

THE CREATIVE CAPITALISM SPECTRUM: Evaluating Corporate Social Responsibility Through a Legal Lens

by Janet E. Kerr ¹

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Introduction

“The world is not getting better fast enough, and it’s not getting better for everyone.”² So began Bill Gates’ call to philanthropic and Corporate Social

Responsibility (“CSR”) arms at the World Economic Forum in Davos Switzerland in

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² John Markoff, *Bill Gates: Social Philosopher*, N.Y. TIMES, “Davos Diary,” Jan. 24, 2008, <http://dealbook.blogs.nytimes.com/2008/01/24/bill-gates-social-philosopher/index.html> (last visited Apr. 6, 2008) (quoting Bill Gates, Chairman, Microsoft Corp., Address at the World Econ. Forum (Jan. 24, 2008)).

January 2008 when he challenged executives of the world's largest corporations to put social entrepreneurship on the corporate agenda.³ Only a few weeks earlier on December 7, 2007, presidential candidate Senator Barack Obama made a rousing campaign speech in which he promised to start a Social Entrepreneur Agency if elected.⁴ When the dialogue on the world's political stage is the same as the dialogue on the corporate stage, reasonable minds cannot disagree on whether or not a corporate board should have some knowledge of the subject matter.⁵ Welcome to the age of corporate conscience.

In the fall of 2007, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship* introduced the innovative proposition that boards have a fiduciary duty to be informed of both the financial and *social* impacts of business decisions.⁶ The pursuit of this "double bottom line" is supported by existing corporate laws that allow boards to consider stakeholders other than shareholders, the growing body of knowledge

³ *Id.*

⁴ Sen. Barack Obama, Address at Cornell College, Mt. Vernon, Iowa (Dec. 7, 2007) (transcript available at http://www.swamppolitics.com/news/politics/blog/2007/12/appealing_to_youth_obama_issue_1.html (last visited Apr. 6, 2008)). Senator Obama has been a community organizer "tackling toxic environmental conditions around public housing projects in Chicago." Rick Cohen: 'Presidents' with Thin Promises *FIN. TIMES*, Jan. 19, 2008 <http://search.ft.com/ftArticle?queryText=Presidents+with+thin+promises&y=0&aje=true&x=0&id=080119000423&ct=0> (last visited Apr. 6, 2008).

⁵ While courts have not explicitly stated this proposition, it is likely only a matter of time. In Britain, "the 2006 Companies Act introduced a requirement for public companies to report on social and environmental matters." Daniel Franklin, *Just Good Business*, *THE ECONOMIST*, available at http://www.economist.com/surveys/displaystory.cfm?story_id=10491077 (last visited Apr. 6, 2008). Daniel Franklin is Executive Editor of *The Economist*. *Economist.com*, Corporate Social Responsibility, Author Interview, http://www.economist.com/surveys/displaystory.cfm?story_id=10523534 (last visited Apr. 6, 2008).

⁶ Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 *CARDOZO L. REV.* 623, 635-39 (2007) [hereinafter Kerr, *Sustainability Meets Profitability*].

on measuring social impacts qualitatively and quantitatively, and the increasing demand by consumers, investors and governments for sustainable and responsible business practices.⁷ In *Sustainability Meets Profitability*, social entrepreneurship was proven to be a valuable business tool “that has come into its own in the last decade, capturing the imaginations of many thoughtful observers.”⁸

While *Sustainability Meets Profitability* argued that the business judgment rule protects a board’s decision to engage in social entrepreneurship, this article follows up to examine creative capitalism⁹ in the legal landscape, refine the definition of CSR, and offer an original, distinct framework for analyzing a socially responsible project in light of the primary duties a board of directors has to a corporation. The article will focus on answering three questions: (1) When, and under what circumstances can a company truthfully claim to be socially responsible? (2) What kinds of socially responsible

⁷ Kerr, *Sustainability Meets Profitability*, *supra* note 6, at 633 (“The concept of the double bottom line views profit as having financial and social components; it achieves measurable results in both areas by harnessing innovation, people, and resources to develop an enterprise that is self-sustaining, makes money, and solves a social problem.”). There has been a trend toward further dividing the double bottom line into the triple bottom line, separating the environmental bottom line from the more general social impact bottom line to create a third measure of analysis. *See e.g.* ANDREW W. SAVITZ, *THE TRIPLE BOTTOM LINE: HOW TODAY’S BEST RUN COMPANIES ARE ACHIEVING ECONOMIC, ENVIRONMENTAL AND SOCIAL SUCCESS AND HOW YOU CAN TOO* Jossey-Bass/Wiley 2006).

⁸ J. Gregory Dees, *Taking Social Entrepreneurship Seriously*, SOCIETY, March/April 2007, 24 J. Gregory Dees is Professor of the Practice of Social Entrepreneurship and Non-Profit Management at the Fuqua School of Business at Duke University. *See* Duke University Faculty home pages *available at* <http://www.fuqua.duke.edu/faculty/alpha/dees.htm> (last visited Apr. 3, 2008).

⁹ Throughout this article, the terms “creative capitalism” and “corporate social responsibility”, or “CSR,” are used often and used somewhat interchangeably. Part II will clarify these terms, but it is perhaps helpful to mention that the article deliberately adopts the term recently used at Davos – creative capitalism – because it stands to encompass more than the term corporate social responsibility; and as a newer term, it is not burdened by a history of ambiguity and mischaracterization. *See* David Callahan, *A Gentler Capitalism*, L.A. TIMES, Jan. 31, 2008, *available at* <http://www.latimes.com/news/printedition/asection/la-oe-callahan31jan31.1,4639586.story?ctrack=2&cset=true> (last visited Mar. 2, 2008) (explaining that the term creative capitalism encompasses the goals of enabling “more people [to] make a profit, or gain recognition, doing work that eases the world’s inequities.”) However, creative capitalism should be recognized as the umbrella term for CSR and social entrepreneurship because all three share similar goals. *See* discussion *infra* Part II.

projects can corporate boards pursue while minimizing the risk of litigation? (3) What kinds of CSR information should a director track to be reasonably informed? Part I provides a brief overview of current corporate law jurisprudence. Part II introduces an entirely original Creative Capitalism Spectrum in an effort to clarify ambiguous terms and gauge whether a corporation can truthfully claim to be socially responsible.¹⁰ Part III introduces a new five-factor test for determining what projects corporate boards should pursue and for evaluating whether a board breached a duty of good faith or of due care in choosing a particular CSR project.¹¹ The five factor test - dubbed the “PRISM,” – provides an entirely new and objective set of benchmarks against which CSR projects can be evaluated so that a board may justify deploying valuable corporate resources. Section IV provides reference to information that boards should track to be reasonably informed of the impact and opportunities of CSR.¹² Section IV concludes the article, predicting the trends toward quantifying social return on investment (SROI), expecting further

¹⁰ This article introduces the novel concept of the Creative Capitalism Spectrum, taking its name from the term Bill Gates used at the World Economic Forum in Davos, Switzerland to describe a system in which “more people can make a profit, or gain recognition, doing work that eases the world’s inequities.” Callahan, *supra* note 9. This spectrum presents a different way of looking at the terminology because it recognizes the different degrees of commitment to CSR, including whether or not a company is first compliant with laws affecting all social issues like human rights, labor, the environment, and more. *See* discussion, *infra* Part II.

¹¹ PRISM is an acronym for the five issues that a board should be consider before pursuing a CSR project: potential, relevance, impact, suitability, and morale. Four of these factors were articulated by Peter Sands. *See* Maidment, *infra* note 185. However, our research discovered that a fifth – employee morale – should be included. We thus rearranged Sands’ four factors and included our fifth to create the PRISM test. *See* discussion *infra* Part III.

¹² *See* Kerr, *Sustainability Meets Profitability*, *supra* note 6, at 636 (“Also incorporated in the directors’ fiduciary duty of due care is the duty to act on an informed basis, which requires the directors to ‘consider all material facts reasonably available’ before making a decision.”) quoting Meredith M. Brown & William D. Regner, *The Duties of Target Company Directors Under State Law: The Business Judgment Rule and Other Standards of Judicial Review*, 1351 PRACTISING L. INST.: CORP. L. & PRAC. HANDBOOK SERIES, 177, 185 (2007).

developments of the commercial speech doctrine as well as broadening of the fiduciary relationship to extend to stakeholders besides just stockholders.

This article uses the terms CSR, social enterprise and creative capitalism to generally refer to a company's policies and programs that consider both the financial and social impacts of decisions.¹³ The social impact problems that these decisions attempt to alleviate or prevent range from pollution in the environment to poverty to global warming and beyond.¹⁴ However, the key is to remember that with CSR, a board is not merely chasing a profit, but also seeking business as a vehicle to make a positive social impact.¹⁵

Today, business leaders have been challenged to "think beyond their balance sheets" to address society's needs and problems, and the fierceness of global competition raises the stakes even higher.¹⁶ Thus, with the age of corporate conscience upon us, it is critical to examine the legal foundations upon which CSR rests.¹⁷ Now that creative capitalism is at the tip of the corporate tongue, the conversation about whether to engage in social responsibility is over. The only remaining questions are: "What, specifically, and how?"¹⁸ This article seeks to enable a board of directors to answer those questions

¹³ See *supra* note 9.

¹⁴ This definition stands in contrast to those which reduce CSR to mere compliance or philanthropy and instead focuses on the potential to improve the double bottom line. See discussion, *infra* Part II. Thus, while there are many definitions, this is one developed for this article to convey the broad and general concepts of CSR.

¹⁵ See Kerr, *Sustainability Meets Profitability*, *supra* note 6, at 632-33.

¹⁶ See Callahan, *supra* note 9, ("The very missions of corporations could change. If a focus on social responsibility begins to nudge aside the bottom-line orthodoxy, we can expect voluntary steps to raise wages, improve health benefits (as Wal-Mart has promised) and adopt environmentally sustainable practices.").

¹⁷ See discussion *infra* Part I.A-C.

¹⁸ THE ECONOMIST, *In Search of the Good Company*, Sept. 6, 2007 available at http://www.economist.com/business/displaystory.cfm?story_id=9767615 (last visited Apr. 6, 2008)

satisfactorily while preserving the integrity of the fiduciary relationship to the corporation while also being protected by the business judgment rule.¹⁹

I. CSR in the Corporate Law Landscape

Three legal issues are poised to directly impact CSR: potential director liability for engaging in CSR projects, unfair competition or “false advertising” claims for falsely claiming to be socially responsible, and liability under section § 10(b)(5) of the Securities Act for misstatements relating to claims of being socially responsible.²⁰

A. Director Liability and the *Disney Good Faith Standard*

Corporate Social Responsibility should be on every company’s agenda for the variety of reasons that will be discussed throughout this article. However, the fact remains that a board of directors owes a fiduciary duty to the corporation, and hence, the stockholders.²¹ As discussed in later sections, socially responsible practices and programs can lead to greater profitability and therefore directors should be engaging in CSR.²² However, in a post-Enron corporate era, directors should always be aware of

(“Simon Zadek, the head of AccountAbility, a CSR lobby group, recently stated, “The ‘whether in principle’ conversation about CSR is over . . . What remains is: ‘What, specifically, and how?’”).

¹⁹ See discussion *infra* Part I.

²⁰ See discussion *infra* Part I.A.-C..

²¹ See e.g. Janet E. Kerr, *Developments in Corporate Governance: The Duty of Good Faith and Its Impact on Director Conduct*, 13 GEO. MASON L. REV. at 1049, 1077 (Fall 2005 / Winter 2006) [hereinafter *Developments in Corporate Governance*] (“The duty to maximize shareholder return remains central to any evaluation of whether or not a director acted in the best interests of the corporation”).

²² See Adrienne Selko, *Just How Socially Responsible are Corporations Today?* IndustryWeek.com, Apr. 3, 2008, available at <http://www.industryweek.com/ReadArticle.aspx?ArticleID=16060> (last visited Apr. 3, 2008).

potential liability pitfalls surrounding their decisions.²³ Fortunately for those who support CSR, American jurisprudence insulates directors' decisions to engage in some socially responsible projects and to conduct business in socially responsible ways.²⁴ Also, the duty of good faith may even require that directors consider the social impact of their decisions in this current era of corporate responsibility.²⁵

First, a corporation's articles of incorporation may limit a director's personal liability for breaches of due care.²⁶ Section 102(b)(7) of the Delaware General Corporation Law "permits corporations to exculpate directors from personal liability for breach of the duty of care in performing a task at issue, but not for violations of the duty of loyalty or acts not in good faith, intentional misconduct or knowing violation of the law."²⁷ This type of provision, coupled with the business judgment rule, has provided

²³ See Kerr, *Developments in Corporate Governance*, *supra* note 21, at 1071.

²⁴ See Kerr, *Sustainability Meets Profitability*, *supra* note 6.

²⁵ See *supra* notes 26-50, and accompanying text. Perhaps the most notorious critic of CSR is Robert Reich, former labor secretary under Bill Clinton and Professor of Public Policy at the University of California, Berkeley, and author of *Supercapitalism*. See Economist.com, *In Search of the Good Company* Sept. 6, 2007, <http://www.economist.com/business/displaystory.cfm?story+id=97676> (last visited Jan. 31, 2008). Reich believes "CSR activists are being diverted from the more realistic and important task of getting governments to solve social problems." *Id.* citing ROBERT B. REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* (2007).

²⁶ See DEL. CODE ANN. TIT. 8 § 102(b)(7) (2008). See also Kerr, *Developments in Corporate Governance*, *supra* note 21, at 1049. ("Section 102(b)(7) was created 'to help alleviate the consequences and concerns of directors' following the decision in the seminal case in the field of director liability.") *Id.* citing *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (reaffirming and solidifying the position that the business judgment rule provides no protection for directors who have made an unintelligent or unadvised judgment). *Id.*

²⁷ DEL. CODE ANN. TIT. 8 § 102(b)(7) (2008). The relevant portion of the code states, "In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters: ... (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director

ample protection to directors facing litigation from shareholders who are dissatisfied with the directors' decisions.²⁸

Secondly, the business judgment rule is a standard of review that protects directors of corporations from liability, creating a presumption that “in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.”²⁹ If the business judgment rule applies, courts will not question the decisions of the board.³⁰ However, the plaintiff may rebut these presumptions if the plaintiff shows that the director breached the fiduciary duty of loyalty, the fiduciary duty of due care, or if the director acted in bad faith.³¹

Generally, the business judgment rule will protect directors' decisions unless plaintiffs can establish one of several scenarios, including, but not limited to: (1) the directors were grossly negligent;³² (2) the directors were uninformed when making the

derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective . . .” *Id.*

²⁸ See e.g. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, (Del. 2006). Directors were protected by the business judgment rule and a section 102(b)(7) provision in the articles of incorporation in a shareholder derivative suit alleging breach of due care and good faith for approving an employment agreement and subsequent termination that resulted in considerable losses. See *id.*

²⁹ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

³⁰ See e.g. *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, (Del. 2006). See also Kerr, *Developments in Corporate Governance*, *supra* note 20, at 1074 (“The primary purpose of the presumption is to protect and promote the full exercise of managerial power.”).

