

lighthearted boasting, whimsy, exaggeration, and "bluster" are, as a matter of law, not misleading, because reasonable people do not take such speech seriously. The problem is that human beings are in fact often influenced by discourse that the law calls "mere" puffery.ⁿ²⁷ There are two lines of evidence for this. The first is social scientific inquiry, which has demonstrated in controlled experimental settings the influence of puffery.ⁿ²⁸ The second line of evidence is the market practice [*201] [*202] of profit-maximizing corporations which spend billions of dollars per year on advertising and promotional campaigns which often contain nothing but puffery.ⁿ²⁹ Where firms are operating in competitive markets, corporations that engage in puffery would be quickly subsumed by those who did not waste precious resources on such efforts, if it were as inconsequential as the law takes it to be.ⁿ³⁰

Corporate law scholars at times appear to believe that loose discursive standards for corporate speech directed at consumers is a necessary correlate to the command that firms pursue profits for shareholders. In a remarkable article on the problem of "half-truths" in corporate speech, Donald Langevoort argues that whether a "half-truth" should give rise to a shareholder cause of action for securities fraud depends on to whom the "half-truth" was directed.ⁿ³¹ If a firm tells a "half-truth" about the quality of its products, but directs the statement to consumers rather than shareholders, then shareholders should not have a cause of action. The reason for this, according to Langevoort, is that shareholders stand to gain from such half-truths being spoken to consumers, and therefore the shareholders should have no complaint about them. It is expected that directors will exaggerate the firm's strengths when dealing with non-shareholders [*203] because this will make it easier for them to get better deals for shareholders: "Company executives have a strong incentive to style general corporate publicity to conform to a desirable image . . . that image-making is said to be necessary to capture desired resources for the firm from among a broad array of constituents, both internal and external."ⁿ³² And therefore, "expressions of optimism should not be actionable in those settings where hype is most commonplace: the kinds of statements made with customer and employee audiences largely in mind."ⁿ³³ If I understand Langevoort correctly, his point is that "half-truths" should not be actionable precisely because they can influence non-shareholders in a manner beneficial to shareholders. It thus appears that what is part of the solution for shareholders is part of the problem for non-shareholders.

b. Pushing Past the Pareto Fallacy of Corporate Profitability

Conversations about corporate governance and the relationship between various stakeholders in corporate enterprise sometimes degenerate into what I call "the Pareto fallacy of corporate profitability."ⁿ³⁴ The fallacy is the view that, in the end, boards of directors will always maximize profits for shareholders if they make decisions that are also in the best interest of workers, consumers, and the community at-large. The fallacy assumes that worker-friendly decisions will attract and retain the best workers, and consumer friendly decisions will attract and retain the most loyal consumers, thereby ensuring maximum returns to shareholders. Under this view, there is no conflict between shareholder interests and stakeholder interests, so long as corporate boards sufficiently seize the synergies available to them.ⁿ³⁵ [*204]

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