

COMMENTARY TO DEAN FERSHÉE'S ARTICLE

*Alexander Brent**

Dean Fershée's article raises multiple discussion points that I would like to address.

I. COMMUNITY SERVICE MISSIONS CAN PROMOTE STOCKHOLDER¹ WEALTH MAXIMIZATION

First, I want to discuss the *eBay* court's insinuation that maintaining a community service focus renders a corporation "purely philanthropic."² While the Craigslist directors did state that the company's goal is not to maximize wealth,³ one director also stated that the company's community service mission "is the basis upon which our business success rests. Without that mission, I don't think this company has the business success it has."⁴ Craigslist has been profitable for almost twenty years while continuing its commitment to its community service mission.⁵ Although the company's officials appear to genuinely maintain their more community-focused mission in public statements and testimonies (as they did in *eBay*), the company's financial statements speak for themselves. Craigslist is a for-profit corporation, regardless of what its officials say or believe. If Craigslist had pursued a purely profit-based mission from its inception, its platform would have been muddled with advertisements that would have agitated consumers and likely driven them to a different platform. Thus, one could argue, if not state as fact, that Craigslist owes its sustained success to its community service mission. Craigslist does not appear to be a 'purely philanthropic' company at all; rather, Craigslist

* Alexander Brent is a third-year law student at The University of Tennessee College of Law and is scheduled to graduate in May 2020.

¹ Some jurisdictions use the term "shareholder" rather than "stockholder." To maintain consistency, I will only use the term stockholder in this comment.

² *eBay Domestic Holdings v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

³ *Id.*

⁴ *Id.* at 8.

⁵ *Craigslist's Ongoing Success Story*, BLOOMBERG (May 15, 2007, 4:23 PM), <https://www.bloomberg.com/news/articles/2007-05-15/craigslists-ongoing-success-story-businessweek-business-news-stock-market-and-financial-advice>.

officials have a philanthropic mindset, and that mindset has resulted in sustainable profitability and continual increases in stockholder wealth (whether the officials intended this result or not).⁶

II. LET DIRECTORS SPEAK HONESTLY

The *eBay* court essentially implied that Craigslist's directors should have lied or stayed silent about the company's mission instead of admitting that they prioritized their community service mission above all other goals. This implication is problematic because company directors should be free to speak candidly about their motives and intentions; this will better enable companies to avoid situations where people invest in reliance on an director's boilerplate statements about immediate and maximized profitability and are later upset when the company spends (or forgoes) profits in furtherance of long-term community service goals. Investors need to know the true intentions of company directors before they decide to invest their money.

Further, Dean Fershée did a nice job of illustrating the effect that the *eBay* case had on the way that CVS announced its intentions to stop selling tobacco. CVS appears to have made this decision in an effort to adopt a more healthcare friendly brand—thus increasing its reputation and profitability over time—yet CVS apparently felt the need to qualify the announcement of this decision by including a second paragraph in its statement, complete with yearly revenue and stock price analyses as well as a statement that the company had “identified opportunities that are expected to offset the profitability impact.”⁷ While the cost of adding a similar paragraph to company announcements is likely low, I agree with Dean Fershée—a company should only include these types of statements because they want to and because they actually believe in the message they purport to send, not because of the *eBay* case. Furthermore, this CVS announcement is precisely the type of boilerplate statement that might

⁶ Ben and Jerry's has also experienced sustained success utilizing a similar community service mission. See *Our Values*, BEN & JERRY'S, <https://www.benjerry.com/values> (last visited Jan. 18, 2020). Dean Fershée did an excellent job discussing Ben and Jerry's success. He concludes that Ben and Jerry's “company philosophy helped build the brand.” I think both Craigslist and Ben and Jerry's are two examples of companies that used community service missions to enhance profitability and stockholder wealth.

⁷ *CVS Caremark to Stop Selling Tobacco at all CVS/Pharmacy Locations*, PR Newswire, (Feb. 5, 2014, 7:00 PM), <https://www.prnewswire.com/news-releases/cvs-caremark-to-stop-selling-tobacco-at-all-cvspanpharmacy-locations-243662651.html>

cloud a director's true intentions (to an extent). If the CVS directors planned (in good faith) to stop selling tobacco in an effort to improve its long-term reputation as a healthcare provider, then that is all that the CVS directors need to say; any additional analysis of the immediate economic impact of the decision seems, in my mind, to be boilerplate forced by the *eBay* decision.

