



November 1, 2017

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-1090

**Manipulative Short Selling in the Biopharmaceutical Industry:
Petition for Rulemaking to Require Disclosure of Short Positions.**

Dear Mr. Fields:

On behalf of MiMedx Group, Inc. (“MiMedx” or the “Company”), I hereby respectfully submit this petition for rulemaking to the U.S. Securities and Exchange Commission (the “Commission”) pursuant to Rule 192(a) of the Commission’s Rules of Practice,¹ requesting that the Commission promulgate rulemaking pursuant to Sections 10 and 13(f) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), to [set up a pilot program to] require the periodic public disclosure of short-sale positions in securities of biopharmaceutical companies by investment advisers.

Given the current dearth of reporting and disclosure of short positions, the resulting information vacuum is manipulated by persons seeking to peddle inaccurate data and unfounded rumors (often unverifiable) in order to maximize their own financial gain at the expense of the investing public. Companies are often left defenseless in the face of well-orchestrated media “distort” attacks. These practices are particularly damaging for biotech and life science companies – the favored prey of so-called “wolf packs” engaging in “short and distort” schemes. These schemes often prove devastating to the company and its investors, and worse, deprive our society of potential advances in lifesaving technologies, resulting in costlier or fewer products and services for patients and consumers.

MiMedx is the leading biopharmaceutical company developing and marketing regenerative and therapeutic biologics utilizing human placental tissue allografts with patent-protected processes for multiple sectors of healthcare. “*Innovations in Regenerative Medicine*” is the framework behind our mission to give physicians products and tissues to help the body heal itself. For additional information, please visit www.mimedx.com. As detailed below, MiMedx serves as an example of the experience common to companies in the biopharmaceutical industry.

¹ 17 CFR § 201.192(a).

We understand and acknowledge that legal short selling² is not always detrimental to the capital markets, and in some instances may contribute to efficient price formation, enhance liquidity, and facilitate risk management. The Commission has acknowledged the benefits of short selling,³ but also has found it necessary to regulate short selling to address abuses, including the potential for short-sale activity to exacerbate market declines.⁴ The Commission promulgated the “naked” short selling antifraud rule⁵ and has regulated the use of shares purchased in a public offering to cover a short position.⁶ The Commission also has prosecuted certain short sale activity that manipulates the market.⁷ Thus, to be clear, my request is not designed to limit legitimate market trading activity. Rather, the Commission should promote disclosures and transparency for a fair, efficient, and orderly market that can sustain both long and short position investments in securities.

We submit to you that this is the opportune time for the Commission to end the current lack of transparency of short positions which enables trading behaviors that unfairly harm companies and their investors.

The Commission’s Existing Authority Is Sufficient to Act on This Petition

The Commission has ample authority to promulgate a short-position disclosure regime under the rulemaking authority provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”) and the Commission’s plenary rulemaking authority under Section 10 of the Exchange Act. Under Section 10(a)(1) of the Exchange Act, the Commission has authority to promulgate rules that are necessary or appropriate and in the public interest or for the protection of investors concerning short sales, which indeed the Commission has previously used to prescribe short-position reporting.⁸ Section 929X(a) of the Dodd-Frank Act amended Section 13(f) of the Exchange Act to direct the Commission to “prescribe rules providing for the public disclosure of the name of the issuer and

² Short selling involves a sale of a security that the seller does not own and that is consummated by the delivery of a security borrowed by or on behalf of the seller. 17 CFR § 242.200(a).

³ See, e.g., Amendments to Regulation SHO and Rule 10a-1, 71 Fed. Reg. 75,068, 75,069-70 (Dec. 13, 2006), available at <https://www.gpo.gov/fdsys/granule/FR-2010-03-10/2010-4409> (“Short selling provides the market with at least two important benefits: market liquidity and pricing efficiency.”).