³¹ E.g. *In re Disney*, 906 A.2d at 52. See also Kerr, *Developments in Corporate Governance*, *supra* note 21, at 1076 citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1994), modified 636 A.2d 956 (Del. 1994).

³² *FDIC v. Castetter*, 184 F.3d 1040 (9th Cir. 1999) (applying CA law).

decision;³³ (3) the directors were not independent or disinterested in making the decision;³⁴ or (4) the directors breached the duty of good faith.³⁵

The Delaware courts have recently clarified the distinction between the duties of good faith and of due care.³⁶ Additionally, the court articulated three categories of fiduciary misconduct.³⁷ The first, the court explained, is “subjective bad faith” whereby a director engages in “fiduciary conduct motivated by an actual intent to do harm”³⁸ The second category of conduct is “fiduciary action taken solely by reason of gross negligence and without any malevolent intent . . . [whereby] appellants assert claims of

³³ See Kerr, Sustainability Meets Profitability, *supra* note 6, at 635-36. “It is widely recognized that those who control and direct the decisions and operations of the corporations are instilled with the duties of good faith and due care. These duties form the core of corporate governance In addition to setting the baseline standard for due care, MBCA 8.30(b) states that directors ‘shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.’ Also incorporated in the directors’ fiduciary duty of due care is the duty to act on an informed basis, which requires the directors to ‘consider all material facts reasonably available’ before making a decision.” *Id.* quoting Meredith M. Brown & William D. Regner, *The Duties of Target Company Directors Under State Law: The Business Judgment Rule and Other Standards of Judicial Review*, 1351 PRACTISING L. INST.: CORP. L. & PRAC. HANDBOOK SERIES, 177, 185 (2007).

³⁴ *Treadway Co’s, Inc. v. Care Corp.*, 638 F.2d 357, 384 (CA2 1980).

³⁵ *In re Disney*, 906 A.2d at 64.

³⁶ See *In re Disney*, 906 A.2d at 66. While the duty of good faith and due care seem to overlap, the Delaware court has made clear that “from a legal standpoint those duties are and must remain quite distinct. Both our legislative history and our common law jurisprudence distinguish sharply between the duties to exercise due care and to act in good faith, and highly significant consequences flow from that distinction.” *Id.* This is consistent with the notion that the Supreme Court of Delaware supports the approach to good faith that recognizes it as a separate duty from due care and loyalty rather than the approach that views good faith a subset of the other two duties. See Kerr, *Developments in Corporate Governance*, *supra* note 21, at 1050 citing David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 DEL. J. CORP. L. 491, 501 (2004).

³⁷ *In re Disney*, 906 A.2d at 64.

³⁸ *In re Disney*, 906 A.2d at 64. The court explained, “That such conduct constitutes classic, quintessential bad faith is a proposition so well accepted in the liturgy of fiduciary law that it borders on axiomatic.” *Id.* at 64 citing *McGowan v. Ferro*, 859 A.2d 1012, 1036 (Del. Ch. 2004) (“Bad faith is ‘not simply bad judgment or negligence,’ but rather ‘implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.’”) (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 n.16 (Del. 1993)).

gross negligence to establish breaches not only of director due care but also of the directors' duty to act in good faith.”³⁹ This category is the one where the duties of due care and of good faith overlap, but still should not be conflated.⁴⁰ The court expressly stated that “gross negligence (including a failure to inform one's self of available material facts), without more [cannot] constitute bad faith.”⁴¹ The third category, according to the court, is an intermediate category between the two aforementioned extremes.⁴² This category encompasses an “intentional dereliction of duty or conscious disregard for one’s responsibilities.”⁴³ The court elaborated, explaining that the fiduciary’s intentional failure to act in the face of a known duty to act “demonstrat[es] a conscious disregard for

³⁹ *In re Disney*, 906 A.2d at 64.

⁴⁰ *In re Disney*, 906 A.2d at 64-65. To elucidate this point, the court provided a helpful example: “An example of such overlap might be the hypothetical case where a director, because of subjective hostility to the corporation on whose board he serves, fails to inform himself of, or to devote sufficient attention to, the matters on which he is making decisions as a fiduciary. In such a case, two states of mind coexist in the same person: subjective bad intent (which would lead to a finding of bad faith) and gross negligence (which would lead to a finding of a breach of the duty of care). Although the coexistence of both states of mind may make them indistinguishable from a psychological standpoint, the fiduciary duties that they cause the director to violate—care and good faith—are legally separate and distinct.” *Id.* at 65, n.104.

⁴¹ *In re Disney*, 906 A.2d at 64-65. The court thus made it clear that failure to inform oneself of any material information, i.e. gross negligence alone, clearly falls only within due care. *See id.* Moreover, the court stated, “There is no basis in policy, precedent or common sense that would justify dismantling the distinction between gross negligence and bad faith.” *Id.* at 66. “Basic to the common law of torts is the distinction between conduct that is negligent (or grossly negligent) and conduct that is intentional. And in the narrower area of corporation law, our jurisprudence has recognized the distinction between the fiduciary duties to act with due care, with loyalty, and in good faith, as well as the consequences that flow from that distinction. Recent Delaware case law precludes a recovery of rescissory (as distinguished from out-of-pocket) damages for a breach of the duty of care, but permits such a recovery for a breach of the duty of loyalty.” *Id.* at 66, n. 107 citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1147-1150 (Del. Ch. 1994), *aff’d*, 663 A.2d 1156 (Del. 1995).

⁴² *In re Disney*, 906 A.2d at 66.

⁴³ *Id.*

his duties,” and therefore bad faith.⁴⁴ Thus, while gross negligence is outside the bounds of a finding of a breach of good faith, dereliction of duty is unequivocally bad faith.⁴⁵

Therefore, while a corporation may elect to include a provision limiting a director’s personal liability for breaches of due care, it cannot limit a director’s personal liability for dereliction of duty because it falls under the non-exculpatory duty of good faith.⁴⁶ Before *Disney*, one might have argued that a director’s failure to be informed of CSR’s effect on the bottom line and subsequent failure to implement such policies fell squarely within due care and thus a properly protected director could not have been held personally

⁴⁴ *Id.* at 67.

⁴⁵ *See Id.* This is not a creation of a new duty, but merely the court’s articulation of a duty the law has recognized in the past. *See Id.* Indeed, the court provided many helpful examples to demonstrate the history of good faith jurisprudence. *Id.* at 67, n.111 citing *Allaun v. Consol. Oil Co.*, 147 A. 257, 261 (Del. Ch. 1929) (further judicial scrutiny is warranted if the transaction results from the directors’ “reckless indifference to or a deliberate disregard of the interests of the whole body of stockholders”); *Gimbel v. Signal Co’s., Inc.*, 316 A.2d 599, 604 (Del. Ch. 1974), *aff’d*, 316 A.2d 619 (Del. 1974) (injunction denied because, *inter alia*, there was “[n]othing in the record [that] would justify a finding ... that the directors acted for any personal advantage or out of improper motive or intentional disregard of shareholder interests”); *In re Caremark Int’l Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (“only a sustained or systematic failure of the board to exercise oversight-such as an utter failure to attempt to assure a reasonable information and reporting system exists-will establish the lack of good faith that is a necessary condition to liability.”); *Nagy v. Bistricher*, 770 A.2d 43, 48, n.2 (Del. Ch. 2000) (observing that the utility of the duty of good faith “may rest in its constant reminder ... that, regardless of his motive, a director who consciously disregards his duties to the corporation and its stockholders may suffer a personal judgment for monetary damages for any harm he causes,” even if for a reason “other than personal pecuniary interest”).

⁴⁶ DEL. CODE ANN. tit. 8, § 102(b)(7) (2008). (“... the certificate of incorporation may also contain A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director . . . for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;”). The court in *Disney* used this portion of the code to justify their articulation of dereliction of duty falling within bad faith, explaining, “[T]he legislature has also recognized this intermediate category of fiduciary misconduct, which ranks between conduct involving subjective bad faith and gross negligence. Section 102(b)(7)(ii) of the DGCL expressly denies money damage exculpation for ‘acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law.’ By its very terms that provision distinguishes between ‘intentional misconduct’ and a ‘knowing violation of law’ (both examples of subjective bad faith) on the one hand, and ‘acts . . . not in good faith,’ on the other. Because the statute exculpates directors only for conduct amounting to gross negligence, the statutory denial of exculpation for ‘acts . . . not in good faith’ must encompass the intermediate category of misconduct captured by [this] definition of bad faith.” *In re Disney*, 906 A.2d at 67 *citing* DEL. CODE ANN. tit. 8, § 102(b)(7)(ii) (2008).

liable.⁴⁷ In light of the court's holding in *Disney*, however, the argument will not necessarily carry the day.⁴⁸ Purposely refusing to consider the social effects of a business decision could be considered a dereliction of duty and therefore a breach of good faith, because the positive effects of CSR on the bottom line have become quantifiable, accessible and a topic of common discussion on the global corporate stage.⁴⁹ In *Stone v. Ritter*, the Delaware Supreme Court reiterated that conscious disregard for directorial responsibilities or dereliction of duties is properly treated as a non-exculpable, non-indemnifiable violation of the fiduciary duty to act in good faith.⁵⁰ Now that the law supports, if not requires, a director to investigate and consider whether CSR can impact the bottom line, the question becomes: when can a company truthfully claim to be socially responsible?

B. Securities Laws: 10(b)(5) Actions

⁴⁷ The director's limited liability for breach of due care would extend from a 102(b)(7) provision in the Articles of Incorporation. *See* tit. 8, §102(b)(7).

⁴⁸ *See In re Disney*, 906 A.2d at 67. *See also* discussion *infra* notes 35 – 43.

⁴⁹ *But see supra* note 21 and accompanying text. The duty to be informed has fallen traditionally under due care, and directors can shield themselves from personal liability from due care. However, purposely refusing to inform oneself of the potential benefits of CSR could be considered bad faith. *See supra* note 40.

⁵⁰ *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). The case was a “derivative suit filed against AmSouth Bancorporation alleging that the board of directors failed to properly oversee the company and should have detected criminal activity that led to a \$40 million fine against AmSouth. *Id.* The *Stone* court reviewed the directors' duty of good faith in the oversight of the company, and approved the Chancery Court's 1996 Caremark standard, stating that the requirements for oversight liability are that “(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.” Directors must have known that they were not fulfilling their fiduciary obligations in order to be found liable. The decision should give added comfort to directors that the protection against liability for honest failures to live up to best practices is alive and well in Delaware.” Patricia A. Vlahakis, PLI, TAKEOVER LAW AND PRACTICE 2007, 850 (Nov. 8-10, 2007) *citing* *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996); *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

“Section 10(b) of the Securities Act and Rule 10b-5 promulgated thereunder prohibit ‘fraudulent material misstatement[s] or omissions in connection with the sale or purchase of a security.’”⁵¹ To succeed on a claim for violation of §10(b)(5), a plaintiff “must establish: ‘(1) a misrepresentation or omission; (2) of a material fact, (3) made with scienter, (4) justifiably relied on by plaintiffs, and (5) proximately causing injury.’”⁵² “The requisite state of mind is scienter, a ‘mental state embracing intent to deceive, manipulate, or defraud.’”⁵³ However, this requirement may be satisfied merely “by alleging facts giving rise to a strong inference of recklessness.”⁵⁴ Recklessness is defined as “highly unreasonable conduct which is an extreme departure from the standards of ordinary care [and] while the danger need not be known, it must be at least so obvious that any reasonable person would have known of it.”⁵⁵ Under Rule 10(b)(5), silence is not misleading absent a duty to disclose.⁵⁶ However, if a party chooses to disclose material facts regarding a securities transaction, even in the absence of the duty to speak, the party “assume[s] a duty to speak fully and truthfully on those subjects.”⁵⁷

⁵¹ *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 567 n.2 (6th Cir. 2004).

⁵² *In re Ford*, 381 F.3d at 567 citing *Helwig v. Vencor, Inc.*, 251 F.3d 540, 554 (6th Cir. 2001).

⁵³ *In re Ford*, 381 F.3d at 567-68 citing *In re Comshare*, 183 F.3d at 548 quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976).

⁵⁴ *In re Ford*, 381 F. 3d at 568 quoting *In re Comshare*, 183 F.3d at 549. The court noted that “Under the [Private Securities Litigation Reform Act]’s safe harbor provision for forward-looking statements, 15 U.S.C. § 78u-5(c)(1), a defendant is liable for such statements only if they were material; if the defendant ‘had actual knowledge that the statements were false or misleading’; and if the defendant did not identify the statements as forward-looking or insulate them with ‘meaningful cautionary language.’” *Id.* at n.3.

⁵⁵ *In re Ford*, 381 F.3d at 568 quoting *In re Comshare*, 183 F.3d at 550.

⁵⁶ *In re Ford*, 381 F.3d at 569 quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 239, n.17 (1988).

⁵⁷ *In re Ford*, 381 F. 3d at 569 quoting *Helwig*, 251 F.3d at 559.

There is generally no duty to disclose “soft information,” or “information that is uncertain and not objectively verifiable such as ‘predictions, matters of opinion, and asset appraisals.’”⁵⁸ However, if circumstances change enough to permit a “confident disclosure,” the duty may arise.⁵⁹ “A misrepresentation is material only if there is a substantial likelihood that ‘a reasonable investor would have viewed the misrepresentation or omission’ as ‘having significantly altered the total mix of information made available.’”⁶⁰ Put another way, “misrepresentations or omissions are only immaterial if ‘they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their unimportance.’”⁶¹ “Immaterial statements include vague, soft, puffing statements or obvious hyperbole upon which a reasonable investor would not rely.”⁶² “Statements that are ‘mere puffing’ or ‘corporate optimism’ includes those which may be forward looking or ‘generalized statements of optimism that are not capable of objective verification.’”⁶³

In 2004, the Sixth Circuit issued an opinion involving a class action by investors against Ford Motor Company alleging a violation of § 10(b)(5) of the Securities Act for, *inter alia*, making false or misleading statements or omissions about the dangerousness of

⁵⁸ *In re Ford*, 381 F. 3d at 569 quoting *Helwig*, 251 F.3d, 559. The *Helwig* court held that “a company may remain silent regarding soft information ‘until the fullness of time and additional detail permit confident disclosure,’ but it may not volunteer material, soft information despite its uncertainty and then escape liability for that information’s misleading or false nature.” *Helwig*, 251 F.3d at 569-70.

⁵⁹ *In re Ford*, 381 F. 3d at 569 quoting *Helwig*, 251 F.3d, 559.

