

# CEO postings: Leveraging the Internet's communications potential while managing the message to maintain corporate governance interests in information security, reputation and compliance

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Published in *DePaul Business & Commercial Law Journal*, vol. 7, no. 2, pp. 179-202,  
Winter 2009

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# DEPAUL BUSINESS & COMMERCIAL LAW JOURNAL

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Volume 7

Winter 2009

Number 2

Published by

DePaul University College of Law and the Commercial Law League of America

# CEO Postings – Leveraging the Internet’s Communications Potential While Managing the Message to Maintain Corporate Governance Interests in Information Security, Reputation and Compliance

Margo Reder\*

## I. INTRODUCTION

For approximately eight years, Whole Foods Market, Inc. (“Whole Foods”) CEO John Mackey posted messages to the Yahoo! Financial message board devoted to Whole Foods.<sup>1</sup> Rather than using his real name, Mr. Mackey, like many posters to chat rooms, created an online alter ego and posted his comments under a pseudonym. As *Rahodeb*, Mr. Mackey promoted his Whole Foods chain, boasted about personal stock gains in Whole Foods stock, and criticized Whole Foods’ competitor Wild Oats Markets (“Wild Oats”).<sup>2</sup> His actions raise important corporate governance questions and potentially implicate a range of legal challenges including: securities, employment, defamation, privacy, trade libel, copyright, and trade secret laws.

Perhaps tempted by the perception (or illusion) of anonymity on the internet, posters perceive they are protected and liberated from further inquiry. Mr. Mackey’s public communications about his publicly traded company raise novel questions, especially in the area of securities regulation, because of his position as an executive engaged in public communications about his publicly traded company.<sup>3</sup> While there is extensive literature addressing issues raised by anonymous employee bloggers and posters,<sup>4</sup> this case involves anonymous com-

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1. See David Kesmodel & John R. Wilke, *Whole Foods is Hot, Wild Oats a Dud — So Said ‘Rahodeb,’* WALL ST. J., July 12, 2007, available at [http://online.wsj.com/article/SB118418782959963745.html?mod=home\\_whats\\_news\\_us](http://online.wsj.com/article/SB118418782959963745.html?mod=home_whats_news_us) (detailing the controversy following disclosure of Mr. Mackey’s anonymous online activity).

2. *Id.*; see also Joshua Lipton, *Whole Foods Faces SEC Probe*, FORBES.COM, July 16, 2007, available at [http://www.forbes.com/markets/2007/07/16/whole-foods-sec-markets-equity-cx\\_jl\\_0716markets30.html](http://www.forbes.com/markets/2007/07/16/whole-foods-sec-markets-equity-cx_jl_0716markets30.html).

3. See Marcy Gordon, *Whole Foods Postings Pique U.S. Interest*, FORBES.COM, July 15, 2007, available at <http://www.forbes.com/feeds/ap/2007/07/15/ap3915230.html>.

4. See Margo E. K. Reder & Christine Neylon O’Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. TECH. L. REV. 195 (2002), available at <http://www.mttlr.org/voleight/Reder.pdf>; see also Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employ-*

munications made by an executive, thus triggering other legal and regulatory concerns.<sup>5</sup>

As courts, agencies, and the Whole Foods Board of Directors sort out the issues involved, these matters and their relation to a broader set of concerns is notable. Executive communications have unlimited reach and scope, and can impact the company's security, reputation, and compliance practices. Given this context, corporations must learn to manage the message. Recommendations follow on best practices for managing officer and employee blogging, an issue of growing concern due to the increasing modes and opportunities for communication.

## II. BACKGROUND: HOW MR. MACKEY WAS UNMASKED AND WHAT WAS FOUND

Between 1998 and 2006, Mr. Mackey was pseudonymously posting to the Yahoo Whole Foods message board while continuing to build Whole Foods into the premier natural foods chain in the United States.<sup>6</sup> Mr. Mackey is one of the founders of Whole Foods, and as the company's CEO during this period, was privy to all operational, strategic decision making within the company. As CEO, Mr. Mackey helped grow the company from a one-store operation by anticipating and meeting market demand and acquiring competitors.<sup>7</sup>

Through one of these acquisitions, Mr. Mackey's identity as the poster *Rahodeb* became known. Mr. Mackey offered to buy Wild Oats, the nation's second largest natural foods supermarket chain.<sup>8</sup> The two companies entered into a merger agreement in February 2007

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*ees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355 (2007); Katherine M. Scott, *When is Employee Blogging Protected by Section 7 of the NLRA?*, 2006 DUKE L. & TECH REV. 17 (2006); Konrad S. Lee, *Hiding From the Boss Online: The Anti-Employer Blogger's Legal Quest For Anonymity*, 23 SANTA CLARA COMP. & HIGH TECH. L.J. 135 (2006).

5. See Kara Scannell, *SEC Opens Informal Inquiry of Whole Foods CEO Postings*, WALL ST. J., July 14, 2007, at A2, available at [http://online.wsj.com/article/SB118470129494469198.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB118470129494469198.html?mod=googlenews_wsj) (noting that, "The SEC is likely to examine whether Mr. Mackey's comments contradicted previous public statements by the company, or whether they were overly optimistic about the firm's performance. In addition, the SEC will likely look at whether the CEO selectively disclosed material corporate information – that could violate a securities law that passed in 2000 known as Regulation Fair Disclosure, which was designed to prevent executives from sharing information with favored clients or analysts.").

6. See Whole Foods Market, *Company History Page*, <http://www.wholefoodsmarket.com/company/history.php> (last visited Jan. 24, 2009).

7. *Id.*

8. See Joyzell Davis, *FTC: Grocer's Basket Too Full*, ROCKY MOUNTAIN NEWS, June 6, 2007, [http://www.rockymountainnews.com/drmn/other\\_business/article/0.2777/DRMN\\_23916\\_5572553,00.html](http://www.rockymountainnews.com/drmn/other_business/article/0.2777/DRMN_23916_5572553,00.html).

and scheduled to close the transaction by August 2007.<sup>9</sup> Both the Department of Justice's Antitrust Division and the Federal Trade Commission have jurisdiction to review mergers and acquisitions because these transactions affect interstate commerce and potentially impact competition.<sup>10</sup> While the DOJ passed on investigating the proposed deal, the FTC immediately expressed concern about the merger and requested documents from Whole Foods.<sup>11</sup> Whole Foods roundly criticized the FTC's work in this case even as it complied with government requests, turning over millions of documents for review.<sup>12</sup> (Whole Foods and Wild Oats cooperated in challenging the FTC's opposition to the merger.)<sup>13</sup> In June 2007, the FTC unanimously voted to block the deal and filed a complaint arguing that, should the companies merge, the deal would violate the antitrust laws,<sup>14</sup> specifically Section 5 of the Federal Trade Commission Act<sup>15</sup> and Section 7 of the Clayton Act.<sup>16</sup> To bolster its position, the FTC filed a Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order; in this Memo, the FTC revealed all of Mr. Mackey's postings under the pseudonym *Rahodeb*.<sup>17</sup>

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9. See Joyzell Davis, *FTC Filing Tells of 30 Wild Oats Closings*, ROCKY MOUNTAIN NEWS, Aug. 15, 2007, [http://www.rockymountainnews.com/drmn/other\\_business/article/0,2777,DRMN\\_23916\\_5672915,00.html](http://www.rockymountainnews.com/drmn/other_business/article/0,2777,DRMN_23916_5672915,00.html).

10. See U.S. Dep't of Justice Antitrust Overview Page, <http://www.usdoj.gov/atr/overview.html> (last visited Jan. 24, 2009); Federal Trade Commission's Mergers and Acquisitions Page, <http://www.ftc.gov/bc/mergers.shtm> (last visited Jan. 24, 2009).

11. See *FTC v. Whole Foods Mkt., Inc.*, No. 1:07-cv-01021, slip op. at 3 (D.C. Cir. July 29, 2008), <http://www.ftc.gov/os/caselist/0710114/exhibits.shtm> (last visited Jan. 24, 2009); cf. The Associated Press, *Whole Foods Tries To Discredit Analysis of Acquisition*, ABC NEWS, Aug. 1, 2007, <http://abcnews.go.com/Business/story?id=3433688&page=1> (reporting that a key part of the FTC's case is an email Mr. Mackey sent to the Whole Foods Board in which he wrote that the merger would enable the company to "avoid nasty price wars").

