
**THE CREATIVE CAPITALISM SPECTRUM:
EVALUATING CORPORATE SOCIAL RESPONSIBILITY
THROUGH A LEGAL LENS**

*Janet E. Kerr**

TABLE OF CONTENTS

INTRODUCTION.....	832
I. CORPORATE SOCIAL RESPONSIBILITY IN THE CORPORATE LAW LANDSCAPE.....	834
A. <i>Director Liability and the Disney Good Faith Standard</i>	835
B. <i>Securities Laws: Rule 10b-5 Actions</i>	839
C. <i>Nike, Inc. v. Kasky: False Advertising and Greenwashing</i>	843
II. DEFINING CREATIVE CAPITALISM: WHEN IS A COMPANY SOCIALLY RESPONSIBLE?	848
A. <i>Defining Corporate Social Responsibility and Social Entrepreneurship</i>	852
1. Defining What CSR Is Not	853
2. Greenwashing: Publicly Disclosing CSR Measures.....	855
B. <i>The Creative Capitalism Spectrum as a Model</i>	856
III. PRISM: THE FIVE BENCHMARKS OF EFFICIENT CREATIVE CAPITALISM	860
IV. QUANTIFYING CREATIVE CAPITALISM.....	864
A. <i>Sustainability Indexes</i>	864
B. <i>The United Nations Global Compact (Novartis)</i>	865
C. <i>Quantifying Value Creation</i>	867
1. Global Reporting Initiative.....	867
2. Social Return on Investment	868
CONCLUSION.....	869

* Professor of Law and Executive Director of the Geoffrey H. Palmer Center for Entrepreneurship and the Law at Pepperdine University School of Law. B.A., 1975, Pepperdine University; J.D., 1978, Pepperdine University School of Law; LL.M, 1979, New York University School of Law. The Author is an expert in the areas of corporate governance, corporate social responsibility, and securities regulation, and additionally serves on the board of directors of a publicly traded company. The Author gives special thanks to Jennifer Holliday-Bowden for her invaluable insight, research, and editing of this Article. She would also like to thank Kelsey Nunez for her vital research and editing, and to thank her research assistants Scott Akamine, Chris Osborne, and Kea Asato. Research assistants are students at Pepperdine University School of Law.

INTRODUCTION

“The world is getting better, but it’s not getting better fast enough, and it’s not getting better for everyone.”¹ So began Bill Gates’ call to philanthropic and Corporate Social Responsibility (“CSR”) arms at the World Economic Forum in Davos, Switzerland in January 2008 when he challenged executives of the world’s largest corporations to put social entrepreneurship on the corporate agenda.² Only a few weeks earlier on December 7, 2007, then-presidential candidate Senator Barack Obama made a rousing campaign speech in which he promised to start a Social Entrepreneur Agency if elected.³ 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.⁴ 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.⁵ 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 on measuring social impacts qualitatively and quantitatively; and the increasing demand by consumers, investors, and governments for sustainable and responsible business practices.⁶ 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.”⁷

1. William H. Gates, Chairman, Microsoft Corp., Remarks at the World Economic Forum 2008: A New Approach to Capitalism in the 21st Century (Jan. 24, 2008) (transcript available at <http://www.microsoft.com/Presspass/exec/billg/speeches/2008/01-24WEFDavos.msp>).

2. *Id.*

3. Senator Barack Obama, Address at Cornell College (Dec. 5, 2007) (transcript available at http://www.barackobama.com/2007/12/05/obama_issues_call_to_serve_vow.php).

4. 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.” *Just Good Business*, *ECONOMIST*, Jan. 19, 2008, at 3, 3.

5. 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, 633–39 (2007).

6. *Id.* at 633 (explaining that “[t]he 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 WITH KARL WEBER, *THE TRIPLE BOTTOM LINE: HOW TODAY’S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS— AND HOW YOU CAN TOO* xiii (2006) (proposing model of business sustainability based upon economic, environmental, and social meaning).

7. J. Gregory Dees, *Taking Social Entrepreneurship Seriously*, *SOCIETY*, Mar./Apr. 2007, at 24.

24. J. Gregory Dees is Professor of the Practice of Social Entrepreneurship and Nonprofit

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 capitalism⁸ 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 projects can corporate boards pursue while minimizing the risk of litigation? and (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.⁹ 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. The five-factor test—dubbed the "PRISM"¹⁰—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. Part IV provides reference to information that boards should track to be reasonably informed of the impact and opportunities of CSR.¹¹ Part IV concludes the

Management at the Fuqua School of Business at Duke University. Duke University Faculty Profile, http://www.fuqua.duke.edu/faculty_research/faculty_directory/dees/ (last visited Apr. 8, 2009).

8. Throughout this Article, the terms "creative capitalism" and "corporate social responsibility" are used often and somewhat interchangeably. Part II clarifies 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, at A25, available at <http://articles.latimes.com/2008/jan/31/opinion/oe-callahan31> (explaining that creative capitalism encompasses goals of enabling "more people [to] make a profit, or gain recognition, doing work that eases the world's inequities" (quoting Gates, *supra* note 1)). See *infra* Part II for the argument that creative capitalism should be recognized as the umbrella term for CSR and social entrepreneurship because all three share similar goals.

9. 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." Gates, *supra* note 1. See *infra* Part II for an argument that this spectrum presents a different way of looking at the terminology because it recognizes the different degrees of commitment to CSR, including whether a company is first compliant with laws affecting all social issues, like human rights, labor, the environment, and more.

10. PRISM is an acronym for the five issues that a board should consider before pursuing a CSR project: potential, relevance, impact, suitability, and morale. Four of these factors were articulated by Peter Sands, group chief executive of Standard Chartered. Paul Maidment, *Re-Thinking Social Responsibility*, FORBES.COM, Jan. 25, 2008, http://www.forbes.com/leadership/2008/01/25/davos-corporate-responsibility-lead-cx_pm_0125notes.html. However, my research showed that a fifth factor—employee morale—should be included. See *infra* Part III for a discussion of how this Article rearranges and expands Sands' four factors to create the PRISM test.

11. See Kerr, *supra* note 5, at 636 ("Also incorporated in the directors' fiduciary duty of due care

Article, predicting the trends toward quantifying social return on investment (“SROI”), expecting further developments of the commercial speech doctrine, and 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.¹² 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.¹³ 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.¹⁴

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.¹⁵ Thus, with the age of corporate conscience upon us, it is critical to examine the legal foundations upon which CSR rests.¹⁶ 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?”¹⁷ This Article seeks to enable a board of directors to answer those questions satisfactorily while preserving the integrity of the fiduciary relationship to the corporation and being protected by the business judgment rule.¹⁸

I. CSR IN THE CORPORATE LAW LANDSCAPE

Three legal issues are poised to directly impact CSR: potential director liability for engaging in CSR projects, liability under § 10(b) of the Securities

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)).

12. See *supra* note 8 for a discussion of the distinctions between the use of CSR and creative capitalism.

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

14. See Kerr, *supra* note 5, at 632–34 (noting that goals of social entrepreneurship are both financial and social).

15. See Callahan, *supra* note 8 (suggesting that increasing CSR measures would change corporate focus and result in increased wages, improved health benefits, and environmentally sustainable practices).

16. See *infra* Part I.A–C for a discussion of the three legal foundations that affect current CSR analysis.

17. *In Search of the Good Company*, ECONOMIST, Sept. 8, 2007, at 65, 66 (quoting Simon Zadek, Managing Partner and Director, AccountAbility).

18. See *infra* Part I for an overview of the current legal issues that might guide and constrain actions taken by boards of directors in relation to CSR matters.

Exchange Act for misstatements relating to claims of being socially responsible, and unfair competition or “false advertising” claims for falsely claiming to be socially responsible.

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 this Article will discuss. However, the fact remains that a board of directors owes a fiduciary duty to the corporation, and, hence, the stockholders.¹⁹ As discussed in later sections, socially responsible practices and programs can lead to greater profitability and therefore directors should engage in CSR.²⁰ However, in a post-Enron corporate era, directors should always be aware of potential liability pitfalls surrounding their decisions.²¹ 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.²² 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.²³

First, a corporation’s articles of incorporation may limit a director’s personal liability for breaches of due care.²⁴ Section 102(b)(7) of the Delaware General Corporation Law permits corporations to exculpate directors from

19. 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. 1037, 1077 (2006) (“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.”).

