

2012

The Twelfth Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law at the Fordham Corporate Law Center

James B. Steward

Constantine N. Katsoris

Fordham University School of Law, ckatsoris@law.fordham.edu

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Recommended Citation

James B. Steward and Constantine N. Katsoris, *The Twelfth Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law at the Fordham Corporate Law Center*, 18 Fordham J. Corp. & Fin. L. 1 (2012).

Available at: <https://ir.lawnet.fordham.edu/jcfl/vol18/iss1/1>

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Cover Page Footnote

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FORDHAM

JOURNAL OF
CORPORATE & FINANCIAL LAW

LECTURE

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CORPORATE, SECURITIES & FINANCIAL LAW AT THE
FORDHAM CORPORATE LAW CENTER

HIDING BEHIND THE CORPORATE VEIL

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HIDING BEHIND THE CORPORATE VEIL

WELCOME AND INTRODUCTORY REMARKS

Constantine N. Katsoris^{*}
Fordham University School of Law

LECTURER

James B. Stewart^{**}
Columbia Journalism School

[†] The lecture was held at Fordham University School of Law on March 21, 2012. It was edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory materials where the editors deemed appropriate.

^{*} Constantine N. Katsoris is the Wilkinson Professor of Law at Fordham University School of Law. Constantine N. Katsoris—Biography, <http://law.fordham.edu/faculty/10197.htm>.

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WELCOME AND INTRODUCTORY REMARKS

PROFESSOR KATSORIS: Good evening, ladies and gentlemen. On behalf of the DeStefano Family, I'd like to welcome you here tonight. For those of you who never met Al DeStefano, let me briefly describe him to you. He started at Fordham Law School as an evening student, worked during the day, still managed to make the Law Review, and graduated at the top of his class. He then went on to become a partner in the Becker firm, specializing in corporate matters, particularly mergers and acquisitions. In his spare time, he devoted himself to numerous charitable endeavors and, as an adjunct professor on our faculty, shared his enormous knowledge and experience with our students.

Former Dean of Fordham Law School and current Federal Circuit Judge Joseph McLaughlin, truly a great teacher in his own right, when once asked to describe the duties of a law professor, responded without hesitation: "He must be thoroughly versed in every aspect of the material and his role is not in creating more academics, but rather scrappy, smart lawyers who are ethical and engaged." I'm proud to say that Al DeStefano is just such a lawyer, and I might add the word compassionate as well.

Indeed, I personally feel that the goal of the DeStefano Lecture series is to follow the McLaughlin rule, that is, to communicate with scrappy, smart lawyers who are ethical and engaged on topics of current interest. In keeping with this tradition since its inception over a decade ago, the DeStefano Lectures have covered a wide range of timely and diverse topics such as: the need for market regulation; the demise of Enron and its auditor Arthur Anderson; strengthening the protection for investors; making our capital markets more transparent; the subprime mortgage meltdown; and corporate and governmental accountability.

Last year, we were treated to Judge Rakoff's thought-provoking lecture, entitled "Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise." Tonight we're in for another treat. Tonight's speaker will cover the topic "Hiding Behind the Corporate Veil." Interestingly, it was exactly one hundred years ago, 1912, that Professor I. Maurice Wormser, of the Fordham faculty, wrote his famous article in the *Columbia Law Review* regarding piercing the corporate veil, where he analyzed various situations in which the concept of corporate entities should be ignored and the veil of limited liability lifted. Professor Wormser was a legend at Fordham Law School. Indeed,

although he was truly an outstanding academician, he also fit the McLaughlin definition of being a smart, scrappy lawyer who was both ethical and involved. Why did such a giant in the law choose the *Columbia Law Review* to launch his famous doctrine of piercing the corporate veil? There are several theories.

The first is a simple explanation. The *Fordham Law Review* was not yet in existence. It began publication two years later in 1914 and Professor Wormser could not wait to issue his theory. Another explanation is somewhat more complex. Professor Wormser knew the *Columbia Law Review* was then, and would continue to be, one of the leading premier legal periodicals; and, he had a premonition that one hundred years later a professor from the Columbia School of Journalism would pick up the torch of justice in search of abuses by those who hide behind the corporate veil. Does that sound far-fetched? Perhaps. But to me, the connection between piercing the corporate veil one hundred years ago and those who have lurked behind the corporate veil this past century seems compelling and more than just a coincidence. I wish I could add that tonight's speaker was a collateral descendant of Professor Wormser, but that would be wishful thinking.

In any event, fraud, deception, misrepresentation, and perjury have occurred in the business community since Professor Wormser's article a century ago. There is no one more qualified to report on that subject than tonight's speaker, who will discuss those who hide behind the corporate veil.

James Stewart was born in Quincy, Illinois. He graduated from DePauw University and Harvard Law School. He is the Bloomberg Professor of Business Journalism at Columbia University Graduate School of Journalism. He writes the *Common Sense* column for the Business Day section of the *New York Times*. He contributes regularly to *The New Yorker*, and he was formerly Page 1 Editor of *The Wall Street Journal*.

