Fiduciary Duty and Social Responsibility

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Abstract:

This paper focuses on the importance of the fiduciary duty that directors and officers of corporations owe to shareholders and explores the potential conflict between this duty and the desire of directors and officers to pursue corporate social responsibility policies. Fiduciary duty operates as an essential constraint on the behavior of directors and officers of corporations, providing protection for shareholders against decisions that are grossly incompetent or are tainted by a conflict of interest. Ethical decision-making cannot disregard the legal and ethical fiduciary duty owed to shareholders, even to promote socially responsible policies. However, this conflict can often be avoided because there is a strong business case for ethical behavior that promotes social and environmental goals, particularly when those goals align with various aspects of the business. The authors suggest that if the business case cannot be made for a particular socially responsible action, then shareholder approval or ratification should be obtained in order to satisfy the fiduciary duty to shareholders in a legal and ethical manner.

Directors and officers (hereinafter Ds&Os) who formulate policy for both large and small firms thereby impact a number of different stakeholders. The providers of debt and equity capital, employees, customers, suppliers, citizens of the regions in which they operate, society at large, and even future generations each have a stake in the enterprise's activities. The interests of these stakeholders frequently conflict. How then, can the Ds&Os decide policy issues wisely when the impacts on the different groups of stakeholders are so likely to differ? The problem seems insoluble. While such decisions *are* made, one can fairly ask how *should* such decisions be made. In particular, how should the Ds&Os resolve conflicts between their desire to be socially responsible to their stakeholders and their fiduciary obligation to their company's owners?

According to black letter corporate law, Ds&Os are retained by the owners to act as their agents. Their fiduciary duty obligates these agents to act in the interests of the principle as if the agent was promoting his or her own interests: "For centuries court have required trustees to serve the interests of beneficiaries loyally – with the same devotion that the trustees devote to their own interests"[1] The Ds&Os are also subject to various legal obligations to non-owner stakeholders. A society of laws, regulations and contracts govern the company's dealings with its creditors, employees, customers, suppliers, local community, etc.

A company and its Ds&Os are expected to obey the laws and regulations as well as fulfill the terms of its contracts. Business misbehavior may sometimes produce a temporary advantage for the company. In the long run, however, such misbehavior is much more likely to reduce, rather than enhance shareholder wealth. Indeed, the costs incurred by a corporation in the form of fines, penalties, and judgments, along with the increased regulatory burdens that are often imposed in the wake of such scandals, can be quite substantial, not to mention the reputational effects. One recent example is the situation in which Volkswagen was found to be cheating on the emissions tests of its automobiles. As evidenced by the Volkswagen case, among others, in addition to the costs to the corporation, corporate misbehavior may well put the responsible Ds&Os personally at risk. Moreoever, white collar criminals may end up in jail (Enron, WorldCom, Tyco, Volkswagen, etc.).[2]

As fiduciaries, Ds&Os generally are expected to seek to maximize shareholder wealth while living up to their legal, regulatory and contractual obligations.[3] Does this guidance leave room for acting socially responsible and if so, how?

Maximizing shareholder wealth is likely to involve, among other things, being perceived to be a good business citizen. A company that is tagged as a polluter, maker of unsafe products, misleading advertiser, exploiter of its work force, etc. is unlikely to be very successful in creating shareholder value. One that is respected as a good corporate citizen is much more likely to be successful, other things being equal. So in addition to meeting its legal, regulatory and contractual obligations, shareholder wealth maximization will almost always imply operating in ways that receive favorable (as opposed to unfavorable) press. Good public relations are generally a part of effective value maximization. Acting in an ethical, socially and environmentally responsible, manner within the confines of the law may help companies avoid the risks of misbehavior as noted above. Moreover, ethical corporate behavior can provide reputational benefits and generate goodwill. Thus, ethical decision-making and promotion of environmental, social, and governance (ESG) issues that are aligned with the business is often tied to profit maximization and the promotion of the long-term, and oftentimes the short-term, health of the business.[4]