III. NO EXPLICIT STATUTORY BASIS EXISTS FOR THE MAXIMIZATION OF STOCKHOLDER WEALTH THEORY IN DELAWARE

Dean Fershée also states that nothing in the Delaware General Corporation Code “indicates [that] a company must maximize profits or take risks or ‘monetize’ anything.”⁸ The notion that a company must pursue more aggressive, short-term profits at the expense of long-term sustainability and community service missions appears to stem from the language in the *Dodge* case,⁹ where the court stated that corporations exist *primarily* to produce profits for their stockholders, despite the absence of any explicit statutory support for such a standard. While this standard seems innocuous at first glance, it appears to imply that directors should primarily pursue strategies that lead to direct and immediate profits for stockholders—yet the pursuit of short-term profits represents just one of many business strategies. Some companies may choose to donate excess profits to a local charity rather than distributing these profits to stockholders.

While this would not technically maximize stockholder wealth *in that particular year*, it would be foolish for one to suggest that this positive local press could not boost the company's reputation and lead to stockholder wealth maximization *in subsequent years*. While there are many instances in which aggressive, short-term strategies yield the best result for companies (and stockholders), it seems myopic to suggest that companies exist primarily to produce immediate profits. More often than not, directors should pursue goals that advance the long-term success and profitability of their businesses.

⁸ Joshua P. Fershée, *The End of Responsible Growth and Governance?: The Risks Posed by Social Enterprise Enabling Statutes and the Demise of Director Primacy*, 19 TRANSACTIONS: TENN. J. BUS. L. 361, 372 (2017). “A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes” DEL. CODE. ANN. tit. 8, § 101(b).

⁹ *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

IV. THE *eBay* DECISION MAY CAUSE DIRECTORS TO AVOID PURSUING LONG-TERM BUSINESS STRATEGIES

The *eBay* decision may cause directors to balk when faced with decisions that provide a long-term benefit to their companies at the expense of more short-term financial gains.

An example of a company pursuing a long-term strategy at the (possible) expense of short-term profits is CVS's decision to stop selling tobacco products (referenced above). CVS stated that this decision would cost the company approximately two billion dollars in revenue, leading to a loss of approximately seventeen cents per share.¹⁰ However, CVS stated that it had identified opportunities to set off these losses in the long-term (whether CVS should have to say this is debatable, as discussed above), and further stated that this decision would “more closely align” CVS with patients, clients, and health care providers.

To me, CVS sees a fork in the road—CVS is either a healthcare provider or a glorified drug and convenience store. CVS directors should feel free to take the healthcare provider path—despite its negative impact on short-term profits and stock price—if they comply with their fiduciary duties and actually believe that this decision will benefit CVS in the long-term.

V. *eBay*'S POTENTIAL TO INCENTIVIZE FRIVOLOUS LAWSUITS

One additional point I considered when reading Dean Fershée's article was the potential for similar, wasteful suits in the aftermath of *eBay*. Stockholders who struggle to trust long-term strategies that a Board of Directors may pursue at the expense of short-term gains could use *eBay* as authority to challenge these long-term strategies. Litigating these unnecessary suits would waste the time and resources of companies and the courts and would have a chilling effect on directors who wish to pursue long-term business strategies at the expense of short-term profits.

The Business Judgment Rule can serve to limit these lawsuits and this potential chilling effect, as this Rule prevents courts from reviewing director decisions—such as whether to pursue short-term or long-term business strategies—absent fraud, self-dealing, or illegality.¹¹ This

¹⁰ *CVS Caremark to Stop Selling Tobacco at all CVS/Pharmacy Locations*, PR NEWSWIRE, (Feb. 5, 2014, 7:00 PM), <https://www.prnewswire.com/news-releases/cvs-caremark-to-stop-selling-tobacco-at-all-cvspanarmacy-locations-243662651.html>.

¹¹ Fershée, *supra* note 8, at 389.

mechanism acts to promote director creativity by giving Boards wide discretion (without the constant fear of judicial intervention) while still protecting stockholders from bad faith directors. This standard should act to prevent a court from reviewing a company's decision to pursue community service missions (or other long-term business strategies) at the expense of short-term profits—thus the craigslist directors would be free to pursue their community service mission (above all else) without worrying about judicial intervention.¹²

CONCLUSION

In sum, I think Dean Fershée's ultimate conclusion is correct, “[c]ompanies should be free to pursue their course of business for any lawful purpose without courts second guessing their motives absent a requisite showing that directors’ business judgment should not apply.”¹³ The Business Judgment rule exists to shield the Craigslist directors from judicial condemnation of a particular business philosophy and to allow the CVS directors to stop selling tobacco without the fear of judicial repercussion.¹⁴

The Business Judgment Rule does not shield bad actors, and stockholders can always vote out directors that pursue ineffective business strategies. Therefore, the courts should stay out of the boardroom absent director fraud, self-dealing, or illegality and allow directors to freely exercise their creative business judgment and decision-making skills—even if that creativity leads some directors to focus on community service missions rather than short-term profits.

¹² Assuming compliance with the Business Judgment Rule.

¹³ Fershée, *supra* note 8, at 381.

¹⁴ Assuming these directors exercised due care and did not act fraudulently, illegally, or against the best interests of the corporation.