His awards are too numerous to list, but I will highlight just a few. He is the recipient of the 1988 Pulitzer Prize for *The Wall Street Journal* articles on the 1987 stock market crash and insider trading scandal. He is a winner of the George Polk award and several Gerald Loeb awards. He is the author of eleven books, including *Den of Thieves*, and also the national best seller, *DisneyWar*, dealing with Michael Eisner's tumultuous reign at Disney. His latest book, *Tangled Webs: How False Statements are Undermining America*, examines several recent high profile cases to show how wrong-doers escape individual responsibility by invoking the legal concept of the corporation.

Never forgetting his alma mater, he serves on the Board of Advisory Trustees at DePauw University and also served as its past president. In addition, he will be the principal speaker at this year's graduation at DePauw University, at which time he will be awarded by DePauw the Bernard Kilgore medal for distinguished lifetime achievement in journalism. I could go on and on, but you didn't come here to listen to me. Ladies and gentlemen, it gives me great pleasure to introduce to you James B. Stewart.

LECTURE: HIDING BEHIND THE CORPORATE VEIL

PROFESSOR STEWART: Thank you very much. What a wonderful introduction. I did not even know this 100-year anniversary was coming up, but I am delighted to learn that. This was quite an unusual opportunity, being invited by a law school to address such a distinguished audience on the subject of corporate legal issues. At first, I had a moment of panic thinking what I, a journalist, could possibly say to you. And I believe I may be the first practicing journalist to give this lecture, so I'll just warn you ahead of time that there will be a little more fact emphasis than there will be legal emphasis. I have enjoyed slipping back to my legal roots and my legal training to try to weave the two together, and I have really enjoyed thinking about the subject and putting this talk together. I have to give special thanks right at the beginning to two Fordham students who kind of served as my associates. In fact, they made me feel like something that in life I never have been: a law firm partner with an array of talented, smart associates to deploy to do the heavy lifting—and at the same time, keeping the billable hours down. And so I have to thank Megan Ferrer and Arielle Buss, who did some tremendous work and legal research for me in preparing this topic.

There is a guy named Greg Lee, whom you have probably never heard of. He was the Chief Administrative Officer of the poultry giant, Tyson Foods, and President of Tyson's International Unit—one of the highest-ranking executives in the company. And when he retired, he could hardly have gotten a better send-off from the company. Here is what the press release said:

“Greg spent 27 years helping build and grow Tyson Foods, so his leaving the company will not be easy,” said Dick Bond, Tyson's president and CEO. “He will be missed by all, but we take comfort

in knowing he will still be available on a consulting basis in the future.”

“My career at Tyson has been rewarding in so many ways,” said Lee. “It has been exciting to see the company grow from the small regional chicken company it was when I started, to the largest protein provider on the planet”

“The Tyson family greatly appreciates Greg’s dedicated service to the company over the last three decades,” said Tyson Chairman John Tyson. “He has been a stalwart team member wherever he was needed and we will miss having him here on a day-to-day basis.”¹

So Tyson paid Mr. Lee nearly one million dollars on the date of his retirement and awarded him a ten year consulting contract, which provided an additional \$3.6 million in compensation. Mr. Lee continues to be reimbursed for his country club dues, use of a company car, and enjoys, I’m quoting from his employment agreement, “[p]ersonal use of the Company-owned aircraft for up to one hundred (100) hours per year for the first five (5) years.”² As you’ve already heard, the title of my lecture tonight is “Hiding Behind the Corporate Veil” and exhibit A is none other than Mr. Lee of Tyson foods. In my opinion, Mr. Lee is lucky that Tyson Foods is paying his country club dues and not his bail bond. Exhibits B and C are other high ranking Tyson executives who conceived, implemented, and even once they were detected, kept alive one of the most brazen foreign bribery schemes in recent corporate history. It was a blatant violation of the Foreign Corrupt Practices Act.³ Has anyone involved at Tyson been charged with a crime, let alone convicted of one? No. The Justice Department and the SEC, which investigated the affair, would not even name the alleged individual offenders, identifying them only by vague reference to their job description, such as VP International.⁴ You are hearing their names tonight only because I decided to take matters into my own hands and get to the bottom of what happened. I was able to identify the three top

1. Press Release, Tyson Foods Inc., Greg Lee - Tyson’s Chief Administrative Officer and International President - Announces Early Retirement (Apr. 3, 2007), <http://www.tysonfoods.com/Media-Room/News-Releases/2007/04/Greg-Lee---Tyson-s-Chief-Administrative-Officer-and-International-President---Announces-Early-Retirement.aspx>.