⁶⁰ *In re Ford*, 381 F. 3d at 570 quoting *In re Sofamor Danek Group*, 123 F.3d 394,400 (6th 1997).

⁶¹ *In re Ford*, 381 F. 3d at 570 quoting *Helwig*, 251 F.3d at 563.

⁶² *In re Ford*. 381 F. 3d at 570 quoting *In re K-tel, Inc. Sec. Litig.*, 300 F.3d 881, 897 (8th Cir. 2002).

⁶³ *In re Ford* 381 F. 3d at 570 quoting *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997).

the Ford Explorer vehicles equipped with ATX tires.⁶⁴ Among the allegedly false and misleading statements were Ford's "statements regarding its commitment to quality, safety, and corporate citizenship, such as . . . Ford 'want[s] to be clear leaders in corporate citizenship' . . . Ford 'is going to lead in corporate social responsibility.'"⁶⁵ This gave the court an opportunity to articulate the standards for evaluating a 10(b)(5) action involving the term "corporate social responsibility," but the court lumped that statement in with various other statements the plaintiffs alleged to be misleading, holding that

Such statements are either mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information, and thus, are not material, even if they were misleading. All public companies praise their products and their objectives. Courts everywhere, "have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace - loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available."⁶⁶

⁶⁴ *In re Ford*, 381 F. 3d 563. Over fifty lawsuits had been filed against Ford from 1993 – 1999 for injuries or deaths from Explorer crashes. *Id.* at 568-69.

⁶⁵ *In re Ford*, 381 F. 3d at 570. The court listed 13 of the alleged misleading statements. *Id.* "In their complaint, plaintiffs allege that Ford made many misleading statements regarding its commitment to quality, safety, and corporate citizenship, such as: 1) '[A]t Ford quality comes first.'; 2) 'We aim to be the quality leader'; 3) 'Ford has its best quality ever'; 4) Ford is 'taking across-the-board actions to improve...[its] quality.'; 5) Ford has made 'quality a top priority'; 6) 'Ford is a worldwide leader in automotive safety'; 7) Ford has made 'quality a top priority'; 8) Ford is "designing safety into ... [its] cars and trucks" because it wants its 'customers to feel safe and secure in their vehicles at all times'; 9) Ford 'want[s] to make customers' lives ... safer"; 10) Ford has "dedicated...[itself] to finding even better ways of delivering ...safer vehicles to [the] consumer"; 11) Ford 'want[s] to be clear leaders in corporate citizenship'; 12) Ford's 'greatest asset is the trust and confidence [it] has earned from [its] customers"; 13) Ford "is going to lead in corporate social responsibility." *Id.*

⁶⁶ *In re Ford*, 381 F. 3d at 570-71 citing *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996); see also *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 404, 419 (5th Cir. 2001) ("broad, general statements" about "positive" and "statistically significant" test results of a new drug were puffery); *Lasker v. N.Y. State Elec. & Gas Corp.* 85 F.3d 55, 58 (2d Cir. 1996) (corporation's self-praise about its business strategy is "not considered seriously by the marketplace and investors in assessing a potential investment").

Ford instructs the prudent director to be wary of making misleading statements regarding CSR. Although at first blush it may seem that the court decidedly held that statements about CSR do not fall within the category of material information, a more careful read reveals that the court pinned its holding on the fact that either the statements merely referred to “objectives” or that they were “vague” or “lacking in specificity.”⁶⁷

However, in today’s climate, a board should not count on a court to find the notion of corporate social responsibility to be too vague to be material.⁶⁸ With the increased availability of information about CSR’s impact on the bottom line and the importance of CSR to investors, a court may easily justify finding related statements to be material.⁶⁹ Moreover, *Ford* demonstrates that investors have already used a statement about CSR as a foundation for allegations of 10(b)(5) violations to take aim at a public company.⁷⁰ While Ford Motor Company was able to escape liability, it was not because the court unequivocally found statements about CSR to be *per se* immaterial.⁷¹ In fact, a recent article on CNNMoney.com describing a socially responsible project between Isuzu Commercial Truck of America and Dutch-based Corporate ExpressNV contained a “Safe

⁶⁷ See *In re Ford*, 381 F. 3d at 570-71. The court did not analyze the statements about corporate citizenship or corporate responsibility independently of the other statements that the plaintiffs alleged to be misleading. See *id.* Therefore, the court generalized that none of the statements was material, staking its opinion apparently on the fact that they seemed to be optimistic aspirations rather than assertions of fact. See *id.*

⁶⁸ Again, it is not clear whether the court in *In re Ford* found the notion of CSR to be too vague or simply that the statement was merely an objective because the court offered both reasons as possibilities of why the statement would be immaterial but committed to neither specifically. See *In re Ford*, 381 F.3d at 570.

⁶⁹ See FLEISHMAN-HILLARD RESEARCH, *supra* note 57.

⁷⁰ See *In re Ford*, 381 F. 3d 563.

⁷¹ See *In re Ford*, 381 F. 3d 563.

Harbor Statement” expressly stating that the statements were forward-looking.⁷² Thus, companies are prudently taking measures in recognition that information about CSR could influence an investor as well as a consumer.⁷³ If consumers are influenced by a company’s commitment to social responsibility, the next question becomes: what kinds of statements about CSR can a corporation make to consumers?

C. *Nike, Inc. v. Kasky*⁷⁴: False Advertising and Greenwashing⁷⁵

During the late 1990’s, the Nike suffered adverse publicity stemming from the allegations that the company was engaging in unfair labor practices overseas.⁷⁶ In reaction to this criticism, Nike took out full page advertisements in leading newspapers, drafted press releases, and sent letters to universities stating that the company found “no evidence of illegal or unsafe working conditions at Nike factories”⁷⁷ Responding to Nike’s campaign, Mark Kasky, a California resident, sued Nike in California state court alleging violations of the California Business and Professions Code for unfair and

⁷² CSRwire.com, *Corporate Express Piloting Hybrid-Electric Delivery Truck from Isuzu Commercial Truck of America*, Jan. 21, 2008 <http://www.csrwire.com/News/10770.html> (last visited Apr. 8, 2008).

⁷³ See *infra* note 75.

⁷⁴ *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

⁷⁵ Greenwashing refers to “the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.” TerraChoice, *The Six Sins of Greenwashing*, http://www.terrachoice.com/files/6_sins.pdf. (last visited Feb. 8, 2008).

⁷⁶ *Kasky*, 539 U.S. at 665. Specifically, it was alleged, “in the factories where Nike products are made workers were paid less than the applicable local minimum wage; required to work overtime; allowed and encouraged to work more overtime hours than applicable local law allowed; subjected to physical, verbal, and sexual abuse; and exposed to toxic chemicals, noise, heat, and dust without adequate safety equipment, in violation of applicable local occupational health and safety regulations.” *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002).

⁷⁷ *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002).

deceptive practices.⁷⁸ Kasky asserted that, “in order to maintain and/or increase its sales [Nike made] false statements and/or material omissions of fact” about Nike’s working conditions for manufactured products.⁷⁹ Alleging no harm or damages as an individual and acting as a private attorney general, Kasky brought the suit “on behalf of the General Public of the State of California and on information and belief.”⁸⁰

After Nike successfully demurred on the grounds that Nike’s statements were noncommercial speech and subject to the greatest measure of Constitutional protection, the case reached the California Supreme Court.⁸¹ The court reversed the lower holdings and remanded, opining that statements made during Nike’s public relations campaign should appropriately be considered “commercial speech.”⁸²

The United States Supreme Court initially granted a writ of certiorari but determined that review would not be appropriate at the current stage of litigation.⁸³

⁷⁸ Nike, Inc. v. Kasky, 539 U.S. 654, 656 (2003). Specifically, Mr. Kasky claimed that Nike violated California’s unfair competition law. *Id.* citing CAL. BUS. & PROF. CODE § 17200 et seq. (West 2008). The law defines “unfair competition” to mean and include “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by the false advertising law (§ 17500 et seq.)” *Id.* The purpose of the unfair competition law is to “protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.” *Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 110 (1972).

⁷⁹ *Kasky*, 539 U.S. at 656.

⁸⁰ *Kasky*, 539 U.S. at 656. California’s Unfair Competition Law and False Advertising Law permits a citizen to act as a private attorney general. *See Id.* at 664, n.5. (J. Stevens, J. Ginsburg, & J. Souter, *concurring*).

⁸¹ *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002).

⁸² *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002) The court cited two reasons for why they deemed the speech to be commercial speech: (1) “the messages in question were directed by a commercial speaker to a commercial audience”; and (2) they made representations of fact about the speaker’s own business operations for the promoting sales of its products . . .” This action merely sent the case back down to the lower courts while reversing the demurrer; thus, the court stated that “the suit ‘is still at a preliminary stage, and whether any false representations were made is a disputed issue that has yet to be resolved.’” *Id.*

⁸³ *Kasky*, 539 U.S. at 655. The Supreme Court initially granted the writ of certiorari to decide two outstanding questions: (1) whether a corporation participating in a public debate may ‘be subjected to liability for factual inaccuracies on the theory that its statements are commercial speech because they might

Before leaving the appeal to be tried at the state court level, the Court articulated the policy issues that hung in the balance:

This case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance On the one hand, if the allegations of the complaint are true, direct communications with customers and potential customers that were intended to generate sales - and possible to maintain or enhance the market value of Nike's stock - contained significant factual misstatements. The regulatory interest in protecting market participants from being misled by such misstatements is of the highest order. That is why we have broadly (perhaps overbroadly) stated that "there is no constitutional value in false statements of fact."⁸⁴ On the other hand, the communications were part of an ongoing discussion and debate about important public issues that was concerned not only with Nike's labor practices, but with similar practices used by other multinational corporations. Knowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance.⁸⁵ That is why we have provided such broad protections for misstatements about public figures that are not animated by malice.⁸⁶

affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions'; and (2) even assuming the California Supreme Court properly characterized such statements as commercial speech, whether the 'First Amendment, as applied to the states through the Fourteenth Amendment, permit[s] subjecting speakers to the legal regime approved by that court in the decision below.'" *Kasky* 539 U.S. at 657 (Stevens, J., Ginsburg, J., & Souter, J. concurring). The court withdrew the grant of certiorari in June of 2003 as being "improvidently granted." Justice Stevens, joined by Justice Ginsburg stated three reasons why dismissal was proper: First, the California Supreme Court never entered final judgment; Second, neither party had standing in federal court; and Third, the Court refrained from anticipating a question of constitutional law. *Id.* at 658 - 63. In sum, the Court reasoned that it was not wise to "address the constitutional questions presented by the certiorari petition at this stage of the litigation." *Kasky*, 539 U.S. at 664 (Stevens, J., Ginsburg, J., & Souter, J. concurring.).

⁸⁴ *Kasky*, 539 U.S. at 664 (Stevens, J., Ginsburg, J., & Souter, J. concurring) quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

⁸⁵ *Kasky*, 539 U.S. at 664 (Stevens, J., Ginsburg, J. & Souter, J. concurring) citing Brief for ExxonMobil et al. as Amici Curiae 2; Brief for Pfizer Inc. as Amicus Curiae 11-12.

⁸⁶ *Kasky*, 539 U.S. at 663-64 (Stevens, J., Ginsburg, J. & Souter, J. concurring).

The importance of the issues was hardly lost on the corporate world as thirty-one *amicus* briefs were filed.⁸⁷ The dissent, who argued that the case should have been heard, articulated the conflicting principles in First Amendment jurisprudence presented by the dispute: “[I]n commercial speech cases . . . the First Amendment ‘embraces at least the liberty to discuss publicly and truthfully all matters of public concern.’”⁸⁸ However, in different contexts, free speech about public concern issues “needs ‘breathing space’ – potentially incorporating certain false or misleading speech – in order to survive.”⁸⁹ The dissent specifically addressed concerns regarding

the delegation of state authority to private individuals [because it] authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums.⁹⁰

The dissent expressly stated that if the Court had reached the merits, “California’s delegation of enforcement authority to private attorneys general disproportionately burdens speech . . . and that the First Amendment consequently forbids it.”⁹¹ The actions

⁸⁷ *Kasky*, 539 U.S. at 667 (Breyer, J., & O’Connor, J. *dissenting*).

⁸⁸ *Kasky*, 539 U.S. at 676 (Breyer, J., & O’Connor, J. *dissenting*) quoting *Consol. Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 534 (1980).

⁸⁹ *Kasky*, 539 U.S. at 676 (Breyer, J., & O’Connor, J. *dissenting*) quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

⁹⁰ *Kasky*, 539 U.S. at 679 (Breyer, J., & O’Connor, J. *dissenting*). The dissent elaborated: “That threat means a commercial speaker must take particular care – considerably more care than the speaker’s noncommercial opponents – when speaking on public matters. A large organization’s unqualified claim about the adequacy of working conditions, for example, could lead to liability, should a court conclude after hearing the evidence that enough exceptions exist to warrant qualification – even if those exceptions were unknown (but perhaps should have been known) to the speaker. Uncertainty about how a court will view these, or other, statements, can easily chill a speaker’s efforts to engage in public debate – particularly where a “false advertising” law, like California’s law, imposes liability based upon negligence or without fault. *Id.* citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

⁹¹ *Kasky*, 539 U.S. at 681 (Breyer, J., & O’Connor, J. *dissenting*).

Nike took to manage risk demonstrated the dissent's concern about the chilling effect

because as a result of the lawsuit, Nike decided

to restrict severely all of its communications on social issues that could reach California consumers, including speech in national and international media . . . it [did] not released its annual Corporate Responsibility Report, . . . decided not to pursue a listing in the Dow Jones Sustainability Index, and refused invitations to speak on corporate responsibility issues.⁹²

Nike reached a settlement whereby the company agreed to contribute \$1.5 million to a workers' rights organization, leaving unsettled the important national policy issues articulated by the Supreme Court.⁹³ However, the California Supreme Court opinion remains untouched as precedent on the issue of commercial versus noncommercial speech.⁹⁴ Therefore, under the current law of California, a company choosing to respond to negative publicity by way of a public relations campaign must do so in a manner that is not false or misleading.⁹⁵ Importantly, it is irrelevant whether a company *intentionally* makes false or misleading statements.⁹⁶ So long as the court finds that the company's statement was made to a "commercial audience" about the company's "own business operations for the promoting sales of its products," it will be considered "commercial speech" and given minimal protection.⁹⁷

⁹² *Kasky*, 539 U.S. at 676 (Breyer, J., & O'Connor, J. *dissenting*) quoting Brief for Petitioners 39.

⁹³ William McCall, *Nike Free-Speech Case Settled for \$ 1.5 Million*, SEATTLE TIMES, Sept. 13, 2003, at C1.

