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Insurgent Intentions: Are Retail Investors on Social Media Subject to Federal Market Manipulation Laws?

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INTRODUCTION

Marie-Antoinette's folkloric remark "let them eat cake" evokes memories of the story behind the French Revolution.[1] Similarly, the famous line attributed to Paul Revere "The British are coming! [T]he British are coming!" typically reminds people of the American Revolution.[2] Recently, a gang of individual investors on Reddit[3] repeatedly vowed to send shares of multiple companies' stocks "to the moon."[4] These three quotes are associated with famous rebellions involving groups of individuals who joined forces to match the power of the authoritative elites of their times. Instead of rebelling against a powerful monarch, the individual investors on Reddit rebelled against a modern world power: Wall Street.

To the individual investor, understanding the stock market can seem like a foreign language that only Wall Street and the wealthy speak fluently.[5] Nevertheless, with the increasing accessibility to the internet, regular people are learning more information about trading stocks every day.[6] This newfound knowledge is largely due to the increasing popularity

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1. John M. Cunningham, *Did Marie-Antoinette Really Say "Let Them Eat Cake"?*, BRITANNICA, https://www.britannica.com/story/did-marie-antoinette-really-say-let-them-eat-cake [https://perma.cc/4QU7-PNM4] (last visited Feb. 13, 2023).

2. J. L. Bell, *When Did We Start Saying, "The British Are Coming"?*, BOS. 1775 (Apr. 8, 2008), https://boston1775.blogspot.com/2008/04/when-did-we-start-saying-british-are.html?m=0 [https://perma.cc/D5T6-9LWL].

3. Reddit is a collection of forums where users share news, content, and comments on other users' posts. The site is broken up into millions of different communities called subreddits. Each subreddit covers a different topic. *See* Jake Widman, *What is Reddit?*, DIGITAL TRENDS (Dec. 28, 2022), https://www.digitaltrends.com/web/what-is-reddit/ [https://perma.cc/JG56-8GQ6].

4. Krystal Hu, *'To the moon' or to a lawyer, GameStop investors cope with stock's rollercoaster*, REUTERS (Feb. 5, 2021, 4:06 AM), https://www.reuters.com/article/us-retail-trading-gamestop-investors/to-the-moon-or-to-a-lawyer-gamestop-investors-cope-with-stocks-rollercoaster-idUSKBN2A510U [https://perma.cc/F42H-6AJK].

5. Jill Cornfield, *More than three-quarters of Americans feel bad about this investing mistake*, CNBC (updated Jan. 15, 2020, 11:04 AM EST), https://www.cnbc.com/2020/01/15/these-are-the-biggest-regrets-people-have-about-investing-in-stocks.html [https://perma.cc/BDT9-62VB].

6. Michelle Fox, *Social media is the most popular source of investment ideas for young investors, CNBC survey finds*, CNBC (updated Aug. 26, 2021, 8:59 AM EDT), https://www.cnbc.com/2021/08/26/social-media-top-pick-of-young-investors-for-ideas-cnbc-survey-finds.html [https://perma.cc/U739-KB7S].

of social media over the last decade.[7] Specifically, a group of financial enthusiasts created a Reddit page titled WallStreetBets (WSB) to share stock tips and other financial advice with one another.[8] In early 2021, the members of WSB were responsible for an astronomical increase in the price of numerous stocks, including GameStop, AMC, Bed Bath & Beyond, and Blackberry.[9] WSB members accomplished this feat by coordinating a mass purchase of the companies' stocks via the WSB Reddit page.[10] The motivations of the WSB insurgents were crystal clear—generate financial losses throughout Wall Street's institutions.[11]

Interestingly, the current interpretations of market manipulation laws suggest that the members of the Reddit rebellion will likely not face any charges due to the nature of their financial activity.[12] Many WSB members made substantial profits because of the WSB Reddit page while some Wall Street financial institutions incurred considerable losses.[13] The activity on WSB created volatility in the stock market, which resulted in a trading platform for individuals, called Robinhood, to halt trading of popular stocks amongst the WSB members.[14] Robinhood halted trading during a

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7. *Id.*

8. Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Power of Retail Investors*, 22 NEV. L.J. 51, 52 (2021). Cambridge dictionary defines a *social network* as a network that allows people to communicate and share information on the internet. *Social Network*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/social-network [https://perma.cc/Z6CA-SNZ8] (last visited Mar. 2, 2023). Reddit is considered a social media network because users post prompts or questions, and other users from around the world interact with the post. Mitja Rutnik, *Change my mind: Reddit is a social network and it's the best one out there*, ANDROID AUTH. (Oct. 17, 2021), https://www.androidauthority.com/reddit-vs-facebook-vs-twitter-3037642/ [https://perma.cc/3ALN-YXT3].

9. Ricci & Sautter, *supra* note 8, at 56.

10. *Id.*

11. *Id.* at 56–57.

12. James Burton, *Retail investors will get 'hurt the most' over GameStop saga*, WEALTH PRO. (Jan. 29, 2021), https://www.wealthprofessional.ca/news/industry-news/retail-investors-will-get-hurt-the-most-over-gamestop-saga/337335 [https://perma.cc/83MV-MNXM].

13. Tyler Sonnemaker, *The winners and losers – so far – in Reddit traders' war on Wall Street that sent GameStop shares skyrocketing*, BUS. INSIDER (Jan. 30, 2020, 8:13 AM), https://www.businessinsider.com/winners-losers-gamestop-reddit-wallstreetbets-traders-wall-street-short-squeeze-2021-1#loser-short-sellers-2 [https://perma.cc/8TYY-JX2Q].

14. Tucker Higgins, *Lawmakers from AOC to Ted Cruz are bashing Robinhood over its GameStop trading Freeze*, CNBC (updated Jan. 28, 2021, 5:17

time where both WSB and Wall Street institutions were experiencing major financial impacts.[15] The WSB members, along with some notable politicians, were outraged by Robinhood's actions, claiming that the halt in trading unfairly penalized[16] individual investors while safeguarding Wall Street institutions from financial ruin.[17] The halt in trading raised the question: if Wall Street is allowed to buy and sell securities in colossal quantities, then why should individual market participants be prohibited from banding together to buy and sell similarly sized quantities?[18] This thought presents the issue of whether retail investors on social media, like the WSB members on Reddit, violate federal securities laws when participating in online trading communities.

Securities and Exchange Commission (SEC) Rule 10b-5 is the salient anti-fraud provision in securities law, and § 9(a) of the Securities and Exchange Act of 1934 sets the rules for charging individuals and entities with market manipulation.[19] However, the SEC will often choose to charge potential market manipulators under Rule 10b-5 instead of § 9(a).[20] Under the current laws, the SEC is limited with respect to when and how it can

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PM EST), https://www.cnbc.com/2021/01/28/gamestop-cruz-ocasio-cortez-blast-robinhood-over-trade-freeze.html [https://perma.cc/RAG5-AXQG].

15. *Id.*

16. The legal implications of Robinhood's halt in trading is beyond the scope of this Comment. However, it is important to note that a federal judge in Miami dismissed a lawsuit that claimed Robinhood wrongfully restricted trading. Chief Judge Cecilia Altonaga "ruled that retail investors cannot pursue negligence and breach of fiduciary duty claims against the commission-free brokerage, citing Robinhood's customer agreement which allowed it to restrict trading." Jody Godoy, *Court dismisses claims Robinhood wrongly restricted 'meme stock' trades*, REUTERS (Jan. 27, 2022, 1:43 PM CST), https://www.reuters.com/business /court-dismisses-claims-robinhood-wrongly-restricted-meme-stock-trades-2022-01-27/#:~:text=Chief%20Judge%20Cecilia%20Altonaga%20of,allowed%20it%20to%20restrict%20trading [https://perma.cc/U9PE-TD67].

17. Democratic Congresswoman Alexandra Ocasio-Cortez tweeted her disapproval of Robinhood's actions regarding the halt in trading, and Republican Senator Ted Cruz reposted the tweet and expressed that he fully agreed with the Congresswoman. Higgins, *supra* note 14.

18. Slav Fedorov, *The Impact of Institutional Investors on the Price of a Stock*, ZACKS FIN., https://finance.zacks.com/impact-institutional-investors-price-stock-2615.html [https://perma.cc/U699-FZHA] (last visited Feb. 13, 2023).

19. Joseph Dever & John W. R. Murray, *Market Manipulation Investigations*, *in* DAVID M. STUART, SEC COMPLIANCE AND ENFORCEMENT ANSWER BOOK 16-1 (2021).

20. *Id.*

charge retail investors on social media with market manipulation.[21] The impact of social media investors is significant, but the impact is not necessarily negative.[22]

Part I of this Comment will define market manipulation and explain the background and origin of federal securities law and the policy behind the enactment of the current securities laws. Part II will provide the history of the WSB Reddit page and give a background of how the WSB leaders made a powerful impact. Part III will analyze whether retail investors acting together on social media can be liable for market manipulation under § 9(a)(2) of the Securities and Exchange Act and SEC Rule 10b-5. Lastly, Part IV will discuss the ideal solution to the areas of confusion surrounding the liability of retail investors on social media sites.

I. BACKGROUND

In the mid-1920s to late 1929, the American stock market grew exponentially, with stock prices soaring to impressive heights.[23] Individuals, companies, and industry leaders were withdrawing cash from their bank accounts and buying stocks with dreams of getting rich.[24] As a result, business professionals eagerly promoted the value of their company's stocks to brokers, providing speculations of positive returns.[25] Those stock brokers aimed to induce investors to purchase the companies' stocks.[26] However, many companies and brokers made speculations with questionable bases, and some of these speculations were completely fraudulent.[27] The discovery of these false promises led to a panic amongst investors, which resulted in those investors pulling their money out of the stock market.[28] The pulling of funds eventually caused the stock market to

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21. SEC. & EXCH. COMM'N, STAFF REPORT ON EQUITY AND OPTIONS MARKET STRUCTURE CONDITIONS IN EARLY 2021 (Oct. 14, 2021), https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf [https://perma.cc/VXW3-44LB].