Whenever a board of directors makes a business decision that does not involve a conflict of interest and is not considered a waste of corporate assets, then that decision has the protection of the business judgment rule. That is, courts will give deference to business decisions made by the Board of Directors. So long as the duty of care or the duty of loyalty is not breached, the business judgment rule will protect the decision of the board from second-guessing by the courts.[5] However, if a decision is not motivated by business considerations and/or made to advance the interests of the business, but, rather, for some other purpose, then that decision will lose the protection of the business judgment rule and face review by the court. If companies can articulate a business reason for making the decision, then that decision of the Board of Directors will be protected against judicial interference. However, purely eleemosynary or charitable decisions will lose the protection of the business judgment rule.[6] As the court stated in the 1919 case of *Dodge v. Ford Motor Co.*: "There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his co-directors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes."[7] The court went on to say that "it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere."[8]

While this case is very old, and research has not revealed more recent cases where a board's decision to advance an environmental or social goal was overturned by a court (except perhaps in the dissolution context)[9], this approach dominates the legal landscape. As a result, if Ds&Os make purely ethical decisions without thinking about the profitability of the business, then those decisions will not be given judicial deference pursuant to the business judgment rule. Thus, the Ds&Os may incur legal liability to the shareholders for those decisions. Nevertheless, even under the constraints of *Dodge v. Ford Motor Co*., if the board of directors focuses in on ESG issues that are aligned with the business when making decisions, then those decisions are likely to receive the protection of the business judgment rule.

Given this legal constraint, should managers do more for society at large than simply try to avoid legal and PR problems? Should managers try to foster a better society? In particular, can or should they do so when they perceive a net loss to their shareholders' wealth that is more than outweighed by the social benefit? This very challenging question is at the crux of the debate over social responsibility. This debate is by no means new. See for example, the 1930's exchange between Berle and Dodd in the *Harvard Law Review*.[10] In that debate Berle argued that Ds&Os hold corporate power in trust and must, therefore, act in the shareholders' interests. Dodd, in contrast, argued that Ds&Os, while owing a duty to shareholders, also owe a duty to society. Dodd's recommended approach left it to the Ds&Os how to sort out their conflicting obligations to various stakeholders. Thus we see two opposing views. On the one hand, Berle would have managers look exclusively to the shareholders' interests. Dodd, in contrast, would allow the Ds&Os, to override shareholder interests when they believed doing so was sufficiently in the interest of society. Dodd did not, however, explain how the Ds&Os should decide what is and is not the socially responsible behavior. Nor did he offer any guidance on how to evaluate the tradeoffs between shareholder and other stakeholder interests. Berle's approach appears to be consistent with fiduciary duty while Dodd's does not. This debate was revisited when Milton Friedman wrote his now famous article in response to the advocates of the developing corporate social responsibility movement and continues today.[11]

Ds&Os who use their companies' resources to promote particular social policies may be as much in conflict with their fiduciary duty as Ds&Os who favor their personal interests over the interests of their shareholders, a practice that agency theory has both identified and criticized.[12] Under what circumstances if any, can Ds&Os utilize shareholder wealth in order to promote the interests of some other group of stakeholders? If the Ds&Os want to use shareholder's resources to promote a social purpose, the shareholders could be given the option of approving or vetoing the proposed action. Shareholders not infrequently seek to influence their firm's social behavior by offering resolutions. For example, CREF's 2002 proxy contained two separate shareholder proposals that if passed, would require CREF to divest its portfolio of companies in the tobacco industry and favor those supporting gun control.[13] A third proposal related to reporting on each investment's social and environmental policies.[14] Clearly, many investors are interested in the social policies of the companies in which they invest. While shareholders could have individually used some of the incremental wealth created by the firm to promote a social purpose, often the firm can be more effective than the shareholders acting separately.[15]

A decision to utilize an increment of shareholder wealth to promote manager-favored social objectives without having shareholder approval raises various problems. Assessing social costs and benefits is very difficult. Managers may sincerely believe that a particular policy designed to achieve a particular objective will benefit society far more than the costs to the shareholders. Such judgments are inherently uncertain and indeed very subjective. The Ds&Os who take such actions are not only imposing their own agenda on their company's shareholders, but are also assuming the correctness of their own analysis of the relative cost/benefits. Others with differing social welfare functions may well disagree with their analysis.