2. Tyson Foods Inc., Current Report (Form 8-K) (Apr. 3, 2007).

3. See 15 U.S.C. § 78dd-1 (2006).

4. Plea Agreement at 14-16, United States v. Tyson Foods, Inc., No. 11-37 (Feb. 10, 2011).

executives who, when I contacted them, not surprisingly, declined comment.

So what actually happened at Tyson? In late June 2004, a plant manager for one of Tyson Foods' Mexican poultry processing plants sent a memo to headquarters in Springville, Arkansas.⁵ Two women on Tyson payroll who "most definitely [] [did] not work for Tyson Foods in Mexico,"⁶ were being paid over 30,000 pesos a month and had been for years.⁷ The Mexican women happened to be the wives of two veterinarians stationed at the plants as part of the Mexican government's efforts to assure high sanitary and processing standards for the Mexican meat and poultry industries.⁸ The veterinarians certified the plant's products as suitable for export, a step required by countries like Japan and increasingly sought after by Mexican consumers as well, as an assurance for quality and safety. By withholding their certifications, the veterinarians could essentially halt exports of Tyson's Mexican products or, as one executive present observed, create "problems at the plants."⁹ A few days after this missive, the plant manager's revelations prompted a meeting of high-level Tyson executives at headquarters in Springdale.¹⁰ Someone present pointed out the obvious, which was that the purpose of the payment was to "keep the TIF veterinarians from making problems."¹¹ In short, to pay them bribes. All participants at this meeting, including the then president of Tyson International, whose name is Greg Huett, the Vice President for Operations, and the Vice President of Internal Audit, evidently agreed that the payments to the wives had to stop.¹² Around the same time, a company lawyer said he was seeking advice on the company's "possible exposure" from the payments, evidently referring to Tyson's potential criminal liability for

5. *Id.* at 15.

6. *Id.*

7. *Id.* at 16.

8. *Id.* at 13 ("The Government of Mexico administers an inspection program, called *Tipo Inspección Federal* ("TIF"), for meat-processing facilities. Any company that exports meat products from Mexico must participate in the inspection program, which is supervised by an office in the Mexican Department of Agriculture ("SAGARPA").").

9. *Id.* at 15.

10. *Id.* ("Executive, VP International, VP Audit and others met in Springdale, Arkansas.").

11. *Id.*

12. *Id.*

maintaining fraudulent records and bribing foreign officials.¹³ And then, having apparently identified the serious legal and illegal lapses, the potential liability, and the need to stop these bogus payments to the non-working wives, these high level executives “were tasked with investigating how to shift the payroll payments to the TIF veterinarians’ wives directly to the veterinarians.”¹⁴

A subsequent statement of facts negotiated by Tyson’s lawyers and the Department of Justice, written in the all too passive voice typical of these documents, begs the question of just who “tasked” such an undertaking. A memo written by Tyson’s audit department, titled “Tyson de Mexico - Payroll Memo,” stated “doctors will submit one invoice which will include the special payments formerly being made to their spouses along with there [sic] normal consulting services fees.”¹⁵ The invoice for the payments to the veterinarian inspectors would be labeled as “professional honorarium.”¹⁶ The manager of the plant at the time charged with implementing this new scheme was a manager named Paul Fox. So I wondered, what were these Tyson executives thinking? It’s hard to see how simply shifting the payments from the wives to the veterinarians did anything to mitigate the bribery scheme or the false descriptions of the payments. If anything, it appears to me even more brazen. Perhaps once the wives’ cover was blown by the plant manager, they saw no alternative if the goal was to keep the bribery scheme going. There is no indication anyone gave serious consideration to stopping the payments, but only to finding a new way to make them. The President of International, Mr. Huett, who was the highest-ranking official at the meeting, communicated this resolution to Tyson’s Chief Administrative Officer, the Mr. Lee I mentioned earlier.¹⁷

So the payments to the veterinarians continued. Another plant manager subsequently complained to an accountant at Tyson headquarters that he was uncomfortable with this arrangement.¹⁸ The accountant went to Mr. Huett. “He” meaning Mr. Huett, “agreed that we are OK to continue to make these payments against invoices (not

13. *Id.*

14. *Id.*

15. *Id.* at 16 (citing “Tyson de Mexico – Payroll Memo” drafted on or around August 26, 2004).

16. *Id.* (“Tyson increased the amount it paid to [a veterinarian] based on invoices for ‘professional honoraria’ by approximately the same amount that it had previously paid to the wives of the TIF veterinarians.”).

17. *Id.*

18. *Id.* at 17.

through payroll) until we are able to get [the Mexican inspection program] to change,” the accountant informed the plant manager.¹⁹ Now, Tyson has stressed that none of the products certified by these Mexican veterinarians taking the bribes ever made it to the US and apparently no sickness or fatalities have been traced to products processed at the plants. But such concerns underscore the obvious, which is why bribing officials charged with protecting the public health is especially serious.