⁴ See Amendments to Regulation SHO, Exch. Act Release No. 34-61595 (Feb. 26, 2010), 75 Fed. Reg. 11,232 (Mar. 10, 2010), available at <https://www.gpo.gov/fdsys/pkg/FR-2010-03-10/pdf/2010-5075.pdf> (“[W]e remain concerned that excessive downward price pressure on individual securities accompanied by the fear of unconstrained short selling can undermine investor confidence in our markets generally.”).

⁵ See “Naked” Short Selling Antifraud Rule, Exch. Act Release No. 34-58774 (October 14, 2008), 73 Fed. Reg. 61666 (October 17, 2008), available at <https://www.gpo.gov/fdsys/pkg/FR-2008-10-17/pdf/E8-24785.pdf>.

⁶ See Short Selling in Connection With a Public Offering, Exch. Act Release No. 34-56206 (Aug. 6, 2007), 72 Fed. Reg. 45,093 (Aug. 10, 2007), available at <https://www.gpo.gov/fdsys/pkg/FR-2007-08-10/pdf/E7-15608.pdf>.

⁷ See Exch. Act Release No. 34-58774, *supra* note 5, at nn.8, 27 (citing Commission enforcement against illegal short selling).

⁸ Disclosure of Short Sales and Short Positions by Institutional Investment Managers, Exch. Act Release No. 34-58785 (Oct. 15, 2008), available at <https://www.sec.gov/rules/final/2008/34-58785.pdf>.

the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period,” providing that “[a]t a minimum, such public disclosure shall occur every month.”⁹

Broad Public Demand for Rulemaking

Our petition for a rulemaking requiring institutional investors and investment advisers to disclose certain short positions aligns with concerns expressed by the U.S. Congress, the Commission, two of the largest U.S. stock exchanges, and individual members of Congress¹⁰ in petitions for rulemakings before the Commission,¹¹ and identified as a priority by participants at the 2016 SEC Government-Business Forum on Small Business Capital Formation.

Section 417(a)(2) of the Dodd-Frank Act directed the Commission’s Division of Risk, Strategy, and Financial Innovation to study:

(A) the feasibility, benefits, and costs of requiring reporting publicly, in real time short sale positions of publicly listed securities, or, in the alternative, reporting such short positions in real time only to the Commission and the Financial Industry Regulatory Authority; and

(B) the feasibility, benefits, and costs of conducting a voluntary pilot program in which public companies will agree to have all trades of their shares marked “short”, “market maker short”, “buy”, “buy-to-cover”, or “long”, and reported in real time through the Consolidated Tape.

Through this provision, Congress expressly recognized the need for more prominent disclosures in the short-selling space, and directed the Commission’s Division of Risk, Strategy, and Financial Innovation (now called the Division of Economic and Risk Analysis, the “Division”) to investigate such a requirement. The Division performed the study, and stated its belief that there are “benefits in public Real-Time Short Position Reporting in discouraging abusive short selling, particularly if it facilitates better monitoring for abusive short selling or real-time surveillance by self-regulatory organizations (‘SROs’),” and that disclosure could also “facilitate new research on short selling and short sale strategies.”¹² Nonetheless, the

⁹ Pub. L. No. 111-203, § 929X(a) (codified as amended at 15 U.S.C. § 78m(f)(2) (2012)).

¹⁰ Letter from Hon. Robert Menendez, Hon. Jeffrey A. Merkley, Hon. Tammy Baldwin, U.S. Senate, to Hon. Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n (Jan. 9, 2017).

¹¹ Letter from Biotechnology Innovation Org. to the U.S. Sec. & Exch. Comm’n (Mar. 11, 2016), available at <https://www.sec.gov/comments/4-691/4691-5.pdf>.

¹² Short Sale Reporting Study Required by Dodd-Frank Section 417(a)(2), Exch. Act Release No. 34-64383, 100 SEC Docket 3701, at iv (May 3, 2011), available at <https://www.sec.gov/files/short-sale-position-and-transaction-reporting%2C0.pdf>.

Division found that real-time short position reporting would be cost-prohibitive.¹³ We note that our petition does not request real-time reporting and would result in far lower reporting burdens.