A second problem arises when Ds&Os seek to promote objectives that are opposed by significant numbers (perhaps a majority) of their shareholders. For example, such issues as gun control, abortion, affirmative action, bilingual education, immigration policy, trade policy, tax policy, prohibition, legalization of drugs, same sex marriage, and so on generally raise strong feelings on both sides. Ds&Os who use their shareholders' resources to promote one side of such controversies are inevitably promoting policies that are opposed by significant numbers of their company's owners. For shareholders as a group to impose costs on a minority of their fellow shareholders is one thing. It is quite another for managers to impose their personal agendas on their firm's shareholders when a significant-sized minority and quite possibly a majority of the shareholders do not sympathize with those objectives. Social/political activism that promotes (liberal or conservative) causes with shareholder resources would appear to violate the managers' fiduciary obligations unless the shareholders have formally instructed the Ds&Os to support these social activities.

Two hypothetical (slightly disguised) examples may help illustrate how a social political agenda could conflict with effective management. Each example may be seen to bear some resemblance to a real life story.

First, consider the case of a highly respected editor of a major national newspaper who had a writer who was an African American. The editor was a Caucasian man who had grown up in the segregated South. By his own admission the editor felt guilt for the way African Americans had been treated by his fellow Southerners. The editor took a particular interest in the career of this African American writer. He was, however, warned repeatedly that much of the writer's work looked to be plagiarized. The editor admitted, after the fact, that he gave the writer too many second chances. When it finally came out that much of the writer's work was indeed plagiarized, the newspaper was very embarrassed. Not only was the writer let go but the editor himself was forced to resign.[16]

The second example involves a company that owns television stations in a number of major population centers. The managers of the company were known to be supporters of conservative causes. Shortly before a presidential election, they ordered each of their local stations to broadcast a controversial quasi documentary that was highly critical of the more liberal presidential candidate. The result of the uproar accompanying the decision to broadcast the story was a substantial decline in the market price of the company's stock.[17]

In both of these examples, one involving a liberal leaning bias and the other a conservative leaning bias, ill advised decisions had an adverse effect on the shareholders. While the poor decisions can be criticized on their own merits, the liberal/conservative bias of the decision maker clearly played a role in the process. In other words, the personal agendas of the managers who were supposed to be acting in the interest of the owners led to a sub optimal result for the owners.

Still, one wonders if other circumstances exist where managers can depart from the goal of shareholder wealth maximization in order to promote some other objective. Recall the two extreme positions. Berle would say "no" while Dodd would not only say "yes," but would leave it up to the Ds&Os to decide how far to depart. Perhaps we can find a middle ground. One guidepost: "Would a majority of the shareholders approve of the action?" Even without the guidance of a shareholder resolution, some actions would no doubt be in line with shareholder interests.

Suppose a news media learned an important military secret such as the date of a planned military action. Publicizing the information might sell a lot of newspapers, but would not be in the national interest. Most shareholders would probably prefer that their company not publicize that sensitive information. Similarly, suppose a company owns property that containes an important archaeological site. Shareholders might well want the site maintained for historical examination before it was commercially developed. One could think of many other examples where an overwhelming majority of the shareholders would want their company to use its resources to promote a social purpose even when the activity has a negative impact on shareholder wealth, particularly if the reduction was relatively small compared to a much larger social benefit. These types of situations illustrate the importance of psychic as opposed to material wealth.

An investor who contributes to charity almost always reduces his or her material wealth (even taking account of the tax benefit). And yet in some sense, the investor is acting as a rational utility maximizer. The gift to charity must be giving something back (a positive feeling) that more than offsets the monetary cost of the gift. Both altruistic and patriotic behaviors very generally reduce material wealth, but at the same time confer an enhanced sense of well being.