The issue of these payments resurfaced in November 2006, and this time, Tyson did what it should have done two years earlier: It retained an outside law firm, Kirkland and Ellis, which conducted an internal investigation and, under a government program intended to encourage voluntary disclosure of white-collar crime, turned the results over to the Justice Department and the SEC.²⁰ The government’s ensuing multi-year investigation ended last year when Tyson was charged with conspiracy and violating the Foreign Corrupt Practices Act, and agreed to resolve the charges with a deferred prosecution agreement and pay the four million dollar criminal penalty.²¹ The company paid an additional \$1.2 million to settle related SEC charges that it maintained false books and records and lacked the controls to prevent payments to phantom employees and government officials.²²

But what about those at Tyson responsible for the bribery scheme? Corporations may have assets and liabilities, but they do not commit crimes. Their officers, executives, and employees do. And the 23-page letter agreement between Tyson and the Department of Justice, as well as the criminal information and the SEC’s public statement of facts, all withheld any names. It would seem to me self-evident that if Tyson engaged in a conspiracy and violated the Foreign Corrupt Practices Act, then someone at Tyson did so as well. For violation of the FCPA’s bribery provisions, individuals can be fined up to \$100,000 and

19. *Id.* (citing an email sent from Accountant to the plant manager at TdM).

20. James B. Stewart, *Bribery, but Nobody Was Charged*, N.Y. TIMES, June 25, 2011, at B1, available at http://www.nytimes.com/2011/06/25/business/25stewart.html?pagewanted=all&_r=0.

21. Press Release, Dept. of Justice, Tyson Foods Inc. Agrees to Pay \$4 Million Criminal Penalty to Resolve Foreign Bribery Allegations (Feb. 10, 2011), <http://www.justice.gov/opa/pr/2011/February/11-crm-171.html>.

22. Press Release, SEC, SEC Charges Tyson Foods with FCPA Violations (Feb. 10, 2011), <http://www.sec.gov/news/press/2011/2011-42.htm>.

imprisoned for up to five years.²³ For books and record violations of the FCPA, the penalties are fines of up to \$5 million and a prison term of up to twenty years for individuals, and fines of up to \$25 million for companies.²⁴ I assumed the names were withheld because this investigation was continuing and further charges might be forthcoming. It turns out I was wrong. The investigation is over, and the SEC and the Justice Department have said there will be no individual charges.

Companies seem only too willing to go along with this, passing settlement costs onto shareholders while sweeping the details and even the names under the rug. Gary Mickelson, a Tyson spokesman, declined to name any company officials involved when I asked him, but he said, “they’re either no longer with the company or they were disciplined.”²⁵ He declined to be more specific and I wondered just how exactly they were “disciplined.”

So how have these individuals fared, the ones I identified by additional reporting? Tyson announced in May 2006 that Greg Huett, the President of International, whom my research shows was heavily involved in the scheme, would be named to “another leadership position within the company.”²⁶ SEC filings indicate he left in 2007 without any further comment from Tyson. He is currently a director of publicly traded YUHE International, China’s largest producer of day-old broiler chickens, where he serves on the Audit and Compensation committees, and chairs the Nominating Committee.²⁷ Paul Fox, the Mexican plant manager, was actually promoted by Tyson to Vice President, Processed Meats Operation and left a year later to become the Chief Executive of Dickinson’s Frozen Foods in Idaho. He then became a Managing Director of Brazil-based Marfrig Group, one of the world’s largest meat and poultry producers, and currently serves as the Chief Executive Officer of O.K. Industries, an integrated chicken producer. And of course, Mr. Lee got the glowing sendoff and the lucrative consulting

23. See 15 U.S.C. § 78ff(c); see also U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 (2011), available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/2c1_1.htm.

24. 15 U.S.C. § 78ff(a).

25. Stewart, *supra* note 21.

26. Press Release, Tyson Foods, Inc., Tyson Selects International Group Vice President; Other Management Changes Announced (May 23, 2006), <http://www.prnewswire.com/news-releases/tyson-selects-international-group-vice-president-other-management-changes-announced-56525442.html>.

27. YUHE Int’l Inc., Current Report (Form 8-K) (June 13, 2008).

contract along with other perks like use of the company plane.²⁸ When I called for comment, everyone said this was the end of it and they felt that the settlement had largely achieved the government's objectives, which were to stop the illegal conduct at Tyson and deter future instances. But surely bribery, not to mention other forms of corporate wrongdoing, would be more effectively deterred if some individual was actually held accountable for it.

