

A BAYOU PRIVATEER CRITIQUE'S MARCOUX'S FIDUCIARY ARGUMENT AGAINST STAKEHOLDER THEORY

Emir Phillips *

Abstract

This Article critique's Alexei Marcoux's A Fiduciary Argument Against Stakeholder Theory which set the mark for Shareholder Theory. Stakeholder Theorists sense the denouement of Shareholder Theory, but perhaps this in-depth reassessment of Marcoux's Article may have them reconsidering. Recent corporate scandals reveal only the moral paucity of that company's management and are not conclusive evidence of any odious qualities inherent to either shareholders or Shareholder Theory. The theory that can throw out the bathwater and keep the baby will win. This article adheres to a modified Shareholder Theory elucidated therein while admitting that the human, all-too human Shareholder Theory evinces every fiber of our moral being when injustice harms that which we most love. This Article hopefully makes clear that Stakeholder Theory is best attainable within the legal rubric of 3rd party beneficiary analysis, which is a valid extension of Shareholder Theory. One can see the power of this when applied to a 3rd party beneficiary (stakeholder), thereby generally negating any further philosophizing as to a Stakeholder Theory when the legal contract principle of 3rd party beneficiary so readily inculcates it. Thus, Stakeholder Theorists can sleep at night, 3rd party beneficiary Contract Law is operating 24/7. The contracting 1st parties need only address important contingencies likely enough to warrant the transaction costs of express provision, such as the possible subsequent inclusion of 3rd party beneficiaries. For all other contingencies, the fiduciary obligation fills the gap. And so, while presently in an awkward position, Shareholder Theory has the advantage of being right, even if it desperately needed this Article to save itself.**

Key Words: Shareholder Theory, Stakeholder Theory, Shareholder Model, Stakeholder Model. Alexei Marcoux, Fiduciary, Exclusive Benefit Rule, Duty of Loyalty, Duty of Care, Pirate Jean Lafitte, BP, New Orleans

* JD, MBA, MSFS, ChFC, CLU, is a student in the PhD Program in Financial and Retirement Planning at The American College

E-mail: emirphil@yahoo.com

** The author, wishes to acknowledge the financial support from New York Life Insurance Company, its beneficent Shareholders, and its Chairman, President and CEO Theodore A. Mathas, without whose exceedingly generous and continuing support of the American College and its PhD Program would not have made this Article possible. The author would also like to thank the President of the American College, Dr. Laurence Barton, PhD and Dr. Julie Ragatz, PhD (Assistant Professor of Ethics and Director of the Cary M. Maguire Center for Ethics in Financial Services at the American College) for their insights and guidance both academically and personally. More specifically, this Article was written after perhaps becoming possessed by Marie Laveau, Professor Ragatz in her Philosophy of Business Ethics course resurrected the Great Philosophers, put them in a business context and let them speak from themselves, thereby setting this Author flambeau and ensconced by the pirate Jean Lafitte, who then thereby traveled passé-partout and weaved this cutlass.

I. Non-Fiduciary Stakeholder Theory

In I. Non-Fiduciary Stakeholder Theory, Marcoux delineates the two citadels of normative theories for corporate social responsibility, that of shareholder³ and stakeholder which have been determining what a corporation's role ought to be. Ethically speaking, corporate executives and managers should make

decisions according to the correct theory. Unfortunately, the two management theories are at loggerheads as to which is "right." This is no small matter since this combination of shareholder/management interests' bellies nearly every economy around the world and this analytical framework founds domestic and global institutions struggling to pull mankind out of the Hobbesian Reality that is.

³ Sometimes called "stockholder" theory, "shareholder" is used for consistency.

For Marcoux shareholder theory holds that managers are fiduciaries for and ought to manage firms in the interests of shareholders. The why of it is that shareholders advance capital to their managers, who then spend corporate funds in pursuit of...short-term⁴...long-term profit?...maximum value?...maximum dividend (infinite?) stream? The Father of this position is the almighty Milton Friedman who spoke, "There is one and only one social responsibility of business... to use its resources and engage in activities designed to increase its profits so long as it engages in open and free competition, without deception, *arriere-pensee* or fraud."⁵ Subsequently, Milton Friedman pronounced to management that their fundamental obligation is render to shareholders their just due: profits. It would be unethical to invest corporate funds in endeavors management found socially beneficial but that reduced shareholders' returns.⁶ Frankly, with these profits, shareholders themselves can give whatever amount to whatever charity they desire. The varietal skill of management is not needed, or sought after, to give the gift of money away.

According to Marcoux, stakeholder theory holds that management⁷ must orchestrate the equally valued interests of various stakeholders: usually shareholders, employees, customers, suppliers, and the community-at-large.⁸ Stakeholder theory⁹ justifies itself since managers have a (Kantian) duty to both the corporation's shareholders and "individuals and constituencies that augment a company's wealth-creating capacity and activities, and who are therefore its potential beneficiaries and/or risk bearers."¹⁰ The

most relevant distinction is stakeholder theory's demand that all stakeholders be duly considered even if it reduces company profitability.¹¹ The ultimate danger for Marcoux in implementing stakeholder theory is its insidious, inevitable and inherent terminus: that of eliminating management's fiduciary duty to their shareholders in exchange for an impossibly complicated weighing and balancing of stakeholder interests, each vying for the supremacy of being the "equal" interest acted upon by management. Thus, an inevitable immoral danger awaits each and every stakeholder theorists by, sooner or later, terminating the fiduciary status of the very group most deserving of said status: the impoverished shareholders. For Marcoux then, at minimum stakeholder theorists are inevitably dangerous to all, and at worse, straight up: tenured ne'er-do-wells.

For Marcoux, non-shareholders can legitimately be viewed as (exclusive) "means" to the "ends" of profitability; whereas, under the (Kantian) stakeholder theory, the vital interests of multiple non-shareholders are also perceived as "ends."¹² Marcoux holds that, it seems, under no circumstance, can stakeholders have or acquire fiduciary duties. Any form of self-dealing or engaging in decision-making to further stakeholder interests is a clear breach of duty of undivided loyalty¹³, which is foundational to fiduciary duty. Any form of self-dealing or engaging in decision-making to further stakeholder interests is a clear breach of duty of undivided loyalty, which along with the duty of care is en toto the fiduciary duty and is wholly derived from Trust Law which is itself founded from private trust situation wherein the settlor's welfare is maximized if the beneficiaries captured all the benefits flowing from the trust. That is why the duty of loyalty required the trustee (herein corporate management) to act in the exclusive interest of the beneficiaries (shareholders). The exclusive benefit rule truncates any transaction or managerial

4 Mitchell, L. E. (2008). *The speculation economy: How finance triumphed over industry*. Berrett-Koehler Publishers.

5 Friedman, M. (1973). The social responsibility of business is to increase its profits. *New York*.

6 Ibid.

7 Throughout, the terms directors, executives and managers are generally used interchangeably. Strictly speaking, directors are members of the corporation's board and can be either executives or non-executives directors depending on whether they are responsible for day-to-day operations; whereas, managers run the business, but not necessarily as members of the board. This separation of management from ownership is achieved by this creation of the board of directors who manage the capital of the corporation subject to limitations on its activities set out in its charter or memorandum of association. Shareholders have only very limited rights over the capital in the corporation, in particular over its withdrawal from the corporation, usually in the form of dividends.

8 Marcoux, A. M. (2003). A fiduciary argument against stakeholder theory. *Business Ethics Quarterly*, 1-24. This 'pluralist' approach views the firm as a bundle of human assets and relationships of which corporate officials are agents of all stakeholders, *i.e.* shareholders, creditors, employees, customers, consumers etc... Penrose, E. T. (1995). The theory of the growth of the firm, 1959. *Cambridge, MA*. Hill, C. W., & Jones, T. M. (1992). Stakeholder-agency theory. *Journal of management studies*, 29(2), 131-154.

9 Only the normative version of the theory is being considered: how managers ought to behave. Certain versions of the stakeholder theory describe management's actual behavior; whereas, instrumental versions predict outcomes if management acts a certain way. Jones, T. M., & Wicks, A. C. (1999). Convergent stakeholder theory. *Academy of management review*, 24(2), 206-221.

10 Post, J. E., Preston, L. E., & Sachs, S. (2002). Managing the extended enterprise: The new stakeholder view. *California management review*, 45(1).

11 Stakeholder theorists have provided algorithms to mediate stakeholders' interests. Ellsworth, R. R. (2002). *Leading with purpose: The new corporate realities*. Stanford University Press. But in agreement with Marcoux, this Author does not see algorithmic formulae being utilized by management any time soon, if ever. So the point remains.

12 Hasnas views the "social contract" theory as providing a third normative paradigm equivalent to both shareholder and stakeholder theories. Hasnas, J. (1998). The normative theories of business ethics: a guide for the perplexed. *Business Ethics Quarterly*, 19-42. However, Donaldson, T., & Dunfee, T. W. (1999). *Ties that bind: A social contracts approach to business ethics*. Harvard Business Press. Chapter 9) seems to view the "social contracts" perspective as a meta-theory to help sort through the stakeholder obligations.