Indeed, investors choose some investments over others because they approve of some types of activities and not others. Most investors would probably prefer to invest in a wind farm rather than a bordello (legal in Nevada), assuming both investments offered similar risk-adjusted expected returns. Socially responsibility mutual funds are designed to cater to such investor preferences (organic food, yes; tobacco, no). Clearly, investors consider the behavior of the companies in which they invest to be relevant to their investment decision. If social responsibility matters to shareholders, it should also matter to managers.

While notions of psychic wealth and shareholder preferences regarding social responsibility are important considerations, measurement and valuation in these areas is elusive. It is often difficult to discern whether or not shareholders would receive psychic benefits or would endorse a particular action. Thus, we must resort to the default rule of fiduciary duty. If there is alignment with business objectives or justification, then the decision to act ethically should be protected by the business judgment rule (as discussed *supra*.) Each of the above examples could conceivably encompass a business reason for the decision to act ethically. Additionally, we might want to look at whether the ethical decision is tied to the business plan in a way that provides adequate disclosure for shareholders to arrive at an agreement. That is, if the ethical preferences of the corporation are reflected in the business plan and aligned with business objectives, then shareholders who chose to invest have agreed to those preferences. Lastly, the ethically motivated decision can be upheld based on shareholder approval. Fiduciary duty is fulfilled either by advancing the business interests of the corporation or by obtaining shareholder approval for the ethical decision. Requiring the imprimatur of shareholder approval, either tacit or explicit, mirrors the shareholder ratification doctrines already enshrined in the law (and described above.) This focus on shareholder approval also is aligned with the contractual approach, which emphasizes the contract principle of agreement and genuineness of assent.

The above considerations lead us to the following conclusions: Officers, directors and other senior managers should manage their companies in line with their fiduciary duty to the owners. Exercising that fiduciary duty involves maximizing total shareholder welfare, which includes both a material and psychic welfare component. A manager should pursue a (socially responsible) policy that reduces material shareholder wealth only if the shareholders have either explicitly approved (via shareholder-resolution or ratification) or the managers have good reason to believe that a majority of them would approve of the use of their resource to promote that social objective. Following such a policy would lead toward maximizing total shareholder welfare which includes both financial and psychic components.

In many ways, the evolution of the literature on business ethics and corporate social responsibility reinforces this approach. The philanthropic model of corporate giving was at the heart of Milton Friedman's criticism.[18] That is, why should significant firm assets be diverted to social, artistic, educational, or environmental causes that might be the pet projects of the Ds&Os when the shareholders themselves might prefer other causes?[19] There is also some concern about the social utility of the choices made by the Ds&Os as well as the effectiveness or impact of those choices on the particular social problem. If money is spent by a corporation on a social cause, shouldn't shareholders have a right to expect that the cause be advanced appropriately?[20]

Corporate Social Responsibility developed as a counterpoint to the philanthropic model in the form of the corporate good citizen and stakeholder theory.[21] Conscious capitalism espoused by John Mackey is another more recent iteration of the corporate social responsibility movement [22], as is Terry Molner's Common Good Capitalism.[23] Further developments in the form of sustainability and the triple bottom line focused on the importance of these issues to the long-term health of the corporation, but were still susceptible to some of the same criticisms regarding how to maintain accountability without requiring adherence to fiduciary duty rules that focus on benefit to the shareholders, as well as how to balance competing constituency interest and how to ensure effective environmental or social engagement.[24] Green to Gold posited that corporations that focused on environmental issues and diverted resources to acting ethically in this arena would actually perform better financially.[25] Michael Porter's shared value approach held that both the financial goals of the firm and the social or environmental causes would be appropriately advanced.[26] Porter seemed to hone in on alignment.

