly

114. See Complaint, *supra* note 113, at 2.

115. *Id.* at 4.

116. *Id.* at 1.

117. *Id.* at 1-2.

118. *Id.* at 2.

119. *Id.* at 26-27.

120. *Id.* The complaint made several assertions, including:

On February 14, 2003, Schmidt, on behalf of Durus and Sacane, filed electronically with the Commission a Form 13F, which contains Schmidt's electronic signature, reporting Durus' purported stock holdings as of December 31, 2002.

.....

Schmidt followed Sacane's instructions and, as a result, on this Form 13F, Durus reported falsely that it owned 5,283,248 shares of Aksys stock as of December 31, 2002.

Id. at 26-27.

121. See *In re Cabot Money Mgmt., Inc.*, Exchange Act Release No. 37573, Investment Advisers Act Release No. 1577, at 1 (Aug. 15, 1996), available at <http://sec.gov/litigation/admin/ia1577.txt> (last visited Nov. 11, 2006).

122. *Id.* at 3.

holdings via Form 13F within forty-five days of March 31, 1996,¹²³ but did not file until roughly three (3) months after the deadline.¹²⁴ Due to the defendants' alleged failure to timely file the relevant Form 13F, investors of the publicly traded companies were improperly deprived of the subsequently and untimely disclosed information.¹²⁵ The SEC emphasized that the congressional purpose of requiring Form 13F filings was to create a "central depository of historical and current data about the investment activities of institutional investment managers,"¹²⁶ and further asserted:

The importance of timely disclosure of such information is especially pronounced here, where the institutional investment managers' holdings include a significant percentage of the outstanding securities of an issuer with a volatile stock price . . . These circumstances illustrate that the information required on Form 13F can be of value to the marketplace and investors in evaluating the demand for a stock, and assessing the motivations of those holding or recommending a stock.¹²⁷

The SEC has also brought Administrative Proceedings against investment advisers who have failed to file required 13F disclosures.¹²⁸ The SEC has made clear through its enforcement efforts that the Section 13(f) reporting requirements are a significant portion of the overall disclosure framework for the U.S. securities markets; and consistent with that position, has sought to sanction violators who attempt to evade

123. *Id.* at 2.

124. *Id.*

125. *Id.* at 3. Information that should have been disclosed to investors in the quarterly filing includes:

As of December 31, 1995, accounts over which Cabot Money Management and Lutts exercised investment discretion held 693,109 shares of Presstek, approximately 4.7 percent of the total outstanding. As of March 29, 1996, that figure had increased to 729,441 shares, or approximately 4.8 percent of the total outstanding. Those holdings accounted for more than 45 percent of the 'Section 13(f) securities' in accounts over which Cabot Money Management and Lutts exercised investment discretion as of December 31, 1995, and nearly 40 percent of the 'Section 13(f) securities' as of March 29, 1996.

Id.

126. *Id.* (quoting S. REP. NO. 94-75, at 77-78 (1975)).

127. *Id.* at 3.

128. See *In re* Joel R. Mogy Investment Counsel, Inc., Exchange Act Release No. 44268, Investment Advisers Act Release No. 1941 (May 7, 2001), available at <http://www.sec.gov/litigation/admin/34-44268.htm> (last visited Nov. 12, 2006).

the requirements to the detriment of the public.

However, under certain circumstances the SEC has demonstrated that it is receptive to relaxing various requirements for legitimate purposes, and Form 13F data has been a factor in certain requests for exemption. Examples of the SEC’s flexibility include use of 13F data to successfully support requests for exemption from registration requirements under Exchange Act Rule 10b-13,¹²⁹ and companies have made use of Form 13F data to support requests for exemption from tender offer rules,¹³⁰ which the SEC has granted on occasion.¹³¹

D. Civil Litigants Use Form 13F Data

A publicly traded company utilized Section 13(f) securities information against an alleged “group of secretive and interconnected New York and offshore hedge funds and investment bankers.”¹³² The alleged securities manipulation by defendants, according to plaintiff Payless Shoesource, Inc., was orchestrated through “suspicious” Form

129. AMP Limited, SEC No-Action Letter, 1998 WL 870709, at *2 (Sept. 17, 1998).

130. Letter from William A. Groll, Cleary, Gottlieb, Steen & Hamilton, to the Office Chief, Office of Mergers and Acquisitions, Division of Corporation Finance, SEC, July 29, 2002, available at <http://sec.gov/divisions/marketreg/mr-noaction/saipem072902.pdf> (last visited Nov. 24, 2006). In an effort to gain exemption from tender offer rules, companies have used Form 13F data to support their requests as follows:

We are writing on behalf of our client, Saipem SpA (“Saipem”), to follow up on our recent conversations and to request that the Securities and Exchange Commission (the ‘Commission’) grant exemptive relief from the provisions of Rule 14d-10(a) and Rule 14e-5 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), with respect to the proposed tender offer in the United States by Saipem for securities of Bouygues Offshore S.A. (“Bouygues Offshore”) described in this letter.

In conjunction with the French standing offer that Saipem is required to make, Saipem would like to make an offer to acquire ADSs and Shares from holders resident in the United States, both to enable it to achieve the highest possible ownership through the offers, and to enable the U.S. holders to participate in the transaction on the same terms as holders outside the United States. Accordingly, it has undertaken an assessment of the level of ownership of Shares and AD[R]s in the United States to determine the applicability of the U.S. tender offer rules to the proposed offer.

Id. at 1, 4.

131. Serono S.A., SEC No-Action Letter, 2002 WL 31116135, at *1-2 (Sept. 12, 2002) (granting exemptions from Section 14(d)(5) of the Exchange Act and Rules 14d-10, 14d-11 14e-5 under the Exchange Act).

132. Amended Complaint at ¶ 1, Payless Shoesource, Inc. v. Barington Cos. Equity Partners, L.P., 2004 WL 2079384 (D. Kan. May 11, 2004) (No.04-4045).

13F disclosures by a group allegedly engaged in an “ongoing manipulative and misleading scheme and course of conduct in purporting to nominate and solicit proxies for their hand-picked candidate for election to the Board of Directors of Payless.”¹³³ Full and accurate 13F disclosure can serve to inform shareholders as to the possible motive and nature of potential board of directors candidates, but if market participants file false or misleading Forms 13F, the shareholder franchise can be compromised and candidates possibly elected under false pretenses.

Class action litigants have also relied upon Form 13F data. An uncertified class of short-sellers asserted a Section 10(b) (and Rule 10b-5 thereunder) securities fraud claim against an investment adviser.¹³⁴ The short-seller plaintiffs alleged that defendant Durus Capital’s Form 13F materially misrepresented its ownership in Aksys stock – claiming it only owned 5,283,248 shares of Aksys, when in fact it actually owned over 10 million shares (approximately 44 percent of Aksys common stock).¹³⁵ Class action administrators have also utilized 13F data to identify eligible class member claimants in order to disburse settlement proceeds.¹³⁶

The many methods which regulators, market participants, litigants and the investing public have all legitimately utilized 13F data seriously undermines Goldstein’s contention that no legitimate use for the disclosure requirements exists beyond “stealing” investment ideas. Beyond the citation of a handful of financial magazine articles describing the investment holdings of a handful of certain “celebrity” investment managers, Mr. Goldstein proffered no evidence whatsoever to show that the allegedly rampant idea theft that he claims is regularly perpetrated on Wall Street and Main Street even exists. Moreover, the Goldstein Application made no measurable attempt to cogently

133. *Id.* at ¶¶ 57, 1.

134. Memorandum of Decision, *Collier v. Aksys Ltd.*, 2005 WL 2603945 (D.Conn. Aug. 12, 2005).

Id.

135. *Id.*

136. See, e.g., James D. Cox and Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411, 412 (2005) (citing Inst’l Shareholder Servs., Final Settlements for 2004, available at <http://scas.issproxy.com/> (last visited Nov. 11, 2005)); see also James D. Cox and Randall S. Thomas, *Leaving Money on the Table: Do Institutional Investors Fail To File Claims in Securities Class Actions?*, 80 WASH. U. L.Q. 855 (2002).

distinguish why his hedge fund holdings should not have been subject to a confidential treatment application prior to his request for full exemption from the Section 13 reporting framework.

V. SEC CONFIDENTIAL TREATMENT

A non-exempt investment manager may request to delay 13F disclosure¹³⁷ through the filing of an application with the SEC,¹³⁸ which delays and if granted, may altogether prevent disclosure of Form 13F data. The confidential treatment remedy serves as a form of relief that is generally consistent with the confidentiality procedures for a variety of other federal agencies.¹³⁹ confidential treatment applications are no

137. See SEC, Commission Notice: Re: Section 13(f) Confidential Treatment Requests (June 17, 1998), available at <http://www.sec.gov/divisions/investment/guidance/13ft2.htm> (last visited Dec. 1, 2006) [hereinafter Commission Notice]. The SEC has laid the groundwork to delay 13F disclosures:

Section 13(f)(3) authorizes the Commission to delay or prevent the public disclosure of information as it determines to be necessary or appropriate in the public interest or for the protection of investors.

Congress specified two categories of securities information that the Commission, upon request, should exempt from disclosure on reports filed under Section 13(f): (1) information that would identify securities held by the account of a natural person or certain estates or trusts; and (2) information that would reveal an investment manager's program of acquisition or disposition that is ongoing both at the end of a reporting period and at the time that the investment manager's Form 13F is filed. The legislative history of Section 13(f) emphasizes the second of these categories in pointing out that: “[t]he Committee believes that generally it is in the public interest to grant confidential treatment to an ongoing investment strategy of an investment manager. Disclosure of such strategy would impede competition and could cause increased volatility in the market place.”

Id. (emphasis in original).

138. 17 C.F.R. § 240.24b-2 (2006); see also Commission Notice, *supra* note 137, at n.1 (citing Brett D. Fromson, *SEC Disclosure Exemption Questioned; 25-50 Money Managers, Firms Allowed to Keep Holdings Confidential*, WASH. POST, Aug. 23, 1997, at C1 (noting “[f]ederal securities law requires large investors in the public markets to file quarterly reports on their holdings, which are known as 13F reports. But the agency routinely allows investors to keep some of their positions confidential so they can more easily move into or out of stocks.”)).

139. For example, all of the following federal agencies have confidentiality provisions which are similar to the SEC provisions discussed herein: Consumer Product Safety Commission (15 U.S.C. § 2055); Copyright Office (37 C.F.R. § 202.20(d)); Environmental Protection Agency (42 U.S.C. § 7607(a)); Equal Employment Opportunity Commission (42 U.S.C. § 2000e-8e); Food and Drug Administration (21 U.S.C. §§ 331(j), 360j(c); 21 C.F.R. § 130.32); Occupational Safety and Health

longer routinely granted, and recent denials of high profile investors' efforts to shield their equity portfolio holdings from public view have been widely reported; but even a denied confidential treatment application delays disclosure and increases the "stale" nature of the pertinent portfolio data because during the pendency of the confidential treatment application process, "the material for which confidential treatment has been applied will not be made available to the public."¹⁴⁰ The bureaucratic advantage inherent in the confidential treatment application process invariably reduces any potential utility to the "free riders" of which Goldstein complains, and savvy market players have increasingly exploited this "red tape" delay.¹⁴¹

Administration (29 U.S.C. § 664); Patent and Trademark Office (35 U.S.C. § 122; 37 C.F.R. § 1.14(b)); Postal Service (39 U.S.C. § 410); and the Social Security Administration (42 U.S.C. § 1306). *See also* Conference Report, *supra* note 27, at 87.

140. 17 C.F.R. § 240.24b-2(c).

141. Commission Notice, *supra* note 137, at n.1 (citing Floyd Norris, *A Misinterpretation of a Buffett Filing Stings Wells Fargo*, N.Y. TIMES, Aug. 22, 1997, at A1; *Mixup Sheds Light on Confidential Stock Buys*, CHI. SUN-TIMES, Aug. 25, 1997, at 43). 13F filings allow the public to monitor institutional investors:

The 13F filled out by big institutional investors and filed 45 days after the end of the quarter details portfolio holdings and is a big reason why America's stock market is considered one of the most transparent in the world.

Exclusions to 13F that allow certain investments to be shielded from public view are not requested often, according to SEC spokesman John Heine.

That at least has been the case since the late Eighties when the SEC said it was tightening scrutiny and would deny requests for confidentiality unless a compelling case could be made for why the information should be withheld.

Id.; *see also*, Miles Weiss, *Warren Buffet Loses Appeal to Keep Holdings Secret*, BLOOMBERG, Aug. 20, 2003, http://quote.bloomberg.com/apps/news?pid=20670001&refer=news_index&sid=a.iXY.g37tbc (last visited Jan. 2, 2007). The SEC has also refused to allow the delaying in certain instances:

Warren Buffett lost an appeal before the Securities and Exchange Commission to delay disclosure of certain stock holdings, part of an effort by the billionaire to prevent copycat investing. As the chairman of Berkshire Hathaway Inc., Buffett has argued that his short-term trading strategies qualify as intellectual property, and warrant an SEC filing exemption. Publication of Berkshire's holdings, Buffett says, lead to price movements that drive up his investment costs. The SEC acknowledged in a decision released today that traders attempt to mimic Buffett's stock selections. At the same time, the agency said Buffett had failed to show that complying with disclosure rules would cause Berkshire competitive harm. "The SEC is saying if you want any special treatment, then the burden is on you to show how it harms you," said Terry Nelson, a partner at Foley & Lardner in Madison, Wisconsin, who represents investment advisers. "The public needs to know, the markets need to know, and deserve to know, what's going on."

Id.; *but see* Gregory Zuckerman, *Edward Lampert is in the Hunt -- Sears Chairman Has*

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Confidential treatment may be granted pursuant to Exchange Act Rule 24b-2.¹⁴² The pertinent analysis for a confidential treatment application includes evaluation of the Freedom of Information Act (“FOIA”) exemption criteria,¹⁴³ and often includes assessment of FOIA Exemption 4, which contemplates “Trade Secrets,” and/or “Commercial or Financial Information.”¹⁴⁴ A prudent confidential treatment applicant will articulate the facts that relate to FOIA exemption criteria and the “applicable exemption(s) from disclosure under the Commission’s rules

Sent Signals He’s Looking for Acquisitions – Is General Motors in His Sights?, WALL ST. J., Sept. 19, 2006, at C1.

The following article reflects the difficulty of the Commission experiences in trying to follow the moves of all hedge fund managers:

It isn’t easy to track Mr. Lampert’s moves. Like all hedge-fund managers he doesn’t publicize his investments. And while most big investment managers are forced to file so-called 13F filings after each quarter, listing their largest holdings, Mr. Lampert is one of a small handful who have obtained permission from the Securities and Exchange Commission to delay releasing details of at least some of those holdings.

Id.

142. Commission Notice, *supra* note 137. The Commission Notice explains:

The Commission’s Office of the General Counsel recently has advised the Division that Release No. FOIA-65 applies only to requests for confidential treatment submitted under the FOIA, 17 C.F.R. § 200.83 (1997), and not to confidential treatment applications made pursuant to Rule 24b-2 under the Exchange Act. Applicants filing under Rule 24b-2, therefore, should not fail to include relevant information in the confidential treatment application based upon a concern that the request itself may be disclosed. Investment managers should also request confidential treatment for the confidential treatment application itself under Rule 24b-2.

Because confidential treatment applications which include a request for confidential treatment for the application itself, and which are granted, obtain at least the same degree of protection as the underlying securities positions, a request for the confidential treatment application made under the FOIA will be denied

Id. at n.4.

143. *Id.* at n.3. The Commission Notice details how a confidential treatment application may rely on an a FOIA exemption:

Rules adopted by the Commission under the federal securities laws, including Rule 24b-2 under the Exchange Act, require, among other things, that a confidential treatment application contain an analysis of the applicable FOIA exemption. For example, Exemption 4 of the FOIA states that “trade secrets and commercial or financial information obtained from a person and privileged or confidential may be withheld from disclosure.”

Id.

144. See Dep’t of Justice, Freedom of Information Act Guide, May 2004, <http://www.usdoj.gov/oip/exemption4.htm> (last visited Nov. 12, 2006).

and regulations adopted under the Freedom of Information Act.”¹⁴⁵ An applicant’s bases for confidentiality must be self-evident and “fully substantiated” within the confidential treatment application,¹⁴⁶ and the requested confidentiality must be demonstrably within “the public interest.”¹⁴⁷

Congress was mindful of the possible legitimate purposes served by confidential treatment when it amended the Exchange Act in 1975. Legislative history indicates that Congress considered it to be “in the public interest to grant confidential treatment to an ongoing investment strategy . . . [as] [d]isclosure of such strategy would impede competition and could cause increased volatility in the market place.”¹⁴⁸ The granting of a request for confidential treatment will maintain secrecy, for a period of time, over “that portion of any report filed by an investment manager covering holdings or transactions which are part of a program of acquisition or disposition in which the investment manager is engaged both at the end of the reporting period and at the time the report is filed.”¹⁴⁹ A successful confidential treatment applicant typically receives confidentiality for two broad categories of securities information:

- (1) Information that would identify securities held by the account of a natural person or certain estates or trust;
- (2) information that would reveal an investment manager’s program of acquisition or disposition

145. Commission Notice, *supra* note 137. Confidential treatment applications are held to certain requirements:

Confidential treatment application must include a description of the investment strategy used by the manager (whether it is an ongoing program of acquisition or disposition, block positioning, etc.), as well as an analysis supporting the applicable exemption. A confidential treatment application that does not provide the Division with a sufficient basis to evaluate the request or that provides only conclusory or generalized information will be denied.

Id.

146. *Id.*

147. *Id.* The Commission Notice stresses the limited circumstances in which confidential treatment may be granted:

Under the Exchange Act and the Freedom of Information Act (“FOIA”), which set out the requirements under which the Commission may grant confidential treatment for Form 13F information, such treatment is available only in those instances in which an investment manager demonstrates in its confidential treatment application that confidential treatment is in the public interest.

Id.

148. Conference Report, *supra* note 27, at 87.

149. *Id.*

that is ongoing both at the end of a reporting period *and* at the time that the investment manager’s Form 13F is filed.¹⁵⁰

A confidential treatment request filed in accordance with the instructions pursuant to Rule 24b-2, if granted, extends confidentiality to all documentation submitted in connection with the confidential treatment request, including the application itself.¹⁵¹ Subsequent requests made to access the confidential treatment application, related documents, or the Form 13F data itself, by third parties pursuant to the FOIA, will be logically and summarily denied.¹⁵² There can be little doubt that Congress found that certain proprietary investment strategies may have merit and economic value, and that the confidentiality of those strategies was something worth protecting. Confidential treatment relief, however, is the exception that the Goldstein Application apparently seeks to convert into the *de facto* rule.

A. FOIA Request Denials and Exemption 4

The SEC General Counsel’s office affirmed the SEC Freedom of Information Officer’s denial of FOIA requests where a Form 13F filer was granted confidential treatment.¹⁵³ Such a FOIA request can be

150. Commission Notice, *supra* note 137.

151. *Id.* The granting of confidentiality status to the confidential treatment application itself results from recent policy changes:

This represents a change in the Division’s policy. The Division is aware that Form 13F filers previously may have had a concern that the confidential treatment application itself would not be afforded confidential treatment based upon a 1983 Commission release stating that, in general, requests for confidential treatment are not protected under the FOIA. Release No. FOIA-65, May 5, 1983, 48 F.R. 21112. The Commission’s Office of the General Counsel recently has advised the Division that Release No. FOIA-65 applies only to requests for confidential treatment submitted under the FOIA, 17 C.F.R. § 200.83 (1997), and not to confidential treatment applications made pursuant to Rule 24b-2 under the Exchange Act. Applicants filing under Rule 24b-2, therefore, should not fail to include relevant information in the confidential treatment application based upon a concern that the request itself may be disclosed. Investment managers should also request confidential treatment for the confidential treatment application itself under Rule 24b-2.

Id. at n.4.

152. The FOIA specifies the procedures for appealing a denial. *Id.* at n.5 (citing 17 C.F.R. § 200.80 (1997)).

153. Order Affirming Denial of Freedom of Information Act Request for Confidential Filing, Freedom of Information Act Release No. FOIA – 177, 9 SEC Docket 1043, 1991 WL 286669, at *1 (Aug. 29, 1991) (explaining that the SEC “relied

denied pursuant to FOIA Exemption 4.¹⁵⁴ The SEC requires that a FOIA request “[a]t a minimum . . . must satisfy the requirements of FOIA Exemption 4 which protects ‘trade secrets and commercial or financial information obtained from a person and privileged or confidential.’”¹⁵⁵ Where confidentiality has been granted to a Form 13F filer, the SEC has stated its policy is to deny any FOIA request—not only for the securities holding information which has been granted confidential treatment—but also for the confidential treatment application and related documents which accompanied the confidential information.¹⁵⁶

The FOIA and confidential treatment policies are not without critics, and some market participants deride the confidential treatment policies due to the enlarged time lag of Form 13F data disclosure attributable to the bureaucratic application process,¹⁵⁷ and assert that confidential treatment policies create an unfair playing field for investors where “[s]ecret filings give unfair advantages to a few,” and that confidential treatment should be “abolish[ed].”¹⁵⁸ Larry Feinberg, manager of the \$500 million Oracle Partners funds, has argued that confidential treatment is inherently unfair, and quipped, “[i]f I’m going to pull down my pants in public I want everyone to pull their pants down

upon Section 13(f)(3) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(f)(d), which provides the Commission with authority to delay or completely prevent disclosure of information filed with it on Form 13F by investment advisers”).

154. *Id.*

155. Division of Investment Management: Frequently Asked Questions About Form 13F, Question 52 (May 2005), available at <http://sec.gov/divisions/investment/13ffaq.htm> (last visited Dec. 2, 2006) (quoting 5 U.S.C. § 552(b)(4) (2002)).

156. Commission Notice, *supra* note 137; see *id.* at n.5 (noting that “[t]he FOIA specifies the procedures for appealing a denial”).

157. See Debra Sparks, *Does Warren Buffett Deserve Special Treatment?* BUS. WK., Sept. 22, 1997, available at 1997 WLNR 4029680. For example:

Technimetrics Vice-President Cary Krosinsky says it’s ridiculous to allow confidential filings. “Its not clear who’s getting confidential treatment at any point in time,” he says. “Right now, for example, Warren Buffett has disclosed part of his holdings, but the other part remains confidential. The most recent information about his confidential holdings is from Mar. 31, 1996. That’s 15 months late.” Everyone without special treatment has 45 days after the end of the quarter to file. “That should be time enough for investors like Buffett as well,” says Krosinsky.