⁹⁴ *See Nike, Inc. v. Kasky*, 27 Cal. Rptr. 2d 296 (2003).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* Overseas, both private and government entities have taken to the cause of eliminating greenwashing. In the United Kingdom, the Advertising Standards Authority—an independent, self-regulating organization—has taken the role of policing "advertisements, sales promotions and direct marketing" to ensure that marketing campaigns are not conducted in a misleading, harmful or offensive manner.

Despite the lawsuit, or perhaps even motivated by it, Nike, Inc. is now ranked among the world's leading companies in sustainability reporting, evidence of their commitment to the corporation's social responsibility reporting and transparency.⁹⁸ The issue of whether or not a corporation can claim to be socially responsible without facing liability, however, remains unsettled.⁹⁹

The environmental marketing group TerraChoice has defined "greenwashing" as "the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service."¹⁰⁰ The issues in *Kasky* provide a

Advertising Standards Authority, <http://www.asa.org.uk/asa/about> (last visited Feb. 8, 2008). The ASA generally regulates the content of "advertisements, sales promotions and direct marketing" in the United Kingdom. The goals of the organization are to stop misleading, harmful or offensive advertising, and generally ensure that marketing promotions are run fairly. Once a complaint is filed with the ASA, the organization engages in an investigation and ultimately determines if a violation has occurred. Once decided, the advertising industry enforces the rulings through the Committee of Advertising Practice, which represents the main industry bodies representing advertisers, agencies and media owners. *Id.* It was the ASA that conducted an inquiry of the Malaysian palm-oil commercials airing on British television. Advertising Standards Authority, *ASA Adjudications*, http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43763.htm. The ASA concluded that the "ad was likely to mislead viewers as to the environmental benefits of palm-oil plantations, compared with native rain forests." *Id.*

⁹⁸ CSRWire.com, "SustainAbility Names Nike Top U.S. Company for Social Responsibility Reporting" Nov. 9, 2006, <http://www.csrwire.com/News/6800.html> (last visited Apr. 1, 2008). "Nike's inclusion on the list signifies its leadership in corporate responsibility and clearly sets it apart as one the world's leading companies in sustainability reporting," said John Elkington, founder and chief entrepreneur at SustainAbility, the think tank and strategy consultancy that operates Global Reporters and produced the rankings in its 'Tomorrow's Value' report. "Similar to the other top reporters, Nike is embracing the idea that sustainability and reporting are about far more than mitigating risk and appeasing stakeholders, they are the very basis for entrepreneurship inside their company that will lead to strategic innovations and the building of new markets yet to come." *Id.*

⁹⁹ See discussion *infra* notes 90 - ____.

¹⁰⁰ TerraChoice, *The Six Sins of Greenwashing*, http://www.terrachoice.com/files/6_sins.pdf. A report released by the TerraChoice has received much attention for its investigation of 1,753 environmental claims on 1,018 products. *Id.* In this report, it was determined that only *one* of the reviewed product advertisements did not commit at least one of the six "sins" of greenwashing. *Id.* These sins were categorized as the sins of: hidden trade-off, no proof, vagueness, irrelevance, lesser of two evils, and fibbing. *Id.* The conclusion reached by the report's authors is that "greenwashing is pervasive," and that the practice of greenwashing creates a danger that consumers will be confused and misled. *Id.*

helpful parallel contour of the greenwashing versus greenmuting debate.¹⁰¹ At the core of the greenmuting debate is essentially an argument warning against the chilling effect: those who oppose harsh penalties for alleged greenwashing fear that companies will be muted if there are harsh penalties for statements about CSR, thus deterring transparency.¹⁰² By way of *amici* briefs filed with the Court before *certiorari* in the *Kasky* case was withdrawn, several argued that “[t]ransparency is a key element of the CSR debate as it helps business to improve their practices and behaviour [sic]; transparency also enables businesses and third parties to measure the results achieved”¹⁰³ Others sympathetic to Nike’s position felt that an adverse decision would illustrate that “the United States . . . [is] more interested in insuring that the small number of false statements be penalized than enabling an emerging corporate candor.”¹⁰⁴ Those who believe that corporate America should be free to engage in public debate over their social performance with the full protection of the First Amendment seek to defer to the public by way of the media because it provides the necessary scrutiny that the public needs to develop informed opinions on topics of public concern.¹⁰⁵ By allowing plaintiffs’

¹⁰¹ See discussion, *infra* Part I.B. While *Kasky* did not expressly deal with environmental issues, the public policy issues of free speech versus the chilling effect are parallel.

¹⁰² Brief *Amici Curiae* on Behalf of SRiMedia and CoreRatings in Support of Petitioners, 2003 WL 836303 at 2. The authors of this brief forward their concerns that if corporations are subject to suit “based on allegations that statements it makes in annual reports or other similar publications or to rating agencies were incomplete or misleading, without any requirement of pleading or proving knowing falsity or malice,” that corporations would be unlikely to disclose corporate responsibility measures. *Id.*

¹⁰³ Brief *Amici Curiae* on Behalf of SRiMedia and CoreRatings in Support of Petitioners, 2003 WL 836303 at 7 (quoting the European Commission’s “Green Paper” on corporate social responsibility).

¹⁰⁴ Brief *Amici Curiae* on Behalf of SRiMedia and CoreRatings in Support of Petitioners, 2003 WL 836303 at 17.

¹⁰⁵ Brief *Amici Curiae* of Forth Leading Newspapers, Magazines, Broadcasters, Wire-Services, and Media-Related Professional and Trade Associations in Support of Petitioners, 2003 WL 83513, at 1.

attorneys to attack corporations on all statements released, companies will be forced to withdraw from the social and political conversation, limiting their comments to “bland, indisputable claims, for fear of being held liable for good faith errors or unintended but potentially ‘misleading’ implications.”¹⁰⁶ This silence will reduce corporate transparency and hinder public discussion of business-related issues.¹⁰⁷

Recognizing that image advertising has become an “essential marketing tool stimulating product purchase,” many contend that the states are justified in punishing all false and misleading statements—including statements addressing corporate social responsibility.¹⁰⁸ This awareness of the social consciousness of consumers is the undercurrent driving debate. In fact, several members of Congress submitted *amici* briefs supporting state legislation on the grounds that “false commercial speech causes economic harms to consumers who are deceived into buying products and services that do not meet their needs or expectations.”¹⁰⁹ While the legal arguments attempt to draw the fine line between commercial and noncommercial speech, the states’ ultimate concern is that the greenwashing campaigns are not aimed as “political speech intended to

¹⁰⁶ *Id.* at 12.

¹⁰⁷ *Id.* at 15. The media *amici* goes even further in asserting that California Supreme Court is being paternalistic over consumers and assuming that “consumers lack the ability or sophistication to decide for themselves whether a company’s image reflects reality, or whether that image should influence their purchasing decision at all.” *Id.* at 19.

¹⁰⁸ Brief of *Amici Curiae* the states of California, Alaska, Arizona, Connecticut, Florida, Illinois, Louisiana, Maine, Maryland, Minnesota, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Vermont, and West Virginia and the Commonwealth of Puerto Rico in Support of Respondent, 2003 WL 1844750, 2003, at 1.

¹⁰⁹ *Amicus Curiae* Brief in Support of Respondent by Members of the United States Congress, Representatives Dennis J. Kucinich, Bernard Sanders, Corrine Brown, and Bob Filner, 2003 WL 1844684, at 3-4.

influence public policy,” but rather, “commercial speech intended to influence consumers’ decisions.”¹¹⁰

To summarize section I in its entirety, creative capitalism has a legal foundation that is somewhat uncertain. However, it is not entirely a new legal frontier as courts have already provided some guidance on CSR and related issues.¹¹¹ Thus, the key factors a board should consider include the importance of transparency and language, and of making truthful statements about CSR policies to both investors and consumers. Moreover, under the duty to be informed, directors should employ an objective test against which to evaluate potential CSR projects.¹¹² With the ambiguity of terms like CSR, it is critical to refine the definitions of some fundamental concepts and employ an objective framework in order for a corporation to justify a public claim of social responsibility and reap the benefits.

II. Defining Creative Capitalism: When is a Company Socially Responsible

Although “corporate social responsibility” has enjoyed increased usage in various contexts in recent years, the term is still largely ambiguous.¹¹³ Moreover, perhaps overlooking the fact that CSR is poorly defined, Daniel Franklin, Executive Editor of *The*

¹¹⁰ *Id.* at 9.

¹¹¹ See discussion *supra* Part I.A.-C.

¹¹² See discussion, Part III.

¹¹³ See Paul Maidment, *Re-Thinking Social Responsibility*, FORBES.COM (Jan. 25, 2008) <http://www.forbes.com/2008/01/25/davos-corporate-responsibility> (last visited Jan. 25, 2008) (“The definition of a company and its involvement in wider society is expanding, as is the expectations of shareholders, employees, and consumers. Traditional corporate social responsibility is starting to be replaced with a new notion of corporate citizenship, which for larger companies means global corporate citizenship.”).

Economist, recently asserted, “nobody much likes the CSR label.”¹¹⁴ Without a commonly accepted definition, the risk of capricious misuse of the term endangers the discourse on corporate social responsibility, especially when companies use the term to promote merely a marketing campaign aimed at cleaning up a tarnished corporate image.¹¹⁵

“If you believe what they say about themselves, big companies have never been better citizens.”¹¹⁶ The *New York Times* featured a special advertising supplement in October of 2007 on CSR entitled “Corporate Social Responsibility: Designing a Sustainable Future.”¹¹⁷ In it, Aaron Cramer, the President and CEO of Business for Social Responsibility (BSR), announced the “Designing a Sustainable Future” conference where the participants focused on how “[d]esigning a sustainable future involves conscious choices about business strategies . . . [where] social and environmental

¹¹⁴ Daniel Franklin, *Just Good Business*, THE ECONOMIST: a Special Report on Corporate Social Responsibility, 3 (Jan. 19, 2008). Franklin reiterates the lack of uniformity and of definition. *Id.* (“All this is convoluted code for something simple: companies meaning (or seeming) to be good.”) *See also supra* note 5.

¹¹⁵ *See* Hannah Clark, *A New Taste For Activism*, FORBES.COM; http://www.forbes.com/2007/01/09/leadership-citizenship-politics-lead-citizen-cx_hc_010 (last visited Oct. 9, 2007). In her interview with Ben Cohen, founder of Ben & Jerry’s, Hannah Clark mentioned, “Corporate citizenship is a powerful branding tool,” to which Mr. Cohen replied, “Incredibly powerful. But the problem is now some corporations are saying, ‘Hey, we develop more loyal customers if we give the *perception* that we’re really focused on dealing with these social issues.’” *Id.* Cohen points out that Wal-Mart is a good example because he doesn’t know what is driving Wal-Mart’s announcement that they are going to carry organic foods. *Id.*

¹¹⁶ *In Search of the Good Company*, THE ECONOMIST, Sept. 8, 2007 at 65.

¹¹⁷ Aron Cramer, *Corporate Social Responsibility: Designing a Sustainable Future*, N.Y. TIMES, Oct. 25, 2007, at ZJ1. The Business for Social Responsibility conference included over 1,000 people from forty countries. *Id.* The conference is designed to highlight “new forms of thinking and action needed to build sustainable prosperity.” *Id.* Given the considerable attention—both positive and negative—that corporate social responsibility had received in the past year, the conference recognized the “new urgency for business strategy to integrate social and environmental impacts and opportunities.” *Id.* The conference was hopeful of the possibilities of leveraging “business success for broad social benefit” by the “design of new types of partnerships among business, government and nongovernmental organizations. . .” *Id.*

considerations [must be] center stage in the boardroom.”¹¹⁸ Several companies purchased advertising space, including Yahoo!, Coca-Cola, DuPont, Chevron, and Conoco Phillips.¹¹⁹

The reason for such aggressive social campaigning is rooted at the consumer level.¹²⁰ Of United States consumers polled, 52% claim that they “actively seek information on companies’ Corporate Social Responsibility, with 46% citing the Internet as their “primary source of CSR-related information.”¹²¹ The expansion of available information has exploded in recent years as extensive communication networks—namely

¹¹⁸ Aron Cramer, *Corporate Social Responsibility: Designing a Sustainable Future*, N.Y. TIMES, Oct. 25, 2007, at ZJ1.

¹¹⁹ *Corporate Social Responsibility: Designing a Sustainable Future*, N.Y. TIMES, Oct. 25, 2007, at ZJ1. In the advertisement, Yahoo! took the opportunity to promote its website Yahoo! Green, which “use[s] the Internet as a platform for educating, communicating, and organizing consumers all over the world, and making it fun,” mostly focusing on highlighting individual impacts on the government and helping people realize their “carbon footprint.” *Id.* Coca-Cola emphasized their partnership with Greenpeace, “a former nemesis,” to commit to “innovative refrigerant technology” to reduce the “impacts its 9 million coolers and vending machines [have] on our global climate.” *Id.* DuPont discussed its commitment to using fifteen criteria to screen new business ideas for developing nations for their ability to achieve the triple bottom line, i.e. “mak[ing] a positive contribution to society, be[ing] good for the environment, and be[ing] an attractive business opportunity.” *Id.* DuPont acknowledges that their efforts are “inspired, in part, by civic duty” but also “to a tremendous market opportunity.” *Id.*

¹²⁰ See Kerr, *Sustainability Meets Profitability*, *supra* note 6, at 667 (The 2002 Cone Corporate Citizenship Study found that “84 percent of Americans say they would be likely to switch brands to one associated with a good cause, if price and quality are similar.”).