20. See Adrienne Selko, *Just How Socially Responsible are Corporations Today?*, INDUSTRYWEEK.COM, Apr. 3, 2008, <http://www.industryweek.com/ReadArticle.aspx?ArticleID=16060> (citing business executive statements that increased business profit opportunities are likely for companies with CSR programs).

21. Cf. Kerr, *supra* note 19, at 1071 (citing legal settlement by former WorldCom directors amounting to “an estimated twenty percent of their aggregate net worth”).

22. See Kerr, *supra* note 5, at 635–39 (discussing business judgment rule’s insulation of directors that engage in CSR initiatives).

23. See *infra* notes 24–48 and accompanying text for a discussion of statutes and case law supporting the view that directors must consider social impact in order to comply with their duty of good faith. 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*. Reich believes “CSR activists are being diverted from the more realistic and important task of getting governments to solve social problems.” *In Search of the Good Company*, *supra* note 17, at 65 (citing ROBERT B. REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* 169 (2007)).

24. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (2001) (providing that director’s personal liability may be limited in corporation’s certificate of incorporation); see also Kerr, *supra* note 19, 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, *Smith v. Van Gorkom*.” (footnote omitted) (quoting John L. Reed & Matt Neiderman, “Good Faith” and the Ability of Directors to Assert § 102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty, 29 DEL. J. CORP. L. 111, 113–14 (2004))).

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.²⁵ This type of provision, coupled with the business judgment rule, has provided ample protection to directors facing litigation from shareholders dissatisfied with the directors' decisions.²⁶

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."²⁷ If the business judgment rule applies, courts will not question the decisions of the board.²⁸ However, the plaintiff may rebut these presumptions if the plaintiff shows that the director breached the fiduciary duties of loyalty or due care, or if the director acted in bad faith.²⁹

Generally, the business judgment rule will protect directors' decisions unless plaintiffs can establish that, among other possible scenarios: (1) the directors were grossly negligent,³⁰ (2) the directors were uninformed when

25. § 102(b)(7). 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 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.

26. *See, e.g., In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 65–67 (Del. 2006) (finding that directors were protected by business judgment rule and § 102(b)(7) provision in articles of incorporation in shareholder derivative suit alleging breach of due care and good faith for approving employment agreement and subsequent termination that resulted in considerable losses).

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

28. *See, e.g., In re Disney*, 906 A.2d at 52 (explaining that business decisions of directors are presumed to be in interests of corporation); *see also* Kerr, *supra* note 19, at 1074 ("The primary purpose of the presumption is to protect and promote the full exercise of managerial power.").

29. *In re Disney*, 906 A.2d at 52 (explaining that presumption of valid business decisions of directors "can be rebutted if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith"); *see also* Kerr, *supra* note 19, at 1076 (noting that "to supersede a director's authority and hold him or her accountable, the plaintiff must provide evidence that the board has breached one of the triad of fiduciary duties: good faith, due care, or loyalty" (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1994), *modified*, 636 A.2d 956 (Del. 1994))).

30. *FDIC v. Castetter*, 184 F.3d 1040, 1043 (9th Cir. 1999) (applying California law).

making the decision,³¹ (3) the directors were not independent or disinterested in making the decision,³² or (4) the directors breached the duty of good faith.³³

The Delaware Supreme Court, in *In re Walt Disney Co. Derivative Litigation*,³⁴ recently clarified the distinction between the duties of good faith and of due care.³⁵ Additionally, the court articulated three categories of fiduciary misconduct.³⁶ The first, the court explained, is “subjective bad faith,” whereby a director engages in “fiduciary conduct motivated by an actual intent to do harm.”³⁷

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 gross negligence to establish breaches not only of director due care but also of the directors’ duty to act in good faith.”³⁸ This category is the one where the duties of due care and of good faith overlap, but still should not be conflated.³⁹ The court expressly stated that “gross negligence (including a

31. See Kerr, *supra* note 5, at 635–36 (noting that fiduciary duty of directors to act with due care requires director to consider all material facts reasonably available to directors before making decisions (citing *Brown & Regner*, *supra* note 11, at 185)).

32. *Treadway Cos, Inc. v. Care Corp.*, 638 F.2d 357, 384 (2d Cir. 1980).

33. *In re Disney*, 906 A.2d at 63–64.

34. 906 A.2d 27, 65–67 (Del. 2006).

35. See *In re Disney*, 906 A.2d at 65 (stating that although good faith and due care are intertwined, grossly negligent conduct does not itself breach good faith requirement). While the duties 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 Delaware Supreme Court 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. Kerr, *supra* note 19, at 1050 (citing David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 DEL. J. CORP. L. 491, 495 (2004)).

36. *In re Disney*, 906 A.2d at 64–66.

37. *Id.* The court explained, “[t]hat 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.* (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))).

38. *Id.* at 64.

39. *Id.* at 64–65. To elucidate this point, the court explained that

[a]n 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.

In re Disney, 906 A.2d at 65 n.104.

failure to inform one's self of available material facts), without more [cannot] . . . constitute bad faith."⁴⁰

The third category, according to the court, is an intermediate category between the two aforementioned extremes.⁴¹ This category encompasses an "intentional dereliction of duty, [or] conscious disregard for one's responsibilities."⁴² 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 his duties," and therefore bad faith.⁴³ Thus, while gross negligence is outside the bounds of a finding of a breach of good faith, dereliction of duty is unequivocally bad faith.⁴⁴

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 nonexculpatory duty of good faith.⁴⁵ Before *Disney*, one might have argued that a director's

40. *Id.* 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. *Id.* Moreover, the court stated, "[t]here 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.109 (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1147–50 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995)).

41. *In re Disney*, 906 A.2d at 66.

42. *Id.*

43. *Id.* at 67.

44. *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. Indeed, the court provided many helpful examples to demonstrate the history of good faith jurisprudence. *Id.* at 67 n.111.

45. DEL. CODE ANN. tit. 8, § 102(b)(7) (2001) (stating that articles of incorporation may 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.

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 court could not have held a properly protected director personally liable.⁴⁶ In light of the court's holding in *Disney*, however, the argument will not necessarily carry the day.⁴⁷ 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.⁴⁸ In *Stone v. Ritter*,⁴⁹ the Delaware Supreme Court reiterated that conscious disregard for directorial responsibilities or dereliction of duties is properly treated as a nonexculpable, nonindemnifiable 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: Rule 10b-5 Actions

"Section 10(b) of the Securities [Exchange] Act and Rule 10b-5 promulgated thereunder prohibits [sic] 'fraudulent material misstatement[s] or omissions in connection with the sale or purchase of a security.'" ⁵¹To succeed on a claim for violation of Rule 10b-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 them injury.'" ⁵²"The requisite state of mind is scienter, a 'mental state embracing intent to

In re Disney, 906 A.2d at 67 (citing § 102(b)(7)(ii)).

46. The director's limited liability for breach of due care would extend from a § 102(b)(7) provision in the articles of incorporation. See § 102(b)(7) (allowing certificate of incorporation to include provisions limiting director liability).

47. See *In re Disney*, 906 A.2d at 67 (discussing forms of bad faith from which directors may not be immunized). See *supra* notes 34–44 and accompanying text for a discussion of categories of fiduciary misconduct and distinction between duties of good faith and good care.

48. But see *supra* note 19 and accompanying text for an acknowledgment that maximization of shareholder return is a primary concern. The duty to be informed has fallen traditionally under due care, and directors can shield themselves from personal liability from due care. See *supra* note 39 for an illustration of how purposely refusing to inform oneself of the potential benefits of CSR could be considered bad faith.

49. 911 A.2d 362 (Del. 2006).

50. *Stone*, 911 A.2d at 370. In a derivative suit filed against AmSouth Bancorporation, plaintiffs asserted that the board of directors failed to properly monitor illegal activity. *Id.* at 365–66. The Court applied the *Caremark* standard, finding liability only if "(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." *Id.* at 370. Refusing to "equate a bad outcome with bad faith," the Court insulated honest failures to live up to the best practices. *Id.* at 373.

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

52. *Id.* at 567 (quoting *Helwig v. Vencor, Inc.*, 251 F.3d 540, 554 (6th Cir. 2001)).