Id.

158. *Id.* In fact, the SEC’s confidential treatment policy seems to be at odds with its very own purpose. “Secret filings give unfair advantages to a few and fuel the harmful whisper circuit on Wall Street. To keep the market truly open, the SEC’s job is to prevent unnecessary speculation, not create it.” *Id.*

too."¹⁵⁹

B. Risk Arbitrage Trumps Block Trading

The SEC amended its Form 13F instructions in 1985 in an effort to "simplify" confidential treatment requests for certain risk arbitrage positions.¹⁶⁰ Although trading strategies that utilize block positioning are among the categories the SEC may delay or prevent public disclosure of, such strategies have simply not been afforded the same confidential treatment status as risk arbitrage techniques.¹⁶¹ Block trading secrecy is important for brokers and specialists seeking to buy or sell an inordinately large position, especially in illiquid issues, and the arguably inconsistent 13F policies potentially exacerbate the problem.¹⁶²

During the proposed Rule comment period, at least two broker-dealers asserted that the SEC should include block positioning¹⁶³ within the confidential treatment rubric, consistent with risk arbitrage confidential treatment requests. These broker-dealers took issue with the SEC proposing the release position that the Form 13F reporting time lag was sufficiently mitigating, and noted that "block positions 'involve transactions which are completed during a very short period of time.'"¹⁶⁴ These broker-dealers addressed the fact that block positions are

159. *Id.*

160. *See* Requests for Confidential Treatment, *supra* note 77, at *1 (explaining that the amendments to the Form 13F instructions "simplify the procedures for requesting confidential treatment of certain risk arbitration and limit the time for which confidential treatment of commercial information may be requested").

161. *See* Commission Notice, *supra* note 137.

162. Nicholas L. Georgakopoulos, *Classical and Cross Insider Trading: Variations on the Theme of Rule 10B-5*, 28 AM. BUS. L.J. 109 (1990) ("Trades too large to be executed in the anonymity of the trading floor go through the more personal 'block trading' specialists or 'upstairs' brokers. In such cases, it is harder to maintain secrecy. Large-scale insider trading is thus likely to be discovered.").

163. Requests for Confidential Treatment, *supra* note 77, at *12. "A transaction involving 10,000 shares or more of an underlying security, or options or security futures covering such number of shares is generally deemed to be a block transaction, although a transaction of less than 10,000 shares could be considered a block transaction in appropriate cases." NASD, Inc., Form 19b-4 Proposed Rule Change, by National Association of Securities Dealers, Inc. at 12 (Mar. 21, 2002), available at http://www.nasd.com/web/groups/rules_regs/documents/rule_filing/nasdw_000418.pdf (last visited Dec. 1, 2006).

164. *See* Requests for Confidential Treatment, *supra* note 77, at *12.

sometimes held for longer than forty-five days, and asserted that the SEC's "assumption" that block positions held that long are "for investment purposes" was inaccurate.¹⁶⁵ The broker-dealers insisted that block positioners should receive the same confidential protection as risk arbitrageurs, and emphasized the significant liquidity effects of block trading, similar to the market efficiency contributions of risk arbitrageurs.¹⁶⁶ The SEC has acknowledged that block positioners do in fact "facilitate the operation of the markets by offsetting temporary imbalances in the supply and demand for securities,"¹⁶⁷ yet were not persuaded by the broker-dealer block trading arguments.¹⁶⁸

The SEC excluded block trading from the "simplified" confidential treatment proposal, as it believed that such trading typically "involve[s] transactions which are completed during a very short period of time,"¹⁶⁹ and that block positions still held at the quarter's end, would likely "be disposed of by the date on which Form 13F is required to be filed (*i.e.*, 45 days later)."¹⁷⁰ Blocks still maintained forty-five days later "would be presumed to be maintained for investment purposes, rather than as a block position."¹⁷¹ While the SEC conceded that aspects of the broker-dealer assertions had merit, it considered the possibility of a block trade requiring confidentiality to be aberrant considering the time lag for Form 13F disclosures. Combining the reporting time lag with the fact that only a "limited number of block positions [are] maintained for 45 days, . . . [and] requests for confidential treatment of block position

165. *Id.*

166. *Id.*

167. SEC Concept Release: Short Sales, Exchange Act Release No. 34-43037, 17 C.F.R. § 240 (Oct. 20, 1999), available at <http://www.sec.gov/rules/concept/34-42037.htm> (last visited Dec. 2, 2006).

168. See Requests for Confidential Treatment, *supra* note 77, at *13. For example, two broker-dealers argued that "premature disclosure of a block position could cause harm (e.g., competitors could trade against the position and impede the block positioner's ability to liquidate unobtrusively and without loss), and that this likelihood of competitive harm is no less substantial than the likelihood of harm to a risk arbitrageur." *Id.* at *12-13.

169. *Id.* at *12. Rule 3b-9(c) of the Exchange Act defines a Qualified Block Positioner as a "dealer" who, among other things, acting as a principal, "engages in the activity of purchasing long or selling short . . . a block of stock with a current market value of \$200,000 or more in a single transaction . . . and sells the . . . block as rapidly as possible commensurate with the circumstances." 17 C.F.R. § 240.3b-8 (2006).

170. Requests for Confidential Treatment, *supra* note 77, at *9.

171. See *id.* at *12.

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data" the SEC has determined that such requests can be adequately addressed on a "case-by-case basis."¹⁷²

As a result, the amended Form 13F instructions¹⁷³ specifically apply to risk arbitrage confidential treatment requests but exclude block traders. Applicants seeking confidential treatment for block positioning (which may include broker-dealers and specialists)¹⁷⁴ are required to provide full factual support for the requests,¹⁷⁵ and must demonstrate a likelihood of competitive harm if the positions are disclosed.¹⁷⁶ The Goldstein Application made no mention of the varying considerations made by the SEC regarding its evaluation of differing factors for confidential treatment Applicants, and barely recognized the available relief of confidentiality, presumably because it profoundly undermines the conclusory contention that Section 13 reporting requirements are unconstitutional regulatory "takings."

172. *Id.* at *13.

173. *See* Form 13F General Instructions, *available at* <http://sec.gov/about/forms/form13f.pdf> (last visited Jan. 2, 2007). A Manager's request for confidential treatment must include:

If a request for confidential treatment is based upon a claim that the subject information is confidential, commercial or financial information, provide the information required by paragraph 2.a through 2.3. of this Instruction except that, if the subject information concerns security holdings that represent open risk arbitrage positions and no previous requests for confidential treatment of those holdings have been made, the Manager need provide only the information required in paragraph 2.f.

[2.f. For securities holdings that represent open risk arbitrage positions, the request must include good faith representations that:

- i. the securities holding represents a risk arbitrage position open on the last day of the period for which the Form 13F report is filed; and
- ii. the reporting Manager has a reasonable belief as of the period end that it may not close the entire position on or before the date that the Manager is required to file the Form 13F report with the Commission.

If the Manager makes these representations in writing at the time that the Form 13F is filed, the Commission will automatically accord the subject securities holdings confidential treatment for a period of up to one (1) year from the date that the Manager is required to file the Form 13F report with the Commission.

Id. at 2-3.

174. *See* Requests for Confidential Treatment, *supra* note 77, at *1 (noting that Forms 13F are required to be filed by "institutional investment managers exercising investment discretion over accounts having, in the aggregate, more than \$100,000,000 in exchange traded or NASDAQ quoted securities").

175. *Id.* at *8.

176. Requests for Confidential Treatment, *supra* note 77, at *12-13.

C. Confidentiality Requests and SEC Application Review

Examples of the SEC's recognition of the independent merits of confidential treatment applications abound. Despite the recent trend towards a lower likelihood of confidential treatment for 13F filers, ample support exists for the position that the SEC continues to give due consideration to confidential treatment applications. The SEC grants (or denies) individual requests based upon appropriate factors, and as noted herein, perhaps the most factor is whether the merits of an confidential treatment application demonstrate that confidentiality is a matter within the public interest. The SEC has adopted a case-by-case scrutiny of confidential treatment applications that have produced varied results.

1. End of Permissive Confidentiality—Bill Gates's
Cascade Investments, LLC

Cascade Investments, LLC, a money management firm formed to buy stocks on behalf of Bill Gates, filed its first Form 13F in November 1999, which publicly disclosed a portion of the Microsoft founders' equity holdings. Gates had previously obtained repeated confidential treatment grants for his entire portfolio (for successive one year terms).¹⁷⁷ According to market analyst Fred Hult, "[a]ny disclosure of (Gates's) positions [is] going to have an influence on the price of the stocks."¹⁷⁸ Kathryn McGrath, former director of the SEC's Division of

177. Miles Weiss, *Money Has Its Privileges, Gates Broker Insists*, MEMPHIS COMMERCIAL APPEAL, Nov. 21, 1999, at C4, available at 1999 WLNR 4517835. The SEC permits:

The SEC permits confidential treatment for information that would identify securities held by the account of a natural person or that would reveal an ongoing program of buying or selling by a manager. Confidentiality is also available for money managers who have open risk-arbitrage positions or who are engaged in trading of large blocks of stock.

Id.

178. *Id.* (noting that Mr. Hult is an analyst with the Carson Group, Inc., a firm that tracks institutional stock ownership). Explaining the reasoning behind keeping disclosure forms confidential:

Larson is seeking confidential status for Cascade's entire portfolio. His argument may be that Cascade's trading strategies would be disrupted by the media attention and investor scrutiny Gates receives.

"It would be unfair because other people would start piling on," said Ted Laurenson, a securities attorney at the law firm Paul, Weiss, Rifkind, Wharton & Garrison who works with a number of hedge funds.

Id.

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Investment Management stated that until that time, “institutions have been able to get confidential treatment with very little effort.”¹⁷⁹ The permissive trend of granting confidential treatment came to a halt in 1999 when the SEC indicated that in order to obtain confidential treatment in the future, the SEC would require “more detailed information on trading strategies from those seeking to keep their stock selections secret.”¹⁸⁰

2. Denial of Incomplete Confidential Treatment
Applications—Two Sigma Investments

The SEC recently denied a confidential treatment application primarily because the applicant “failed to provide sufficient information, either in its [r]equests or in its [p]etition, to substantiate that confidential treatment [wa]s merited.”¹⁸¹ The SEC reasonably determined that it was

179. *Id.*

180. *Id.*; see also SEC Letter to Confidential Treatment Filers, June 17, 1998, available at 1998 SEC No-Act. LEXIS 643. The SEC wrote the following:

We are writing this letter to inform investment managers with Section 13(f) reporting obligations of the position of the Division regarding Form 13F confidential treatment requests. The Division’s position is that these requests can be granted only under certain limited circumstances.

The Division is concerned that many Form 13F filers have concluded that confidential treatment of information contained on Form 13F will be granted automatically upon a superficial showing of need. Such a conclusion is erroneous. Under the Exchange Act and the Freedom of Information Act (“FOIA”), which set out the requirements under which the Commission may grant confidential treatment for Form 13F information, such treatment is available only in those instances in which an investment manager demonstrates in its confidential treatment application that confidential treatment is in the public interest. As discussed more fully below, a confidential treatment application must be limited to securities holdings that fall into one or more of the narrowly defined categories established by legislation or by the Commission, and the bases for seeking confidential treatment must be fully substantiated in the confidential treatment application itself. The Division will deny any confidential treatment application that does not provide the Division with a sufficient basis upon which to evaluate the request.

Id. at *2-3; see also Weiss, *supra* note 177 (indicating that “[y]ou can cook up all kinds of reasons, [to seek confidential treatment]” said [Kathryn] McGrath, now an attorney in the Washington office of Morgan, Lewis & Bockius”).

181. Two Sigma Investments, LLC, Exchange Act Release No. 52134, 2005 SEC LEXIS 1900, July 27, 2005, Order Denying Requests For Confidential Treatment, at *9. Denial was made “pursuant to Sections 13(f)(3) and (4) of the Securities Exchange Act of 1934 (‘Exchange Act’), to deny the requests for confidential treatment of information for the calendar quarters ended December 31, 2002 . . . filed by Two Sigma

in the interest of the public and protection of investors to deny this apparently incomplete confidential treatment request.¹⁸² The SEC set forth the information that must be included in a complete confidential treatment application,¹⁸³ and found that Two Sigma failed to provide information sufficient to substantiate its request.¹⁸⁴ Two Sigma argued that it is “engaged in a program of acquisition and disposition that employs a statistical arbitrage investment strategy,” and that disclosure of its securities position would expose its investment strategy to “reverse engineering.”¹⁸⁵ Two Sigma claimed that even partial reverse

Investments, LLC (‘Two Sigma’) pursuant to Section 13(f) of the Exchange Act.”

Id. at *1.

182. *See id.* at *1.

183. *See id.* at *5-6. The SEC requires the following for a confidential treatment request:

The Instructions require that a request that is based upon a claim that the subject information is confidential, commercial or financial information must provide supporting information in five specific areas: (1) a description of the investment strategy, including the extent of any program of acquisition or disposition; (2) an explanation of why disclosure of the securities would be likely to reveal the strategy; (3) a demonstration that the revelation of the investment strategy would be premature; (4) a demonstration that failure to grant the request for confidential treatment would be likely to cause substantial harm to the Manager’s competitive position; and (5) a statement of the period of time for which confidential treatment is requested.

Rule 24b-2(b)(2)(ii) under the Exchange Act also requires that a request for confidential treatment of Form 13F information contain “a justification of the period of time for which confidential treatment is sought.”

The Instructions also provide that a Manager may discuss each of the five areas listed above with respect to a class of holdings rather than with respect to each individual holding if “the Manager can identify a class or classes of holdings as to which the nature of the factual circumstances and the legal analysis are substantially the same.”

The Instructions further provide that at the expiration of the period for which confidential treatment has been granted, a Manager may file a *de novo* request for confidential treatment that meets the requirements of the Instructions.

Rule 430(b)(2) of the Commission’s Rules of Practice (“Rules of Practice”) provides that a “person seeking review [of an action made pursuant to delegated authority] shall file a petition for review containing a clear and concise statement of the issues to be reviewed.” Rule 430(b)(2) further provides that a petition for review shall “include exceptions to any findings of fact or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such record as may exist.”

Id. at *5-6.

184. *See id.* at *7.

185. *Id.* at *7-8 (stating “[a]s the Division notes, Two Sigma fails to explain how public disclosure of a partial list of its securities positions (Form 13F does not require disclosure of all of a Manager’s holdings) would allow others to ‘reverse engineer’ Two Sigma’s investment strategy.”)

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engineering would place it at “a competitive disadvantage in the market,” and that outcome would “undermin[e] [the] public interest.”¹⁸⁶

Despite the aforementioned favorable consideration for risk arbitrage strategies, the SEC found that Two Sigma failed to provide adequate information regarding “basic characteristics of its investment strategy,” and further failed to demonstrate “how its strategy is applied to each security for which [it] is seeking confidential treatment,”¹⁸⁷ and provided insufficient clarity as to how its investment strategy would, in fact, be revealed through public disclosure in a Form 13F.¹⁸⁸ Furthermore, Two Sigma did not support its conclusory claim of substantial harm from public disclosure,¹⁸⁹ nor did it explain how

186. *Id.* at *7.

187. *Id.* (noting that “statistical arbitrage strategies may be based upon any number of different relative relationships among securities and that individual investment strategies will differ depending on the relationships on which they focus.”).

188. *See id.* at *8-9. The SEC found that:

Two Sigma also fails to explain sufficiently how public disclosure of its securities positions would be likely to reveal its investment strategy for each of the securities in its Requests in light of the specific requirements of Form 13F. We note that Form 13F requires a Manager to report only the number of shares and market value of each position as of the close of trading on the last trading day of the quarter. Because Form 13F is not required to be filed until forty-five days after the last trading day of each quarter, disclosure of a security holding as of the last day of a quarter would not necessarily reveal a Manager’s *current* investment strategy. We therefore find that Two Sigma has failed to provide us with a sufficient explanation of how public disclosure of its holdings would be likely to reveal its investment strategy for each of its holdings.

Id.

189. *See id.* at *10-11. The SEC found that:

Two Sigma fails to explain how reverse engineering by its competitors could be accomplished when Two Sigma is not required to disclose certain of its securities holdings on Form 13F. Two Sigma’s failure to provide an explanation prevents us from being able to make an informed decision as to whether public disclosure of Two Sigma’s securities positions would be likely to cause Two Sigma substantial harm. Further, Two Sigma does not attempt to quantify the extent to which it could be harmed by disclosure, and thus does not demonstrate that it would be likely to suffer ‘substantial’ harm to its competitive position. Two Sigma also does not provide any facts or analysis pertaining to any particular security for which it seeks confidential treatment to demonstrate that disclosure of its position in that security would likely cause substantial harm to Two Sigma’s competitive position. We agree with the Division that additional information is necessary in order for us to be able to conclude that disclosure would result in substantial harm. As the Division noted in its Denial Letter, such information could include, among other things, discussion and analysis of relevant market conditions and the likely effect of disclosure on Two Sigma’s securities positions.

disclosure would “prematurely reveal its investment strategy.”¹⁹⁰

The Goldstein Application, as discussed in greater detail below, is similarly inconclusive in terms of the purported trade secret status of the “Bulldog” portfolio holdings and offers scant support for the position. Goldstein offered no measurable insight into the valuation methods he employs, nor the strategies utilized in the management of the “Bulldog” investments. And as described in detail below, the Goldstein Application is wholly lacking supportive facts and law to establish that anything that even resembles a trade secret exists in the components of his portfolio. Beyond Goldstein’s assertions that there is apparent public interest in what various other “celebrity” investors are holding, he cited nothing to demonstrate that any specific risk of competitive harm exists sufficient to warrant confidential treatment of his 13(f) securities holdings, let alone sufficient to merit exemption from the disclosure framework.

3. Public Disclosures by Form 13F Filers—Research Affiliates, LLC

The SEC affirmed the denial of a confidential treatment application on November 15, 2006.¹⁹¹ The SEC determined that Research Affiliates

Id.

190. *Id.* at *9. The SEC noted that:

We note that revelation of a Manager’s strategy could be premature if, among other things, the Manager was still engaged in the strategy at the time of the required disclosure. Two Sigma, however, does not demonstrate in its Requests and the Petition that its investment strategy with respect to any particular security was ongoing at the time of filing. For instance, as the Division notes, Two Sigma does not provide any transaction data showing purchases or sales of any of the securities from the end of a quarter through the date of filing. Such failure to demonstrate that its investment strategy has not changed from quarter to quarter prevents us from concluding that Two Sigma’s investment strategy is ongoing and static and that disclosure of Two Sigma’s securities positions would be likely to prematurely reveal its investment strategy.

Id. at *9-10.

191. Research Affiliates, L.L.C., Exchange Act Release No. 54,757 2006 SEC LEXIS 2657 at *5 (Nov. 15, 2006), available at <http://sec.gov/rules/other/2006/34-54757.pdf> (last visited Nov. 25, 2006) (affirming the denial of the Research Affiliates confidential treatment request). The SEC found that Research Affiliates had not provided “sufficient information” justifying their request. In characterizing the company’s request, the Commission stated:

Research generally describes itself as providing investment advisory services based on proprietary indices that are used to build passive portfolios. Research states that its indices (“Fundamental Indexes”) are based on a variety of alternative economic measures of the worth of an underlying company, such as revenue, sales, book value,

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failed to show that disclosure of the information contained in its Form 13F would cause it substantial competitive harm – largely because it had already publicly revealed its investment strategies.¹⁹² The SEC found that even if Research Affiliates had demonstrated it would be harmed – notwithstanding its public revelations – it failed to show “the likelihood that such harm would be substantial.”¹⁹³

Phillip Goldstein’s widely publicized penchant for public interviews, proxy fights and protracted litigation all offer insight into the “Bulldog” investment method and its ostensibly “value” oriented strategy. Any confidential treatment application by Goldstein might have been considered somewhat analogous to Research Affiliate’s public disclosure of its passive indices, at least in terms of Goldstein’s irascible “activist” strategies, leaving only the mix of actual securities held as potential “trade secrets.” Mr. Goldstein’s Full Value Advisors, LLC filed an otherwise blank Form 13F-HR on or about May 10, 2007 that noted confidential treatment was requested.¹⁹⁴ Various Schedules

cash flow and dividends, among others. Research states that it has a patent pending on the method of creating and weighting the indices and related analytical processes. Research also has made publicly available a methodology paper that precisely describes how the Fundamental Indexes are calculated. Specifically, the methodology paper, among other things, specifies 11 steps to define the universe of stocks and generate portfolio weights for the Fundamental Indexes, defines the RAFI factors used to create the Fundamental Indexes (sales, cash flow, book value, and dividend distributions), and includes instructions for additions, removals, splits, and mergers.

Id.

192. *Id.* at *6. In other words, the Commission decided that by revealing their purported confidential information:

Research itself already has disclosed how the Fundamental Index is composed and has provided information that would enable others to engage in an investment strategy based on Research’s purportedly proprietary index. Research cannot argue that the strategy would be revealed prematurely by disclosure on Form 13F or that such disclosure would be likely to cause Research harm because Research already has disclosed its strategy.

Id.

193. *Id.* For example, Research Affiliates did not provide any quantitative data regarding the cost of developing or maintaining any of the indices even though such data should have been readily available to the company. *Id.*

194. Mr. Goldstein’s colleague, Andrew Dakos, filed a blank Form 13F-HR with the SEC on or about February 6, 2007, on behalf of the “Bulldog” hedge fund, Full Value Advisors, LLC, for the fiscal quarter ending December 31, 2006, which does not disclose any of the fund’s holdings and does not indicate on its face that a confidential treatment request was made. See <http://sec.gov/Archives/edgar/data/1388269/000138826907000006/thirteenf.txt> (last visited May 26, 2007). Mr. Dakos also filed a

13D and Proxy Forms 14 filed by Goldstein's hedge funds, however, do shed light onto certain of his funds' holdings, and tend to negate the

blank Form 13F-HR with the SEC on or about May 10, 2007, for the subsequent quarter ending March 31, 2007, which notes at the bottom, "Confidential Treatment Requested." See <http://sec.gov/Archives/edgar/data/1388269/000138826907000006/thirteenf.txt> (last visited May 26, 2007). See also Dane Hamilton, *Hedge funds step up challenge to SEC*, REUTERS, May 17, 2007, available at <http://www.reuters.com/article/ousiv/idUSN1739603520070517> (last visited May 18, 2007).

[D]on't look for any information from Bulldog Investors or Wynnefield Capital—their so-called 13-F filings are largely blank. The two funds are leading a charge to overturn the rules that require them to file quarterly holdings information, maintaining that such disclosures are trade secrets. Both have applied to keep their holdings confidential, but expect regulators to turn them down, forcing a court battle.