Despite the Commission's determination in 2011 that real-time short position reporting was not feasible, the New York Stock Exchange Group ("NYSE") petitioned the Commission in October 2015 to "bring light to a less transparent and increasingly consequential corner of the securities market through instituting a short-sale activity reporting and disclosure regime applicable to institutional investment managers."¹⁴ NASDAQ petitioned the Commission in December 2015 to "take swift action to promulgate rules to require public disclosure by investors of short positions in parity with the disclosure regime applicable to long positions, including the timing for such disclosure and when updates are required."¹⁵ Thus the two largest exchanges in the U.S. have each separately petitioned the Commission to craft rules that require the disclosure of short positions. We echo the sentiments expressed in those previous petitions and urge the Commission to act on the concerns of Congress, NYSE, NASDAQ, and the Commission itself.

Manipulative Short Selling

While conventional short selling can, within a well-regulated environment, produce certain positive outcomes, manipulative short selling results in harmful market inefficiencies and can severely damage otherwise healthy companies and investors who hold long positions in the stock of such companies. Manipulative short sellers engage in practices that are not calculated as part of a rational and legitimate hedging or market making strategy, and often attempt to illegally manipulate share prices for personal monetary gain.

The Commission has previously recognized the harm that manipulative short selling can cause, noting that "unrestricted short selling can exacerbate a declining market in a security by increasing pressure from the sell-side, eliminating bids, and causing a further reduction in the price of a security by creating an appearance that the security price is falling for fundamental reasons."¹⁶ Additionally, in proposing an Emergency Order during the financial crisis requiring Form SH filings, the Commission expressed its concern about "sudden and excessive fluctuation of securities prices and disruptions in the fair and orderly functioning of the securities markets," and about "possible unnecessary or artificial price movements that may be based on unfounded rumors and may be exacerbated by short selling."¹⁷

¹³ *Id.*

¹⁴ NYSE, Petition for Rulemaking Pursuant to Sections 10 and 13(f) of the Securities Exchange Act of 1934 (Oct. 7, 2015), available at <https://www.sec.gov/rules/petitions/2015/petn4-689.pdf>.

¹⁵ NASDAQ, Petition for Rulemaking to Require Disclosure of Short Positions in Parity with Required Disclosure of Long Positions (Dec. 7, 2015), available at <https://www.sec.gov/rules/petitions/2015/petn4-691.pdf>.

¹⁶ Proposed Rule: Short Sales, Exch. Act Release No. 34-48709, 68 Fed. Reg. 62,972 (Nov. 6, 2005), available at <https://www.sec.gov/rules/proposed/34-48709.htm>.

¹⁷ Disclosure of Short Sales & Short Positions By Institutional Investment Managers, Exch. Act Release No. 34-58785, 73 Fed. Reg. 61,678 (Oct. 17, 2008), available at <https://www.sec.gov/rules/final/2008/34-58785fr.pdf>.

Manipulative short sellers use various strategies to distort markets for personal gain. For example, the “bear raid,” or “short and distort,” strategy involves selling a security short in an effort to drive down the security’s price by creating an imbalance of sell-side interest.¹⁸ This illegal strategy is based on short selling the securities of a target company in high volume combined with the spread of negative rumors or innuendo about the company.¹⁹ Numerous commentators have observed that this brand of manipulative short selling may have been directly responsible for the 1929 stock market crash and subsequent depression.²⁰ Other commentators assert that “shorters and distorters” either directly caused or hastened the collapses of Bear Stearns and Lehman Brothers in the fall of 2008, precipitating the financial crisis.²¹

Recognizing the severe harm that this type of manipulative short selling can cause, the Commission previously issued an Emergency Order to curtail these types of activities. During the financial crisis, the Commission required institutional investment managers to report information concerning their short sales of section 13(f) securities on a weekly basis in order to reduce the potential for manipulative short selling.²² Likewise, the Commission has brought enforcement actions against such shorters and distorters. For example, in 2008 the Commission charged a trader with securities fraud and market manipulation for intentionally disseminating a false rumor about a company after the trader had sold the company’s stock short.²³ The false rumor caused the share price to fall dramatically, enabling the trader to profit. Likewise, in 2000, the Commission charged a trader with a similar scheme.²⁴ The trader expected a decline in the share price of a company and short sold the stock, but within a week, the share price had increased resulting in the trader exposed to a large loss. The trader then used an alias to spread a false rumor online that the Commission was investigating the company’s accounting practices. The false information caused the share price to fall nearly 50% within the first hour of trading the next day.