12. See Whole Foods CEO's Blog Page, [http://www.wholefoods.com/blogs/jm/archives/2007/06/hole\\_foods\\_mark.html](http://www.wholefoods.com/blogs/jm/archives/2007/06/hole_foods_mark.html) (last visited Jan. 24, 2009).

13. Financial Press Releases, Whole Foods Market to Challenge Wild Oats Merger, WHOLE FOODS MKT., May 21, 2007, <http://www.wholefoodsmarket.com/company/press-releases.php#self>.

14. See Complaint at 2, *In re Whole Foods Mkt., Inc. v. Wild Oats Mkts., Inc.*, No. 9324 (F.T.C. June 27, 2007), available at <http://www.ftc.gov/os/adjpro/d9324/070628admincmplt.pdf>.

15. Monopolies and Combinations in Restraint of Trade, 15 U.S.C. § 18 (2006).

16. *Id.* § 45; see also Complaint, *FTC v. Whole Foods Mkts., Inc.*, No. 1:07-cv-01021 (F.T.C. June 6, 2007), available at <http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf>.

17. See Memorandum in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction at 4 n.2, *FTC v. Whole Foods Mkts., Inc.*, No. 1:07-cv-01021 (F.T.C. June 6, 2007), available at <http://www.ftc.gov/os/caselist/0710114/070710PublicVersiontromemo.pdf> (asserting that the FTC identified Mackey as the poster of comments to the Yahoo site). For a copy of the posting in full, see Plaintiff's Memorandum of Points and Authorities in Support of its Motions for Temporary Restraining Order and Preliminary Injunction at Exhibit 6, *FTC v. Whole Foods Mkts., Inc.*, No. 1:07-cv-01021 (F.T.C. June 6, 2007), available at [http://www.ftc.gov/os/caselist/0710114/0710114\\_Whole\\_Foods\\_exhibits/PX00801.pdf](http://www.ftc.gov/os/caselist/0710114/0710114_Whole_Foods_exhibits/PX00801.pdf).

The Federal District Court denied the FTC's request to block the merger and denied the request for equitable relief.<sup>18</sup> The FTC's revelation that Mr. Mackey was the poster known as *Rahodeb* set off a firestorm on all news fronts; blogs, reports, editorials, and commentators debated the business and legal implications of the postings.<sup>19</sup> While the focus in the immediate-term was the effect of the online postings as they related to the Whole Foods-Wild Oats merger, the focus over the longer-term will be on the tensions between communications and company integrity, and what is at stake. These events have launched an internal investigation by the Whole Foods Board of Directors<sup>20</sup> and a regulatory investigation by the SEC.<sup>21</sup>

While the messages were posted over seven years and are too numerous to cite and reference individually, the following are representative of his postings: (The collection of postings is archived on Yahoo's message board for further examination.<sup>22</sup>)

[Wild] OATS has lost their way and no longer has a sense of mission or even a well thought out theory of the business. They lack a viable business model that they can replicate. They are floundering around hoping to find a viable strategy that may stop their erosion. Problem is is [sic] that they lack the time and the capital now. Whole Foods

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18. *FTC v. Whole Foods Mkts, Inc.*, 502 F. Supp.2d 1 (D. D.C. 2007).

19. See Tom Regan, *On the Internet, Everyone May Find You're a Dog*, CHRISTIAN SCI. MON., July 18, 2007, <http://www.csmonitor.com/2007/0718/p17s01-stct.html> (noting that journalists "had a field day with this material," and citing the SEC's subsequent investigation of the matter); Joshua Lipton, *Whole Foods Faces SEC Probe*, FORBES.COM, July 16, 2007, [http://www.forbes.com/2007/07/16/whole-foods-sec-markets-equity-cx\\_jl\\_0716markets30.html](http://www.forbes.com/2007/07/16/whole-foods-sec-markets-equity-cx_jl_0716markets30.html) (noting the embarrassment of this incident and exploring legal and business ramifications); Brad Stone & Matt Richtel, *The Hand that Controls the Sock Puppet Could Get Slapped*, N.Y. TIMES, July 16, 2007, <http://www.nytimes.com/2007/07/16/technology/16blog.html> (citing many instances of sock-puppeting and exploring effects on communications, careers, and businesses); Opinion Journal, *Mr. Mackey's Offense*, WALL ST. J., July 16, 2007, at A12, available at <http://online.wsj.com/article/SB118454129429667079.html?mod=opinion&ojcontent=otep> (referencing the hype surrounding Mr. Mackey's postings); Scannell, *supra* note 5 (highlighting attention postings received, and how they raised questions about whether securities laws were broken, including Regulation Fair Disclosure); Tom McGhee, *Posts raise legal issues*, DENVERPOST.COM, July 13, 2007, [http://www.denverpost.com/business/ci\\_6362068](http://www.denverpost.com/business/ci_6362068) (reporting that Mr. Mackey's actions raise a series of legal and business questions); Kesmodel & Wilke, *supra* note 1 (front page report on Mr. Mackey's online comments and the attention they received).

20. See Whole Foods Mkt Press Room, *Whole Foods Market's Board of Directors Begins Independent Internal Investigation Associated with Online Financial Message Board Postings*, WHOLE FOODS MKT, July 17, 2007, <http://www.wholefoodsmarket.com/pressroom/2007/07/17/whole-foods-market%E2%80%99s-board-of-directors-begins-independent-internal-investigation-associated-with-online-financial-message-board-postings/>.

21. See *supra* note 5 and accompanying text (discussing commencement of SEC informal inquiry).

22. See Yahoo! Finance Message Boards Page, *Rahodeb Postings*, [http://search.messages.yahoo.com/search?.mbintl=finance&q=rahodeb&action=search&r=huiz75WdCYfD\\_KCA2Dc-&within=author&within=tmv](http://search.messages.yahoo.com/search?.mbintl=finance&q=rahodeb&action=search&r=huiz75WdCYfD_KCA2Dc-&within=author&within=tmv) (last visited Jan. 24, 2009).

says they will open 25 stores in OATS territories in the next 2 years. The average Whole Foods store in development is now about 50,000 sq. ft.—twice as large as the OATS stores that they will be competing with. The writing is on the wall. The end game is now underway for OATS. It will just take a couple of years to play completely out. . . . I stand by all of the above statements. I told no lies. I still believe that OATS doesn't have a viable business model and that Whole Foods is systematically destroying their viability as a business—market by market, city by city. [Post Number 116, Mar. 28, 2006]<sup>23</sup>

Is [Wild] OATS at risk for eventual bankruptcy as I claimed? Well yes they are. They've only got \$4 million in tangible net worth and over \$100 million in long-term debt. They haven't produced consistent profits. They've lost \$81 million over 19 years of business and \$33 million the past 3 years. Bankruptcy remains a distinct possibility IMO [in my opinion] if the business isn't sold within the next few years. [Post Number 108, Mar. 29, 2006]<sup>24</sup>

The most telling pattern over the last 12 months is that Whole Foods was at \$48.32 exactly one year ago and it is at \$66.52 right now. That is a 37.67% increase in the last 12 months. Exactly 2 years ago, Whole Foods closed at \$35.49 and 3 years ago it closed at \$26.70, 4 years ago it closed at \$21.86, and 5 years ago it closed at \$10.00. Whole Foods stock has therefore increased 113.6% from March 29th 2001 to March 29th 2002, 22.1% from March 29th 2002 to March 29th 2003, 32.9% from March 29th 2003 to March 29th 2004, 36.1% from March 29th 2004 to March 29th 2005 and 37.67% from March 29th 2005 to March 29th 2006. This is a 5 year CAGR [compound annual growth rate] of 46.07%. That is the most telling pattern, but your dislike of Whole Foods is so great that you can't see it. [Post Number 113, Mar. 29, 2006]<sup>25</sup>

FYI—Whole Foods has 72 stores currently in development and they are adding about 35 to 40 a year to their pipeline each year. Those stores are going to begin coming out the pipeline at about 30 to 35 a year beginning in 2007. [Post Number 148, Mar. 9, 2006]<sup>26</sup>

1. Whole Foods breaks out their comps from their identical store sales. Identical store sales were 11.5% in 2005. . . . 2. Perhaps Whole

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23. Posting by Rahodeb to Yahoo! Finance Message Boards, [http://messages.finance.yahoo.com/Business\\_%26\\_Finance/Investments/Stocks\\_%28A\\_to\\_Z%29/Stocks\\_W/threadview?bn=19842&tid=42698&mid=42857](http://messages.finance.yahoo.com/Business_%26_Finance/Investments/Stocks_%28A_to_Z%29/Stocks_W/threadview?bn=19842&tid=42698&mid=42857) (Mar. 28, 2006).