13 Essentially, Stakeholder Theory would require directors to be granted greater independence than they have at present wherein their sole legal duty is to the Shareholders, but this linchpin of Stakeholder Theory raises massive agency concerns about self-interested directors pursuing personal gain at the expense of the corporation. This Article would rather amend Shareholder Theory to inculcate into the corporate body more committed Shareholders (Owners) with less control put in the hands of Piratical Day-Traders only out for immediate Stock Price Treasure, these short-term shareholders and their kind must be endured but only as disempowering shareholders with little to no effect via the vote on management. So there are good privateering pirates, and not-so-good treasure-only Pirates.

mode of conduct that might also benefit management or one stakeholder (customer vs. employees) over another. It is specifically this adamant position by Marcoux that offends so many; and perhaps, rightfully so. But beware, Marcoux is duly enshrouded by Trust Law which he ironically (hypocritically?) uses to gut Stakeholder Theory and bolster the Contractarian viewpoint that is Shareholder Theory. Simply put folks, it's Trust Law vs. Contract Law.

B. Fiduciary Relations

Marcoux delineates the essential nature of a fiduciary relation by citing "Fiduciary," in *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West, 1979), 563, which ventures back to Roman times to derive the original meaning of fiduciary's as a Trustee full of scrupulous good faith and candor. However, unfortunately for Marcoux, while the essence of fiduciary remained relatively static until the Industrial Revolution, since then and particularly in a corporate environment, Courts have viewed fiduciary as having more and more a contractual basis as opposed to Trust basis. This is somewhat farcical given that Marcoux wants us to end up with a Contractual viewpoint of shareholder/management relations.

Predictably, Marcoux then focuses on the 1st component of fiduciary: the Duty of Loyalty, rather than the Duty of Care. But like Janus, Fiduciary is bi-facial, one mien the duty of loyalty, the other duty: to really care, which conveniently enough, Marcoux fails to mention. To make matters worse, Marcoux's examples of fiduciary (doctor, attorney, and guardian) all involve non-C-corporate environments and are therefore by definition, non-shareholder examples, making their applicability to shareholder theory arduous at best. At worse, wholly irrelevant.

Fact is, the law tends to impose a fiduciary obligation whenever there exists an agency problem. Agency problems arise whenever one person, the principal, engages another person, the agent, to act in the best interests of the principal rather than his own.¹⁴ The gnawing fear is that when the agent's interests diverge from those of the principal, guess who loses (money). Agency problems are ubiquitous since who has the time, energy and skills necessary to do everything for themselves. The law steps in to fix this dilemma by imposing a fiduciary duty. In a corporate environment this is what transpires. Shareholders trust management and agree (contract) with management to act on their behalf in exchange for various forms of compensation. This duty of loyalty means corporate management should act appropriately when conflicts of interest exist.¹⁵

Under the exclusive benefit rule, this means 100% of management's efforts must work towards only shareholder interests. For Marcoux and Trust Law, to do otherwise is to violate one's fiduciary duty, which both involves legally culpable as well as unethical managerial behavior. Thus, stakeholder theorists presently advocate an impractical, unethical and illegal theory, making all proselytes to their cause nefarious accomplices. Why these public miscreants have been allowed to run amuck through business ethical journals is a query of queries.

Sadly, Marcoux makes this Section of his Article largely or wholly inapplicable by using inapplicable analogies, that of the professional class (doctor and attorney) as well as fiduciary duty based on status (Legal Guardian), neither of which readily applies to that of public (or closely held) corporate governance.

C. Stakeholder Theory and Fiduciary Relations

Multi-fiduciary stakeholder theory insists managers are fiduciaries for all the firm's stakeholders. But Marcoux notes that managers cannot simultaneously be fiduciaries for all of these groups since it is conceptually impossible to justly effectuate balance between the various and equal interests of the multiple stakeholders. Too many Chefs in the kitchen, firm failure is nigh guaranteed. Kant notwithstanding, no human or god can implement the interests of each of these groups simultaneously. Someone is going to get less than. The only question is who not if, particularly when each interest has an equal Kantian-nominal-Platonic weight at all times.

With the grist of multi-fiduciary theory apparently emanating from Immanuel Kant, it would follow that all stakeholder interests carry the transcendental weight of a Categorical Imperative and so the multitudinous process to fairly determine which interest should guide management decisions would be akin to driving a caravan of camels through the eye of a needle. Marcoux concurs with Hasnas who notes, it is unethical to take on fiduciary obligations to parties with conflicting interests in the same asset or project because there will come a time when it will be impossible to act as a fiduciary for all of them. In addition, according to Marcoux, on this point most stakeholder theorists and specifically authors Evan and Freeman would also concur. Little did these three souls realize this hyper-critical admission would cast their Beloved Stakeholder Model into the Inferno? But can they *cherchez la femme* Beatrice di Folco Portinari. As yet, Stakeholder Theorists have not articulated a viable methodology to resolve this inveterate thorn in the flesh. And until such time, 'tis no thorn, but rather, a driven stake betwixt the heart. Businesses must move

14 Jensen, M. C., & Meckling, W. H. (1976). Theory of the firm: Managerial behavior, agency costs and ownership structure. *Journal of financial economics*, 3(4), 305-360.

15 Lorsch, J., & Young, J. (1990). Pawns or potentates: The reality of America's corporate boards. *The Executive*, 4(4), 85-87.

well in a tumultuous environment. A good ship has a Capitaine, not a concerned committee.¹⁶

II Morally Substantial Fiduciary Relations

Marcoux admits that for certain relationships (doctor-patient, attorney-client, guardian-ward) it would be morally wrong for these specific relations not to be fiduciary in character. But Marcoux misses the point entirely. These non-shareholder relationships never ever enter the realm of corporate governance. They simply do not apply and are entirely irrelevant since they involved non-shareholder, non-C-corporate realities and their fiduciary duty is primarily derived from Trust Law and not Contract Law from which corporate governance is headed towards more and more.

Stakeholders never seem to fully and truly acknowledge that the corporate fiduciary schemata bring to business not just skills *creme de la creme* but also deep pockets. Originally, trust law did not allow compensating trustees since any gentleman serving as a family stakeholder required no pay. This reality is long gone. Soon enough, legislation overcame the presumption against trustee compensation.¹⁷ Particularly within the realm of corporate governance, a contractarian view of fiduciary duty has become the dominant doctrinal current in modern American law. From corporations¹⁸ and partnership,¹⁹ to the law of marriage²⁰ to landlord and tenant,²¹ scholars increasingly perceive imputed bargains if they can be readily modified by actual bargains. Today, statutes empower trustees (management) to conduct every conceivable transaction to enhance the value of trust (shareholder) assets or wrest market advantage.

Fiduciary duties and remedies emerge from a single solitary common source: equity. This is why fiduciaries must account for ill-gotten profits even if their shareholders suffered no injury, which is a remedy in equity. Marcoux should not have muddied his position by conceding there are times when certain fiduciary relationships or duties apply, not to mention his analogies were all non-corporate and off

point given the ever-increasing contractarian basis for fiduciary relationships, particularly in the shareholder realm of C-corporate governance where the paradigm is *nigh Lord and King*.

Quite apropos is Roscoe Pound's *bon mot*: "Wealth, in a commercial age, is made up largely of promises." Modern wealth takes the form of financial assets. For example, insurance and annuity contracts, stocks, bonds, mutual fund shares, pension plans, and capital. The modern trust normally contains a portfolio of these complex financial assets, which are nothing but contract rights against the issuers. By comparison with a trust involving ancestral land, the modern trust fund affords greater resilience to accumulate, issue, or consume trust funds on behalf of 1st Party (Shareholder) and 3rd Party (Stakeholder) beneficiaries. Stakeholder theory too often crimps this wealth creating process.

The change of realty trust assets to that of financial assets, also transformed the identity of trusteeship from stakeholder (Trust Law) to management (Contract Law). Private trustees are still prevalent, but the quintessential modern trustee is corporate management, whose business is to enter into and carry out shareholder agreements. Marcoux fails to note that in the eyes of the law, C-corporations, as opposed to pass-thru entities such as an S-Corp. or LLC (not to mention Sole Proprietor) are for all intents and purposes: legal persons entitled to Due Process and at times, a fiduciary duty. After all, it was during Reconstruction, in the consolidation of Capitalism (via the Railroad) following the Yankee victory in the War of Northern Aggression, that Corporations were granted personhood. Anyone having a serious problem with this should have joined the Army of Northern Virginia. This, Marcoux seems wholly unaware of.²²

Simply put, shareholders in the aggregate make up a legal person (the corporation)²³, who enters into

16 The notable John Hasnas would agree with Marcoux on this point. Hasnas, John. (1998). The normative theories of business ethics: a guide for the perplexed. *Business Ethics Quarterly*, 19-42.

17 Langbein, J. H. (1995). Contractarian Basis of the Law of Trusts, *The. Yale Lj*, 105, 625.

18 Easterbrook, F. H., & Fischel, D. R. (1993). Contract and fiduciary duty. *JL & Econ.*, 36, 425; Butler, H. N., & Ribstein, L. E. (1990). Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians. *Wash. L. Rev.*, 65, 1.

19 Recent revisions to the Uniform Partnership Act substantially augment the sphere for contract to defeat the default regime. Revised Uniform Partnership Act §§ 103, 404, 6 U.L.A. 288, 313 (1994).

20 The Uniform Marriage and Divorce Act encapsulate the modern position. Section 201 defines marriage as "a personal relationship... arising out of a civil contract." Uniform Marriage & Divorce Act § 201, 9A U.L.A. 160 (1973).

21 Glendon, M. A. (1981). Transformation of American Landlord-Tenant Law, *The BCL Rev.*, 23, 503; Chase, E. (1981). Property-Contract Theme in Landlord and Tenant Law: A Critical Commentary on Schoshinski's American Law of Landlord and Tenant, *The. Rutgers Lj*, 13, 189.