"We filed but it was blank," said Phillip Goldstein, a veteran investor who heads the \$300 million-plus hedge fund group Bulldog Investors and affiliate Full Value Advisors. "We haven't heard back from the SEC."

.....

"Frankly I think we will win," said Goldstein of his latest effort. But he said "I suspect it will take a long time." Last year Full Value Advisors also asked for an exemption, but got no response from the SEC, he said. If Goldstein succeeds and funds stop filing quarterly 13-F reports, investors could be denied an important investment tool: a quarterly window into what the world's best investors are holding, at least as of a particular quarter's end. And evidence shows that information is closely followed.

Id. See also Jack Willoughby, *Keeping It Confidential*, BARRON'S, May 27, 2007, available

at

http://online.barrons.com/google_login.html?url=http%3A%2F%2Fonline.barrons.com%2Farticle%2FSB118012652930915048.html%3Fmod%3Dgooglenews_barrons (last visited May 28, 2007). The Dow Jones' weekly "sister" publication to the *Wall Street Journal* took note of the fact that "Bulldog" filed blank Forms 13F:

Phillip Goldstein takes the notion of confidentiality a significant step further: He argues that all institutional investors should be exempt from revealing their holdings, not merely Wall Street's biggest fish. Goldstein, head of Bulldog Investors in Pleasantville, N.Y., is seeking to overturn SEC rules requiring managers of more than \$100 million to file quarterly reports, known as 13-Fs, about their positions. Last fall the money manager, who oversees more than \$450 million in several hedge funds, sought his own filing exemption, but received no response from regulators. Now he has filed 13-Fs that are largely blank, hoping to force the issue into court.

.....

Quixotic as Goldstein's current quest sounds, people are taking him seriously. "Normally, I advise against challenging the government," says Ron Geffner, a former SEC prosecutor. "These cases are less likely to be meritorious. But I have previously underestimated Goldstein, and I'm not prepared to make the same mistake again. These 13-F filings seem to serve little purpose and are redundant in the web of information the managers disclose."

The SEC has yet to contact Goldstein about his blanks.

Id.

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contentions that his portfolio holdings are somehow secret.¹⁹⁵

4. Failure to Demonstrate Substantial Likelihood
of Harm—Berkshire Hathaway

The SEC recently denied confidential treatment to Berkshire Hathaway because it determined that the company “failed to demonstrate a likelihood of substantial competitive harm from the disclosure of its acquisition program for two securities.”¹⁹⁶ The SEC determined that Berkshire’s showing was inadequate because it failed to demonstrate how public disclosure of its investment strategy would impair its “ability to acquire or liquidate a securities position, in the context of the market for those securities.”¹⁹⁷ The SEC did recognize

195. See Bulldog Investors Gen. P’ship’s Form 13D filings, available at <http://sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001364773&owner=include&count=40> (last visited Dec. 14, 2006). See also Opportunity Partners L.P.’s Proxy Form 14 filings, available at <http://sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000896017&owner=include&count=40> (last visited Dec. 14, 2006); see also Bulldog Investors, General Statement of Acquisition of Beneficial Ownership (Form 13D/A) (May 17, 2006), available at <http://www.sec.gov/Archives/edgar/data/838133/000106762106000013/third.txt> (last visited Feb. 9, 2007) (revealing a series of specific trades between April 3, 2006 and May 17, 2006 (as opposed to reporting an aggregate position), including the individual size, date, and price of each respective trade by “Bulldog” during a sixty-day time period in the shares of ACM Managed Income Fund, Inc).

196. Berkshire Hathaway, Inc., Exchange Act Release No. 48,368, 2003 SEC LEXIS 1986 at *3-4 (Aug. 20, 2003). The SEC characterized the confidential treatment application as unspecific, explaining that:

Berkshire essentially relies on general statements and exhibits involving other selected securities, indicating that revelation of Berkshire’s position in the securities which are the subject of their Petition would, because of its CEO’s (Mr. Buffett’s) reputation for successful stock selection, adversely affect Berkshire’s acquisition program. Berkshire argues that other market participants would on learning of Berkshire’s interest join in acquiring the stock, causing a material increase in the price of the stock, thus making pursuit of the acquisition program more costly. Berkshire provided a list of instances where disclosure of Berkshire’s positions in other securities was followed by increases in the prices of the securities in question.

Id.

197. *Id.* at *4-5. The SEC also stated that Berkshire did not justify the “requested one-year time period for confidential treatment.” *Id.* at *6-7. Furthermore, the Commission re-affirmed the Division’s reasoning that it was appropriate to request additional information from Berkshire, such as (1) “discussion and analysis of the market conditions and the likely effect of disclosure, at the times in question for these

that there have been instances where temporary spikes in the market occurred upon disclosure of Berkshire-Hathaway's "stock purchase and selling programs, acknowledging that Berkshire might be 'foreclose[d] . . . [from] increas[ing] its holdings in that security at prices Mr. Buffett concludes are attractive.'"¹⁹⁸ Still, the SEC seemed hesitant to declare that disclosure would inexorably cause market disruption "so severe as to cause substantial competitive harm to Berkshire's competitive position in all cases,"¹⁹⁹ noting that such a finding would lead to a "virtual *per se* justification for confidentiality for Berkshire, without specification of limits or specific time frames for any acquisition (or sales) program."²⁰⁰ Yet, Berkshire-Hathaway has also been granted confidential treatment.²⁰¹ At a minimum, the bureaucratic

securities;" (2) "more specific reasons for Berkshire's assertion that its ability to acquire or sell these securities would be so adversely affected as to cause it substantial competitive harm;" (3) that Berkshire address both the status and expected duration of Berkshire's programs in these securities; (4) information concerning matters such as "historical price of and an average daily trading volume for these securities;" and (5) "more specific description of the planned program of acquisition or disposition." *Id.*

198. *Id.* at *5

199. *Id.*

200. *Id.*

201. See Berkshire Hathaway, Inc., Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR/A), (Aug. 14, 2006), available at <http://sec.gov/Archives/edgar/data/1067983/000095013406016077/0000950134-06-016077-index.htm> (last visited Dec. 12, 2006) (listing securities holdings which were granted confidential treatment (expiring Aug. 14, 2006) on Form 13F (filed on May 15, 2006) for period ending Mar. 31, 2006, and which were not included in the Mar. 2006 13F due to their confidential treatment status). *But see* Berkshire Hathaway, Inc. Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR/A), (Oct. 27, 2006), available at <http://sec.gov/Archives/edgar/data/1067983/000095013406019935/a24427a1e13fvrza.txt> (last visited Dec. 12, 2006) (reporting, on an amended Form 13F, the securities holdings which had been denied confidential treatment (on Aug. 20, 2006) for the quarter ending June 30, 2006 after a Form 13F was filed on Aug. 14, 2006). Berkshire filed a second amended Form 13F on Oct. 27, 2006 for the quarter ending June 30, 2006, "pursuant to a request for confidential treatment and for which confidential treatment is no longer warranted" reporting the securities holdings for Form 13F which had been filed on Aug. 14, 2006. Berkshire Hathaway, Inc. Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR/A), (Oct. 27, 2006), available at <http://sec.gov/Archives/edgar/data/1067983/000095013406019936/0000950134-06-019936-index.htm> (last visited Dec. 12, 2006); see also Berkshire Hathaway, Inc., Exchange Act Release No. 50,206, 2004 SEC LEXIS 1794 (Aug. 17, 2004), available at <http://sec.gov/rules/other/34-50206.htm> (last visited Dec. 1, 2006) (denying confidential treatment requests for the quarters ended Dec. 2003 and Mar.

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delay in processing Berkshire’s many confidential treatment requests has likely afforded it opportunities to quietly acquire (or dispose of) equity positions while the related confidential treatment requests were processed. The Goldstein Application fell far below the aforementioned denied Berkshire’s confidential treatment application because of a wholesale absence of any particularized factual statements or evidentiary showing that competitive harm would result from the “Bulldog” funds filing Forms 13F.

5. The “Small Handful Who Have Obtained
Permission”—Eddie Lampert

Eddie Lampert has filed numerous successful confidential treatment applications²⁰² and his ESL hedge fund’s managing affiliate, RBS

2004) The SEC stated that the requests “are substantially similar to Berkshire’s confidential treatment request for the quarter ended Sept. 2002, which the Commission denied.” Berkshire Hathaway, 2004 SEC LEXIS 1794, at *4; *see also* Berkshire Hathaway, Inc., Exchange Act Release No. 48,368, 2003 SEC LEXIS 1986 (Aug. 20, 2003), *available at* <http://sec.gov/rules/other/34-48368.htm> (last visited Dec. 1, 2006) (affirming the Investment Division’s denial of Berkshire’s Sept. 2002 confidential treatment request); *see also* Berkshire Hathaway, Inc., Exchange Act Release No. 43,909, 2001 SEC LEXIS 182 (Jan. 31, 2001), *available at* <http://sec.gov/rules/other/34-43909.htm> (last visited Dec. 1, 2006) (declining to review denials of Berkshire’s Dec. 1999 and Mar. 2000 confidential treatment requests); *see also* Berkshire Hathaway, Inc., Exchange Act Release No. 43,142, 2000 SEC LEXIS 1652 (Aug. 10, 2000), *available at* <http://sec.gov/rules/other/34-43142.htm> (last visited Dec. 1, 2006), (declining to review confidential treatment request denials (filed through a Form 13F) for the calendar quarter ended June 1999 and Sept. 1999).

202. *See* RBS Partners, L.P., Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR/A) (Aug. 16, 2006), *available at* <http://sec.gov/Archives/edgar/data/860585/000095013406016341/0000950134-06-016341-index.htm> (last visited Dec. 13, 2006) (for period ending Mar. 31, 2006); *see also*, RBS Partners, L.P., Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR/A) (amendment no. 2) (Aug. 16, 2006), *available at* <http://sec.gov/Archives/edgar/data/860585/000095013406016341/d38918e13fvhrza.txt> (last visited Dec. 13, 2006) (explaining that “[p]ursuant to Rule 24b-2 of the Securities Exchange Act of 1934, as amended, confidential information has been omitted from this form 13f and filed separately with the Securities and Exchange Commission.”) (all caps omitted); *see also* Douglas Scheidt, SEC No-Action Letter, 1998 SEC No-Act. LEXIS 643, at *5-6 (June 17, 1998), *available at* <http://www.sec.gov/divisions/investment/guidance/13fpt2.htm> (last visited Dec. 16, 2006) (saying that “[r]ule 24b-2 under the Exchange Act, . . . sets out the procedures for requesting confidential treatment for information

Partners, L.P.,²⁰³ has been granted confidentiality throughout the years.²⁰⁴ Lampert's stealth investment approach requires his investors to lock-up their funds for at least five years (typical fund "lock-up" periods are between one and two years), and he "believes that secrecy is a key advantage for an investor," even refusing to talk about details of his portfolio with his own investors.²⁰⁵

According to the *Wall Street Journal* "Lampert is one of a small handful who have obtained permission from the Securities and Exchange Commission to delay releasing details of at least some of those holdings."²⁰⁶ The delay effect for confidential treatment applicants was underscored by the *Journal* when it described Lampert's recent amendment of a prior RBS Form 13F filing as a "little noticed move," which revealed that "Lampert's firm owned 1.754 million shares of GM at the end of 2005, and that it reduced that stake to 633,000 shares of GM at the end of the first quarter of this year."²⁰⁷ Upon the expiration of confidentiality treatment for those periods, Lampert had to amend those Form 13F filings.²⁰⁸

Lampert's successful efforts in obtaining confidentiality have left market-watchers speculating on what firms his ESL Investments, Inc. might target next, and frustrated Michigan residents who watched

required to be filed under the Exchange Act . . .").

203. RBS Partners, L.P., Statement of Changes in Beneficial Ownership (Form 4) (May 24, 2006), available at <http://sec.gov/Archives/edgar/data/1183200/000089375006000184/0000893750-06-000184-index.htm> (last visited Dec. 13, 2006).

Explanation of Responses No. 8, *id.*, explains the relevant relationships as follows:

RBS is the general partner of Partners and the managing member of Investors.

RBSIM is the general partner of Institutional. Investments is the general partner of RBS and CBL and the manager of RBSIM. Mr. Lampert is the Chairman, Chief Executive Officer and Director of Investments and the managing member of ESLIM.

Id.

204. See RBS Partners, L.P., available at <http://sec.gov/cgi-bin/browse-edgar?company=RBS+Partner&CIK=&filenum=&State=&SIC=&owner=include&action=getcompany> (last visited Dec. 13, 2006) for an index of SEC filings, including many confidential treatment applications.

205. Patricia Sellers, *How Eddie Lampert Picks His Stocks*, FORTUNE, Feb. 9, 2006, available at http://money.cnn.com/2006/02/03/news/companies/investorsguide_lampert_stockpicking/index.htm (last visited Dec. 13, 2006).

206. Gregory Zuckerman, *Edward Lampert Is in the Hunt Sears Chairman Has Sent Signals He's Looking for Acquisitions—Is General Motors in His Sights?*, WALL ST. J., Sept. 19, 2006, at C1.

207. *Id.*

208. *Id.*

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Lampert export K-Mart jobs to Illinois as it consolidated its operations with Sears. Those Michigan residents presumably track Lampert’s trading of GM shares in an effort to discern what it might portend for the future of auto manufacturing jobs.²⁰⁹ This demonstrates yet another public benefit of Form 13F data, and other similar instances include critics decrying George Soros’s Halliburton holdings²¹⁰ and the Yale University endowment’s investments in Halliburton, and Talisman Energy, which according to the *Yale Daily News* and the *Yale Herald* was “exposed as having ‘a not insignificant role’ in human rights violations in Sudan.”²¹¹

6. Broker-Dealers—Credit Suisse Confidential Treatment Success
Suggests 13F System Efficacy

Credit Suisse Holdings (USA),²¹² acting on behalf of Credit Suisse, Inc.,²¹³ filed an amended Form 13F on December 5, 2006 that disclosed Section 13(f) holdings which had previously been confidential and withheld from the publicly available Form 13F filed on November 14,

209. See, e.g., “General Watch,” available at <http://www.generalwatch.com/gmshareholdernews.cfm> (last visited Dec. 18, 2006), General Motors’s website for shareholder news, as a way to track the movement of GM shares.

210. Posting of fight_truth_decay to <http://209.157.64.200/focus/f-news/1522152/posts> (Nov. 14, 2005, 6:53:56 PST) (last visited Dec. 19, 2006) (posting on the FREE REPUBLIC NEWS/ACTIVISM message board thread titled, *13F Holdings Report: (George) Soros Fund Management L.L.C.*).

211. Saqib Bhatti, *University might hold Halliburton*, YALE DAILY NEWS, Apr. 5, 2004, available at <http://www.yaledailynews.com/PrintArticle.aspx?ArticleID=25594> (last visited Nov. 12, 2006) (citing YALE HERALD, Nov. 15, 2002).

212. See Company Information: Credit Suisse Holdings (USA), Inc., available at <http://sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000036121&owner=include&count=40> (last visited Dec. 12, 2006), for Credit Suisse Holdings (USA), Inc.’s SEC filing index. The company’s Standard Industrial Classification (“SIC”) number is 6212—listed as “Security Brokers, Dealers & Flotation Companies.” See S.E.C. Division of Corporation Finance: Standard Industrial Classification (“SIC”) Code List, available at <http://sec.gov/info/edgar/siccodes.htm> (last visited Dec. 13, 2006). The Division of Corporate Finance uses the SIC code to denote a company’s type of business for the purpose of “assigning review responsibility for the company’s filings.” SIC Code List.

213. See Credit Suisse Holdings (USA), Inc., Quarterly Report filed by Institutional Managers, Notice (Form 13F-NT) (Nov. 14, 2006), available at http://sec.gov/Archives/edgar/data/36121/000003612106000008/sec_filing.txt (last visited Dec. 14, 2006) (listing Credit Suisse as the entity filing the Form 13F on behalf of Holdings).

2006,²¹⁴ “pursuant to a request for confidential treatment and for which that request is no longer necessary.”²¹⁵ Credit Suisse has filed over thirty Forms 13F since June 16, 1999,²¹⁶ including multiple amendments (Form 13F-HR/A) that suggest confidential treatment applications by Credit Suisse have been successful.²¹⁷ For example, Credit Suisse filed a Form 13FCONP²¹⁸ on February 15, 2005 for the period ending

214. *See* Credit Suisse Holdings (USA), Inc., Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR) (Nov. 14, 2006), *available at* http://sec.gov/Archives/edgar/data/824468/000082446806000033/sec_filing.txt. Credit Suisse Int’l filed a Form 13F-NT for the period ending Sept. 30, 2006, which stated, “other managers reporting for this manager: . . . Credit Suisse.” Credit Suisse Int’l, Quarterly Report filed by Institutional Managers, Notice (Form 13F-NT) (Nov. 14, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1343079/000134307906000005/sec_filing.txt. The SEC permits subsidiaries or parent companies to file Form 13F if the companies have shared investment discretion; *see also* SEC Division of Investment Management, Frequently Asked Questions About Form 13F, May 2005, Question 46, *available at* <http://sec.gov/divisions/investment/13faq.htm> (last visited Dec. 13, 2006). The website explained “shared-defined investment discretion” thusly:

If you control another entity (or are controlled by another entity), you should report shared-defined investment discretion. This category includes parent corporations and their subsidiaries (*e.g.*, a bank holding company and its subsidiaries), investment advisers and mutual funds that they advise, and insurance companies and their separate accounts. *See* Securities Exchange Rule 13f-1, 17 C.F.R. § 240.13f-1(b) (1999).

For example, if you are a bank holding company, you are required to file Form 13F even though you may not be directly involved in the management of Section 13(f) securities. Although your trust department or other subsidiary may handle that responsibility, you are deemed to have shared-defined investment discretion based on your corporate structure. *See* 17 C.F.R. § 240.13f-1(b).

215. Credit Suisse First Boston, Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR/A) (Dec. 5, 2006), *available at* http://searchwww.sec.gov/EDGARFSCClient/jsp/EDGAR_MainAccess.jsp#topAnchor (filing for reporting period ending Sept. 30, 2006 and noting entry dated “12/05/2006” if text “13F-HR/A for Credit Suisse – CIK 824468”). Credit Suisse filed the Form 13F notice indicating that Credit Suisse “report[ed] for this manager.” *See* Credit Suisse Holdings (USA), Inc., Quarterly Report filed by Institutional Managers, Notice (Form 13F-NT) (Nov. 14, 2006), *available at* http://sec.gov/Archives/edgar/data/36121/000003612106000008/sec_filing.txt (last visited Dec. 12, 2006) (filing for period ending Sept. 30, 2006).

216. *See* Company Information: Credit Suisse Holdings (USA), Inc., *available at* <http://sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000036121&type=&dateb=&owner=include&start=40&count=40> (last visited Dec. 12, 2006) for a filing index for Credit Suisse Holdings (USA), Inc.

217. *Id.*

218. *See* PRR FILING FORM TYPE INFORMATION , at 9 (Oct. 30, 2006), *available at*

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December 31, 2004, which does not provide any information, but for the fact that the document referenced was filed in “confidential” paper format.²¹⁹ Additionally, Credit Suisse filed an amended Form 13F (13F-HR/A) on June 15, 2005 for the period ending December 31, 2004, “list[ing] securities holdings reported on the Form 13F filed on February 14, 2005 pursuant to a request for confidential treatment and for which that request is no longer necessary.”²²⁰ To date, Credit Suisse has filed more than sixty-three other confidential treatment applications that successfully shielded its holdings from public view.²²¹ The multiple

<http://sec.gov/nb/ftdreport.pdf> (last visited Dec. 14, 2006) (listing descriptions of SEC forms). Form 13FCON is a paper only filing which is designated as “confidential.” It is described as “Confidential quarterly report of an institutional investment manager pursuant to Section 13(f) of the Securities Exchange Act of 1934.” *Id.*

219. See Credit Suisse Holdings, Confidential Quarterly Report of an Institutional Investment Manager, (Form 13FCONP) (Jan. 15, 2005), available at <http://sec.gov/Archives/edgar/data/36121/999999999706015851/9999999997-06-015851.paper> (last visited Dec. 12, 2006) (filing for the quarterly period ending Dec. 31, 2004).

220. See Credit Suisse First Boston, Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR/A) (June 15, 2005), available at <http://sec.gov/Archives/edgar/data/36121/000003612105000024/csfb13fdec04amd4.txt> (last visited Dec. 12, 2006) (filing for period ending Dec. 31, 2004) (“This Form 13F is being filed by Credit Suisse First Boston, Inc., on behalf of Credit Suisse First Boston, a Swiss bank (“CSFB Bank”), and its subsidiaries identified on this report. The ultimate parent company of CSFB Bank is Credit Suisse Group.”).

221. Credit Suisse First Boston, Inc. has made numerous confidential treatment filings. See Metaldyne Corp., Statement of Beneficial Ownership (Schedule 13D/A) (Nov. 24, 2006) (Amendment 2), available at <http://sec.gov/Archives/edgar/data/745448/000134100406003132/nyc681186.txt> (last visited Dec. 14, 2006) (The parent company of the Credit Suisse (the “Bank”) is Credit Suisse Group); Credit Suisse (USA), Inc., Quarterly Report (Form 10-Q), at *8 (Nov. 14, 2006) (filing for the quarterly period ending Sept. 30, 2006), available at http://sec.gov/Archives/edgar/data/29646/000110465906074766/a06-23286_110q.htm (last visited Dec. 13, 2006); Credit Suisse, Quarterly Report filed by Institutional Managers (Form 13F) (Nov. 13, 2006), available at http://sec.gov/Archives/edgar/data/1321482/000090395406000077/form13f-a2_063006.txt (last visited Dec. 12, 2006); Credit Suisse First Boston, Inc., Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR/A) (June 15, 2006), available at <http://sec.gov/Archives/edgar/data/36121/000003612105000024/csfb13fdec04amd4.txt> (Dec. 12, 2006) (filing for the quarterly period ending Dec. 31, 2004 (on behalf of Credit Suisse First Boston)); Credit Suisse First Boston, Inc, Quarterly Report filed by Institutional Managers, Holdings (Form 13F-HR/A) (May 15, 2004), available at <http://sec.gov/Archives/edgar/data/36121/000003612103000009/csfb13fjun02amd4.txt> (last visited Dec. 12, 2006) (filing for quarterly period ending

successes Credit Suisse and Lampert's RBS have achieved in obtaining confidentiality for Section 13(f) holdings, is testament that the current reporting regime is effective, and that confidentiality is an available form of relief for market participants, including Mr. Goldstein's hedge funds.