22. *Id.*

23. The Editors of Encyclopedia Britannica, *stock market crash of 1929*, BRITANNICA (Jan. 6, 2023), https://www.britannica.com/event/stock-market-crash-of-1929 [https://perma.cc/684K-7EHP].

24. *Id.*

25. *Id.*

26. *Id.*

27. *Securities law history*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/securities_law_history [https://perma.cc/S3PV-WKG6] (last visited Feb. 24, 2023).

28. *Id.*

crash in October of 1929, which ultimately led to the Great Depression.[29] In the aftermath of the Great Depression, Congress sought to shield individual investors from the perils of the stock market by enacting a robust statutory regime intended to protect individual investors.[30]

A. Two Types of Investors

The financial world recognizes two types of investors: institutional investors and retail investors. Institutional investors are firms, companies, or other organizations that invest money on behalf of their clients.[31] Institutional investors often buy and sell large quantities of stocks, bonds, or other securities.[32] Alternatively, retail investors are nonprofessional individual investors who typically buy and sell securities on their own behalf through traditional or online brokerage firms.[33] Retail investors, as individual people, have less resources in comparison to institutional investors, who have access to large pools of money from various clients.[34] Thus, retail investors buy much smaller volumes of securities in comparison to institutional investors.[35] Due to a retail investor's low quantity of trading activity, a retail investor's trades typically do not cause fluctuations in the market price of the securities that they buy and sell.[36] Alternatively, large institutional investors can cause stock prices to increase or decrease as a result of their vast resources and large-volume trading.[37] This ability gives institutional investors the power to manipulate market prices.

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29. *Id.*
30. *Id.*
31. James Chen, *Institutional Investor*, INVESTOPEDIA (Nov. 22, 2021), https://www.investopedia.com/terms/i/institutionalinvestor.asp [https://perma.cc/5LZD-FEQD].
32. *Id.*
33. Adam Hayes, *Retail Investor: Definition, What They Do, and Market Impact*, INVESTOPEDIA (Feb. 17, 2021), https://www.investopedia.com/terms/r/retailinvestor.asp [https://perma.cc/VU4C-S22Z].
34. *Retail v. Institutional Investors: What's the Difference?*, MARCUS: BY GOLDMAN SACHS (July 6, 2021), https://www.marcus.com/us/en/resources/investing/institutional-investors-vs-retail-investors [https://perma.cc/X9EM-XLWV].
35. *Id.*
36. Knowledge at Wharton Staff, *How a New Wave of Retail Investors Is Redefining Stock Pricing*, KNOWLEDGE AT WHARTON (July 13, 2021), https://knowledge.wharton.upenn.edu/article/new-wave-of-retail-investors-is-redefining-stock-pricing/ [https://perma.cc/L9NU-K5AR].
37. *Id.*

B. What is Market Manipulation?

Market manipulation involves artificially increasing or decreasing the price of a security or otherwise affecting the behavior of the market for personal gain.[38] The manipulator attempts to influence the market to raise or lower the price of an asset so that the actual price differs from the true price implied by the economic principle of market fundamentals.[39] Market fundamentals are qualitative and quantitative bits of information that contribute to the calculation of a security's value.[40] When there is a difference between the true price implied by market fundamentals and the actual price of the security, the manipulator can earn a profit by strategically buying and selling at certain points in time.[41] The manipulator turns a profit because they are controlling the change in price and, as a result, know when the stock price is going to change.[42]

Market manipulation can come in many different forms.[43] For instance, a market manipulator may make and publish factually false statements with the intent to create false impressions of the market place in the minds of market participants.[44] Alternatively, a person could manipulate the market by placing a bunch of orders for a stock at a price that is below the typical trading price.[45] This action makes investors assume there is something wrong with the company because of the high

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38. Adam Hayes, *Manipulation: Definition, Methods, Types, and Example*, INVESTOPEDIA (Feb. 18, 2022), https://www.investopedia.com/terms/m/manipulation.asp [https://perma.cc/V6YM-23QS]; U.S. Securities and Exchange Commission, *Market Manipulation*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/market-manipulation [https://perma.cc/JAJ5-45BV] (last visited Mar. 16, 2023).

39. Hayes, *supra* note 38; U.S. Securities and Exchange Commission, *supra* note 38.

40. Hayes, *supra* note 38; U.S. Securities and Exchange Commission, *supra* note 38.

41. Hayes, *supra* note 38; U.S. Securities and Exchange Commission, *supra* note 38.

42. Hayes, *supra* note 38; U.S. Securities and Exchange Commission, *supra* note 38.

43. Hayes, *supra* note 38; U.S. Securities and Exchange Commission, *supra* note 38.

44. Hayes, *supra* note 38; U.S. Securities and Exchange Commission, *supra* note 38.

45. Hayes, *supra* note 38; U.S. Securities and Exchange Commission, *supra* note 38.

volume of trades at such a low price.[46] Consequently, the investors sell their shares of stock in that company, which causes the share price to drop. However, market manipulation is not pigeonholed to a single method or technique.[47]

Generally, there are two types of market manipulation: traditional market manipulation and open market manipulation. The distinction between these two concepts is vital to determining how to charge a potential manipulator with a violation of the law. Open market manipulation involves trades that are facially legitimate but, when viewed in the proper context, could give rise to a manipulative practice.[48] An example of open market manipulation is a practice called "marking the close."[49] This scheme involves engaging in a series of transactions on a security, at the end of the trading day, to give the impression of activity or price movement in a security.[50] Each transaction is technically legitimate and legal, but the purpose behind these transactions is to artificially affect the value of a company's stock.[51] However, there is some debate as to whether open market manipulation falls within the purview of market manipulation laws.[52]

Traditional market manipulation involves conduct that is facially illegal. Examples of traditional market manipulation include schemes like

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46. Hayes, *supra* note 38; U.S. Securities and Exchange Commission, *supra* note 38.

47. Hayes, *supra* note 38; U.S. Securities and Exchange Commission, *supra* note 38.

48. Maxwell K. Multer, *United States: Open-Market Manipulation Under SEC Rule 10b-5 And Its Analogues: Inappropriate Distinctions, Judicial Disagreement And Case Study: FERC's Anti-Manipulation Rule*, MONDAQ (Sept. 1, 2011), https://www.mondaq.com/unitedstates/commoditiesderivativesstock-exchanges/144132/open-market-manipulation-under-sec-rule-10b-5-and-its-analogues-inappropriate-distinctions-judicial-disagreement-and-case-study-fercs-anti-manipulation-rule [https://perma.cc/K4LA-ZLVX].

49. *Id.*

50. *Id.*

51. *Id.*

52. *See generally* Thomas R. Millar & Paul J. Pantano, Jr., *Open Market Manipulation: The Dangers of Policing Thought*, 39 FUTURES AND DERIVATIVES L. REP. 1 (2019), https://www.willkie.com/-/media/files/publications/2019/11/fdlr_39_10_article_2.pdf [https://perma.cc/YVB5-873F].

"wash sales"[53] or "pump and dumps."[54] Traditional market manipulation involves a "bad act" proscribed by the Securities and Exchange Act.[55] Specifically, Congress sought to prevent bad acts like the fraudulent speculations about stocks that contributed to the stock market crash in 1929.[56] The Securities and Exchange Act aimed to provide protection to market participants in the aftermath of the stock market crash of 1929.[57]

Traditional market manipulation is widely accepted as an illegal practice, and it is regulated by § 9(a) of the Securities and Exchange Act.[58] However, as previously mentioned, there is discourse over whether open market manipulation is actually illegal.[59] Some judges and scholars believe that open market manipulation practices do not create liability under the Securities and Exchange Act of 1934, while others believe that

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53. A wash sale is when a person sells or trades a security at a loss, and within 30 days, before or after the sale, that person buys a substantial amount of identical securities, acquires a substantial amount of identical securities in a fully taxable trade, or acquires a contract or option to buy substantially identical securities. This scheme enables the person to deduct the losses from their taxable income. The IRS prohibits this scheme. *See* U.S. Securities and Exchange Commission, *Wash Sales*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/wash-sales [https://perma.cc/Y5L3-QHY9] (last visited Feb. 13, 2023).

54. A pump and dump scheme occurs when an investor buys shares of a stock with the intention of artificially driving up the price of that stock. Pump and dumpers usually target low-valued stocks. The scammers purchase a large quantity of stocks at the low price. Subsequently, the company and the company's shares of stock are marketed and promoted with the intent to cause people to buy the shares. The promotion of the stock has been accomplished in different ways. Sometimes, the scammers will prepare false reports that give the impression that the stock will increase in value in the near future, hire stockbrokers to call clients and push the stock, or use other tactics. After the promotional phase of the scheme, the stock price increases, and the investor who bought the shares of stock at the low price will sell his shares for a significant gain. Multer, *supra* note 48.

55. *See id.*

56. *Securities law history*, *supra* note 27.

57. Dever & Murray, *supra* note 19.

58. Sina Mansouri, *Criminal and Regulatory Enforcement of Market Manipulation Spikes*, ARNOLD & PORTER PUBL'NS & PRESENTATIONS (July 21, 2016), https://www.arnoldporter.com/en/perspectives/publications/2016/07/2016_07_22_criminal_and_regulatory_enfor_13099?keyword= [https://perma.cc/A4V4-9RR7].

59. *See generally* Gina-Gail S. Fletcher, *Legitimate Yet Manipulative: The Conundrum of Open-Market Manipulation*, 68 DUKE L.J. 481 (2018).