24. Posting by Rahodeb to Yahoo! Finance Message Boards, [http://messages.finance.yahoo.com/Business\\_%26\\_Finance/Investments/Stocks\\_%28A\\_to\\_Z%29/Stocks\\_W/threadview?bn=19842&tid=42698&mid=42957](http://messages.finance.yahoo.com/Business_%26_Finance/Investments/Stocks_%28A_to_Z%29/Stocks_W/threadview?bn=19842&tid=42698&mid=42957) (Mar. 29, 2006).

25. Posting by Rahodeb to Yahoo! Finance Message Boards, [http://messages.finance.yahoo.com/Business\\_%26\\_Finance/Investments/Stocks\\_%28A\\_to\\_Z%29/Stocks\\_W/threadview?bn=19842&tid=42922&mid=42926](http://messages.finance.yahoo.com/Business_%26_Finance/Investments/Stocks_%28A_to_Z%29/Stocks_W/threadview?bn=19842&tid=42922&mid=42926) (Mar. 29, 2006).

26. Posting by Rahodeb to Yahoo! Finance Message Boards, [http://messages.finance.yahoo.com/Business\\_%26\\_Finance/Investments/Stocks\\_%28A\\_to\\_Z%29/Stocks\\_W/threadview?bn=19842&tid=41796&mid=41798](http://messages.finance.yahoo.com/Business_%26_Finance/Investments/Stocks_%28A_to_Z%29/Stocks_W/threadview?bn=19842&tid=41796&mid=41798) (Mar. 9, 2006).

Foods 'disappointed' you last quarter, but they didn't 'disappoint me'. The fact is that Whole Foods beat the FY2005 guidance that they gave the Market back in 2004. Since the stock price has trended up strongly since they announced earnings it is safe to say that the Market doesn't collectively agree with your assessment. . . . 3. Like many of the other shorts on this Board you don't seem to be able to distinguish between [Generally Accepted Accounting Principles] earnings and operating cash flow. Stock options don't negatively impact the cash produced by a business—regardless of whether GAP [sic] calls it an expense and forces a company to deduct it. . . . 4. Whole Foods has publicly announced that going forward that stock options will not dilute EPS [earnings per share] by more than 10% per year. The acceleration means that dilution will be considerably less than 10% over the next few years. . . . 5. I have heard of no high profile executives leaving Whole Foods since the options were accelerated. [Post Number 213, Dec. 27, 2005]<sup>27</sup>

Whole Foods net margins were 3.54% in 2004. If they keep that margin and hit the \$10 billion sales target in fiscal year 2009 (20.72% CAGR) they will make \$354 million in that fiscal year. Current market cap is \$5.68 billion so the company is trading at 16 times their projected 2009 earnings. If they don't hit the \$10 billion target until fiscal 2010 then their CAGR for the next 6 years will be 17%. I predict they will come very close to hitting the \$10 billion target in 2009. . . . Is Whole Food's Market Cap/Stock price therefore too high? Yes it is, if they don't achieve their growth goals. No it isn't, if they do. [Post Number 708, Jan. 26, 2005]<sup>28</sup>

Such communications create opportunities and vulnerabilities for companies. While the internet is the most accessible, potent, and democratizing forum ever, users can communicate anything, regardless of source or authenticity. Information could potentially be fact or fantasy, parsed information or disinformation, a misappropriated trade secret, or part of a fraudulent securities transaction. Anonymous postings, which are an integral and accepted part of the internet culture and experience, exacerbate the problem. Posters may be casual investors or, as we now know, CEOs of publicly traded companies. It is a fantastic virtual world of conjecture among online doppelgangers<sup>29</sup>—posters' motivations and qualifications are mere guesswork. Any iden-

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27. Posting by Rahodeb to Yahoo! Finance Message Boards, [http://messages.finance.yahoo.com/Business\\_%26\\_Finance/Investments/Stocks\\_%28A\\_to\\_Z%29/Stocks\\_W/threadview?bn=19842&tid=35931&mid=35991](http://messages.finance.yahoo.com/Business_%26_Finance/Investments/Stocks_%28A_to_Z%29/Stocks_W/threadview?bn=19842&tid=35931&mid=35991) (Dec. 27, 2005).

28. Posting by Rahodeb to Yahoo! Finance Message Boards, [http://messages.finance.yahoo.com/Business\\_%26\\_Finance/Investments/Stocks\\_%28A\\_to\\_Z%29/Stocks\\_W/threadview?bn=19842&tid=17373&mid=17374](http://messages.finance.yahoo.com/Business_%26_Finance/Investments/Stocks_%28A_to_Z%29/Stocks_W/threadview?bn=19842&tid=17373&mid=17374) (Jan. 26, 2005).

29. See Stone & Richtel, *supra* note 19.

tity is possible in cyberspace where, as wags point out, "on the Internet, nobody knows you're a dog."<sup>30</sup>

### III. ANALYSIS: THE IMPACT OF ANONYMOUS POSTINGS ON THE LEGAL ENVIRONMENT OF BUSINESS

The internet as a publications medium completely turns around the historic paradigm of communications where professional entities control the flow of information. Under any identity though, Mr. Mackey, as a CEO, must be in compliance with all relevant laws. The legal doctrines relating to officers' duties when communicating corporate information include: the agency relationship and corresponding fiduciary duties, tort and intellectual property laws, securities laws, and doctrines of free speech. As one commentator wrote, "[t]his episode raises more questions about [Mr. Mackey's] sanity than his criminality' . . . 'He does not appear to have made any materially false statement . . . and he did not release material information. The real issue for the future is what his board should do. Can it have confidence in someone with judgment this poor?'"<sup>31</sup>

The communication of corporate information must conform to legal constraints regarding content and dissemination.<sup>32</sup> Corporations must manage the message, an increasingly complex mission in an era where everyone—employee, temp, vendor, supplier, sub-contractor, officer, director—is a potential publisher. Proprietary company information, policies, and strategies are located in digital files. The digital format makes this material susceptible to inexpensive misappropriation and widespread dissemination. The complications are compounded by the blurring of time and space that are hallmarks of internet and other instant communications. With a loss of distinction between work time and personal time, users are able to perform personal tasks at the office or from any other location. There is also a more ambiguous boundary between where work can be completed. Corporate information is increasingly mobile (often intermingled, downloaded, and copied over non-secure networks), and therefore at risk of being disseminated beyond the work environment.

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30. Peter Steiner, *On the Internet, Nobody Knows You're a Dog*, THE NEW YORKER, July 5, 1993, at 61, available at <http://www.unc.edu/depts/jomc/academics/dri/idog.html>.

31. Roger Parloff, *Legal Pad Blog*, FORTUNE.COM, July 12, 2007, <http://legalpad.blogs.fortune.com/2007/07/12/whole-foods-chatty-ceo-more-a-looney-problem-than-a-legal-problem/> (quoting Columbia Law School Professor Jack Coffee).

32. See Commodity and Securities Exchanges, 17 C.F.R. §§ 240, 243, 249 (2000) (clarifying rules for issuer disclosure of material non-public information, and detailing what issuers' responsibilities are).

It is notable that these postings were to a message board, and thus stand in contrast to blogging,<sup>33</sup> another common form of online communication. Many executives participate in company-sanctioned forums, writing blogs under their real names through their companies' websites. While not offering the free-wheeling, no-holds-barred environment of anonymous message boards, these blogs present other (perhaps less candid) opportunities for access, communication, and insight.<sup>34</sup> There is a qualitative difference between message board users posting under the cover of pseudonyms and bloggers posting from company-sanctioned sites using their real names.