VI. THE GOLDSTEIN APPLICATION FOR 13F EXEMPTION

No known procedures or rules of practice yet exist to evaluate the unprecedented justification for Goldstein's October 24, 2006 exemption request and, according to Mr. Goldstein, the SEC has not yet ruled on the Goldstein Application.²²² The articulated basis for Goldstein's exemption (or compensation) theory is that his unique combination of Section 13(f) equity holdings is, in and of itself, a form of intellectual property—a trade secret.²²³ While Goldstein's various equity allocations may not rival the top-secret Coca-Cola formula²²⁴ or the

June 30, 2002); *see also* Company Information: Credit Suisse Holdings (USA), Inc., available at <http://sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000036121&type=&dateb=&owner=include&start=0&count=40> (last visited Dec. 12, 2006); SEC Division of Investment Management, Frequently Asked Questions About Form 13F, May 2005, Question 46, available at <http://sec.gov/divisions/investment/13ffaq.htm> (last visited Dec. 13, 2006). Two Credit Suisse confidential treatment filings, among many others: Credit Suisse First Boston, Inc., Quarterly Report filed by Institutional Managers, Holdings (Form13F-HR/A) (Aug. 31, 2005), available at <http://sec.gov/Archives/edgar/data/36121/000003612105000027/csf13fdec04amd5.txt> (last visited Dec. 12, 2006) (filing for the quarterly period ending Dec. 31, 2004).

222. *See* Hamilton, *supra* note 194 (“We filed [a Form 13F] but it was blank,” said Phillip Goldstein, a veteran investor who heads the \$300 million-plus hedge fund group Bulldog Investors and affiliate Full Value Advisors. “We haven’t heard back from the SEC.”).

223. *See, e.g.*, RESTATEMENT (FIRST) OF TORTS § 757 (1939).

224. *Morning Call: Hedge Funds Spill the Beans*, Mark Haines Interview with Phillip Goldstein and David Marder (CNBC television broadcast Dec. 12, 2006) (unpublished transcript, on file with The Fordham Journal of Corporate & Financial Law). In response to Haines’s suggestion that the reporting requirement is merely a “snapshot” of his portfolio, Goldstein likens the “snapshot” to forcing Coca-Cola to release a percentage of its trade secret recipe:

Well, that’s true. If you are arguing is it could be worse because you could have to publish every trade, I agree, but that’s like saying that Coca-Cola doesn’t have to publish its entire formula, but just maybe like thirty percent of all the ingredients, and that is not so bad.

Id.

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Kentucky Fried Chicken “Colonel’s Secret Recipe”²²⁵ in terms of pop culture notoriety, some commentators have not taken the market maverick’s windmill-tilting lightly, though at least one legal expert has correctly noted that Goldstein’s latest battle is actually not with the SEC, but that this time he has picked a fight with Congress.²²⁶

225. Lori Pizzani, *Hedge Fund to Challenge SEC, Again: Denial of 13f Regulatory Exemption to Prompt New Lawsuit*, MONEY MANAGEMENT EXECUTIVE, Sept. 18, 2006 at 6 (“Goldstein likens the requirement of having to divulge his securities holdings to a restaurant whose chef has to publish his best recipes once the restaurant achieves a certain level of revenues. ‘Disclosure sounds good, but what we’re really talking about are trade secrets,’ he said.”).

226. See, Michael Maiello, *Hands Off My Stocks: Portfolio picks are intellectual property, says hedge fund manager Phil Goldstein, who wants the SEC to stop requiring disclosure*, FORBES, Dec. 11, 2006, at 58, available at <http://members.forbes.com/forbes/2006/1211/058b.html> (last visited Mar. 25, 2007). Discussing Goldstein’s reasoning behind petitioning the SEC for exemption from disclosure:

But Goldstein, 61, is petitioning the SEC to get exempted from the disclosure law. His argument is novel: His investments, he says, are his intellectual property--trade secrets that the SEC shouldn’t force him to reveal any more than it would ask Yum Brands to put the recipe for KFC chicken into its annual report. He even contends the law violates the Constitution’s Fifth Amendment: Disclosing his holdings is a ‘taking’ of his property without just compensation.

Id.; see also Jenny Strasburg, *Goldstein Asks SEC for Hedge-Fund Filing Exemption (Update1)*, BLOOMBERG.COM, Oct. 24, 2006, available at <http://www.bloomberg.com/apps/news?pid=20601103&sid=ajWZjtcAeRUM> (last visited Nov. 12, 2006) (“‘This time he’s not challenging the SEC, he’s challenging Congress,’ because 13F filings stem from the U.S. Securities Exchange Act of 1934, Irwin Latner, a partner at New York-based Herrick Feinstein LLP, said in an interview. ‘It’s clearly more of an uphill battle.’”); Corporate and Securities Law Blog, available at http://corpandsecuritieslawblog.typepad.com/my_weblog/funds/index.html (Jan. 10, 2007) (noting that “[a]lthough the court has been more willing in recent years to see excessive regulation as a ‘taking,’ it’s still a hard claim to make. *But, nobody thought [Goldstein] would win in June either.*”) (emphasis added); Posting of Daniel O’Neill to The Legal Infrastructure of Business, available at http://picker.typepad.com/legal_infrastructure_of_b/2006/11/do_hedge_funds_.html (Nov. 7, 2006, 21:16 CST) (“In comparison to Coke, why does the government have the authority to demand this trade secret vs. a formula by *Coca Cola*? In comparison to Coke, why does the government have the authority to demand [Goldstein’s] trade secret vs. a formula by *Coca Cola*?”); N.Y. TIMES Dealbook, available at <http://dealbook.blogs.nytimes.com/2006/10/26/hedge-fund-libertarian-finds-new-target/#more-8811> (Oct. 26, 2006, 11:53 EDT); Posting of Press to Trade Secrets Blog, available at <http://wombletradesecrets.blogspot.com/2006/09/hedge-funds-and-trade-secrets.html> (Sept. 15, 2006, 8:06 EDT)(stating that Goldstein raised “some serious arguments in favor of his position”);

According to at least one online financial publication, FINalternatives, Goldstein reportedly admitted that his Application was merely the “pretext for a lawsuit,” and presumably yet another round of high-profile litigation with the SEC, certain to keep Goldstein’s name in financial headlines for years to come.²²⁷ Mr. Goldstein’s reported admission that the Application is just a ploy to lure the SEC into further litigation might be perceived by a reviewing tribunal as indicia of bad faith. Despite that possibility, Goldstein seems undeterred and went on the offensive during a December 2006 CNBC televised interview, during which he seemed to suggest that the SEC somehow duped Congress into passing Section 13(f) and stated:

[T]here is no [legitimate government] interest, because the funny thing is, when they passed this law, the SEC told Congress that the reason they needed the law [Section 13(f)] was that they were going to review this data and come up with regulatory initiatives. That was thirty-one years ago, and the SEC admitted that they do not look at the data so essentially you are making filings for no good reason at all²²⁸

The SEC did indicate the data would be used for policy development,²²⁹ and this Article is replete with valid regulatory and

Greg Norton, *Naked Shorts*, available at http://nakedshorts.typepad.com/nakedshorts/2006/10/goldstein_plead.html (Oct. 26, 2006) (noting sardonically in an entry titled *Goldstein pleads the Fifth* that Goldstein’s “20-odd dense pages of argument that will doubtless provide SEC staff and commissioners with hours of diversion from their current core mission of ducking Senate committee inquiries about how enthusiastically insider trading laws get enforced when the alleged miscreants are more important than, say, *Business Week* printing plant managers.”).

227. See *Victorious Goldstein Aims For A Second Regulatory Win*, FINALTERNATIVES.COM, Sept. 13, 2006, available at <http://www.finalalternatives.com/node/403> (registration required—search “Victorious Goldstein” in the link frame) (last visited Feb. 24, 2007)

The man who more or less single-handedly (with an assist from the federal courts) killed the Securities and Exchange Commission’s hedge fund registration requirement has *seemingly developed a taste for blood*. Phillip Goldstein of Bulldog Investors, who filed the registration suit against the SEC, is taking aim at the regulator’s portfolio disclosure requirement. . . . According to Goldstein, the rule forces funds to give up their trade secrets, and “investors are relying on your trade secrets to earn money.” *He said he would seek an exemption from the requirement as a pretext for a lawsuit*, since the SEC is unlikely to take the bait and make his fund an exception.

Id. (emphasis added).

228. *Morning Call*, *supra* note 224.

229. Final Rule 1978, *supra* note 50, at 2.

public purposes, despite Mr. Goldstein's oft-stated viewpoint that there is no legitimate reason for Section 13 disclosures.²³⁰ Comment letters on a variety of SEC proposed rules, for example, referenced 13F filings,²³¹ while the legislative history strongly suggests that Form 13F data would improve the availability of "factual data about large investment managers," to individuals, federal and state regulatory agencies, and other investment managers.²³² In an ironic twist, some of the suggested uses for 13F filings quoted in the Goldstein Application were submitted to the SEC during the rule making process.²³³ Despite the uses he suggested, Goldstein's statement argued that the "primary purpose was to fill the information gap about the activities of institutional investment managers that would enable the Commission to devise regulatory initiatives."²³⁴

The Goldstein Application asserts that the legitimate government interest in advancing laws and regulations to augment the "integrity" of American securities markets is "not the objective of [Section] 13(f)."²³⁵

230. See Pizzani, *supra* note 225, at 6.

231. Letter from WR Hambrecht & Co. to the Nat'l Ass'n of Secs. Dealers (NASD) to Request a Comment on the Proposed Rule Governing Allocations and Distributions of Shares in Initial Public Offerings (Jan. 7, 2004), available at http://www.wrhambrecht.com/ind/strategy/bill_pov/200401/index.html (last visited Dec. 10, 2006) (citing "WR Hambrecht & Co data, co-managed institutional pot lists and 13F filings" as a source for the chart presented).

232. Conference Report, *supra* note 27, at *85. The report emphasizes the importance of collecting investment data to enable "reasoned discussion," explaining that:

The lack of such data has prevented and inhibited careful consideration by interested persons of the public policy implications. While expanding the reporting burden for certain institutional investment managers may result in some initial expense to some investment managers, it is nevertheless clear that it is now appropriate to begin to accumulate such a body of data to permit reasoned discussion and decisions about the influence and impact of the large institutional investment managers on the securities markets.

Id.

233. Goldstein Application, *supra* note 12, at 3 n.1 (statement of the Securities and Exchange Commission) (citing *Hearings on Securities Act Amendments of 1975 Before the Subcomm. on Oversight and Investigations and the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 1st Sess. 545 (1977)) (suggesting 13(f) information be used for analysis of institutional holdings, the effect of institutional trading, etc.).

234. Goldstein Application, *supra* note 12, at 3.

235. *Id.* at 4.

The legislative history, however, compels a different conclusion. “The primary purpose of this section of the bill,” according to the conference report, “was to create a central depository of historical and current data about the investment activities of investment managers. The Committee believes that subjecting certain institutional investment managers to the reporting requirements of the bill will advance two important public policy and regulatory objectives.”²³⁶ Thus, Congress specifically recognized that “with the dissemination of data about institutional investment managers, an institutional disclosure program should stimulate a higher degree of confidence among all investors in the integrity of our securities markets.”²³⁷

Another instance of Goldstein’s clever sleight-of-hand wordplay relates to the question of the “value” of Section 13(f) disclosures. Goldstein uses pretzel-logic when confronted with the issue of the “staleness” of Form 13F data as not posing any threat of significant harm to 13F filers, rhetorically noting that if the data is “worthless,” then its collection must certainly be nothing more than an “arbitrary exercise.”²³⁸ For whatever reason, Goldstein neglects to consider, facetiously or not, the many meanings of “value,” including, for example, the inherent utility of aggregated data to spot and forecast trends. JPMorgan Chase & Co. apparently found value in 13F data when it recently announced that it “is the leading depository bank in Latin America,” for ADRs (“American Depositary Receipts”), as did The Bank of New York when it announced the release of its annual year-end report and included remarks regarding the international ADR market.²³⁹ Both JP Morgan Chase & Co. and The Bank of New York’s

236. Conference Report, *supra* note 27, at *85.

237. *Id.* at *82.

238. John Carney, *DealBreaker of the Year Candidate: Phil Goldstein*, DEALBREAKER.COM, Dec. 13, 2006, available at http://www.dealbreaker.com/2006/12/dealbreaker_of_the_year_candid_4.php (last visited Dec. 14, 2006).

239. Press Release, JPMorgan Chase & Co., Petrobras Selects JPMorgan for \$25 Billion ADR Program, (Jan. 2, 2007), available at http://www.jpmorgan.com/cm/Satellite?c=JPM_Content_C&cid=1159304758690&page=JPM_redesign%2FJPM_Content_C%2FGeneric_Detail_Page_Template (last visited Mar. 25, 2007) (“JPMorgan is the leading depository bank in Latin America, maintaining more than 65% of the Brazilian ADR market as measured by ADRs held by institutional investors (based on most recent Form 13F filings with the SEC).”); see also, Press Release, The Bank of New York, Depository Receipt Trading Volume Increases Nearly 60%, Approaching Two Trillion Dollars in 2006, (Jan. 16, 2007), available at http://www.bankofny.com/htmlpages/npr_2007_2402.htm (last visited

recent ADR market-related statements were based upon 13F data.

VII. WHETHER THE COCA-COLA FORMULA OR A KO LONG,
 WHAT IS A TRADE SECRET?

The trade secret has been regarded as among “the most elusive and difficult concepts in the law to define.”²⁴⁰ Significant aspects of U.S. trade secret doctrine (including the prevailing definition that is still widely used today) can be, in part, traced back to the “New Deal” era and the introduction of the RESTATEMENT (FIRST) OF TORTS, which according to the definition of trade secrets found within its comment, may consist of:

[A]ny formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.²⁴¹

The drafters of the RESTATEMENT (FIRST) OF TORTS firmly established the foundation of trade secret doctrine in the concept of a confidential relationship, and a corresponding duty of good faith owed by one to maintain the other’s entrusted confidences, regarding almost any conceivable sort of confidential proprietary commercial information. Of course, Goldstein has, for whatever reason, elected not to submit a confidential treatment application to the SEC on behalf of his “Bulldog” funds and, as a result, nothing even resembling a confidential relationship exists between the SEC and Goldstein as it relates to his Section 13(f) portfolio holdings.

The U.S. Supreme Court followed the RESTATEMENT’s definition in *Kewanee Oil Co. v. Bicron Corp.* and specifically noted that the subject matter of any trade secret “must not be of public knowledge or of a general knowledge in the trade or business.”²⁴² Common law precursors

Mar. 25, 2007).

240. *Lear Siegler, Inc. v. Ark-Ell Springs, Inc.*, 569 F.2d 286, 288 (5th Cir. 1978).

241. *See* RESTATEMENT (FIRST) OF TORTS § 757 cmt. a (1939).

242. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474-75 (1974) (citing *B.F. Goodrich Co. v. Wohlgemuth*, 192 N.E.2d 99, 104 (Ohio Ct. App. 1963); *Nat’l Tube Co. v. E. Tube Co.*, 3 Ohio C.C. (n.s.) 459 (Muskingum County Ct. 1902), *aff’d*, 69

to the 1939 RESTATEMENT's duty-based doctrine can also be found scattered throughout Industrial Revolution-era opinions, many of which still remain valid and controlling authority.²⁴³ Similarly, unfair competition law, from which much of modern trade secret protection is also derived, has a nearly two-century legacy in U.S. common law.²⁴⁴

It is the secrecy of the information itself that must create some sort of a competitive advantage (and a resultant economic value) for the "holder" of the secret, and "protection [is] accorded [to] the trade secret holder against the disclosure or unauthorized use of the trade secret by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse."²⁴⁵ When one obtains the confidential proprietary information that qualifies as a trade secret of another through means that are deemed to be "improper," the trade secret may be considered to have been misappropriated, and the holder of that trade secret may be able to prevent any further use (or disclosure) of the secret through injunctive relief, and can seek to be made whole for the misappropriation through a claim for damages.²⁴⁶ It is worth noting that what is considered "improper means" is typically determined on a case-by-case basis,²⁴⁷ and conduct by private actors that has been

Ohio St. 560 (1903)).

243. See *id.* at 475 (citing *Cincinnati Bell Foundry Co. v. Dodds*, 10 Ohio Dec. Reprint 154, 156 (Ohio Super. Ct. 1887) ("This necessary element of secrecy is not lost, however, if the holder of the trade secret reveals the trade secret to another in confidence, and under an implied obligation not to use or disclose it.")).

244. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 164-68 (1989); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 ("A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."). RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 cmt. d, however, includes the requirement that one must knowingly or recklessly possess (or disclose) another's trade secret *wrongfully*, saying that "to subject an actor to liability . . . the owner [of trade secret] need not prove that the actor knew that its possession of the trade secret was wrongful, it is sufficient if the actor had reason to know." Section 41 affirms the "duty of confidence" concept much like the doctrine developed based upon RESTATEMENT (FIRST) OF TORTS § 757, *supra* note 241.

245. *Kewanee Oil Co.*, 416 U.S. at 475.

246. See, e.g., *E.I. DuPont de Nemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970) (holding that a defendant who took aerial photographs of a plaintiff's yet-to-be-completed factory used improper means to obtain a trade secret).

247. *Id.*; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 (1995) (updating the "improper means" definition to include "unauthorized interception of communications" and acts that are "either wrongful in themselves or wrongful under

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construed as actionable trade secret misappropriation, has also been held to be completely proper (and constitutional) when committed by the government in the furtherance of regulatory or law enforcement objectives.²⁴⁸ The Goldstein Application conspicuously avoided any discussion of the traditional deference that is typically afforded to the government when performing regulatory functions.

A. Are Trade Secrets Private Property?

The *Kewanee Oil* Court opined that trade secrets have “no property dimension” and stated that the term *property* as applied to trade secrets, “is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith.”²⁴⁹ The *Kewanee Oil* Court, however, also apparently contemplated the “theft of a trade secret,” which necessarily implies certain property attributes, and intertwined such a hypothetical “theft” with torts remedies and the breach of a contract.²⁵⁰ Similarly, civil

the circumstances of the case”).

248. Compare *Dow Chemical Co. v. U.S.*, 476 U.S. 227 (1986) (government (“EPA”) aerial surveillance is not considered to be an unconstitutional search or seizure in violation of U.S. CONST. amend. IV), with *E.I. DuPont de Nemours & Co.* 431 F.2d 1012 (5th Cir. 1970) (private aerial surveillance determined to be “improper means” in context of trade secret misappropriation claim). Compare, *California v. Greenwood* 486 U.S. 35 (1988) (no privacy interest is violated when the government obtains evidence from garbage placed at residential curbside), with *Tennant v. Advanced Mach.*, 355 N.W.2d 720 (Minn. Ct. App. 1984) (so-called “dumpster diving” to obtain competitive intelligence can constitute improper means in context of trade secret misappropriation claim).

249. See *Kewanee Oil Co. v. Bicon Corp.*, 416 U.S. 470, 497-98 (1974) (citing *E.I. DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (stating that “[t]rade secrets often are unpatentable . . . [and in] that event there is no federal policy which is contravened when an injunction to bar disclosure of a trade secret is issued”)); see also *id.* at 497 n.3 (citing S. OPPENHEIM, UNFAIR TRADE PRACTICES 264-65 (2d ed. 1965); Milgrim, *Trade Secret Protection and Licensing*, 4 PAT. L. REV. 375 (1972) (discussing further contrasts between patents and trade secret doctrines)).

250. *Id.* at 498 (citing *Cataphote Corp. v. Hudson*, 422 F.2d 1290 (5th Cir. 1970) (“A suit to redress theft of a trade secret is grounded in tort damages for breach of a contract . . .”). Examples of other courts that have contemplated potential theft of a trade secret include: *Christianson v. Colt Operating Corp.*, 486 U.S. 800, 804-05 (1988); *Scharmer v. Carrollton Mfg. Co.*, 525 F.2d 95, 99 (6th Cir. 1975); *Tedder Boat Ramp Sys., Inc. v. Hillsborough Cty.*, 54 F. Supp. 2d 1300, 1303 (D. Fla. 1999); *Keystone Plastics, Inc. v. C&P Plastics, Inc.*, 340 F. Supp. 55, 63 (D. Fla. 1972).

causes of action exist for trade secret misappropriation, which further suggests that there must be some element of property at issue for such a tort to exist.

What property rights, if any, are embodied in a trade secret? According to the intellectual property treatise MILGRIM ON TRADE SECRETS, the concept of a trade secret embraces, at a minimum, the holder's right to exclude others and to dictate the manner in which the trade secret is used.²⁵¹ Judge Taft (later President Taft, and later still, Chief Justice Taft of the United States Supreme Court) defined the ephemeral characteristic of the property rights embodied in trade secrets doctrine within his seminal *Cincinnati Bell Foundry* opinion:

The property in a secret process is the power to make use of it to the exclusion of the world. If the world knows the process, then the property disappears. There can be no property in a process, and no right of protection if knowledge of it is common to the world.²⁵²

Professor Jonathan S. Shapiro has noted that trade secrets are “some of the most valuable property” in American companies’ possession,²⁵³ and Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has commented that the very “future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property.”²⁵⁴

An undisclosed trade secret could conceivably exist in perpetuity.²⁵⁵

251. 1-2 ROGER M. MILGRIM ON TRADE SECRETS § 2.01 (Release No. 83 2006) (“[T]he right of the owner of the trade secret to use and disclose it to others subject to restrictions on their use and disclosure.”).

252. *Nat’l Starch Prods. Inc. v. Polymer Indus., Inc.*, 79 N.Y.S.2d 357, 360 (1st Dep’t. 1948) (quoting *Cincinnati Bell Foundry Co. v. Dodds*, 10 Ohio Dec. Reprint 154 (Ohio Super. Ct. 1887)).

253. Jonathan S. Shapiro, *Protecting Trade Secrets in an IP Audit*, 228 N.Y.L.J., Oct. 21, 2002, at S4 (col. 1).

254. *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991) (interpreting Illinois trade secret law to hold that a factual issue as to whether a manufacturer took reasonable precautions to protect its trade secrets in its piece part drawings used to manufacture replacement parts precluded summary judgment).

