ESSAY

SOCIAL MEDIA, SECURITIES MARKETS, AND THE PHENOMENON OF EXPRESSIVE TRADING

by
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A new category of retail stock trader has emerged: the "expressive" trader. An expressive trader is not motivated by profit alone, but trades as a form of social protest, political speech, or aesthetic expression. GameStop's meteoric surge in price in January 2021 revealed the power expressive traders can exert on the market. This Essay explores the phenomenon of expressive trading and its implications for issuers, markets, and regulators. The Essay sets forth potential defensive measures available to issuers against the consequences of expressive trading, and cautions regulators against hasty action to address expressive trading.

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INTRODUCTION

Commentators have likened the recent surge in social-media-driven (SMD) retail trading in securities such as GameStop to a roller coaster: "You don't go on a roller coaster because you end up in a different place, you go on it for the ride and it's exciting because you're a part of it."[1] The price charts for GameStop in late 2020 through early 2021 resemble a theme-park thrill ride. Retail traders, led by some members of the "WallStreetBets" subreddit "got on" the GameStop roller coaster at just under $20 a share in early January 2021 and rode it to almost $500 by the end of that month. Prices then dropped to around $30 dollars in February before shooting back to $200 in March. But, like most amusement park rides that end where they start, many analysts expect market forces will ultimately prevail, and GameStop's share price will soon settle back to levels closer to what the company's fundamentals suggest it should.[2] Conventional wisdom counsels that bubbles driven by little more than noise and FOMO—fear of missing out—should eventually burst. There are, however, signs suggesting that something more than market noise and overexuberance is sustaining the SMD retail trading in GameStop.

There is evidence that at least some of the recent SMD retail trading in GameStop and other securities is not only motivated by the desire to make a profit, but rather *to make a point*. This Essay identifies and addresses the emerging phenomenon of "expressive trading"—securities trading for the purpose of political, social, or aesthetic expression—and considers some of its implications for issuers, markets, and regulators.

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1 Bailey Lipschultz & Divya Balji, *Historic Week for GameStop Ends with 400% Rally as Shorts Yield*, BLOOMBERG (Jan. 29, 2021, 2:12 PM), https://www.bloomberg.com/news/articles/2021-01-29/historic-week-for-gamestop-ends-with-400-rally-as-shorts-yield.

2 *See, e.g.*, Matt Levine, Opinion, *Matt Levine's Money Stuff: How Will the GameStop Game Stop?*, BLOOMBERG L. (Jan. 28, 2021, 9:08 AM), https://news.bloomberglaw.com/esg/matt-levines-money-stuff-how-will-the-gamestop-game-stop (opining that GameStop prices are unlikely to remain at current levels without a "fundamental turnaround—it would have to start making money").

This Essay proceeds in three Parts. Part I sets forth the recent history of, and more predictable motivations behind, SMD retail trading in securities such as GameStop. Part II introduces the concept of expressive trading as an emerging subset of SMD retail trading, and offers some recent examples. Part III identifies some risks and other implications of expressive trading for issuers, markets, and regulators. It outlines potential defensive measures available to issuers against the harmful consequences of expressive trading, and cautions regulators against hasty action to address expressive trading specifically, and SMD retail trading more generally.

I. HISTORY

This Part sets forth the history of SMD trading, beginning with the formation of the WallStreetBets community. It pays special attention to the evolution of GameStop's meteoric rise in "stonk"[3] price, and Keith Gill, a/k/a DeepF——ingValue[4] a/k/a RoaringKitty,[5] who has been the primary motivator behind interest in GameStop.

A. *WallStreetBets Is Born*

The WallStreetBets subreddit was started in October 2012 by Jamie Rogozinski.[6] Mr. Rogozinski was working as an information technology consultant in Washington, D.C., and wanted to invest some of his disposable income.[7] The conventional wisdom of investing in a diversified portfolio bored him.[8] He wanted

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3 The WallStreetBets community frequently uses "stonk" to refer to "stock." The remainder of this Essay uses "stock."

4 This is Mr. Gill's user name on Reddit.

5 This is Mr. Gill's user name on YouTube, Twitter, and other platforms.

6 Emma Bowman, *Reddit WallStreetBets Founder Calls GameStop Stock Frenzy a 'Symbolic Movement'*, NPR (Jan. 31, 2021, 9:19 AM), https://www.npr.org/2021/01/31/962479849/reddit-wallstreetbets-founder-calls-gamestop-stock-frenzy-a-symbolic-movement; Mary Meisenzahl, *How GameStop Became the Perfect 'Meme Stock' for r/WallStreetBets*, INSIDER (Jan. 30, 2021, 5:26 AM), https://www.businessinsider.com/how-wall-street-bets-subreddit-chose-gamestop-stock-2021-1; Steven Asarch, *The History of WallStreetBets, the Reddit Group that Upended the Stock Market with a Campaign to Boost GameStop*, INSIDER (Jan. 28, 2021, 12:36 PM), https://www.insider.com/wallstreetbets-reddit-history-gme-gamestop-stock-dow-futures-yolo-2021-1; r/wallstreetbets Stats, SUBREDDIT STATS, https://subredditstats.com/r/wallstreetbets (last visited Dec. 27, 2021) (r/wallstreetbets inquiry).

7 Akane Otani, *WallStreetBets Founder Reckons with Legacy amid Stock-Market Frenzy*, WALL ST. J. (Jan. 28, 2021, 5:30 AM), https://www.wsj.com/articles/wallstreetbets-founder-reckons-with-legacy-amid-memes-loss-porn-and-online-threats-11611829800; Asarch, *supra* note 6; Bowman, *supra* note 6.

8 Otani, *supra* note 7. Under financial theory, investing in a diversified portfolio maximizes the risk-return ratio. *See* RICHARD A. BREALEY, STEWART C. MYERS & FRANKLIN ALLEN, PRINCIPLES OF CORPORATE FINANCE 168–70 (10th ed. 2011).

to be a more active investor with the potential for high returns.[9] When he found that online fora, financial news analysts, and his friends all told him to index, he started WallStreetBets.[10]

The subreddit's goal was to be a forum in which like-minded investors interested in high-risk, high-reward strategies could post their research and discuss risky and fun investments that would make a "financial advisor's skin crawl."[11] Its original motto was "YOLO"—"you only live once."[12] Its earliest recorded subscribership is 1,557.[13]

The group grew impressively, at least by ordinary standards, over the next several years.[14] WallStreetBets had over 450,000 subscribers by the start of 2019. That year would see an explosion in retail investing.

B. Keith Gill and His Initial Interest in GameStop

Mr. Gill's formal training is that of a financial educator and a chartered financial analyst.[15] In 2019, after having been unemployed, he took a marketing and financial education job at MassMutual where he developed financial education classes.[16] In that job, and since, he neither spoke with clients nor made stock purchase recommendations.[17] His investments in GameStop are the result of his own research and analysis, which was based on public information.[18] He believed that the market underestimated GameStop's value, and overestimated its bankruptcy potential, because the company had the potential to reinvent itself.[19]

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9 *See* Asarch, *supra* note 6; Otani, *supra* note 7.

10 *See* Asarch, *supra* note 6; Otani, *supra* note 7. He would eventually be removed from WallStreetBets in April 2020 over allegations that he was attempting to sell the rights to the subreddit. Meisenzahl, *supra* note 6.