22 In *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886), Chief Justice began oral argument by stating, "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." 118 U.S. 394 (1886) Two years later, in *Pembina Consolidated Silver Mining Co. v. Pennsylvania*- 125 U.S. 181 (1888), the Court clearly affirmed the doctrine, holding, "Under the designation of 'person' there is no doubt that a private corporation is included [in the Fourteenth Amendment]." The Court has since then reaffirmed this doctrine many times, even recently in *Citizens United v. Federal Election Commission*, No. 08-205 (1/21/10): corporations have the same political speech rights as individuals under the 1st Amendment. And even the Brits are in on it, *Jameel and Others (Respondents) v. Wall Street Journal Europe Sprl (Appellants)*, UKHL, 44 wherein the House of Lords upheld the corporate right to sue in defamation for reputational damage despite any specific evidence of pecuniary loss.

23 From this Promethean adventure, we have conjured up something that is both of ourselves and distinct from us. This something has morphed into a creature with characteristics not part of its creator's design. A faithful servant no more, our son, Frankenstein, must be captured and re-electrified to better suit the world he was created to tend. As an aside, all monsters are not in ratio, unlike Aphrodite. This entire macabre is the proper structural alignment, and not negation, of valid interests, the result

binding shareholder agreements with management. Yet how can we blame Marcoux for missing the historical linchpin to the contractarian basis of Shareholder Theory when a scholar of the common law, Austin W. Scott, got it totally wrong, but had the fortitude to write his contagious gaffe into the *Restatement of Trusts*: "Trust creation is perceived as a beneficent transfer of the trust property rather than as a contract."²⁴ Typhoid Mary did less damage.

From this infectious error, one can plainly see that Stakeholder theorists are essentially, unwittingly or not, advocates of Trust Law and so see no need why a contractual agreement between shareholders and stakeholders should stand in the way of Justice when certain conditions apply. Both theories presently stand at the Crossroads in Mississippi. Lucky for them there is a functional equivalency of trusts under contract law which involves 3rd party-beneficiary contracts, thereby offering stakeholder legitimacy under the Shareholder Theory, if and only if they are in fact intended 3rd party beneficiaries.

This contractarian account arises from two fundamental attributes of Trust Law. First, the deal, the shareholder agreement or trust are all volitional. No one can be coerced to accept any legal deal or valid trusteeship. Management makes that key choice to bind themselves to the shareholder agreement. As with any contract, the trust is wholly consensual. The other contractarian feature is that the parties can reject nearly all of trust law. The rules of trust law are applicable only when the trust does not contain terms *au contraire*.²⁵ One chooses trust law by deciding not to oust it. One can agree to almost anything in a Trust. If not, default rules apply. This is the Miltonian freedom, shareholders love, the art and chain of the deal.

All hail the sanctity of choice. "[Property is merely the conventional label for that bundle of economic interests which society deems worthy of protection by law,"²⁶ accordingly, "labeling something property is a conclusion and not a reason. The hard part is not to supply a label but to truly spot the protected interest."²⁷ The combination of consensual formation and party autonomy over the contract terms is essentially the law of contract, and from whence Shareholder Theory is sinewed.

Not so the Stakeholder. Since the stakeholder is not a chosen party to the shareholder agreement and had no autonomous control whatsoever over the shareholder agreement terms, how can they be legally and ethically grafted into the shareholder agreement? The beneficent answer, *viola!*---3rd party beneficiary contract doctrine (Please genuflect). 3rd party-

beneficiary contracts are bedrock to contract law, and for good reason.

One common example of 3rd party contracts involves insurance policies wherein a contract is formed between the purchasing individual and the insurance company, but a 3rd party will receive the insurance payments. When the purchaser of the policy dies, the 3rd party beneficiary legally receives the tax-free insurance benefits and can sue either party (the estate of the deceased and/or the insurance company) if the insurance contract is not upheld. Yet another common example involves the Joint Life with Last Survivor Annuity which when annuitized pays the annuitant, the annuitant and the spouse, or the annuitant and another 3rd party beneficiary until both the annuitant and the spouse have died. These annuities are not term certain, and continue paying out to the annuitant and whoever is designated to receive payments, until both the death of the annuitant and the designated 3rd party. To analogize, the 3rd party beneficiary in both salient cases would be a valid stakeholder under present shareholder theories via the 3rd Party Doctrine within Contract Law.

Of note, there is also a legal distinction between a donee and a creditor as to 3rd party beneficiaries. If a 3rd party beneficiary is a creditor, the contract was entered to discharge some form of debt. Contrasted, donees are given a gift or award under the contract. With life insurance, the policy beneficiary is a donee beneficiary. Stakeholders being grafted into the Shareholder 3rd party beneficiary rubric would have to be donee beneficiaries. This niche within the Shareholder paradigm is more commodious than first imagined, as we shall later see.

The potential legal remedy for a 3rd party beneficiary can vary, depending on the contract and circumstances. Most contracts that involve 3rd party beneficiaries are carefully constructed to protect both parties. At times, a 3rd party beneficiary may have to sue for the contractual benefits. For example, a car passenger in an auto wreck, will oftentimes not get any compensation for pain and suffering unless suit is filed even though legally considered a 3rd party beneficiary of the auto insurance policy.

Third party beneficiaries must be an intended beneficiary. Incidental beneficiaries are excluded from ever attaining status as stakeholders since they are persons who happen to benefit indirectly from a contract and were never intended at contract inception. Law has evolved to more readily perceive customers and employees²⁸ as intended 3rd party beneficiaries than your average Stakeholder Theorists would admit. Sadly, this is more mucky with environmental issues, as we shall see.

being a more credible, more trusted, transparent, inclusive corporate body.

²⁴ Restatement (Second) Of Trusts§ 197 cmt. b (1959).

²⁵ Restatement (Second) Of Trusts§ 164(a) (1959).

²⁶ Weinrib, E. J. (1975). The fiduciary obligation. *University of Toronto Law Journal*, 1-22; Grey, T. C. (1980). The disintegration of property. *Nomos XXII: Property*, 69.

²⁷ Weinrib, at 11.

²⁸ Providing employees with standing to sue the directors is a core normative aspect of the stakeholder value approach. O'Connor, M. A. (1992). Human Capital ERA: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation. *Cornell L. Rev.*, 78, 899.

Even so, it should be quite clear by now that a usable fiduciary duty can easily emanate from a contractual relationships, especially one involving long duration and multistage complexity which makes contracting with precision difficult. Despite the intended end-result being an ironclad contract, a contract remains forever relational whenever parties cannot reduce key terms into well-defined obligations.²⁹ Since asset management necessarily involves uncertainty, the decision-making and actions of the fiduciary cannot be determined in advance?³⁰

When a dispute arises, the court must then engage in grafting, in relational interpretation.³¹ This is when good faith and fiduciary is imputed into a contract, even unto 3rd party beneficiaries (stakeholders) who are by law subsequently "wedded" into the contract.

"The commodious heart of fiduciary administration is to induce the fiduciary to exercise his latitude beneficently."³² The fiduciary's obligations are open-ended and involve: trust, good faith, fair dealing and active concern. This is the light to which all Stakeholder Theorists venture.

And the administration of this living, breathing, relationship is the very core of modern law of trusts, and wholly derived from the duties of loyalty and prudence (also called the duty of care). The duty of loyalty demands the trustee "administer the trust solely in the beneficiaries' interest."³³ The loyalty norm forbids the trustee (management) from self-dealing with trust assets (shareholder's invested capital) and from engaging in conflict-of interest transactions adverse to the trust (corporation).³⁴ There is no tolerance for self-dealing, and when done, the trustee must disgorge the profits to the trust even if the trustee paid market value for the property?³⁵

Most significantly, the duty of loyalty forbids misappropriation and manages conflicts of interest by mandating the fiduciary to behave in the "sole" interests of the principal, which in this case can only be the corporate shareholders. This is exactly why Marcoux conclusively wins his confrontation with Stakeholder Theorists since by law there is no compromise or weighing when it comes to conflicts of interests as far as the duty of loyalty is concerned. It would intestinally gully Marcoux's argument if corporate shareholders and management could

contractually negotiate away the exclusive benefit rule and thereby allow management to consider other interests, such as stakeholder interests, in their corporate decision-making. Marcoux must forever remain unwilling to concede that even the fiduciary duty of loyalty is subject to modification by agreement of the parties.³⁶ If the principal-shareholder gives informed consent to certain self-dealing by the fiduciary-management, the basis for the duty of loyalty's prophylactic rule against self-dealing becomes porous and superfluous.

In this case, management may engage in the specified self-dealing, provided that the transaction is not against the best interests of the shareholder. Yet, both morality and law are quite firm in that there is a mandatory core of management obligation that cannot be overridden by agreement. For example, the shareholder cannot authorize management to act in bad faith.³⁷

Even if the shareholder authorizes self-dealing, fiduciary law provides substantive safeguards, requiring management to comport itself in good faith and deal fairly with and for the shareholder; as well as procedural safeguards, requiring management to apprise the shareholder of the material facts, which means the facts that would reasonably affect the shareholder's judgment, in securing the shareholder's informed consent.³⁸

The existence of such mandatory (non-contractual) rules sorely vexes purist Shareholder Theorists, particularly those who so wrongfully perceive their Theory as that of maximization of profits and subsequently shareholder's stock prices as opposed to the true, correct and proper Miltonian view of increasing long-held dividends³⁹ through long-term profitability. Committed Shareholder Theorists would fume that sophisticated parties do not have complete "Miltonian" freedom of contract to alter the terms of that relationship, despite the fact the

²⁹ Goetz, C. J., & Scott, R. E. (1981). Principles of relational contracts. *Virginia Law Review*, 1089-1150.