255. *Cf. Christianson v. Colt Indus. Operating Corp.*, 766 F. Supp. 670, 689 n.19 (1991) (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989)). Of course, confidential information that comprises a trade secret must also represent at least a modicum of economic value (*e.g.*, a competitive advantage over actual or potential competitors) to the holder, and reasonable efforts to guard the secret must be expended by the holder in order for that confidential information to remain a protectable

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A trade secret can also exist in an almost *Lockean* combination of characteristics and components, each of which may well exist by itself within the public domain (and not independently constitute trade secrets), but the unified process, design and operation of which, in its unique and otherwise unknown combined whole, typically created by the efforts of the putative trade secret holder, affords the holder competitive advantages that are a protectable secret.²⁵⁶ The government has acknowledged that trade secrets can constitute property under state law, and the U.S. Supreme Court has found that a trade secret can be considered property, which under certain circumstances may be protected by the takings clause of the Fifth Amendment of the U.S. Constitution.²⁵⁷

Trade secrets have also been considered alienable property interests, according to transactional documents on file with the SEC.²⁵⁸

trade secret. *Cf. id.* at 679 (“In this case Colt has made several very plausible economic arguments that the protection of trade secrets through contractual obligations as they used in this case enhances overall efficiency . . .”).

256. See, e.g., *Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 174 (2d Cir. 1990) (applying New York law); see also *3M v. Pribyl*, 259 F.3d 587, 595-96 (7th Cir. 2001) (“A trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.”); *Imperial Chem. Indus. Ltd. v. Nat’l Distillers & Chem. Corp.*, 342 F.2d 737, 742 (2d Cir. 1965); *Smith v. Dravo Corp.*, 203 F.2d 369, 374 (7th Cir. 1953); *Ferroline Corp. v. Gen. Aniline & Film Corp.*, 207 F.2d 912, 921 (7th Cir. 1953); *Head Ski Co. v. Kam Ski Co.*, 158 F. Supp. 919, 923 (D. Md. 1958); *Allen Mfg. Co. v. Loika*, 144 A.2d 306, 309 (Conn. 1958); *Sun Dial Corp. v. Rideout*, 108 A.2d 442, 445 (N.J. 1954); see generally JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES*, (1980).

257. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-03 (1984) (applying Missouri law and finding that a trade secret was property, and could consequently be protected from government confiscation pursuant to the “takings clause” of U.S. CONST. amend. V); Mark A. Lemley, *Property, Intellectual Property, and Free Riders*, 83 TEX. L. REV. 1031, 1042 n.45 (2005) (citing Lynn C. Tyler, *Trade Secrets in Indiana: Property vs. Relationship*, 31 IND. L. REV. 339 (1998) (“Commentators have argued that the Uniform Trade Secrets Act, in force in forty-two states, adopts the view that trade secrets are property.”)).

258. See, e.g., *Asset Purchase Agreement between Mayne Pharma, PLC and SuperGen, Inc., and Eurogen Pharms., Ltd.*, at § 1.31 (Nov. 25, 2006), available at http://www.sec.gov/Archives/edgar/data/919722/000110465906078099/a06-24665_1ex2d1.htm (last visited Jan. 2, 2007) (filed Nov. 28, 2006 with the SEC via Edgar as “Exhibit 2.1” to SuperGen, Inc., Current Report of Material Events or Corp.

Not entirely unlike an expired leasehold, or a terminated easement, mineral profit, or a vacated ingress-egress license in the realm of real property (or for that matter, a software, film, photo, literary or music license in the intellectual property digital realm), trade secret property rights can also be terminated, typically by public disclosure.²⁵⁹ Once an applicant seeks patent protection with the U.S. Patent and Trademark Office, in an application which details what was previously confidential proprietary information, the applicant loses any pre-existing trade secret status if a patent is granted and the application data is disclosed to the public.²⁶⁰ Other examples abound where a private actor seeks benefits from the government in exchange for certain social benefits (*i.e.*, a limited monopoly is granted to the holder of a copyright in exchange for the copyrighted material joining the public domain at the conclusion of the copyright term).²⁶¹ Intellectual property in general, and trade secret protection in particular, are not traditional property rights, but rather are a function of law. Whether that protection is judge-made or legislated,

Changes (Form 8-K) (Nov. 25, 2006), available at http://www.sec.gov/Archives/edgar/data/919722/000110465906078099/a06-24665_18k.htm (last visited Apr. 11, 2007)). This agreement defines “Intangible” as: “[A]ny and all of the following and any and all rights and interests in, arising out of, or associated therewith, throughout the world, . . . all inventions (whether patentable or not), formulas, algorithms, methods, processes, discoveries, invention disclosures and trade secrets . . .” *Id.*

259. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) (finding that a trade secret property right can be lost if the purported secrets are disclosed by the company to individuals who do not have a duty to preserve the information’s confidentiality and determining that because of the ruling in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), registrants who submitted data with notice of the disclosing scheme established by the 1978 amendments to FIBRA could no longer claim a property interest under state law in data subjected to mandatory disclosure by said Amendments).

260. *See, e.g.*, *Timely Prods. Corp. v. Arron*, 523 F.2d 288 (2d Cir. 1975) (holding that disclosure of trade secrets in patent cuts off right to prevent disclosure or use by others); *see also* *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1050 (Fed. Cir. 2001) (affirming district court’s determination that Missouri law properly treated trade secrets as a property right and, accordingly, once plaintiff published its patent in a patent publication, plaintiff lost future trade secret rights against a confidential discloser). However, the loss of trade secret property rights in such an instance are replaced with property rights in a limited patent monopoly over the invention, provided of course, that the related patent application is granted.

261. *See* U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”); *see generally* Copyright Act of 1976, 17 U.S.C. § 106, (2002).

the privileges afforded are largely dependent upon correlative public benefits, and perceived encroachments onto those privileges, such as a regulatory requirement to report certain securities holdings, are probably much closer to a rebalancing of that relationship than to any sort of unconstitutional “taking.”

The Goldstein Application implicitly contended that in light of his investment acumen, the particular assemblage of securities gathered by Goldstein’s unspecified efforts are a protectable trade secret. This is the case, despite the fact that the names and ticker symbols of each of the particular Section 13(f) securities contained in his hedge funds’ portfolio holdings are known and readily ascertainable to the investing public.²⁶² In the abstract, it would appear that closely guarded secret details of a portfolio might be considered a compilation of information that is appropriate for trade secret protection. Whether Goldstein effectively established that his Section 13(f) equity holdings are in fact trade secrets worthy of exemption from public disclosure is certainly another question altogether.

B. Trade Secrets Are Creatures of State Law

The Goldstein Application was filed in the name of Full Value Advisors, LLC et al., apparently of Pleasantville, New York.²⁶³ Goldstein reportedly moved his hedge fund operations to Saddleback, New Jersey, however, at least five weeks prior to filing the Application, and did not disclose the domicile of, or the laws under which, any of the entities on whose behalf the Goldstein Application seeks exemption relief were organized or registered.²⁶⁴ Presumably, the question of

262. See McCormack, *supra* note 22. Goldstein told BUSINESSWEEK magazine, “I’m saying my investments, as a whole, are trade secrets. It would be like we’re going to take one of your copyrighted articles, but we want to take this paragraph and take it out of the copyright.” See also *Integrated Cash Mgmt. Serv. v. Digital Transactions*, 920 F.2d 171, 174 (2d. Cir. 1990) (applying New York law and holding that “[the] way in which [the] various components fit together as building blocks in order to form the unique whole” is a trade secret).

263. Goldstein Application, *supra* note 12, at 4-5.

264. See Goldstein Application, *supra* note 12. The Goldstein Application initially identifies the applicants as “Full Value Advisors, LLC et al.” Goldstein Application, *supra* note 12, at 1, 2. Mr. Goldstein identified entities known as “Oak Value Fund,” “Full Value Partners, LP,” apparently as Co-Applicants, Goldstein Application, *supra* note 12 at 3, 4. Nowhere in the Application are the domiciles of any of these

whether Goldstein holds a protectable property interest would be accordingly governed by New York trade secret law in that it is the only potential locus identified in the Application.²⁶⁵ The Third Circuit has addressed at least one matter where a question of Pennsylvania versus New Jersey conflict of trade secret law existed, and found little substantive difference.²⁶⁶ For the purposes of this discussion, New York trade secret principles are presumptively applied based upon the Application's use of a New York address. Both New Jersey and New York base their trade secret doctrines on principles set forth in the

Applicants identified. The New Jersey Secretary of State's records do note, however, in filing No. 0600118277, that a "Full Value Advisors, LLC," is registered as a New Jersey domestic business organization. See New Jersey State Business Gateway Service Website, available at <https://www.accessnet.state.nj.us/home.asp> (business name search for "Full Value Advisors") (last visited Jan. 21, 2007); see also, Goldstein Opening Brief, *supra* note 10, at *1; see also, Complaint, RMR Hospitality & Real Estate v. Bulldog Investors Gen. P'ship et al., Civ. Action No. 06-4054 (Middlesex County (Mass.) Super. Ct. 2006), available at http://www.sec.gov/Archives/edgar/data/1278038/000110465906076852/a06-23938_4ex99d1.htm (last visited Mar. 25, 2007) (alleging that Goldstein's hedge fund entities use Westchester County, New York and Bergen County, New Jersey addresses interchangeably and that various Goldstein-controlled hedge fund entities were formed under either Ohio or New York law). An entity known as "Bulldog Investors, LLC" is registered as a domestic Limited Liability Company with the Ohio Secretary of State. See Bulldog Investors, LLC, Ohio Corp. Records & Bus. Registrations Identification No. 1167223 (filed June 1, 2000). See also Bulldog Investors Gen. P'ship, Statement of Beneficial Ownership (Schedule 13D/A) (Sept. 25, 2006), available at <http://www.sec.gov/Archives/edgar/data/897951/000136477306000008/thirdamend.txt> (last visited Dec. 2, 2006) (stating both the Pleasantville, N.Y. and Saddle Brook, N.J. addresses within the same disclosure document regarding Bulldog's beneficial ownership and control of shares in the Mun. Advantage Fund, Inc.); Warren Boroson, *Goldstein Beat SEC on Hedge Fund Rule*, NEW JERSEY DAILYRECORD.COM, Sept. 17, 2006, ("Phil Goldstein, 61, just moved his offices from Pleasantville, N.Y., to Saddle Brook in Bergen County [New Jersey]. I heard him talk Monday at a press conference in New York and interviewed him Thursday.").

265. Goldstein Application, *supra* note 12.

266. See, e.g., *Rohm & Haas v. ADCO Chem. Co.*, 689 F.2d 424 (3rd Cir. 1982). The applicability of Ohio trade secret law is also a possibility considering the ambiguity of the Goldstein Application. General Ohio trade secret principles are thoroughly discussed in *Arthur Murray Dance Studios, Inc. v. Witter*, 105 N.E. 2d 685 (Cuy. Cty. Common Pleas 1952). See also *Kewanee Oil v. Bicron Corp.*, 416 U.S. 470, 475 (1974) (citing *B.F. Goodrich Co. v. Wohlgemuth*, 117 Ohio App. 493, 498 (1963) and *W.R. Grace & Co. v. Hargadine*, 392 F.2d 9, 14 (C.A. 6 1968)) (stating that "Ohio [like New York and New Jersey] has adopted the widely relied-upon definition of a trade secret found at RESTATEMENT [(FIRST)] OF TORTS § 757, cmt. b (1939).").

RESTATEMENT (FIRST) OF TORTS.²⁶⁷

C. Trade Secret Ingredients

The Goldstein Application conclusively declares that the component securities of his portfolio holdings are *de facto* trade secrets.²⁶⁸ Notwithstanding the glaring potential conflicts of law issues that might exist due to the absence of any identified domiciles of the various “Bulldog” entities that are the putative co-applicants, there is scant reference to any of the required elements for a *prima facie* trade secret claim. Considering the paucity of any facts relating to the elements required pursuant to New York state law, if the rhetoric of the Goldstein Application were to be asserted as a civil claim, it would not likely survive a motion to dismiss due to its failure to state a claim for which relief could be granted.²⁶⁹ A successful civil claimant for trade secret misappropriation must establish that: (i) it possesses a trade secret, and (ii) the defendant(s) is using that trade secret “in breach of an agreement, confidence, or duty, or as a result of discovery by improper

267. J. Christopher Jensen et al., *Misappropriation of Trade Secrets*, 4 N.Y. PRACTICE SERIES: COMMERCIAL LITIG. IN N.Y. STATE COURTS, § 81:4 (ROBERT L. HAIG ed., 2d ed. 2005) [hereinafter Jensen] (citing *Ashland Mgmt., Inc. v. Janien*, 82 N.Y.2d 395 (1993) (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. b)). *See also*; *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 15 (1st Dept. 1998); *Softel, Inc. v. Dragon Med. & Scientific Commc’ns, Inc.*, 118 F.3d 955, 968 (2d Cir. 1997); *U.S. Reinsurance Corp. v. Humphreys*, 618 N.Y.S.2d 270, 273 (1st Dept. 1994); *Delta Filter Corp. v. Morin*, 485 N.Y.S.2d 143, 144 (3d Dept. 1985); *Eagle Comtronics, Inc. v. Pico, Inc.*, 453 N.Y.S.2d 470, 472 (4th Dept. 1982). The general definition explains which elements a plaintiff needs to establish in order to prove a misappropriation:

The essential first step for a trade secret plaintiff is to prove that the information sought to be protected qualifies as a trade secret. The New York Court of Appeals has stated that, while there is no universally accepted definition of a trade secret, New York courts generally adopt the definition suggested by the 1939 RESTATEMENT (FIRST) OF TORTS: “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”

Id.

268. *See, e.g.*, Goldstein Application, *supra* note 12, at 4. (“Unless exempted from [Section] 13(f)(1), the Applicants would have to publicly disclose their trade secrets without compensation in violation of the Taking [sic] Clause of [U.S. CONST. amend. V]”).

269. *See* FED. R. CIV. P. 12(b)(6).

means.”²⁷⁰ Many New York state courts address the first element and premise decisions largely on whether the information at issue is considered a trade secret, without any reference to the second element of unlawful or “improper means” of appropriation.²⁷¹ Of course exceptions exist,²⁷² and it has typically been federal courts that have articulated a two-part analysis as the proper test for successful assertion of a trade secrets misappropriation claim while applying New York state trade secrets law.²⁷³

D. New York Definition of “Trade Secret”

The threshold question in a New York civil trade secret claim is whether the information at issue is actually a trade secret, and the “single most important factor in determining whether particular information is a trade secret is whether the information is kept secret.”²⁷⁴ While no one generally accepted definition of a trade secret exists in New York, according to the Court of Appeals, courts have traditionally employed the 1939 RESTATEMENT (FIRST) OF TORTS definition.²⁷⁵ The

270. Jensen *supra* note 267, at § 81:3, (citing Hudson Hotels Corp. v. Choice Hotels Int’l., 995 F.2d 1173, 1176 (2d Cir. 1993), *abrogated on other grounds* by Nadel v. Play-By-Play Toys & Novelties, Inc., 208 F.3d 368 (2d Cir. 2000); Integrated Cash Mgmt. Services, Inc. v. Digital Transactions, Inc., 920 F.2d 171, 173 (2d Cir. 1990); Kadant, Inc. v. Seeley Machine, Inc., 244 F. Supp. 2d 19, 35 (N.D.N.Y. 2003); LinkCo, Inc. v. Fujitsu Ltd., 230 F. Supp. 2d 492, 497-98 (S.D.N.Y. 2002).

271. See, e.g., E.I. DuPont de Nemours & Co. v. Christopher, 431 F.2d 1012, 1016 (5th Cir. 1970) (stating that not all acts of “improper means” of acquiring a trade secret are necessarily illegal). The DuPont court determined that aerial photo surveillance over a factory under construction was an “improper means” of acquiring a trade secret, despite the fact that the act of surveillance in no way constituted a trespass or any other illegal act. *Id.* at 1016-17.

272. Jensen, *supra* note 267, at § 81:3 (citing DoubleClick v. Henderson, 1997 WL 731413 (N.Y. Sup.Ct. 1997)).

273. Jensen, *supra* note 267, at § 81:3.

274. Register.com v. Verio, Inc., 356 F.3d 393, 418 (2d Cir. 2004) (quoting Ivy Mar Co. v. C.R. Seasons, Ltd., 907 F. Supp. 547, 556 (E.D.N.Y. 1995)).

275. See RESTATEMENT (FIRST) TORTS § 757 (1939) (defining trade secrets as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it”); see also, Jensen, *supra* note 267, at § 81:4 (citing Softel, Inc. v. Dragon Med. and Scientific Commc’ns, Inc., 118 F.3d 955, 968 (2d Cir. 1997); Wiener v. Lazard Freres & Co., 672 N.Y.S.2d 8, 15 (1st Dept. 1998); U.S. Reinsurance Corp. v. Humphreys, 618 N.Y.S.2d 270, 273 (1st Dept. 1994); Ashland Mgmt., Inc. v. Janien, 604 N.Y.S.2d 912, 918 (1993); Delta Filter Corp. v. Morin, 485 N.Y.S.2d 143, 144 (3d

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“New Deal” era definition was somewhat supplanted by a slightly modified modern description set forth in the RESTATEMENT (THIRD) OF UNFAIR COMPETITION, which is occasionally referenced by New York jurists, and characterizes a trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”²⁷⁶ The modern definition does broaden the categories of potentially protectable subject matter to include “any information,” but limits the “do not know or use it” portion of the definition by requiring the information to be “secret” and further articulates that the secret must in fact be “sufficiently valuable.”²⁷⁷ Multiple potentially outcome-determinative nuances exist within these broad definitions, in terms of eligible trade secret subject matter, and in terms of the required competitive advantage and secrecy components.²⁷⁸

Dept. 1985); *Eagle Comtronics, Inc. v. Pico, Inc.*, 453 N.Y.S.2d 470, 472 (4th Dept. 1982)).

276. *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 15 (1st Dept. 1998) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995)).

277. Compare RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995), with RESTATEMENT (FIRST) OF TORTS § 757 (1939).

278. *Jensen, supra note 267*. Secrecy is widely considered to be the “most important” and an “essential prerequisite” consideration in New York trade secret litigation. See, e.g., *Monovis, Inc. v. Aquino*, 905 F. Supp. 1205, 1223 (W.D.N.Y. 1994); *Atmospherics, Ltd. v. Hansen*, 702 N.Y.S.2d 385 (2d Dept. 2000). Curiously, the Goldstein Application, *supra note 12*, at 7, conclusively states, without citing any further factual or legal support, that “[t]he Applicants’ investments are trade secrets” and references the “trade secrets” definition in RESTATEMENT (FIRST) OF TORTS § 757 cmt. a, as applied in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and for some reason, the definition contained in The Economic Espionage Act of 1996, 18 U.S.C. § 1831. See Goldstein Application, *supra note 12*, at 7 n.7. The Application further states that “[t]he entire value of a trade secret lies in its secrecy. Once a trade secret is publicly disclosed, its entire economic value even though the owner can continue to use it.” Goldstein Application, *supra note 12*, at 7. See also *Jensen, supra note 267*, at § 81:6 (citing *Frink Am., Inc. v. Champion Road Mach., Ltd.*, 48 F. Supp. 2d 198 (N.D.N.Y. 1999); *Schripteck Mktg., Inc. v. Columbus McKinnon Corp.*, 589 N.Y.S.2d 656, 658-59 (3d Dept. 1992); *Delta Filter Corp. v. Morin*, 485 N.Y.S.2d 143, 144 (3d Dept. 1985)). The concept of secrecy in New York depends upon the standard of “substantial exclusivity of knowledge” and “the employment of precautionary measures to preserve such exclusive knowledge by limiting legitimate access by others.” *Jensen, supra note 267*, at § 81:6. By contrast, the Goldstein Application, *supra note 12*, at 6 makes little reference to the methods, policies, procedures and practices used (if any) to protect or “police” the purported trade secrets. The application goes on to state that:

New York courts are likely to evaluate the relative ease with which a purported secret can be independently replicated by others in the field who possess reasonable knowledge,²⁷⁹ but often first employ the following six-factor threshold analysis to determine the question of whether a trade secret is even in dispute:

(i) the extent to which the information is known outside of [the] business; (ii) the extent to which it is known by employees and others involved in [the] business; (iii) the extent of measures taken by [the business] to guard the secrecy of the information; (iv) the value of the information to [the business] and [its] competitors; (v) the amount of effort or money expended by [the business] in developing the information; (vi) the ease or difficulty with which the information could be properly acquired or duplicated by others.²⁸⁰

It is highly improbable that any New York tribunal would interpret the factual averments within the Goldstein Application as satisfying the six-prong burden, and neither should the SEC.²⁸¹ Certain factual subtleties that must be addressed by a successful trade secrets claimant are altogether absent from the Goldstein Application and could conceivably thwart his latest campaign. While no apparent framework

Applicants generally do not publicly disclose their investments. Moreover, the Applicants generally do not disclose their investments to investors in their funds nor do they provide a condensed schedule of such investments in their funds' financial statements, much less a complete schedule, even though a condensed schedule is required to obtain an unqualified audit opinion. Their funds' financial statements contain [an] explanatory note.

Goldstein Application, *supra* note 12, at 6.

279. Jensen, *supra* note 267, at § 81:8 (citing *Ashland Mgmt., Inc. v. Janien*, 82 N.Y.2d 395 (1993) (stating that trade secret protection is not available for an investment strategy model that a financial analyst could reproduce from publicly disclosed information)); *Garvin Guy Butler Corp. v. Cowen & Co.*, 588 N.Y.S.2d 56, 59 (N.Y. Sup. Ct. 1992).

280. Jensen, *supra* note 267, at § 81:8 (quoting *Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Inc.*, 118 F.3d 955, 968 (2d Cir. 1997); *Tactica Int'l, Inc. v. Atlantic Horizon Int'l, Inc.*, 154 F. Supp. 2d 586, 606 (S.D. N.Y. 2001); *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 404 (1993); *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 15 (1st Dept. 1998); *Eagle Comtronics, Inc. v. Pico, Inc.*, 453 N.Y.S.2d 470, 472 (4th Dept. 1982)).

281. See Goldstein Application, *supra* note 12, at 16-18 (ignoring in large part the first five prongs of the New York trade secret test, and placing almost all of its emphasis on the sixth, through cited excerpts from various financial publications that have featured articles regarding the past portfolio holdings of *other* "celebrity" investment managers).

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for review of Goldstein’s request currently exists, it seems plausible that the SEC might apply an analysis similar to that employed with confidential treatment applications (as discussed above), only modified to evaluate whether a meritorious showing exists in support of the novel theory for exemption. Such a finding would seem implausible based upon the facts.