Where has this idea come from? That somehow corporations in the abstract can commit crimes? Slowly but surely, the corporation has been anthropomorphized by American common and statutory law as much as any Disney movie has produced talking animals and birds. As far back as 1819 in *Trustees of Dartmouth College v. Woodward*,²⁹ the Supreme Court ruled that a corporation, like a person, could enter into an enforceable contract. In 1830, another Supreme Court case granted corporations the same property rights as those enjoyed by natural persons.³⁰ From there, the corporation was on a slippery slope to full-blown personhood. As a matter of interpretation of the word "person" in the Fourteenth Amendment, US courts have extended many, although not all, constitutional protections to corporations. And since the Supreme Court's ruling in *Citizens United v. Federal Election Commission*³¹ in 2010, upholding the corporation's right to make unlimited political expenditures as an exercise of First Amendment protected speech, many have begun to wonder if this trend has gone too far.³²

That's a separate issue from my talk tonight. Still, the fictional notion that the corporation has the rights to enter into contracts, to own property, and to engage in other activities customarily associated with actual people, was quite slow to become embedded in the notion of criminal law. Many wondered how an abstract entity, a collective of people, could act with a specific criminal intent necessary for commission of a crime. But especially as the notion of vicarious

28. Tyson Foods Inc., Current Report (Form 8-K) (Apr. 3, 2007).

29. 17 U.S. (4 Wheat.) 518 (1819).

30. Soc'y for the Propagation of the Gospel in Foreign Parts v. Pawlett, 29 U.S. (4 Pet.) 480 (1830).

31. 558 U.S. 310 (2010).

32. For an overview of the arguments against corporate personhood, see Susanna Kim Ripken, *Corporate First Amendment Rights after Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209 (2011).

corporate liability and tort law expanded to cover corporate liability, in large part because of the deep pockets and generous recoveries that could often be obtained from corporations, criminal liability for corporate persons followed. In 1909, the Supreme Court ruled in *United States v. New York Central & Hudson River Railroad Co.*,³³ that corporate criminal sanctions could be imposed if an employee had committed a crime, first, within the scope of his or her employment and second, for the benefit of the corporation. That standard is still widely applied today. And finally, the very first section of the US Code, Title 1, Section 1 states that the word “person” includes “corporations, companies, associations, firms, partnerships, societies and joint stock companies,” as well as individuals.”³⁴ At this point, the personhood of the corporation is complete.

Even so, the notion that corporations might commit crimes seems to have been largely seen as something that supplemented, rather than supplanted, individual liability. In other words, individuals would be charged with crimes and then, on top of that, the corporation might also be held liable, in many cases, in order to collect financial damages for victims. That has changed relatively recently. Ironically, in the wake of major criminal scandals over the last two decades, starting with Enron and WorldCom, and continuing through the financial crisis, criminal investigations seem to have increased significantly, but convictions have not. In the five years following Enron, only one major company, accounting firm Arthur Anderson, was actually convicted of a crime, and even that was subsequently overturned, although not in time to save the firm.³⁵ Numerous individuals have been prosecuted and quite a few convicted, many of them, however, quite low on the corporate scale. And recently, even that trend seems to have diminished, with very few individuals being held accountable for corporate wrongdoing. This appears in large part to be due to policies embraced in Washington by the Justice Department and the SEC, which favor deferred prosecution agreements such as that with Tyson.

As the Tyson case indicates, the corporation itself rarely has any interest in seeing its executives brought to justice, particularly when

33. 212 U.S. 509 (1909).

34. 1 U.S.C. § 1 (“[T]he words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).

35. Linda Greenhouse, *Justices Unanimously Overturn Conviction of Arthur Andersen*, N.Y. TIMES, May 31, 2005, <http://www.nytimes.com/2005/05/31/business/31wire-andersen.html?pagewanted=all>.

those executives might be at the very top of the hierarchy, including the CEO. Now, why this would be the case is not entirely self-evident, at least to me, especially since their behavior has often brought tremendous embarrassment and financial damage to the institution they were purporting to serve. But I believe there is a clue in the Tyson accolades for Mr. Lee, and the reference to him being a wonderful “team player.”³⁶ In my experience, there seems to be no higher accolade in corporate America than being called a “team player” or even a “TP,” as I’ve sometimes heard it abbreviated. A “TP” displays a quality much prized by many organizations, which is loyalty—a quality prized far too much, in my view. Loyalty is often elevated to the top of the ethical pyramid, above the rule of law, and the obligation to obey the law. “Loyalty above all” is essentially the code of organized crime. This is hardly limited to corporations, as scandals at Penn State and the Catholic Church have demonstrated, but it does seem to be particularly attractive within the corporate context.