³⁰ Cooter, R. D., & Freedman, B. J. (1991). The fiduciary relationship: its economic character and legal consequences. *New York University Law Review*, 66(4), 1045-1075.

³¹ Hadfield, G. K. (1990). Problematic relations: franchising and the law of incomplete contracts. *Stanford Law Review*, 42, 927-992.

³² Weinrib, note 120, at 4.

³³ Restatement (Second) Of Trusts § 170(1) (1959), continued in Restatement (Third) Of Trusts: Prudent Investor Rule § 170(1) (1992). The 1992 volume does not republish the official comments, which remain in force in the 1959 edition.

³⁴ I Austin W. Scott & William F. Fratcher, *The Law Of Trusts*, §§ 170-170.25, at 311-437. (4th ed. 1987-89). The parentheses and its contents are from the Author and not in the original quote.

³⁵ Hartman v. Hartle, 122 A. 615 (N.J. Ch. 1923).

³⁶ Uniform Power Of Attorney Act § 114(b) (2006); Restatement (Third) Of Trusts § 78, cmt. c(2) (2007); Restatement (Third) Of Agency § 8.06 (2006).

³⁷ Uniform Power Of Attorney Act § 114(a) (2006); Uniform Trust Code § 105(B)(2) (2000); Restatement (Third) Of Trusts § 78, cmt. c(2) (2007); Restatement (Third) Of Agency §§ 8.06(1)(a), (2)(a) (2006).

³⁸ Restatement (Third) Of Agency.

³⁹ Every corporation has the inalienable right to define the scope of shareholder influence by excluding from those with short-term investment horizons (day traders, stock-price strikers and the like) from voting and thereby unduly influencing management's decision-making. In this regard, the Leviathan State can at last lend a calloused hand by legally precluding any voting rights from shareholders who hold corporate stock for less than one year and further instituting a capital gains rate for dividends that diminishes each year until it doesn't. Not surprisingly, this needed corporate law would be in line with droit des sociétés français. One long-term share should equal one vote. Strine Jr, L. E. (2010). One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?. *Business Lawyer*, 66(1). Stiglitz, J. E. (1989). Using tax policy to curb speculative short-term trading. In *Regulatory Reform of Stock and Futures Markets* (pp. 3-17). Springer Netherlands. Summers, L. H., & Summers, V. P. (1989). When financial markets work too well: a cautious case for a securities transactions tax. *Journal of financial services research*, 3(2-3), 261-286.

Milton Friedman curbed such freedom at the point of coercion, deception and illegality. Even Marcoux's usually reliable allies, Easterbrook and Fischel, erroneously asserted that in trust law "[a]ll rules are freely variable by contract in advance."⁴⁰ This poignant assertion is not only faux, but volatile and nuclear. It's the Skull and Bones, redcoat red, blinking-hazardous and pollutive.

Thus, in some critically key aspects Shareholder Theorists have misunderstood their own position. Indispensable fiduciary rules protect the principal and also 3rd party beneficiaries, like customers, who deal with management. And it is these rules de rigueur that adjudicate all applicable interests, shareholder and/or stakeholder, to the point of applicability.

These rules de rigueur are justified since the law assumes a fully informed, sophisticated principal would never bargain them away. For example, Louisiana never agreed to her white-sanded Gulf, her uterine wetlands, or her Catholic Cajun sentiments be swamped in a deluge of British black gold. No more than Louisiana agreed to have invited Katrina or the Brits in their 1st invasion (War of 1812).⁴¹ A particular principal might be fully informed and still want to bargain away something from the mandatory core. But this occurrence would so rare that a prophylactic (if paternalistic) mandatory rule is warranted, particularly when the principal is not sophisticated and fully informed.⁴² By God, pearled oysters, albino alligators, and the glory of aviation: The Pelican: warrant such protection by Louisiana against all who commit lese majeste.

This is why Marcoux brings up the ironclad (paternalistic?) duty of loyalty, and not the duty of care, which is more contextual and less determinative. The duty of care is comparable to the reasonable person rule of tort and on behalf of the beneficiary imposes upon the trustee a duty to act with such care and skill as a man of ordinary care would if dealing with his own property.⁴³ Under the hegemony of these two duties, which comprise fiduciary duty, are many sub-rules of fiduciary administration, such as the duties to furnish information, to keep and render accounts, to minimize costs, to diversify investments,

to enforce and defend claims, and to invest or preserve trust assets and make them productive.⁴⁴ All these sub-rules are subsumed under the duties of loyalty and prudence by which the beneficial interest is vindicated.⁴⁵

Simply put, if the duty of loyalty is part of the mandatory core, (ironically from Trust Law and hereby used by Marcoux to advocate Contract Law), Marcoux by both Trust Law and Contract Law accomplishes his sought after coup d'etat against hegemonic Stakeholder Theory. But if this core can be modified/tweaked from "sole" interest to "best" interest of shareholders, then Marcoux is no longer invincible, no more. a god. His hair is cut and he is cast down. Marcoux knows this, which is why he clings to the duty of loyalty (one of the two components of fiduciary duty) that by law must be in the sole and exclusive interests of the shareholders. A best interest rule is the sharp Damoclean sword hanging by a horse hair above Marcoux's revolutionary head.

A Fiduciary Breach Resulting In A Serious Harm Emblazons The Morality Paradigm: Stakeholder Theory.

Who can deny that a serious breach of fiduciary duty can be a gruesome sight, and stakeholder literature abounds with nigh-infinite examples (Enron, Maddoff, and so on). Not surprisingly, Courts naturally use moralistic language to describe such behavior. Even Marcoux gives in to this unnecessary moralizing (as does this hypocritical Author throughout the endnotes. It's hard to refrain when you really care. God forbid, love.) Even though fiduciary duties are and should be contractually assumed since they codify the appropriate behavior for a corporate shareholders and management. But Courts, stakeholder theorists and at times Marcoux's sermonizing about fiduciary duties can distract them from paying sufficient attention as to whether and why someone is actually a fiduciary and what fiduciary standards applies under the circumstances.

Stripped of legalistic formalisms and moralizing rhetoric, the *raison d'etre* of the fiduciary obligation is deterrence.⁴⁶ The agent (corporate management in this case) agrees to act in the principal's best interests by the threat of suit if failing to do so. The agent is given expansive powers, but must exercise that discretion in the principal's best interests on pain of suit and disgorgement remedies. Viewed in this manner, the operation of the fiduciary obligation becomes intuitive.

Marcoux's two most stalwart allies, Easterbrook and Fischel, emphasizing corporate law,

⁴⁰ Easterbrook, F. H., & Fischel, D. R. (1993). Contract and fiduciary duty. *JL & Econ.*, 36, 425, 432. Prevailing trust law is to the contrary. Restatement (Third) Of Trusts § 78, cmt. c(2) (2007) ("[N]o matter how broad the provisions of a trust may be in conferring power to engage in self-dealing or other transactions involving a conflict of fiduciary and personal interests, a trustee violates the duty of loyalty to the beneficiaries by acting in bad faith or unfairly."); Langbein, J. H. (2003). Mandatory Rules in the Law of Trusts. *Nw. UL Rev.*, 98, 1105.

⁴¹ The preservation of Her wetlands reign supreme since, as most ornithologists are fully aware, the wings of Noah's dove were Pelicanic.

⁴² The exclusive benefit rule emanates from Trust Law, and yet Marcoux and this Author advocate for a contractual (Shareholder) view. Marcoux and this Author are using a bedrock of Trust Law (stakeholder) to put stakeholder theory, as presently explicated, to perpetual rest. Oh well.

⁴³ The applicability of which to investing and managing the trust assets appears in Restatement (3rd) of Trusts: Prudent Investor Rule §227 (1992).

⁴⁴ Restatement (Second) Of Trusts §§172-78, 188 (1959); Restatement (Third) Of Trusts: Prudent Investor Rule §227(b) (1992).

⁴⁵ The duty of impartiality, which is merely an application of the duty of loyalty, requires the trustee give due regard to the interests of all beneficiaries with no preference to one over any other. Restatement (Second) Of Trusts §§183, 232 (1959).

⁴⁶ Easterbrook, F. H., & Fischel, D. R. (1981). Corporate control transactions. *Yale Lj*, 91, 698.

ably explain why fiduciary law is not morality based, not Trust Law based, but rather, agreed-upon, contractarian: When the task is complex, and contractual efforts will span a substantial time, a detailed contract would be ludicrous. When one party hires another's money-making skill set, there is not much they can write down given the future's refusal to be predictable. Thus, in lieu of specified clauses, the management of corporations or the trustee of a trust takes on a duty of loyalty and a duty of care (prudence in Trust Law). The process is contractual since both principal and agent enter the agreement for profit.⁴⁷ At the end of the day, properly defined a fiduciary relation is a contract characterized by an inability both to specify exactly, future behavior and to effectively monitor, that profit-making behavior.⁴⁸

As Marcoux is so subliminally aware, the duty of loyalty supersedes trumps and outright replaces detailed contractual terms. To great effect, Marcoux makes this exact same point by properly citing Easterbrook on page 13.

And now we must journey to where true and appropriate stakeholders can safely reside within the Shareholder rubrics: contract law's 3rd party beneficiaries. Nearly all Marcoux's, Stakeholders', and this Author's moralizing can all be rightly subsumed within the contract doctrine of a 3rd party beneficiary: a person can acquire the right to sue, despite not having been an original or active party to the contract. This is where Stakeholders must plant their flag, and no Shareholder can take that fort if and when the doctrine applies.