SEC Rule 10b-5 can impose liability on those who practice open market manipulation.[60]

C. The Securities and Exchange Act of 1934

Congress enacted the Securities and Exchange Act of 1934 to regulate securities transactions on the secondary market and to mitigate fraud and manipulation.[61] The Act created the SEC and provides the SEC with the power to oversee securities and the conduct of financial professionals.[62] Specifically, § 10(b) grants the SEC power and responsibility to investigate financial fraud and market manipulation.[63]

Congress also included § 9(a) of the Securities and Exchange Act with the intention of forbidding market manipulation.[64] Section 9(a) provides that it is "unlawful for any person, directly or indirectly" to use the postal service or interstate commerce "[f]or the purpose of creating a false or misleading appearance of active trading in any security other than a government security, or a false or misleading appearance with respect to the market for any such security . . . ."[65] Congress did not intend for § 9(a) to prohibit a trade simply because it moves the price of the security, but rather, Congress aimed to "keep an open and free market where the natural forces of supply and demand determine a security's price."[66]

Congress views § 9(a)(2) as the heart of the Securities and Exchange Act.[67] Section 9(a)(2) prohibits market manipulation when one or more persons effects "a series of transactions in any security . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."[68] Congress inserted this provision to prevent individuals from "dominating the market in a stock" while intending to benefit from the artificial level of value to the detriment of the investing

60. *See, e.g.*, *id.*
61. Will Kenton, *What Is the Securities and Exchange Act of 1934? Reach and History*, INVESTOPEDIA (Oct. 30, 2020), https://www.investopedia.com/terms/s/seact1934.asp [https://perma.cc/J3AR-NN5E].
62. *Id.*
63. *Id.*
64. Dever & Murray, *supra* note 19.
65. Securities Exchange Act of 1934, 15 U.S.C. § 78i(a)(1).
66. Dever & Murray, *supra* note 19.
67. *Id.*
68. Securities Exchange Act of 1934, 15 U.S.C. § 78i(a)(2).

public.[69] Section 9(a)(2) also includes a specific intent requirement, which means that the actions are only illegal when the investor performs them for the specific purpose of manipulating the market of a particular security.[70] Congress sought to target people or entities with the manipulative intention to create artificial value in a security with hopes of persuading investors to purchase the security.

To be liable for market manipulation under § 9(a)(2), the investor must intend to alter the price of the security while also possessing a financial interest in the security.[71] In *Crane Co. v. Westinghouse Air Brake Co.*, a business called American Standard, Inc. (Standard) allegedly purchased and sold large quantities of stock in Air Brake Company on the open market for the purpose of driving up the share prices.[72] Standard aimed to prevent stockholder approval of a tender offer.[73] If Standard prevented the offer, then Standard was more likely to close a merger deal between itself and Air Brake Company.[74] Additionally, Standard took affirmative steps to conceal the fact that it sold off shares of Air Brake Company at the same time it was purchasing them, thus increasing the trading volume of Air Brake stock and increasing the stock's price.[75]

The Second Circuit stated that the purpose of the Securities and Exchange Act was to outlaw every device used to manipulate the market, implying that the activity of a security ought to be the reflection of a genuine demand instead of a mirage.[76] Section 9(a)(2) contains requirements of both manipulative motive and willfulness.[77] The court ruled that Standard violated § 9(a)(2).[78] The court found that Standard's

69. *Id.* Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 794 (2d Cir. 1969).

70. *Securities Exchange Act of 1934*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/securities_exchange_act_of_1934 [https://perma.cc/LL9J-XUTB] (last visited Feb. 13, 2023).

71. *Crane Co.*, 419 F.2d at 794.

72. *Id.* at 793.

73. *Id.* at 794.

74. A tender offer is a public solicitation to all shareholders requesting that they tender their stock for sale at a specific price during a certain time. The defendant in *Crane* sought to increase the price of Air Brake Company in hopes that the stockholders would refuse the tender offer of their stock. Adam Hayes, *Tender Offer Definition: How It Works, With Example*, INVESTOPEDIA (Apr. 15, 2022), https://www.investopedia.com/terms/t/tenderoffer.asp [https://perma.cc/3ALT-FQS2].

75. *Crane Co.*, 419 F.2d at 794.

76. *Id.*

77. *Id.*

78. *Id.*

financial interest in the security—the desire for the merger to go through—was sufficient to qualify as a manipulative purpose when coupled with their massive purchasing and concealed sales of Air Brake Company's stock.[79] However, the court stated that § 9(a)(2) does not condemn extensive buying or buying that raises the price of the security without meeting the intent requirements.[80] Further, the court stated that the statute was designed to prevent those with a financial interest in a security from manipulating the market.[81] Thus, the court's language demonstrates that "manipulative motive and willfulness" cannot be satisfied merely by buying a large quantity of stock if there is no financial interest in the price movement, like Standard's desire for its merger to close.[82] Additionally, the court noted that "[s]ection 9(a)(2) was aimed at preventing an individual from dominating the market in a stock for the purpose of conducting a one-sided market at an artificial level for its own benefit and to the detriment of the investing public."[83] The court's use of the language "one-sided market at an artificial level" suggests that a market manipulator must aim to *artificially* alter the price of a security to the detriment of the investing public.[84] The *Crane* court's interpretation of § 9(a)(2) demonstrates that § 9(a)(2) requires: (1) a manipulative motive and willfulness; (2) a financial interest; and (3) the manipulative motive must create some sort of artificial value in the security.[85]

Additionally, in *Cohen v. Stevanovich*, the Southern District of New York elaborated on the meaning of artificial value by asserting that, in addition to intent, an investor must cause market participants to have a false impression as to the value of the security if that investor is going to be held liable for market manipulation under § 9(a)(2).[86] In *Cohen*, the Southern District of New York addressed whether a failure to deliver due to naked short selling qualified as market manipulation under § 9(a)(2) of the Securities and Exchange Act.[87] Broadly, naked short selling is when a broker, acting on behalf of a seller, promises to sell shares of stock to a buyer before the seller actually possesses the shares that he promised to

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79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *See generally* Cohen v. Stevanovich, 722 F. Supp. 2d 416 (S.D.N.Y. 2010).
87. *Id.*

sell the buyer.[88] If the seller does not obtain the shares within the required time frame, then the seller will not have any actual shares to deliver to the buyer.[89] The result is a failure to deliver.[90] A failure to deliver could result in *phantom shares* in the marketplace, meaning the buyer could own shares on paper that do not exist.[91] Thus, the existence of phantom shares could dilute the price of the underlying security.[92]

Nevertheless, the *Cohen* court dismissed the case, relying in part on an SEC statement that rejected the notion of phantom shares.[93] Further, the court asserted that § 9(a)(2) requires that the manipulative actions "must be willfully combined with something more to create a false impression of how market participants value a security."[94] Additionally, the court stated that the "plaintiff's opposition brief pointed to no wash sales, match[ed] orders, rigged prices or any other manipulative act intended to mislead investors."[95] This language suggests that the actions of the alleged manipulator must be inherently manipulative the same way financial fraud schemes like wash sales, matched orders, or rigged prices are inherently manipulative.

The *Crane* and *Cohen* courts implied that § 9(a)(2) does not apply to transactions that are facially legitimate or, in other words, open market manipulation.[96] The mere intent to change the price of the security does not qualify as market manipulation if there is a lack of financial interest on the side of the potential manipulator and a lack of a manipulative act that creates artificial value or false impression of the market to other investors.[97] These two cases reinforce the idea that open market manipulation is not subject to regulation under § 9(a)(2).[98] Where § 9(a)(2) does not apply to open market manipulation, courts have scrambled to find another way to regulate these manipulative practices.

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88. Adam Hayes, *What is Naked Shorting, How Does It Work, and Is It Legal?*, INVESTOPEDIA (updated July 17, 2022), https://www.investopedia.com/terms/n/nakedshorting.asp [https://perma.cc/EWD2-JV7C].

89. *Id.*

90. *Id.*

91. Gordon Scott, *What Is Failure to Deliver, and What Happens With FTDs?*, INVESTOPEDIA (updated July 13, 2022), https://www.investopedia.com/terms/f/failuretodeliver.asp [https://perma.cc/8BJR-3V3E].

92. *Id.*

93. *See* Cohen v. Stevanovich, 722 F. Supp. 2d 416, 425 (S.D.N.Y. 2010).

94. *Id.* at 424 (quoting Santa Fe Indus. v. Green, 430 U.S. 462 (1997)).

95. *Id.*

96. *See generally Cohen*, 722 F. Supp. 2d 416; Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969).

97. *See generally Cohen*, 722 F. Supp. 2d 416; *Crane Co.*, 419 F.2d 787.

98. *See generally Cohen*, 722 F. Supp. 2d 416; *Crane Co.*, 419 F.2d 787.

D. Rule 10b-5 and How it Applies to Market Manipulation

Section 10(b) of the Securities and Exchange Act of 1934 grants the SEC the power to make rules against "manipulative and deceptive practices," which enabled the SEC to adopt Rule 10b-5.[99] Before Rule 10b-5, most of the provisions in the Securities and Exchange Act primarily focused on protecting the buyers of securities while neglecting the sellers.[100] This one-sided protection inspired the SEC to adopt Rule 10b-5 in 1942.[101] Rule 10b-5 protects buyers and sellers of securities.[102] The legislators suggested that their intent when promulgating Rule 10b-5 was to provide protection to the aggrieved party, whether that be the buyer or seller.[103] Initially, the aggrieved party was considered to be the buying party because prior to the enactment of the Securities and Exchange Act, much of the fraud and deception occurring was accomplished through inducing the buyer to purchase securities.[104] Nevertheless, Congress presumably recognized that fraud and manipulation can come in many different forms, and a person can employ manipulative or deceptive practices on either the buying or selling side of a transaction.[105]

Appropriately, Rule 10b-5 is titled "Employment of manipulative and deceptive devices."[106] In connection with the purchase or sale of any security, SEC Rule 10b-5 makes it unlawful for a person: "(a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact . . . , or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[107] Rule 10b-5 was initially intended to be an anti-fraud provision governing securities, and it still serves that function today.[108] But, this Comment will not explore the anti-fraud function of Rule 10b-5. Interestingly, the line between fraud and market manipulation is blurry, and, as a result, Rule 10b-5 has also been applied to market manipulation

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99. *Securities and Exchange Act Rule 10b*, FINDLAW (updated June 20, 2016), https://www.findlaw.com/consumer/securities-law/securities-and-exchange -act-rule-10b.html [https://perma.cc/HHQ2-RQ52].

100. A. A. Sommer Jr., *Rules 10b-5: Notes for Legislation*, 17 CASE W.L. REV. 1029, 1034 (1966).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See* 17 C.F.R. § 240.10b-5 (2023).