11 Otani, *supra* note 7; *see also* Meisenzahl, *supra* note 6.

12 Otani, *supra* note 7; Asarch, *supra* note 6.

13 r/wallstreetbets Stats, *supra* note 6.

14 *Id.* Although the graph at this web page shows what appears to be relatively flat growth until recently, the recent spike distorts the graph's scale. Membership as of the end of December 2013, 2014, 2015, 2016, 2017, 2018, 2019, and 2020 was 4,168, 8,686, 26,556, 94,001, 207,204, 455,376, 773,354, and 1,755,666, respectively. *Id.*

15 Nathaniel Popper & Kellen Browning, *The 'Roaring Kitty' Rally: How a Reddit User and His Friends Roiled the Markets*, N.Y. TIMES (Jan. 29, 2021), https://www.nytimes.com/2021/01/29/technology/roaring-kitty-reddit-gamestop-markets.html.

16 *Game Stopped? Who Wins and Loses when Short Sellers, Social Media, and Retail Investors Collide: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong., at 38:20 (Feb. 18, 2021), https://www.c-span.org/video/?508545-1/gamestop-hearing-part-1&event=508545 (statement of Keith Gill beginning at 37:09) [hereinafter *GameStop Hearing, Part I*].

17 *Id.* at 39:00.

18 *Id.* at 39:15.

19 *Id.* at 39:40.

In mid-2019, Mr. Gill began posting on his social media accounts his theories about why GameStop stock was undervalued.[20] His first post on the WallStreetBets subreddit showed a screenshot of his $53,566.04 purchase of GameStop call options.[21] A discussion about his investment, which by the time of his post had nearly doubled, ensued.[22] Engaging commenters, he defended his position against criticism, describing why he believed that GameStop was a good investment.[23] On that date, he thought that GameStop was "worth quite a bit more than $8/sh and there are numerous catalysts that could trigger a reversion to fair value over the next 18mo."[24] During his subsequent monthly Reddit posts, his focus was on the stock's "fair value," although he infrequently got into the details.[25] On one occasion, for example, in discussing $8 GameStop call options that he purchased for $0.30 to $0.75, he said, "I'm shooting for at least 10x on the position. 15-20x would be terrific. 20x+ is possible but not worth seriously entertaining right now," roughly suggesting that he expected the value of GameStop stock to double or nearly triple the $8-per-share strike price.[26] Mr. Gill would later state, before Congress, that he expected GameStop stock to reach $20 to $25.[27]

C. The Wisdom of Crowds and Fighting the Man

In October 2019, Charles Schwab, Fidelity Investments, and other brokerages eliminated commissions for stock trades, after facing tough competition from low-commission and commission-free brokers like Robinhood.[28] WallStreetBets would

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[20] *Id.* at 40:30.

[21] u/DeepFuckingValue, *Hey Burry Thanks a Lot for Jacking up My Cost Basis*, REDDIT (Sep. 8, 2019, 1:12 PM), https://www.reddit.com/r/wallstreetbets/comments/d1g7x0/hey_burry_thanks_a_lot_for_jacking_up_my_cost/.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] u/DeepFuckingValue, REDDIT, https://www.reddit.com/user/DeepFuckingValue/posts/ (last visited Dec. 27, 2021) (click on individual posts).

[26] u/DeepFuckingValue, *GME YOLO Month-end Update – Oct 2019*, REDDIT (Oct. 31, 2019, 5:14 PM), https://www.reddit.com/r/wallstreetbets/comments/dpwjy8/gme_yolo_monthend_update_oct_2019.

[27] *See Game Stopped? Who Wins and Loses when Short Sellers, Social Media, and Retail Investors Collide, Part II: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong., at 01:02 (Mar. 17, 2021), https://www.c-span.org/video/?508545-2/gamestop-hearing-part-2&event=508545 [hereinafter *GameStop Hearing, Part II*] (statement of Keith Gill).

[28] Jeff Cox, *Fidelity Joins the Stampede to Eliminate Fees for Online Trading*, CNBC, https://www.cnbc.com/2019/10/10/fidelity-joins-the-stampede-to-eliminating-fees-for-online-trading.html (Oct. 10, 2019, 10:30 AM); Paul R. La Monica, *Charles Schwab and TD Ameritrade Will Eliminate Commissions for Stock and ETF Trading. The Online Broker Wars Are in Full Swing*, CNN, https://www.cnn.com/2019/10/01/investing/charles-schwab-eliminates-commissions/index.html (Oct. 1, 2019, 8:34 PM).

have over 773,000 subscribers by the end of the year.[29] By the March 2020 market sell-off, it had a million subscribers.[30] In April 2020, Mr. Gill, who kept regularly posting his position in GameStop, mentioned the possibility of "a short squeeze of some sort, though that was never a part of my original thesis."[31]

A short squeeze is a legitimate investment device that can be used when a stock has been driven artificially low by short sellers. The maneuver's success depends on shorters having to close their positions at a loss or continue funding margin calls as the position gets more and more out of the money.[32] A squeeze can be difficult to maintain, however, as participants may defect to take profits before the maneuver is complete. But the introduction of nonwealth investment motives can help successfully sustain a squeeze by counterweighing the incentive to defect.

On his YouTube channel, which Mr. Gill started in summer 2020, he discussed his stock-picking methods, educated viewers on the stock market, and explained how to analyze stocks.[33] He did so in a way to which nonprofessionals could relate, using plain language while cracking jokes and sipping beer.[34] In these videos he expounded his reasons for believing that GameStop was a solid investment.[35] The WallStreetBets subreddit had a similar atmosphere in which people could talk about stock analysis while "'spreading positivity.'"[36]

Mr. Gill worked with his "crew" to analyze financial filings.[37] In the process, they discovered that hedge funds were shorting GameStop stock, betting that it would fall and, presumably, that GameStop would eventually go bankrupt.[38] The

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[29] *See supra* note 14.

[30] Otani, *supra* note 7.

[31] u/DeepFuckingValue, *GME YOLO Month-end Update – Apr 2020*, REDDIT, (Apr. 30, 2020, 1:16 PM), https://www.reddit.com/r/wallstreetbets/comments/gb3ctb/gme_yolo_monthend_update_apr_2020/.

[32] Cory Mitchell, *Short Squeeze*, INVESTOPEDIA, https://www.investopedia.com/terms/s/shortsqueeze.asp (May 25, 2021); Reyna Gobel, *How to Trade a Short Squeeze*, INVESTOPEDIA, https://www.investopedia.com/articles/stocks/08/short-squeeze-profits.asp (June 28, 2021).

[33] Roaring Kitty, *The Big Short SQUEEZE from $5 to $50? Could GameStop Stock (GME) Explode Higher?? Value Investing!*, YOUTUBE (Aug. 21, 2020), https://www.youtube.com/channel/UC0patpmwYbhcEUap0bTX3JQ; Popper & Browning, *supra* note 15.

[34] *See* sources cited *supra* note 33.

[35] *E.g.*, Roaring Kitty, *supra* note 33; Roaring Kitty, *100%+ Short Interest in GameStop Stock (GME) – Fundamental & Technical Deep Value Analysis*, YOUTUBE (Jul. 27, 2020), https://youtu.be/GZTr1-Gp74U; Roaring Kitty, *5 Reasons GameStop Stock (GME) Is a Roach Not a Cigar Butt a la Warren Buffett & Could Short Squeeze*, YOUTUBE (Aug. 4, 2020), https://youtu.be/JWdWCtLMoU0.