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 w]hile the danger need not be known, it must at least be so obvious that any reasonable man would have known of it.”⁵⁵ Silence, absent a duty to disclose, is not misleading under Rule 10b-5.⁵⁶ 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

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 immaterial only 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) of the

53. *Id.* at 567–68 (quoting *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 548 (6th Cir. 1999)).

54. *Id.* at 568 (quoting *In re Comshare*, 183 F.3d at 549). The court noted that [u]nder 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 568 n.3 (quoting *Helwig*, 251 F.3d at 547–48).

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

56. *Id.* at 569.

57. *Id.* (alteration in original) (quoting *Helwig*, 251 F.3d at 561).

58. *Id.* (quoting *Helwig*, 251 F.3d at 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 564.

59. *In re Ford*, 381 F.3d at 569 (quoting *Helwig*, 251 F.3d at 564) (internal quotation marks omitted).

60. *Id.* at 570 (quoting *In re Sofamor Danek Group*, 123 F.3d 394, 400 (6th Cir. 1997)) (internal quotation marks omitted).

61. *Id.* (quoting *Helwig*, 251 F.3d at 563).

62. *Id.* (quoting *In re K-tel Int’l, Inc. Sec. Litig.*, 300 F.3d 881, 897 (8th Cir. 2002)).

63. *Id.* (quoting *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997)).

Securities Exchange Act for, inter alia, making false or misleading statements or omissions about the dangerousness of 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 Rule 10b-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

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

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

65. *Id.* at 570. The court listed thirteen of the alleged misleading statements:

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. *Id.* at 570–71 (quoting *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) (stating that "broad, general statements" about "positive" and "statistically significant" test results of new drug were puffery (quoting *Lasker v. N.Y. State Elec. & Gas Corp.*, 85 F.3d 55, 59 (2d Cir. 1996))); *Lasker*, 85 F.3d at 58 (reasoning that corporation's self-praise about its business strategy is "not considered seriously by the marketplace and investors in assessing a potential investment" (internal quotation marks omitted)).

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 Rule 10b-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 CSRwire.com describing a socially responsible project between Isuzu Commercial Truck of America and Dutch-based Corporate Express NV contained a “Safe 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?

67. *In re Ford*, 381 F.3d at 570–71 (quoting *Shaw*, 82 F.3d at 1217). 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.* (discussing only three statements relating specifically to safety of Ford Explorer). Therefore, the court generalized that none of the statements were material, staking its opinion apparently on the fact that they seemed to be optimistic aspirations rather than assertions of fact. *See id.* at 572 (holding that statements of opinion are not actionable unless “the speaker does not believe the opinion and the opinion is not factually well grounded” (quoting *Helwig v. Vencor, Inc.*, 251 F.3d 540, 562 (6th Cir. 2001))).

68. *See supra* notes 1–7 and accompanying text for a discussion of the increasing importance of CSR and *supra* note 21 and accompanying text for a discussion of director liability in the post-Enron era. Again, it is not clear whether the court in *In re Ford* found the notion of CSR to be too vague or concluded that the statement was merely an objective—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 (discussing vague and aspirational statements).

69. *See* FLEISHMAN-HILLARD RESEARCH & NAT’L CONSUMERS LEAGUE, RETHINKING CORPORATE SOCIAL RESPONSIBILITY 9–10 (2005), available at http://www.csresults.com/FINAL_Full_Report.pdf (discussing importance of CSR to consumers, which indirectly influences importance to investors).

70. *See In re Ford*, 381 F.3d at 571 (discussing statement about CSR among allegations of 10b-5 violations in suit brought by investors).

71. *See id.* at 571–72 (ignoring CSR nature of statements and focusing on speakers’ belief and factual grounding).

72. *Corporate Express Piloting Hybrid-Electric Delivery Truck from Isuzu Commercial Truck of America*, CSRWIRE, Jan. 21, 2008, <http://www.csrwire.com/News/10770.html>.

73. *See infra* note 74 for a discussion of information about CSR and influence on consumers.

C. Nike, Inc. v. Kasky:⁷⁴ *False Advertising and Greenwashing*⁷⁵

During the late 1990s, 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, Marc Kasky, a California resident, sued Nike in California state court alleging violations of the California Business and Professions Code for unfair and 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 its 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 court holdings and remanded, opining that statements made during Nike’s public relations campaign should appropriately be considered “commercial speech.”⁸²

74. 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 ENVTL. MKTG. INC., THE “SIX SINS OF GREENWASHING™”: A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS 1 (2007), http://www.terrachoice.com/files/6_sins.pdf.

76. *Kasky*, 539 U.S. at 656 (Stevens, J., concurring). Specifically, it was alleged that 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*, 45 P.3d at 248.

78. *Kasky*, 539 U.S. at 656 (Stevens, J., concurring). Specifically, Kasky claimed that Nike violated California’s Unfair Competition Law. *Id.* (citing CAL. BUS. & PROF. CODE § 17200 et seq. (West 1997)). 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.)].” § 17200. 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.” *Kasky*, 45 P.3d at 249 (citing *Barquis v. Merchs. Collection Ass’n*, 496 P.2d 817, 828 (Cal. 1972)).

79. *Kasky*, 539 U.S. at 656 (Stevens, J., concurring) (internal quotation marks omitted).

80. *Id.* (internal quotation marks omitted). California’s Unfair Competition Law and False Advertising Law permit a citizen to act as a private attorney general. *See id.* at 663 n.5 (discussing private attorney general privileges).

81. *Kasky*, 45 P.3d at 248–49.

82. *Id.* The court cited two reasons for why it deemed the speech to be commercial speech: (1) “the messages in question were directed by a commercial speaker to a commercial audience”; and (2)

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 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 possibly 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.” 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 in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance.⁸⁴

The importance of the issues was hardly lost on the corporate world as thirty-one amicus briefs were filed.⁸⁵ The dissent, which argued that the case should have been heard, articulated the conflicting principles in First

“they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products.” *Id.* at 247. 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 that whether any false representations were made is a disputed issue that has yet to be resolved.” *Id.*

83. *Kasky*, 539 U.S. at 657 (Stevens, J., concurring). The Supreme Court initially granted the writ of certiorari

to decide two 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 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.”

Id. (alteration in original) (quoting petition for certiorari). The court withdrew the grant of certiorari in June of 2003 as being “improvidently granted.” *Id.* 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.” *Id.* at 665.

84. *Kasky*, 539 U.S. at 663–64 (Stevens, J., concurring) (footnote and internal citations omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

85. *Id.* at 667 (Breyer, J., dissenting).

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.’”⁸⁶ However, in different contexts, free speech about public concern issues “needs ‘breathing space’—potentially incorporating certain false or misleading speech—in order to survive.”⁸⁷ The dissent specifically addressed concerns regarding “[t]he 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.”⁸⁸

The dissent expressly stated that if the Court had reached the merits, it would have held that “California’s delegation of enforcement authority to private attorneys general disproportionately burdens speech; and that the First Amendment consequently forbids it.”⁸⁹ The actions 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. . . . [I]t [did not release] 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.⁹⁰

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.⁹¹ However, the California Supreme Court opinion remains untouched as precedent on the issue of commercial versus noncommercial speech.⁹² Therefore, under the current law of California, a company choosing to respond to negative publicity by way of a

86. *Id.* at 676 (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 534 (1980)) (internal quotation marks omitted).

87. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)) (internal quotation marks omitted).

88. *Id.* at 679. 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.

Kasky, 539 U.S. at 680 (Breyer, J., dissenting) (citing *Gertz*, 418 U.S. at 340).

89. *Id.* at 681.

90. *Id.* at 682 (internal quotation marks omitted).