This right vests when the 3rd party assents to the relationship. The 3rd party then either sue the contract's promisor (*promittens*, or the performing party, management) or the promisee (*stipulans*, or anchor party, corporation), depending on how and why the original contract relationship was created. In conformity with Marcoux's Roman Basis of fiduciary duty, this principle too is so grounded and is known as *ius quaesitum tertia*. Any agreement, accord, or contract made in favor of a 3rd party is known as a 3rd party beneficiary contract (*stipulatio alteri* or *pactum in favorem tertii*). Any subsequent action to enforce a *ius quaesitum tertio* is a 3rd party action. From this base, we can now explore the stakeholder's most profound example of an injustice needing corporate governance redress, and see said grave injustice fits reasonably snug within the realm of 3rd party beneficiary.

Pristine Example of an intended 3rd Party Beneficiary Stakeholder Lawsuit Involving Fiduciary Duties that Stomp, Throttle and Drown Shareholder Interests

In this Ideal Example (Plato), BP leased from Transocean the *Deepwater Horizon* drilling platform

with which to drill off the Louisiana coast. On April 20, 2010, some 40 miles off the Louisiana coast the exploratory well blew out, creating the greatest oil spill in human history. Oil spewed from the seabed 5,000 ft. below at roughly 25,000-30,000 barrels per day.⁴⁹ In this wake of sludge, 11 homo sapiens were dead, 17 injured. The cortege of which is ongoing.

Various attempts to stem spillage failed. The every widening darkness crept upon once transparent waters and the Devil's Blood seeped into depths no man had ever ventured, valuable muck suffocated marine life and water birds, estuaries became flightless, and shores seeped black gold until enough Cajuns ventured deep into their souls, bid their wives adieu and raised the **Skull and Bones**.

The National Oceanic and Atmospheric Administration shut down recreational and commercial fishing in a huge portion of the Gulf, while the federal government issued a 6-month moratorium on exploratory drilling, thereby idling about 33 drilling operations in progress.⁵⁰ Meantime, after meeting with President Obama, BP quite reluctantly agreed to a concordat and set up a \$20 billion compensation fund.⁵¹ Reportedly operating on a self-insured basis, BP carried little to none 3rd party liability insurance.⁵² Given the minimal insurance, BP's pockets are perhaps not deep enough to meet the overall liabilities which, in addition to the \$20 billion compensation may well include \$21 billion in further civil fines via the Clean Water Act (CWA).⁵³ Stakeholder litigation followed like a force majeure, and the Lord was with them...and even the angels shall forever wonder if BP had so defecated in the North Sea, or effected the Thames instead of Old Man River, would their response have been so aloof, so nonchalant, so Thackerian, so crumpet and tea time, so sang-froid instead of cafe u lait and beignets

⁴⁹ Gillis, J., & Fountain, H. (2010). New Estimates Double Rate of Oil That Flowed Into Gulf. *The New York Times*.

⁵⁰ Bill Sasser, *Despite BP Oil Spill, Louisiana Still Loves Big Oil*, Christian Science Monitor, May 24, 2010, <http://www.csmonitor.com/USA/2010/0524/Despite-BP-oil-spill-Louisiana-still-loves-Big-Oil>.

⁵¹ Deepwater Horizon Oil Spill Trust (Execution Copy) (Aug. 6, 2010), http://media.nola.com/2010_gulf_oil_spill/other/Trust%20Agreement.pdf.

⁵² This fund operates independently of the Oil Spill Liability Trust Fund, which is funded by taxes on oil exports and imports into the US, was inadequate to redress the BP spill since it merely requires a responsible party like Deepwater Horizon to produce proof of "financial responsibility" up to \$150 million either by insurance, surety bond, letter of credit, and/or qualification as a self-insurer. 33 U.S.C. §2716(c) and (e)(2006). Transocean reportedly carried \$500 million in physical damage insurance and \$900 million in 3rd party liability insurance. Howard Epstein and Theodore Keyes, *BP Oil Spill: An Insurance Perspective*, N.Y.L.J., Aug. 18, 2010, available at http://www.srz.com/Epstein_Keyes_NYL_BP_Oil_Spill/.

⁵³ In 2010, the Justice Department sued BP to retrieve fines and penalties from violating OPA. See Jerry Markon, *BP, 8 other firms sued by Justice Dept. over gulf oil spill*, WASH. POST, Dec. 15, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010112/15/AR2010121503894.html>.

⁴⁷ Easterbrook, F. H., & Fischel, D. R. (1993). Contract and fiduciary duty. *JL & Econ.*, 36, 425.

⁴⁸ Easterbrook, F. H., & Fischel, D. R. (1993). Contract and fiduciary duty. *JL & Econ.*, 36, 425, 426-27.

wolfed down by sans-culottes declassé livid to set free the vampires of La Nouvelle-Orleans.⁵⁴

On 12 May 2009 at a postgraduate lecture to Stanford Business School, perhaps in a not so subtle attempt to merge Yin and Yang⁵⁵ poseur Tony Hayward⁵⁶, chief executive of BP, stated to the business attendees, "...our primary purpose in life is to create value for our shareholders. In order to do that you have to take care of the world." Apparently, the Gulf of Mexico, notre eau de vie, and the surrounding environs are not part of the World.

Pure "economic loss" is the kind of loss that strikes the wallet and nothing else. A party suffering only economic harm recovers damages solely founded upon a contractual claim as opposed to one grounded in a tort such as negligence or strict liability. Sadly, this legal shield⁵⁷ against tort liability is strikingly ineffective in connection with oil spills. There the overwhelming harm is not to human lives and private property as such but to "unowned resources," viz. the high seas, territorial waters, wildlife⁵⁸, and marine and coastal environment, all of

which lie in the public domain. Since these resources are publicly owned, a private claimant is typically unable to recover on the basis of direct property loss, or even able to attach his economic losses to any physical loss, even parasitically speaking. This is an example of a 3rd party beneficiary who is a valid Stakeholder.⁵⁹ Where private claimants do not have access to remedy a wrong, the Stakeholder theory/3rd party contract beneficiary should take root and form.

The public resources are exogenous to the private property law system and therefore the "damage" consists mostly of pure economic loss. For example, marina owners and seafood processors who depend directly upon these public resources for their livelihood are in theory barred from recovery. This would adversely affect the menu of chez Galatoire's, and obviously that's not going to happen.⁶⁰ Thus, in the end, Stakeholder Theory won, when the Sovereign State of Louisiana⁶¹ defeated the Brits (BP), thereby winning the Second Battle of New Orleans⁶² where once the very Redcoats who defeated Napoleon lost to the ruffraff of New France. Here are BPs terms of surrender of which both General

⁵⁴ Man perceives New Orleans as a City of Sin. Quite the opposite. Fact is, vampires, werewolves, fallen angels and more do reside in the City that Care Forgot, but they all have one peculiar distinction. Each and every ghoul has asked God for forgiveness. And to there, He sends them even though they cannot be forgiven, for the blood of Christ is only applied to man. Problem is, vampires, demons and such, on occasion fall off the wagon and imbibe in the draining of humans of all their blood, flesh or spirit, depending on the particular appetite involved. And then, the guilt sets in, there's the requisite visit to the parish confessional, who sends them onto their various Chapters of Anonymity (e.g. Vampires Anonymous, Noisy Spirits in the Vieux Carre' Anonymous and so on. And yes, each ghoul gets a medallion at the appropriate benchmark.) Point is, New Orleans is not the City of Sinners. It is the City of generally repentant Vampires and Whatnot. To fairly compensate the human New Orleanians from the occasional hauntings, half-eaten bodies, Vampire feedings (most often Dirty Birds or 49ers, so no real foul), and so on, the Lord in 1967 through his mouthpiece, the Archbishop, publicly made his Team, the Saints, an allusion to November 1 being All Saints Day in the Catholic Faith. The Lord failed to mention most Saints were martyrs, which aptly explains the Wilderness Years.

⁵⁵ "Entrepreneurial Spirit Needed". Stanford Business School via Stanford University. 12 May 2009.

⁵⁶ If you look into the bathroom mirror and see Marie Laveau, please, please blame me. Being both an avid practitioner of Catholicism and Voodoo, Marie has friends in locales high and low. Hire a retiree from MI-6 and verify that her mausoleum in St. Louis Cemetery No. 1 at 3421 Esplanade Ave is wide open. No one knows who took axe and pick and set her dank spirit free (it was me!), but to you her spirit alights. If you notice a woman behind Marie, it's Mme. Marie Delphine Lalaurie, like yourself, by every societal standard sweet, kind and most importantly, captivating. Good luck in your new life: the Grand Guignol!

⁵⁷ By contrast, economic loss does include damages for disappointed expectations, such as lost profits, the benefit of the bargain lost, and the reduced value of property. Throughout the United States, the economic loss doctrine is recognized to a certain extent by courts but not in any sort of uniform fashion whatsoever.

⁵⁸ The ownership and title to all wild birds, and wild quadrupeds, fish, other aquatic life, the beds and bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico within the territory or jurisdiction of the state, including all oysters and other shellfish and parts thereof grown thereon, either naturally or cultivated, and all oysters in the shells after they are caught or taken therefrom, are and remain the property of the state, and shall be under the exclusive control of the Wildlife and

Fisheries Commission La.Rev. Stat. Ann. §56:3(A) (West 2011). "The control and supervision of the wildlife of the state, including all aquatic life, is vested in the Louisiana Wildlife and Fisheries Commission." La. Const. art. IX, §7(A).