¹²¹ GOLDMAN SACHS, GS SUSTAIN 1 http://www.unglobalcompact.org/docs/summit2007/g_s_esg_embargoed_until030707pdf.pdf (June 22, 2007) (last visited Apr. 8, 2009). This innovative report released by Goldman Sachs at the U.N.-sponsored 2007 Global Compact Leaders Summit, includes a “proprietary framework for analyzing competitive advantage in mature industries and the identification of winners in emerging industries as they evolve in response to a rapidly changing, globalizing world. *Id.* Goldman Sachs has found an effective manner of considering the shifting global political landscape while measuring performance within the strictures of traditional valuation methods. *Id.* Commentators have discussed the GS Sustain report with praise, finding that the ESG indicators—environmental, social, and governance—illuminate strongly positioned companies capable of thriving within a highly-competitive business environment. World Business Council for Sustainable Development, *U.N. group discusses groundbreaking Goldman Sachs Study on Green Business*, <http://www.wbcsd.org/plugins/DocSearch/details.asp?type=DocDet&ObjectId=MjU0MDc>. “The success ratio of stocks picked [in the report] is in excess of 70 percent. On a long run average I think the best hedge funds and investors are typically looking at around a 50 percent or 55 percent success rate.” *Id.*

the Internet—has created greater connectivity in a highly transparent corporate world.¹²² These numbers are not insignificant when consumers have identified “being socially responsible” as the factor most likely to influence “brand loyalty.”¹²³ It is important to recognize that in these studies, social responsibility garnered 35% of the responses, outscoring “lower prices,” which came in at 20%.¹²⁴ Consumers are even choosing to redirect their credit card rewards toward efforts to cut greenhouse gas emissions, frequently paying higher than average interest rates.¹²⁵

As more attention is cast upon corporate social performance, the “role that business plays in promoting—or abusing—human rights has never been under such scrutiny.”¹²⁶ In fact, recent consumer polling has revealed that consumers are more likely to be loyal to a company that is known for its social responsibility than to a company that offers a lower price.¹²⁷ Similarly, 63% of investors considered a company’s record of

¹²² GOLDMAN SACHS, GS SUSTAIN 1 (June 22, 2007).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Carolyn Cui, *Credit Cards’ Latest Pitch: Green Benefits*, WALL STREET JOURNAL (Feb. 6, 2008), at D1. Although the popularity of these “green” credit cards reflects the consumer’s desire to “do their part” in whatever way possible, the most devote environmentalists are questioning the actual impact the cards are having on greenhouse gas emissions. *Id.* Due to the lack of regulation in this area, environmentalists seek greater transparency to ensure that the money directed to programs provide offsets that actually reduce overall emissions. *Id.* Others question the efficacy of the “green” cards, pointing out that it may give people an “easy pass” so that they may feel that since they have a green credit card, they can do things “that are carbon-ridiculous.” *Id.* at D2.

¹²⁶ *Doing the Wrong Thing*, THE ECONOMIST, Oct. 27, 2007, at 74.

¹²⁷ FLEISHMAN-HILLARD RESEARCH, RETHINKING CORPORATE SOCIAL RESPONSIBILITY (2005), http://www.csrresults.com/FINAL_Full_Report.pdf. The authoring organization, Fleishman-Hillard Inc., is a public relations firm that has specialized in delivering positive communications regarding the performance of their organizations. *Id.* This study was conducted as a follow-up study that was originally conducted in 2005 to measure consumer attitudes and behaviors regarding corporate social responsibility. *Id.* Furthermore, the organization tracked the role that the media and technology plays in educating consumers about corporate behavior. *Id.* After collecting and analyzing their specific data, the report revealed four themes: (1) “Americans expect corporations to be engaged in their communities in ways that go beyond just making financial contributions”; (2) “corporate America receives low marks for its CSR

being socially responsible “extremely” or “very” influential in their decision to invest in the company.¹²⁸ Recognizing the expanding pool of socially conscious investors, investment funds such as Calvert, Innovest, and Domini have garnered momentum and capital by screening social irresponsibility and pressuring corporations to become more socially aware through shareholder activism.¹²⁹

There was a prevailing myth that a company’s investment in socially responsible profits and practices is inversely proportional to its profitability.¹³⁰ *Sustainability Meets Profitability* argued that information regarding participation in proactive CSR is measurable both qualitatively and quantitatively, so directors can take it into consideration without violating the fiduciary duty of due care and thus enjoy protection under the business judgment rule.¹³¹ Large investment firms are now moving one step further and demonstrating that proactive CSR operates in lockstep with profitability.¹³²

performance”; (3) “Americans believe that government should play a role in ensuring the social responsibility of corporations—in some industries more than others”; and (4) “online forms of communication continue to change the landscape in which consumers gather and communicate information about how well companies are being socially responsible.” *Id.*

¹²⁸ FLEISHMAN-HILLARD RESEARCH, *supra* note 126.

¹²⁹ These three investment firms, among others, have made the conscious decision to invest solely in socially and environmentally responsible companies. Calvert has been in the mutual fund business for 30 years and manages more than \$15 billion in assets. Calvert, *Calvert Funds*, <http://www.calvert.com/funds.html>. Innovest has turned profits by using an innovative approach to investments, targeting companies whose management is capable of turning profits amidst the current climate of political, environmental, labor, and human rights issues. Innovest, *Our Approach*, <http://www.innovestgroup.com>. Domini emphasizes the importance of responsible investing, recognizing that the power of the institutional investor to engage companies on “global warming, sweatshop labor, and product safety,” is a powerful tool that brings “new voices to the table.” Domini, <http://www.domini.com>.

¹³⁰ See Milton Friedman, *The Social Responsibility of Business is to Increase Profits*, N.Y. TIMES MAGAZINE 126, Sept. 13, 1970. See also Kerr, *Sustainability Meets Profitability*, *supra* note 4, at 640-41.

¹³¹ See generally, Kerr, *Sustainability Meets Profitability*, *supra* note 6.

¹³² See GOLDMAN SACHS, GS SUSTAIN 1 (July 6, 2007). But see THE ECONOMIST, *Does CSR Work?* at 10 (Jan. 19-25, 2008) (“Two of the best known indices – the Dow Jones Sustainability index and the FTSE4Good underperform the market.”)

Goldman Sachs released its “GS Sustain” report at the United Nations Global Compact Summit in July 2007 which reflected a correlation between environmental issues, social issues, and governance (“ESG”) and stock performance—ESG leaders led Morgan Stanley Capital International (“MSCI”) by 24% since August 2005.¹³³

The GS Sustain report reflects what directors have been thinking for a long time—the world is changing, the consumer is changing, and the investor is changing. As progressive businesses pushed into this new frontier, investment managers and analysts picked up on the new trend.¹³⁴ The logic behind the shift in perspective was simple: “Companies that think creatively about how these issues affect the bottom line are likely to have an edge over rivals that don’t.”¹³⁵ In other words, the “market rewards competitive advantage with premium valuations,” which could explain the fact that venture capitalists are pouring billions of dollars into “clean-energy” startups.¹³⁶ The businesses that will thrive tomorrow are those that understand the need to “design the

¹³³ GOLDMAN SACHS, *supra* note 120.

¹³⁴ Carolyn Cui, *For Money Managers, A Smarter Approach to Social Responsibility*, WALL ST. J. R1, Nov. 5, 2007. The search for indicators of financial performance is far from a novel idea, but this article identifies a new indicator. The premise is simple; the companies that are implementing progressive social and environmental policies possess a flexible management team capable of quickly responding to the current needs of the consumer and investor. Conversely, those companies incapable of moving beyond the cost and profit drivers of yesterday are those without the managerial talent to adapt quickly to the future issues of consumer and investor importance, eventually becoming unprofitable and obsolete.

¹³⁵ Carolyn Cui, *For Money Managers, A Smarter Approach to Social Responsibility*, WALL ST. J. R1, Nov. 5, 2007.

¹³⁶ Carolyn Cui, *For Money Managers, A Smarter Approach to Social Responsibility*, WALL ST. J. R1, Nov. 5, 2007; Rebecca Buckman, *Betting on Green*, WALL ST. J. R14, Feb. 11, 2007 (reporting that venture capitalists funds have been driven away from traditional favored companies such as semiconductors and software, and toward producers of solar panels, biodiesel fuel and even eco-friendly drywall).

future” with a socially responsible vision, not those which attempt to “retrofit the past.”¹³⁷

A. Defining Corporate Social Responsibility and Social Entrepreneurship

CSR and Social Entrepreneurship are being redefined in the public discourse.¹³⁸

“Ten years ago, few people had heard the term ‘social entrepreneur.’”¹³⁹ However, the term is rapidly becoming part of the boardroom lexicon despite the fact that people are not necessarily using the term to describe the same concepts.¹⁴⁰ Bill Gates avoided using either of the terms “CSR” or “social entrepreneurship,” calling instead for “creative capitalism,” in his World Economic Forum speech to refer to both spending money on

¹³⁷ Nicholas Casey, *New Nike Sneaker Targets Jocks, Greens, Wall Street*, WALL ST. J. B1, Feb. 15, 2008. See also, *An Introduction*, in *Corporate Social Responsibility: Designing a Sustainable Future*, N.Y. TIMES, Special Advertising Section, Oct. 25, 2007, at ZJ1 (“Designing a sustainable future involves conscious choices about business strategies.”).

¹³⁸ Paul Maidment, *Re-Thinking Social Responsibility*, FORBES.COM (Jan. 25, 2008) <http://www.forbes.com/2008/01/25/davos-corporate-responsibility> (last visited Jan. 27, 2008). Paul Maidment suggests that the “definition of a company and its involvement in wider society is expanding, as [are] the expectations of shareholders, employees and consumers. Traditional corporate social responsibility is starting to be replaced with a new notion of corporate citizenship.” *Id.*

¹³⁹ ECONOMIST.COM, *Unreasonable People Power*, Jan. 22, 2008 http://www.economist.com/business/displaystory.cfm?story_id=1055875 (last visited Apr. 8, 2008). Some assert that the definition is irrelevant if “people feel good and part of a supportive community when they use the term to describe themselves.” *Id.*

¹⁴⁰ ECONOMIST.COM, *Unreasonable People Power*, Jan. 22, 2008 http://www.economist.com/business/displaystory.cfm?story_id=1055875 (last visited Apr. 8, 2008). The article mentions several different kinds of people engaging in different kinds of work. The article explains, “Each of them was entrepreneurial, certainly, but quite what ‘social’ means is less clear. The Czech organisation, Bily Kruh Bezpeci, founded by Petra Vitousova, is never going to turn a profit, nor should it try to do so. Ariel Zylbersztejn, the managing director of Mexico’s Cinepop, by contrast, boasts that his entertainment-based platform allows business and government to target otherwise inaccessible markets. He has ambitious plans to expand, not least to China. His brand of social entrepreneurship could make him rich.” *Id.* The article goes on to say, “Perhaps it does not really matter exactly how ‘social entrepreneur’ is defined if such impressive people feel good and part of a supportive community when they use the term to describe themselves.” *Id.* However, this is not helpful, as it does not provide any guidance to those whose claim of being a social entrepreneur might be actionable. See also discussion, *infra* note 150.

socially desirable projects and dedicating a portion of their greatest innovators' time to solving social problems.¹⁴¹ The academic and business communities have recently articulated the need to specifically define the terms “social entrepreneurship” and “social responsibility.”¹⁴²

i. Defining What CSR is Not

CSR is neither philanthropy nor a cog in a marketing machine.¹⁴³ Ben Cohen, co-founder of Ben & Jerry's and pioneer in the CSR movement, explains, “I think philanthropy is great. But there is a limit to how much you can just give away. If you integrate social concerns into day-to-day profit-making activity, there's no limit to how

¹⁴¹ John Markoff, *Bill Gates: Social Philosopher*, N.Y. TIMES, “Davos Diary,” Jan. 24, 2008, <http://dealbook.blogs.nytimes.com/2008/01/24/bill-gates-social-philosopher/index.html> (last visited Apr. 6, 2008) (quoting Bill Gates, Chairman, Microsoft Corp., Address at the World Econ. Forum (Jan. 24, 2008)). Some sources conflate the terms corporate social responsibility and sustainability, indicating the lack of uniform definitions. See e.g. Andrew Savitz & Karl Weber, *The Sweet Spot: Where Profit Meets Common Good*, COMPLIANCE WEEK 1, July 18, 2006 http://www.businesswire.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/services/ir_and_pr/ir_resource_center/editorials/2006/The_Sweet_Spot__Where_Profit_Meets_Comm_on_Good.pdf (“Sustainability, also known as corporate social responsibility, incorporates the idea that companies can become more profitable by doing the right thing.”). The authors refer to the “sustainability sweet spot” as “The place where the pursuit of profit blends seamlessly with the pursuit of the common good.” *Id.* at 2. However, in the same article, the authors explain, “Sustainable organizations and societies generate and live off interest rather than deplete capital. Capital, in this context, includes natural resources such as water, air, sources of energy, and foodstuffs. It also includes human and social assets – from worker commitment to community support – as well as economic resources. . .” *Id.* at 1. See also Savitz & Karl Weber, *THE TRIPLE BOTTOM LINE* (2006).

¹⁴² See Roger L. Martin & Sally Osberg, *Social Entrepreneurship: The Case for Definition*, Stanford Social Innovation Review, Spring 2007. The authors distinguish between the traditional entrepreneur and the social entrepreneur. “The social entrepreneur, however, neither anticipates nor organizes to create substantial financial profit for his or her investors – philanthropic and government organizations for the most part – or for himself or herself. Instead, the social entrepreneur aims for value in the form of large-scale, transformational benefit that accrues either to a significant segment of society or to society at large.” *Id.* at 34-35. See also Maidment, *infra* note 143.

¹⁴³ See *infra* note 143 and accompanying text.

much you can do.”¹⁴⁴ Some critics claim that CSR is a “tax” on consumers and that it is irresponsible to deploy corporate assets for social causes.¹⁴⁵ This idea challenges whether it is socially responsible to charge customers more for a product, donate the money to the corporation’s favorite charity, and take a tax deduction.¹⁴⁶ Naturally, this view presupposes that CSR costs are passed on to consumers. Another view is that “[CSR] refers largely to what the company does *not* do.”¹⁴⁷ Betsy Atkins, a CEO and director on various boards, has publicly opposed CSR and contends:

What the investing and consuming public really means by ‘social responsibility’ is: Be transparent in your financial reporting; Produce a quality product and don’t misrepresent it; If you know something about the product that endangers the consumer, be forthright and let the public know; do not use predatory practices in offshore manufacturing, such as

¹⁴⁴ Hannah Clark, *A New Taste For Activism*, FORBES.COM; http://www.forbes.com/2007/01/09/leadership-citizenship-politics-lead-citizen-cx_hc_010 (last visited Oct. 9, 2007). As one journalist recently explained, “Chucking a few dollars at the pet charity of the chairman’s wife no longer cuts it as corporate philanthropy, if it ever did. Nor does using corporate philanthropy as PR or window dressing to mollify critics, or even roping off a slice of the profits to be dispensed for good works.” Paul Maidment, *Re-Thinking Social Responsibility*, FORBES.COM, Jan. 25, 2008, available at <http://www.forbes.com/leadership/2008/01/25/davos-corporate-responsibility> (last visited Jan. 25, 2008).

¹⁴⁵ Betsy Atkins, Commentary, *Is Corporate Social Responsibility Responsible?* FORBES.COM, http://www.forbes.com/2006/11/16/leadership-philanthropy-charity-lead-citizen-cx_ba_1128directorship.html (last visited Apr. 8, 2008).