The Unfair and Inefficient Market of Short Sales in MiMedx Stock

There are certainly a thousand good examples of illegal short selling of U.S. public companies over the last decade. We have endured various techniques and results of illegal short selling. MiMedx Group is thus a key example, or “poster child,” of this kind of market manipulation.

¹⁸ Exch. Act Release No. 34-48709, *supra* note 16.

¹⁹ See Charles F. Walker & Colin D. Forbes, SEC Enforcement Actions and Issuer Litigation in the Context of a “Short Attack,” 68 Bus. Lawyer 687, 687 (May 2013).

²⁰ Exch. Act Release No. 34-48709, *supra* note 16 (citing 7 Louis Loss and Joel Seligman, Securities Regulation 3203-04, n.213 (3d ed. 1989)).

²¹ See Walker & Forbes, *supra* note 19, at 2 n.2.

²² Exch. Act Release No. 58785, *supra* note 17.

²³ Paul S. Berliner, Exch. Act Release No. 34-57774, 93 SEC Docket 545 (May 5, 2008), *available at* <https://www.sec.gov/litigation/litreleases/2008/lr20537.htm>.

²⁴ SEC v. Mark S. Jakob, Litig. Release No. 16671, 73 SEC Docket 415 (Aug. 31, 2000), *available at* <https://www.sec.gov/litigation/litreleases/lr16671.htm>.

Short selling is a common and long-standing trading practice that can improve market efficiencies. However, manipulative short selling can influence the market by artificially depressing share prices. Manipulative short sellers can face acute moral hazards which lead some unscrupulous investors to take explicit steps to depress share prices of shorted companies. Coupled with a social media landscape that can disseminate un-curated information on shorted companies to a large number of investors, manipulative short selling can generate unusual and harmful outcomes for companies and their long investors and deserves careful scrutiny by the Commission. Such is the case with the recent aggressive shorting of MiMedx stock. A market composed of rational actors trading in the stock of a company with MiMedx's fundamentals would not result in the observed short interest activity in MiMedx stock. The most logical explanation is that traders are attempting to distort the rational functioning of the market for MiMedx stock in an attempt to negatively affect the share price for their monetary gain.

Background

There are many ways of assessing the fundamental value of a company, but experts tend to coalesce around several factors, which include, among others: revenue, earnings, return, recommendations, earnings surprises, forecast, and earnings growth.²⁵ By these metrics, a company with the profile of MiMedx has a strong fundamental value and one would not anticipate traders to take short positions in the stock in large numbers absent manipulative activity.

MiMedx operates in a niche submarket within the larger biopharmaceutical industry. Within this niche market, MiMedx holds a significant patent portfolio and regularly conducts Food and Drug Administration ("FDA") trials of new and innovative products.²⁶ The products that MiMedx produces fulfill a demand for high quality surgical grafts – a demand that other biopharmaceutical companies have largely been unable to serve. As a result of competing in a high-demand, but largely underserved market, and producing products that consistently perform better than competing products, MiMedx has experienced rapid, but steady growth over time.²⁷

Because of MiMedx's position within the market, its underlying metrics demonstrate a strong fundamental share value. In terms of revenue, MiMedx anticipates total revenue of approximately \$320 million for 2017,²⁸ which is an increase from approximately

²⁵ NASDAQ, The NASDAQ Dozen, <http://www.nasdaq.com/investing/dozen/> (last visited Oct. 30, 2017)