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

92. *See Nike, Inc. v. Kasky*, 45 P.3d 243, 262 (Cal. 2002) (discussing permissible regulation of commercial speech).

public relations campaign must do so in a manner that is not false or misleading.⁹³ Importantly, it is irrelevant whether a company *intentionally* makes false or misleading statements.⁹⁴ So long as the court finds that the company made the statement to a “commercial audience” about the company’s “own business operations for the purpose of promoting sales of its products,” it will be considered “commercial speech” and given minimal protection.⁹⁵

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.⁹⁶ The issue of whether or not a corporation can claim to be socially responsible without facing liability, however, remains unsettled.⁹⁷

The environmental marketing group TerraChoice defines “greenwashing” as “the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.”⁹⁸ The issues in

93. *Id.*

94. *Id.*

95. *Id.* at 247. Overseas, both private and government entities have taken to the cause of eliminating greenwashing. In the United Kingdom, the Advertising Standards Authority (“ASA”)—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. ASA: A Short Guide to What We Do, http://www.asa.org.uk/asa/about/short_guide (last visited Apr. 9, 2009). The ASA generally “regulates the content of advertisements, sales promotions and direct marketing” in the United Kingdom. *Id.* The goals of the organization are to “stop misleading, harmful, or offensive advertising,” and generally ensure that marketing promotions are run fairly. *Id.* Once a complaint is filed with the ASA, the organization engages in an investigation and ultimately determines if a violation has occurred. *Id.* 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. ASA Adjudications, http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43763.htm (last visited Apr. 9, 2009). The ASA concluded that the “ad was likely to mislead viewers as to the environmental benefits of oil palm plantations compared with native rainforest.” *Id.*

96. *SustainAbility Names Nike Top U.S. Company for Social Responsibility Reporting*, CSRWIRE, Nov. 9, 2006, <http://www.csrwire.com/News/6800.html>.

“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.

97. See *supra* notes 90–91 and accompanying text for a discussion of Nike’s reaction to potential liability.

98. TERRACHOICE, *supra* note 75, at 1. A report released by TerraChoice has received much attention for its investigation of 1,753 environmental claims on 1,018 products. *Id.* The report 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,” “fibbing,” and “lesser of two evils.” *Id.* The conclusion reached by

Kasky provide a helpful parallel contour of the greenwashing versus greenmuting debate.⁹⁹ 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.¹⁰⁰ 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 businesses to improve their practices and behaviour; transparency also enables business and third parties to measure the results achieved.”¹⁰¹ 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 culture of corporate candor.”¹⁰² 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.¹⁰³ By allowing plaintiffs’ 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.”¹⁰⁴ This silence will reduce corporate transparency and hinder public discussion of business-related issues.¹⁰⁵

Recognizing that “[i]mage advertising has become an essential marketing tool stimulating product purchase,” many contend that the states are justified in

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.*

99. See *supra* notes 84–95 for a discussion of free speech rights of corporations in the context of the *Kasky* decision. While *Kasky* did not expressly deal with environmental issues, the public policy issues of free speech versus the chilling effect are parallel.

100. Brief Amici Curiae on Behalf of SRiMedia and CoreRatings in Support of Petitioners at 2, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575). The authors of this brief forward their concerns that if a corporation is 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,” then corporations would be unlikely to disclose corporate responsibility measures. *Id.*

101. *Id.* at 6 (quoting Commission of the European Communities, *Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 13, COM (2002) 347 final (July 2, 2003)).

102. *Id.* at 16–17.

103. Brief Amici Curiae of Forty Leading Newspapers, Magazines, Broadcasters, Wire-Services, and Media-Related Professional and Trade Associations (Listed on the Inside Cover) in Support of Petitioners at 1, *Kasky*, 539 U.S. 654 (No. 02-575).

104. *Id.* at 12.

105. *Id.* at 15. The media amici goes even further in asserting that the California Supreme Court is being paternalistic to 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.

punishing all false and misleading statements—including statements addressing corporate social responsibility.¹⁰⁶ This awareness of the social consciousness of consumers is the undercurrent driving debate. In fact, several members of Congress submitted an amicus brief supporting state legislation on the grounds that “[f]alse commercial speech causes economic harms to consumers who are deceived into buying products and services that do not meet their needs or expectations.”¹⁰⁷ 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 influence public policy,” but rather, “commercial speech intended to influence consumers’ decisions.”¹⁰⁸

To summarize Part 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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ Moreover, perhaps overlooking the fact that CSR is poorly defined, Daniel Franklin, Executive Editor of *The Economist*, recently asserted, “nobody much likes the

106. 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 at 1, *Kasky*, 539 U.S. 654 (No. 02-575).

107. 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 at 4, *Kasky*, 539 U.S. 654 (No. 02-575).

108. *Id.* at 9.

109. See *supra* Part I.A–C for a discussion of examples of judicial regulation of CSR.

110. See *infra* Part III for a discussion of the effective benchmarks for evaluation of potential CSR projects.

111. See Maidment, *supra* note 10 (noting that “[t]he definition of a company and its involvement in wider society is expanding,” moving from traditional corporate social responsibility to growing, more demanding concept of international corporate citizenship).

CSR label.”¹¹² 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.¹¹³

“If you believe what they say about themselves, big companies have never been better citizens.”¹¹⁴ The *New York Times* featured a special advertising supplement in October of 2007 on CSR entitled “Corporate Social Responsibility: Designing a Sustainable Future.”¹¹⁵ In it, Aron Cramer, the President and CEO of Business for Social Responsibility, 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 considerations [must be] center stage in the boardroom.”¹¹⁶ Several companies purchased advertising space, including Yahoo!, Coca-Cola, and DuPont.¹¹⁷

112. *Just Good Business*, *supra* note 4, at 3. The report reiterates the lack of uniformity and definition. *Id.* (“All this is convoluted code for something simple: companies meaning (or seeming) to be good.”).

113. See Hannah Clark, *A New Taste for Activism*, FORBES.COM, Jan. 9, 2007, http://www.forbes.com/corporatecitizenship/2007/01/09/leadership-citizenship-politics-lead-citizen-cx_hc_0109cohen.html. 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 does not know what is driving Wal-Mart’s announcement that they are going to carry organic foods. *Id.*

114. *In Search of the Good Company*, *supra* note 17, at 65.

115. ARON CRAMER, BUS. FOR SOC. RESPONSIBILITY, CORPORATE SOCIAL RESPONSIBILITY: DESIGNING A SUSTAINABLE FUTURE 1 (2007), <http://www.bsr.org/files/2007-conference/new-york-times.pdf>. 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 for the possibilities of leveraging “business success for broad social benefit” by the “design of new types of partnerships among business, government and non-governmental organizations.” *Id.*

116. CRAMER, *supra* note 115, at 1.

117. *Id.* at 1–3. 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.* at 1. 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.* at 2. 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 “[by] a tremendous market opportunity.” CRAMER, *supra* note 115, at 2.

The reason for such aggressive social campaigning is rooted at the consumer level.¹¹⁸ Of United States consumers polled, fifty-two percent claim that they “actively seek information on companies’ Corporate Social Responsibility,” with forty-seven percent citing the Internet as their “primary source of CSR-related information.”¹¹⁹ The expansion of available information has exploded in recent years as extensive communication networks—namely the Internet—have created greater connectivity in a highly transparent corporate world.¹²⁰ These numbers are not insignificant when consumers have identified “being socially responsible” as the factor most likely to influence “brand loyalty.”¹²¹ It is important to recognize that in these studies, social responsibility garnered thirty-five percent of the responses, outscoring “lower price[s],” which came in at twenty percent.¹²² Consumers are even choosing to redirect their credit card rewards toward efforts to cut greenhouse gas emissions, frequently paying higher than average interest rates.¹²³

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.”¹²⁴ 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

118. See Kerr, *supra* note 5, at 664–65 (noting that 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”).

119. GOLDMAN SACHS, INTRODUCING GS SUSTAIN 22 (2007), available at http://www.unglobalcompact.org/docs/summit2007/g_s_esg_embargoed_until030707pdf.pdf. This innovative report, released by Goldman Sachs at the United Nations-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.* at 1. 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. Nathaniel Gronewold, *U.N. Group Discusses Groundbreaking Goldman Sachs Study on Green Business*, GREENWIRE, July 5, 2007, <http://www.eenews.net/Greenwire/2007/07/05/8/>. “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.* (quoting Anthony Ling, financial analyst of Goldman Sachs) (alteration in original).

120. GOLDMAN SACHS, *supra* note 119, at 1.

121. *Id.* at 22.

122. *Id.*

123. Carolyn Cui, *Credit Cards’ Latest Pitch: Green Benefits*, WALL ST. J., Feb. 6, 2008, at D1. Although the popularity of these “green” credit cards reflects consumers’ desire to “do their part” in whatever way possible, the most devoted 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 provides offsets that actually reduce overall emissions. *Id.* Others question the efficacy of the “green” cards, pointing out that they 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.* (quoting Leslie Lowe, director of the Interfaith Center on Corporate Responsibility).