Louisiana courts also have recognized the state's constitution created a public trust for the protection and conservation of its natural resources. See *Save Ourselves, Inc. v. La. Envtl. Control Comm'n*, 452 So. 2d 1152, 1154 (La. 1984) (citing La. Const. art. IX, §1. And so, Louisiana is a viable stakeholder since as owner it has the requisite property rights. Also, one must assume that BP intended Louisiana not suffer extreme wetland and wildlife damage when effectuating its shareholder agreement. Thus, Louisiana is a valid 3rd-party beneficiary in the BP Gulf Spill debacle, and not some incidental objet trouve.

⁵⁹ As a consequence, where corporations are found to have violated environmental regulations, the share price losses amount only to the regulatory fine in contra-distinction to product recalls which harm corporate customers with correlative share price losses commensurate with the discovered damage. The market is not effective in punishing corporate environmental failure where the primary damage is against external 3rd parties. Karpoff, J. M., Lott Jr, J. R., & Wehrly, E. W. (2005). The Reputational Penalties for Environmental Violations: Empirical Evidence*. *Journal of Law and Economics*, 48(2), 653-675.

⁶⁰ 209 Bourbon St, New Orleans, LA 70130. Galatoire's specializes in French Creole cooking. Perhaps as an embodiment of the egalitarian French Revolution (1789), exceptions to their first-come-first-served policy have never been allowed. According to the restaurant, President Ronald Reagan called U.S. Senator J. Bennett Johnston, who was waiting in line for a table. After taking the President's call, Senator Johnston returned to his position in line. Of note, Author Tennessee Williams was a habitué and preferred to sit by the main front window looking out onto Bourbon St. As such, Galatoire's is rightfully mentioned in: *A Streetcar Named Desire*. Much as I would look onto Boubon for décolleté of each and every coquette. *Laissez les bons temps rouler!*

⁶¹ In 1803 Louisiana was 828,000 square miles, and crucified Herself so that other sovereign States (15 States and 2 Canadian Provinces) might come into Existence. Had Louisiana maintained a more independent and Texan point of view, She would have had the electoral votes to perhaps have been more rightly treated by this Nation after both the BP debacle and Katrina. But now, with merely 3 electoral votes, what can an Old Mother, or Old Man River for that matter, rightly expect? How quickly this World forgets.

⁶² Upon any verbal or inscribed mention of BP, at His command, the 6-winged Seraphs immediately stop chanting their Holy, Holy, Holy...and sing with all their invisible hearts Johnny Horton's number #1 1959 hit, 'The Battle of New Orleans.' Amen.

Jackson and this Pirate Jean Laffite are so proud: http://seafoodsustainability.us/uploads/MOU_LouisianaBPoilspill.pdf.

One must keep in mind that a 3rd party beneficiaries' legal right arises only if the purpose of the contract was to benefit a 3rd party who either relied upon or accepted the contract's benefit. "Clearly", BP intended to not destroy the very State of Louisiana, and Louisiana relied on this by allowing BP to drill so near Her children, her pod of chicks, fed by the very red blood from her own pelicanic breast (for verification please closely review the Louisiana State Flag).⁶³

Had Louisiana known BP would willfully be so under-insured and unprepared to fix a drilling explosion, which is a foreseeable risk, Louisiana would have prevented BP from doing business near her shores, her wetlands, her fisheries, her noble Cajuns. Thus, Louisiana was an intended 3rd party beneficiary who detrimentally relied on BP's good faith. BP consistently violated its fiduciary duty to Louisiana, for which BP was not punished near enough. This result fits neatly within the Shareholder Theory, which is contract-based and more specifically in this case, adequately addressed by a 3rd party beneficiary paradigm. Thus, more cases than initially surmised would fit within this Shareholder purview, particularly when long-term maximization of company value is the decisional goal of management and not short-term profits⁶⁴ or mere increase in the price of company stock price. This one-two combination should bring a lasting and suitable detente in the not-so Cold War between Shareholder and Stakeholder Theorists.

A near-constant 3rd party beneficiary would be shareholders-managers' customers since no one could truthfully argue their customers were not an intended beneficiary at contract inception. Thus, the preeminent 3rd party beneficiary (stakeholder) would be the customer and no customer more so than the insured (policy-holder) with a mutual life insurance company where they are no shareholders, only policy-holders. In that case, the costumer (the

insured) is both the "shareholder" and "stakeholder," such a person would be in the proverbial "catbird seat."

It is understood that shareholders via their management intend to do business with the public-at-large for a profit. And so the public is nearly always a 3rd party beneficiary since it was in mind as an intended beneficiary when the shareholder agreement was made between shareholders and management. Obviously, no company can get a public license to intentionally harm the public, and so to do business with the public, whether by C-corp status or even a DBA, the public and more specifically, the customer is presumptively a 3rd Party Beneficiary. The question remains on whether the State can swoop in and defend these customers. The answer is of course. It has, and will continue to do so. In encouraging BP to establish the 20 Billion dollar trust fund (a stakeholder fund, a 3rd party beneficiary fund), the Federal Government dipped its hand in the water to quell the uproar in public opinion. But as with all such funds, the final beneficial effect will be largely determined by claimants' utility curves and the time value of money. And who can forget the lengthy *Exxon Valdez* litigation only to have the U.S. Supreme Court restrict the scope of punitive damage awards.

Admittedly, what happens when the rubric of 3rd party beneficiary is perhaps insufficient since ironically, a Trust (stakeholder) structure could have been used in the BP situation to great effect? Claimants are attracted to courts of law because, among other things, of the individual attention given to them. Claimants seek courts to get a personal, thorough review of their case. At times, neither the Courts nor Contract Law are equipped to handle a case like this wherein multiple State were nearly engulfed by hurricanic losses.

But a Trust structure, which does embody Stakeholder theory, could employ special procedures and case management tools in order to have the Trust Fund operate in an orderly and efficient manner. If the Court is required to sort through beaucoup de individual claims (over 100,000) to determine just claims from unjust ones, Justice grinds to a standstill in all of Louisiana. In this instance, the stakeholder theory, Trust Law, would perhaps have led to lower agency costs, better services, and better compensation. When the legal system cannot justly remedy the problem, stakeholder theory reasserts itself, even though the presumption for a wealth-creating society must tow the Shareholder Theorist line of thought and being, even if tears must cascade behind the eyes and down the throat.

Control and Information Vulnerabilities

In A. Control and Information Vulnerabilities Revisited, Marcoux wastes ink and tree persuading

⁶³ In Act 3, Scene 4, did not King Lear cry out: Death, traitor! nothing could have subdued nature

To such a lowness but his unkind daughters.

Is it the fashion, that discarded fathers Should have thus little mercy on their flesh?

Judicious punishment! 'twas this flesh begot

Those pelican daughters. (Act 3, Scene 4)

The daughters, Regan and Goneril, betray King Lear only after he has given them all his land and power. King Lear is that mother pelican who pierces so deeply her own breast that might greedy daughters thrive.

As is plain, when the Bard walked the Earth, mother pelicans were thought to have pierced their own breasts so their young might drink the richest sustenance. Just before Shakespeare wrote *King Lear*, the barren Queen Elizabeth I portrayed herself the pelican, that so self-sacrificing "mother" to her "children" (the subjects of England). Perhaps this is poetic indicia that not all Lordly Brits deserve to be actually drawn-and-quartered.

⁶⁴ Jacobs, J. B. (2011). Patient Capital: Can Delaware Corporate Law Help Revive It. *Wash. & Lee L. Rev.*, 68, 1645.

the reader shareholders are deserving of fiduciary duties. There is no such need. Contract Law amply provides for fiduciary duties. They are ably imputed into any contract by at minimum the covenant of good faith and fair dealing, which also applies to intended 3rd party beneficiaries of the agreement. The query is not whether shareholders are entitled to or owed a fiduciary duty; but rather, does such an obligation inhere to anyone else, namely a Stakeholder that could not come under the rubrics of intended 3rd Party Beneficiary. The answer, is the almost always, No. Contract Law, not Trust Law, generally is broad enough to protect all victims. A possible exception would be the BP Gulf Spill, but even there a 3rd Party Beneficiary analysis would suffice, but a Trust (Stakeholder) in that case would probably have been more efficient and more just. Courts adjudicate Contract Law always, but in special cases, Special Administrative Bodies would probably be more proper to adjudicate and process claims, particularly in Class Action cases or where only the State is the owner of what was damaged or seriously harmed (Gulf of Mexico, wildlife, the menu of Galatoire's (specifically, crab sardou: hollandaise sauce over lumps of white crabmeat, artichoke hearts and a verdant spinach en creme de la creme)).

B. Reply: The Ready-Market-for-Shares Argument

In this Section Marcoux literally thrashes Stakeholders Theorists who so glibly assert shareholders are protected against managerial practices adverse to their interests in a way that employees are not, since they may easily dispose of their shares and recoup the current market value of their investment. If Marcoux were more right on this point we would all have to bend the knee and declare him a demi-god. His analogy that the existence of a market for shares is no more a protection of shareholders' investments in their firms than is the existence of wrecking yards a "protection" of car owners' investments in their cars is more than incisive. This argument reaches the level of a Platonic Ideal withering the ideological myopia of Stakeholder Theorists who leap at any argument that makes the employee the defenseless victim the way a dog bolts after a bouncing ball.

While fearing to mar Marcoux's chef d'oeuvre in this section, I would only add that employees have many legal remedies available to them. And as for retraining employees when a firm leaves, it is up to the government, State or Federal, to retrain it citizenry (if they truly believe in them since they are its tax base in perpetuity. Firms, as with the State and Federal government are Immortal (carte blanche) and employees are not their source of revenue en perpetuity: Immortal corporations, enabled by Nordiste law live en perpetuity.) It is not the moral or legal obligation of a firm to have its one-time

employees trained for life--a manifestation of loyalty that ironically, the employees themselves would never render the employer. An employee can leave for higher pay and be considered smart, dutiful to his family and so on, but a firm that leaves to survive due to the Nigh Almighty Invisible Hand is per se to be a scumbag. This Stakeholder position seems to be one of at least two faces.