As the CEO and Director of a publicly traded company, Mr. Mackey is in a unique position with his comprehensive knowledge of Whole Foods; as an officer he is charged with acting as a fiduciary on behalf of the company.<sup>35</sup> Mr. Mackey is an agent of the company with respect to its shareholders, so his efforts should primarily accrue benefits to the company.<sup>36</sup> This notion seems almost an anachronism in this era of corporate officer as superstar.<sup>37</sup> CEOs necessarily focus on

33. See Scott Pomeroy, *Promoting the Progress of Science and the Useful Arts in the Digital Domain: Copyright, Computer Bulletin Boards, and Liability for Infringement by Others*, 45 EMORY L.J. 1035, 1040-41, nn.14-17 (1996) (defining operational functions and uses of bulletin boards for posting comments); David Stevenson, *A Presumption Against Regulation: Why Political Blogs Should be (Mostly) Left Alone*, 13 B.U. J. SCI. AND TECH. L. 74, 74 n.1 (2007) (defining blog).

34. See Stone & Richtel *supra* note 19 (discussing the phenomenon of use of blogs); MarketBeat Staff, *The CEO Blogs*, WALL ST. J., July 12, 2007, available at <http://blogs.wsj.com/marketbeat/2007/07/12/the-ceo-blogs/> (listing the CEOs who blog under their own names, in company-sponsored forums). Famously, and as a rare exception, Robert Scoble blogged to his own site *scobleizer* while employed at Microsoft, featuring personal commentary on Microsoft. See *scobleizer*, <http://scobleizer.com/2008/02/14/microsoft-researchers-make-me-cry/> (last visited Jan. 24, 2009).

35. Nadelle Grossman, *Director Compliance With Elusive Fiduciary Duties in a Climate of Corporate Governance Reform*, 12 FORDHAM J. CORP. & FIN. L. 393, 400 (2007) (in order to promote and maintain accountability, a fiduciary duty is owed by officers and directors); cf. Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors' Fiduciary Duty Through Legal Liability*, 42 HOUS. L. REV. 393 (2005).

36. See Aaron D. Jones, *Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers Under Delaware Law*, 44 AM BUS. L.J. 475, 483 n.42 (2007) ("[i]t is beyond doubt that officers are agents of the corporation"); see also RESTATEMENT (THIRD) OF AGENCY § 8.08 (2006) (officers are required to discharge their duties in good faith with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the officer reasonably believes to be in the best interests of the corporation).

37. See, e.g., Justin Fox, *Are Today's CEOs Batting a Thousand?* CNNMONEY.COM, Oct. 20, 2006, [http://money.cnn.com/magazines/fortune/fortune\\_archive/2006/10/30/8391732/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2006/10/30/8391732/index.htm) (observing existence of "superhero ethos" at corporations, and that it does not always have a correlation to performance); Alan Webber, *OVERRATED: Business 'Super-Stars.'* USA Today, Apr. 25, 2005, available at [http://www.usatoday.com/news/opinion/editorials/2005-04-25-ceo-edit\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2005-04-25-ceo-edit_x.htm) (noting this point in time as "the era of the CEO" and commentary that this phenomenon is a disturbing trend); Michael Maccoby, *Narcissistic Leaders: The Incredible Pros, the Inevitable*

competition, customers, and markets in an effort to achieve maximum returns for the corporation. The temptation to leverage advantages through any means available is nearly irresistible. Mr. Mackey's motives remain ambiguous, and admittedly eccentric.<sup>38</sup> It is unclear whether Mr. Mackey's use of the message board forum was more "gratifying than effective in swaying opinion or stock prices."<sup>39</sup> This digital-age deception of using a pseudonym "to praise, defend or create the illusion of support for one's self, allies or company" is known as "sock-puppeting."<sup>40</sup> Yet it is unclear how seriously posts are taken—many consider such forums as "inherently untrustworthy by anyone who reads them," especially because of the online setting where the identity of the users is unknown.<sup>41</sup>

One commentator explains:

[T]hey all seemed to think that the problem [is a bit broader than just legal issues]. It's a control issue, they explained. The CEO is disseminating information that hasn't been reviewed by either the general counsel or the board. If his comments move the market, he could be engaging in stock manipulation. If anything he says is materially misleading, he's violating Section 10B of the Securities Exchange Act. If any material nonpublic information slips out, he's violating Regulation FD, which forbids selective disclosures. If he's ragging on a competitor's CEO, he could inadvertently say something defamatory. If there are confidentiality agreements in place, he could be violating them.<sup>42</sup>

Clearly there are risks associated with corporate officers and directors who post anonymous messages dealing with sensitive corporate information.

### A. Agency

Mr. Mackey is virtually the alter-ego of this company; he operates in the dual roles of Chief Executive Officer and Chairman of the Board of Directors. Corporate officers are fiduciaries of the corporation, agents charged with acting on behalf of the principal, the corpo-

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*Cons.* HARV. BUS. REV., Jan.-Feb. 2000. <http://www.maccoby.com/Articles/NarLeaders.shtml> (proposing that when businesses become significant agents of change and innovation in society, there is correlating rise of high-profile narcissist CEOs attracted to risk without regard to its costs).

38. See Collin Levy, *Mack the Nice*, WALL ST. J., Aug. 2, 2007, available at [http://online.wsj.com/article/SB118601771662185590.html?mod=todays\\_us\\_opinion](http://online.wsj.com/article/SB118601771662185590.html?mod=todays_us_opinion).

39. Stone & Richtel, *supra* note 19.

40. Stone & Richtel, *supra* note 19.

41. Levy, *supra* note 38.

42. Parloff, *supra* note 31.

ration.<sup>43</sup> Agency law is replete with cases and literature regarding directors' fiduciary duties to corporations, yet there is little scholarship<sup>44</sup> and few cases<sup>45</sup> on the nature and scope of officers' fiduciary duties. The law of agency is based on common law, where the breach of a fiduciary duty by an agent is like a tort, with liability based on negligence and damages including equitable relief.<sup>46</sup> The responsibility of an agent is to "discharge his duties . . . solely in the interest of the beneficiaries" and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man . . . would use in the conduct of an enterprise of a like character and with like aims."<sup>47</sup> The law requires that a fiduciary must satisfy the "prudent person" standard of care.<sup>48</sup>

Fiduciary duties arise independently of any employment contract that may exist between the officer and corporation.<sup>49</sup> The duty of loyalty requires the agent to act solely for the benefit of the corporate principal and to use complete candor.<sup>50</sup> Agents owe a duty of loyalty to principals; agents must refrain from actions that would conflict with principals' interests (such as disclosing trade secrets), and pursuant to this, are charged with informing their principals of any facts that materially affect the agency relationship.<sup>51</sup>

Commentators have noted that corporate officers currently operate differently from the model established in the 19th and 20th centuries.<sup>52</sup> In that era, the Board of Directors wielded the power as princi-

43. Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1601, 1607 (2005).

44. *Id.* at 1609.

45. See Z. Jill Barclift, *Senior Corporate Officers and the Duty of Candor: Do the CEO and CFO Have a Duty to Inform?*, 41 VAL. U.L. REV. 269, 270 (2006) (noting that recent legislation focused on corporate boards, and that there is little interest or activity in regulation of corporate officers, and few cases in this area to provide guidance).

46. RESTATEMENT (THIRD) OF AGENCY §§ 7.01-7.08 (2006).

47. *Bixler v. Central Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1299, (3d Cir. 1993).

48. *Id.*

49. *Bank of Am. Corp. v. Lemgruber*, 385 F. Supp. 2d 200, 224-25 (S.D.N.Y. 2005) (citing long-standing authority for the rule that fiduciary duties exists independently of contractual duties and thus provide additional theories of liability); see also *In re Edgewater Medical Center*, 344 B.R. 864, 867-70 (Bankr. N.D. Ill. 2006) (rejecting Defendant's assertion that any fiduciary duty owed is solely as a function of the parties' contractual relationship).

50. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

51. See RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006). Section 8.05 provides that an Agent may not "use or communicate confidential information of the Principal." *Id.* § 8.05. Finally, Section 8.08 provides that "an Agent has a duty to the Principal to act with the care, competence, and diligence normally exercised by Agents in similar circumstances." *Id.* § 8.08; see also Stone & Richtel, *supra* note 19.