[36] Popper & Browning, *supra* note 15 (quoting Joe Fonicello, a follower of Mr. Gill's YouTube page, whose less than $10,000 investment in GameStop stock grew to over $250,000).

[37] *Id.*

[38] *Id.*; *see supra* text accompanying note 19.

stock had fallen to under $3 per share, and was always under $5 per share during that time.[39] The short selling angered the community, which included both Mr. Gill's crew and "hordes of young online traders" involved in the broader conversation surrounding GameStop.[40] The discovery led to a "fighting the man" mentality that caught on with many of Mr. Gill's followers and fellow subreddit subscribers.

Then, in August 2020, Ryan Cohen, the founder of Chewy.com, which successfully wrested leadership in online petfood sales from Amazon, announced that he had taken a large stake in GameStop.[41] Mr. Gill's GameStop investment had reached $1 million.[42] Mr. Cohen made further investments into GameStop in September 2020 and December 2020. He also wrote a strongly worded letter to GameStop's board encouraging it to shift from its brick-and-mortar business model to take advantage of online and other opportunities.[43]

In January 2021, he took a seat on GameStop's board, causing another rise in GameStop's stock price.[44] By this point, tens of thousands of subreddit subscribers, plus potentially many more of Mr. Gill's YouTube and other social media followers, were paying close attention.[45] The possibility of a short squeeze, in which investors could both make money and stick it to the man, became ever more real. A September 2020 subreddit post entitled "The REAL Greatest Short Burn of the Century" was a case in point.[46] In the lengthy post, its author (not Mr. Gill) set forth why "GME is TSLA one year ago. GME is AAPL in 2017."[47] Basing its analysis on GameStop stock's short interest, GameStop stock's correlation with the market, Mr. Cohen's holdings, and other financial data, it focused on a short squeeze's money-

[39] *GameStop Corp. (GME), Historical Data*, YAHOO! FINANCE, https://finance.yahoo.com/quote/GME/history?p=GME (last visited Dec. 27, 2021).

[40] Popper & Browning, *supra* note 15.

[41] Joan Verdon, *Can Ryan Cohen Work His Chewy Magic at GameStop? Here's a Possible Game Plan*, FORBES (Jan. 11, 2021, 4:58 PM), https://www.forbes.com/sites/joanverdon/2021/01/11/can-ryan-cohen-work-his-chewy-magic-at-gamestop-heres-a-possible-game-plan/; Popper & Browning, *supra* note 15.

[42] *See* Popper & Browning, *supra* note 15.

[43] Letter from Ryan Cohen, Managing Member, RC Ventures LLC, to Bd. of Dirs., GameStop Corp. (Nov. 16, 2020), https://sec.report/Document/0001013594-20-000821/.

[44] *See* Popper & Browning, *supra* note 15.

[45] *Id.*

[46] u/Jeffamazon, *The REAL Greatest Short Burn of the Century*, REDDIT (Sept. 8, 2020, 6:24 PM), https://www.reddit.com/r/wallstreetbets/comments/ip6jnv/the_real_greatest_short_burn_of_the_century/.

[47] *Id.* GME, TSLA, and AAPL are the ticker symbols for GameStop, Tesla, and Apple stock, respectively.

making potential.[48] And, "[a]dd to that the greatest short burn you'll see in history, and you're in for a hell of a show."[49]

At about the same time, Mr. Gill's Reddit posts became more and more popular as he discussed money made from Tesla and "meme stocks," which are "investments made that don't make sense by traditional metrics but simply catch-on online."[50] By this time, WallStreetBets had expanded to a server on the online community platform, Discord, in which text, voice, and video conversations could continuously be had on separate channels corresponding to various topics.[51] As of this writing, there are eight channels to discuss trading, of which seven are for analysis-based trading and one is for meme stocks.[52] This is a hint that a strand of the WallStreetBets community was interested in something other than investing based on analysis, however unorthodox.

But the Discord server is not the wild west. It has rules that are broken on pain of being suspended from posting or banned from the server.[53] For example, cryptocurrencies may not be discussed on the server, which is limited to stocks and options.[54] The channels are typically filled with people seriously discussing investments, but often with the low-pressure feel of a bunch of friends sitting around ragging on each other. The meme stocks channel is often an exception. It is the place on the server where people bet on "joke" or purely speculative stock plays. The behavior on this channel can also be crude and less civilized. Nevertheless, as one server member says, "good things can come up here, too."[55]

The community, and perhaps especially the Discord server, enables large-scale collective action. According to one member, "My experience in the Discord has been a mix of jokes, people having fun and making fun of each other in jest, memes, and actual valuable speculation in a collective almost 'hivemind'-like experience where hundreds/thousands of people can in a way 'compute/speculate' on stocks to buy in the daytrade."[56] Such was Mr. Gill's intent in his online activity, to level the

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48 *Id.*

49 *Id.*

50 Asarch, *supra* note 6.

51 Official /r/wallstreetbets, DISCORD, https://discord.com/channels/725851172266573915/806654756113612822 (last visited Dec. 27, 2021); *What Makes Discord Different?*, DISCORD, https://discord.com/why-discord-is-different (last visited Dec. 27, 2021).

52 Official /r/wallstreetbets, *supra* note 51.

53 *Id.* (navigate to "rules"); *see also Discord Community Guidelines*, DISCORD, https://discord.com/guidelines (May 19, 2020) (referenced in Official /r/wallstreetbets).

54 Official /r/wallstreetbets, *supra* note 51.

55 Zoom Interview with [Anonymous] (Feb. 13, 2021) (interviewee's name has been replaced with "Anonymous" to maintain confidentiality).

56 Signal Message from [Anonymous] to author (Feb. 13, 2021) (on file with author) (the Anonymous in this note is the same individual as the Anonymous in *supra* note 55).

investment playing field.[57] That the community is truly that—a meaningful community—and a hivemind, is important. As James Surowiecki shows (and economists have known), crowds are often better at making decisions than so-called experts.[58] At any given time, tens of thousands of members will be logged into the Discord server, and seeing over 100,000 is common. Not only did the WallStreetBets community have the resources to match the analytical power of hedge funds,[59] it possessed the comradery needed to maintain a short squeeze.[60]

D. The Short Squeeze

By the time that GameStop stock would enjoy its meteoric rise at the end of January, Mr. Gill had become somewhat of a folk hero.[61] He would post daily updates on his portfolio of YOLO stocks which had grown to a value of over $1 million.[62] WallStreetBets had, by then, become a genuine community, where subscribers would post "gain porn" and "loss porn," which are pictures of large gains and losses realized from day trading.[63] Community members were "just as quick to support a fellow member after a big loss as they [were] to celebrate after a big gain."[64]

The squeeze began in mid-January 2021.[65] It continued pushing up the price until two major short-selling hedge funds were forced to close their positions on January 27th, driving GameStop's price to its peak.[66]

On January 27, 2021, the first of GameStop stock's three highest days, Discord banned the WallStreetBets server, allegedly for violating community guidelines.[67] Although Discord asserts that it removed the server because its members violated Discord's policies, many speculated that Discord feared that it would be caught up

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57 *GameStop Hearing, Part I*, *supra* note 16, at 40:50.

58 *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS (2004).

59 *See supra* text accompanying notes 37–40.

60 *See supra* text following note 32.