1. Trade Secrets Must Be Kept Secret—Reasonable Efforts and Improper Means

New York courts evaluate the measures used to preserve exclusivity of information, and such measures must guard the secret from outsiders and within the workplace.²⁸² Secrecy need not be “absolute,”²⁸³ but “a substantial element of secrecy,” must exist to the extent that it would be difficult to acquire the information absent “improper means.”²⁸⁴ Unfortunately for the fate of the Goldstein Application, it contains almost nothing to demonstrate any measures used by the “Bulldog” to guard his purported “secret,” nor were any “improper means” attributable to conduct of the government cited. A prudent trade secret holder would employ reasonable efforts to exclude others from the secret and guard against its public disclosure.²⁸⁵ Such reasonable efforts

282. Jensen, *supra* note 267, at § 81:9 (citing *Delta Filter Corp. v. Morin*, 485 N.Y.S.2d 143, 145 (3d Dept. 1985)).

283. Jensen, *supra* note 267, at § 81:9 (citing *Inflight Newspapers, Inc. v. Magazines In-Flight, LLC*, 990 F. Supp. 119, 133 (E.D.N.Y. 1997); *Monovis, Inc. v. Aquino*, 905 F. Supp. 1205, 1224 (W.D.N.Y. 1994)).

284. Jensen, *supra* note 267, at § 81:9 (citing *Schripteck Mktg., Inc. v. Columbus McKinnon Corp.*, 589 N.Y.S.2d 656, 659 (3d Dept. 1992); *Monovis, Inc. v. Aquino*, 905 F. Supp. 1205, 1224 (W.D.N.Y. 1994)); *see also* *E.I. DuPont de Nemours & Co. v. Christopher*, 431 F.2d 112 (5th Cir. 1970) (discussing “improper means”). In *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.*, 925 F.2d 174, 179-80 (7th Cir. 1991) Judge Posner expressed that “reasonability” is a function of the specific circumstances unique to the case at bar:

[O]nly in an extreme case can what is a ‘reasonable’ precaution be determined on a motion for summary judgment, because the answer depends on a balancing of costs and benefits that will vary from case to case and so require estimation and measurement by persons knowledgeable in the particular field of endeavor involved . . . and therefore perfect security is not optimum security.

Rockwell Graphic Sys., 925 F.2d at 179-80.

285. *See, e.g.*, Lori McLeod, *Hedge fund fights to keep ‘trade secrets’ Disclosure challenge*, FINANCIAL POST (Canada), Sept. 18, 2006, available at

would be likely to include, at a minimum: limiting employee access to any proprietary information;²⁸⁶ demanding that employees, agents, contractors and others with access to the information execute non-disclosure agreements;²⁸⁷ avoiding access to the “secret” by outsiders; and allowing only those who “need to know” to gain access.²⁸⁸ This is

<http://www.canada.com/components/print.aspx?id=e7e8e234-0792-4cfe-95e8-38099e84de8b> (last visited Nov. 12, 2006). The article, speaking of the merits of Goldstein’s argument, emphasize the manner and extent to which ‘secret information’ is kept secret, saying:

Depending on how well-protected information about his holdings is, Mr. Goldstein’s argument may well have legal merit, said Talcott Franklin, an intellectual property lawyer at law firm Patton Boggs, and author of *Protecting the Brand*.

“If he’s managed to keep this information completely secret until now, it could fit the definition of a trade secret,” Mr. Franklin said. “That definition is very broad, it can involve any formula, compilation, pattern or device whose use in business gives the operator a competitive advantage.”

A protectable secret has to be well guarded by a company, difficult for the public to figure out, and a firm should have expended considerable resources on it, said another lawyer who asked not to be named. He agreed with Mr. Franklin’s view that a money manager’s holdings could fit the bill.

Id.

286. Jensen, *supra* note 267, at § 81:9 (citing *Hancock v. Essential Res., Inc.*, 792 F. Supp. 924 (S.D.N.Y. 1992) (holding that customer materials did not constitute trade secret where “all personnel had access to” information and plaintiff “imposed no restrictions or guidelines” concerning the circulation of customer lists among employees); *Downtown Women’s Ctr., Inc. v. Carron*, 655 N.Y.S.2d 479 (1st Dept. 1997) (holding that a patient list was not a trade secret where it was left on a computer accessible to everyone in a medical suite)). The Goldstein Application identified no specific procedures, policies, practices or methods employed (“reasonable efforts”) in order to preserve any purported “secret.” See generally, Goldstein Application, *supra* note 12.

287. Jensen, *supra* note 267, at § 81:9 (citing *U.S. Reinsurance Corp. v. Humphreys*, 618 N.Y.S.2d 270, 272-73 (1st Dept. 1994)).

288. *Contra* Goldstein Application, *supra* note 12 (failing to cite any notable “reasonable efforts” specifically designed to “police” the purported portfolio trade secret(s) or to mention the risk of disclosure of its trade secrets if it had sought Confidential Treatment instead of exemption in the event that the SEC placed such a confidential treatment request on its computer network). Ironically, a recent Government Accounting Office (“GAO”) study of the SEC’s information technology revealed potential inadequacies in the Commission’s efforts to maintain the confidentiality of “sensitive data,” explaining that:

[The] SEC has not effectively implemented information system controls to protect the integrity, confidentiality, and availability of its financial and sensitive data, increasing the risk of unauthorized disclosure, modification, or loss of the data, possibly without detection. The risks created by these information security weaknesses are compounded because the SEC does not have a comprehensive monitoring program to

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just one among many respects in which the Goldstein Application falls well short.

The one prominent measure claimed by the Goldstein Application is that investors in the “Bulldog” funds are supposedly not privy to any of the funds’ holdings.²⁸⁹ Goldstein’s claimed secrecy, however, is contradicted by a variety of public documents, including a Memorandum and Order in a civil matter adjudicated in 2001 in the Eastern District of Pennsylvania in a matter captioned *Phillip Goldstein v. Lincoln National Convertible Securities Fund, Inc.*, in which Judge Dubois cited sworn testimony in her findings of fact, and clearly indicated that Goldstein had previously communicated specific information related to investment strategies and trading activities, and that he has actually consulted with certain of his hedge funds’ investor-limited partners about contemplated investments *before* the trades were actually executed.²⁹⁰

New York courts often assess a claimant’s conduct prior to seeking trade secret protection in order to discern whether, as a course of business, the putative holder considered and treated the information as a valuable secret, and would presumably take a dim view of Goldstein’s claims of secrecy because of the contradictory public records.²⁹¹ New

identify unusual or suspicious access activities. SEC is currently working to improve controls in all these areas.

U.S. GOV’T ACCOUNTABILITY OFF., FIN. AUDIT: SEC. & EXCH. COMM’N FIN. STATEMENTS FOR FISCAL YEAR 2004, GAO-05-244 (2005) (quoting from the abstract, *available at* <http://www.gao.gov/docsearch/abstract.php?rptno=GAO-05-244>). *See* <http://www.gao.gov/highlights/d07134high.pdf> for the highlights of the GAO’s audit for the fiscal years 2005 and 2006 (last visited Dec. 2, 2006). *See also* Paul Tharp, *GAO Audit: SEC Has Problems*, N.Y. POST, Nov. 17, 2006, at 38, *available at* http://www.nypost.com/seven/11172006/business/gao_audit_sec_has_problems_business_paul_tharp.htm (last visited Jan. 1, 2007).

289. Goldstein Application, *supra* note 12, at 6. The Application alleges the extent to which investment confidentiality is maintained by saying:

The Applicants generally do not publicly disclose their investments. Moreover, the Applicants generally do not disclose their investments to investors in their funds nor do they provide a condensed schedule of such investments in their funds’ financial statements, much less a complete schedule, even though a condensed schedule is required to obtain an unqualified audit opinion.

Goldstein Application, *supra* note 12 at 6.

290. *Goldstein v. Lincoln Nat’l Convertible Secs. Fund, Inc.*, 140 F. Supp.2d 424, 435 (E.D. Pa. 2001), *vacated in part, appeal dismissed*, *Goldstein v. Lincoln Nat’l Convertible Secs. Fund, Inc.*, No. 01-2258, 2003 WL 1846095 (3rd Cir. Apr. 02, 2003).

291. *See* Jensen, *supra* note 267, at § 81:9 (citing *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 15 (1st Dept. 1998) (denying trade secret protection where “there are

York courts are also generally receptive to protecting proprietary information where considerable time and money was expended in developing the secret.²⁹² The Goldstein Application, however, reveals almost nothing quantifiable about any reasonable secrecy efforts or funds expended to maintain the secrecy of, or to select “Bulldog’s” various Section 13(f) stock picks, nor anything relating to his buy/sell/hold decisions regarding those securities.²⁹³ Moreover, in addition to Judge Dubois’ Findings of Fact in the 2001 matter, less than a month prior to filing the Application, Goldstein spoke in detail in various media interviews, and in late September, 2006, Goldstein revealed aspects of his hedge fund investment strategies for generating “alpha” during a conference call.²⁹⁴ A judicial review of prior conduct related to any purported trade secrets, especially the testimony from the 2001 civil matter, would hardly bode well for any supposed trade secret status of the “Bulldog” portfolios.

Substantially more damaging to Goldstein’s purported trade secrets theory in terms of its glaring lack of any demonstrated “reasonable efforts,” is an administrative complaint filed January 31, 2007 by the Massachusetts Commonwealth Secretary, William F. Galvin.²⁹⁵ The Massachusetts administrative action charges Goldstein, his “Bulldog” funds, and his hedge fund lieutenants with what *Reuters* characterized as a failure “to restrict online access to the portfolios, which are considered a private offering,” and which the *Financial Times* noted, according to the complaint, that “Mr. Goldstein and Bulldog Investors failed to control access to fund information that should have been available only to password-holders screened by fund managers.”²⁹⁶ The complaint

no factual allegations suggesting that, prior to negotiations with [a third party], measures were taken to treat information as secret.”)).

292. See Jensen, *supra* note 267, at § 81:10.

293. See generally, Goldstein Application, *supra* note 12 (alleging very few specifics regarding what was done to ensure confidentiality).

294. Conference Call with Phil Goldstein, at Millennium Media Consulting Money Manager Series Fall 2006: *What’s Next for Phil Goldstein* (Sept. 26, 2006), available at, http://www.vcall.com/CustomEvent/conferences/millennium_media/092606/agenda.asp. For discussion of the hedge fund manager compensation known as “alpha,” see *supra* note 1.

295. See Admin. Complaint, *In re Bulldog Investors Gen. P’ship et al.*, No. E-07-0002 (Sec’y of the Commw., Secs. Div. Jan. 31, 2007), available at <http://www.sec.state.ma.us/sct/sctpdf/bulldogcomplaint.pdf> (last visited Feb. 18, 2007) [hereinafter Admin. Complaint].

296. Svea Herbst-Bayliss, *Mass. sues hedge fund manager who took on SEC*,

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further alleges violations of the Massachusetts Uniform Securities Act and related regulations, "based upon the Respondents' failure to ensure that the offer or sale of its securities in the Commonwealth were properly registered or exempted in accordance with §301 of the [Massachusetts] Act."²⁹⁷

The administrative complaint alleges that "Bulldog" also sent e-mail investment solicitations to a Massachusetts resident, which in combination with the website materials, included: "investment strategies;" "specific examples of investments;" "assets and firm information . . . historical performance, latest period returns, statistical analysis;" as well as a "detailed monthly breakdown[s] of return estimates for the Full Value Fund."²⁹⁸ The complaint further alleged that "[t]here are no controls on the Bulldog web site to prevent advertising and/or offering materials from being sent to Massachusetts investors."²⁹⁹ A check of Bulldog's website subsequent to the filing of the Massachusetts complaint confirmed that it did contain a "front page" message which indicated that the web site was "currently being updated," however, the entire Bulldog website was readily available through the "Internet Archive," despite the fact that relatively simple (and fairly well known) methods to avoid website archiving exist.³⁰⁰

REUTERS, Jan. 31, 2007, available at http://today.reuters.com/news/articleinvesting.aspx?type=governmentFilingsNews&storyID=2007-01-31T195617Z_01_N31340761_RTRIDST_0_MASSACHUSETTS-HEDGE-FUNDS-UPDATE-1.XML (last visited Feb. 18, 2007); see Anuj Gangahar, *Regulators sue Goldstein over fund marketing*, FINANCIAL TIMES, Feb. 1, 2007, Companies International, at 16, available at <http://www.ft.com/cms/s/f991070e-b199-11db-b901-0000779e2340.html> (last visited Feb. 2, 2007); see also Bulldog Investors Website, available at <http://www.bulldoginvestors.com> (last visited Feb. 18, 2007) ("Our website is currently being updated. Please check back soon. Thank you. Bulldog Investors 201-556-0092").

297. See Admin. Complaint, *In re Bulldog Investors Gen. P'ship et al.*, (No. E-07-0002), *supra* note 295, at 1, ¶ 1.

298. See, e.g., Admin. Complaint, *In re Bulldog Investors Gen. P'ship et al.*, (No. E-07-0002), *supra* note 295, at 7-11, ¶¶ 26, 31, 45 (citing Exhibits B, C-2, C-5).

299. See Admin. Complaint, *In re Bulldog Investors Gen. P'ship et al.*, (No. E-07-0002), *supra* note 295, at 11, ¶ 47.

300. See Bulldog Investors Website Archive, available at <http://web.archive.org/web/20060116131029/http://www.bulldoginvestors.com/> (last visited Feb. 5, 2007). The Internet Archive and its "Wayback Machine," have maintained a conspicuous and long-standing liberal policy that easily accommodates website owners who do not desire to be included in the aggregated collection of website pages obtained by the Internet Archive's "crawlers." In fact, the Internet Archive

The allegations within Secretary Galvin's pleadings against "Bulldog" which relate to voluntary public disclosures of investments and strategies are among the many facts that call into serious question Goldstein's claims of secrecy in his Application, and strongly suggest a lack of "reasonable efforts" expended to protect the confidentiality of his purported trade secrets.³⁰¹

specifically notes in its "Frequently Asked Questions" (FAQs) that a relatively simple method for website proprietors to avoid inclusion in the Internet Archive, and includes the following policies:

[Question]: How can I remove my site's pages from the Wayback Machine?

[Answer]: The Internet Archive is not interested in preserving or offering access to Web sites or other Internet documents of persons who do not want their materials in the collection. *By placing a simple robots.txt file on your Web server, you can exclude your site from being crawled as well as exclude any historical pages from the Wayback Machine.* Internet Archive uses the exclusion policy intended for use by both academic and non-academic digital repositories and archivists. See our exclusion policy. You can find exclusion directions at [exclude.php](#). If you cannot place the robots.txt file, opt not to, or have further questions, email us at info@archive.org.

Id. (emphasis added); see also Internet Archive: Frequently Asked Questions, available at <http://www.archive.org/about/faqs.php#2>; Internet Archive: Terms of Use, available at <http://www.archive.org/about/terms.php>; Internet Archive: Wayback Machine, available at <http://web.archive.org/web/20050305142910/>; The Oakland Archive Policy, available at <http://www.sims.berkeley.edu/research/conferences/aps/removal-policy.html>; Internet Archive: Removing Documents from the Wayback Machine, available at <http://www.archive.org/about/exclude.php> (each last visited Feb. 6, 2007). The Internet Archive also represents that it may "remove certain content or disable access to content that appears to infringe the copyright or other intellectual property rights of others." See Internet Archive: Terms of Use, available at <http://www.archive.org/about/terms.php> (last visited Feb. 6, 2007); see also, Jeffrey D. Neuberger, *Technology, the Internet and Electronic Commerce: Staying Interactive in the High-Tech Environment*, THELEN, REID, BROWN, RAYSMAN & STEINER, LLP PUBLICATION (Thelen, Reid, Brown, Raysman & Steiner LLP, New York, N.Y.) Dec. 31, 2006 at 13, available at http://www.thelen.com/tlu/Technology_Law_White_Paper_December_2006.pdf (last visited Mar. 25, 2007) (citing *Field v. Google, Inc.*, No. 04-0413 (D. Nev. Jan. 19, 2006)) ("Consent to copying and caching of an author's online works may be inferred from the author's failure to use available technology to block search engine access to the works.).

301. See Admin. Complaint, *In re Bulldog Investors Gen. P'ship et al.*, (No. E-07-0002), *supra* note 295; Jay Fitzgerald, *Galvin probes hedge fund: Web sales at issue*, BOSTON HERALD, Feb. 1, 2007, Finance, at 33, available at <http://business.bostonherald.com/businessNews/view.bg?articleid=180315&src=biz> (last visited Feb. 8, 2007) ("The usual manner to conduct such a private offering over the Internet requires the Web site to be password-protected," said Galvin in a statement. But Bulldog had no such controls and, therefore, was effectively holding an unregistered

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Goldstein has publicly rebuffed the Massachusetts regulator’s allegations; characterized the administrative lawsuit as “bizarre;” referred to Secretary Galvin as a “bully” and a “pompous ass;”³⁰² claimed Bulldog was subjected to “pretexting” and an innocent victim of a “sting operation;” and asserted during a CNBC televised interview and in periodicals such as the *Boston Globe* and *The New York Times* that unfettered online access to his hedge funds’ information is somehow constitutionally protected free speech. “If someone asks for info and you give it to them, isn’t that First Amendment activity? I’m not selling anything, I’m just providing information.”³⁰³ These remarks were all apparently foreshadowing Goldstein’s next high-profile regulatory windmill, a First Amendment-based challenge to long-standing state and federal prohibitions of general advertising or solicitations for private hedge fund offerings.³⁰⁴ These prohibitions include the Investment Company Act of 1940 that exempts certain private securities offerings from registration and disclosure if sold only to less than one hundred investors, and/or to so-called “qualified purchasers,” but which also require that any such offering not be made available to the public as a

public offering, he said.”); *see also* Press Release, Bulldog Investors, Bulldog Investors General Partnership Makes Announcement Concerning RMR Hospitality & Real Estate Fund (Feb. 5, 2007), *available at* <http://www.marketwatch.com/news/story/bulldog-investors-general-partnership-makes/story.aspx?guid=%7B3D7A2A1E-4F3E-432C-8C32-3B0A455AF8B2%7D> (last visited Feb. 8, 2007) (disclosing publicly the fact that its funds recently sold a portion of one of its largest equity holdings: “BIGP has voluntarily reduced its position so that it and its affiliates do not collectively beneficially own more than 9.8% of RHR’s outstanding common stock”) (emphasis added).

302. Jay Fitzgerald, *Bulldog Hedge Fund Manager Says Galvin ‘Is a Bully,’* BOSTON HERALD, Feb. 15, 2007, *available at* <http://business.bostonherald.com/businessNews/view.bg?articleid=183048> (last visited Feb. 15, 2007).

303. Jenny Anderson, *News Analysis: Taking the Muzzle Off Hedge Funds Is an Idea Whose Time Has Come*, INT’L HERALD TRIB., Feb. 8, 2007, *available at* <http://www.iht.com/bin/print.php?id=4526541> (last visited Feb. 9, 2007); Steven Syre, *Taking Aim at Hedge Funds*, Feb. 1, 2007, BOSTON GLOBE, *available at* http://www.boston.com/business/globe/articles/2007/02/01/taking_aim_at_hedge_funds?mode=PF (last visited Feb. 6, 2007).

304. *See* CNBC “On The Money” interview with Melissa Francis, *Regulating Hedge Funds*, CNBC.COM, Feb. 21, 2007, *available at* <http://www.cnbc.com/id/15840232?video=186208585&play=1> (last visited Feb. 23, 2007) (stating that Mr. Goldstein claims he will take the Massachusetts administrative matter to the U.S. Supreme Court).

quid pro quo for the exemption.³⁰⁵

Goldstein told the *Wall Street Journal* “[w]e’re being punished for providing truthful information,” and added, “[i]t’s almost like mind control . . . [i]t’s what you would see in Communist China.”³⁰⁶ He has openly challenged the public “to find any First Amendment lawyer who’s not going to agree that this regulation, this attempt to strike down free communication, is going to be invalidated by a court” and even unsuccessfully dared an apparently unimpressed Connecticut Attorney General Richard Blumenthal, and former SEC Commissioner Laura Unger, to wager \$100,000 with him regarding any judicial outcome of Goldstein’s tenuous First Amendment theory during a televised CNBC interview.³⁰⁷ It seems unlikely that Goldstein’s notions regarding the regulation of so-called “commercial speech”³⁰⁸ will persuade any court, and the revelations regarding the easy access to information about the

305. The Investment Company Act of 1940 §§ 3(c)1, 3(c)7 (“qualified purchasers”) are construed as exempt “private” offerings pursuant to the Act (15 U.S.C. §§ 80a-3(c)(1), -3(c)(7)). William Natbony, Esq., senior partner with New York law firm, Katten, Muchin, Rosenman, LLP, explained:

The question [in the Massachusetts administrative action against ‘Bulldog’ is] whether such Web site content constitutes an offering to the general public. This question has been placed on the front burner by the Massachusetts complaint and it is likely that a number of hedge funds which are in the same position as Bulldog will be paying close attention to the resolution of this matter.

Allegations Raise Questions on Marketing Hedge Funds to Public, JAFFE LEGAL NEWS SERVICE, Feb. 15, 2007, available at <http://www.jlms.com/index.cfm?fuseaction=Home.ShowArticleDetail&ArticleID=5404&SectionTitle=Allegations%20Raise%20Questions%20on%20Marketing%20> (last visited Feb. 16, 2007).

306. See Winstein, *supra* note 302.

307. See *Goldstein Takes First Amendment Fight to CNBC*, FINALTERNATIVES.COM, Feb. 22, 2007, available at <http://www.finalternatives.com/node/1217> (last visited Feb. 24, 2007); see generally *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of N.Y.*, 447 U.S. 557 (1980). The Central Hudson Court noted that the U.S. Constitution provides a lesser First Amendment protection from governmental regulation for so-called “commercial speech,” than it does for other forms of expression. The relevant analytical test for “commercial speech” derived from *Central Hudson* is: (1) whether the speech at issue concerns lawful activity and is not misleading; (2) whether the governmental interest served by the commercial speech restriction is substantial; (3) whether the regulation directly advances the governmental interest; and, (4) whether the regulation at issue is more extensive than is necessary to serve that governmental interest. *Id.*

308. See *supra* note 307; see generally *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) (applying the so-called “commercial speech” test); *cf. Lowe v. SEC*, 472 U.S. 181 (1985).

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"Bulldog" funds on the Internet, that came to light as a result of the Massachusetts administrative action, may very well be the absolute undoing of Goldstein's rather suspect Application.