The social entrepreneurship movement has recognized that the traditional charitable or development model has not done a particularly effective job of solving social problems and seeks to harness the profit model both to advance social issues and make a profit.[27] This alignment approach can now be seen in the metrics and reporting literature.[28] That is, corporations should be paying attention to ESG issues that are aligned with/material to the business. Corporations increasingly are encouraged to report on these issues on the 10K [29], and failure to address these issues has resulted in shareholder lawsuits (Exxon and Sea World.)[30] This is an investor driven area. Measuring and reporting on ESG issues that are material to the business and then acting on those metrics is an essential part of modern business strategy, and the push for this measurement is now investor driven.[31] Recent research has reinforced the hypothesis that there is a strong correlation between effective reporting and management of ESG issues and performance.[32]

At the end of the day, ESG strategies tend to be good business. But when issues are not aligned with the business, then the waters become murkier. There is no good reason to abandon the fiduciary duty rule which focuses on benefits to shareholders. This rule provides appropriate constraints where they are most needed and should only be disregarded based on adequate disclosure to and evidence of agreement or ratification from shareholders. Thus, the solution as outlined above would provide the strongest justification for action when the business case is lacking.

Footnotes

1. F.H. Easterbrook and D. Fischel, 1993, "Contract and Fiduciary Duty," *Journal of Law and Economics*, (April) 425-446. See also Stephen M. Bainbridge, Corporate Law (3rd Ed. Foundation Press 2013). Also note that there have been some adjustments to fiduciary duty principles in the corporate context, but the traditional obligations of fiduciary duty are typically required of Ds&Os. For example, contrast the agency case of General Automotive Mfg. Co. v. Singer, 120 N.W.2d 659 (1963) with the corporate director liability case of Broz v. Cellular Information Systems, Inc., 673 A.2d 148 (Del. 1996)(both of these cases explore the fiduciary rules regarding taking opportunities of the principal, with the former focused on traditional principal/agent law, with its greater restrictions on seizing opportunities of the principal, and the latter focused on fiduciary duty in the corporate opportunity context.)

2. See, for example, Hiroko Tabuchi, "Volkswagen Expected to Pay Another $1 Billion in Emissions Scandal", Business Day, New York Times, December 20, 2016(https://www.nytimes.com/2016/12/20/business/volkswagen-agrees-to-buy-back-or-fix-remaining-diesel-cars.html); "Guilty VW to pay record $4.3bn over emissions scandal, News/Europe, Aljazeera, January 12, 2017 (http://www.aljazeera.com/news/2017/01/guilty-vw-pay-record-43bn-emissions-scandal-170111202127103.html); Aaron Smith and Evan Perez, Volkswagen executive arrested in emissions scandal", CNN Money U.S., January 9 2017 (http://money.cnn.com/2017/01/09/news/companies/volkswagen-emissions-scandal-arrest/); Geoff Colvin, "Why Volkswagen's Emissions Scandal Has No End", Fortune: Leadership, January 11, 2017 (http://fortune.com/2017/01/11/volkswagen-emissions-scandal-2/); Steven Overly, "Six Volkswagen executives indicted in emissions-cheating scandal", The Washington Post, January 11, 2017 (https://www.washingtonpost.com/news/innovations/wp/2017/01/11/justice-department-volkswagen-to-plead-guilty-to-three-criminal-counts-in-emissions-scandal/?utm_term=.bf9a83d93046); Marcy Kreiter, "Volkswagen Emissions Scandal Update: Dealerships Win $1.67B Settlement", International Business Times, January 23, 2017 (http://www.ibtimes.com/volkswagen-emissions-scandal-update-dealerships-win-167b-settlement-2479870); Dan Shepardson, "VW must face U.S. investor lawsuit in emissions scandal", Reuters Business News, January 5, 2017 (http://www.reuters.com/article/us-volkswagen-emissions-idUSKBN14P01R); Sophie Jamieson, "British drivers take legal action for compensation over Volkswagen emissions scandal", The Telegraph, January 9, 2017 (http://www.telegraph.co.uk/news/2017/01/09/british-