61 Meisenzahl, *supra* note 6; Popper & Browning, *supra* note 15.

62 Meisenzahl, *supra* note 6; Popper & Browning, *supra* note 15.

63 *GameStop Hearing, Part I*, *supra* note 16, at 35:07 (statement of Steve Huffman, Co-Founder & CEO, Reddit, Inc.); Otani, *supra* note 7.

64 *GameStop Hearing, Part I*, *supra* note 16, at 35:21.

65 Catherine Thorbecke, *GameStop Timeline: A Closer Look at the Saga that Upended Wall Street*, ABC NEWS (Feb. 13, 2021, 5:00 AM), https://abcnews.go.com/Business/gamestop-timeline-closer-saga-upended-wall-street/story?id=75617315.

66 *Id.* (noting also that one of the funds forced to close its position had previously ridiculed the WallStreetBets investors); *GameStop Corp. (GME), Historical Data*, *supra* note 39 (hitting its highest price at $483.00 on January 28, 2021).

67 Asarch, *supra* note 6; *GameStop Corp. (GME), Historical Data*, *supra* note 39.

in a potential securities law violation.[68] Discord allowed WallStreetBets to restart its server the next day.[69] The same day, Robinhood and other brokers restricted transactions in GameStop because their systems and capital reserves could not handle the sudden demands placed upon them, but they likewise reallowed it the following day.[70]

In his Congressional testimony, Mr. Gill reiterated his position that he believed, and continues to believe, that GameStop is a good investment.[71] Mr. Gill continues to maintain his GameStop position, along with others.[72] It is mistaken, in other words, to suggest that the WallStreetBets community "decided it would be funny and righteous (and maybe even profitable, though that part was less important) to execute a 'short squeeze' by pushing up the price of GameStop's stock, entrapping the big-money hedge funds that had bet against it."[73] From the outset, profit was the community's primary motive and its actions in realizing it were deliberate. But, as noted above, there were hints of other motives informing some of the GameStop trading—like the desire to stick it to shorting hedge funds—and these hints became more overt as the surge gained steam. The next Part focuses on such expressive motives for trading.

II. THE PHENOMENON OF EXPRESSIVE TRADING

The profit-seeking motives identified in the previous Section do not account for all the recent SMD trading volume in stocks like GameStop. Many of the retail traders involved in the recent short squeeze acknowledge buying and holding their

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[68] *See* Jay Peters, *Discord Bans the r/WallStreetBets Server, but New Ones Have Sprung to Life*, THE VERGE (Jan. 27, 2021, 6:09 PM), https://www.theverge.com/2021/1/27/22253251/discord-bans-the-r-wallstreetbets-server; Robert N. Adams, *GameStop Stock Situation Attracts Government Attention, Retail Apps Close Trading on It*, TECHRAPTOR, https://techraptor.net/gaming/news/white-house-economic-team-monitoring-gamestop-stock-situation (Jan. 29, 2021, 1:22 PM).

[69] Tom Warren, *Discord Is No Longer Banning r/WallStreetBets—It's Helping Them*, THE VERGE (Jan. 28, 2021, 2:20 PM), https://www.theverge.com/2021/1/28/22254339/discord-r-wallstreetbets-server-help-moderation-ban.

[70] Thorbecke, *supra* note 65.

[71] *See GameStop Hearing, Part I*, *supra* note 16, at 42:15 (statement of Keith Gill); *GameStop Hearing, Part II*, *supra* note 27, at 00:48.

[72] u/DeepFuckingValue, *GME YOLO Update – Apr 1 2021*, REDDIT (Apr. 1, 2021, 6:00 PM), https://www.reddit.com/r/wallstreetbets/comments/mi9hdf/gme_yolo_update_apr_1_2021. *E.g.*, Official /r/wallstreetbets, *supra* note 51.

[73] Kevin Roose, *The Reckoning*, N.Y. TIMES, Jan. 29, 2021, at B1.

positions as a form of social protest,[74] political speech,[75] or aesthetic expression.[76]

Retail traders who buy and sell individual stocks are typically classified as either investors or speculators.[77] Investors research a stock's fundamentals and buy in the expectation that it will perform well over time.[78] Speculators are more concerned with a stock's potential for near-term price volatility (up or down).[79] While the investor and speculator employ different strategies, they both share the same goal—trading profit.[80]

The recent SMD and meme-trading phenomena, however, suggest that a new category of retail trader has emerged: the "expressive trader." An expressive trader does not solely trade for profit. Historically, the opportunity for expressive trading has been limited. Until recently, retail investors had no opportunity to coordinate capital or a message while trading over anonymous exchanges. Social media makes expressive trading practicable by allowing many small investors to coordinate their trading to deliver their message in the form of a measurable impact on the targeted stock's price.[81] As one 37-year-old store manager put it, "I feel like my [trading in

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[74] *E.g.*, Kat Lonsdorf, *How the Financial Crisis of 2008 Appeared in the GameStop Trading Frenzy*, NPR (Feb. 8, 2021, 5:28 PM), https://www.npr.org/2021/02/08/965563614/how-the-financial-crisis-of-2008-appeared-in-the-gamestop-trading-frenzy.

[75] *E.g.*, Chris Cillizza, *How Trumpism Explains the GameStop Stock Surge*, CNN POLITICS (Jan. 28, 2021, 6:42 AM), https://www.cnn.com/2021/01/27/politics/gamestop-stock-surge-trumpism/index.html.

[76] *E.g.*, Eamon Javers, *Republicans in Washington Warn Wall Street: The GameStop Populists Are More Powerful than You Think*, CNBC (Jan. 28, 2021), https://www.msn.com/en-us/news/politics/republicans-in-washington-warn-wall-street-the-gamestop-populists-are-more-powerful-than-you-think/ar-BB1daWLa (noting that some meme traders are "looking for nostalgia plays—to bring back the companies from their youth").

[77] *See, e.g.*, William W. Bratton, *Shareholder Value and Auditor Independence*, 53 Duke L.J. 439, 455 (2003); BENJAMIN GRAHAM & DAVID L. DODD, SECURITY ANALYSIS: PRINCIPLES AND TECHNIQUE 33–36 (3d ed. 1951). Of course, these are loose classifications; one trader can reflect characteristics of both the investor and speculator.

[78] *See* sources cited *supra* note 77.

[79] JOHN P. ANDERSON, INSIDER TRADING: LAW, ETHICS, AND REFORM 25 (2018).

[80] *See* Bratton, *supra* note 77, at 455–57.

[81] *E.g.*, Allana Akhtar, *Reddit and Robinhood are Testifying to Congress Today About GameStop's Unlikely Rally. Here's What's Going On.*, INSIDER (Feb. 18, 2021, 5:30 AM), https://www.businessinsider.com/what-to-expect-gamestop-robinhood-reddit-congressional-hearing-2021-2 (noting that "GameStop's frenzy proved Reddit's power in attracting and organizing 'everyday people'" to move markets (quoting Steve Huffman, Reddit CEO)); Barbara Ortutay & Matt O'Brien, *Fight the Man: What GameStop's Surge Says About Online Mobs*, U.S. NEWS (Jan. 31, 2021, 10:18 AM), https://www.usnews.com/news/business/articles/2021-01-31/fight-the-man-what-gamestops-surge-says-about-online-mobs (quoting Professor Tiffany C. Li as noting that the "internet can democratize access [to markets], upsetting power dynamics between the people and traditional institutions").

