

### i. Shareholders

The principal way that corporate law enforces the fiduciary duties that directors owe to shareholders is through the imposition of discourse norms. In order to satisfy their duty of care, directors must speak with each other about what kind of corporate conduct is in the shareholders' best interest. Indeed, the requirement to speak and deliberate in an informed and good faith fashion more or less describes both the necessary and the sufficient condition for satisfying directors' obligations to shareholders. Directors are completely insulated from liability to shareholders for bad, non-self-interested business decisions so long as they comply with the requirement of forthcoming, honest, good faith deliberation in the shareholder interest. In order to satisfy that fiduciary duty of good faith, the director's speech acts must also be sincere-she must honestly believe the things she says are in the shareholder's best interest are in fact in their best interest. <sup>n21</sup>

### ii. Non-shareholders

Workers and consumers, like shareholders, are part of the nexus-of-contracts over which the corporate board of directors presides. Instead of fiduciary-based attention at the level of firm governance, however, consumers must monitor their interests in corporate operations by themselves, in the market.

Unlike shareholders, consumers are not as a matter of corporate law entitled to any internal corporate speech or deliberations about their interests. Corporations, however, are entitled under the First **[\*199]** Amendment to speak to consumers through commercial advertising. <sup>n22</sup> When corporations choose to speak to consumers, the discourse norms that accompany the speech are far less co-operative in nature than are the norms governing corporate discourse with its fiduciaries. Instead, the firm's speech to its consumers reflects "the morals of the marketplace;" it is the kind of speech, in Cardozo's words, "trodden by the crowd." <sup>n23</sup>

While corporations have a First Amendment right to advertise legal products, it is permissible for government to restrict false or misleading commercial speech. <sup>n24</sup> But the categories "false" and/or "misleading" are of limited utility in analyzing contemporary corporate speech problems. A ubiquitous advertising campaign associating happiness, health, and vitality with the consumption of junk food is not so much false or misleading in its failure to with similar zeal describe the **[\*200]** health risks associated with frequent junk food consumption as it is, perhaps, incomplete and exploitative. <sup>n25</sup>

We might describe the discourse norm of the marketplace as one in which "rhetoric," in the sense of "insincere speech," <sup>n26</sup> is expected. That is, ordinary consumers generally know that rhetoric reigns in the market. But knowledge of its operation does not, unfortunately, rid rhetoric of its power and influence. Speech in such an idiom can much more easily manipulate consumers' perception of the personal or social consequences of consumption than would fiduciary-based speech. Such consequences can be highly acute and personal, such as the development of lung cancer or heart disease. Or, they may be farther-reaching and more dispersed, such as the destruction of the environment.

The manipulative power of insincere speech is buttressed by the common law doctrine of "puffery," which has been incorporated into modern consumer protection regimes such as the FTC and cognate state regulatory regimes. The puffery doctrine holds that facially

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