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

than to a company that offers a lower price.¹²⁵ Similarly, sixty-six percent of investors considered a company's record of being socially responsible "extremely" or "very" influential in their decision to invest in the company.¹²⁶ 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.¹²⁷

There was a prevailing myth that a company's investment in socially responsible profits and practices is inversely proportional to its profitability.¹²⁸ *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.¹²⁹ Large investment firms are now moving one step further and demonstrating that proactive CSR operates in lockstep with profitability.¹³⁰ Goldman Sachs' GS Sustain report,

125. FLEISHMAN-HILLARD RESEARCH & NAT'L CONSUMERS LEAGUE, *supra* note 69, at 45. The authoring organization, Fleishman-Hillard Inc., is a public relations firm that has specialized in delivering positive communications regarding the performance of their organizations. FLEISHMAN-HILLARD RESEARCH & NAT'L CONSUMERS LEAGUE, RETHINKING CORPORATE SOCIAL RESPONSIBILITY: EXECUTIVE SUMMARY i (2007), http://www.csresults.com/CSR_ExecutiveSummary07.pdf. 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.* at 1. 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 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) "[o]nline forms of communication continue to change the landscape in which consumers gather and communicate information about how well companies are being socially responsible." *Id.*

126. FLEISHMAN-HILLARD RESEARCH & NAT'L CONSUMERS LEAGUE, *supra* note 125, at 6.

127. 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 \$12.5 billion in assets." Calvert Online, Calvert Funds, <http://www.calvert.com/funds.html> (last visited Apr. 11, 2009). Innovest has turned profits by using an innovative approach to investments, targeting companies whose management is capable of making money amidst the current climate of political, environmental, labor, and human rights issues. Innovest Strategic Value Advisors, Our Approach, http://www.innovestgroup.com/index.php?option=com_content&task=view&id=34&Itemid=32 (last visited Apr. 11, 2009). 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 Social Investments, <http://www.domini.com> (last visited Apr. 11, 2009).

128. See Kerr, *supra* note 5, at 640–41 (discussing relationship between profitability and social responsibility); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32, 126 (arguing that increasing bottom line is corporation's only responsibility).

129. Kerr, *supra* note 5, at 667–68.

130. See GOLDMAN SACHS, *supra* note 119, at 5–7 (showing how CSR enhances long-term

released at the United Nations Global Compact Summit in July 2007, reflected a correlation between environmental issues, social issues, and governance (“ESG”) and stock performance—leaders in ESG led Morgan Stanley Capital International by twenty-five percent since August 2005.¹³¹

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.¹³² 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.”¹³³ In other words, “[t]he market rewards competitive advantage with premium valuations,”¹³⁴ which could explain the fact that venture capitalists are pouring billions of dollars into “clean-energy” startups.¹³⁵ The businesses that will thrive tomorrow are those that understand the need to “design the future” with a socially responsible vision, not those that attempt to “retrofit the past.”¹³⁶

A. *Defining Corporate Social Responsibility and Social Entrepreneurship*

CSR and social entrepreneurship are being redefined in the public discourse.¹³⁷ “Ten years ago, few people had heard the term ‘social entrepreneur.’”¹³⁸ However, the term is rapidly becoming part of the boardroom lexicon despite the fact that people are not necessarily using the term to describe

profitability). *But see The Next Question*, ECONOMIST, Jan. 19, 2008, at 10 (“Two of the best known indices—the Dow Jones Sustainability index and the FTSE4Good—underperform the market.”).

131. GOLDMAN SACHS, *supra* note 119, at 56.

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

133. *Id.*

134. GOLDMAN SACHS, *supra* note 119, at 1.

135. Rebecca Buckman, *Betting on Green*, WALL ST. J., Feb. 11, 2008, at R14 (reporting that venture capitalists’ funds have been driven away from traditionally favored companies such as semiconductors and software, and toward producers of solar panels, biodiesel fuel, and even ecofriendly drywall).

136. Nicholas Casey, *New Nike Sneaker Targets Jocks, Greens, Wall Street*, WALL ST. J., Feb. 15, 2008, at B1 (quoting Hannah Jones, Nike’s head of corporate responsibility); *see also* CRAMER, *supra* note 113, at 1 (“Designing a sustainable future involves conscious choices about business strategies.”).

137. Maidment, *supra* note 10. Paul Maidment suggests that the “definition of a company and its involvement in wider society is expanding, as is [sic] the expectations of shareholders, employees and consumers. Traditional corporate social responsibility is starting to be replaced with a new notion of corporate citizenship . . .” *Id.*

138. *Unreasonable People Power*, ECONOMIST.COM, Jan. 22, 2008, http://www.economist.com/business/displaystory.cfm?story_id=10555875.

the same concepts.¹³⁹ Bill Gates avoided using either of the terms “CSR” or “social entrepreneurship” in his World Economic Forum speech, calling instead for “creative capitalism” and referring to both spending money on socially desirable projects and dedicating a portion of their greatest innovators’ time to solving social problems.¹⁴⁰ The academic and business communities have recently articulated the need to specifically define the terms “social entrepreneurship” and “social responsibility.”¹⁴¹

1. Defining What CSR Is Not

CSR is neither philanthropy nor a cog in a marketing machine. Ben Cohen, cofounder 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 much you can do.”¹⁴² Some critics claim that CSR is a “tax” on

139. *Id.* The article mentions several different kinds of people engaging in different kinds of work. The article explains,

[e]ach 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, “[p]erhaps 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 *infra* note 141 and accompanying text for a discussion of the differences between traditional and social entrepreneurs.

140. Gates, *supra* note 1. 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, July 18, 2006, at 42, 42. (“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 “[t]he place where the pursuit of profit blends seamlessly with the pursuit of the common good.” *Id.* However, in the same article, the authors explain, “[s]ustainable organizations and societies generate and live off interest rather than deplete their 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.*; see also SAVITZ WITH WEBER, *supra* note 6, at 21–39 (discussing corporate sustainability imperative to interdependent world and maintaining progress of sustainability).

141. E.g., Roger L. Martin & Sally Osberg, *Social Entrepreneurship: The Case for Definition*, 5 STAN. SOC. INNOVATION REV. 28, 34–35 (2007). The authors distinguish between the traditional entrepreneur and the social entrepreneur:

[t]he social entrepreneur . . . 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.; see also Maidment, *supra* note 10 (noting expanding definition of “a company and its involvement in wider society”).

142. Clark, *supra* note 113. As one journalist recently explained,

consumers and that it is irresponsible to deploy corporate assets for social causes.¹⁴³ 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.¹⁴⁴ Naturally, this view presupposes that companies pass on CSR costs to consumers. Another view is that "[CSR] actually refers largely to what the company does *not* do."¹⁴⁵ 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 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.¹⁴⁶

This definition reduces CSR to mere compliance with existing laws and market demands.¹⁴⁷

The definitions of social entrepreneurship or social enterprise can be even

[c]hucking 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 profits to be dispensed for good works.

Maidment, *supra* note 10.

143. Betsy Atkins, *Is Corporate Social Responsibility Responsible?*, FORBES.COM, Nov. 28, 2006, http://www.forbes.com/corporatecitizenship/2006/11/16/leadership-philanthropy-charity-lead-citizen-cx_ba_1128directorship.html.

144. *Id.* Atkins explains a "litmus test of the market for corporate social responsibility" and explains,

[f]or 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.* (comparing CSR spending to Massachusetts' effort to have citizens voluntarily opt to pay higher tax to fund social services).

145. *Id.* (emphasis added).

146. Atkins, *supra* note 143.

147. *See infra* Part II.B for a discussion of the Creative Capitalism Spectrum model and the argument that compliance means to simply operate 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 abidance is not equivalent to taking deliberate steps toward improving social conditions.

more elusive.¹⁴⁸ 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.¹⁴⁹ 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; second, a project can only be defined retrospectively.¹⁵⁰ 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.¹⁵¹

2. 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. “[S]ome companies introduce CSR practices at a superficial level for window-dressing purposes, whereas other companies embed CSR into their core company strategy.”¹⁵² Indeed, “[t]he social responsibility component of branding is increasing. . . . Firms even have an incentive to create a consumer demand for social responsibility so that they can distinguish their goods in the market and earn competitive rents.”¹⁵³ 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.”¹⁵⁴

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

148. See *supra* note 141 and accompanying text for a discussion of the differences between traditional and social entrepreneurs.