Subsequent to Secretary Galvin's administrative action against "Bulldog," a battle boiled over between the financial website DealBreaker.com and Solengo Capital, the new hedge fund start-up of former Amaranth trader Brian Hunter, over DealBreaker.com's snarky and recalcitrant publication of the Solengo Capital initial investment brochure.³⁰⁹ The Solengo "imbroglio" led to public posturing between Mr. Hunter's new hedge fund and the "Wall Street Tabloid," threats of litigation, and a supposedly "loony-tunes confidentiality theory."³¹⁰ The disputed publication of Mr. Hunter's new "confidential" hedge fund offering memorandum also acts to undermine the "Bulldog" trade secrets theory to some extent, notwithstanding the "loony-tunes" riposte, because Solengo's "takedown" demand was predominantly premised upon a copyright infringement theory, and its lawyers did not include New York trade secrets law as an asserted ground for removal of the offering materials from the DealBreaker site.³¹¹ Moreover, DealBreaker's expected affirmative First Amendment defense is entirely distinguishable from the facts of the Massachusetts administrative matter against "Bulldog." The most notable distinction being, in the former scenario, the offering materials were apparently leaked by third parties to various financial news websites who, in turn, published reproductions

309. John Carney, *Hedge Fund To DealBreaker: Please Shut Up!* DEALBREAKER.COM, Mar. 29, 2007, available at http://www.dealbreaker.com/2007/03/hedge_fund_to_dealbreaker_plea.php (last visited Mar. 30, 2007); see also Dane Hamilton, *Ex-Amaranth traders ask blogs to remove materials*, REUTERS, Mar. 28, 2007, available at <http://www.reuters.com/articlePrint?articleId=USN2834004320070328> (last visited Mar. 30, 2007).

310. See Dane Hamilton, *Solengo hedge fund threatens court action vs blog*, REUTERS, Mar. 30, 2007, available at <http://www.reuters.com/articlePrint?articleId=USN3034295020070330> (last visited Mar. 30, 2007).

311. See John Carney, *Solengo's Lawyers Strike Back: We Still Say Suck It.*, DEALBREAKER.COM, Mar. 29, 2007, available at http://www.dealbreaker.com/2007/03/solengos_lawyers_strike_back_w.php (last visited Mar. 30, 2007); and a copy of the March 28, 2007 "takedown" letter, available at http://www.dealbreaker.com/images/entries/letter_to_bess.jpg (last visited Mar. 30, 2007). See also John Carney, *Solengo Seeks Court Order To Strip DealBreaker Of Brochure*, DEALBREAKER.COM, Mar. 30, 2007, available at http://www.dealbreaker.com/2007/03/solegno_seeks_court_order_to_s.php (last visited Mar. 30, 2007).

of the Solengo brochure, whereas the latter is an alleged instance of a hedge fund who made marketing materials directly available to the public through its own website, without regard for whether access was restricted to accredited investors.³¹² As such, it seems implausible that “Bulldog” can affirmatively defend its alleged public disclosures as a member of the “fourth estate,” or anything else even remotely analogous to a financial newsletter publisher that successfully defended itself against an SEC investigation on First Amendment grounds.³¹³

At least in theory, there initially appears to be nothing to necessarily preclude a trade secret misappropriation claim where the subject matter is a secret combination of equity holdings in a hedge fund portfolio, notwithstanding the apparent lack of any “reasonable efforts” to protect the supposed Bulldog “secrets.” At least one New York hedge fund litigant has been successful in an equitable action related to the alleged “theft” of trade secrets.³¹⁴ However, “isolated bits of useful competitive information are not likely to win protection in New York courts.”³¹⁵ Goldstein’s collection of Section 13(f) securities, as a portion of a portfolio,³¹⁶ would likely be construed by a New York court as mere

312. See *supra* note 295.

313. See *Lowe v. SEC*, 472 U.S. 181 (1985). Ironically, dicta in *Lowe*, 472 U.S. 181 (1985), regarding the definition of “client” played a prominent role in the D.C. Circuit Court’s decision in *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006). See *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006); see also *Pekarek*, *supra* note 10; cf. *Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) (analyzing “commercial speech”).

314. See *Quantitative Fin. Strategies, Inc. v. Gamma Capital Mgmt*, No. 1:01-cv-05088-SAS (S.D.N.Y. Terminated June 29, 200) (unreported) (issuing a two year injunction enjoining a former hedge fund research director from accepting employment with a competitor in theft of trade secrets action), available at <http://ecf.nysd.uscourts.gov> (last visited Nov. 12, 2006); see also *B.C. Zeigler & Co. v. Ehren*, 414 N.W.2d 48 (1987) (applying Wisconsin trade secret law to hold that a broker-dealer securities underwriter’s customer information, obtained by a former licensed broker via batches of scrap paper containing customer names and account summaries and sold to a paper recycler was a trade secret and did not lose its property status by virtue of an inadvertent disclosure, because the title to the property conveyed included only the scrap paper, not the proprietary customer data printed on that paper).

315. HAIG, *supra* note 267, at § 81:4 (“Subject matter of trade secrets”).

316. Form 13F filings are due not less than forty-five (45) days after the end of the respective reporting period (“[M]ust file no later than 45 days after the end of the March, June, September, and December quarters.”). See Exchange Act Rule 17 C.F.R. § 240.13f-1(a)(1); see also Division of Investment Management: Frequently Asked Questions About Form 13F, available at <http://www.sec.gov/divisions/investment/>

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“isolated bits” unworthy of trade secret status.³¹⁷

New York jurisprudence has established the threshold trade secrets showing is simply not met by “information as to single or ephemeral events in the conduct of the business,” but instead requires the demonstration of “a process or device for continuous use in the operation of the business.”³¹⁸ The composition of a hedge fund portfolio is likely to be as fluid and dynamic as the ebb and flow of market sentiment and individual stock picks are presumably not for “continuous use.” Moreover, Form 13F data is only revealed after more than a six week time lag³¹⁹ from the last day of a respective reporting period (and a greater than four (4) month time lag from the first day of a respective reporting period). Such information could be reasonably construed as no longer possessing the qualities of “hot” news, and is perhaps unsuitable to receive the limited protection created by the doctrine of unfair competition by misappropriation.³²⁰

13ffaq.htm; *see, e.g., Calendar of SEC Holidays and EDGAR Filing Deadlines (2006 and 2007)*, available at http://www.secfile.net/SEC_calendar.htm (last visited Jan. 2, 2007).

317. *See*, HAIG, *supra* note 267, at § 81:5. Additionally, the parameters of the Form 13F do not require disclosure of open short positions; bonds and other debt securities; various derivatives, including collateralized obligations, credit swaps, options (and various option strategies such as “collars;” “covered calls;” “straddles;” “strangles;” etc.); commodities; futures contracts; or portfolio and trading aspects and information such as block positioning; margin leverage; position cost-bases; allocation percentages; timing techniques; or other trading strategies.

318. *See* Bear Stearns Funding, Inc. v. Interface Group-Nevada, Inc., 361 F. Supp. 2d 283, 305 (S.D.N.Y. 2005).

319. James Altucher, *No Place to Hide in an Age of Transparency*, FINANCIAL TIMES (U.K.), Nov. 7, 2006.

The only real tangible benefit of viewing a 13F-HR filing is the knowledge that 45 days earlier (the filing comes 45 days after the quarter’s end) the fund was not (or was) over-concentrated in any one set of positions. You also get to know if there was any style drift or if any of the statements the manager has made about his portfolio differ from what is revealed.

Id.

320. *See, e.g.,* Intl. News Serv. v. Assoc. Press, 248 U.S. 215, 236, 239-40 (1918) (Brandeis, J., dissenting) (establishing the doctrine of unfair competition by misappropriation). The Court provided limited protection to “hot” news, and only for a limited time, stating that “it must be regarded as quasi property, irrespective of the rights of either as against the public,” and indicating that the private actor’s intellectual property protection benefits afforded by law are inherently subordinate to the co-extensive social benefits. The Court also noted “it was not the news events themselves

A New York tribunal could reasonably conclude that the subject matter of the Goldstein Application is something more akin to the aforementioned “ephemeral events,” than to any “process or device for continuous use,” and thus is not a trade secret at all.³²¹ In fact, the drafters of the RESTATEMENT (FIRST) OF TORTS, §757 cmt. b specifically excluded “security investments made or contemplated” from its trade secret definition, and New York courts have traditionally followed the RESTATEMENT view.³²² A potential Form 13F filer/petitioner located in a forum (*e.g.*, California) that more closely follows the expansive Uniform Trade Secrets Act (“UTSA”)³²³ might have been better positioned to challenge the Section 13(f) reporting regime in part because of the UTSA’s broad trade secret definition, which does not necessarily exclude arguably “ephemeral events” such as securities positions from trade secret status.³²⁴ Without a requisite showing of the necessary elements of a trade secret pursuant to New York law, it seems unlikely that Mr. Goldstein’s theory will triumph.

which were being protected by the doctrine, but rather the proprietor’s effort and expense in obtaining them.” *Int’l. News Serv.*, 248 U.S. 239 (1918). Similarly, Goldstein’s portfolio holdings do receive limited secrecy protection during the “time-lag” period between his funds’ acquisitions (and/or dispositions) of the relevant § 13(f) securities and the respective Form 13F disclosure deadlines. Moreover, where a non-exempt investment adviser of a holder of § 13(f) securities seeks to avail itself of the confidential treatment administrative remedies (including those specifically available for trade secrets and other proprietary commercial information), a period of secrecy can be extended, at a minimum, during the bureaucratic delay of the processing of any confidential treatment application, which could conceivably extend in perpetuity if the confidential treatment Application is granted unconditionally. *See, e.g.*, Part V.C.4, *supra*. However, as discussed in this Note, Credit Suisse has obtained confidential treatment approvals for limited times, and thereafter amended the respective Forms 13F where secrecy was no longer necessary. *See* Part V.C.6, *supra*; *see e.g., supra* notes 213-14.

321. *Id.*; *see also*, *Hudson Hotels Corp. v. Choice Hotels Int’l*, 995 F.2d 1173, 1176 (2d Cir. 1993), *abrogated on other grounds by* *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000); *see also*, *LinkCo, Inc. v. Fujitsu Ltd.*, 230 F. Supp. 2d 492, 500 (S.D.N.Y. 2002).

322. *See*, RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939) (“Definition of a trade secret”). However, a claimant might have a civil cause of action pursuant to RESTATEMENT (FIRST) OF TORTS § 759 (1939) (“Procuring Information by Improper Means”).

323. *See, e.g.*, *DVD Copy Control Ass’n v. Bunner*, 4 Cal. Rptr. 3d 69, 78 (2003).

324. *See id.*

2. Alleged Harm of "Free-Rider" Trade Secret Stock Traders

While the information at issue need not be "vital" to a claimant's business operations, it must be adequately important to the extent that a misappropriation would unfairly benefit another in a competitive market.³²⁵ This issue appears to be the one on which the Goldstein Application focused much of its energy and rhetoric, by repeatedly noting that third parties can hypothetically "free-ride" the investment acumen of various "celebrity" investment managers.³²⁶ A prudent trade secrets claimant would presumably be well served to articulate precisely how the information at issue is used in its operations and exactly why it is a substantial factor in the continued functioning of the business.³²⁷ Mr. Goldstein did sketch some broad strokes in media interviews, and within the Application itself, as to how others might hypothetically mimic his positions, but he did not describe with particularity the aforementioned "how" and "why" aspects of his purported trade secrets.³²⁸

While the Goldstein camp initially and inexplicably eschewed the available confidential treatment relief, and instead sought exemption from Section 13(f) reporting requirements, existing confidential treatment analysis may offer some guidance in terms of the likely SEC scrutiny of this unprecedented petition. As discussed above, a confidential treatment application must convincingly demonstrate that a Form 13F disclosure would create a substantial likelihood of competitive harm, whereas confidential treatment requests presenting mere conjecture are summarily rejected. The SEC could properly deny the Goldstein Application on numerous grounds, including the failure to specifically demonstrate a substantial likelihood of competitive harm by suspected "free riders."³²⁹ The Goldstein Application also failed to

325. HAIG, *supra* note 267, at § 81:5.

326. See Goldstein Application, *supra* note 12; see also, Altucher, *supra* note 319 ("To support his claim [Goldstein] quotes my worst-selling and most recent book, SuperCaDollars. In particular, a chapter titled 'Trade Like Jeff Berkowitz.'"); see also McCormack, *supra* note 22.

327. HAIG, *supra* note 267, at § 81:5.

328. See, e.g., *Spotlight Post: Time for an Encore?*, Oct. 19, 2006, <http://thevalueblogs.com/valueblogger/spotlight-post-time-for-an-encore>.

329. Perhaps as a result of Mr. Goldstein's newfound notoriety, there is at least one investment-oriented website that now actively tracks the Bulldog Funds' investments. This new fact does lend some measure of support to the Goldstein Application theory.

particularize exactly what is the claimed trade secret(s), which if the context was a civil claim for trade secret misappropriation, that conspicuous lack of detail could result in dismissal for failure to adequately provide notice of the subject matter to the opponent.³³⁰

Considering that the required Section 13(f) disclosures are limited to positions in exchange-listed or Nasdaq quoted equities and options,³³¹ it would seem that anyone who hypothetically sought to “free-ride” and mimic Goldstein’s positions would presumably provide some measure of bid support for those same equities (a potential detriment to an investment manager seeking to add to a long position).³³² If a sufficient number of investors sought to mirror Goldstein’s “stale” disclosures,³³³ that “free rider” buy-side pressure might even cause the prices of Goldstein’s positions to increase.³³⁴ In fact, a clever (and presumably

See SECINVESTOR.COM, *Bulldog Investors Takes on Open-end Mutual Funds*, Mar. 23, 2007, available at <http://www.secinvestor.com/2007/03/23/Bulldog+Investors+Takes+On+Openend+Mutual+Funds.aspx> (last visited Mar. 24, 2007) (“Bulldog Investors is certainly a hedge fund worth tracking!”); *see also* SECINVESTOR.COM tracking index of Bulldog Funds’ Schedules 13D, available at <http://secfilings.com/sec-filings/companies/1364773/Bulldog-Investors-General-Partnership.aspx> (last visited Mar. 24, 2007).

330. *See, e.g.*, *Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, No. 5:03CV165 (HGM/GLS), 2003 WL 1956214, at *4 (N.D.N.Y. Apr. 24, 2003) (information sought to be protected as a trade secret must be identified and described with particularity).

331. *See* Section 13(f) securities list, available at <http://www.sec.gov/divisions/investment/13flists.htm> (last visited Feb. 25, 2007) [hereinafter Section 13(f) securities list].

332. Warren Buffet’s, *Letter to Berkshire-Hathaway Shareholders*, available at <http://www.berkshirehathaway.com/letters/1984.html> (1984) (last visited Dec. 20, 2006); *see also*, Warren Boroson, *Goldstein Beat SEC on Hedge Fund Rule*, DAILY RECORD, Sept. 17, 2006, available at <http://www.dailyrecord.com/apps/pbcs.dll/article?AID=/20060917/COLUMNISTS04/609170312/1003/ENT05> (last visited Nov. 12, 2006); *see also generally* Goldstein Application, *supra* note 12.

333. *See* Altucher, *supra* note 319.

Goldstein assumes we can make use of his picks to avoid doing serious research and simply piggyback his positions. However, for all we know, he is already out of those positions, or is scaling out of them (45 days is a long time), or he got in at much lower prices, or that his research is awful. . . . Hedge funds take nice compensation already for winning stock picks like these. I’m not sure we have to provide ‘just compensation’ on top of that for taking a peek behind the sacred wall.

Id. *But see* *How To Trade Around a Billionaire*, Oct. 9, 2006, available at <http://willsss.blogspot.com/2006/10/how-to-trade-around-billionaire.html> (last visited Feb. 25, 2007).

334. *See generally*, Patrick J. Glen, *The Efficient Capital Market Hypothesis, Chaos Theory, and Insider Filing Requirements of The Securities Exchange Act of 1934: The*

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highly cynical) “celebrity” hedge fund manager might even deliberately hold long positions in equities in order to sell them subsequent to the 13F filing, and possibly even short-sell the issue into any “free-rider” fresh money buying.³³⁵

The Application misses the mark on a number of the aforementioned required elemental showings needed to establish a protected intellectual property trade secret interest in New York. Based upon the factual statements of record in the Goldstein Application, standing alone, it seems highly improbable that Mr. Goldstein’s combination of Section 13(f) securities holdings would give rise to trade secret status in any court applying New York law. As such, based on matters of public record and the statements within the Goldstein Application and given the absence of any competent showing of the necessary elements required, the SEC may properly deny Goldstein’s request as it lacks the necessary elements for a protected trade secret

*3. Inherently Unreasonable Expectations of a
Regulated Market Participant?*

Mr. Goldstein has operated his funds in an era that demands Section 13(f) disclosure. He presumably could have elected to structure his funds and portfolios in a manner that would have remained below the \$100 million reporting threshold, just as a company who desires to avoid the reporting requirements of the 1934 Exchange Act (and the Sarbanes-

Predictive Power of Form 4 Filings, 11 Fordham J. Corp. & Fin. L. 85 (2005) (analyzing a sample of greater than 100 issuers which had insider equity holdings disclosed in Forms 4 and found tendencies of equity price appreciation subsequent to the reporting of those insider holdings, observing that, based upon the public availability of insider holdings data, “a non-insider steps slightly closer to that point in time where profit becomes more accessible to the trader”).

335. See, e.g., Lori McLeod, *Hedge Fund Fights to Keep ‘Trade Secrets’ Disclosure Challenge*, FINANCIAL POST (Canada), Sept. 18, 2006, available at <http://www.canada.com/components/print.aspx?id=e7e8e234-0792-4cfe-95e8-38099e84de8b> (last visited Nov. 12, 2006). McLeod explains,

But not everyone is put off by the [Section 13(f)] disclosure rules. Peter Hodson, an investment strategist at Sprott Asset Management [Canada], said seeing his top 25 won’t allow others to replicate his portfolio. “We don’t have to declare shorts, for example, and there are no selling restrictions. You can file on March 31 and sell everything on April 1. That makes it pretty tough for someone else to follow what we’re doing,” he said.

Id.

Oxley Act of 2002) can refrain from becoming an issuer of publicly traded securities pursuant to the 1933 Securities Act (or can take the company private if it is already a public issuer).³³⁶ It is inherently unreasonable for Goldstein to conduct his business based on public disclosure requirements, essential in a market system, then to contend his business information is protected by the Fifth Amendment. This is an especially weak stance for Goldstein to take, considering portions of his “secret” information were allegedly made available to investors through solicitations on unsecured websites, pursuant to the First Amendment.³³⁷

There are numerous instances in U.S. commerce where public disclosure is an accepted requirement that is rationally related to legitimate government interests as part of a *quid pro quo* exchange for the privilege of conducting business in a regulated market. The Section 13(f) reporting regime is wholly consistent with that long-standing tradition.³³⁸ For example, a food manufacturer seeking to market a product in the U.S. would almost invariably fail to achieve trade secret protection for a list of ingredients (in contrast to a protectable and unique process or recipe, such as the “Coca Cola” formula) in a challenge to public disclosure regulations and the designation of ingredients (in descending order of predominance) via product labeling requirements.³³⁹ Unlike food products marketed in the U.S. (irrespective

336. See generally, Exchange Act, 15 U.S.C. §§ 78 (1934); The Sarbanes-Oxley Act of 2002 (“Public Company Accounting Reform and Investor Protection Act of 2002”), 15 U.S.C. §§ 7201; Pub. L. No. 107-204, 116 Stat. 745 (2002); and The Securities Act of 1933, 15 U.S.C. §§ 77 (1933).

337. See Syre, *supra* note 303 (quoting Mr. Goldstein as saying that “. . . just getting information is a First Amendment issue; people are allowed to have information.”). But see Goldstein Application *supra* note 12.

338. See, e.g., *supra* note 139 (citing various federal agencies which require disclosure and provide similar confidential treatment under proscribed circumstances); see also Trade Secrets Act, 18 U.S.C. § 1905 (1948) (prohibiting federal government employees from disclosure of confidential proprietary information).

339. See Chapter I—Food And Drug Admin., Dept. of Health and Human Services, Part 101 – Food Labeling, 21 C.F.R. §§ 101; but see Chapter I, Food And Drug Admin., Dept. of Health and Human Services, Part 720—Voluntary Filing of Cosmetic Product Ingredient Composition Statements, Confidentiality of statements, 21 C.F.R. § 720.8. This FDA provision (much like the Section 13(f) provisions discussed in Part VII *supra*) affords confidential treatment for trade secrets, provided the applicant makes a supportive statement that articulates the factual and legal grounds for confidentiality that satisfies a threshold six-factor test which is virtually identical to the six-factor New York trade secret test (discussed in Part VII.D, *supra*). See also Zotos Int’l, Inc. v.

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of the size of the marketer as there is nothing similar to the Section 13(f) \$100 million threshold within the food labeling regime), Form 13F filers are only required to disclose Section 13(f) securities holdings (held on the last day of a respective reporting period), and as such, various hedge fund portfolio “ingredients” that are not included in the SEC’s Section 13(f) securities list need not be disclosed.³⁴⁰

Goldstein’s seemingly quixotic Section 13(f) challenge appears especially unreasonable in light of the fact, as noted earlier, that his “Bulldog” funds have filed numerous Schedules 13D and 14 (without seeking exemption or compensation) that have publicly disclosed concentrated positions in certain equities. Goldstein typically filed just before he launched an attempted putsch-by-proxy to overthrow a target issuer’s board of directors, install his confederates, and even force companies to sell off assets in order to supposedly unlock “value,” and apparently has used at least one of his targets’ servicemarks and trademarks without permission, in what seems to be a confusingly similar shareholder group name.³⁴¹ The Schedule 13D reporting

Young, 830 F.2d 350, 353 (D.C. Cir. 1987) (reversing the FDA’s confidential treatment denial to cosmetics manufacturer for hair care “secret ingredient” which had been present in products for decades). The FDA required public disclosure of ingredient on product labels based on an agency determination that the product could be reverse engineered, but the agency could not explain how the products (including the “secret ingredient”) had been marketed for some twenty years and had still not been reverse engineered by competitors. *Id.*

340. See Section 13(f) securities list, *supra* note 331.

341. See, e.g., Definitive Proxy Form DEFC14A filed by Bulldog Investors with the SEC on Feb. 12, 2007, available at <http://www.sec.gov/Archives/edgar/data/1278038/000136477307000005/defproxy.txt>; see also, Form DEFA14A, filed Feb. 13, 2007 with the SEC, available at http://www.sec.gov/Archives/edgar/data/1278038/000110465907010000/a07-4369_1defa14a.htm (last visited Feb. 18, 2007); Form PREC14A filed with the SEC on Jan. 18, 2007 by Bulldog Investors General Partnership (“Bulldog”), a [Preliminary] Proxy Statement of Bulldog Investors General Partnership, a Stockholder of RMR Hospitality & Real Estate Fund in Opposition to the Solicitation by the Board of Trustees at the Annual Meeting of Shareholders on March 8, 2007, available at <http://sec.gov/Archives/edgar/data/1278038/000136477307000003/prelimpro.txt> (last visited Jan. 21, 2007); Amended Schedule 13D/A filed with the SEC on Nov. 17, 2006 by Bulldog, available at <http://sec.gov/Archives/edgar/data/1278038/000136477306000013/third.txt> (last visited Jan. 21, 2007); *Attack of the Hungry Hedge Funds*, BUSINESSWEEK.COM, Feb. 20, 2006, available at http://www.businessweek.com/magazine/content/06_08/b3972103.htm (last visited Feb. 8, 2007).