drivers-take-legal-action-compensation-volkswagen-emissions/). For Enron, see, for example, Alexei Barrionuevo, "Enron Chiefs Guilty of Fraud and Conspiracy", The New York Times, May 25, 2006 (http://www.nytimes.com/2006/05/25/business/25cnd-enron.html); for WorldCom, see, for example, Carrie Johnson, "Ebbers Gets 25-Year Sentence for Role in WorldCom Fraud", The Washington Post, July 14, 2005 (http://www.washingtonpost.com/wp-dyn/content/article/2005/07/13/AR2005071300516.html); for Tyco, see, for example, Ben White, "Ex-Tyco Executives Convicted, The Washington Post, June 18, 2005 (http://www.washingtonpost.com/wp-dyn/content/article/2005/06/17/AR2005061701003.html) and Ben White, "Ex-Tyco Officers Sentenced", The Washington Post, September 20, 2005 (http://www.washingtonpost.com/wp-dyn/content/article/2005/09/19/AR2005091900246.html)

3. See Easterbrook, *Supra* Note 1. See also, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). Fiduciary duty is enshrined in the law, but it is also an ethical duty owed by the agent to the principal and underscored by considerations of honesty, loyalty, and trust. Thus, ethical decision-making processes must incorporate fiduciary duty obligations as fundamental considerations in any analysis.

4. See Orhan Akisik and Graham Gal, "Financial performance and reviews of corporate social responsibility reports". Mathematical Methods of Operations Research, 2014, vol. 25, issue 3, pages 259-288, http://EconPapers.repec.org/RePEc:spr:mathme:v:25:y:2014:i:3:p:259-288 and J Manag Control (2014) 25: 259. doi:10.1007/s00187-014-0198-2. See also Orhan Akisik and Graham Gal, (2011) "Sustainability in businesses, corporate social responsibility, and accounting standards: An empirical study", International Journal of Accounting & Information Management, Vol. 19 Issue: 3, pp.304-324, doi: 10.1108/18347641111169287. For more information, see Ben Branch and Li Cai, "Do Socially Responsible Index Investors Incur an Opportunity Cost?", The Financial Review 47 (2012), pp. 617-630); David Kiron, Nina Kruschwitz, Knut Haanaes, and Ingrid Von Streng Velken. "Sustainability nears a tipping point." MIT Sloan Management Review 53, no. 2 (2012) 69; and Eccles, Robert G. and Ioannou, Ioannis and Serafeim, George, The Impact of Corporate Sustainability on Organizational Processes and Performance (December 23, 2014). Management Science, Volume 60, Issue 11, pp. 2835-2857, February 2014. Available at SSRN:https://ssrn.com/abstract=1964011 or http://dx.doi.org/10.2139/ssrn.1964011.

5. See, for example, Brehm v. Eisner, 746 A.2d 244, 264, n. 66 ("[D]irectors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attirbuted to a rational business purpose or reach their decision by

a grossly negligent process that includes the failure to consider all material facts reasonably available.") See also, Robert Charles Clark, Corporate Law, §3.4, page 123 (Little, Brown and Company 1986) and Stephen M. Bainbridge, Corporate Law, Chapter 4 (Foundation Press 20__).

6. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

7. Id.

8. Id. The language of the court emphasizes the importance of advancing shareholder value. However, as noted below, research has not revealed any cases where a court has held directors and officers liable for engaging in ESG issues, despite the language in Dodge v. Ford Motor Co. Indeed, the idea of the legal dominance of shareholder value has been challenged. See, for example, Lynn Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public (Berret-Koehler Publishers 2012). Stout's observations have helped shape our understanding of the law and reinforced the importance of making the business case for ESG decisions in order to get protection under the business judgment rule. She also makes a strong case against shareholder value as a goal. Nevertheless, the emphasis on the duty of directors and officers to promote shareholder value continues to be the dominant approach, which, we posit, provides valuable constraints that may in fact advance, rather than hinder, ethical decision-making.