107. *Id.* § 240.10b-5(a)–(c).

108. Sommer, *supra* note 100.

cases.[109] The cases discussed below involve instances of open market manipulation where the court used Rule 10b-5 to evaluate whether the defendants were liable for market manipulation.[110]

E. The Interpretation of Rule 10b-5

In *Ernst & Ernst v. Hochfelder*, the United States Supreme Court held that Rule 10b-5 is constrained to intentional or willful conduct designed to deceive investors by controlling or artificially affecting the price of securities.[111] The case involved defrauded investors who sought to hold a brokerage house's accounting firm liable for their damages on the theory of negligent nonfeasance.[112] The Court noted that use of the word *manipulative* in § 10(b) and in the title of Rule 10b-5 had a special meaning when used in connection with securities markets.[113] The Court stated that the term manipulative "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."[114] Thus, the Court suggested that the use of the word manipulative in § 10(b) and the use of the word manipulative in §10b-5 means that the reach of Rule 10b-5 is limited to intentional or willful conduct.[115] However, in later cases, the Supreme Court also highlighted that the *conduct* must deceive investors by controlling or artificially affecting the price of securities.[116]

The deceptive and artificial requirements mentioned above were reinforced in *Santa Fe v. Green*, where the Supreme Court noted that the intent to manipulate must also be accompanied by some form of *conduct* that misleads investors.[117] In *Santa Fe*, the Court explained that market manipulation "refers generally to practices . . . that are intended to mislead investors by artificially affecting market activity."[118] The Court's language stating that "practices . . . intended to mislead investors" demonstrates that intent to manipulate the market is not the only requirement for liability

109. Mansouri, *supra* note 58.
110. *See generally* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).
111. *Ernst & Ernst*, 425 U.S. at 201.
112. *Id.* at 199.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 201.
117. Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).
118. *Id.* at 476.

under Rule 10b-5.[119] The conduct itself must be aimed at misleading the rational market participant or, in other words, retail investors.[120] The Court recognized that Congress intended to prohibit the full range of ingenious devices that might be used to manipulate securities prices.[121] The Court equated the term *practices* with financial fraud schemes such as wash sales, matched orders, and rigged prices.[122] All of the enumerated practices are financial fraud schemes that involve inherently manipulative conduct.[123] The use of the word *practices* suggests that the Supreme Court's stance on market manipulation under Rule 10b-5 requires inherently manipulative or deceptive conduct.[124]

The Supreme Court's interpretations of Rule 10b-5 typically prevent open market manipulation schemes from being susceptible to liability under Rule 10b-5, seemingly for the same reasons the Court found open market manipulation did not fall under § 9(a)(2).[125] Courts have stated that *artificial* movement of stock prices refers to conduct like a pump and dump scheme[126] or wash sale[127] scheme.[128] The Supreme Court's interpretations in *Ernst* and *Santa Fe* suggest that the conduct must be intentional and inherently manipulative or deceptive, similar to the *Crane* and *Cohen* courts' interpretation of conduct under § 9(a)(2). Thus, the conduct itself must be deceitful or fraudulent. Therefore, manipulation under Rule 10b-5 requires intentional or willful conduct, but that conduct must defraud investors by artificially affecting the price of securities.[129]

In *GFL Advantage Fund, LTD v. Colkitt*, the Third Circuit reinforced the idea that market manipulation requires some form of deceptive conduct when it addressed an alleged market manipulation case under Rule 10b-5.[130] In *GFL*, the court looked at whether GFL Advantage Fund's short selling qualified as manipulative under Rule 10b-5.[131] The court's decision

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119. *Id.*
120. *Id.* at 477.
121. *Id.*
122. *Id.* at 476.
123. Multer, *supra* note 48.
124. *Id.*
125. *Id.*
126. *See* discussion *supra* note 54.
127. *See* discussion *supra* note 53.
128. *See generally* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).
129. *Santa Fe Indus., Inc.*, 430 U.S. at 475–76.
130. GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 202–03 (3d Cir. 2001).
131. *Id.*

hinged on whether "the alleged manipulator injected 'inaccurate information' into the market or created a false impression of market activity."[132] The court's assertion does not add an extra requirement to Rule 10b-5 market manipulation.[133] Rather, it reinforces the Supreme Court's interpretations in *Ernst* and *Santa Fe* because the *GFL* court acknowledged the fact that the manipulative or deceptive conduct must somehow artificially affect the price of securities, for instance, by injecting inaccurate information into the market or creating false impression of market activity.[134]

Reading *Ernst*, *Santa Fe*, and *GFL* together, the requirements for market manipulation liability under Rule 10b-5 are intentional and willful conduct that is intended to mislead retail investors and designed to deceive or defraud investors by controlling or artificially affecting the price of securities.[135] The Supreme Court's interpretation seems to eliminate the possibility of open market manipulation falling within the purview of Rule 10b-5 because Rule 10b-5 requires manipulative or deceptive *conduct*.[136] The conduct involved in an open market manipulation is not facially manipulative or deceptive.[137]

F. Instances When Courts Held that Rule 10b-5 Encompasses Open Market Manipulation

Despite the Supreme Court's interpretation of Rule 10b-5 in *Ernst* and *Santa Fe*, some courts—along with the SEC—believe that investors can be liable for open market manipulation under Rule 10b-5.[138] In *Markowski v. SEC*, the SEC determined that liability under Rule 10b-5 could be imposed solely based on intent to manipulate the market, despite the fact that the "manipulative" conduct was done through legal open market transactions.[139] The defendant appealed, and the D.C. Circuit court affirmed the SEC's order holding the defendant in violation of § 10(b) of

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132. *Id.*

133. Millar & Pantano, *supra* note 52.

134. *GFL Advantage Fund, Ltd.*, 272 F.3d at 202–03.

135. *See generally* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); *GFL Advantage Fund, Ltd.*, 272 F.3d 189.

136. *See generally Ernst & Ernst*, 425 U.S. 185; *Santa Fe Indus., Inc.*, 430 U.S. 462.

137. *See Ernst & Ernst*, 425 U.S. at 199.

138. *See generally* Markowski v. SEC, 274 F.3d 525 (D.C. Cir. 2001); SEC v. Masri, 523 F. Supp. 2d 361 (S.D.N.Y. 2007).

139. *Markowski*, 274 F.3d at 527.

the Securities and Exchange Act and Rule 10b-5.[140] In *Markowski*, Global America, Inc. (Global) underwrote the initial public offering (IPO) of Mountaintop Corporation.[141] In the following six months, Global was the primary purchaser and seller of Mountaintop's securities.[142] The high volume of buying and selling by Global kept Mountaintop's stock price artificially high.[143] Once Global withdrew from the market, Mountaintop's security prices dropped 75% in a single day.[144] Global's trades were legitimate, meaning the trades were transacted legally and did not involve deceit or manipulation.[145]

The SEC argued that despite the facially legitimate trades, Global ought to be liable for market manipulation due to Global's intent to keep Mountaintop's stock price high.[146] The SEC supported its argument by emphasizing Global's domination of the Mountaintop security market combined with the fact that many of Global's clients were invested in Mountaintop's IPO.[147] The latter fact is relevant because if Mountaintop began trading below its initial IPO, then Global's clients would incur significant losses.[148] Thus, Global bought a majority of Mountaintop's shares in order to keep the company's value high.[149] The court agreed with the SEC, finding that Global's intent to manipulate the market was sufficient to hold them liable for market manipulation, despite the lack of deceptive conduct.[150] The court stated that Congress manifested the idea that intent is sufficient to manipulate the market by the following language in § 9(a)(2): "to effect . . . a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."[151] The court relied on Congress's alleged manifestation that manipulation can be illegal solely because of the actor's purpose.[152] Thus, the court found that the SEC's ruling that manipulation included facially legal

140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 528.
146. *Id.* at 528–29.
147. *Id.*
148. *See generally Markowski*, 274 F.3d 525.
149. *Id.* at 528–29.
150. *Id.*
151. *Id.* at 529.
152. *Id.*

conduct with a manipulative intention was not unreasonable.[153] Essentially, it appears the court is stating that manipulative intent is enough to transform facially legal conduct into manipulative or deceptive conduct for the purposes of Rule 10b-5.[154] The D.C. Circuit ruled that open market-manipulation schemes can be subject to liability under Rule 10b-5 despite the Supreme Court's rulings in *Ernst* and *Santa Fe*.[155]

In addition to *Markowski*, the district court for the Southern District of New York has held that Rule 10b-5 can encompass open market manipulation, stating that liability should be imposed if "*but for* the manipulative intent, the defendant would not have conducted the transaction."[156] In *SEC v. Masri*, the SEC alleged that the defendants violated Rule 10b-5 by intending to manipulate a security through legal open market transactions.[157] The SEC claimed that Moises Saba Masri (Masri) manipulated the closing price of a security by buying and selling large quantities of shares at strategic times to move the price of the security to a position that was favorable to him.[158] The issue came down to whether Masri had a proper or improper purpose for making the trades.[159] As seen in *Markowski*, the SEC argued that the court could find a violation of Rule 10b-5 based on Masri's manipulative intent alone.[160] Alternatively, Masri argued that, absent deceptive or fraudulent conduct, a court could not find him liable for market manipulation under Rule 10b-5.[161] The Southern District of New York agreed with the SEC, stating that the standard for establishing a market-manipulation violation of Rule 10b-5 based solely upon intent is to determine if "*but for* the manipulative intent, the defendant would not have conducted the transaction."[162] Thus, the courts in *Masri* and *Markowski* embraced the notion that open market manipulation falls within the purview of Rule 10b-5.[163]

The opinions in *Markowski* and *Masri* revealed that an investor can be liable for market manipulation based solely on that investor's intent.[164]

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153. *Id.*
154. *Id.*
155. *Id.*
156. SEC v. Masri, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007).
157. *Id.* at 362–63.
158. *Id.*
159. *Id.* at 372.
160. *Id.*
161. *Id.*
162. *Id.*
163. *See generally* Markowski v. SEC, 274 F.3d 525 (D.C. Cir. 2001); *Masri*, 523 F. Supp. 2d 361.
164. *See generally Markowski*, 274 F.3d 525; *Masri*, 523 F. Supp. 2d 361.