Once they’ve got their teeth into a company, the new activists usually won’t let go. “I

requirement is also not unlike those within the Hart-Scott-Rodino Act (“HSR”),³⁴² which compels an investor attempting to acquire a concentrated equity stake to file a pre-merger report notification with the Federal Trade Commission, which also establishes the beginning of a thirty-day agency review period where a proposed acquisition is scrutinized for potential antitrust violations.³⁴³

U.S. Bankruptcy Judge for the Southern District of New York Allan Gropper rejected similar unavailing non-disclosure arguments of an “unofficial equity committee” formed by hedge fund shareholders in the Norwest Airlines bankruptcy. The shareholders had contended that disclosure of the details of their respective Northwest stock positions “would give competitors insight into the funds’ strategies,” and “argued that just as car dealers and home builders don’t tell potential buyers their actual costs, the funds shouldn’t have to reveal their investments.”³⁴⁴ Judge Gropper responded to these contentions in a March 9, 2007 ruling that the first argument was an “improbable contention,” and quipped that “the committee members do not advance their position when they compare themselves to car or real estate salesmen.”³⁴⁵ The “Bulldog” claimed that Judge Gropper’s *In re Northwest Airlines* ruling was

stand up for all I’m entitled to and will accept nothing less,” says Phillip Goldstein, founder of Bulldog Investors LLC, which fought a long battle to force Blair Corp. (BL), a Warren (Pa.)-based catalog retailer, to sell its \$174 million portfolio of receivables.”

Id.

342. See Hart-Scott-Rodino Antitrust Improvements Act (“HSR”) (1976) (codified as amended at 15 U.S.C. §§ 18a (2000)). HSR reporting requirements are generally triggered when an investor acquires securities of a particular issuer either valued at more than fifteen million dollars, or equivalent to fifteen percent of an issuer’s outstanding shares. Closing acquisitions in violation of HSR can result in *daily* civil penalties of up to \$11,000 for non-compliance, and the provision is actively enforced, even years after an acquisition has closed. HSR is unlike aspects of Section 13(f), in that the exercises of conversion rights, options, warrants, etc., attached to any security are construed as acquisitions covered by HSR, however, much like Section 13(f), HSR does include certain “size of person” and “size of transaction” thresholds that are similar to the \$100 million threshold of Section 13(f). See 16 C.F.R. §§ 801.10-801.15; see also *Valuation of Transactions Reportable under the Hart-Scott-Rodino Act*, available at <http://www.ftc.gov/bc/hsr/hsrvaluation.htm> (last visited Jan. 21, 2007).

343. See Federal Trade Commission regulations pursuant to HSR (16 C.F.R. §§ 801)

344. Christopher Scinta and Jenny Strasburg, *U.S. Judge Tells Hedge Funds: You Aren’t So Special (Update2)*, BLOOMBERG, Mar. 12, 2007, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=ad6rHfnWzato> (last visited Mar. 12, 2007).

345. Scinta and Strasburg, *supra* note 344.

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somehow "forcing the hedge funds to put information into the public domain that would allow their competitors to reverse-engineer the fund managers' ideas."³⁴⁶

Mr. Goldstein has not yet explained why he apparently deems public disclosure of equity holdings acceptable when he attempts to remove a target issuer's board of directors (or when he allegedly makes selective private disclosures to investors, or alleged disclosures to prospective investors based on some unpersuasive First Amendment theory), but claims that the Section 13(f) disclosures at issue would somehow deprive him of trade secret property rights in violation of the Fifth Amendment. Goldstein advocates secrecy, even while many of those same "secret" equity positions have been previously disclosed in media articles touted on the Bulldog web site, in proxies and in Schedules 13D, and would presumably overlap with at least some of those required to be disclosed on Form 13F.³⁴⁷

Mr. Goldstein and his Bulldog outfit have not addressed a number of relevant issues still surrounding his Application, but a press release criticizing the Section 13 reporting requirements was issued on March 28, 2007.³⁴⁸ Although the release did directly quote Phillip Goldstein, and one other hedge fund manager named Nelson Obus from a firm named Wynnefield Capital, it did not identify any specific issuer.³⁴⁹ The press release, titled *Investment Managers Urge Repeal of Rule 13-F*, was distributed via BusinessWire by a Madison Avenue public relations firm known as Kekst and Company, which specifically notes on its website that as "a matter of policy, Kekst does not publish a list of its clients."³⁵⁰ Perhaps the identity of the press release issuer is another theoretical trade secret?

The Goldstein Application included no substantive discussion of

346. *Id.*

347. *See, e.g., supra* notes 289 and 299.

348. *See* March 28, 2007 press release, *Investment Managers Urge Repeal of Rule 13-F*, available at http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20070328005586&newsLang=en (last visited Mar. 30, 2007).

349. *See Id.* The only identified contact in this press release was a Kekst & Co. staffer named Eric Berman. *Id.*

350. *See* the Kekst & Co. website—Overview, available at <http://www.kekst.com> (last visited Mar. 30, 2007), (stating that its client list is not disclosed, and which also uses URL "masking" technology to conceal all so-called "deep links" on its site).

the many instances where disclosures are required in order to participate in a regulated market, nor did it distinguish any meaningful differences between the disclosures made within Forms 13F and those within Schedules 13D and Proxy solicitations.³⁵¹ The cumulative effect of the many shortcomings of the Goldstein Application, coupled with the numerous inconsistencies and contradictions within the Bulldog Fund's words and deeds regarding portfolio disclosures, invariably leads to the conclusion that the "Bulldog's" expectations as a participant in a regulated market are highly unreasonable, and that the request for exemption should be denied.

VIII. MUCH ADO³⁵² ABOUT DUE PROCESS?

When otherwise protectable trade secret property is subjected to government regulation, often related to health and safety concerns, the "constitutional dimensions of trade secret law are important," and the regulation potentially implicates the Fifth Amendment's "takings clause."³⁵³ Typical examples of takings frequently involve a government occupation of realty or personalty, which have generally been considered *per se* invalid.³⁵⁴

Where regulatory activity touches a trade secret in a manner that might result in the public disclosure of the secret, such as the disclosure requirements contemplated in Section 13 of the 1934 Act, one should be cautious to not "overestimate the distinctive nature of intellectual property," nor to "underestimate its continuity with tangible forms of property."³⁵⁵ University of Chicago Professor Richard Epstein characterized the common law in this area as "a back-handed vindication of this thesis by its excessive reliance on and misapplication of the now-canonical but intellectually indefensible distinction between physical and regulatory takings."³⁵⁶

351. See generally, Goldstein Application, *supra* note 12.

352. WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING.

353. Richard A. Epstein, *The Constitutional Protection of Trade Secrets Under the Takings Clause*, 71 U. CHI. L. REV. 57 (2004).

354. See, e.g., *id.* at 61 n.14 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)).

355. See *id.* at 58.

356. *Id.* Professor Epstein observed:

[A] complete understanding of the clause requires a court to address four questions: [(1)] Has private property been taken? [(2)] If so, was there some justification for that taking under the police power [(3)] If not, was the taking for a public use? And [(4)]

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The U.S. Supreme Court has emphasized that the main design of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³⁵⁷ Courts have characterized this concept as the “notion of reciprocal benefit, or, in Justice Holmes’ words, the ‘average reciprocity of advantage.’”³⁵⁸ There are certainly different ways to process Holmes’ concept of “average reciprocity of advantage,” and a number of prominent cases in the Supreme Court’s takings jurisprudence find that “reciprocal benefit renders a governmental seizure of assets not a taking.”³⁵⁹ The Goldstein Application neglected to address this critical issue.³⁶⁰

A public benefit can arise indirectly, such as a municipal zoning ordinance that restricts or eliminates an undesirable property use.³⁶¹ Where use restrictions are imposed, the “far lower standard[] of judicial review,” essentially a rational basis standard, is applied.³⁶² The Section 13(f) reporting regime appears to pose certain restrictions, but leaves the

if so, has just compensation been provided? The actual articulation of each of these elements bristles with difficulties in ordinary cases associated with land. We should not be surprised to find that these problems will surface in the more specific context of trade secrets, where the intangible nature of the right adds yet another layer of interpretive uncertainty.

Id. at 58.

357. *Colorado Springs Prod. Credit Assoc. v. Farm Credit Admin.*, 967 F.2d 648, 654 (D.C.Cir. 1992); *accord Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988); *First English Lutheran Evangelical Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986); *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

358. *Colorado Springs*, *supra* note 357, at 654 (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

359. *Id.* at 654 n.5 (citing *U.S. v. Sperry Corp.*, 493 U.S. 52, 62 (1989)).

360. *See generally*, Goldstein Application, *supra* note 12, at 5-19.

361. *See, e.g.*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

362. Epstein, *supra* note 353, at 58 (quoting *Penn Central v. City of New York*, 438 U.S. 105 (1978)) (“The standard formulation indicates that so long as the regulated user retains some viable economic use of the property in question, he cannot complain of the loss of the right to use because he keeps many other ‘sticks’ in the bundle of property rights.”). Professor Epstein also noted that “all legislation that pertains to trade secrets is treated as use restrictions, the lower rational basis test that derives its power from the Penn Central case will be used in connection with every system of regulation that deviates in any particular manner from the common law rules (or their codifications) that govern the subject.” *Id.*

non-exempt investment adviser in possession of the information. The Supreme Court has “identified several factors that should be taken into account when determining whether a governmental action has gone beyond ‘regulation’ and effects a ‘taking’: ‘[1] the character of the governmental action, [2] its economic impact, and [3] its interference with reasonable investment-backed expectations.’”³⁶³ Professor Epstein characterized this test as “dubious,” and the first prong to be “most uninformative because it does not explain why different treatments ought to be attached in the end to coercive government behavior. Coercive government behavior is the same no matter what form it takes.”³⁶⁴

Despite the academic excoriating of the *Penn Central* standard, no one factor controls the outcome. The character of the government’s action is designed to provide transparency through disclosure by major market participants. Any adverse economic impact to the Form 13F is potentially *de minimus* for investment managers who properly seek confidential treatment from the SEC,³⁶⁵ and the reasonable investment-backed expectations³⁶⁶ of investment managers cannot be credibly characterized as incurring interference, as the disclosure requirement has been in place for roughly three decades. Goldstein was certainly aware

363. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)); *see also id.* at 1007 (quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979)).

364. Epstein, *supra* note 353, at 65; *see also Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670 (1st Cir. 1998); *Philip Morris, Inc. v. Reilly*, 267 F.3d 45 (1st Cir. 2001) (holding Massachusetts disclosure law was facially unconstitutional where cigarette companies were required to provide information as to all of the additives in their cigarettes, and where additives were distinct and different for various cigarettes and hence constituted the “stuff of competitive value,” was an uncompensated regulatory taking of the cigarette companies’ trade secret property).

365. *See* Part V.A, *supra* discussion of confidential treatment requests and FOIA exemption basis No. 4. *But see*, Paul G. Mahoney, *Technology, Property Rights in Information, and Securities Regulation*, 75 Wash. U.L.Q. 815, 817-18 (1997). One author explained,

The cost of transmitting data to regulators and investors, however, is only one component of the cost of disclosure. Two other important components are what I will call opportunity cost and liability cost. Opportunity cost is the difference between the value of the information to the company if kept secret and its value to the company if publicly disclosed. Many forms of corporate information are more valuable if they are kept secret.

Id.

366. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-12 (1984).

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of this prior to his funds having greater than \$100 million under management.

The spirit and function of the federal securities laws has always been to provide a “level playing field” and promote public confidence in the equity markets through disclosure, and whether an individual is a stock investor or not, certain benefits invariably flow to all Americans³⁶⁷ by virtue of a healthy, reliable and trustworthy securities market.³⁶⁸ As discussed above, one of the primary objectives of the Section 13(f) reporting requirement is “to improve the availability of ‘factual data about large investment managers’ to individuals, federal and state regulatory agencies, and other institutional managers.”³⁶⁹ Arguably the public as a whole benefits from this sort of populist regulatory function, as well as from its by-products, at least indirectly.³⁷⁰

The thrust of the legal substance and analysis contained in the Goldstein Application was in large part an almost rote recitation of authority consistent with constitutional interpretation of the takings clause in regulatory settings, with few exceptions.³⁷¹ The Goldstein

367. See, e.g., Milton H. Cohen, *‘Truth in Securities’ Revisited*, 79 Harv. L. Rev. 1340 (1966) (“The tendency of some commentators to refer to the Securities Act as the “Truth in Securities” law is a deliberate link to consumer protection law.”).

368. David Wighton and Peter Thal Larsen, *Hedge funds may need to be regulated*, says *NY Fed Chief*, FINANCIAL TIMES, Sept. 15, 2006, available at <http://www.ft.com/cms/s/818c42c4-4456-11db-8965-0000779e2340.html> (last visited Jan. 2, 2007).

Timothy Geithner, president of the New York Fed, said supervision of core banks and investment banks had encouraged the transfer of risk to unregulated institutions such as hedge funds. . . . The effectiveness of this market discipline may be compromised by “market failures” such as lack of information, incentive conflicts and moral hazard.

Id.

369. See Parts III and IV, *supra*.

370. See Part IV, *supra*, for additional public benefits discussion; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (citing Richard A. Epstein, *Takings*, at 195 (1985)). Epstein explains,

It might be more accurate, however, to say that a reciprocal benefit amounts to ‘implicit in-kind compensation’ for governmental action that *is* a taking. [citation omitted] Nothing of substance hinges on this characterization, because the seemingly distinct questions whether something is a taking and whether compensation must be required are, in reality, a single inquiry.

Id. [emphasis in original].

371. See Goldstein Application, *supra* note 12, at 5-15. Significant portions of the Application appear to be extensive “cut and paste” language consisting of pages and pages of single-spaced block quotes extracted from opinions. See also *id.* at 9-12.

Application, however, apparently overlooked adverse relevant authority where the Supreme Court held that the termination of a trade secret did not warrant compensation to the holder because there was no actual “property taken.”³⁷²

As an investment manager, Goldstein is compelled to disclose certain holdings exceeding \$100 million in 13(f) securities (absent an approved confidential treatment application³⁷³ or a full exemption pursuant to Section 13(f)(2)), and as the holder of that information, Goldstein still possesses it, but he no longer holds the exclusion right when that information becomes a public record (such as a Form 13F filing accessible at the SEC website). According to Professor Epstein, the “residual right to use [the information] along with others is not wholly worthless;” however, he contends it should still be considered a loss of property at the hands of a state actor.³⁷⁴ Courts have addressed this partial taking concept (although it is arguably a complete taking of the right to exclude others)³⁷⁵ and have applied the traditional takings analytical approach, holding the state action (without proper compensation) to be *per se* invalid, with the key test being “whether other individuals are allowed to go where before they were

372. See Epstein, *supra* note 353, at n.15 (citing *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 5 (1949)). But see Epstein, *supra* note 353, at n.15 (citing Richard A. Epstein, *In and Out of Public Solution*, In *Property Rights: Cooperation, Conflict and Law*, 307, 317-21 (Terry L. Anderson and Fred S. McChesney eds. (2003))).

373. See Part V, *supra*, for additional discussion regarding confidential treatment requests.

374. See Epstein, *supra* note 353, at 62. The author explains,

Parity is preferable to exclusion: it is better to be able to use the process even when others use it than it is to be barred from its use altogether. But it hardly follows that the reduction from a position of dominance to one of parity does not count as a loss, simply because state action could have reduced that position to one of absolute inferiority.

Id.

375. *Id.* at 63 (“The hallmark of property is found in the right to exclude.”). See also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (quoting *Kaiser Aetna v. U.S.*, 444 U.S. 164, 176 (1979)). The Court held:

The right to exclude others is generally “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.

Id.

“BULLDOG’S” 13F THEORY MAY NOT BE SO LUCKY

prohibited.”³⁷⁶

Mr. Goldstein’s “Bulldog” funds were not previously required to file a Form 13F,³⁷⁷ as the \$100 million assets under management threshold had not yet been reached by his funds, and as such, it would seem credible that others, by having a peak into a portion of his portfolio holdings, would now be allowed to tread where they had formerly been restricted.³⁷⁸ The Goldstein Application does not appear to expressly assert, or even suggest, that this conceptual framework merits any consideration. However, the effect of the Form 13F disclosure could also certainly be reasonably construed as a mere diminution of Goldstein’s property value, which would not be considered a regulatory taking and would not offend the “Takings Clause” of the Fifth Amendment.³⁷⁹ The language in Goldstein’s Application is long on conclusory declarations³⁸⁰ and short on any factual support favoring exemption from the disclosure requirements of Section 13 of the Securities Exchange Act of 1934 as a *bona fide* trade secret. Thus, where the reporting requirement is determined to be a regulation that is

376. Epstein, *supra* note 353, at 62 (citing *Kaiser-Aetna v. U.S.*, 444 U.S. 164 (1979)).

377. See Goldstein Application, *supra* note 12, at 4-5, (“The Applicants [are] . . . a private investment fund that holds equity securities with an aggregate fair market value on March 31, 2006 of more than \$100 million. Therefore, absent the requested relief, Full Value Advisors, LLC will be required to file a Form 13F by February 14, 2007.”).

378. *Contra* Goldstein v. Lincoln Nat’l Convertible Secs. Fund, Inc., 140 F. Supp.2d 424, 435 (E.D. Pa. 2001), *vacated in part, appeal dismissed*, Goldstein v. Lincoln Nat’l Convertible Secs. Fund, Inc., No. 01-2258, 2003 WL 1846095 (3rd Cir. Apr. 02, 2003).

379. *In re* Eagletech Comm., Inc., SEC Admin. Proc. File No. 3-11832, 2006 SEC Lexis 1534 n.12 (July 5, 2006) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978) (stating that courts “uniformly reject the proposition that diminution in property value” is a regulatory taking)); see also Wm. Barr, Henry Weissmann, and John Frantz, *The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 487 n.259-64 (2005) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-08, 1011 n.15; and 17 U.S.C. § 203(a)(5) (2000)). The court held:

Regulation of intellectual property can be viewed in the same terms. Intellectual and other intangible forms of property are entitled to the protection of the Takings Clause. . . . A government regulation that reduces the value of intellectual property by limiting the owner’s use would not amount to a taking, except perhaps in an extreme case.

Id.

380. See generally Goldstein Application, *supra* note 12.

rationally related to a legitimate government interest, the Application can be reasonably denied as a result.

IX. CONCLUSION

The Goldstein Application is certainly a creative and colorful document filled with the sort of irascible rhetoric that made Phillip Goldstein a recognized market maverick in 2006. However, when one delves deeper than what is in some instances little more than baseless bluster, the Application falls short at a number of levels. When plumbing the depth of the Application's substance, it becomes apparent that its factual support is as sparse as the legal analysis is self-serving and shallow. Particularly unavailing is the absence of any factual showing that the information regarding his Section 13(f) securities holdings are protectable intellectual property under New York state trade secret law (or any other state law). The Goldstein Application makes no attempt to establish the required elements of a trade secret under any cognizable legal standard, and leaps into a conclusory due process diatribe that avoided adverse authority that may well spell the undoing of his regulatory reformist agenda. And just as the SEC had to endure its unfortunate historical use of the term "client" in the *Goldstein v. SEC* matter, this time the "Bulldog" is stuck with a variety of adverse facts that substantially undermine his trade secret theory.

The rational basis standard that is almost certainly the pertinent analytical framework for the issue of Section 13(f) disclosure is curiously missing in action from Mr. Goldstein's manifesto,³⁸¹ which is instead supplanted with naked assertions that all economic value is lost through disclosure (though the investment manager admittedly still possesses the information). Given the considerable deference that is traditionally afforded to the rule, regulation or statute in any judicial review following a rational basis analysis, surprisingly scant attention was dedicated to an attempted demonstration that the Section 13(f) disclosure rule is not rationally related to a legitimate government interest. The Goldstein Application conspicuously avoided any discussion of the litany of public purposes and populist benefits that flow from the Section 13 regulatory framework, just as it evaded any

381. See Goldstein Application, *supra* note 12, at 3 (declaring that "[a]s administered there is no rational relationship between the disclosure scheme of § 13(f)(1) and any legitimate government interest").

discussion of diminution of value considerations.

The Goldstein Application also largely skirted the issue of the alternate (and appropriate) confidential treatment remedy available to investment advisers. At a minimum, as Warren Buffet has demonstrated on an almost quarterly basis, the bureaucratic process involved in a confidential treatment application delays the public disclosure of the contents of a Form 13F for months, and substantially reduces what little (if any) economic harm might arise as a function of the disclosure of Section 13(f) securities holdings, as the data becomes increasingly “stale” with every additional day of delayed disclosure.

While the theoretical basis for the Goldstein Application is indeed novel in some respects, and certainly does raise some important implications regarding private property rights and due process, the approach taken rings hollow, and the result is probably more missed opportunity than anything else. Had the Application methodically addressed the necessary aspects required to properly establish an intellectual property right in trade secrets, and empirically demonstrated a substantial likelihood of the alleged economic harm resulting from the compulsory disclosure scheme, this issue may have fostered a Libertarian private property rights discourse and debate within the securities industry.

Instead, what is absent from the Application is far more notable than what is present, and it seems improbable that the SEC will grant “Bulldog” an exemption based upon the inadequate Application. It seems equally improbably that any subsequent reviewing tribunal would resuscitate the lackluster attempt. However, Mr. Goldstein’s creative theory does lay some groundwork for a future enterprising investment adviser who might seek to advance a regulatory reformist agenda by filling in some of the many legal and factual gaps of the Goldstein Application. On the other hand, the Application was reportedly just a “pretext for a lawsuit,”³⁸² and perhaps a return to the spotlight was always the “Bulldog’s” underlying objective.

382. See *Victorious Goldstein*, supra note 13.