149. Martin & Osberg, *supra* note 141, at 35.

150. See *id.* at 39 (noting social entrepreneur is one whose ultimate affect is successfully establishing new stable equilibrium). While the definition may be effective for defining past projects, it fails to serve companies looking to engage in social entrepreneurship prospectively. See Kerr, *supra* note 5, at 639–42 (discussing history and development of social entrepreneur movement).

151. See Kerr, *supra* note 5, at 632–33 (defining social entrepreneurship).

152. Ruth V. Aguilera et al., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 ACAD. MGMT. REV. 836, 838 (2007).

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

154. Tom Wright, *False ‘Green’ Ads Draw Global Scrutiny*, WALL ST. J., Jan. 30, 2008, at B4; see also Atkins, *supra* note 143 (“There are practical reasons why corporations should cloak themselves in the politically correct rhetoric of social responsibility. But marketing should not be confused with significant deployments of corporate assets.”); TERRACHOICE, *supra* note 75, at 1 (providing definition of greenwashing).

and aiding communities.¹⁵⁵ 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 ("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 state 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.

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 suggest 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.¹⁵⁶

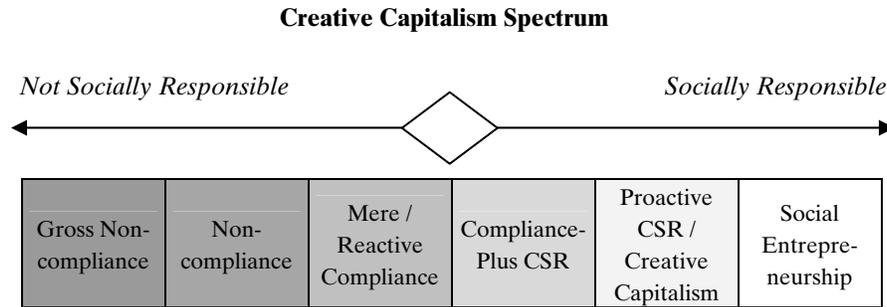
The terms should not be interchangeable, nor should they be reduced to general concepts, because the current ambiguity rewards those companies who can barely justify claiming to be socially responsible and fails to reward those who take it seriously. Because consumers are paying attention, and because whether a company is socially responsible is likely to be "material" information, the business and legal communities need specific definitions.¹⁵⁷ However, this Article did not set out to rewrite the dictionary. Instead, this Article develops 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

155. 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 as a potential pitfall of liability for directors and corporations facing Rule 10b-5 actions or unfair competition claims. See *supra* Part I.A-C for an analysis of director liability, securities laws, false advertising, and greenwashing. However, these general characteristics form the basic respective cores of each concept.

156. Naturally, those companies that claim to be socially responsible but do not deploy any assets will perform at least as well as they would have 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.

157. See *supra* notes 49-55 and accompanying text for a discussion of applicable duties by corporate directors under Rule 10b-5 of the Securities Exchange Act.

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 discourse and public debate about CSR, to encourage transparency, and to ferret out “greenwashing” and similar unethical practices.



The Spectrum contends that there is a point at which a company is fully compliant with all laws that relate to social issues and chooses to go beyond merely operating within the law and instead take a step towards making a positive impact on one or more social issues.¹⁵⁸ The Creative Capitalism Spectrum acknowledges that from that point on, a company can truthfully claim to be socially responsible.¹⁵⁹ Therefore, on the right of the spectrum, we find: (1) Compliance-Plus CSR, (2) Proactive CSR, and (3) Social Entrepreneurship.¹⁶⁰

The Compliance-Plus category recognizes that the businesses abide by current laws relating to social welfare—labor practices, environmental policies, anticorruption measures, and the like—but go beyond mere compliance to integrate socially responsible practices into the model.¹⁶¹

158. This point is illustrated on the Creative Capitalism Spectrum just beyond the threshold of Mere/Reactive Compliance.

159. Thus, the Creative Capitalism Spectrum requires, as a precondition, that all companies claiming to be socially responsible first be in compliance with all laws relating to social issues. If they take the additional step, investing time or capital resources to go beyond what is merely required under the law, they can claim to be socially responsible.

160. These are the only three categories of social responsibility according to the Spectrum, but the categories are broad enough to encompass all levels of CSR. See *infra* notes 161–67 and accompanying text for an analysis of the gradations of social entrepreneurship.

161. Therefore, Compliance-Plus is the lowest threshold of social responsibility, recognizing that the company has deployed additional capital 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 health care. However, the company still remains socially responsible only *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

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.¹⁶²

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.¹⁶³ 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 CSR.¹⁶⁴ The primary difference between the social enterprise and the business enterprise that adopts forms of Compliance-Plus CSR or Proactive CSR is whether the double or triple bottom line is negotiable.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷

On the other side of CSR on the Spectrum are the categories of businesses that cannot be labeled socially responsible. This side includes (1) Reactive Compliance with current laws, (2) Noncompliance, and (3) Gross

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.

162. An example of these would include Whole Foods, Inc., which functions primarily as a grocer but whose profits are inexorably linked to principles of fair trade, organic farming, and sustainability. Whole Foods Market, The Whole Trade™ Program, <http://www.wholefoodsmarket.com/products/wholetrade> (last visited Apr. 11, 2009).

163. See JOHN ELKINGTON & PAMELA HARTIGAN, THE POWER OF UNREASONABLE PEOPLE: HOW SOCIAL ENTREPRENEURS CREATE MARKETS THAT CHANGE THE WORLD 4 (2008) (discussing how social entrepreneurs “prioritize social returns on investment” and “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”). Elkington and Hartigan listed “Ten Characteristics of Successful Social Entrepreneurs.” *Id.* at 5.

164. 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.

165. See *supra* note 6 and accompanying text for a discussion of the double and triple bottom line.

166. 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.

167. See GLOBAL REPORTING INITIATIVE, SUSTAINABILITY REPORTING GUIDELINES 10 (2006), [http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF2-5F735235CA44/0/G3_Guide linesENU.pdf](http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF2-5F735235CA44/0/G3_Guide%20lines%20ENU.pdf) (counting among stakeholders those who are “invested in the organization (e.g., employees, shareholders, suppliers) as well as those who are external to the organization (e.g., communities”).

Noncompliance.¹⁶⁸ 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 claim to be socially responsible.¹⁶⁹ 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.¹⁷⁰

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.¹⁷¹ This type of situation would fall under Noncompliance on the Spectrum. For example, a company that 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 noncompliant with existing law.¹⁷² This category marks the difference between companies that inadvertently dip below the minimum legal standards by failing to abide by all related laws versus ones that knowingly and intentionally violate these laws.¹⁷³ The primary difference is the corporation's intent, and this distinction is important because a grossly noncompliant 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.¹⁷⁴ A company that is

168. These three categories deal specifically with the precondition of compliance with laws affecting social issues. See *supra* Part II for an analysis and definition of corporate social responsibility.

169. See *supra* notes 158–60 and accompanying text for a discussion of the Creative Capitalism Spectrum and businesses that can and cannot be labeled socially responsible.

170. See *supra* note 160 and accompanying text for a discussion of the three levels of accepted corporate social responsibility.

171. See *supra* notes 158–67 and accompanying text for definitions of the Creative Capitalism Spectrum and definitions of noncompliance therein. 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.

172. See *infra* note 173 and accompanying text for a discussion and definition of scienter under federal securities law.

173. This relates to the issue of scienter under Rule 10b-5. See *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 567–68 (6th Cir. 2004) (noting that, for Rule 10b-5 action, required state of mind is scienter, a “mental state embracing intent to deceive, manipulate or defraud” (internal quotation marks omitted)). 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 *supra* Part I.B for a discussion of Rule 10b-5 actions and corporate disclosure duties under federal securities law.