52. See, e.g., Barclift, *supra* note 45, at 275.

pal, and agents were charged with executing the board's mandate.<sup>53</sup> In a dramatic shift, we are now in an era of officer-centered patterns of corporate power.<sup>54</sup> Officers have achieved greater control over corporate governance as directors' powers have concomitantly diminished.<sup>55</sup> This environment, where the agent exercises a great deal of control over the principal, is inconsistent with agency principles.<sup>56</sup> The recent spate of corporate scandals by corporate officers who perpetrated accounting and other forms of fraud<sup>57</sup> were made possible by the officers' failures to inform the directors of all relevant, material, and truthful information about transactions.<sup>58</sup> This trend highlights the difficulty of effective corporate governance in this era of officer-centered governance.

Whole Foods follows this pattern as well. Mr. Mackey is among the "Chief Executive Officers [who] wield enormous power in the modern corporation."<sup>59</sup> There is a "striking dearth of attention" relating to officers' agency status.<sup>60</sup> It would appear that Mr. Mackey could be responsible to the corporation on the theory that, as an agent for the corporate principal, he failed to disclose his identity while posting information about the company and its competitors.<sup>61</sup> "Mr. Mackey issued an apology for his 'error in judgment in anonymously participating on online financial message boards.'"<sup>62</sup> Any legal charges by the company against Mr. Mackey are improbable because of the respect the Whole Foods Board has for Mr. Mackey's work. While unlikely that Mr. Mackey's postings will generate any other liability issues for Whole Foods, Whole Foods could face liability for postings to the extent they impact securities laws.

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53. *Id.*

54. See Johnson & Millon, *supra* note 43, at 1617-18 (noting how this officer-centered pattern of corporate power diminishes controls over corporate activities since it reverses the traditional paradigm in the Board-as-Principal—Officer-as-Agent relationship).

55. *Id.* at 1621.

56. Barclift, *supra* note 45, at 301.

57. See Johnson & Millon, *supra* note 43, at 1652.

58. See Barclift, *supra* note 45, at 270.

59. Johnson & Millon, *supra* note 43, at 1599.

60. See Johnson & Millon, *supra* note 43, at 1611, 1614-15, 1621-22.

61. See RESTATEMENT (THIRD) OF AGENCY § 8.10 (2006) ("an agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise."); see also *id.* § 8.05 (providing that an agent has the duty "not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party").

62. Andrew Martin, *Judge Sides With Whole Foods on Deal for Wild Oats*, N.Y. TIMES, Aug. 17, 2007, available at <http://www.nytimes.com/2007/08/17/business/17food.html?scp=3&sq=andrew+martin+%2Bwhole+foods&st=nyt> (quoting Mr. Mackey).

## B. *Intellectual Property*

While all forms of communication have the potential to expose proprietary corporate information, infringe on copyrights, or give rise to tort claims, communicating on the internet is unique. Nothing compares to the internet's distribution potential in terms of speed, reach, and cost. The internet compounds the probability and magnitude of harm, and because communications can be done anonymously, defendants are increasingly judgment-proof.<sup>63</sup> Both Mr. Mackey and the corporate entity Whole Foods have exposure to these troublesome liability issues.

Ideas are the engine of innovation, and this is reflected in the economic development caused by those who capture the ideas. Intellectual property represents the legal status of ownership of intellectual capital, or ideas. Intellectual property consists of four types of property interests: copyright, patent, trade secret, and trademark. A recent study by USA for Innovation estimates "that U.S. intellectual property today is worth [approximately] \$5.5 trillion, equivalent to about 45 percent of U.S. GDP [Gross Domestic Product] and greater than the GDP of any other nation in the world."<sup>64</sup> It is reported that the value of intellectual property accounts for two-thirds of the market capitalization of U.S. corporations.<sup>65</sup> This contrasts sharply with the earlier era when corporations' business assets consisted mostly of tangible property.<sup>66</sup> Ideas and innovations fuel our economy. "The emergence of new digital information technologies, such as the internet, has had a significant impact on copyright and related rights [and related industries] . . . throughout the world."<sup>67</sup> The authors of the USA for Innovation report note that growth and productivity, which "raise output and incomes . . . depend vitally on respect and protection for the intellectual property embodied in every innovation."<sup>68</sup> Corporate intellectual property has become startlingly porous because of the internet. It is porous in the sense that many current corporate assets are one of millions of digital files, made portable through internet connec-

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63. Reder & O'Brien, *supra* note 4; see also DVD Copy Control Ass'n, Inc. v. Bunner, 116 Cal. App. 4th 241, 255 (2004) (refusing to find liability for those who merely re-publish trade secret content that was already widely released).

64. See Robert J. Shapiro & Kevin A. Hassett, *The Economic Value of Intellectual Property*, USA FOR INNOVATION, Oct. 2005, at 3, [http://www.ipxi.com/press/Hasset\\_Shapiro\\_2005.pdf](http://www.ipxi.com/press/Hasset_Shapiro_2005.pdf).

65. Jenna Greene, *Patent Office at Center Stage*, NAT'L L.J., Jan. 15, 2001, at B8.

66. Andrew Beckerman-Rodau, *Trade Secrets – The New Risks to Trade Secrets Posed by Computerization*, 28 RUTGERS COMP. & TECH. L.J. 227, 228, (2002).

67. *E-Commerce and Copyright*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/copyright/en/ecommerce/>.

68. Shapiro & Hassett, *supra* note 64, at 3.

tivity. Corporate officers are in the best situation to understand the intellectual property portfolio.

The intellectual property most at risk is trade secrets. In a sort of circular pattern, as our economy has become more data-based, intellectual property has become more valuable—and because of this companies “now claim a broader range of non-public information as trade secrets than in the past.”<sup>69</sup> Trade secrets comprise any,

[F]ormula, pattern, compilation, program device, method, technique, or process, that: (1) [d]erives independent economic value, actual or potential, from not being generally known to the public or other persons who can obtain economic value from its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>70</sup>

“Trade secrets can easily be lost, not only by reverse engineering, but also through accidental disclosure, independent creation by another, use of other proper means to obtain the secret, and all too often by misappropriation.”<sup>71</sup> In this way, trade secrets are more susceptible to misuse because so many company assets are digital, and commonly represent fleeting plans (including, for example, new store locations, store format, pricing and marketing decisions). By their very nature, trade secrets are easier to create than to maintain. “Where patent law acts as a barrier, . . . trade secret law functions relatively like a sieve.”<sup>72</sup>

The online communications commonly used have obscured the inherent risks in using the internet.<sup>73</sup> Company trade secrets are at risk like never before, and because of the value of trade secrets, corporations have more incentive than ever to seek the protection of trade secrets. While the risk exists that officers (under cover of their pseudonyms) will intentionally disclose company trade secrets, the threat is not substantial because officers' interests are closely aligned with corporate interests; this contrasts with cases involving the theft or misappropriation of trade secrets by employees of corporations.<sup>74</sup> Two caveats exist regarding officer misappropriation of trade secrets: the trade secrets could be misappropriated accidentally or when the shared interests between officers and their corporations diverge. For

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69. Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777, 789 (2007); cf. Beckerman-Rodau, *supra* note 66, at 267-68, n.n.176, 177.

70. UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 437, 438 (1990).

71. Samuelson, *supra* note 69, at 784.

72. *Keweenaw Oil Co. v. Bicon Corp.*, 416 U.S. 470, 489 (1974) (Burger, C.J.).

73. Beckerman-Rodau, *supra* note 66, at 268.

74. See Samuelson, *supra* note 69, at 777 & n.1-6 (discussing cases and outcomes).

example, interests could diverge when major corporate decisions requiring board or shareholder approval do not have complete agreement.

Corporate best practices in these instances include drafting a comprehensive agreement covering non-disclosure of company information by all employees, vendors, suppliers or sub-contractors, and developing measures to secure material in the workplace and on any mobile devices, work-related software, and hardware.<sup>75</sup>

Potential liability exists for copyright infringement on the theory that anonymous officers posted corporate documents. Copyright protection “subsists in . . . original works of authorship fixed in any tangible medium of expression.”<sup>76</sup> The owner of the copyright has the exclusive rights to the works and controls a wide range of uses.<sup>77</sup> For example, officers could include quotations from company publications, employees’ creative works, or computer code in their communications.<sup>78</sup> Just as with trade secret misappropriation, copyright infringement claims could emerge in that unlikely scenario where the parties’ mutual interests diverge.