This impulse also extends to behavior that may be scandalous even though it may not reach the level of criminal conduct. A vivid recent example occurred at the Hewlett-Packard Company, the world’s largest computer maker. Let me read an excerpt from a remarkable letter from a lawyer that landed on the desk of Hewlett-Packard’s then Chief Executive, Mark Hurd. And by the way, then tell me whether you think corporate law is boring. Here is the quote:

[She] was scared. She was a nervous wreck but attempted to appear relaxed. She sat down on one of two loveseats in the sitting room. She was worried when you came over and sat directly next to her and put your arm on the back of the loveseat. As you did so, your hand brushed across her breast. It happened a second time and [she] said, “you know that you are touching my breast, right?” You said, “oh, sorry, sorry” and then laughed it off.³⁷

This is a passage from the letter that triggered one of the most remarkable sagas in modern boardroom history and cost Mark Hurd his position as Chief Executive of Hewlett-Packard. A year and a half after this letter landed on his desk, the question persists – how much of it is

36. Press Release, Tyson Foods Inc., *supra* note 1.

37. Letter from Gloria Allred, Attorney, Allred, Maroko & Goldberg, to Mark Hurd, CEO, Hewlett Packard Co. (June 24, 2010), <http://www.nytimes.com/interactive/2011/12/30/business/30hurd-letter.html> [hereinafter Allred Letter].

fiction? It's written in a breathless narrative style by Gloria Allred, the high profile lawyer who represents former H-P consultant, Jodie Fisher, the woman who is the "she" in the excerpt I read. The letter was unsealed recently by the Delaware Supreme Court after Mr. Hurd intervened in impending shareholder litigation in an effort to keep it secret. The letter is, to the best of my knowledge, unprecedented in the annals of boardroom history. It purports to convey explicit dialogue, "[s]o, you'll stay the night, right? You'll stay?"³⁸ It explores the characters' inner thoughts and states of mind, even Mr. Hurd's. "You were outraged and felt insulted by [Ms. Fisher's publicist] and by Ms. Fisher,"³⁹ "[s]he felt tired, irritated and depressed, sad and mad. . . ."⁴⁰ It contains brand name details in glamorous foreign locations. "You went in a town car from the [Ritz] hotel to Combarro Restaurant in Madrid."⁴¹ And then it employs rarely used second person narration, consistently referring to Mr. Hurd as "you." In this regard, it joins bestsellers like Jay McInerney's "Bright Lights, Big City," and Terry McMillan's "Waiting to Exhale," as well as classic works by Nathaniel Hawthorne and John Updike. I have to congratulate Ms. Allred. It's one of the few legal documents I can honestly describe as a page-turner. But stripped of its literary flourishes, it boils down to an alleged two-year campaign by Mr. Hurd to have sex with Jodie Fisher, a former soft-core movie actress who H-P hired as a consultant to help host so-called executive summit events for the company.

In the course of those years, Ms. Fisher alleges Mr. Hurd let his hand brush against her breast, asked her to spend the night with him, asked her to hug him—and did hug her while she was dressed in a robe—once put his arms around her and "quickly kissed [her] on the lips," asked her to go away with him, and said he could spend the rest of his life with her.⁴² She mentioned several occasions when they were alone together in his or her hotel room, unrelated to any alleged executive summit meeting, and where they sometimes chatted about movies and sports. She insists she rebuffed all these approaches, there was no sexual activity, and as a result, her consulting contract was not extended. Abruptly dropping the role of omniscient narrator, Ms. Allred

38. *Id.* at 3.

39. *Id.* at 5.

40. *Id.* at 4.

41. *Id.* at 5.

42. *Id.* at 4, 6.

then concludes that Mr. Hurd's behavior amounted to "the most egregious type of sexual harassment."⁴³

Taken as true, Ms. Fisher's allegations do seem to meet the threshold for sexual harassment in California, which is "verbal, visual or physical conduct of a sexual nature or of a hostile nature based on gender that were unwelcome and pervasive or severe."⁴⁴ But Mr. Hurd wasn't asked to resign for sexual harassment and it's not clear that the key elements of Ms. Fisher's allegations are true. She settled the matter and promptly shattered her credibility by conceding that the letter contained "many inaccuracies" without specifying what they are.⁴⁵ She has since declined comment as she did when I tried to reach her.

Putting the details aside, to believe Ms. Fisher, you have to accept her claims that Mr. Hurd, a married Chief Executive of a Fortune 500 company, who by her account had plenty of other women at his disposal,⁴⁶ pursued her for two years while being constantly rebuffed. And emails from her to Mr. Hurd suggest that whatever transpired between the two of them, Mr. Hurd's attentions were hardly unwelcome, which is a critical element of any sexual harassment claim. H-P commissioned an outside law firm, Covington and Burling, to investigate Ms. Fisher's allegations. And while it "did not show that Hurd had committed sexual harassment", it "did reveal that Hurd had breached H-P's standards of business conduct," according to a summary by the Delaware Supreme Court. In a letter to H-P employees at the time of his dismissal, H-P's then interim Chief Executive, Catherine Lesjak, said Mr. Hurd "failed to disclose a close personal relationship he had with [a] contractor, [which] constituted a conflict of interest, failed to maintain accurate expense reports, and misused company assets."⁴⁷ But at least four expense reports do list Ms. Fisher as being present. And the Allred letter cites frequent occasions when Mr. Hurd's assistant dealt with Ms. Fisher as well as numerous meetings where Ms. Fisher

43. *Id.* at 7.