174. One might go so far as to say that the directors should be held strictly liable because they

simply noncompliant should not be automatically charged with constructive knowledge of the falsity of its statement that it is socially responsible.¹⁷⁵

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.¹⁷⁶ 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.¹⁷⁷

However, some socially responsible projects simply do not fit with a corporation.¹⁷⁸ Therefore, to truthfully claim social responsibility, directors need an objective set of factors against which to weigh potential projects, and the next Part 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.¹⁷⁹ Strategically chosen and properly implemented, a socially responsible project or policy should not expose directors to liability for breach of

fail to meet the requisite state of mind, are aware of the falsity of their statements, and therefore intended to defraud or deceive. See *In re Ford*, 381 F.3d at 568.

175. See *supra* note 168 and accompanying text for a discussion and definition of noncompliant corporations. If the directors of a corporation are unaware that the corporation is violating the 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 174 and accompanying text for a discussion of the requisite state of mind to be charged with constructive knowledge.

176. See Kerr, *supra* note 5, at 633 (discussing federal securities laws that create fiduciary duty for corporate boards regarding social responsibility and entrepreneurship).

177. A corporation cannot hide behind vague, empty rhetoric. See Atkins, *supra* note 143 (noting corporations should not confuse use of significant corporate assets with marketing to make public feel good about buying products).

178. See Robert Barrington, *The Day Corporates Gained Responsibility: The Investor's View*, TIMESONLINE, Jan. 31, 2008, http://business.timesonline.co.uk/tol/business/related_reports/business_ideas/article3284511.ece?token=null&offset=0&page=1 (discussing limits of various approaches to corporate social responsibility).

179. *Id.* "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.* Barrington 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, Barrington'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.

fiduciary duty.¹⁸⁰ 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.”¹⁸¹

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.”¹⁸² According to Sands’ benchmarks, a project should (1) “be relevant to the markets a company operates in,” (2) “leverage a company’s competencies and infrastructure,” (3) “have the potential to extend existing business lines or become a new business,” and (4) “offer an opportunity to make a distinctive impact.”¹⁸³ In addition to these sensible benchmarks, this Article puts forth a fifth that should be weighed: (5) the project should reflect the firm’s commitment to attracting and maintaining employees and building company morale.¹⁸⁴

These five benchmarks compose PRISM: Potential, Relevance, Impact, Suitability, and Morale. Although the body of information is rapidly growing in the area of CSR, my research could not pinpoint 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 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 that 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.¹⁸⁵ In fact, some tremendously effective projects could be designed around one or two of these benchmarks, with the others only incidentally affected.¹⁸⁶ However, the benchmarks should be

180. See Kerr, *supra* note 19, at 1077 (discussing relationship between good corporate governance and high shareholder return).

181. Maidment, *supra* note 10.

182. *Id.* 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.* Maidment does not explain specifically how either project leverages Standard Chartered’s competencies and infrastructures, nor what type of business Standard Chartered conducts.

183. *Id.*

184. *How Good Should Your Business Be?*, ECONOMIST, Jan. 19, 2008, at 12, 12, available at http://www.economist.com/opinion/displaystory.cfm?story_id=10533974 (noting that “a modern business needs to be, or at least appear to be, ‘good’” in order to “recruit clever young people”).

185. This should naturally go without saying because even satisfying the one factor of potential, for example, whereby the directors seek 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.

186. One such company is Sasol, an oil and gas company based in South Africa. UNITED

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 her decision to pursue a CSR project.¹⁸⁷ 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.”¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰

NATIONS, GLOBAL COMPACT OFFICE, HUMAN RIGHTS, LABOUR, ENVIRONMENT, ANTI CORRUPTION, PARTNERSHIPS FOR DEVELOPMENT: AN INSPIRATIONAL GUIDE TO IMPLEMENTING THE GLOBAL COMPACT 16 (2007), available at http://www.unglobalcompact.org/docs/news_events/8.1/Inspirational_Guide.pdf [hereinafter GLOBAL COMPACT OFFICE, HUMAN RIGHTS]. 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: (1) “[p]roviding human rights awareness and training programs,” (2) “[i]ntegrating human rights issues more formally in project and country risk assessments,” (3) “[f]urther integrating human rights concerns in company policies and procedures,” (4) “[c]onsulting and communicating on human rights issues,” and (5) “[d]eveloping 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 on moving the company toward CSR.

187. The reasoning here is parallel to the court’s reasoning in *Disney*. The *Disney* 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 to warrant protection under the business judgment rule. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 61–62 (Del. 2006).

188. Maidment, *supra* note 10 (emphasis added). Each factor represents a letter 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.

189. See *supra* note 185, which notes that a board’s decision to pursue a new business opportunity that has potentially positive social side effects is a legitimate business decision in addition to a fulfillment of the first PRISM requirement.

190. 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 141, at 35 (including requirement of creating new equilibrium as component necessary for classification as social entrepreneurship). See *supra* notes 149–51 and accompanying text for a discussion of this

The second factor, relevance, states that the project should be “*relevant* to the markets a company operates in.”¹⁹¹ This factor is entirely reasonable, as it merely requires that some relationship exists between the project and the corporation’s markets 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.¹⁹² This factor thus recognizes that the board cannot justify any frivolous or irrelevant project as a positive use of corporate resources.¹⁹³

The third factor states that the project should “offer an opportunity to make a distinctive *impact*,”¹⁹⁴ 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.”¹⁹⁵ 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*.¹⁹⁶ 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.”¹⁹⁷ In fact, some claim that “environmentally-focused jobs are one of the fastest growing, especially within clean technology, public relations and consumer products. . . . [and] the increase in candidates’ interest exceeds the growth in positions available.”¹⁹⁸ 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.

contrasting definition of social entrepreneurship, which enumerates three components that effectively create an exclusively retroactive identification of such activities.

191. Maidment, *supra* note 10 (emphasis added). 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.

192. See Kerr, *supra* note 5, at 664–65 (noting research results indicating that eighty-four percent of Americans were likely to switch to products of similar price and quality that were associated with good causes).

193. See *supra* note 192 and accompanying text for a discussion of the relevance factor as distinguishing between CSR projects seeking to add value to the business and those projects that bear no legitimate relation to the business.

194. Maidment, *supra* note 10 (emphasis added).

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

196. See *infra* notes 197–98 and accompanying text for a discussion of the benefits that businesses perceive to be the result of CSR projects.

197. *How Good Should Your Business Be?*, *supra* note 184, at 12.

198. Linda Anderson, *Making an Impact*, FINANCIAL TIMES, Jan. 28, 2008, at 20, available at http://us.ft.com/ftgateway/superpage.ft?news_id=fto012820080113035151.

In an issue of *The Economist* featuring several articles on CSR, the magazine posed the following question to corporate leaders: “What are the main business benefits to your organisation of having a defined corporate-responsibility policy?”¹⁹⁹ In addition to increased revenue, the answers included (in order of popularity): “[h]aving a better brand reputation,” “[m]aking decisions that are better for our business in the long term,” “[b]eing more attractive to potential and existing employees,” “[m]eeting ethical standards required by customers,” and “[h]aving better relations with regulators and lawmakers.”²⁰⁰ 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.²⁰¹

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 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.²⁰²

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.²⁰³

“Launched in 1999, the Dow Jones Sustainability Indexes are the first global indexes tracking the financial performance of the leading sustainability-

199. *A Stitch in Time*, *ECONOMIST*, Jan. 19, 2008, at 12, 13 fig.5.

200. *Id.*

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

202. See *supra* note 5 and accompanying text for a discussion of the proposition that boards have a duty to inform themselves of both the financial and social consequences of business decisions.

203. See *supra* Part I.A for a discussion of the scope of a director’s duty of good faith and due care, and the possible requirements under each in relation to CSR projects.

driven companies worldwide.”²⁰⁴ The indexes enable asset managers to manage sustainability portfolios with reliable and objective benchmarks.²⁰⁵

B. The UN Global Compact (Novartis)

In 1999, Kofi Annan, Secretary-General of the United Nations, challenged business leaders to join together in a unified initiative with UN agencies, labor, and society “to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices.”²⁰⁶ The response to this challenge was the creation of the Global Compact, which became operational in 2000.²⁰⁷ Since its inception, the Global Compact has become the world’s largest voluntary corporate initiative, with over 5,100 participants and stakeholders from more than 130 countries contributing to the “momentum and strength” of the Compact.²⁰⁸ This broad participation is crucial to the success of the Global Compact as it operates neither as an agency nor regulatory instrument; “[r]ather, 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.”²⁰⁹ At its core, the Global Compact is rooted in ten principles of responsible business, addressing the issues of human rights, labor standards, the environment, and anticorruption.²¹⁰

204. Dow Jones Sustainability Indexes, <http://www.sustainability-index.com> (last visited Apr. 11, 2009).

205. *Id.* “Currently 70 DJSI licenses are held by asset managers in 16 countries to manage a variety of financial products including active and passive funds, certificates and segregated accounts. In total, these licensees presently manage over 6 billion USD . . .” *Id.*

206. Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Doc. SG/SM/6881 (Feb. 1, 1999), available at <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html>.