The Supreme Court, however, has held that market manipulation requires some form of manipulative or deceptive conduct.[165] Thus, the SEC and some lower courts share the belief that the presence of manipulative intent alone is sufficient to impose liability under Rule 10b-5, which seemingly contradicts the Supreme Court's interpretation of Rule 10b-5.

With the increasing use of the internet to discuss stocks and other securities, the need for clarity regarding open market manipulation has never been greater.[166] As previously mentioned, the SEC regulates the securities market and protects investors, so it is logical that the SEC would advocate for strict enforcement of market manipulation laws.[167] As of 2018, the SEC had 4,200 employees working to ensure the safety of the market remains intact.[168] The Commissioner of the SEC noted that, while it may seem like a high number of employees, he believes the SEC is understaffed and that there will be an influx of new employees in the near future.[169] The size of the SEC's staff could pose an issue when regulating the markets in the near future, considering the growing concern of retail investors on social media reached a fever pitch in early 2021, when millions of members of a Reddit page made a powerful impact on the stock prices of multiple companies.[170]

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165. *See generally* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 475–76 (1977).

166. *Updated Investor Alert: Social Media and Investing -- Stock Rumors*, U.S. SEC. AND EXCH. COMM'N (Nov. 5, 2015), https://www.sec.gov/oiea/investor-alerts-bulletins/ia_rumors.html [https://perma.cc/G3SV-ER55].

167. James Chen, *Securities and Exchange Commission (SEC) Defined, How It Works*, INVESTOPEDIA (Apr. 27, 2022), https://www.investopedia.com/terms/s/sec.asp#:~:text=The%20Securities%20and%20Exchange%20Commission%20(SEC)%20is%20a%20U.S.%20government,securities%20markets%20and%20protecting%20investors [https://perma.cc/WFS2-LEDZ].

168. *SEC Employees*, U.S. SEC. AND EXCH. COMM'N, https://www.sec.gov/spotlight/sec-employees.shtml [https://perma.cc/YJU4-9XN7] (Aug. 28, 2018).

169. Jack Kelly, *The Head Of The SEC Says The Agency Is 'Short-Staffed' – A Hiring Boom For Compliance And Regulators Should Follow*, FORBES (Sept. 15, 2021, 5:26 PM EDT), https://www.forbes.com/sites/jackkelly/2021/09/15/the-head-of-the-sec-says-the-agency-is-short-staffed-a-hiring-boom-for-compliance-and-regulators-should-follow/?sh=22a08112ec53 [https://perma.cc/CUD6-4DGG].

170. Justin Hartwig, *Reddit's Top Investing and Trading Communities*, INVESTOPEDIA (June 17, 2021), https://www.investopedia.com/reddit-top-investing-and-trading-communities-5189322 [https://perma.cc/K946-FGJA].

II. The Reddit Rebellion and its Leaders

Reddit is a collection of online forums where users share news, content, and comments on other users' posts.[171] The site is broken up into millions of different communities called *subreddits*.[172] Each subreddit covers a different topic.[173] WallStreetBets is a subreddit that was created in 2012.[174] The creators of WSB wanted a place where they could share high-risk trading and investing tips.[175] The Reddit revolution started somewhere between December 2020 and January 2021 when WSB gained a large number of members.[176] The WSB members continued sharing risky stock tips, but the users also started tailoring their stock tips to benefit themselves while adversely affecting Wall Street's earnings.[177] The WSB members targeted Wall Street by encouraging each other to invest in stocks that institutional investors on Wall Street had *shorted*.[178]

Typically, a person buys a company's stock with hopes that the company's stock price will increase, but investors may also elect to short a stock. Shorting a stock is when the investor bets that a company's stock price is going to decrease in value.[179] First, the investor borrows shares of the stock that he or she believes will decrease in value.[180] Next, the investor sells the borrowed shares to a third party and agrees to buy the shares back at a later date.[181] The investor will net a profit if the price of the shares decreases by the time he or she buys the shares back from the third party.[182]

Similarly, institutional investors borrow shares of stock and *short sell* them to other investors with hopes that the price of the stock will decrease before the institution agrees to buy the shares back.[183] For instance, a

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171. Widman, *supra* note 3.
172. *Id.*
173. *Id.*
174. Ricci & Sautter, *supra* note 8.
175. *Id.*
176. *See* Stephen Gandel, *How Reddit posters made millions as Wall Street lost billions on GameStop's wild stock ride*, CBS NEWS (Jan. 29, 2021, 8:45 AM), https://www.cbsnews.com/news/gamestop-reddit-wallstreetbets-short-squeeze-2021-01-28/ [https://perma.cc/RRC6-A986].
177. *See id.*
178. Ricci & Sautter, *supra* note 8.
179. Adam Hayes, *Short Selling: Definition, Pros, Cons, and Examples*, INVESTOPEDIA (Dec. 1, 2022), https://www.investopedia.com/terms/s/shortselling.asp [https://perma.cc/ULA5-T3TA].
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

hedge fund named Melvin Capital took a short position in GameStop long before the WSB insurgents targeted Wall Street.[184] Among other reasons, Melvin Capital believed that online video game downloads would eventually put GameStop, and its retail business model, out of business.[185] Thus, Melvin Capital betted that GameStop shares would decrease in price.[186]

Melvin Capital was not alone. The members of WSB recognized that numerous Wall Street investors positioned themselves short with respect to GameStop.[187] After some discussion on the WSB subreddit, many members of WSB decided to buy GameStop shares, thereby increasing the trading volume and giving the impression of heightened demand for GameStop stock.[188] WSB members intended to cause a *short squeeze* by buying GameStop stock at the time Wall Street was positioned short in GameStop.[189] A short squeeze occurs in the time after the investor sells the borrowed security to a third party but before the investor buys the security back.[190] A short squeeze happens when the security that the investor shorted starts increasing in value.[191] Since the investor bet the security would decrease in value, the investor will typically begin buying back the security early to minimize their loss before the security price increases more.[192] If many institutions shorted the same security, then many of those same institutions will start buying back their shares to minimize their losses.[193] The increasing number of institutions that buy back shares of the

184. Juliet Chung, *Melvin Capital Says It Was Short GameStop Since 2014*, WALL ST. J. (Feb. 17, 2021, 7:55 PM ET), https://www.wsj.com/articles/melvin-capital-says-it-has-been-short-gamestop-since-2014-11613593854 [https://perma.cc/S8MK-9C7P].

185. *Id.*

186. *Id.*

187. Rob Davies, *GameStop: how Reddit amateurs took aim at Wall Street's short-sellers*, THE GUARDIAN (Jan. 28, 2021, 10:24 EST), https://www.theguardian.com/business/2021/jan/28/gamestop-how-reddits-amateurs-tripped-wall-streets-short-sellers#:~:text=What%20has%20happened%20with%20GameStop,a%20co%2Dordinated%20buying%20spree [https://perma.cc/J7KS-449V].

188. Maxwell James, *SEC. v. WSB: The case of GME*, THE BOS. POL. REV. (Apr. 2, 2021), https://www.bostonpoliticalreview.org/post/sec-v-wsb-the-case-of-gme [https://perma.cc/9ATU-5C3V].

189. *Id.*

190. Cory Mitchell, *Short Squeeze Definition*, INVESTOPEDIA (Feb. 7, 2023), https://www.investopedia.com/terms/s/shortsqueeze.asp [https://perma.cc/TFE8-678M].

191. *Id.*

192. *Id.*

193. *Id.*

security to minimize their losses results in an increase in the volume of purchases of the shorted security, which results in an increase in the price of the security.[194] This phenomenon causes a panic amongst those who shorted the stock, or in other words, it causes a *short squeeze*.[195]

Once WSB started driving the GameStop stock price upwards, Wall Street institutions realized they needed to buy back GameStop to prevent significant losses.[196] Ironically, this buying back, intended to prevent loss, increased the price of the security more and caused additional loss if the firms failed to buy back the stock quickly.[197] Besides GameStop, WSB members employed similar trading activities with companies including AMC, Microvision, and Blackberry.[198] During the trading frenzy, there were millions of members in the WSB Reddit page. However, three individuals were alleged to have exercised substantial power and influence over the WSB members throughout the financial controversy: Keith Gill, Player896, and Trey Collins.

*A. Keith Gill A.K.A. Roaring Kitty A.K.A. DeepF***ingValue*

In 2019, a member of WSB named Keith Gill posted a picture of his $53,000 investment in GameStop.[199] He was the first person to post on WSB that his money was officially invested in GameStop.[200] Gill is known as "Roaring Kitty" on his YouTube channel and "DeepF***ingValue" on the WSB Reddit page.[201] Gill has been dubbed as one of the most influential voices on the WSB page that ultimately led to the extreme

194. *Id.*

195. *Id.*

196. Shalini Nagarajan and Harry Robertson, *These hedge funds have gotten torched by the Wall Street Bets army that targeted their short positions in GameStop*, MKTS. INSIDER (Jan. 29, 2021, 7:33 AM), https://markets.businessinsider.com/news/stocks/hedge-funds-torched-wall-street-bets-gamestop-short-squeeze-reddit-2021-1-1030016596 [https://perma.cc/YM84-8RRP].

197. Davies, *supra* note 187.

198. William White, *Meme Stocks: 10 Reddit WSB Stocks Seeing the Most Chatter Today*, INV. PLACE (June 2, 2021, 10:28 AM EST), https://investorplace.com/2021/06/meme-stocks-10-reddit-wsb-stocks-seeing-the-most-chatter-today/ [https://perma.cc/7AK3-HMV7].

199. Julia-Ambra Verlaine & Gunjan Banerji, *Keith Gill Drove the GameStop Reddit Mania. He Talked to the Journal.*, WALL ST. J. (Jan. 29, 2021, 9:48 AM ET), https://www.wsj.com/articles/keith-gill-drove-the-gamestop-reddit-mania-he-talked-to-the-journal-11611931696 [https://perma.cc/SYB7-8JZF].

