

## 21 Health Matrix 189, \*

n30 This may be overstated, for it may not be that puffery is not wholly meaningless or that it has no effect, but merely that it does not mislead or confuse. Perhaps puffery creates a sense of whimsy and excitement, and provides opportunity for identity formation and expression which is desirable and fun. So even if it is a little destructive in some ways, it is not unduly so, given its utility in other ways. In either event, it remains true that discourse norms in the marketplace are far less demanding than are the explicitly co-operative norms regulating corporate speech to shareholders.

n31 Langevoort, *supra* note 17.

n32 *Id.* at 107.

n33 *Id.* at 122.

n34 Economists usefully distinguish between two kinds of efficiency. The first and best kind is called "Pareto" efficiency. A Pareto efficient rule or proposed alteration to a rule is one which makes at least one person better-off, and which makes nobody worse off. Pareto efficiency is so comely a thing that it probably deserves a better name. A second kind of efficiency, also good but not great, is "Kaldor-Hicks" efficiency, which refers to a rule or proposal which would improve the lot of one person more than it would harm the lot of another, but it makes no promises as to distributional consequences. Kaldor-Hicks efficiency is only potentially beautiful. It requires either some justification for the distributional burdens occasioned by its operation, or else it requires some additional rule or program to ensure that the efficiency gains realized from the rule are somehow transferred to compensate the parties harmed on the way to increasing the overall social pie. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 12-17 (7th ed. 2007).

n35 Such assumptions about the reconcilability of corporate social responsibility and profitability were already widespread enough for E. Merrick Dodd, Jr. to reference, and critique them, in his famous 1932 essay, *For Whom Are Corporate Managers Trustees?*

No doubt it is to a large extent true that an attempt by business managers to take into consideration the welfare of employees and consumers . . . will in the long run increase the profits of stockholders. As Dean Donham and others have demonstrated, it is the lack of a feeling of security on the part of those who are dependent on employment for their livelihood which is largely responsible for the present under-consumption which has so disastrous an effect upon business profits. . . . And yet one need not be unduly credulous to feel that there is more to this talk of social responsibility on the part of corporation managers than merely a more intelligent appreciation of what tends to the ultimate benefit of their stockholders.

45 HARV. L. REV. 1145, 1156-1157. The reconcilability of responsibility and profits continues to be a theme in contemporary scholarship and public policy debate. See, e.g., STEVEN ROCHLIN ET AL., *STATE OF CORPORATE CITIZENSHIP IN THE U.S.: A VIEW FROM INSIDE 2003-2004* 4 (2004) ("Business executives see corporate citizenship as a fundamental part of business. . . . 82 percent of executives surveyed say that good corporate citizenship helps the bottom line."), available at <http://bclcl.uschamber.com/sites/default/files/files/04stateccreport.pdf>; Cherie Metcalf, *Corporate Social Responsibility as Global Public Law: Third Party Rankings as Regulation by Information*, 28 PACE ENVTL. L. REV. 145, 158-59 (2010) ("Corporate social responsibility may enhance profitability through increased employee productivity or reduced labor costs. . . . The adoption of corporate social responsibility commitments can serve as a way to screen employees and allow firms to pay reduced wages or gain loyalty and productivity thereby enhancing profitability."); Robert Sprague, *Beyond Shareholder Value: Normative Standards for Sustainable Corporate Governance*, 1 WM. & MARY BUS. L. REV. 47, 77 (2010) ("[Scholars have] found that 'consumers are willing to pay substantially more for ethically produced goods, suggesting that there is a financial reward for socially responsible behavior.'") (citation omitted); Reena De Asis, *Corporate Giving and the Social Economy*, HUFFINGTON POST (Mar. 13, 2011, 12:56 PM), <http://www.huffingtonpost.com/reena-de-asis/corporate-giving-and-the-b833626.html> ("Corporate giving can be strategic while also being a valuable investment in the community. One major strategic benefit is an increase in brand awareness that can result in a competitive edge.").

n36 The urtext of this fallacy is the example of Johnson & Johnson Inc.'s reaction to the cyanide-in-the-Tylenol scandal of 1982. After a still-unknown malefactor laced several bottles of Tylenol in the Chicago area with cyanide, the company was quickly and fully forthcoming about the risk, pulled all of its products off store shelves at substantial short-term cost to the

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