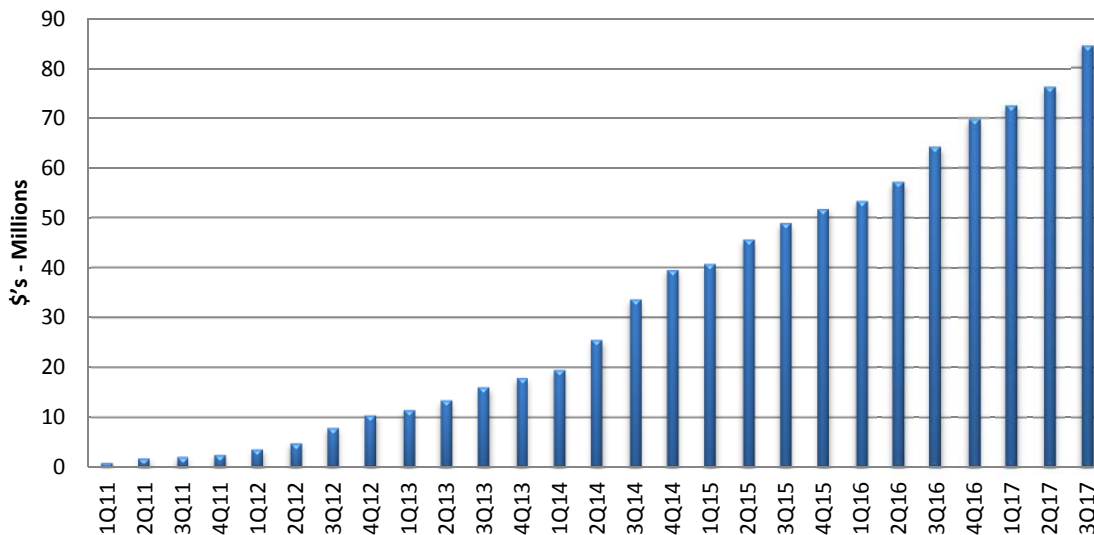
²⁶ See MiMedx 10-K for fiscal year ending December 31, 2016, available at <https://www.sec.gov/Archives/edgar/data/1376339/000137633917000042/mdxg-20161231x10k.htm>.

²⁷ See Seeking Alpha, "MiMedx: America's 5th-Fastest-Growing Company," <https://seekingalpha.com/article/4111056-mimedex-americas-5th-fastest-growing-company> (last visited Oct. 30, 2017).

²⁸ MiMedx News Release, "MiMedx Announces Record Results for Third Quarter of 2017 and Raises Full Year Revenue Guidance," <http://phx.corporate-ir.net/phoenix.zhtml?c=213465&p=irol-newsArticle&ID=2311784> (last visited Oct. 30, 2017).

\$125 million in 2015 and \$25 million in 2013.²⁹ MiMedx expects third-quarter revenue to total roughly \$84.6 million, ahead of its guidance range of \$79-80 million, representing a growth rate of 31% year over year.³⁰ MiMedx was recently named by *Fortune Magazine* as the fifth fastest growing public company in the country,³¹ and has demonstrated 27 straight quarters of incremental revenue growth.³² Earnings have likewise been strong, and the company has set the realistic earnings per share target of \$1 per share by 2020. MiMedx's total return price has increased nearly six fold over the past five years, and net income has increased significantly over the same time horizon. As a result, four of the six analysts listed on NASDAQ for the symbol recommend MiMedx as a "strong buy."³³ The following figures illustrate MiMedx's quarterly revenue and operating cash flow growth.

Figure 1: Revenue Growth by Fiscal Quarter



²⁹ The Motley Fool, "Why MiMedx Group Inc. Is Sinking Today," <https://www.fool.com/investing/2017/10/23/why-mimedx-group-inc-is-sinking-today.aspx> (Oct. 23, 2017) (last visited Oct. 30, 2017).