To his credit, Marcoux has one face, which admittedly at times is hard to face emotionally, or with a keen sense of social justice. But to oppose him effectively you must face his unique face creatively. No one has done that yet.

In this Section, one can only join Medusa as a sister femme fatale, or face Marcoux and be turned to stone. Every Section before this one was just venomous hissing, an act of mercy, a warning, a cue to run for your life. His enemies will say Section 3B. was a trap, but deception (and illegality) is precluded by Marcoux. This Game has hors de combat, some fatal, but it is more fairly played than surmised; and when not, the State if true, does more than referees, it rectifies⁶⁵. So who is to Bless, and who is to Blame?

Has anyone even bothered to ask Marcoux-Medusa if he/she wanted to turn even one person into stone? One running boy into an immortal statuette of playfulness? Granted such face- to-face time could be lethal. But when you save every seal and starve the killer whales, when you kill every lion to protect every antelope, when you castrate every male in the name of humanity, when you prevent profit and thereby prevent loss, you my enemy will have spoken face-a-face with Medusa-Marcoux and survived.

IV. The Manager- (Non-Shareholding) Stakeholder Relation, B. Customers.

In the last paragraph of IV. The Manager-(Non-Shareholding) Stakeholder Relation, B. Customers, Marcoux errs big-time in stating, "customers exhibit only limited control vulnerability, but generally lack information vulnerability." In the late 1950s and early 1960s, Thalidomide was a widely used to assuage nausea in pregnant women, the side effect of which caused severe birth defects in thousands of children. And yet thalidomide has never been successfully banned, and rightfully so since its benefits outweigh its costs as to leprosy and later, multiple myeloma. Eventually, with an improved understanding of these molecular targets, safer drugs may be designed. But even so, the public uproar was well-founded, justified and fortunately triggered a turning point in developing systematic toxicity testing protocols. Not to mention the use of thalidomide as a tool was a key

⁶⁵ Who can deny that the stock market is a very selfish policeman who only inflicts penalties on corporations whose actions only have damaged the corporation itself. Where the corporation has damaged other Louisiana or the Gulf of Mexico, then far from penalizing it, the stock market might even reward GP for enhancing its profits from its "effective cost-cutting", at least prior to being exposed to regulatory discipline and public censure.

in developmental biology which has led to important discoveries in the biochemical pathways of limb development. Marcoux, what costumer in 1960 could possibly have known a scintilla of this!? Not even a customer such as Marie Pasteur would not have fathomed the effects of thalidomide on her unborn Jean Baptiste.

Marcoux's assertion in this Section only applies to products which are both manufactured and commoditized (widgets), which in this information age is less and apropos for analogous usage. It is because companies failed miserably to disclose key nutritional information to their autonomous soul-imbued customers that this Nation found it necessary to not stop merely refereeing the Game, but step in, throw the flag and assess a new cost/rule via the Nutrition Labeling and Education Act of 1990 (NLEA) which provides the FDA with specific authority to require nutrition labeling of most foods regulated by the Agency. The Stakeholder Government quite arguably has a moral right to do this, as in nigh any case wherein there is no informed consent, thereby turning customers into pure means by negating their inherent soul-imbued infinitude. This must never go unaddressed, and the stakeholder-esque zebras got it right. Now huddle up, cuz the clock is, like always, running...At the whistle, the best Game to create societal wealth, must and will go on...in Russian or Chinese, but preferably English, that amalgamated langue de Normans, Saxons, Angles, Jutes and yes, Brits.

Shareholder Theory As It Should Be and Not As Usually Stated

Perhaps even Marcoux misstates Shareholder Theory as best stated. Maximizing shareholder value as the ultimate goal is not completely consistent with the intentionality of viable or proper shareholder theory. Shareholders receive a return from their invested capital in two different ways: 1) dividends paid out by the corporation and 2) increased share prices.⁶⁶ As mentioned earlier, Milton Friedman's September '70 article "The Social Responsibility of Business is to Increase its Profits," is the very basis of Shareholder Theory and made clear that the *raison d'etre* of corporate governance was to increase dividends through long-term profitability; rather than, merely or solely increase share price in a possibly irrational stock market. And so, true Shareholder Theory never utilizes market returns as the primary end state. On page 13, Marcoux never alludes to dividends en perpetuity to better justify why managers owe shareholders a fiduciary duty. Unfortunately, Marcoux might have greatly bolstered his position if he had.

⁶⁶ And if one comports with a semi-efficient or efficient view of the market, such revelations come swiftly much of the time, although the market information failures are notable (Enron, Maddoff and so on).

Let us pray we never forget those notable instances when corporate management acted in a manner more for their rapacious selves than the trusting shareholders. Enron Corp. CFO Andrew Fastow created a partnership bankrolled with Enron stock and comprised of very risky ventures, and stood to easily make millions even if Enron lost money on the deal. And in fact, Enron lost more than \$500 million from these management misdeeds and entered bankruptcy.⁶⁷

Also, while Kenneth Lay of Enron and Scott Sullivan of WorldCom Inc., profited big-time from bonuses and stock options while their shareholders' capital was disappearing, Shareholder Theory would find such behavior despicable, since management should act only and exclusively in the shareholders' interests. This is why any form of self-dealing by management is clear breach of duty of undivided loyalty, and so how can management consider, hear, or entertain any stakeholder viewpoint under this paradigm. That's why by (Trust) law, Marcoux lands his coup de grace, and wins big.⁶⁸ This is bien pensant by Marcoux.

But for now, despite this defensible argument, Shareholder Theory throughout numerous journals is being repeatedly tarnished by association. Various authors seemingly, more concerned for emotional resonance instead of clarity or partial solutions, have spray-painted the greed of certain infamous corporate managers onto not only Shareholder Theory in general, but unto all who would believe in or espouse said Theory. Not finished their graffiti, Stakeholder Theorists then spray-paint throughout their vast literature this particular blase straw man: that Shareholder Theory justifies and mandates any deed if in pursuit of shareholder returns. As to this Marcoux comes to the rescue, noting that Shareholder Theory demands profits be acquired legally and without deception. There is no grace granted this sort of overt illegal behavior discovered in too many financial scandals au courant. Not one single, solitary corporate executive who, either broke the law or mislead employees, operated within the confines of Shareholder Theory. Thank you, Marcoux for at long last shattering that nefarious crucible.

⁶⁷ Behr, P., & Witt, A. (2002). Visionary's dream led to risky business. *Washington Post* (July 28).sec. A, p. 1

⁶⁸ If under contract law, corporate management had to act in the shareholder's best interest, but not necessarily in their sole interest, Marcoux's ship would suddenly be taking on water. But under present fiduciary law based on Trusts, a corporate manager breaches their fiduciary duty by taking any action in the best interest of the stakeholders or themselves whenever the action benefits stakeholders or themselves, and not exclusively the shareholders. This disregards modern corporate governance reality. And so, the Courts wedge in some fudge as an exception that states by law, incidental self-serving is allowed. Yet who in their right mind thinks executive bonuses are incidental? The Courts' suspension-of-disbelief notwithstanding, the sole/exclusive interest rule de juris unconditionally promulgates that all conflicts of interest inevitably imperils the sole interest of the corporate shareholders. Marcoux makes fantastic use of this current law to land a coup de maitre against Stakeholder Theory.

Another straw man Stakeholder Theorist use with morbid regularity is that since corporate management is charged with maximizing shareholder value and are paid large incentives to accomplish this through stock options or other schema, they can be expected to engage in whatever manipulations are necessary to attain that goal. And furthermore, if those manipulations mean setting up illegal ventures and then shredding any incriminating evidence, Shareholder Theory will insert the morality of OUGHT into that genre of behavior, assuming the Nixonian managers don't get caught. Both Courts and our societal milieu would find these actions despicable and since shareholder theory "drove" management to behave his way, Shareholder Theory is bankrupt and must be cast into the dustbin of History. This yellow journalism is in the end, a voluptuous succubus.

Conclusion

We are allegedly witnessing the emergence of a society predominantly based on fiduciary relations. Today, affluence seems best generated by interdependence, but supposedly personal freedom is cherished at all times. More and more, society disavows the Courts and turns to an arbitrator, the (usually federal) government, for protection from any perceived abuse by those depended upon for specialized services or products with hidden complexity or containing known or unknown affects either in the short or long-run.

A fiduciary society, for better or worse, does not focus or reward competitive-conflict, and the fruit attained thereby from the Invisible Hand; but rather, harmonious integration of interest validated within a highly regulated, Kantian schemata: does evermore more compliance lead to evermore Justice? This New Age permits the government to moderate between altruistic goals and all-too human desires, as well as between the Scylla and Charybdis of increasing societal welfare while corralling the will-to-power (amour propre) that wants to get more than a "fair share." All mighty charioteer Apollo, where art thou? For what you do, the Federalists promise to do 24/7. Beware of what ye ask for, Phaeton. You, mortal man, will only control the dark steeds of Apollo by compliantly, killing them. No heart but Christ can beat l'Etat, c'est moi!