207. UNITED NATIONS, GLOBAL COMPACT OFFICE, AFTER THE SIGNATURE: A GUIDE TO ENGAGEMENT IN THE UNITED NATIONS GLOBAL COMPACT 1, available at http://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf [hereinafter GLOBAL COMPACT OFFICE, AFTER THE SIGNATURE].

208. United Nations Global Compact, Overview of the UN Global Compact, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Apr. 11, 2009).

209. UNITED NATIONS, GLOBAL COMPACT OFFICE, THE GLOBAL COMPACT (2007), available at http://www.unglobalcompact.org/docs/about_the_gc/gc_brochure_final.pdf. Participation in the Global Compact marks a visible commitment to the ten principles of the Compact.

210. *Id.* Specifically, the ten principles are: (1) “[b]usinesses should support and respect the protection of international human rights”; (2) “make sure they are not complicit in human rights abuses”; (3) “[b]usinesses 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 labour;” (6) “the elimination of discrimination in respect of employment and occupation;” (7) “[b]usinesses 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) “[b]usinesses should work against corruption in all its forms, including extortion and bribery.” *Id.*

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 they have enacted in furtherance of these principles, and publicly advocate for others to join in support of the Compact's principles.²¹¹ 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 noncompliant.²¹² As such, participation in the Global Compact does not entail the costs, worry, or oversight of other regulatory instruments such as Sarbanes-Oxley.²¹³ This is one of the important benefits of the Compact—companies are not required to “follow a prescribed formula,” and instead can choose an approach that “suits their business the best” within the parameters of the Global Compact.²¹⁴

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.²¹⁵ A public commitment to the Global Compact principles gives a company access to a broad and strong network of resources, a significant direct benefit of membership.²¹⁶ The indirect benefits associated with

211. United Nations Global Compact, Business Participation, http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html (last visited Apr. 11, 2009).

212. See *infra* Part IV.C.1 for a discussion of an emerging research discipline and its possible effect upon corporate compliance with the UN Global Compact.

213. To be fair, some have criticized the UN Global Compact as being “thin on detail,” and in October 2007 “151 non-governmental organisations . . . 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*, *supra* note 124, at 74. These organizations are hoping Ruggie will “write something stronger for the 60th anniversary of the UN Declaration [in 2008],” however, some criticized the letter for being too confrontational with businesses, instead of 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.* (quoting Geoffrey Chandler, former head of Amnesty International’s Business Group).

214. GLOBAL COMPACT OFFICE, HUMAN RIGHTS, *supra* note 186, at 4. This “inspirational guide” provides in-depth case study analyses of how sixteen signatories, including Lego Group, Gap, and Novartis, have implemented the principles of the Global Compact. *Id.* at 26–30. In addition to their compelling stories, the guide serves as an example of how diverse implementation may be.

215. GLOBAL COMPACT OFFICE, AFTER THE SIGNATURE, *supra* note 207, at 11. “[K]ey 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 all levels of the organization [to senior management and employees] to ensure broad support for the principles; a business environment favourable 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; . . . and openness to engage and dialogue with the company’s stakeholders.

Id.

216. Overview of the UN Global Compact, *supra* note 208. Other direct benefits of participation include global and local opportunities to dialogue and collaborate with other businesses, NGOs, labor, and governments on critical issues; exchange of experiences and good practices inspiring practical solutions and strategies to address challenging problems; finding an entry point through which companies can access the UN’s broad knowledge of development issues; and leveraging the UN’s

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.²¹⁷ As participation in the Global Compact expands, the positive impacts of participation grow stronger and the costs of abstention grow greater. Awareness of the Global Compact has grown throughout the business community and membership will inevitably become an important marker of a company's commitment to CSR.²¹⁸

C. Quantifying Value Creation

1. Global Reporting Initiative

The Global Reporting Initiative ("GRI"), founded in 1997, employs a multistakeholder approach to learn about sustainable development and to create sustainability reports.²¹⁹ Recognizing that "[a]s economies globalize, new opportunities to generate prosperity and quality of life are arising though [sic] trade, knowledge-sharing, and access to technology," the GRI focuses on transparency.²²⁰ By disclosing a set of objectives, facts, and strategic measurements, the GRI offers a reporting framework that offers stakeholders a third party's assessment of a company's performance on certain social issues.²²¹

global reach and convening power with governments, business, civil society, and other stakeholders.
Id.

217. *Id.*

218. The UN 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 Corporate Responsibility*, FORBES.COM, July 6, 2007, http://www.forbes.com/leadership/2007/07/06/un-responsibility-education-lead-citizen-cx_sm_0706bized.html. In July 2007, the UN urged schools to develop programs aimed at "responsible management education." *Id.* An international group of sixty university presidents, deans, and other academic leaders from top business schools developed "[t]he 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, "[w]e 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.

219. GLOBAL REPORTING INITIATIVE, *supra* note 167, at 2. 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 states that it 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.

220. *Id.* at 2.

221. *See id.* (noting need for standardized framework for measuring corporate sustainability activities and GRI's attempt to meet need through provision of reporting guidelines).

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.”²²² 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.

2. Social Return on Investment

Social Return on Investment (“SROI”), described as an “emerging discipline[] which focuses on the measurement and valuation of nonfinancial or extrafinancial returns on investment,” is one of the “most critical areas of research today.”²²³ 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.”²²⁴ Markets tend to ignore or minimize social benefits, improvements, and other social forms of capital that are essential to social entrepreneurship.²²⁵ Going forward, it is likely that SROI will become increasingly quantifiable and a more common measure as global competition compels companies to seek ways to distinguish themselves in the market as well as calculate a more accurate value of their investments.²²⁶ 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, and 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 nonexculpable 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.²²⁷

222. *Id.* at 10. The GRI counts among stakeholders “those who are invested in the organization (e.g., employees, shareholders, suppliers) as well as those who are external to the organization (e.g., communities).” GLOBAL REPORTING INITIATIVE, *supra* note 167, at 10.

223. ELKINGTON & HARTIGAN, *supra* note 163, at 20.

224. *Id.* “Blended value is what results when businesses . . . create value in multiple dimensions—economic, social and environmental.” *Id.* at 4.

225. *Id.* at 20 (citing J. Gregory Dees, The Meaning of “Social Entrepreneurship” 3 (May 30, 2001) (unpublished manuscript, on file with the Kauffman Foundation), available at http://www.caseatduke.org/documents/dees_sedef.pdf).

226. *See id.* at 4 (noting that increasing attractiveness of blended value to all stakeholders is primary challenge faced by investors and managers). “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.” ELKINGTON & HARTIGAN, *supra* note 163, at 4.

227. *See supra* Part I.A for a discussion of the good faith standard applied to directors and the resulting implications for CSR projects.

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.”²²⁸ The law recognizes that directors owe a fiduciary 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 nonexculpable, nonindemnifiable duty 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, courts will not view statements about a company’s commitment to CSR as immaterial or mere puffery. 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, simply adopting narrower, more specific definitions could alleviate confusion 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 it is 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 guidance to courts, which will inevitably address the novel and complex issues of what a reasonable, diligent board of directors should consider when deciding to pursue CSR.

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.²²⁹ 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

228. GLOBAL COMPACT OFFICE, HUMAN RIGHTS, *supra* note 186, at 2.

229. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 680 (2003) (Breyer, J., dissenting) (noting threat of litigation against commercial speakers and resulting chilling effect on commercial speech).

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."²³⁰

230. GLOBAL COMPACT OFFICE, HUMAN RIGHTS, *supra* note 186, at 24-25 (quoting Daniel Vasella, Chairman and CEO of Novartis).