200. *Id.*

201. Class Action Complaint at 1, Iovin v. Gill, No. 3:21-cv-10264-MGM, (D. Mass. Feb. 16, 2021).

increase in stock price for companies like GameStop, AMC, and many more.[202] A man named Christian Iovin filed a complaint in the federal district court for the District of Massachusetts against Keith Gill, claiming Gill illegally manipulated the market and undermined its integrity through his exaggerated posts.[203] The complaint further alleged that Gill "created a far-reaching and wildly successful social media campaign in the year leading up to the surge in GameStop shares."[204] The complaint stated that Gill's online persona and advocacy for GameStop stock attracted "tens of thousands of fans and copycats who share screenshots of their own brokerage accounts."[205]

Gill initially posted a screenshot of his e-trade account depicting the amount of shares and option contracts he had purchased in GameStop, and after noticing the attention his first post received, he continued posting updates of his account at the end of every month.[206] In these monthly updates, Gill showed his followers how the value of his positions had changed since his last update.[207] Gill posted updates more frequently once the price of GameStop's stock started rapidly increasing.[208] Additionally, Gill posted videos on his YouTube channel "Kitty Corner" giving reasons why he believed GameStop was worth the investment.[209] In one video, Gill asserted three reasons why GameStop was a worthy investment: (1) the digital risks to the company were overblown; (2) the negative sentiment

202. Anissa Gardizy, *Officials subpoena former MassMutual supervisors of Keith Gill, local investor known as 'Roaring Kitty'*, THE BOS. GLOBE (Apr. 15, 2021, 11:13 PM), https://www.bostonglobe.com/2021/04/15/business/state-regulators-subpoena-former-massmutual-supervisors-keith-gill-local-investor-known-roaring-kitty/ [https://perma.cc/NJG3-VQ7B]; Christian Berthelsen, *Analyist Behind 'Roaring Kitty' sued for securities fraud over GameStop rise*, THE SEATTLE TIMES (Feb. 17, 2021, 10:16 PM), https://www.seattletimes.com/business/analyst-behind-roaring-kitty-sued-for-securities-fraud-over-gamestop-rise/#:~:text=Keith%20Gill%2C%20one%20of%20the,the%20price%20of%20the%20stock [https://perma.cc/AH3D-YU4P].

203. Class Action Complaint, *supra* note 201, at 1–2.

204. *Id.* at 8.

205. Verlaine & Banerji, *supra* note 199.

206. Class Action Complaint, *supra* note 201, at 8–9.

207. Verlaine & Banerji, *supra* note 199. *See also* Class Action Complaint, *supra* note 201, at 8–9.

208. Class Action Complaint, *supra* note 201, at 9.

209. *See generally* Class Action Complaint, *supra* note 201. There is no mention of "Kitty Corner" in the complaint. His YouTube channel was "Roaring Kitty."

was exaggerated; and (3) the value of the company was generally overlooked.[210]

WSB members often stated that Gill was one of the main reasons they bought and held shares of GameStop.[211] On January 27, 2021, Gill posted a picture of his brokerage account showing that his position in GameStop was worth $48 million.[212] That post was *upvoted*[213] about 200,000 times.[214] Gill likely knew that many people were buying the stock because of his influence on the WSB page and other social media accounts.[215] Thus, the complaint alleged that Gill intentionally sought to increase the price of GameStop when posting about the company's stock.[216] Gill, however, was transparent when explaining to his followers why he considered GameStop a good investment.[217] Although Gill is seen as the most influential member of WSB, he was not the only member influencing retail investors to purchase GameStop stock.

B. Player896

Another notable leader in the Reddit rebellion is a person with the username "Player896."[218] Player896 gained attention from one of their posts in WSB on September 19, 2020.[219] In the post, Player896 pointed out that, contrary to popular belief at the time, GameStop was profitable

210. Roaring Kitty, *100%+ short interest in GameStop stock (GME) – fundamentals & technical deep value analysis*, YOUTUBE (July 27, 2020), https://www.youtube.com/watch?v=GZTr1-Gp74U [https://perma.cc/AVW7-T44D].

211. Class Action Complaint, *supra* note 201, at 11.

212. *Id.* at 10.

213. *How to upvote on Reddit – the complete guide*, SIGNALS, https://www.soar.sh/how-to-upvote-on-reddit/ [https://perma.cc/3MWF-TZ9H] (last visited Feb. 13, 2023). An upvote is a way for Reddit users to show their approval of a post, similar to Facebook likes. *Id.*

214. Class Action Complaint, *supra* note 201, at 11. The post had 200,000 upvotes as of February 16, 2021. The number of upvotes could have changed drastically since February 16, 2021.

215. *See* Roaring Kitty, *supra* note 210.

216. Class Action Complaint, *supra* note 201, at 22.

217. *Id.* at 8–9.

218. *See* Player896, *Bankrupting Institutional Investors for Dummies, ft GameStop*, REDDIT (Sept. 19, 2020, 8:03 AM CT), https://www.reddit.com/r/wallstreetbets/comments/ivs6dw/bankrupting_institutional_investors_for_dummies / [https://perma.cc/PS3J-X4UU].

219. *Id.*

in the 2019 holiday season.[220] A large selling point of Player896's argument was that GameStop planned to capitalize on the next console cycle.[221] Player896 explained that new gaming consoles were set to release in the near future, and the new wave of consoles would result in an influx of business for GameStop in the form of trade-ins, new products, and new customers.[222] Player896 emphasized that GameStop's share price has historically increased during past console cycles.[223] Additionally, Player896 explained that GameStop planned to go digital, evidenced by the company's strategy to release a mobile app and create an online store presence by the end of that month.[224] Further, Player896 mentioned that GameStop's loyalty program accounts for almost 55 million users.[225]

Moreover, Player896 also gave an informative breakdown of GameStop's financial position.[226] The user emphasized that GameStop pushed back 50% of its debts for two years and had decent cash flow.[227] GameStop had significantly reduced inventory, which enabled them to buy new inventory and sell it fast.[228] Lastly, GameStop had recently cut its selling, general, and administrative expenses by 28% in preparation for the next console cycle.[229] Thus, Player896 expressed legitimate financial reasons for favoring GameStop's stock.

However, Player896 had an ulterior motive in giving financial advice to strangers on the internet, which was made obvious to those who read the title of his post: "Bankrupting Institutional Investors For Dummies Ft. GameStop."[230] Player896 pled their case for why WSB members' purchase of GameStop stock had already started to harm institutional investors on Wall Street positioned short in GameStop.[231] Player896 noted that Wall Street shorted GameStop with the belief that GameStop would not survive past the newest console cycle.[232] Additionally, Player896 bitterly pointed out that Wall Street institutions intended to cash out once

220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*

their prediction about GameStop's demise came true.[233] Next, Player896 stressed that "70% of the shorts are underwater," which is a another way of saying that 70% of investments that shorted GameStop will likely result in a loss.[234] Player896 further explained that if GameStop stock reached $15 per share, then there would be a "massive short squeeze."[235] Player896's post about attempting to force the massive short squeeze is a testament to the mindset shared by the members of WSB: generate financial losses throughout Wall Street's institutions. Presumably, Player896 knew they had substantial influence on the members of the page because their plan to cause a short squeeze required the participation of many WSB members, and their posts received a lot of attention.

It is evident that Player896 extensively researched GameStop's financial statements and the management team's plan for the future of the company.[236] However, Player896 was clear about their intention to cause Wall Street to lose money as well.[237] Thus, Player896 intentionally sought to increase the market price of GameStop stock by encouraging the WSB members to buy the company's stock, but Player896 accomplished this goal by providing legitimate investment tips.[238] Player896 along with their WSB followers perfectly embodied the definition of open market manipulation through their legal transactions that simultaneously manipulated the market.

C. Trey Collins A.K.A. Trey's Trades

Another person credited with leading the Reddit rebellion is a man named Trey Collins, who was 23 years old at the time.[239] Collins goes by the alias "Trey's Trades" on social media sites like YouTube, Twitter, and Reddit.[240] Collins initially gained credibility by turning $8,000 into $1 million by trading AMC stocks and has since built himself as the main

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233. *Id.*
234. *Id.*
235. Ricci & Sautter, *supra* note 8.
236. Roaring Kitty, *supra* note 210.
237. *Id.*
238. *Id.*
239. Abram Brown, *The 23-Year-Old Army Officer Turned YouTuber Leading The AMC Meme Stock Frenzy*, FORBES (June 13, 2021, 6:00 AM EDT), https://www.forbes.com/sites/abrambrown/2021/06/13/the-23-year-old-army-officer-turned-youtuber-leading-the-amc-meme-stock-frenzy/?sh=50068e1b7ea5 [https://perma.cc/MA29-ZRV9].
240. *Id.*

driving force behind retail investors' interest in AMC.[241] He has no formal financial education and works a 9–5 day job, but he finds time to post 15–20 minute YouTube videos daily.[242] His YouTube channel primarily deals with news and trends relating to AMC's stock price.[243]

One of the first videos Collins devoted to AMC was on YouTube in January 2021.[244] Collins's YouTube videos reveal that he makes trading decisions based off of trends he sees in the price of securities, while occasionally lightening the mood with odd, yet humorous, comments.[245] Collins analyzes trends in the AMC stock price while noting what he sees on graphs and why he believes the price is trending up or down at that point.[246] Collins speculates on what AMC's stock is going to do in the near future and offers reasons for why he believes his predictions will come true.[247] He is thorough and transparent in his videos.[248] Additionally, Collins is known for his enthusiasm and passion when it comes to AMC, and his fans say its infectious.[249] Fans of the videos do not seem to care about the conflict of interest; that is, someone buying shares of stock while simultaneously explaining why everyone else should buy the same shares of stock.[250] One of his many fans stated, "I think it's important to see somebody being passionate and energetic. It transfers to me—it makes me hyped about it."[251]

Collins was aware of his following based on the number of subscribers to his YouTube channel, which increased from 13,500 in January 2021 to 150,000 just three months later.[252] In 2023, Trey's Trades has nearly 370,000 subscribers on YouTube.[253] Because Collins was aware of his following, he certainly, at least in some way, knew he had the ability to influence the price of the stocks he recommended to his followers;

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241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* Trey's Trades, YOUTUBE, https://www.youtube.com/@TreysTrades [https://perma.cc/9CG2-8AD7] (last visited Mar. 2, 2023).

however, he was honest about his intentions for recommending the stock, and he was transparent about his reasoning.[254]

On January 28, 2021, the trading platform "Robinhood" blocked any new purchases of certain companies' stocks including GameStop, AMC, and Nokia.[255] As a result, the once-volatile market for these stocks slowly stabilized.[256] However, the WSB members had certainly made their impact, as "Melvin Capital lost more than 50% on its investments" in January 2021.[257] Keith Gill, Player896, and Trey Collins appeared to achieve their goal of making Wall Street suffer; however, it is unknown if and at what price any of them sold their shares of stock.