In an era where the lines between the company and the personal are so blurred, Mr. Mackey operated as the alter ego of the company, and could have communicated using the company’s copyright-protected works. This type of use, known as a personal productive use, is typified by online postings “with creative and editorial discretion” over works created by others.<sup>79</sup> Historically, such appropriation of parts of copyright-protected works was considered infringing, but fair use jurisprudence has evolved to recognize that such uses may be transformative, especially where there is an articulated public interest in the postings.<sup>80</sup> Companies that can prove the existence of a trade secret and reasonable efforts to maintain its secrecy are likely to be successful in pursuing claims of misappropriation, although the information’s status as a trade secret may already be compromised or lost because of the disclosure.<sup>81</sup> Copyright infringement claims are less

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75. See Beckerman-Rodau, *supra* note 66, at 268-73.

76. Copyrights, 17 U.S.C. § 102 (2006).

77. See *id.* § 106 (2006).

78. See Benjamin Ostrader, *Problems and Solutions to Corporate Blogging: Model Corporate Blogging Guidelines*, 7 J. High Tech. L. 226, 235-36 (2007).

79. See Jeannine M. Marques, Note, *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 33 Berkeley Tech. L.J. 331, 331-32 (2007); cf. Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 Cardozo Arts & Ent. L.J. 391, 394 (2005).

80. See Madison, *supra* note 79, at 391 (suggesting that fair use is subject to interpretation and re-interpretation).

81. See Marques, *supra* note 79, at 354.

likely to be successful when courts are increasingly willing to consider the uses of other's copyright-protected content as fair uses.

### C. *Torts: Defamation, Trade Libel, Invasion of Privacy, Harassment*

Under his anonymous pseudonym, Mr. Mackey sparred with other posters and engaged in anonymous attacks of rival companies on the Yahoo site.<sup>82</sup> Defamation becomes a very real possibility where communications occur in forums such as online message boards. In that setting, vitriolic messages can be the norm as posters assume they have no responsibility for their messages. Defamation consists of the publication to someone other than the plaintiff of a false statement of fact, which harms that plaintiff, where the communication is unprivileged.<sup>83</sup> If the statement is made about a public figure, then the plaintiff must also prove actual malice (that the statement was made with reckless disregard for the truth of the matter asserted). Truth is a complete defense to claims of defamation, and privilege is a defense in certain situations.<sup>84</sup> Statements of opinion are not actionable under a defamation theory.<sup>85</sup> Claims of product disparagement and trade libel have the same elements and defenses as defamation.<sup>86</sup>

Two of Mr. Mackey's postings to the Yahoo message board serve as a possible basis for a defamation claim:

"Bankruptcy remains a distinct possibility (for Wild Oats) . . . if the business isn't sold within the next few years."<sup>87</sup>

"'Would Whole Foods buy OATS?' . . . 'Almost surely not at current prices. What would they gain? OATS locations are too small,'"<sup>88</sup> and in yet another took a shot at Wild Oats management, stating that it "clearly doesn't know what it is doing. . . . OATS has no value and no future."<sup>89</sup>

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82. See Kesmodel & Wilke, *supra* note 1.

83. DAVID P. TWOMEY & MARIANNE MOODY JENNINGS, *BUSINESS LAW: PRINCIPLES FOR TODAY'S COMMERCIAL ENVIRONMENT* 186 (2d ed. 2008).

84. *Id.*

85. See *Kinderstart.com v. Google, Inc.*, No. C 06-2057 JF, 2007 U.S. Dist. LEXIS 22637, \*20-22 (N.D. Cal. Mar. 16, 2007) (court distinguished false statements which are actionable, from unfavorable opinion which is not actionable).

86. TWOMEY & JENNINGS, *supra* note 83, at 186.

87. Posting of Chanery to [http://search.messages.yahoo.com/search?.mbintl=finance&q=rahodeb&action=search&r=huiz75WdCYfD\\_KCA2Dc-&within=author&within=tm](http://search.messages.yahoo.com/search?.mbintl=finance&q=rahodeb&action=search&r=huiz75WdCYfD_KCA2Dc-&within=author&within=tm) (July 12, 2007).

88. Posting of afbu20 to [http://messages.finance.yahoo.com/Business\\_%26\\_Finance/Investments/Stocks\\_%28A\\_to\\_Z%29/Stocks\\_V/threadview?bn=19642&tid=212271&mid=212271](http://messages.finance.yahoo.com/Business_%26_Finance/Investments/Stocks_%28A_to_Z%29/Stocks_V/threadview?bn=19642&tid=212271&mid=212271) (Nov. 24, 2008).

89. *Id.*

With regard to the elements of a defamation cause of action, publication by Mr. Mackey (to an entity not the potential plaintiff) clearly exists. The real question in these lawsuits is whether the statements were asserted facts or opinions. The context of the comments is outcome-dispositive. This fact-opinion dichotomy is grounded in First Amendment jurisprudence where “under the First Amendment there is no such thing as a false idea.”<sup>90</sup> This crucial question is a question of law to be decided by the court.<sup>91</sup> While the distinction as to what is fact and what is opinion can be difficult, the best resolution analyzes the published statements using a “totality of the circumstances” approach.<sup>92</sup> This “contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed” to decide whether the average reader could have reasonably understood the alleged defamatory statements to be factual.<sup>93</sup>

Message boards traffic in rumor, feature hyperbole and vitriol, all in a style best described as episodic outbursts of raving tantrums. It cannot reasonably be asserted in Mr. Mackey’s case that his posted comments would be construed as facts. “Information on chat boards is considered inherently untrustworthy by anyone who reads them, especially because so much is posted anonymously.”<sup>94</sup> Another commentator found “[t]he comments were typical of banter on Internet message boards for stocks.”<sup>95</sup> Had these remarks been posted by Mr. Mackey as the CEO, in authored format within a company-sponsored forum (i.e., an official company blog), then the imprimatur of officially-sanctioned company research and viewpoint would tend towards being factual. If a court found Mr. Mackey’s statements defamatory, the plaintiffs still would not prevail because it is highly likely OATS CEO Mr. Perry Odak would be considered a public figure (to the relevant community of online posters), and thus the additional element for public figure plaintiffs in defamation claims—actual malice<sup>96</sup>—does not exist in these postings, since these message boards are inherently unreliable sources of factual information due to the pseudonymous

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90. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

91. *Baker v. Los Angeles Herald Examiner*, 32 Cal. 3d 254, 260-61 (1986).

92. *See id.* at 260.

93. *Id.* at 261.

94. Levy, *supra* note 38.

95. Kesmodel & Wilke, *supra* note 1.

96. TWOMEY & JENNINGS, *supra* note 83, at 186. Other potential causes of action include trade libel, invasion of privacy, and harassment. Trade libel requires publication of an intentional disparagement of plaintiff’s property which results in pecuniary damage to plaintiff. *See Lloyd’s v. Real Estate Prof. Ins. Co.*, CV 06-4783, 2007 U.S. Dist. LEXIS 88241 (C.D. Cal. Nov. 26, 2007).

nature of the postings, and the contents are in their nature, caustic and scathing.

#### D. *Securities Compliance*

Two potentially vexing issues arise under the securities laws concerning the: (1) selective disclosure of non-public corporate information, and (2) prohibition on securities fraud.

##### 1. Regulation FD

Regarding the first issue, Regulation Fair Disclosure (“Reg FD”) was enacted in an effort to more closely regulate corporate communications.<sup>97</sup> Historically, favored investors (such as financial industry analysts and large institutional investors) received information ahead of individual investors, resulting in market inefficiencies and a lack of transparency.<sup>98</sup> The SEC adopted Reg FD to encourage the flow of information to all investors through a system of simultaneous and widespread dissemination of the same information.<sup>99</sup> Under Reg FD, material corporate information must be disseminated through official press releases. Interestingly, the SEC does not yet recognize company blogs, email alerts, webcasts, or websites as venues for fulfilling the widespread dissemination requirement.<sup>100</sup>

To the extent that selective disclosure of material nonpublic information occurs, Reg FD requires that companies make a public disclosure simultaneously; in cases when the communication was unintentional, public disclosure must be promptly made by filing a Form 8K with the SEC.<sup>101</sup> Importantly, Reg FD “does not require that corporate officials only utter verbatim statements that were previously publicly made. . . . Fair accuracy, not perfection, is the appropriate

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97. Commodity and Security Exchanges, 17 C.F.R. §§ 243.100-102 (2006).