GameStop shares], here in my little corner, is making a point."[82]

One consistent theme for expressive GameStop traders has been to protest the same perceived Wall Street elitism that motivated the 2011 Occupy Wall Street movement.[83] This trading has "become political," expressing community members' anger "at big investors' behavior over the past decade, be it when many were bailed out during the financial crisis, or watching them make even more money as people suffer during the coronavirus pandemic."[84] According to one 23-year-old college student, "People have not forgiven nor forgotten what happened in 08. It's not about the money. It's about sending a message."[85] This anti-elitist expressive trading has taken on both progressive and populist strands and resists traditional political party classification.[86] Yet, in contrast to the 2011 Occupy Wall Street movement, recent expressive trading has brought the familiar message home with tangible economic consequences for the movement's hedge fund targets. For example, one hedge fund with extensive short positions in GameStop, Melvin Capital Management, lost at least $2 billion as a result of the SMD GameStop short squeeze.[87]

Of course, expressive trading comes at a cost. Expressive traders know that the stock price movement they generate does not reflect the security's fundamentals, and that they may incur losses when the probable correction takes place. They nevertheless consider the expressive act to be worth the risk of financial losses. As one commentator points out, "some . . . investors have publicly said that as long as they

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[82] Jedidajah Otte, *'Sending a Message': GameStop Investors on Why They Bought Shares*, THE GUARDIAN (Jan. 28, 2021, 2:24 PM), https://www.theguardian.com/business/2021/jan/28/sending-a-message-gamestop-investors-on-why-they-bought-shares.

[83] Lonsdorf, *supra* note 74.

[84] Ian Sherr, *GameStop Stock Crushed, but Reddit Still Wants to Send It to the Moon. How and What's Next*, CNET (Feb. 4, 2021, 4:45 AM), https://www.cnet.com/personal-finance/investing/gamestop-stock-crashed-but-reddit-still-wants-to-send-it-to-the-moon-how-and-whats-next/ (quoting Professor Derek Horstmeyer).

[85] Otte, *supra* note 82; *see also* Matt Phillips, *Short Squeeze: What Exactly Is Going on at GameStop*, IRISH TIMES (Jan. 29, 2021, 11:10 AM) https://www.irishtimes.com/business/markets/short-squeeze-what-exactly-is-going-on-at-gamestop-1.4470952 (noting that GameStop retail traders frequently quote Heath Ledger's Joker character from "The Dark Knight" on their trade-related posts: "It's not about the money, it's about sending a message").

[86] *See, e.g.*, Andre Lamar, *The Reddit-GameStop Saga Is Part of a Gen Z Movement to Bully the Rich*, DELAWARE ONLINE (Feb. 8, 2021, 6:48 AM), https://www.delawareonline.com/story/news/2021/02/08/gamestop-saga-gen-z-uses-sites-like-reddit-tiktok-against-rich/4343861001/ (aligning the social-media-driven trading in GameStop with the "Eat the Rich" movement and as an attempt to "defeat hedge fund managers" and "frustrate the rich"); Cillizza, *supra* note 74 (noting that the social-media-driven trading in GameStop has its roots in "Trumpism" and "stick[ing] it to the elites"); Javers, *supra* note 76.

[87] Derek Thompson, *The Whole Messy, Ridiculous GameStop Saga in One Sentence*, ATLANTIC, (Jan. 28, 2021), https://www.theatlantic.com/ideas/archive/2021/01/why-everybody-obsessed-gamestop/617857/.

can hurt the hedge funds, and hurt the system, that is a benefit to them; they don't care if they lose money themselves."[88] Another retail trader admits to buying into the GameStop surge in the hope of a quick profit, but explains that "when individual investors like him managed to inflict some serious pain on hedge funds, it wasn't about the money anymore."[89] A high school junior who lost $300 in GameStop trading explained that his "main goal" in trading "wasn't to make money so much as to frustrate the rich."[90] Similarly, a delivery driver in Central Florida describes her purchase of GameStop shares as a "protest" and explains that she is "not selling" as the price declines.[91]

Some expressive traders have shared more playful or aesthetic motives for their recent securities transactions than sending a message to Wall Street. Many retail traders have suggested that they are buying shares in companies such as AMC, Nokia, Blackberry, and Blockbuster video as "nostalgia plays."[92] They are buying shares in these companies simply to revive familiar services and brands from their youth.[93]

Whatever the motivation of those who engage in it, expressive trading is now part of investing culture. It will continue to play a role in global financial markets, if only at the margins. This raises several important questions. What role should regulators play in addressing the potential risks of expressive trading to issuers and the broader markets? How can issuers protect against risks associated with expressive trading by activists? How does the phenomenon of expressive trading implicate our received understanding of market functioning? The next Part offers some answers to these questions.

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[88] *See* Squawk Box, *Robinhood CEO on What He Thinks Is Motivating the GameStop Short Squeeze*, CNBC (Jan. 29, 2021, 7:35 AM), https://www.cnbc.com/video/2021/01/29/robinhood-ceo-gamestop-reddit-short-squeeze-motivation.html (quoting Andrew Ross Sorkin, co-anchor of CNBC's Squawk Box).

[89] Lonsdorf, *supra* note 74.

[90] Lamar, *supra* note 86.

[91] Lonsdorf, *supra* note 74; *see also* Otte, *supra* note 82 (quoting one GameStop trader as saying, "I'd rather take a loss than let Wall Street and the Fintech [financial technology] apps win").

[92] Javers, *supra* note 76; *see also* Matt Stieb, *The Unlikely Stocks Soaring After Reddit's GameStop Run*, N.Y. MAG. (Jan. 28, 2021), https://nymag.com/intelligencer/2021/01/the-unlikely-stocks-soaring-after-reddits-gamestop-run.html.

[93] *Id.*

III. EXPRESSIVE TRADING AND THE FUTURE OF FINANCIAL MARKETS

Expressive traders have shown a willingness to trade for reasons other than profit. This challenges how many people think about markets.[94] For some, this challenge will serve as a call to increase regulatory barriers to trading.[95] Cooler and wiser heads will advise caution, not only because regulation of expressive trading could infringe on individual expression in troubling ways,[96] but because the long-term impacts of expressive trading are likely to be far less disruptive than the initial reaction. Regulatory efforts enacted in the wake of initial disruption often overshoot.

To understand the risks of expressive trading, it is key to remember that an innovation's ability to shock the existing system is typically short-lived. Human beings adapt,[97] incorporating the risks of new innovation and finding ways to exploit its utility. This Part begins by discussing primarily the effects of expressive trading on traders and issuers, rather than on markets. Markets are simply the aggregation of millions of individual actors, engaging in mutually beneficial transactions.[98] It is the choices of these individuals that, when aggregated through various institutions—most importantly, the price mechanism—yield "market" responses.

Expressive trading—having been on full display, in grand fashion—will become part of individual expectations when engaged in market transactions. It is impossible to know exactly what that will look like, but some predictions seem plausible. First, the disruptive nature of expressive trading makes it a potential weapon that can be wielded by more than Reddit or Discord users. Second, expressive trading is part of a new wave of trading that can counter inefficient actions taken by

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[94] The fraud on the market theory, for example, presumes reliance by all investors on the accuracy of market prices. Basic Inc. v. Levinson, 485 U.S. 224, 246–47 (1988). This is true if investors are concerned about making profitable trades. Even Justice Thomas, who is skeptical of the theory, challenges it by arguing that investors invest for many nonprice-related, but still profit-related, reasons. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 292 (2014) (Thomas, J., concurring).