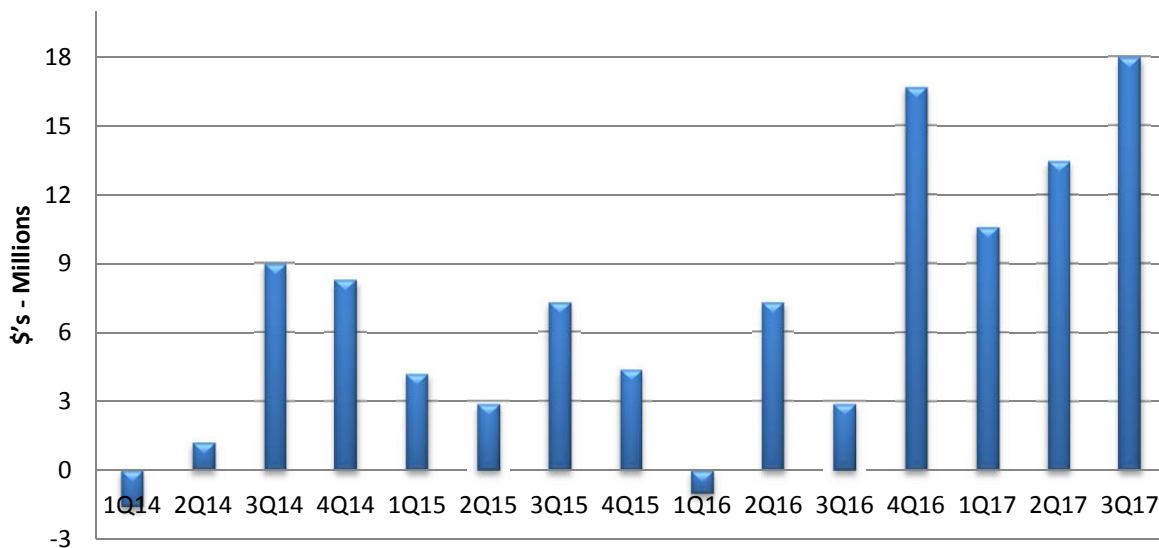
³⁰ *Id.*

³¹ Fortune Magazine, "100 Fastest Growing Companies," available at <http://fortune.com/100-fastest-growing-companies/mimedx-group/>.

³² See MiMedx 10-K for fiscal year ending December 31, 2016, available at <https://www.sec.gov/Archives/edgar/data/1376339/000137633917000042/mdxg-20161231x10k.htm>.

³³ NASDAQ, Analyst Research, Recommendations, <http://www.nasdaq.com/symbol/mdxg/recommendations> (last visited Oct. 30, 2017).

Figure 2: Operating Cash Flow Growth by Fiscal Quarter



In sum, MiMedx's fundamentals are strong when analyzed according to the factors commonly used by investors to determine share value. MiMedx's fundamentals do not on their face support the extent to which traders have taken large short positions in the company's stock. The large short interest positions in MiMedx stock may therefore indicate the presence of manipulative short selling activity.

Manipulation

The Company's market capitalization climbed over the years in spite of some normal short selling activity. The Company believes the majority of this activity came from persons that are now the subject of enforcement actions by the Securities and Exchange Commission. The cases involve two analysts who were involved in bribing a federal employee at the Center for Medicare and Medicaid to provide information so they could make trading decisions on certain healthcare dialysis companies. These same two analysts had been covering MiMedx since 2012.

In the last 60 days, however, MiMedx has come under a severe and coordinated short sell attack by numerous sources. This was prompted by publications from three organizations that we believe have been paid by persons involved in this coordinated and concerted attack, or are otherwise financially motivated to participate in the attack. Some of these persons are not easily located because there is no information on their principals or their location. As part of their strategy, these persons operate in the shadows, digging up numerous sources of data and attempting to turn that into negative information and innuendo on the Company.

Unfortunately, MiMedx terminated some sales personnel in December 2016 for violating their non-compete and duty of loyalty obligations to the Company. Civil lawsuits were filed against several of these individuals because of the extent to which they were selling competitive products while they were full time MiMedx employees. Two of these individuals have become supposed information sources for these short sellers in recent months, and we believe have assisted the creation of the false information.