III. The Reasons Why Retail Investors Won

The question in the aftermath of the January 2021 events is whether any WSB members could be liable for violating federal securities laws for their activity on the social media cite. There are two avenues for finding an investor liable for market manipulation: § 9(a)(2) of the Securities and Exchange Act and Rule 10b-5.[258] It is best to start with § 9(a)(2) since Congress created it specifically to prevent market manipulation.[259]

A. The Impact of § 9(a)(2)

The *Crane* court's interpretation of § 9(a)(2) demonstrates that § 9(a)(2) requires: (1) a manipulative motive and willfulness; (2) a financial interest; and (3) the manipulative motive must create some sort of artificial value in the security.[260] The three leaders of the WSB page, like many of the other WSB members, had the intent to raise the price of the stocks they posted about on the WSB page. Keith Gill posted monthly pictures of his brokerage account, assuring members that he was not going to sell, while implying that other people should buy and hold GameStop

254. *Id.*
255. Rob Davies, *GameStop shares plunge after ban by Robinhood app*, THE GUARDIAN (Jan. 28, 2021, 11:34 AM EST), https://www.theguardian.com/business/2021/jan/28/gamestop-shares-robinhood-app-ban-blackberry-amc-nokia-reddit [https://perma.cc/YQA2-Q45V].
256. *Id.*
257. Chung, *supra* note 184.
258. Dever & Murray, *supra* note 19.
259. *Id.*
260. *See generally* Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969).

to increase the price.[261] Player896's post was titled "How to Bankrupt Institutional Investors for Dummies" and then explained that if GameStop reached $15 per share, there would be a "massive short squeeze" that would cause significant loss for institutional investors.[262] Further, Trey Collins prefers short term gains to make money in the market, so he encourages his followers to buy certain stocks in order to raise the price in a short period of time.[263] While these three individuals, along with many other WSB members, had the intent to increase the price of the security, the *Crane* court's interpretation demonstrated that "manipulative motive and willfulness" cannot be satisfied merely by buying a large quantity of stock if there is no financial interest.[264]

The *Crane* court found Standard liable under § 9(a)(2), holding that the desire for a merger to close based on the manipulated price movement was a sufficient interest to satisfy the financial-interest requirement.[265] The three leaders each satisfy the financial-interest requirement because all three individuals owned shares of the stocks they endorsed and would profit from the increased price.[266] The three members, however, did not create any artificial value. Admittedly, the value in the WSB stocks was not obtained the traditional way, but an unorthodox increase in value does not necessarily mean the value is artificial. The *Cohen* court stated that § 9(a)(2) requires a showing that the manipulative actions "must be willfully combined with something more to create a false impression of how market participants value a security."[267] The *Cohen* court's language illustrates that value can be considered artificial if the market participants have a false impression of where a stock has gotten its value.[268] With respect to WSB, the members presumably bought certain stocks because other members, like the three individuals mentioned above, encouraged them to buy that stock.[269] Keith Gill, Player896, and Trey Collins were transparent with their ideas that if enough WSB members buy a stock, then the demand will increase, as will the stock price. Thus, WSB members, as market participants, knew that the value was coming from the volume of

261. Verlaine & Banerji, *supra* note 199.
262. Player 896, *supra* note 218.
263. Brown, *supra* note 239.
264. *Crane Co.*, 419 F.2d at 794.
265. *Id.*
266. Class Action Complaint, *supra* note 201; Player896, *supra* note 218; Brown, *supra* note 239.
267. Cohen v. Stevanovich, 722 F. Supp. 2d 416, 424 (S.D.N.Y. 2010) (quoting Santa Fe Indus. v. Green, 430 U.S. 462, 476 (1977)).
268. *See id.*
269. Brown, *supra* note 239.

trading that the WSB page generated. Thus, the market participants had no false impression as to the reason behind the value of the security.

Further, the *Cohen* court stated that the plaintiff's opposition brief did not contain "wash sales, matched orders, rigged prices, or some other manipulative act intended to mislead investors."[270] Thus, the court suggested that a manipulative act must be something inherently manipulative, like the financial fraud schemes the court listed. Essentially, the retail investors each chose to purchase the same stocks at similar times, meaning the value of the stock is rooted in the natural forces of supply and demand. Thus, it is unlikely that a court would find that the WSB members engaged in a manipulative act because the WSB members' transactions were all legal.

Due to the large number of members in the WSB community and any similarly situated communities, it is difficult to distinguish between instances of a community acting together as market participants and instances of a group of people engaging in market manipulation. For example, a single retail investor could be liable for market manipulation.[271] Alternatively, two or more entities working in tandem could be found guilty of market manipulation.[272] The complex nature of market manipulation poses the issue of whether a definitive line can be drawn between market participants buying stocks at the same time and investors working together to manipulate the market. The key is not to draw the line at the number of people or entities involved in the purchases, but rather to draw the line at the requirements of § 9(a)(2), specifically the provision's artificial-value requirement.

Perhaps it can be argued that the value of the stock was artificial because the WSB members bought the stock with the intent to raise the price of the stock; however, it is difficult to conclude that the value is artificial when such value was a result of the forces of supply and demand. Each of the WSB investors chose to put their money into the stock with the hope and intent that the stock's price would increase, which is typically the purpose behind investing in a company's stock. Simply because a large quantity of retail investors buys the same stock at the same time does not

270. *Cohen*, 722 F. Supp. 2d at 426.

271. Press Release, U.S. Attorney's Office: Southern District of New York, Stock Trader Arrested And Charged With Securities Fraud for Using His Twitter Account to Operate A Pump-And-Dump Scheme (Oct. 26, 2021), https://www.justice.gov/usao-sdny/pr/stock-trader-arrested-and-charged-securities-fraud-using-his-twitter-account-operate [https://perma.cc/C376-Z5FR].

272. *Market Manipulation Examples*, GIBBS L. GRP. LLP, https://www.classlawgroup.com/securities-fraud/stock/market-manipulation/examples/ [https://perma.cc/KE65-R9Q5] (last visited Mar. 2, 2023).

mean the value of that stock is artificial. As previously mentioned, institutional investors trade large quantities of stock, and sometimes those large-quantity trades alter the price of the security.[273] Institutional investors have been trading in this manner for a long time, and now, retail investors have joined forces to match the institutions' power.[274] To prohibit retail investors from banding together and trading similarly to institutional investors is to award more trading freedom to institutional investors than retail investors. Thus, after applying the interpretations from *Crane* and *Cohen*, it is apparent that the three leaders, along with the other WSB members, will not be liable for market manipulation under § 9(a)(2) because they did not engage in manipulative or deceptive conduct, and they did not create a false impression of the value of the stocks to the market participants.[275]

B. Rule 10b-5 Market Manipulation

Another way to hold investors liable for market manipulation is under Rule 10b-5.[276] The *Ernst* Court limited the reach of the word *manipulative* in Rule 10b-5 to "intentional or willful conduct."[277] The Supreme Court highlighted the conduct requirement in *Santa Fe*, explaining that market manipulation "refers generally to practices . . . intended to mislead investors by artificially affecting market activity."[278] The court in *GFL* stated that the essential element of market manipulation is "that the alleged manipulator injected 'inaccurate information' into the market or created a false impression of market activity . . . ."[279] *GFL* reinforces the Supreme Court's Rule 10b-5 interpretation in *Ernst* and *Santa Fe* because it acknowledges the fact that the conduct must be manipulative or deceptive.[280]

Keith Gill, Player896, and Trey Collins each acted with intentional and willful conduct because they all bought stocks with the intention of raising the stock's price by encouraging their large social media

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273. Knowledge at Wharton Staff, *supra* note 36.

274. *Id.*

275. *See generally* Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969); *Cohen*, 722 F. Supp. 2d 416.

276. 17 C.F.R. § 240.10b-5 (2023).

277. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

278. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 475 (1977).

279. *See* GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 205 (3d Cir. 2001).

280. *Id.*

followings to purchase the same stock.[281] As previously stated, the three WSB leaders posted information about their portfolios, certain stocks' histories, predictions, and speculations as to what might happen if a large number of their followers bought certain stocks within a short period of time.[282] Thus, the three WSB leaders willfully and intentionally encouraged others to buy certain stocks with the intention of raising the price through the large volume of trading. However, the three leaders never injected any inaccurate information into the marketplace or created any false impressions. The leaders did not convey anything false or misleading about the stock.[283] Keith Gill showed pictures of his brokerage account illustrating his monthly gains, assured people that he was not going to sell, and gave his reasons for purchasing the stock.[284] Player896 speculated to the members of WSB about how GameStop's stock was going to rise because of the new wave of gaming consoles, emphasized the value of GameStop's forthcoming online presence, and evaluated the company's financial statements.[285] Lastly, Trey Collins analyzed trends and history in the price of certain stocks to speculate what might happen in the future if people continued buying those stocks.[286] Trey used his passion and enthusiasm to convince followers to buy.[287] Thus, the three leaders did not state anything false or misleading about the stock.[288]

Further, the activity in the market was not artificial. The three leaders and their followers on social media are market participants. Market participants can buy a stock for a myriad of reasons. Simply because a large group of retail investors bought stock with the intention of raising the stock price does not mean the value was artificial because the value was legitimate to those who bought the stock. The WSB members knew the stock price was increasing due to the large volume of trades. Thus, the three leaders are not guilty of manipulating the market according to the interpretation of Rule 10b-5 in *Ernst*, *Santa Fe*, and *GFL*.[289]

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281. *See* discussion *supra* Part II.
282. *See id.*
283. *See id.*
284. Verlaine & Banerji, *supra* note 199.
285. Player 896, *supra* note 218.
286. Brown, *supra* note 239.
287. *Id.*
288. *See generally* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189 (3d Cir. 2001).
289. *See generally Ernst & Ernst*, 425 U.S. 185; *Santa Fe Indus., Inc.*, 430 U.S. 462; *GFL Advantage Fund, Ltd.*, 272 F.3d 189.