[95] *E.g.*, *GameStop Hearing, Part II*, *supra* note 27; Alexis Benveniste, *Elizabeth Warren on GameStop: SEC Should Get off Their Duffs and Do Their Jobs*, CNN BUSINESS, https://www.cnn.com/2021/01/31/investing/elizabeth-warren-gamestop-sec/index.html (Feb. 1, 2021, 8:00 AM).

[96] Although trading can be a form of expression, it is not necessarily protected by the First Amendment. S. Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 610 (11th Cir. 1984) (holding that nudity, although expression, does not automatically receive constitutional protection).

[97] Mark Klock, *Contrasting the Art of Economic Science with Pseudo-Economic Nonsense: The Distinction Between Reasonable Assumptions and Ridiculous Assumptions*, 37 PEPP. L. REV. 153, 163–64 (2010).

[98] Louise A. Halper, *Parables of Exchange: Foundations of Public Choice Theory and the Market Formalism of James Buchanan*, 2 CORNELL J.L. & PUB. POL'Y 229, 231 (1993).

hedge funds. Third, expressive trading is likely to create arbitrage opportunities that will lessen the advantage of indexers and incentivize a marginal increase in active trading. Finally, these three effects will require a rethinking of what it means for markets to be "efficient," with collateral effects on doctrines like the efficient capital markets hypothesis. Considering these effects is crucial to determining the proper response to expressive trading.

A. A New Economic Weapon

Commentators and financial professionals have noted the potential for expressive trading to expand. Former White House communications director Anthony Scaramucci compares "what we're seeing now to the 'French Revolution of finance,' with an army of scrappy traders engaged in a moral uprising."[99]

Expressive trading could supplement or supplant current shareholder activism, with SMD trading used to pressure corporate boards into accepting activists' financial or social demands. As one commentator notes, the "Reddit army" behind expressive trading in GameStop and other heavily-shorted stock has "created a blueprint that future groups might use to draw attention to other activism causes such as climate change or the #MeToo movement."[100] Another commentator encourages future activist expressive trading, noting that "[i]f a corporation's stock plummeted 20 to 30 percent in a single day, that would send a clear and resounding message to its board of directors, principal shareholders and senior leadership team, i.e., the decision-makers."[101] The author concludes, "I hope my fellow retail investors will make GameStop just the start—and use our newfound power to help companies and corporate leaders find a conscience."[102]

But while social activism can lead to long-term progress, as the French Revolution (and recent events) demonstrate, it can also be destabilizing, obstructive, or destructive. Some fear that expressive trading may be weaponized. For example, expressive trading may be used as a form of "economic terrorism."[103] As one commentator worries, "If Russia saw an opportunity to disrupt U.S. elections with disinformation on social media, imagine what Moscow must be thinking about the

99 Thompson, *supra* note 87.

100 Lamar, *supra* note 86.

101 Amber Petrovich, Opinion, *Why We Cannot and Will Not Stop with GameStop*, WASH. POST (Jan. 29, 2021, 6:17 PM), https://www.washingtonpost.com/opinions/the-gamestop-movement-shouldnt-stop-there-use-that-power-for-social-good/2021/01/29/f11a36a8-6266-11eb-9430-e7c77b5b0297_story.html.

102 *Id.*

103 *See, e.g.*, Sinan Aral, Opinion, *GameStop Signals a New, Destabilizing Collision between Social Media and the Real World*, WASH. POST (Jan. 31, 2021, 08:00 AM), https://www.washingtonpost.com/opinions/2021/01/31/gamestop-signals-new-destabilizing-collision-between-social-media-real-world/.

prospects for interfering with the U.S. economy."[104] There is a similar risk that disaffected and marginalized domestic groups will organize through social media to "troll powerful institutions and unleash chaos" on the markets through expressive trading.[105]

Some are skeptical that SMD retail trading on GameStop's scale can be easily replicated.[106] Such skeptics note that there is "a lot of noise" on social media, and it is very difficult for one voice or message to gain sufficient momentum to move a single stock's price for a prolonged period of time, much less to destabilize an otherwise healthy market.[107] Others predict that we are seeing the opening stages of a new trading paradigm. As Mark Cuban explains, "I think now that [SMD retail traders have] recognized their power and now that they've learned some lessons, we're going to get more of it, not less of it."[108] The future remains uncertain, but continuing technological innovation will increase the odds that the latter view will be vindicated.[109]

Importantly, expressive crusaders would not need to own any stock before making a credible threat. An expressive trading attack—whether in the form of activism or economic terrorism—can be commenced by selling short, a much easier task than buying stock and requesting action as a shareholder. If the threat is credible enough and the potential harm severe enough, corporations might bow to pressure before any transactions have taken place. Expressive trading could, therefore, circumvent the normal shareholder resolution process. Without any long-term interest in the company's success, expressive traders would have less incentive to consider all of the costs and benefits of their actions, and could cause both serious harms to corporations and collateral harms to society.

The threat to target corporations of expressive short selling is not one easily countered by boards. Traditional defensive measures—like poison pills—would be useless since the attackers are not aiming for control. Moreover, diluting ownership or introducing provisions that reflect poorly on the bottom line of the corporation[110] would only further the attackers' efforts to devalue the firm's stock. Instead, boards

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[104] *Id.*

[105] Ortutay & O'Brien, *supra* note 81.

[106] Rhonda Schaffler, *Does the GameStop Squeeze Illustrate the Power of Social Media Movements?*, NJ SPOTLIGHT NEWS (Jan. 29, 2021), https://www.njspotlight.com/video/does-the-gamestop-squeeze-illustrate-the-power-of-social-media-movements/ (interview with Professor Nathan Fong).

[107] *Id.* (noting that it was "amazing" that the WallStreetBets group managed to sustain the price surge as long as it did "despite great gains").

[108] Sherr, *supra* note 84.

[109] *See infra* Section III.B.2.

[110] In the "Crown Jewel" defense, for example, the corporation divests valuable assets. Brian A. Korman, *The Corporate Game of Thrones and the Market for Corporate Control*, 12 J. BUS. & TECH. L. 165, 190 (2017).

would need to raise public perceptions of the corporation's value. This could potentially be effectuated by what might be called a "reverse poison pill," with the corporation acting promptly to buy up stock, hoping to effectuate a short squeeze against the expressive shorters.

Not surprisingly, this solution comes with its own potential problems.[111] Such management action to defend the corporation will look a lot like market manipulation or insider trading. The board is therefore presented with a Catch-22: defend the corporation and face the wrath of the Securities and Exchange Commission (SEC); do nothing and watch the corporation be destroyed; or surrender to the demands of the attackers, even if the board is convinced this not in the best interests of the corporation.[112] The SEC could provide a safe harbor for boards in this situation, but it should be mindful that any such safe harbor could also be used by a board facing legitimate concerted short selling.[113]

Now that expressive trading is part of the reality of U.S. financial markets, it should be expected that it will be employed in unexpected ways. Regulators and corporate managers will need to innovate to respond. Patience, particularly in the case of regulators, will help ensure that any such response will guard against abuse while facilitating its benefits, like the ability to increase competition in financial markets.