9. Unocal v. Mesa Petroleum, 493 A.2d 946 (Del. 1985)("Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.") and Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1985)("The Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was for sale. The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. This significantly altered the board's responsibilities under the *Unocal* standards. It not longer faced threats to corporate policy and effectiveness, or to the stockholders' interests, from a grossly inadequate bid. The whole question of defensive measures became moot. The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.") See also Ben Branch, "Fiduciary Duty: Shareholders Versus Creditors", which discusses the shift in fiduciary duty from shareholders to creditors as the company nears insolvency.

10. Berle Jr., Adolf, A., “Corporate Powers as Powers in Trust,” *Harvard Law Review* 44 (1931): 1049-1074; Dodd, Merrick, E., “For Whom Are the Corporate

Managers Trustees," *Harvard Law Review* 45 (1932): 1145-1163; Berle Jr., Adolf, A., "For Whom Corporate Managers *Are* Trustees: A Note," *Harvard Law Review* 45 (1932): 1365-1372.

11. Milton Friedman, "The Social Responsibility of Business Is to Increase Its Profits", N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32-33, 122, 124, 126. See also, Ronald M. Green, "Shareholders as Stakeholders: Changing Metaphors of Corporate Governance", 50 Wash. & Lee L. Rev. 1409 (Fall, 1993) and Stephen M. Bainbridge, In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green, 50 Wash & Lee L. Rev. 1423 (Fall, 1993). See Stephen M. Bainbridge, "The Modern Corporation Statement on Company Law" Pretends it Knows What it is Talking About, ProfessorBainbridge.com (November 1, 2016) (http://www.professorbainbridge.com/professorbainbridgecom/2016/11/the-modern-corporation-statement-on-company-law-pretends-it-knows-what-it-is-talking-about.html) and Stephen M. Bainbridge, "William Galston could not be more wrong; he could try but he would not be successful", ProfessorBainbridge.com (October 5, 2016)(http://www.professorbainbridge.com/professorbainbridgecom/corporate-law/). See additionally, Kenneth E. Goodpaster and John B. Matthews Jr., "Can a Corporation Have a Conscience?", Harvard Business Review, January-February 1982; Albert Z. Carr, "Is Business Bluffing Ethical?", Harvard Business Review, 46(1), 1968, pp. 143-153; R. Edward Freeman, "Stakeholder Theory of the Modern Corporation", Business Ethics: Readings and Cases in Corporate Morality (5th Ed. Wiley Blackwell 2014); Robert E. Frederick, "Ethics in Business: Two Skeptical Challenges", Business Ethics: Readings and Cases in Corporate Morality (5th Ed. Wiley Blackwell 2014);Ralph Nader, Mark Green, and Joel Seligman, "Who Rules the Corporation?", Business Ethics: Readings and Cases in Corporate Morality (5th Ed. Wiley Blackwell 2014); Henry Mintzberg, "Who Should Control the Corporation?, California Management Review, 27(1), 1984, pp. 90-115; and Milton Friedman, John Mackey, and T.J. Rodgers, "Rethinking the Social Responsibility of Business", Reason.Com (October 1, 2005)(http://reason.com/archives/2005/10/01/rethinking-the-social-responsi/print).

12. *Supra* Note 1.

13. CREF 2002 Proxy? Also discussed at: http://corpgo.fatcow.com/news/archives2002/Octobber.html

14. Id.

15. Indeed, shareholders can adopt resolutions and/or ratify decisions made by corporate boards, even in the presence of a breach of the duty of care or breah of the duty of loyalty. For a general discussion, see Stephen M. Bainbridge,

Corporate Law (3ed Edition Foundation Press 2015), pp. 146-156,162-169, 173-175, 206.

