

COMMENTARY TO PROFESSOR MURRAY

*Phil Reed**

In his article, Professor Murray provides an excellent response to the Business Roundtable's (BRT) Statement on the Purpose of a Corporation, and outlines the ways that an interested corporation could implement governance changes to reflect the statement. Reactions to the Business Roundtable's statement, as described by Professor Murray, could be grouped into one of three categories – optimistic praise, supportive pessimism, and blunt opposition. As Professor Murray has done an excellent job of addressing the second category of reactions, supportive pessimism, it falls upon me to address the blunt opposition. I think, however, that there are two modes of opposition to the BRT's statement. The first mode of opposition is that the signatories of the statement are being insincere in endorsing a commitment to stakeholders, rather than shareholders. The second is opposition to stakeholder theory in the first place. In that view, the BRT should not have issued the statement at all.

The sincerity of a signed statement can be readily determined by the behavior of one who signed it. Soon after signing the Business Roundtable's statement, Amazon-owned Whole Foods made the decision to cut health benefits for part-time workers.¹ This move did not do much to inspire confidence in the statement, to put it lightly.² To the extent that

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¹ Bob Bryan, *Amazon-Owned Whole Foods' Decision to Drop Health Benefits for Hundreds of Part-Time Workers Reveals How Promises to Workers Like CEO Jeff Bezos' Recent Pledge are Worthless*, BUS. INSIDER (Sept. 13, 2019, 11:08 AM), <https://www.businessinsider.com/whole-foods-healthcare-amazon-ceo-jeff-bezos-promises-business-roundtable-2019-9> (“the Whole Foods healthcare decision proves that while CEOs love to make extravagant statements about taking care of their workers, there's no guarantee that they'll actually practice what they preach.”).

² See, e.g., Nick Statt, *Amazon-owned Whole Foods is Cutting Medical Benefits for Part-Time Workers*, THE VERGE (Sept. 13, 2019, 2:13 PM), <https://www.theverge.com/2019/9/13/20864636/amazon-whole-foods-medical-benefits-part-time-workers-jeff-bezos> (“The spokesperson made sure to include a reminder that Whole Foods employees can still

the BRT's statement was designed to head off criticism from the political left, it was a demonstrable failure. Senators Bernie Sanders and Elizabeth Warren both took the opportunity to tweet criticisms of CEO Jeff Bezos and emphasize their support for Medicare for All.³ Warren's tweet in particular specifically mentioned Bezos' signing of the Business Roundtable statement weeks prior.⁴ But the BRT's statement emphasizing a commitment to "stakeholders" seems quite similar to Warren's own policy position requiring "very large American corporations to obtain a federal charter as a 'United States corporation,' which obligates company directors to consider the interests of all corporate stakeholders, not just shareholders."⁵ If the purpose of the BRT's statement was to head off more aggressive regulatory schemes such as Warren's Accountable Capitalism Act, this interaction should make clear that it was a failure in that regard.

Business leaders have successfully staved off government action by obviating it with self-regulatory action in the past. Facing a wave of controversy over violent video games such as *Mortal Kombat* in the 1990s, the industry successfully avoided government content regulation by creating the Entertainment Software Ratings Board.⁶ Public pressure against obscene music lyrics led to the creation of the now-familiar "Parental Advisory" warning on CD covers by the Recording Industry Association of America.⁷ These successes by business leaders in heading off regulation show how industry and government can take a collaborative approach to solving problems---real or perceived---but I think, in this case, that it is unrealistic to assume the BRT could somehow sweep the rug out

enjoy a 20 percent discount on groceries, which, it turns out, will not save your life in the event of a medical emergency?").

³ Hayley Peterson, *Alexandria Ocasio-Cortez, Bernie Sanders, and Elizabeth Warren slam Amazon-owned Whole Foods' plan to cut medical benefits for part-time workers*, BUS. INSIDER (Sept. 16, 2019, 11:00 AM), <https://www.businessinsider.com/aoc-bernie-sanders-whole-foods-cuts-to-medical-benefits-2019-9>.

⁴ Elizabeth Warren (@ewarren), TWITTER (Sept. 14, 2019, 7:48 AM), <https://twitter.com/ewarren/status/1172884749737701379>.

⁵ Plan, Elizabeth Warren, *Empowering Workers Through Accountable Capitalism*, WARREN FOR PRESIDENT (Nov. 1, 2019), <https://elizabethwarren.com/plans/accountable-capitalism/>.

⁶ Alan Wilcox, *Regulating Violence in Video Games: Virtually Everything*, 31 J. NAT'L ASS'N L. JUD. 253, 259-60 (2011).

⁷ Shoshana D. Samole, *Rock & Roll Control: Censoring Music Lyrics in the '90s*, 13 U. MIAMI ENT. & SPORTS L. REV. 175, 177 (1995).

from under the American left and make their proposed regulations redundant. There is no action that the 181 signatories of the statement could take that would cause Warren and Sanders to withdraw their proposals. There *certainly* is no statement that the signatories could make that would lead to that result.

Prof. Murray's article does offer some suggestions for those corporate leaders who take the BRT's statement seriously and wish to take concrete steps. Those steps are to: amend the firm's corporate purpose in its governing documents, convert to a benefit corporation, engage in social reporting, support legislation that benefits corporate stakeholders, and give stakeholders corporate governance rights. I think that there is no small amount of irony that suggestions for actually implementing the BRT's statement must come from outside of the BRT itself, and to my knowledge, none of the companies at issue have implemented any of these steps.⁸ So, in keeping with the theme of "blunt opposition," there is some evidence that the BRT did not quite mean what it said.

Of course, this brings us into the second mode of opposition--an opposition to stakeholder theory in the first place. This debate has existed for at least a century, and probably will not be ending at any time soon.⁹ Rather than wading into that debate, I think it is more useful to examine what stakeholders the BRT's statement identified. The specific stakeholders mentioned in the statement were customers, employees, suppliers, shareholders, and "the communities in which we work," which specifically included the environment. The inclusion of community is curious. Every other stakeholder on that list is readily identifiable; every corporation knows who its shareholders and suppliers are. Of course, every corporation knows the community in which it is headquartered, as well. But given that this discussion regards corporate governance rights, it is difficult to imagine how a community could be involved in any practical way. There is no such thing as a tradeable stakeholder certificate, and there is not any comfortable way to identify a representative for "the community." Even assuming a hypothetical world in which a corporation could poll every member of the community as a stakeholder, it is hard to imagine a way in which this could be reviewable. As complex as business litigation can be, the business judgment rule is, at least, deferential and

⁸ With the caveat that "supporting legislation that benefits stakeholders" is, of course, open to considerable interpretation.

⁹ See generally Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L. J. 309 (2011).

identifiable.¹⁰ If the BRT's statement truly reflects a desire to have community involvement in the operations of a corporation, it left a lot of questions unanswered.

The BRT's statement is lofty, but seems as though it was likely a response to political pressure from the American left. If the statement's purpose was to head off regulation or soften the image of large corporations, I doubt much has been accomplished on either front; if its purpose was to describe the stakeholders who should be involved in operating the corporation, it was maddeningly unspecific with respect to the community. The "blunt opposition" described by Professor Murray is well-founded.

¹⁰ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 36 (Del. Ch. 2010).