44. CAL. CIV. CODE § 51.9 (West 2012).

45. Aaron Ricadela, *Former HP CEO Hurd Tried to Cajole Fisher into Sex, Letter Says*, BLOOMBERG (Dec. 30, 2011) <http://www.bloomberg.com/news/2011-12-29/hurd-pursued-sex-with-contractor-jodie-fisher-while-ceo-of-hp-letter-says.html>.

46. *See* Allred Letter at 5.

47. Thom Holwerda, *HP CEO Mark Hurd Resigns after Inappropriate Behaviour*, OSNEWS (Aug. 6, 2010, 10:15 PM), http://www.osnews.com/story/23659/HP_CEO_Mark_Hurd_Resigns_After_Inappropriate_Behaviour/.

did indeed perform the hostess services for which she was hired and got “immediate and incredibly positive feedback from everyone” as she wrote in another email. This hardly seems like concealment.

So why did H-P dismiss Mr. Hurd? Sticking to only the undisputed facts, there’s plenty of evidence that Mr. Hurd exercised dubious judgment, starting with the decision to hire a soft-core film actress as a facilitator at cocktail parties in the first place. Ms. Fisher notes in her letter that she always flew first-class at a time when nearly all other H-P employees were consigned to coach and under orders to cut travel expenses. No Chief Executive should spend time alone in a hotel room with a low-level employee or consultant of either sex, without a good reason, even if all they do is watch sports on TV.

Other possibilities must be confronted. When the board concluded that Mr. Hurd did not engage in sexual harassment, it may have been because he didn’t do any of the things that Ms. Fisher alleged. The other possibility is that Ms. Fisher is lying, that she consented to his advances and indeed that they had a prolonged, consensual affair. As I mentioned, under California Law, consent obviates any charge of sexual harassment.

Those familiar with the board’s thinking have told me that board members felt that Mr. Hurd had committed a fundamental breach of trust that could not be repaired. When questioned about his relationship with Ms. Fisher, board members felt Mr. Hurd was not forthcoming. The final straw came when he settled Ms. Fisher’s allegations, acting on his own initiative and paying her just over one million dollars from his pocket, little more than twenty-four hours before H-P lawyers were scheduled to meet with her to review the evidence.

Now that’s what they told me. Shareholders have never been told this. Did any of this warrant Mr. Hurd’s dismissal? H-P’s revenues, profits and share price soared under his leadership and he was widely hailed as one of the country’s most effective corporate Chief Executives.⁴⁸ The fateful step to dismiss him had enormous consequences for H-P shareholders and plunged H-P into a period of protracted management turmoil. It seems to have been calmed only

48. James B. Stewart, *Ouster of Hewlett-Packard C.E.O. Is Expected: Most Voted to Hire Apotheker Without Meeting Him*, N.Y. TIMES, Sept. 22, 2011, at B1, available at <http://www.nytimes.com/2011/09/22/business/voting-to-hire-a-chief-without-meeting-him.html> (“Mr. Hurd pulled off one of the great rescue missions in American corporate history, refocusing the strife-ridden company and leading it to five years of revenue gains and a stock that soared 130 percent.”).

recently by the appointment of Meg Whitman as Chief Executive.⁴⁹ The Delaware Supreme Court didn't seem to make much of Ms. Allred's allegations, characterizing them as "embarrassing" to Mr. Hurd, but agreeing with the trial court that Ms. Allred's letter should be unsealed.⁵⁰ Or was Mr. Hurd's behavior so serious that he should have been fired for "cause," which would have enabled H-P to deny him his \$12.2 million severance package? That's the subject of ongoing litigation, with several pending shareholder suits alleging it was the board's responsibility to do so.⁵¹ These questions are tough to answer without access to information and documents the board considered in making its decision, such as the Covington Report. Curiously, H-P itself initially agreed to file the Allred letter under seal and it has refused to produce the Covington report, invoking the attorney-client privilege. While it's easy to understand why Mr. Hurd would not want this material made public, it's hard to understand why H-P would care, assuming that the documents indeed support the board's decision to terminate him, but not for cause.

If H-P wants to put all this behind it and dispel the perception that it had something to hide, it should waive the attorney-client privilege and make public all the relevant materials, especially since as the Delaware Court suggests, they're likely to become public eventually anyway. As is too often the case in such corporate battles, the biggest losers in all this are the shareholders. They're the plaintiffs in the various shareholder suits and H-P is spending their money to defend its board and ironically Mr. Hurd, since he's indemnified under his former employment agreement. H-P shares, which were trading at \$46.50 on the day of Ms. Allred's letter, were at \$23.46 today.⁵²

If Ms. Fisher's allegations are fundamentally false, Mr. Hurd has been subjected to needless and unfair embarrassment, an unwarranted invasion of privacy, and scurrilous allegations. But his marriage has

49. Mifa Kim, *Whitman's Top Job: Restore HP Credibility, Jumpstart Growth*, INT'L BUS. TIMES (NOV. 23, 2011, 1:35 AM), <http://www.ibtimes.com/whitmans-top-job-restore-hp-credibility-jumpstart-growth-651901>.