B. New Aggregate Competition

Rather than leading to inefficient or unstable markets, expressive trading can play a role in disciplining markets. It would do so as part of a larger, Coaseian, solution to an excess of market power in the hands of hedge funds—power that may be used in socially harmful ways.

1. The Importance of Competition

Consider that GameStop could have been overvalued but still have had a positive value. Hedge funds, by engaging in extreme shorting of its stock, could drive the company's stock below its true value and into liquidation. Merely selling short would be profitable, as the stock price adjusted downward, perhaps to $10 per share, or some other positive value. By short selling over 140% of the stock,[114] hedge funds

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[111] "[T]here are no 'solutions'. . . only tradeoffs." THOMAS SOWELL, THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY 113 (1995).

[112] The business judgment rule would certainly provide some protection, should the board choose the latter option, George A. Mocsary, *Freedom of Corporate Purpose*, 2016 BYU L. REV. 1319, 1349–51, but an honest director should not be forced into such a no-win scenario.

[113] A badly managed firm could, for example, be subject to repeated efforts to drive down the price of its stock to a level that accurately reflects the poor management.

[114] The short interest in GameStop at one point reached 140%. John McCrank, *Short-Selling Under Spotlight in GameStop Hearing*, U.S. NEWS (Feb. 18, 2021), https://www.usnews.com/news/top-news/articles/2021-02-18/short-selling-under-spotlight-in-gamestop-hearing.

could place so much downward pressure on the price that it falls to $0, leading to the company's liquidation. In doing so, the hedge fund captures the additional $10 per share difference between the correct value of GameStop stock and the liquidation price. Facilitating a reduction in price to the true price is socially beneficial. Destroying an otherwise valuable company is not. In other words, the additional $10 per share captured by the hedge funds is pure rent-seeking. Society loses out because a company that produces consumer value is now no more.

In a market with robust competition, an attempt to ruin a corporation through destructive short selling would present an arbitrage opportunity. As extreme short selling drives the price below the true value, the window opens to commence buying stock, halting the decline and, if sufficient pressure is brought to bear, reversing the downward trend and returning the stock price to something closer to the correct price. There are reasons to believe, however, that our financial markets do not—or at least did not—possess the kind of robust competition that would counter destructive short-selling, as discussed in the next Section.

2. *Coase, Coordination, Competition*

A significant trend in modern investing is towards greater market indexing and away from active trading—trading defined by the search for unexploited arbitrage opportunities. In an indexing world, then, there are fewer individuals who stand ready and willing to counter destructive short selling. Institutional investors have sufficient wealth to counter hedge fund behavior but are, by their nature, more ponderous, not engaging in rapid-reaction trading. Other hedge funds would have incentives to take arbitrage opportunities, but also apparently face counter incentives that pressure them to not get involved.[115]

Individual investors, who are likely to be motivated by profit to seek arbitrage and do not face industry pressures to abstain, could provide a counterweight to hedge funds, but they face significant obstacles. First, few individual investors possess the knowledge to identify such an opportunity. Second, those with the knowledge may lack the wealth, the ability to coordinate with other individual investors, and the ability to access sufficient funds in the market where the arbitrage opportunity presents itself.

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[115] Some appear to have been involved in the GameStop pushback, but were unwilling or unable to do so by themselves or publicly. Juliet Chung, *This Hedge Fund Made $700 Million on GameStop*, WALL ST. J., https://www.wsj.com/articles/this-hedge-fund-made-700-million-on-gamestop-11612390687 (Feb. 3, 2021, 5:23 PM). One explanation is that they fear mutually assured destruction because countering another hedge fund's activities would lead to a tit-for-tat strategy emerging in future interactions. Robert Axelrod, *Effective Choice in the Prisoner's Dilemma*, 24 J. CONFLICT RESOL. 3, 4, 7 (1980).

Hedge funds are free to engage in destructive short selling and other behavior that reduces market efficiency, but only because various transaction costs[116] impede the formation of meaningful competition. But, as has always been true, technology reduces transaction costs and breaks down barriers to competition.[117] Here, the technologies were Reddit, Discord, and other channels, where a single knowledgeable investor could coordinate with thousands or millions of others.[118]

Individually, none could push back against hedge funds. Aggregated, and with continued coordination through technological channels, they managed to push back successfully, save a number of businesses from short-selling destruction, make a tidy profit, and end up with a valuable investment.[119] Such technological aggregation served a Coaseian goal of reducing transaction costs, allowing hordes of individual investors not only to find each other, but to trust each other enough to operate as a collective unit without a centralized locus of control.

Technology reduced the costs of finding others with the same interest in pushing back against the hedge funds, but it may not have been enough to maintain coordination when the opportunity for immediate profit presented itself. For that, the effort needed expressive trading, a shared common interest in stopping the hedge funds—not for profit alone, but for moral and ethical reasons.[120] If the formation of mob trading serves a useful purpose in curbing the excesses of hedge funds, then expressive trading can serve as the glue that keeps the mob together.

Expressive trading, therefore, makes credible the ability of future technological coordination to challenge hedge fund dominance of certain aspects of financial markets. With that threat in effect, hedge funds will be less likely to risk the potential losses from extreme short selling in a market with real competition.

C. *Return of the Active Traders?*

It would be an exaggeration to claim that expressive trading is about to usher in a new era of active trading, but the events of early 2021 have shown that there is a weakness in indexing. To be clear, the evidence suggests that, for most investors, indexing is a superior form of investing.[121] That does not mean, however, that *more*

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[116] R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 27–28 (1960). For a simple explanation of the transaction cost concept, see Jeremy Kidd, *Kindergarten Coase*, 17 GREEN BAG 2D 141, 144–45 (2014).

[117] Jeremy Kidd, *Who's Afraid of Uber?*, 20 NEV. L.J. 581, 649 (2020); Jeremy Kidd, *Fintech: Antidote to Rent-Seeking?*, 93 CHI.-KENT L. REV. 165, 189–91 (2018) [hereinafter Kidd, *Fintech*].

[118] *See supra* Section I.C.

[119] *See supra* Section I.D.

[120] *See supra* text accompanying notes 88–93.

[121] Brad M. Barber & Terrance Odean, *The Behavior of Individual Investors*, *in* HANDBOOK OF THE ECONOMICS OF FINANCE 1533, 1547 (G.M. Constantinides, M. Harris & R.M. Stulz eds., 2013) ("The majority of the empirical evidence indicates that individual investors, in

indexing is always better for markets. This conclusion is common sense in many contexts, but perhaps requires some elaboration here.

Markets move toward accurate pricing as individuals notice and exploit arbitrage opportunities.[122] One who realizes that the price is too low buys at that price and sells at a higher price, gaining a profit and signaling that the price should increase. A similar phenomenon occurs on the sell side. Indexed investing eschews this sort of behavior, so a market with only index investing would adjust more slowly, and with more difficulty, to new information.

Many economic models assume perfect information,[123] which would obviate the need for the market to adjust and render active trading superfluous.[124] In the real world, however, new information is always becoming available (because the world is constantly changing), which means that arbitrage opportunities always exist. The market needs active traders, and the greater the frequency of arbitrage opportunities, the greater the need for active traders to push and pull the market towards accurate pricing.

The advent—or expansion—of expressive trading should increase arbitrage opportunities. If expressive trading is coupled with profit motive, then the market will generally be moving towards correct pricing, albeit with perturbations that perceptive traders will notice and exploit. If expressive trading is used as a form of economic terrorism, for example, it will open up significant opportunities for arbitrage, as those efforts to pressure companies will likely move the market away from efficiency. To the extent this occurs, it will rejuvenate active trading and, at least at the margins, diminish the market power of indexers.