16. Dan Barry, David Barstow, Jonathan D. Glater, Adam Liptak, and Jacques Steinberg. Research support was provided Alain Delaquérière and Carolyn Wilder, "CORRECTING THE RECORD; Times Reporter Who Resigned Leaves Long Trail of Deception", New York Times, May 11, 2003 (http://www.nytimes.com/2003/05/11/us/correcting-the-record-times-reporter-who-resigned-leaves-long-trail-of-deception.html); Adrian Uribarri, SPJ Ethics Committee, "Ethics Case Studies: The Times and Jayson Blair", Society of Professional Journalists (https://www.spj.org/ecs13.asp); Manuel Roig-Franzia, "'A Fragile Trust' exhibits irresponsibility behind Jayson Blair plagiarism scandal", The Washington Post, May 5, 2014 (https://www.washingtonpost.com/lifestyle/style/a-fragile-trust-exhibits-irresponsibility-behind-jayson-blair-plagiarism-scandal/2014/05/05/596aca28-d45d-11e3-95d3-3bcd77cd4e11_story.html?utm_term=.c1a96bff26e9).

17. Conservative TV Chain Orders 62 Stations to Pre-Empt Regular Programming To Air Anti-Kerry "Documentary" Before Election | Democracy Now!, www.democracynow.org, October 13, 2004 (https://www.democracynow.org/2004/10/13/conservative_tv_chain_orders_62_stations). Information about the company, Sinclair, and the effect on stock price can be found at: https://en.wikipedia.org/wiki/Sinclair_Broadcast_Group.

18. Milton Friedman, "The Social Responsibility of Business Is to Increase Its Profits", N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32-33, 122, 124, 126. See also Milton Friedman, John Mackey, and T.J. Rodgers, "Rethinking the Social Responsibility of Business", Reason.Com (October 1, 2005)(http://reason.com/archives/2005/10/01/rethinking-the-social-responsi/print).

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shareholders, even when the goals are social or environmental, rather than financial.

22. Mackey, John and Raj Sisodia, Conscious Capitalism, With a New Preface by the Authors: Liberating the Heroic Spirit of Business (Harvard Business Review Press 2014).

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24. See, for example, Mass. Gen. Laws Ann. ch. 156E, section 15. This is a provision of the Massachusetts Benefit Corporation statute, which established the Benefit Corporation here in Massachusetts. Benefit Corporations are allowed to advance social or environmental interests, in addition to advancing the financial interests of shareholders (codifying the triple bottom line approach advocated in sustainability models.) However, fiduciary duty and accountability to shareholders remains a concern. Section 15 of the Benefit Corporation statute requires the preparation of an annual benefit report, with third party standards and verification regarding the social or environmental interests advanced by the Benefit Corporation. That is, Benefit Corporations must be held to performance standards with regard to their social and environmental goals, as well as to their financial outcomes in order to adequately protect the interests of investors.

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27. Deborah Doane, Social enterprise: can it succeed where traditional development has failed?, The Guardian, February 25, 2014 (https://www.theguardian.com/global-development/poverty-matters/2014/feb/25/social-enterprise-succeed-traditional-development-failed). More generally see Filipe M. Santos, A Positive Theory of Social Entrepreneurship, Faculty and Research Working Paper, Social Innovation Center, INSEAD, 2009 (https://sites.insead.edu/facultyresearch/research/doc.cfm?did=41727) and J.

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29. Note the activities of the Sustainability Accounting Standards Board (SASB) and their various publications, including: Approach to Materiality & Standards Development – Staff Bulletin (https://library.sasb.org/materiality_bulletin/); ESG Integration Insights (https://library.sasb.org/esg_integration_insights/); SASB's Formal Response to SEC's Public Comment Period on Reg. S-K (https://library.sasb.org/sasbs-formal-response-secs-public-comment-period-reg-s-k/). See also, Securities and Exchange Commission, Business and Financial Disclosure Required by Regulation S-K, Concept Release, 17 CFR Parts 210, 229, 230, 232, 239, 240 and 249, Release No. 33-10064; 34-77599; File No. S7-06-16 RIN 3235-AL78, April 15, 2016 (https://www.sec.gov/rules/concept/2016/33-10064.pdf).

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