50. See *Hurd v. Espinoza*, 34 A.3d 1084, 1086 (Del. 2011).

51. See, e.g., *Zucker v. Andreessen*, C.A. No. 6014-VCP, 2012 WL 2366448 (Del. Ch. June 21, 2012). At the time of this speech, this lawsuit was ongoing; however, in June of this year, the Court ruled in favor of Defendants (including H-P) based on the Plaintiff's failure to plead demand futility.

52. *Historical Quote for HPQ*, MARKET WATCH, <http://www.marketwatch.com/investing/stock/hpq/historical> (last visited Oct. 6, 2012).

survived, he got his severance and he's now president of Oracle, which seems unfazed by whatever happened at H-P.⁵³ And Ms. Fisher, though she claims to have been "emotionally debilitated" and "spiraling downwards" at the time she wrote her letter, walks away with a seven-figure settlement, far more than she could ever have hoped for as an H-P hostess or, for that matter, a "B" movie actress.

In my view the corporate law is woefully inadequate in mandating disclosure of material information to shareholders, whether they involve criminal conduct, embarrassing conduct, or the reason for an executive's termination. They pay constant lip service to the notion of corporate democracy and shareholder rights. But courts have consistently declined to extend the notion of materiality to the actual reasons for executive removal. It's deemed enough for shareholders to know that someone has been ousted and replaced.

Shareholders cannot make meaningful decisions as to who should be elected to their boards of directors without adequate information with which to adequately judge their performance. And in many cases, they are getting misleading—if not outright false—statements. This often happens in the case of "resignations," surely one of the most abused words in the corporate cannon. Tyson may not have overtly lied in announcing Mr. Lee's "retirement," but it certainly omitted material information, that he was being forced to resign as part of a deferred prosecution agreement with the government, something that should have sent him to the exit in disgrace, rather than with the use of the corporate jet. And shareholders shouldn't have had to rely on a reporter to tell them that.

The Hurd case is even more significant because the decision to hire and fire a CEO is surely one of the most important decisions a corporate board makes. Yet, how can shareholders evaluate such actions if they're deprived of the basis for knowing why an action was taken? H-P's sudden ousting of Mark Hurd accompanied by patently insincere, if not outright false explanations caused the stock to plunge, triggered a hasty and ultimately disastrous search for a successor, and it's caused billions

53. Aaron Ricadela, *Oracle Hires Ex-HP CEO Hurd as President as Phillips Departs*, BLOOMBERG.COM (Sept. 7, 2010, 9:45 AM), <http://www.bloomberg.com/news/2010-09-07/mark-hurd-joins-oracle-as-president-after-leaving-hp-as-phillips-resigns.html>.

of dollars in shareholder losses.⁵⁴ It is no wonder there are multiple shareholder lawsuits still working their way through the courts.

What can be done about this state of affairs? At the investigative and prosecutorial level, there must be a high-level recognition that whatever the evolution of the statutory and common law, corporations in fact are not people. Punishing shareholders for corporate wrongdoings does little or nothing to deter future unlawful conduct. Witness the blatant recidivism of Citibank and other major banks recently documented in a front page *New York Times* article that describes scores of repeated sanctions and warnings not to repeat illegal behavior that fell upon deaf ears.⁵⁵

In my view, deferred prosecution agreements are simply a lazy and inexpensive way, eagerly embraced by corporations for obvious reasons, for individuals to evade accountability and to sweep corporate wrongdoing under the rug. They should be curtailed, if not halted altogether. Judges—especially those in Delaware who handle the bulk of corporate cases—also in my view need to take a much broader view, especially about requiring corporations to disclose misconduct by high-level officials when it is potentially criminal or results in an executive's termination. The SEC should simply not allow companies to announce that their executives have "resigned" when these resignations aren't voluntary.

Corporations are undoubtedly one of the most effective and extraordinary creations of modern society. But by insulating individuals from the consequences of their behavior, they pose systemic risk, as we have seen just recently with the financial crisis. Americans are hungry for accountability and thus far, they have seen very little of it. Corporate law could play a major role in restoring public confidence in markets, corporations, and the economy, if it returns to its roots in the public interest and stops doing the bidding of the wealthy and powerful entities it is called upon to regulate.

54. *Hewlett-Packard Shares DROP after CEO's Forced Resignation*, HUFFINGTON POST (Aug. 9, 2010, 6:35 PM), http://www.huffingtonpost.com/2010/08/09/hewlett-packard-shares-dr_n_675576.html.

55. Edward Wyatt, *Promises Made, then Broken, by Firms in S.E.C. Fraud Cases*, N.Y. TIMES, Nov. 8, 2011, at A1, available at <http://www.nytimes.com/2011/11/08/business/in-sec-fraud-cases-banks-make-and-break-promises.html>.