D. *Rethinking Market "Efficiency"*

Some of our legal doctrines, like fraud on the market theory,[125] expressly assume that market prices reflect accurate securities values. Others are impliedly based on efficiency assumptions, preferring the self-regulation of markets. If individuals are making investment decisions for purposes other than making a profit, does that require a rethinking of the view that markets are efficient?

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aggregate, earn poor long-run returns and would be better off had they invested in a low-cost index fund.").

[122] *See* Russell S. Sobel, *Entrepreneurship*, LIBR. OF ECON. & LIBERTY, http://www.econlib.org/library/Enc/Entrepreneurship.html (last visited Dec. 27, 2021); Jason Fernando, *Arbitrage*, Investopedia, https://www.investopedia.com/terms/a/arbitrage.asp (Aug. 30, 2021).

[123] *See* Joseph E. Stiglitz, *Information*, LIBR. OF ECON & LIBERTY, http://www.econlib.org/library/Enc/Information.html (last visited Dec. 27, 2021).

[124] If all investors possessed perfect information, there would be limited, if any, reason for two individuals to trade, as they would share the same perfect valuation of every security.

[125] *E.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 241–49 (1988).

The answer is likely yes, but only because the current legal understanding of market "efficiency" is a badly translated version of the economic principle of efficiency. Most introductory economics classes present market efficiency in terms of stable supply and demand graphs, with a clear point of intersection, known as "equilibrium." In that oversimplified presentation, one should be able to take a snapshot of the market and confidently presume that the market is at equilibrium. In the context of financial markets, the theory suggests that any snapshot of the market should reflect accurate prices.[126]

That interpretation of market efficiency, however, leaves off the pivotal caveat included in every respectable economics textbook—*ceteris paribus*, all else held constant. Of course, the world is dynamic, so nothing is constant. Both supply and demand curves, and the resulting equilibrium, are in constant flux. In financial markets, this is made salient by the immense volume of shares that change hands every day. If the value of a stock was easy to pin down, there would be little reason to expect large trading volumes, because everyone would view securities as having approximately the same value.

Any given snapshot of financial markets will not yield the "correct" stock price. That does not mean that markets are not efficient, but rather that "correct" securities prices are aspirational targets toward which markets move, rather than stable places where markets settle. Similarly, market efficiency should not be understood as a characteristic of stability at a "correct" price, but a gravitational pull towards an ever-changing target.

Individual investors who identify and act on arbitrage opportunities are the mechanism by which markets constantly shift towards accurate pricing.[127] There will always be individuals who believe—often correctly—that they can manipulate markets in the short term, but those efforts do not alter the reality of constant pressure towards more accurate prices. Hence, when hedge funds engaged in rent-seeking short sales, they were countered by SMD traders and others who not only wished to express their displeasure at hedge funds' behavior, but also to make a profit by exploiting an arbitrage opportunity created by the hedge funds' overreach. When the SMD traders pushed the price much higher than what could be viewed as a reasonable price, it created strong incentives for others to begin either liquidating long positions or opening new short positions.

An increase in the frequency of expressive trading will not harm the efficiency of the market. Instead, it will merely open up greater profit opportunities for active traders. In a competitive market, increased arbitrage opportunities will incentivize

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[126] Joseph De Simone, *Should Fraud on the Market Theory Extend to the Context of Newly Issued Securities?*, 61 FORDHAM L. REV. (COLLOQUIUM) S151, S153–54 (1993) (describing the implications of the efficient capital markets hypothesis).

[127] *See supra* notes 122–124 and accompanying text.

greater attention to those opportunities. That, in turn, will lessen the duration of market distortions generated by expressive trading.

E. What's a Regulatory Body to Do?

A proper understanding of expressive trading should inform how we view repeated demands that the SEC fix the GameStop "crisis."[128] As a foundational matter, claims that the events of early 2021 evidence a market failure[129] must be balanced against the possibility that the seeming chaos was, instead, a relic of previous government intervention.[130] Similarly, regulators should remember that the decentralized nature of markets also serves to discipline the conduct of market actors, including corporate actors, hedge funds, and SMD traders.

Market self-regulation is often discounted because of the imperfect nature of market processes. But technology is reducing transaction costs and, therefore, increasing competition. Moreover, market critics rarely consider the inefficiencies in government regulation. The decision to impose centralized regulation of extreme short selling or other destructive forms of expressive trading should be based on a full consideration of the reform-specific costs and benefits of both market and government regulation.

Short selling, for example, is regularly singled out as a useless practice that should be banned.[131] Restricting short selling would therefore be a popular reform proposal, but would it really be beneficial? Short selling is a useful corrective to inflated market prices, allowing observant market participants to push inflated prices down to more accurate levels.[132] Markets regulate human behavior through competition—the more robust the competition, the better the regulation.[133] The dangers of short selling arise from a lack of competition in the form of too few traders able to identify arbitrage opportunities arising from excessive short selling.

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[128] Roose, *supra* note 73; *see supra* note 95 and accompanying text.

[129] *E.g.*, Steven Pearlstein, *GameStop Mania Exposes SEC's Failure as Regulator*, WASH. POST (Jan. 30, 2021, 6:57 PM), https://www.washingtonpost.com/business/2021/01/30/financial-regulations-wall-street-sec-gamestop/ ("[A]s we were reminded again this week . . . financial markets are prone to herd behavior, manipulation, inside information and undue risk-taking . . . .").

[130] *See* Jeremy Kidd & Joseph R. Padgett, *Trucker Shortage as Government Failure*, 1 J. REG. COMPL. 7 (2016); Kidd, *supra* note 116, at 149–51.

[131] Marco Pagano, *Should We Ban Short Sales in a Stock Market Crash?,* CLS BLUE SKY BLOG (Mar. 17, 2020), https://clsbluesky.law.columbia.edu/2020/03/17/should-we-ban-short-sales-in-a-stock-market-crash/.

[132] Paul Kiernan, *SEC Chairman: Government Shouldn't Ban Short Selling in Current Market*, WALL ST. J., https://www.wsj.com/articles/sec-chairman-government-shouldnt-ban-short-selling-in-current-market-11585568341 (Mar. 30, 2020, 9:08 AM).

[133] Kidd, *Fintech*, *supra* note 117, at 187–91.

In GameStop's case, the WallStreetBets community, tied together by shared ideals manifest in expressive trading, filled that role. Instead of trying to identify and regulate "bad" market behavior, the SEC should identify and eliminate barriers to effective competition in the financial markets.

CONCLUSION

SMD price surges in stocks like GameStop may be short-lived. GameStop may soon be trading back at levels more consistent with traditional valuations. But this volatility should not be dismissed as merely a bubble driven by over-exuberance and FOMO. Indeed, SMD trading likely corrected an artificially low price induced by excessive shorting. In the process, SMD retail trading in GameStop revealed the new phenomenon of expressive trading. That phenomenon appears to be here to stay.

Innovations like expressive trading can be disruptive and demand a reimagining of the established order. Expressive trading presents new challenges and risks to firms. It will require adjustments by traditional investors and speculators alike. Market participants and regulators are, however, cautioned against hasty adjustments or reforms. As expressive trading proliferates and is studied, the most promising path forward is sure to emerge.