¹⁴⁶ Betsy Atkins, Commentary, *Is Corporate Social Responsibility Responsible?* FORBES.COM, http://www.forbes.com/2006/11/16/leadership-philanthropy-charity-lead-citizen-cx_ba_1128directorship.html (last visited Apr. 8, 2008). Atkins explains a “litmus test for corporate social responsibility” and explains, “For example, Apple Computer. . . could sell one iPod for \$99 and another for \$125. The company could announce that the extra \$26 from the more expensive iPod would be spent to promote specific social causes, such as education, environmentalism, etc. Such a test would account clearly and honestly for how shareholders’ money was being used and would allow the market to drive the outcome. If consumers wanted to pay the extra \$26, voting with their wallets for a cause they believe in, they could.” *Id.* Atkins thus equates CSR with a tax. *See id.* “Betsy Atkins is CEO of Baja Ventures, a VC firm focused on technology and life sciences, and serves on the boards of Reynolds American, Polycom, Chico’s FAS, SunPower and several private companies.” *Id.*

¹⁴⁷ Betsy Atkins, “Is Corporate Social Responsibility Responsible?” FORBES.COM, http://www.forbes.com/2006/11/16/leadership-philanthropy-charity-lead-citizen-cx_ba_1128directorship.html (last visited Apr. 8, 2008).

child labor; do not pollute your environment or other environments, and adhere to laws and regulations; be respectful, fair, and open in your employment practices.¹⁴⁸

This definition reduces CSR to mere compliance with existing laws and market demands.¹⁴⁹

The definitions of social entrepreneurship or social enterprise can be even more elusive.¹⁵⁰ Some scholars have recently argued that social entrepreneurship has three components: identification of an unjust equilibrium, development of a social value proposition as an opportunity, and alleviation of suffering to result in a stable, new equilibrium.¹⁵¹ The fundamental problem with this Hegelian definition is two-fold; first, the definition necessarily depends upon the success of a project because if the project fails to result in a new equilibrium, it cannot be social entrepreneurship, and second, a

¹⁴⁸ Betsy Atkins, "Is Corporate Social Responsibility Responsible?" FORBES.COM, http://www.forbes.com/2006/11/16/leadership-philanthropy-charity-lead-citizen-cx_ba_1128directorship.html (last visited Apr. 8, 2008).

¹⁴⁹ See discussion, *infra*, Part II.B. The Creative Capitalism Spectrum acknowledges that while these actions are socially responsible, mere compliance is simply operating within the law and therefore should not be confused with social responsibility. While it is true that some laws may have positive social effects, mere law abiding is not equivalent to taking deliberate steps toward improving social conditions.

¹⁵⁰ See Roger L. Martin & Sally Osberg, *Social Entrepreneurship: The Case for Definition*, Stanford Social Innovation Review, Spring 2007. The authors distinguish between the traditional entrepreneur and the social entrepreneur. "The social entrepreneur, however, neither anticipates nor organizes to create substantial financial profit for his or her investors – philanthropic and government organizations for the most part – or for himself or herself. Instead, the social entrepreneur aims for value in the form of large-scale, transformational benefit that accrues either to a significant segment of society or to society at large." *Id.* at 34-35.

¹⁵¹ See Martin & Osberg, *supra* note 149, at 35. "We define social entrepreneurship as having the following three components: (1) identifying a stable but inherently unjust equilibrium that causes the exclusion, marginalization, or suffering of a segment of humanity that lacks the financial means or political clout to achieve any transformative benefit on its own; (2) identifying an opportunity in this unjust equilibrium developing a social value proposition, and bringing to bear inspiration, creativity, direct action, courage, and fortitude, thereby challenging the stable state's hegemony; and (3) forging a new, stable equilibrium that releases trapped potential or alleviates the suffering of the targeted group, and through imitation and the creation of a stable ecosystem around the new equilibrium ensuring a better future for the targeted group and even society at large."

project can only be defined retrospectively.¹⁵² This definition also does not necessarily take into account the alignment of interests between the community and the business, often the hallmark of social enterprise.¹⁵³

ii. Greenwashing: Publicly Disclosing CSR Measures

Perhaps one of the most urgent needs for the definition of terms stems from the risk of backlash against practices that purport to be CSR, but do not truly pass muster. “Some companies introduce CSR practices at a superficial level for window dressing purposes while other companies embed CSR into their core company strategy.”¹⁵⁴ Indeed, “the social responsibility component of branding is increasing [and] . . . firms even have an incentive to create a consumer demand for social responsibly so that they can distinguish their goods in the market and earn competitive rents.”¹⁵⁵ With the increasing social awareness of consumers, many companies and advertising agencies could be tempted to overstate or fabricate claims of social responsibility just to keep up with the market, a practice that has earned the nickname “greenwashing.”¹⁵⁶

¹⁵² See Martin & Osberg, *supra* note 149. While the definition may be effective for defining past projects, it fails to serve companies looking to prospectively engage in social entrepreneurship. *Sustainability Meets Profitability* provides a thorough discussion of the history and development of the social entrepreneurship movement. See Kerr, *Sustainability Meets Profitability*, *supra* note 5.

¹⁵³ See Kerr, *Sustainability Meets Profitability*, *supra* note 5 at 632-33.

¹⁵⁴ Ruth V. Aguilera, Deborah E. Rupp, Cynthia A. Williams & Jyoti Ganapathi, *Putting the S Back in Corporate Social Responsibility: A Multi-Level Theory of Social Change in Organizations*, University of Illinois College of Business Working Paper No. 04-0107 (July 2004), available at http://www.business.uiuc.edu/aguilera/pdf/Aguilera_Rupp_Williams_Ganapathi_AMR_forthcoming.pdf. (last visited Jan. 28, 2008).

¹⁵⁵ Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1453 (2006).

¹⁵⁶ Tom Wright, *False ‘Green’ Ads Draw Global Scrutiny*, WALL ST. J. B4 (Jan. 30, 2008). See also TerraChoice *supra* note 75. See also Atkins, *supra* note 144, (“There are practical reasons why

While they may share some similar characteristics, CSR and social entrepreneurship are not the same. Generally speaking and most certainly oversimplifying, CSR embodies the notion of conducting business affairs according to certain socially responsible principles while social entrepreneurship uses business models and methods for the purposes of solving social problems and aiding communities.¹⁵⁷ In short, CSR and Social Entrepreneurship can be thought of as two points on a spectrum.

B. The Creative Capitalism Spectrum as a Model

This Article introduces an innovative perspective on how to gauge a corporation's degree of social responsibility by creating an entirely new model: The Creative Capitalism Spectrum. To derive the greatest benefit from this shift toward creative capitalism, the business and legal communities need to improve the discourse by settling on terminology. After all, directors cannot be making statements that their companies employ socially responsible programs without taking risks that the term "socially responsible" might connote something far greater than what the director intended to mean. Moreover, in researching this article, it became clear that some people oppose CSR simply because they believe it to be something different than what those who support it believe it to be.

corporations should cloak themselves in the politically correct rhetoric of social responsibility. But marketing should not be confused with significant deployments of corporate assets.”).

¹⁵⁷ Any definitions that reduce these terms down to simple generalizations are inadequate to address the broad range of projects that fall within their scope. This Article identifies the lack of specific, meaningful, and precise definitions of the terms to be a potential pitfall of liability for directors and corporations facing 10(b)(5) actions or unfair competition claims. *See* discussion *supra* Part I.A.-C. However, these general characteristics form the basic respective cores of each concept.

Therefore, the most fundamental, urgent need in the CSR field is to simply define and agree on terminology. This need for definition has been the subject of noted scholarship in recent months, but much of the research suggests that terms like CSR, corporate citizenship, social entrepreneurship, and others are interchangeable, general, and very broad. It is perhaps worth noting at this point that defining terms broadly may benefit CSR generally because the data that suggests that CSR is profitable may encompass a wide range of policies and programs that do not necessarily fit within a more precise and narrow definition.¹⁵⁸

The terms should not be interchangeable, nor should they be reduced to general concepts because the current ambiguity rewards those companies who can barely justify claiming to be socially responsible and fails to reward those who take it seriously. Because consumers are paying attention, and because whether a company is socially responsible is likely to be “material” information, the business and legal communities need specific definitions.¹⁵⁹ However, this article did not set out to rewrite the dictionary. Instead, this article developed a different way of addressing the ambiguity problem in creating the Creative Capitalism Spectrum, recognizing that the concepts are best viewed as benchmarks along a continuum. This Spectrum acknowledges that there are preconditions to claiming social responsibility, and that companies must have an objective, relatively simple set of categories to best define their level of commitment to social responsibility. The Creative Capitalism Spectrum is therefore a tool to facilitate

¹⁵⁸ Naturally, those companies that claim to be socially responsible but do not deploy any assets will perform at least as well as they would had they not made the claim. After all, no additional resources were used and the companies enjoyed the positive public perception of being socially responsible.

¹⁵⁹ See discussion, *supra* notes 51-57.

The Compliance-Plus category recognizes that the businesses abide by current laws relating to social welfare – labor practices, environmental policies, anti-corruption measures, and the like – but go beyond mere compliance to integrate socially responsible practices into the model.¹⁶³

Further to the right is the category of Proactive CSR - the businesses that integrate some radical principles of social responsibility into their corporate models or perhaps operate ahead of the curve about a social issue, devoting considerable resources to either preventing or solving problems affecting society.¹⁶⁴

Even further to the right would be social entrepreneurship, or businesses that operate fundamentally to improve communities that are largely ignored or marginalized in the market and profit from employing traditional capitalistic principles to meet the opportunity.¹⁶⁵ These entities exist for the dual motive of improving a social problem as well as making a profit, and as such, deserve a separate distinction from other forms of

¹⁶³ Therefore, compliance plus is the lowest threshold of social responsibility, recognizing that additional capital has been deployed by the company that otherwise would not have been required by law. For example, a company that operates lawfully and chooses to provide its employees more lucrative health care plans than state laws require could fit into this category because the company has complied with state law but purposely dedicated capital toward the social issue of healthcare. However, the company still remains only socially responsible *as to the issue it sought to address*. In other words, the same company cannot claim to be environmentally responsible (a more specific subset of social responsibility that would lead a reasonable person to believe that the company has dedicated additional resources to environmental issues) solely based on the fact that the company offered the health plan. A specific claim of social responsibility and the type of social project must naturally bear a sufficient relationship to one another to avoid misleading consumers.

¹⁶⁴ An example of these would include Whole Foods, Inc. that functions primarily as a grocer but whose profits are inexorably linked to principles of fair trade, organic farming, and sustainability. Whole Foods, Inc., *The Whole Trade Program*, <http://www.wholefoodsmarket.com/products/wholetrade> (last visited Feb. 20, 2008).

¹⁶⁵ See John Elkington & Pamela Hartigan, *THE POWER OF UNREASONABLE PEOPLE 4* (2008). “[S]ocial entrepreneurs develop and operate new ventures that prioritize social returns on investment. For example, they aim to improve the quality of life for marginalized populations in terms of poverty, health, or education and attempt to achieve higher leverage than conventional philanthropy and nongovernmental organizations.” *Id.* Elkington and Hartigan listed “Ten Characteristics of Successful Social Entrepreneurs.” *Id.* at 5.

CSR.¹⁶⁶ The primary difference between the social enterprise and the business enterprise that adopts forms of Compliance-Plus CSR or Proactive CSR is whether or not the double or triple bottom line is negotiable.¹⁶⁷ In other words, in pure social entrepreneurship, the enterprise's ability to make a profit is inexorably tied to its ability to assist a community because the targeted community itself is the business opportunity.¹⁶⁸ Conversely, a traditional business enterprise that adopts CSR practices or projects may adjust, refocusing efforts on a different CSR project or abandoning CSR altogether if doing so is in the best interests of its stockholders, including stakeholders.¹⁶⁹

On the other side of CSR on the spectrum are the categories of businesses that cannot be labeled socially responsible. This side includes the following points: (1) Reactive Compliance with current law; (2) Non-Compliance; and (3) Gross Non-Compliance.¹⁷⁰ If a corporation merely adopts policies that comply with existing law, such as honoring minimum wage, maintaining mandatory employee benefits, having a recycling policy, making charitable contributions and other typical practices, the corporation falls nearer to the degree of simply obeying the law and therefore cannot

¹⁶⁶ If for no other reason than the sheer risk taking involved, social entrepreneurship warrants its own category because it is *primarily* concerned with social returns on investment rather than financial returns on investment.

¹⁶⁷ See Kerr, *supra* note 7.

¹⁶⁸ Because the social entrepreneur is primarily concerned with social return on investment, the double bottom line is always considered whereas the primary emphasis is on the financial bottom line in the corporate context, even when the company is socially responsible.

¹⁶⁹ See GRI, *supra* note 287. (The GRI counts among stakeholders those who are “invested in the organization (i.e. employees, shareholders, suppliers) as well as those who are external to the organization (e.g. communities).”)

¹⁷⁰ These three categories deal specifically with the precondition of compliance with laws affecting social issues. See discussion, *supra* Part II.

claim to be socially responsible.¹⁷¹ After all, if a corporation is simply not violating the law, it should not benefit from claims of being socially responsible because it has not gone to the trouble or expense to do anything except operate lawfully.¹⁷²

The spectrum also recognizes the difference between corporations that are in compliance with the law versus ones that are not. Specifically, it would be unreasonable to permit a corporation to claim to be entirely socially responsible if it is serving one area at the expense of compliance with the laws in another area.¹⁷³ This type of situation would fall under non-compliance on the Creative Capitalism Spectrum. For example, a company who routinely violates minimum wage laws, yet maintains an outstanding environmental policy is still not socially responsible and cannot claim to be so. In other words, the spectrum recognizes that a corporation must be compliant with all laws potentially affecting all reasonable social constituencies as a prerequisite to a claim of social responsibility.

Furthermore, if a corporation intentionally commits human rights violations in the form of unfair labor practices or pollutes the environment with industrial waste, the corporation is at the left-most point on the spectrum where it is grossly non-compliant with existing law.¹⁷⁴ This category marks the difference between companies that inadvertently dip below the minimum legal standards by failing to abide all related laws

¹⁷¹ See *supra* note 162 and accompanying text.

¹⁷² See *supra* note 162 and accompanying text.

¹⁷³ See *supra* note 162 and accompanying text. This acknowledges that the company cannot enjoy the benefits of positive public perception about social responsibility if the policy was achieved at the expense of operating lawfully on another socially-related issue.