MiMedx has filed civil actions for libel, slander, defamation, and tortious interference against the three entities. MiMedx developed a significant amount of evidence prior to filing the lawsuits and the Company is still in the process of perfecting its case against the two hidden entities.

It is very evident when these coordinated attacks take place. They are all orchestrated around a new publication from one of these sources. On that day, the persons will enter the market with their manipulative trading schemes to rapidly bring the stock down. They attempt to create the illusion that a particular document, published on that day, has truthful information catastrophic to the company. They have friends or paid consultants in the media that help transmit the information rapidly. There is very little a company can do to thwart the coordinated daily attacks because of the trading schemes that are utilized.

MiMedx has otherwise traded in a very orderly fashion over the years. Numerous legitimate firms have given the Company and stock very positive and professional analyst coverage.

On August 24 of this year, the Company's stock peaked at \$17.34 a share. That gave the Company a market capitalization of \$1.93 billion. This was not out of the ordinary for a biopharma company which has a 30% growth rate in revenues and profits. In addition, the Company has a technology platform that has a \$10 to 20 billion revenue potential in the years ahead. That valuation of roughly six times the 2017 revenue of \$320 million is not out of the ordinary for a company with these attributes.

With their concentrated and coordinated short sell attacks beginning in early September, the Company's stock was brought down in a matter of days to \$11.78 a share. The stock recovered to approximately \$14.00 a share when a second concerted attack brought the stock down 11% in one day and 5% the next day.

The Company has over the years purchased over \$110 million of its stock in the open market, which has provided the shareholders an 8% reduction in the number of shares issued and outstanding. However, there are certain periods where the Company does not buy shares in order to comply with SEC rules related to the Company having more information about its performance than its shareholders. It is during these "quiet periods" where the short sellers are particularly shrewd in their attacks.

Because of my 36 years of being the Chairman and/or CEO of public healthcare companies, I have seen "the good, the bad, and the ugly" of short selling over the decades. In

my opinion, the short selling done in the shadows has become out of control, and it is causing significant dislocations in the U.S. financial markets. The damage that it causes small investors is particularly outrageous. These individuals do not understand what is transpiring when one of their investments is under attack. The markets have become very unbalanced and unfair, particularly to the millions of small shareholders. In addition, this practice is extremely disruptive to the companies themselves, and could very well jeopardize the existence of some organizations.

Petition for Rulemaking

For the above reasons, we petition the Commission to promulgate rulemaking pursuant to its authority under Sections 10 and 13(f) of the Exchange Act to set up a pilot program to require the periodic public disclosure of short-sale positions in securities of biopharmaceutical companies by investment advisers.

In our view, the appropriate disclosure of short positions would:

- Require the periodic reporting by investment advisers of the name of biopharmaceutical company and the title, class, CUSIP number, aggregate amount of the number of short sales of each NMS security,³⁴ and any additional information determined by the Commission;
- Require public disclosure of the reported information, including the investment adviser's identity and the short-sale transaction and position information for of each NMS security of a biopharmaceutical company, on no more than a two-week delayed basis; and
- Address the disparity between long-position and short-position reporting requirements.

We trust that the appropriate reporting requirements will be made by the Commission after considering the comments of investors, public companies, other market participants, and the general public.

* * *

³⁴ Rule 600(b)(46) of Regulation NMS defines an "NMS security" as "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." 17 CFR § 242.600(b)(46).

Mr. Brent J. Fields

November 1, 2017

Page 11

Please contact the undersigned should you have any questions regarding this petition.

Thank you for your consideration.

Respectfully yours,

Parker H. "Pete" Petit
Chairman of the Board and
Chief Executive Officer

CC: The Honorable Jay Clayton
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar
Brett Redfearn, Director of the Division of Trading and Markets
Jaime Klima, Chief Counsel to Chairman Clayton
Jeffrey Dinwoodie, Senior Advisor to the Chairman
Kristina Littman, Senior Advisor to the Chairman
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