There was a time when chief executives perceived themselves as overseeing customer and employee welfare. If each year the company took in reasonable profit and bumped up dividends: wife, kith, kin and all those around critically acclaimed your succes d'estime.⁶⁹ But before too long, shareholders observed the ever-increasing cost in the shareholder-management relationship, noting that high-level managers did not maximize profits unless shareholders poured both more capital into incentive

packages and better measured-monitored the results. To make matters worse, managers believed that if they did not vigorously beat the Shareholder Drum of ever higher profits, they might soon very well find themselves, unemployed. Although as Ellsworth noted, "If corporate management fulfills their dual duties of care and loyalty, the courts do not overturn, or even seriously review, their decisions," even if those decisions arise from stakeholder theory tenets.⁷⁰ Yet if managers do not maximize profits, and boards do not remove them, the corporation's underperformance will be noted in the marketplace, and eventually be subject to hostile takeover: both the board and the managers replaced by those most likely to detect such underperformance: Robber Barons.

Unfortunately, as you can see, reasonable applications of either theory can easily yield qualitatively different obligations on corporate management. Too often, any causative linkage between such acted upon obligations and the Profit & Loss statement is simply not there or too indirect to really matter. The theory that can throw out the bathwater and keep the baby will win. Ultimately, this Author adheres to the modified Shareholder Theory elucidated herein while admitting that the Human, All-Too-Human Stakeholder Theory evinces every fiber of our moral being when injustice harms that which we most love.

Once Shareholder Theory holds to long-term maximization of company value for the Shareholder, and Stakeholder know themselves to generally be 3rd Party Intended Beneficiaries then while admittedly, one theory becomes moonlight contre-jour, the other shall no longer dream dreams that cannot fly. See for yourself. BP's shareholders presumptively never intended to ruin the Gulf of Mexico and the Piratical City of God; and so, once ruined by BP, said Shareholders are beholden to those (intended) 3rd Party Beneficiaries so affected. Perhaps, shareholders of sufficiently large publically held companies are morally obliged to band together as an industry and establish a fund through insurance (or re-insurance) for harmful outliers that are rare but when they occur causes serious harm to either the surrounding area (stakeholder) or any other probable (stakeholder) 3rd party beneficiary.

One can see why Stakeholder Theorists sense the denouement of Shareholder Theory, and some already declare it ancien regime. Apercu, scandals at Enron, ImClone, Tyco International and WorldCom, not to mention national concerns about the objectivity of accountants hired to audit financial statements, or the type of incentives at Credit Suisse First Boston or investor recommendations at Merrill Lynch have been a rich compost to usurp shareholder supremacy.⁷¹ This Article has made clear that these

⁶⁹ Cassidy, J. (2002). The greed cycle. *The New Yorker*, 23, 64-77.

⁷⁰ Ellsworth, R. R. (2002). *Leading with purpose: The new corporate realities*. Stanford University Press, 348.

⁷¹ Corporate accounting scandals were also involved at Polly Peck, Xerox, Royal Ahold and Satyam.

scandals reveals the moral paucity of that company's management and is not conclusive evidence of any Vampiric qualities inherent to either shareholders or their life-rendering Theory. And this Article has hopefully also made clear that Stakeholder Theory is best attainable within the legal rubric of 3rd party beneficiary analysis. But of course, there are exceptional exceptions which not only should remain just that, exceptional exceptions, but like lord Voldemort, never be discussed, named or mentioned until met vis-a-vis. *Honi soit qui mal y pense!*

Despite presently in an awkward position, Shareholder Theory has the advantage of being right, even if it desperately needed this Article to save itself. Stakeholder Theory simply cannot on a consistent basis be applied at a societal level without instituting at minimum a highly regulated (straight-jacketed?) society. This is the partial legacy of Kant's Imperative and the "Enlightenment" of 1789. To make matters worse, Stakeholder Theorists too often misrepresents Shareholder Theory as urging managers to "do anything you can to make a profit," when said theory obligates managers to increase profits only through legal, non-deceptive means.⁷² Second, some see shareholder theory as solely geared towards short-term profit maximization at the expense of the long run. However, a more viable Shareholder Theory would incentivize Shareholders to develop long-term horizons so their interests would be significantly more aligned with stakeholders, especially employees. Having dividends payout a higher rate of return based on a sufficient holding period, along with a capital gains tax rate diminishing over a longer holding period, would better enable corporate management to inculcate a long-term paradigm⁷³. Lastly, some claim Shareholder Theory precludes gifting corporate monies to charitable institutions or investing to raise employee morale. To the surprise of her enemies, Shareholder Theory rabidly supports those efforts, if and only if, this is the best use of capital to ultimately raise the dividend/growth rate en perpetuity.⁷⁴

⁷² Friedman, M. (2009). *Capitalism and freedom*. University of Chicago press.

⁷³ As a shareholder in the French industrial gases company Air Liquide, the dividend is increased by a maximum of 10%, granted to loyal shareholders for all direct shares held continuously for more than two calendar years. <http://www.airliquide.com/en/shareholders/the-stock-market-and-you/financial-glossary-1.html> Of significant note: French law provides with a general principal which states that "voting rights attached to capital or dividend shares shall be in proportion to the share of the capital they represent and each share shall entitle the holder Co at least one vote" (Article L225-122 of the French commercial Code). Consistent with the words "at least", the same French commercial Code (Article L225-123) enables companies to grant, subject to the satisfaction of certain requirements, double voting rights to their shares: "A voting right equivalent to twice that attributed to other shares may be attributed to fully paid shares which can be proved to have been registered in the name of the same shareholder for at least two years, depending on the proportion of the share capital they represent, by the memorandum and articles of association or a special shareholders' meeting."

⁷⁴ Bowie, N. E., & Freeman, R. E. (1992). Ethics and agency theory: An introduction.

Admittedly, Stakeholder Theory is at times also gravely misunderstood, most often when viewed as never demanding a company focus on profitability. Stakeholder Theory is most concerned that the corporation continues to exist en perpetuity since a bankrupt corporation creates value for no one, but all corporate gains must be attained by fairly weighing the interests of all stakeholders, including the shareholders. Since generally Stakeholder Theory provides no viable formula for mediating stakeholders' disparate interests, some claim the theory cannot be implemented. To their theoretical credit, Stakeholder Theorists have provided algorithms for trade-offs among stakeholders' interests. For example, one could assess risk each stakeholder took and rank them accordingly, or simply assert one specific stakeholder should always prevail, as recently argued by Richard Ellsworth.⁷⁵

Fiduciary law vests in shareholders: 1) the legal right to receive quality fiduciary services from management; and 2) the legal right to rely on the honesty of their managers by imposing on them not only a duty of loyalty, but other specific duties as well, to best prevent fiduciaries from swindling those entrusted interests. This aspect of fiduciary law is analogous to the tort of conversion and with the improper mens rea, the crime of embezzlement. A "fiduciary" relation thus, is a contractual one embodied by extremely high costs of specifying the how-to for management as well as the monitoring of that management. In lieu of detailed contractual terms, there is instead the duty of loyalty and if need be, the courts flesh out the duty of loyalty by delineating what the parties themselves would have wanted done if bargaining were cheap and all promises fully enforced.

Because agency problems arise from incomplete contracting, the duties of loyalty and care are standards empowering the court to complete the parties' contract as regards the facts and circumstances as they in fact unfolded. The duties of loyalty and care minimize transaction costs by drastically reducing the need for a contract clause to anticipate each and every future contingency. The contracting 1st parties need only address important contingencies that warrant the transaction costs of express provision, such as the possible subsequent inclusion of 3rd party beneficiaries. For all other contingencies, the fiduciary obligation fills the gap.

One can see the power of this when applied to a 3rd party beneficiary (stakeholder), thereby generally negating any further philosophizing as to a Stakeholder Theory when the legal contract principle of 3rd party beneficiary so readily inculcates it. Thus, Stakeholder Theorists can sleep at night, 3rd party beneficiary Contract Law is operating 24/7.

⁷⁵ Ellsworth, R. R. (2002). *Leading with purpose: The new corporate realities*. Stanford University Press. Ellsworth believes customers' interests should trump any other stakeholders.

Contract Law is most often quite sufficient to the task, having a rich body of interpretive authority on fiduciary matters across decades of case law, treatises, restatements, and evermore so, statutory codifications. This mass of knowledge lends a valuable predictability to guide corporate management on how the duties of loyalty and care will be applied to their situation. This guidance has already taken further specificity in the form of subsidiary or implementing rules on how to fully one's fiduciary duty. By now, fiduciary duties are endemic to both law and business, and are more akin to the invisible potency of oxygen; rather than, some moral crucifix each manager must carry while simultaneously rendering to Caesar his due: evermore profits.

Contra posed to the central tenets of Stakeholder Theory, fiduciary duties are not special duties from on high and are derived and enforced in the same way, as other contractual arrangements. Actual contracts always prevail over implied ones, which is why 3rd party beneficiary is needed since it makes "stakeholders" part of the contract. Without this, Stakeholder Theory is primarily moralizing, perhaps hoping that if such sermonizing prompts a majority in public opinion, a comprehensive statute will save the day. Yet despite decades of moralizing rhetoric about the inherent morality of fiduciary obligations, fiduciary duties in trust law are in today's world, unambiguously contractarian. Obviously in contract law, they are contractarian. In essence, much of the world and the value within it is nothing but a deal, hopefully fairly played out. This elan vital is neither Heaven on Earth, nor a dimension where the mere passage of Time increases Goodness. Best scenario is a Game refereed well, highly mindful of that which energizes so much of the Game⁷⁶. Yes, the Heart of Darkness.

C'est la vie!

⁷⁶ It is a highly volatile game involving Nature and gods of blood and bone. If corporate problems were just random mistakes, they could be predicted, contained and corrected. Man is not predictable, containable and incorrigibly Fallen.