¹⁷⁴ See *infra* note 175.

versus ones that knowingly and intentionally violate these laws.¹⁷⁵ The primary difference is the corporation's intent, and this distinction is important because a grossly non-compliant company's board is aware that it is not socially responsible and should therefore be charged with constructive knowledge of the falsity of its statements.¹⁷⁶ A company that is simply non-compliant should not be automatically charged with constructive knowledge of the falsity of its statement that it is socially responsible.¹⁷⁷

The Creative Capitalism Spectrum defines the term CSR to mean that a corporation is first and foremost operating within the law on all matters relating to social issues, challenging businesses to warrant that their policies and practices are compliant and then go beyond the bare minimum. Moreover, it separates social entrepreneurship into its own category, distinguishing social entrepreneurship based upon whether the business can exist without pursuing the double bottom line or triple bottom line.¹⁷⁸ With clarified terminology, a company is far less likely to be able to fraudulently capitalize on consumer goodwill or investment by falsely claiming to be socially responsible.¹⁷⁹

¹⁷⁵ This relates to the issue of scienter under § 10(b)(5). See discussion, *supra* Part I.B.. "The requisite state of mind [for a 10(b)(5) action] is scienter, a 'mental state embracing intent to deceive, manipulate, or defraud.'" *Id.* quoting *In re Ford Motor Co. Sec. Litig., Class Action*, 381 F.3d 563 at 567-68 (6th Cir. 2004). If a corporation is aware that it is violating these laws, it is undoubtedly aware that in claiming to be socially responsible, it is intentionally deceiving the public. See *Id.*

¹⁷⁶ One might go so far as to say that the directors should be held strictly liable because they fail to meet the requisite state of mind, are aware of the falsity of their statements, and therefore intended to defraud or deceive. See *Id.*

¹⁷⁷ This represents the converse of the discussion in note 175. If directors of a corporation are unaware that the corporation is violating law, they cannot be automatically charged with constructive knowledge of the falsity of a statement that the corporation is socially responsible and therefore, the requisite state of mind is absent unless the plaintiffs can prove otherwise. See *supra* note 175.

¹⁷⁸ See Kerr, *Sustainability Meets Profitability*, *supra* note 6.

¹⁷⁹ A corporation cannot hide behind vague empty rhetoric. See Atkins, *supra* note 145-148.

However, some socially responsible projects simply do not fit with a corporation.¹⁸⁰ Therefore, to truthfully claim social responsibility, directors need an objective set of factors against which to weigh potential projects, and the next section will answer the question: when is a particular project a good fit for a corporation?

III. PRISM: The Five Benchmarks of Efficient Creative Capitalism

Not all CSR or social entrepreneurship projects are right for every company.¹⁸¹ Strategically chosen and properly implemented, a socially responsible project or policy should not expose directors to liability for breach of fiduciary duty.¹⁸² As one journalist recently explained, “What is key is choosing carefully which causes to support, and then in executing them, not abandoning the rigor and discipline that makes a good company successful in the first place.”¹⁸³

¹⁸⁰ See Clarkson, *infra* note 181.

¹⁸¹ See Jeremy Clarkson, TIMES ONLINE, http://www.business.timesonline.co.uk/tol/business/related_reports/business. (last visited Apr. 1, 2008). “Corporate responsibility can encompass so many different areas...that a company cannot possibly do everything – and not everything will be of value to shareholders.” *Id.* Clarkson argues that companies should err on the side of caution. He explains, “Some actions will clearly protect or add to shareholder value – like operating a good health & safety regime in an oil facility. Others, probably the majority, are in a grey area where they do not cost much to do something about, and may or may not affect shareholder value. The obvious ones to avoid are those that will be very costly to implement and not add value to shareholders.” *Id.* However, Clarkson’s view of erring on the side of caution could arguably lead to corporate waste if the CSR project’s potential for loss is evident though not obvious.

¹⁸² See Kerr, *Developments in Corporate Governance*, *supra* note 21.

¹⁸³ Paul Maidment, *Re-Thinking Social Responsibility*, FORBES.COM, Jan. 25, 2008, <http://www.forbes.com/leadership/2008/01/25/davos-corporate-responsibility>. (last visited Jan. 25, 2008).

Peter Sands, group chief executive of Standard Chartered, wisely articulated “four benchmarks against which companies can judge which corporate citizenship projects to get involved with.”¹⁸⁴ These four benchmarks are: (1) the project should be “relevant to the markets a company operates in”; (2) the project should “leverage a company’s competencies and infrastructure”; (3) the project should “have the potential to extend existing business lines or become a new business”; (4) the project should “offer an opportunity to make a distinctive impact.”¹⁸⁵ In addition to Sands’ four sensible benchmarks, this article puts forth a fifth one that should be weighed: (5) the project should reflect the firm’s commitment to attracting and maintaining employees and building company morale.¹⁸⁶ These five benchmarks comprise the PRISM: Potential, Relevance, Impact, Suitability, and Morale. Although the body of information is rapidly growing in the area of CSR, the research could not identify any legal standard to specifically identify what kind of project or policy would be best suited for a company. Therefore, this article puts forth this PRISM test as a guideline based on the kinds of factors a court would likely weigh in determining whether a director breached a fiduciary

¹⁸⁴ Paul Maidment, *Re-Thinking Social Responsibility*, FORBES.COM, Jan. 25, 2008, <http://www.forbes.com/leadership/2008/01/25/davos-corporate-responsibility>. (last visited Jan. 25, 2008). Standard Chartered “operates widely in the developing world,” and “the bank’s commitment to making \$500 million available for microfinance passes his four tests as does its support for a program tackling preventable blindness, a project undertaken in partnership with nongovernmental organizations.” *Id.* Mr. Maidment does not explain specifically how either project leverages Standard Chartered’s competencies and infrastructures, nor explains what type of business Standard Chartered conducts. *See id.*

¹⁸⁵ Paul Maidment, *Re-Thinking Social Responsibility*, FORBES Jan. 25, 2008, <http://www.forbes.com/leadership/2008/01/25/davos-corporate-responsibility>. (last visited Jan. 25, 2008).

¹⁸⁶ *How Good Should Your Business Be?*, THE ECONOMIST, Jan. 17, 2008, available at http://www.economist.com/opinion/displaystory.cfm?story_id=10533974. (“But the biggest force is the presumption that a modern business needs to be, or at least appear to be, ‘good’ to hang on to customers and recruit clever young people.”).

duty of care to stockholders because the factors require the directors to justify why a particular project is a good fit.

Directors need not give every factor equal weight when creating a program. For that matter, the PRISM benchmarks are not elements which must be satisfied to prevent a finding that a director breached his duty of good faith or of due care in making a decision to pursue CSR.¹⁸⁷ In fact, some tremendously effective projects could be designed around one or two of these benchmarks, with the others only incidentally affected.¹⁸⁸ However, the benchmarks should be weighted, and as such, if only one or two apply, the project should fit narrowly within the scope. Moreover, mere consideration of these benchmarks should be adequate for a director to demonstrate good faith, justifying his or

¹⁸⁷ This should naturally go without saying because even satisfying the one factor of potential, for example, whereby the directors would be seeking to extend existing business lines or become a new business, is simply another way to view a legitimate corporate opportunity that happens to have positive side effects of social impact. This factor alone would justify the board's decision to pursue the project as a potential opportunity for profit.

¹⁸⁸ One such company is Sasol, an oil and gas company based in South America. United Nations, *Human Rights, Labour, Environment, Anti-Corruption, Partnerships for Development*, http://www.unglobalcompact.org/docs/news_events/8.1/Inspirational_Guide.pdf. In light of their business model, the company needs to move its operations to the places where the natural resources exist. *Id.* However, issues of expansion include, among other things, balancing the rights of laborers and the will of the host government. *Id.* Sasol has made a company-wide commitment to the preservation of human rights, even in places where such rights are not recognized. *Id.* In order to ensure that the ideals of the company are recognized and followed, Sasol has implemented a human rights management system centered on five elements: (i) providing human rights awareness and training programs; (ii) integrating human rights issues more formally in project and country risk assessments; (iii) further integrating human rights concerns in company policies and procedures; (iv) consulting and communicating on human rights issues; and (v) developing monitoring and assurance mechanisms. *Id.* The importance of this limited case study is that it illustrates the practice of the five guideposts listed above. Specifically, the program is relevant in the markets the company operates within, uses the existing infrastructure to disseminate its message, offers an opportunity to make a distinctive impact, and certainly reflects the firm's commitment to attracting and maintaining employees and building company morale. Although a new line of business will not spin off of this program, the lack of this factor's presence does not negate the positive impact that this program has to moving the company toward CSR.

her decision to pursue a CSR project.¹⁸⁹ A more thorough discussion of each benchmark follows.

The first factor asserts that the project should “have the *potential* to extend existing business lines or become a new business.”¹⁹⁰ This factor recognizes the value created by the expansion of the corporate presence or of revenue streams, and this could easily be viewed as simply the pursuit of profit with the positive side effect of social impact.¹⁹¹ Moreover, it recognizes that the board can be forward-looking, needing only to assert that there is the propensity for success and expecting some degree of risk.¹⁹²

The second factor, relevance, states that the project should be “*relevant* to the markets a company operates in.”¹⁹³ This factor is entirely reasonable as it merely requires that some relationship exists between the project and the corporation’s markets

¹⁸⁹ The reasoning here is parallel to the court’s reasoning in *Disney*. The court was primarily concerned with whether the board took steps to inform themselves of whether Ovitz’s employment agreement and compensation package were reasonable, and the court concluded that the board’s measures were adequate enough to warrant protection under the business judgment rule. *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27 (Del. 2006).

¹⁹⁰ Each factor emphasizes the letters in the acronym. For example, “potential” is the first factor because it is the first letter in the “PRISM” Test. While there are experts in the field of quantifying social return, this test serves as an effective general guide for evaluating a potential project. However, it would not *per se* justify a board’s decision merely because the board considered these factors. The fact that a board did consider these factors would simply be evidence of a reasonable, good faith effort to make a decision that may initially seem to conflict with shareholders in the short term.

¹⁹¹ *See supra* note 187.

¹⁹² This stands in contrast to a recent definition of social entrepreneurship which only recognized a project as social entrepreneurship retrospectively. *See Martin & Osberg, supra* note 149, at 35. “We define social entrepreneurship as having the following three components: (1) identifying a stable but inherently unjust equilibrium that causes the exclusion, marginalization, or suffering of a segment of humanity that lacks the financial means or political clout to achieve any transformative benefit on its own; (2) identifying an opportunity in this unjust equilibrium developing a social value proposition, and bringing to bear inspiration, creativity, direct action, courage, and fortitude, thereby challenging the stable state’s hegemony; and (3) forging a new, stable equilibrium that releases trapped potential or alleviates the suffering of the targeted group, and through imitation and the creation of a stable ecosystem around the new equilibrium ensuring a better future for the targeted group and even society at large.” *Id.*

¹⁹³ While this may seem obvious, it distinguishes between the *cause célèbre* or pet project and a project that potentially adds value by virtue of its nexus to the underlying business.

to justify the deployment of the corporation's capital assets. For example, it would be unreasonable for a corporation to pursue a project that bore no relation whatsoever to its market because the corporation would not stand to benefit from even positive brand image.¹⁹⁴ This factor thus recognizes that the board cannot justify any frivolous or irrelevant project as a positive use of corporate resources.¹⁹⁵

The third factor states that the project should "offer an opportunity to make a distinctive *impact*," recognizing that, at a minimum, the project should possibly be able to have a unique positive effect that would otherwise not occur. This factor addresses the issue of efficacy and the project's ability to make a difference. The fourth factor, *suitability*, states that the project should "leverage a company's competencies and infrastructure."¹⁹⁶ This factor views positively the corporation's deployment of assets like labor to tackle a project.

The last factor is about leadership and labor: the project should reflect the firm's commitment to attracting and maintaining employees and building company *morale*.¹⁹⁷ The "biggest force [behind CSR] is the presumption that a modern business needs to be, or at least appear to be, 'good' to hang on to customers and recruit clever young people."¹⁹⁸ In fact, some claim that "environmentally-focused jobs are one of the fastest

¹⁹⁴ See Kerr, *Sustainability Meets Profitability*, *supra* note 6, at 667 (The 2002 *Cone Corporate Citizenship Study* found that "84 percent of Americans say they would be likely to switch brands to one associated with a good cause, if price and quality are similar.").

¹⁹⁵ See *supra* note 193.

¹⁹⁶ This factor recognizes that if the project does not result in additional costs, it can be an efficient use of existing corporate resources.

¹⁹⁷ See *infra* note 200.

growing, especially within clean technology, public relations, and consumer products . . . and the increase in candidates' interests exceeds the growth in positions available."¹⁹⁹ Naturally, companies will need to stay ahead of the curve to attract the best and the brightest to improve or maintain their competitive advantage with talented key employees. This fifth factor thus recognizes that a board is justified in pursuing CSR projects that have a positive effect on employees.

In an issue of *The Economist* featuring several articles on CSR, the following question was posed to corporate leaders: "What are the main business benefits to your organization of having a defined corporate-responsibility policy?"²⁰⁰ In addition to increased revenue, the answers included (in order of popularity): "[H]aving a better brand reputation, making decisions that are better for our business in the long term, being more attractive to potential and existing employees, meeting ethical standards required by customers, having better relations with regulators and lawmakers."²⁰¹ While the PRISM benchmarks reflect many of these benefits, the benchmarks are more concerned with opportunity than with outcome and reflect more emphasis on strategic fit.²⁰²

In summary, a board of directors should be able to articulate reasons why a social responsibility project tracks effectively within any combination of the five PRISM benchmarks. This would demonstrate a board's commitment to being informed under the

¹⁹⁸ *How Good Should Your Business Be?*, THE ECONOMIST Jan. 17, 2008 available at http://www.economist.com/opinion/displaystory.cfm?story_id=10533974 (last visited Mar. 19, 2008). *Infra*, n. 145.

¹⁹⁹ Linda Anderson, *Making an Impact*, FINANCIAL TIMES, Jan. 28, 2008 (available at <http://www.ft.com/cms/s/2/4a86ae56-cb17-11dc-97ff-0000077b07658>).

²⁰⁰ THE ECONOMIST, "A Stitch in Time," 12-13 (Jan. 19-25, 2008).

²⁰¹ *Id.*

²⁰² It is important that a board be able to evaluate a project prospectively as the decision to pursue the project must be justifiable.

duty of due care as well as a good faith effort to weigh any potential conflicts between a project or policy and the duties to stockholders. Thus, by employing this test, a board may have solid evidence of diligent efforts to protect the company in taking it forward into the realm of social responsibility and thus enjoy protection under the business judgment rule.²⁰³

IV. Quantifying Creative Capitalism

A. Sustainability Indexes

Information about socially responsible companies is becoming increasingly accessible and reliable. As this trend increases, the business community can expect increased pressure from stockholders on both sides of the CSR debate. Therefore, a director can best arm himself or herself with quantifiable data corroborating decisions on whether or not to engage in compliance-plus CSR, proactive CSR, or social entrepreneurship.²⁰⁴

“Launched in 1999, the Dow Jones Sustainability Indexes are the first global indexes tracking the financial performance of the leading sustainability-driven companies worldwide.”²⁰⁵ The indexes enable asset managers to manage sustainability portfolios

²⁰³ See *infra* note 5 and accompanying text.

²⁰⁴ See discussion *infra* Part IA.