98. Floyd Norris, *Market Place*; S.E.C. Puts Data Disclosure in the Spotlight, N.Y. TIMES, Nov. 26, 2002, at C1, available at <http://query.nytimes.com/gst/fullpage.html?res=9506EFDE1F39F935A15752C1A9649C8B63>.

99. SEC, FINAL RULE: SELECTIVE DISCLOSURE AND INSIDER TRADING, (2000), <http://www.sec.gov/rules/final/33-7881.htm>. Cf. *Opinion Journal*, *supra* note 19 (asserting that Reg FD, as well as the Sarbanes-Oxley Act put CEOs in a “straitjacket” because the laws have the perverse effect of restricting the flow of information).

100. See LAURA UNGER, SEC, SPECIAL STUDY, REGULATION FAIR DISCLOSURE REVISITED (2001), <http://www.sec.gov/news/studies/regfdstudy.htm>; Jonathan’s Blog, *The Internet and Regulation FD*, [http://blogs.sun.com/jonathan/entry/regfd\\_and\\_the\\_odf\\_tidal](http://blogs.sun.com/jonathan/entry/regfd_and_the_odf_tidal) (Mar. 8, 2007) (CEO Jonathan Schwartz is a leading advocate for recognition of alternative means for fulfilling the widespread dissemination requirement of Regulation FD to include company sites. Note as well that this is a CEO writing in an officially-sanctioned company blog).

101. See *SEC v. Siebel Systems, Inc.*, 384 F. Supp. 2d 694, 697 (S.D.N.Y. 2005).

standard.”<sup>102</sup> “To require a more demanding standard . . . could compel companies to discontinue any spontaneous communications. . . . If Regulation FD is applied [too broadly, in a manner contrary to this policy] the very purpose of the regulation . . . would be thwarted.”<sup>103</sup>

In the case of Mr. Mackey’s postings, when he touted his own company’s stock, citing Whole Foods’ company performance, expansion plans and sales figures, as well as predicting future earnings and share price appreciation, the question arises whether he violated Reg FD by making selective disclosures of material company information in this forum. Necessary elements of a Reg FD violation are that the subject statements were material to investors and were selectively, rather than publicly, disclosed.<sup>104</sup> While Reg FD does not define the terms material or non-public disclosure, the SEC Final Release advises that case law already adequately defines these terms. In defining “material,” the SEC’s Adopting Release referred to *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).<sup>105</sup> This case concluded that “information is material if ‘there is a substantial likelihood that a reasonable shareholder would consider it important’ in making an investment decision.”<sup>106</sup> To further analyze materiality, courts may also assess a statement’s importance and relevance by surveying share price fluctuations surrounding the time the statements were made.<sup>107</sup> Material facts include those that “affect the probable future of the company and [that] may affect the desire of investors to buy, sell, or hold the company’s securities.”<sup>108</sup>

Potential Reg FD litigation would most likely be resolved in favor of Mr. Mackey. With respect to the materiality element of the charge, it is highly unlikely that reasonable shareholders or investors would consider pseudonymous postings in making investment decisions. Regarding the disclosure of non-public information, since Mr. Mackey wrote under a pseudonym, investors cannot think that the statements were made on behalf of the company. Hence, there was no public dissemination of any material non-public company information.

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102. *Id.* at 704-05.

103. *Id.*

104. *Siebel*, 384 F. Supp.2d at 700; *see also* Commodity and Securities Exchanges, 17 C.F.R. §§ 240, 243, 249 (2000).

105. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg 51716-01, 51721 (Aug. 20, 2004).

106. *Id.*; *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S., 438, 449 (1976).

107. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 851 (2d Cir. 1968) (en banc); *Elkind v. Liggitt & Myers, Inc.*, 635 F.2d 156, 166-67 (2d Cir. 1980).

108. *Texas Gulf Sulphur*, 401 F.3d at 849.

## 2. Securities Fraud

After this story broke, the Whole Foods Board's Special Committee was charged with considering whether there was potential liability for securities fraud. The statutory provisions make it unlawful to use manipulative or deceptive acts in connection with securities transactions.<sup>109</sup> This includes making untrue statements of a material fact or omitting to state material facts necessary to make other statements accurate.<sup>110</sup> For claims to be actionable, plaintiffs must prove reliance on defendants' misrepresentations.<sup>111</sup> The Supreme Court requires intent, rather than mere negligence, for securities fraud claims to be actionable.<sup>112</sup> Securities laws provide for criminal or administrative sanctions and private rights of action.<sup>113</sup>

The government's burden of proof in this case, showing Mr. Mackey knowingly misrepresented material facts that produced reliance, is a high threshold that cannot be reached. Within his collective postings, Mr. Mackey featured news, including financial results, speculation about future company expansion, share price, competition, market conditions, and an arguably important use of a contrivance (his pseudonym). But context is important, and one only need spend a few minutes on any of the online message boards to understand that in this atmosphere, nothing is really what it seems. Invective and hysteria are the headliners; animus among posters and barbs regarding peripheral ephemera and trivia are the side-shows.

An argument cannot seriously be advanced that the investing public would be able to prove materially false statements or detrimental reliance on these pseudonymous postings. The investing public would view these statements (even seemingly worthy and important communications) no differently from other hyperbolic statements of other pseudonymous posters. Even if, as some commentators point out,

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109. Commerce and Trade, 15 U.S.C. § 78j (2006) (popularly known as Section 10(b)).

110. *See* Commodity and Securities Exchanges, 17 C.F.R. § 240.10b-5 (2006) (popularly known as Rule 10b-5; it was adopted by the SEC in 1942).

111. *See* *Basic, Inc. v. Levinson*, 485 U.S. 224, 232-33 (1988) (discussing the contours of materiality requirement, as well as the reliance standard in securities cases); *cf.* *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735-36 (1975) (highlighting limits of the reach of securities laws).

112. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976); *see also* 15 U.S.C. § 78j(b) (2006) (making it illegal to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance").

113. *Cent. Bank v. First Interstate Bank*, 511 U.S. 164, 171 (1994); *Santa Fe Indus. v. Green*, 430 U.S. 462, 474-76 (1977).

over time Mr. Mackey was identifiable as the poster *Rahodeb*,<sup>114</sup> the government will not be able to successfully mount a case against Mr. Mackey based on securities fraud. However, Mr. Mackey's actions to obscure his identity could be considered fraudulent as the omission of a material fact. One blogger suggested:

Even without disclosing his identity or role in the company, the depth of the comments, the accuracy over time, and the uniqueness of the information, may well have alerted the market to the fact that he had unique information that could only come from an insider . . . . In those circumstances, those in the market may well have treated the statements as material.<sup>115</sup>

This could be the basis for a successful securities fraud theory.

### E. *Corporate Governance, Compliance, and Speech*

The real tensions underlying this incident concern work-related speech by executives that is not conveyed in an official capacity as officer of the company but instead as an individual hobbyist disseminating business information—in the most public of ways—through the internet. Many modes of communication feature company information and can transgress securities and other laws.

Companies must learn to control the content of a communication about the business, even where the communication is typically intermixed with personal speech as well. It is imperative for companies to develop policies and guidance for the online activities of its officers and employees. The urgency of this mandate is magnified: more people are drawn to message boards under pseudonyms; social networking sites (i.e., MySpace, Facebook, LinkedIn) allow individuals to be identifiable; and blogging sites feature diary-like discourse about personal and work lives. Reconciling the personal interests of officers and employees (in creating and disseminating communications) with the needs of business (to control proprietary information or other work matters relating to information security, reputation management, compliance, or issues with the potential for company liability) is more difficult as the modes and ease of communicating increase.

The question arises regarding the extent to which private employers may limit or control speech. If speech involves proprietary business information, employees have no protection, and there exists a poten-

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114. See Posting of Jay Robert Brown to Race to the Bottom.org, <http://www.theracetothetbottom.org/the-sec-governance/corporate-disclosure-and-the-internet-the-odd-case-of-john-m.html> (July 14, 2007).