However, in *Markowski* the D.C. Circuit held that it was not unreasonable for the SEC to interpret § 10(b) and Rule 10(b)-5 to impose liability based on intent to manipulate the market, even though the *manipulative* conduct was legal open market transactions.[290] The court based its decision off of the following language in § (9)(a)(2): "To effect . . . a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."[291] The court stated that a person could be liable under Rule 10b-5 because the language in § 9(a)(2) manifests the idea that Congress believes market manipulation can be based solely on intent.[292] Following the reasoning of the court in *Markowski*, the three WSB leaders would be liable for market manipulation simply because they intended to raise the price of the stocks they bought;[293] however, the opinion in *Markowski* is flawed for a few reasons.

First, the Supreme Court determined that there must be deceptive or manipulative *conduct*, as stated in *Ernst* and *Santa Fe*.[294] Deceptive or manipulative conduct is conduct that creates a price that is not reflective of the forces of supply and demand.[295] Intent to manipulate the market does not qualify as deceptive or manipulative conduct because intent is a state of mind rather than actual conduct. Further, the WSB member's conduct was not manipulative or deceptive, but rather, it was facially legal. Thus, the *Markowski* decision suggests that intent to manipulate the markets can transform facially legal conduct into deceptive or manipulative conduct.[296] Thus, the interpretation in *Markowski* seemingly contradicts the Supreme Court's ruling because while the intention in *Markowski* is manipulative, the conduct is not.[297]

Second, the *Markowski* court's reasoning is flawed because the D.C. Circuit court based its interpretation of § 10(b) and Rule 10b-5 off of an incorrect interpretation of the language in § 9(a)(2).[298] The language "to

290. Markowski v. SEC, 274 F.3d 525, 527 (D.C. Cir. 2001).
291. *Id.* at 529 (alterations in original).
292. *Id.*
293. *See id.*
294. *See generally Ernst & Ernst*, 425 U.S. 185; *see also Santa Fe Indus., Inc.*, 430 U.S. at 475–76.
295. *See generally* Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971).
296. *See generally Markowski*, 274 F.3d 525.
297. *See generally Ernst & Ernst*, 425 U.S. 185; *Santa Fe Indus., Inc.*, 430 U.S. at 475–76; *Markowski*, 274 F.3d at 527.
298. *Markowski*, 274 F.3d at 527.

effect . . . a series of transactions" in § 9(a)(2) refers to an investor's conduct.[299] The investor must actually purchase the security to effect a series of transactions, but there is nothing inherently illegal, deceptive, or manipulative about purchasing securities. Next, "raising or depressing the price of such security . . . for the purpose of inducing the purchase or sale of such security by others" refers to manipulative and deceptive conduct.[300] Intending to change the price of a security with the hope of inducing someone to buy the security requires a person to manipulatively or deceptively affect the price of the security and that manipulated price subsequently induces another person to buy the security. Thus, a person must partake in manipulative or deceptive conduct to fall within the meaning of the language in § 9(a)(2), and the *Markowski* court incorrectly concluded that intent alone is sufficient for liability under Rule 10b-5.[301]

In addition to the decision in *Markowski*, the *Masri* court held a defendant liable for market manipulation under Rule 10b-5 based off the defendant's intent.[302] In *Masri*, the Southern District of New York reasoned that intent is sufficient for market manipulation if it can be proven that "*but for* the manipulative intent, the defendant would not have conducted the transaction."[303] This rationale is flawed for a few reasons. The first flaw, as stated above with *Markowski*, is the fact that the Supreme Court stated that market manipulation requires manipulative or deceptive *conduct*.[304] Similar to *Markowski*, the *Masri* court's ruling that intent is sufficient for market manipulation, despite the conduct involved being facially legitimate, contradicts the Supreme Court's interpretations of Rule 10b-5 in *Ernst* and *Santa Fe*.[305] Second, the rule that the court imposed would be impracticable. The *Masri* court acknowledged that it is inherently ambiguous to determine intent, yet it imposed a rule that would require future courts to determine an investor's subjective intent to the extent of concluding whether a manipulative intent was the sole reason the investor bought the stock.[306] Moreover, courts would have to determine

299. Millar & Pantano, *supra* note 52, at 10.
300. *Id.* at 11 (internal citation omitted).
301. *Markowski*, 274 F.3d at 527.
302. *See generally* SEC v. Masri, 523 F. Supp. 2d 361 (S.D.N.Y. 2007).
303. *Id.* at 372.
304. *See generally* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).
305. *See generally Ernst & Ernst*, 425 U.S. 185; *Santa Fe Indus., Inc.*, 430 U.S. 462.
306. *Masri*, 523 F. Supp. 2d 361.

intent in order to impose liability on many different people for otherwise legal transactions.[307]

Similar to other market manipulators, the WSB members bought securities with the intention of increasing the price; however, the difference is that the WSB members did not create artificial value in the securities because they make up the market participants, which means the prices were moving in accordance with the natural forces of supply and demand. Thus, it would be unfair to characterize WSB members as market manipulators simply because the WSB members want the price of their investment to increase. If an investor was deemed a market manipulator for wanting the price of a security to increase after investing in it, then the lion's share of investors would be considered market manipulators.

It appears that the WSB members were successful in their rebellion against Wall Street institutional investors, but the courts in *Markowski* and *Masri* would likely decide otherwise.[308] Nonetheless, the Supreme Court's interpretation of Rule 10b-5 ought to preempt the interpretations in *Markowski* and *Masri*.[309] Further, the *Markowski* and *Masri* courts posed rules that would be difficult and unfair to enforce.[310] Thus, the WSB leaders, along with the other WSB members, should not be liable for market manipulation under Rule 10b-5, despite the decisions in *Markowski* and *Masri*. Now that the "Reddit Rebellion" is over, the lack of clarity surrounding market manipulation and retail investors on social media poses the legal question of what comes next.

IV. WHAT COMES NEXT?

The ideal solution to the areas of confusion surrounding the liability of retail investors on social media sites is to follow the Supreme Court's ruling that market manipulation requires manipulative or fraudulent conduct.[311] As seen in *Markowski* and *Masri*, some courts believe that intent alone is enough for a person to manipulate the market; however, holding an investor liable for market manipulation because the investor intended to change the price of a security by purchasing that security is not

307. Multer, *supra* note 48.
308. *Stare decisis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis [https://perma.cc/D79G-544H] (last visited Mar. 10, 2022).
309. *See generally Ernst & Ernst*, 425 U.S. 185; *Santa Fe Indus., Inc.*, 430 U.S. 462.
310. *See generally Ernst & Ernst*, 425 U.S. 185; *Santa Fe Indus., Inc.*, 430 U.S. 462.
311. *See generally Ernst & Ernst*, 425 U.S. 185; *Santa Fe Indus*., Inc., 430 U.S. 462.

what § 9(a)(2) and Rule 10b-5 intended to prohibit.[312] If the SEC wants to impose market manipulation liability based solely on intent, then it must advocate to update market-manipulation laws to fit the investment landscape of the modern world. The new laws could target individuals who intentionally influence large groups of people on the internet regarding securities.

However, enacting laws to fit the SEC's take on market manipulation could result in problems. First, as previously stated, the SEC has 4,200 employees.[313] As of June 2021, the WSB page had over 10 million members.[314] Enforcing a market manipulation law that imposes liability based on intent alone would be an impossible task for 4,200 people due to the disproportionate number of employees to investors. Second, it would be difficult to draw the line between those with a sufficient influence to be liable under this potential new law and those who are simply putting stock tips into a group text message involving their closest friends. Third, retail investors on social media are not actually manipulating the market. The retail investors that freely buy securities and share it on social media are acting as the forces of the market. Thus, the social media members are the market participants. To say these social media members are market manipulators is to say that market participants are manipulating themselves.[315] Thus, sharing investment ideas and tips amongst other retail investors does not constitute market manipulation, and the increased value that results from the sharing of those tips is not artificial because the investors freely choose to buy the securities.

Further, Congress enacted market-manipulation laws with the intent to keep an open and free market where the natural forces of supply and demand determine a security's price.[316] If a stock price increases because many retail investors on social media each decide to purchase the same stock, then the market is still open and free, and the natural forces of supply and demand are appropriately affecting the stock's price.

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312. *See generally* Markowski v. SEC, 274 F.3d 525 (D.C. Cir. 2001); SEC v. Masri, 523 F. Supp. 2d 361 (S.D.N.Y. 2007).

313. *SEC Employees*, *supra* note 168.

314. Hartwig, *supra* note 170.

315. *See generally Ernst & Ernst*, 425 U.S. 185; *Santa Fe Indus., Inc.*, 430 U.S. at 475–76.

316. Dever & Murray, *supra* note 19.

CONCLUSION

The retail investors on social media are doing what institutional investors have done for years.[317] Institutional investors historically had more resources and power than retail investors, which enabled institutional investors to affect the price of securities by buying and selling those securities in large quantities.[318] The WSB members demonstrated that when retail investors join forces, they can match the power of the authoritative institutional investors, all while not breaking federal market-manipulation laws. It would be unfair to create new laws that prohibit the retail investors from closing the power gap between them and institutional investors. The investment world is changing, and retail investors are taking the power from those who have historically wielded it.

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317. Knowledge at Wharton Staff, *supra* note 36.
318. *Id.*