²⁰⁵ Sam Indexes, available at <http://www.sustainability-index.com/> (last visited Apr. 6, 2008).

with reliable and objective benchmarks.²⁰⁶

B. The UN Global Compact (Novartis)

In 1999, Kofi Annan, then-Secretary-General of the United Nations, challenged business leaders to join together in a unified initiative with UN agencies, labor, and society to “support universal environmental and social principles.”²⁰⁷ The response to this challenge was the creation of the Global Compact, which became operational in 2000.²⁰⁸ Since its inception, the Global Compact has become the world’s largest voluntary corporate initiative, with close to 5,000 participants and stakeholders from more than 120 countries contributing to the “momentum and strength” of the Compact.²⁰⁹ This broad participation is crucial to the success of the Compact as it operates neither as an agency nor regulatory instrument; rather, the Global Compact “relies on public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.”²¹⁰ At its core, the Global Compact is rooted in ten

²⁰⁶ Sam Indexes, *available at* <http://www.sustainability-index.com/> (last visited Apr. 6, 2008). “Currently 60 DJSI licenses are held by asset managers in 15 countries to manage a variety of financial products including active and passive funds, certificates and segregated accounts. In total, these licensees presently manage over 5 billion. . .” *Id.*

²⁰⁷ United Nations, *United Nations Global Compact*, www.unglobalcompact.org.

²⁰⁸ United Nations, *United Nations Global Compact*, www.unglobalcompact.org.

²⁰⁹ United Nations, *After the Signature: A Guide to Engagement in the United Nations Global Compact*, http://www.unglobalcompact.org/docs/news_events/8.1/GC_Welcome_Kit_final_260307.pdf.

²¹⁰ United Nations, *United Nations Global Compact*, <http://www.unglobalcompact.org>. Participation in the Global Compact marks a visible commitment to the ten principles of the Compact.

principles of responsible business, addressing the issues of human rights, labor standards, the environment and anti-corruption.²¹¹

Signatories to the Global Compact make a visible and public commitment to implement the ten principles of a responsible business, publish an annual report describing the measures it has enacted in furtherance of these principles, and publicly advocate for others to join in support of the Compact's principles.²¹² It is important to note that the Global Compact does not establish an elaborate system of corporate governance reporting requirements, nor does it penalize those who are non-compliant.²¹³ As such, the participation in the Global Compact does not entail the costs, worry, or oversight of other regulatory instruments such as Sarbanes-Oxley.²¹⁴ This is one of the important benefits of the Compact—companies are not required to “follow a prescribed

²¹¹ United Nations, *United Nations Global Compact*, <http://www.unglobalcompact.org/AboutTheGC/index.html>. Specifically, the ten principles are: (1) Businesses should support and respect the protection of internationally proclaimed human rights; (2) make sure that they are not complicit in human rights abuses; (3) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; (4) the elimination of all forms of forced and compulsory labour; (5) the effective abolition of child labor; (6) the elimination of discrimination in respect of employment and occupation; (7) Businesses should support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; (9) encourage the development and diffusion of environmentally friendly technologies; and (10) Businesses should work against corruption in all its forms, including extortion and bribery.

²¹² United Nations, *United Nations Global Compact*, www.unglobalcompact.org/HowToParticipate/index.html. (last visited Apr. 8, 2008).

²¹³ See *infra* note 225.

²¹⁴ To be fair, the UN Global Compact has been criticized as “thin on detail,” and in October 2007 “151 non-governmental organizations (NGOs) and other activists, including Amnesty International and Human Rights Watch, sent an open letter to [John Ruggie, the UN secretary-general’s special representative on human rights and transnational corporations].” *Doing the Wrong Thing*, THE ECONOMIST, Oct. 27, 2007 at 74. These organizations are hoping Ruggie will “write something stronger for the 60th anniversary of the UN Declaration [in 2008], however, the letter has been criticized for being too confrontational with businesses as opposed to seeking to engage them. *Id.* Those opposed to the tone of the letter say that it is “abundantly clear that if we wish to see human rights prevail in the world, we will not do so without the positive involvement of companies.” *Id.*

formula,” and instead, companies can choose an approach that “suits their business the best” within the parameters of the Compact.²¹⁵

Recognizing that businesses are forced to comply with several regulatory bodies, the United Nations has suggested a variety of key success factors to implementing the principles.²¹⁶ A public commitment to the Compact principles gives a company access to a broad and strong network of resources, a significant direct benefit of membership.²¹⁷ The indirect benefits associated with becoming a part of a rapidly expansive movement toward corporate social responsibility include consumer and investor goodwill, increased legitimacy as business expands beyond national borders, and improved employee and stakeholder relationships.²¹⁸ As participation in the Global Compact expands, the positive impacts of participation grow stronger—and the costs of abstention, greater.

Awareness of the Compact has grown throughout the business community and

²¹⁵ United Nations, *Human Rights, Labour, Environment, Anti-Corruption, Partnerships for Development*, http://www.unglobalcompact.org/docs/news_events/8.1/Inspirational_Guide.pdf. This “inspirational guide” provides in-depth case study analyses of how sixteen signators, including Lego Group, Gap and Novartis, have implemented the principles of the Compact. *Id.* In addition to their compelling stories, the guide serves as an example of how diverse implementation may be.

²¹⁶ United Nations, *After the Signature: A Guide to Engagement in the United Nations Global Compact*, http://www.unglobalcompact.org/docs/news_events/8.1/GC_Welcome_Kit_final_260307.pdf. Key success factors in implementing the Global Compact principles are among others: treating the principles not as an add-on, but as an integral part of business strategy and operations; clear commitments from the company leadership; communication of the commitment throughout the organization to senior management and employees to ensure broad support for the principles; a business environment favorable to new ideas and business innovation; measurable targets and a transparent system of communicating progress; willingness and ability to learn and adapt; a dedication to practical actions; openness to engage and dialogue with the company’s stakeholders. *Id.*

²¹⁷ United Nations, *After the Signature: A Guide to Engagement in the United Nations Global Compact*, http://www.unglobalcompact.org/docs/news_events/8.1/GC_Welcome_Kit_final_260307.pdf. Other direct benefits include: global and local opportunities to dialogue and collaborate with other businesses, NGOs, labour and governments on critical issues; exchange of experiences and good practices inspiring practical solutions and strategies to challenging problems; finding an entry point through which companies can access the UN’s broad knowledge of development issues; and leveraging the UN’s global reach and convening power with governments, business, civil society and other stakeholders. *Id.*

²¹⁸ United Nations, *After the Signature: A Guide to Engagement in the United Nations Global Compact*, http://www.unglobalcompact.org/docs/news_events/8.1/GC_Welcome_Kit_final_260307.pdf.

membership will inevitably become an important marker of a company's commitment to CSR.²¹⁹

C. Quantifying Value Creation

i. Global Reporting Initiative

The Global Reporting Initiative, founded in 1997, employs a multi-stakeholder approach to learn about sustainable development and to create sustainability reports.²²⁰ Recognizing that “[a]s economies globalize, new opportunities to generate prosperity and quality of life are arising through trade, knowledge-sharing, and access to technology,” the GRI focuses on transparency.²²¹ By disclosing a set of objectives, facts, and strategic measurements, the GRI offers a reporting framework that offers stakeholders a third

²¹⁹ The U.N. has further articulated a commitment to global social responsibility by calling on business schools worldwide to educate business students on corporate social responsibility. . Steve McGookin, *U.N. Calls for Education in Social Responsibility*, FORBES (July 2007), http://www.forbes.com/leadership/2007/07/06/un-responsibility-education-lead-citizen-cx_sm_0706bized.html. In July 2007, the U.N. urged schools to develop programs aimed at “responsible management education.”²¹⁹ An international group of 60 university presidents, deans and other academic leaders from top business schools developed “The Principles of Responsible Management Education – described as the first global guiding framework for academic institutions to advance the broader cause of corporate social responsibility...” *Id.* The chairman of this task force explained, “We hope to convey to our students the idea that business can be a leading force in eradicating poverty, protecting our natural environment and advancing peace – while meeting its objective of creating economic value to customers and financial returns to shareholders.” *Id.* By formally educating future business leaders to be aware of corporate responsibilities and values, business schools will facilitate a shift in corporate strategy worldwide. In the meantime, the corporate world cannot deny the duty to be informed of the effects a corporate board's decisions have on alternate stakeholders. As information about the effects becomes more readily available and as a board's decisions become more quantifiable, the duty becomes obvious.

²²⁰ Global Reporting Initiative, *Sustainability Reporting Guidelines 2*, http://www.G3_GuidelinesENU.pdf (last visited Jan. 31, 2008). The GRI defines sustainability reporting as “the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development,” and is “synonymous with other [terms] used to describe reporting on economic, environmental, and social impacts (e.g., triple bottom line, corporate responsibility reporting, etc.).” *Id.* at 3.

²²¹ *Id.*

party's assessment of a company's performance on certain social issues.²²² The GRI defines stakeholders as "entities or individuals that can reasonably be expected to be significantly affected by the organization's activities, products, and/or services; and whose actions can reasonably be expected to affect the ability of the organization to successfully implement its strategies and achieve its objectives."²²³ With the availability of objective reports like those created under the GRI framework, directors now have ways to qualitatively and quantitatively measure the effects of their decisions on stakeholders, thus enabling directors to support their decisions with objective information.

ii. Social Return on Investment

Social Return on Investment, or SROI, is an "emerging discipline which focuses on the measurement and valuation of nonfinancial or extrafinancial returns on investment" and one of the "most critical areas of research today."²²⁴ A recent survey conducted for the World Economic Forum traversed the ways "blended value thinking can inform debt finance, credit guarantees and enhancements, and private equity financing."²²⁵ Markets tend to ignore or minimize social benefits, improvements, and

²²² *See Id.*

²²³ *Id.* at 10. The GRI counts among stakeholders those who are "invested in the organization (i.e. employees, shareholders, suppliers) as well as those who are external to the organization (e.g. communities)." *Id.*

²²⁴ John Elkington & Pamela Hartigan, *THE POWER OF UNREASONABLE PEOPLE 20* (2008).

²²⁵ Elkington & Hartigan, *supra* note 235. "Blended value is what results when businesses...create value in multiple dimensions – economic, social and environmental." *Id.* at 4.

other social forms of capital that are essential to social entrepreneurship.²²⁶ Going forward, it is likely that SROI will become increasingly quantifiable and a more common measure as global competition urges companies to seek ways to distinguish themselves in the market as well as calculate a more accurate value of their investments.²²⁷ As SROI becomes a more standard economic measure, corporations will not have the option of ignoring creative capitalism.

Between the GRI, the UN Global Compact, The Dow Jones Sustainability Index, corporate transparency is increasing. Investors, consumers, and the general public will be more aware of blended value creation as the market is able to measure SROI as well as the financial impacts of socially responsible decisions. In the context of the duty to be informed and the non-exculpable duty of good faith, this availability of information makes it impossible for directors to argue that they could not be reasonably informed about the impact of creative capitalism.²²⁸

Conclusion

The definition of what it means to practice responsible business has evolved significantly. What started as a “defensive approach to avoid damage to brand and reputation” has now become an integrated commitment to simultaneously “create value for business and society at large.”²²⁹ The law recognizes that directors owe a fiduciary

²²⁶ Elkington & Hartigan, *supra* note 235, citing Gregory Dees, “The Meaning of Social Entrepreneurship,” http://www.fuqua.duke.edu/centers/case/documents.dees_SE.pdf.

²²⁷ See Elkington & Hartigan, *supra* note 235, at 4. “So a key challenge for twenty-first century investors and managers will be to boost the attractiveness to all key stakeholders of the value blends they create.” *Id.* citing www.blendedvalue.org.

²²⁸ See *supra* notes 12 –35 and accompanying text.

duty to the corporation, and while the business judgment rule protects directors, Delaware courts have recently articulated that the duty of good faith is a non-exculpable, non-indemnifiable duty that is separate from due care. Furthermore, dereliction of duty, or failure to act in light of a duty to do so, may constitute a breach of good faith. Moreover, statements regarding social responsibility may fall within the category of “material information” that could form the basis of an action by stockholders against the corporation if directors make false or misleading statements about it. As the definitions of CSR become more refined and less vague, and because value created by CSR has become increasingly quantifiable, statements about a company’s commitment to CSR will not be viewed as mere puffery or immaterial. Furthermore, a corporation must guard against actions taken by consumers against the corporation for unfair competition or “false advertising” for making misstatements about CSR policies.

However, confusion could be somewhat alleviated simply by adopting narrower, more specific definitions within the discourse on CSR. The Creative Capitalism Spectrum acknowledges the simple, logical, and reasonable proposition that a company cannot truthfully claim to be socially responsible unless they are at least fully compliant with existing laws that relate to social responsibility.

Additionally, the PRISM test created by this article provides companies with an objective set of factors to determine what kinds of projects they should engage. Moreover, it respectfully offers suggested guidance to courts that will inevitably address the novel and complex issues of what a reasonable, diligent board of directors should consider when deciding to pursue CSR.

²²⁹ Nations, *Human Rights, Labour, Environment, Anti-Corruption, Partnerships for Development*, http://www.unglobalcompact.org/docs/news_events/8.1/Inspirational_Guide.pdf.

In the near future, the business community may be at some risk as unsettled questions of the commercial speech doctrine leave open the possibility of facing litigation from consumers and their advocates, perhaps discouraging companies from making public statements about CSR.²³⁰ The Creative Capitalism Spectrum addresses this, giving directors a model for a reasonable set of definitions to ensure that they do not breach their fiduciary duties nor make material misstatements that expose corporations to actions for unfair competition or “greenwashing.” Additionally, directors should use the PRISM benchmarks to demonstrate a good faith effort to determine whether a particular form of creative capitalism or CSR is a proper deployment of capital resources.

Moreover, as the broader definition of stakeholders becomes more common, the question will increasingly become: to whom are fiduciary duties owed? Lastly, there is ample information available and accessible to directors who can now quantitatively and qualitatively justify decisions to engage in CSR. Thus, this article strongly supports the recognized proposition that in today’s world, doing the right thing also makes business sense and is profitable.²³¹

Comment [JH1]:

²³⁰ *Kasky*, 539 U.S. at 679 (Breyer, J., & O’Connor, J. *dissenting*). The dissent elaborated: “That threat means a commercial speaker must take particular care – considerably more care than the speaker’s noncommercial opponents – when speaking on public matters. A large organization’s unqualified claim about the adequacy of working conditions, for example, could lead to liability, should a court conclude after hearing the evidence that enough exceptions exist to warrant qualification – even if those exceptions were unknown (but perhaps should have been known) to the speaker. Uncertainty about how a court will view these, or other, statements, can easily chill a speaker’s efforts to engage in public debate – particularly where a “false advertising” law, like California’s law, imposes liability based upon negligence or without fault. *Id.* citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

²³¹ Nations, *Human Rights, Labour, Environment, Anti-Corruption, Partnerships for Development*, http://www.unglobalcompact.org/docs/news_events/8.1/Inspirational_Guide.pdf.