115. *Id.*

tial trade secret misappropriation or theft.<sup>116</sup> As for communications within the workplace, the majority of courts have established that there is generally no First Amendment free speech protection in private workplaces.<sup>117</sup> There are limited exceptions to this rule, particularly if the speech involves important public policy issues regarding safety, health, and retaliatory employment decisions.<sup>118</sup> This exception does not apply to mere individual complaints about the workplace.<sup>119</sup>

A few strategies exist for companies to control liability by exerting control over this environment. First, employers are well-served to conduct a thorough vetting of all potential officers and employees, including background checks and internet searches, in addition to standard reference checks. Companies also must create an internet use policy, or update the present policy, to make officers and employees aware of which information belongs to the company or is considered proprietary. Employers should also consider requesting each officer and employee to sign a non-disclosure agreement, detailing what information is covered under the agreement. Companies should sponsor online participation/community sites (including wikis, forums, blogging, or message boards) for officers and employees.

While this may seem counterintuitive, it has proven to be both pragmatic and successful. Examples of the range of adoption of these communications technologies include the popular blog of Jonathan Schwartz, Sun Microsystems CEO;<sup>120</sup> WalMart buyers,<sup>121</sup> whose company-sponsored blog is recognized as influential, extending beyond the WalMart environment;<sup>122</sup> Mark Jen whose blog famously contained confidential information and criticism of his new (quickly to be his former) employer Google;<sup>123</sup> and Robert Scoble who wrote a

116. See Samuelson, *supra* note 69, at 777-78 (noting too though, conflicts between trade secret law invoked by employers, and First Amendment rights invoked by officers and employees may escalate in the future since employers are protecting more information with trade secret status).

117. See Sprague, *supra* note 4, at 377-78 & n.127.

118. See Sprague, *supra* note 4, at 372-79; cf. Michael Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006) (suggesting that the jurisprudence of commercial speech and corporate political speech are in need of a new approach).

119. *Id.*

120. See Jonathan's Blog, <http://blogs.sun.com/jonathan/> (last visited Jan. 24, 2009).

121. See Check Out: Where the Lanes Are All Open, <http://checkoutblog.com/> (last visited Jan. 24, 2009).

122. See Michael Barbaro, *WalMart Tastemakers Write Unfiltered Blog*, N.Y. TIMES, Mar. 3, 2008, available at <http://www.nytimes.com/2008/03/03/business/03walmart.html>.

123. See plaxoed!, <http://blog.plaxoed.com/2005/02/11/the-official-story-straight-from-the-source/> (last visited Jan. 24, 2009).

highly popular blog while employed at Microsoft.<sup>124</sup> There are even examples of hybrid blogs using pseudonyms; the most well-known hybrid blog is the 'Fake Steve' blog, written by journalist Daniel Lyons to discuss Steve Jobs and Apple.<sup>125</sup> Providing a service for a known demand generates goodwill, gives companies a ready cache of incredibly useful information, and is an easy way to monitor issues and transgressions. Companies would also benefit through monitoring employee communications from within their corporate communications systems, as well as through engaging an online service that tracks communications about those companies occurring on other sites and forums.<sup>126</sup>

Companies have incentives to regulate communications by integrating internet and online policies into the formal employment relationship because, in an era when it is nearly impossible to control the medium, companies still desire to exert some level of control over the online posters and the messages. After the firestorm over Mr. Mackey's Yahoo! postings and his subsequent apology,<sup>127</sup> the Whole Foods Board of Directors immediately created a Special Committee to investigate and report on recommendations to the Board. Within a few months, the committee concluded its investigation,<sup>128</sup> and the Board "sharply restricted online activities" by company officers.<sup>129</sup> The new policy "bars top executives and directors from posting messages about Whole Foods, its competitors or vendors on Internet forums that aren't sponsored by the natural-foods chain."<sup>130</sup>

These provisions are part of the amended Code of Business Conduct, which did not previously address third-party online postings.<sup>131</sup> This code now provides:

124. See scobleizer, <http://scobleizer.com/2008/02/14/microsoft-researchers-make-me-cry/> (last visited Jan. 24, 2009); see also *supra* note 34 and accompanying text.

125. See The Secret Diary of Steve Jobs, <http://fakesteve.blogspot.com/> (last visited Jan. 24, 2009).

126. There are many such services, including: Technorati, Google Alerts, Trackur, MonitorThis, Naymz, Rableaf to use for reputation management.

127. See Whole Foods Mkt. Press Room, Apology Statement, **WHOLE FOODS MARKET**, July 17, 2007, [http://www.wholefoodsmarket.com/pressroom/pr\\_07-17-07b.html](http://www.wholefoodsmarket.com/pressroom/pr_07-17-07b.html).

128. See Whole Foods Market, Investor Relations, [http://www.wholefoodsmarket.com/investor/pr07\\_10-05.html](http://www.wholefoodsmarket.com/investor/pr07_10-05.html) (last visited Jan. 24, 2009); see also David Kesmodel, *Whole Foods Ends Probe of CEO Web Postings*, WALL ST. J., Oct. 6, 2007, at A18, available at [http://online.wsj.com/article/SB119162494539550641.html?mod=hps\\_us\\_whats\\_news](http://online.wsj.com/article/SB119162494539550641.html?mod=hps_us_whats_news) (reporting that the special committee of the board of directors reported their conclusions and reiterating their support for Mr. Mackey, and that the committee turned over its finding to the SEC).

129. David Kesmodel, *Whole Foods Bars Executives From Web Forums*, WALL ST. J., Nov. 7, 2007, at A14, available at <http://online.wsj.com/article/SB119438706838984352.html>.

130. *Id.*

131. *Id.*

To avoid the actual and perceived improper use of Company information, and to avoid any impression that statements are being made on behalf of the Company, unless approved by the Nominating and Governance Committee, no member of Company Leadership . . . may make any posting to any non-Company-sponsored internet chat room, message board, web log (blog), or similar forum, concerning any matter involving the Company, its competitors or vendors, either under their name, anonymously, under a screen name, or communicating through another person. Violation of this policy will be grounds for dismissal.<sup>132</sup>

Company leadership includes directors, executive team member, and regional vice presidents.<sup>133</sup> Most notably, the Code amended the employment relationship to define improper communications by company officials as proper grounds for dismissal. The Board gave Mr. Mackey a pass on this round, and “reiterated its support for Mr. Mackey, who co-founded the company,” after an internal investigation found that no laws were broken.<sup>134</sup>

Company leadership is expected to use and protect information for business purposes only, and to limit dissemination to only those who have a need to know the information for business purposes.<sup>135</sup> Additionally, company leadership now has more extensive restrictions on it than non-officer company employees for their online activities. The Board made it clear that such restrictions are coextensive with the knowledge company leadership possesses. In other words, the code necessitates stricter requirements of company leadership, due to their insider status and extensive knowledge of proprietary information, than of non-officer employees because companies must be able to manage the flow of material corporate information.

#### IV. CONCLUSION

Corporations are charged with managing the release of material information so that no investor is disadvantaged. It behooves companies to better manage their employees and monitor sites to minimize potential liability. To maximize the ability to govern, companies must develop computer usage policies covering any use of company information, even during off-work hours and when using non-work com-

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132. Whole Foods Mkt. Corporate Governance. Code of Business Conduct, *WHOLE FOODS MKT.*, Aug. 14, 2008, at 10, <http://www.wholefoodsmarket.com/company/pdfs/codeofconduct.pdf>. Whole Foods notified the SEC about the policy changes. See *WHOLE FOODS MKT.*, FORM 8-K (2007), available at [http://www.sec.gov/Archives/edgar/data/865436/000110465907080232/a07-28628\\_18k.htm](http://www.sec.gov/Archives/edgar/data/865436/000110465907080232/a07-28628_18k.htm).

133. Kesmodel, *supra* note 129.

134. Kesmodel, *supra* note 129.

135. Whole Foods Mkt. Corporate Governance, *supra* note 132, at 9.

munications systems. Companies should also deploy non-disclosure agreements for officers and employees. Corporate governance concerns must now be expanded to address corporate director and officer electronic communications protocols to guarantee the quality and security of information assets, corporate reputation, and regulatory compliance.