

<https://www.youtube.com/watch?v=DX5G47mhM28>

CEOs GONE WILD

You Can't Say "Anything"



Reactive vs. Proactive

- Lawyers are hired to give legal advice, how hard do we draw that line? Is that enough?
- Your client is the company, not the CEO. Does that match the reality of our job?
- Can in-house lawyers fix problems proactively? Does that change the scope of our job?



Harvard Law School Forum on Corporate Governance and Financial Regulation

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The Inside Counsel Revolution

Posted by Benjamin W. Heineman, Jr., Harvard Law School and Harvard Kennedy School of Government, on Tuesday, March 29, 2016

on The Inside Counsel Revolution Comments Off   Print  E-Mail  Tweet

Tags: Boards of Directors, Compliance & ethics, Corporate culture, Corporate governance, Corporate Social Responsibility, Fiduciary duties, General counsel, Inside counsel, Management, Risk, Risk management

More from: Ben Heineman

Editor's Note: Ben W. Heineman, Jr. is a former GE senior vice president for law and public affairs and a senior fellow at Harvard University's schools of law and government. This post is based on an article that first appeared in *Corporate Counsel* magazine and is an excerpt from Mr. Heineman's new book, *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension*.

The practical ideal of the modern general counsel is a lawyer-statesperson who is an outstanding technical expert, a wise counselor and an effective leader, and who has a major role assisting the corporation achieve the fundamental goal of global capitalism: the fusion of high performance with high integrity and sound risk management. For the lawyer-statesperson, the first question is: "Is it legal?" But the ultimate question is: "Is it right?"

This vision of the general counsel has been a critical element of the inside counsel revolution that began in the late 1970s and that has increased in scope and power ever since. Working with the CEO and other senior executives, the GC must forge an unbreakable bond between performance, integrity and risk on a set of foundational corporate issues: business strategy, culture, compliance, ethics, risk, governance, citizenship and organization. In so doing, the GC must help create the trust in the enterprise that is so vital to its sustainability and durability: trust among employees, shareholders, creditors, customers, partners, suppliers, regulators, media, NGOs and the public. To carry out this challenging role, the GC must resolve the most basic problem confronting inside lawyers: being partner to the board of directors, the CEO and business leaders but ultimately being guardian of the corporation.

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FIFA



What happened?



2015: US
indictment -
92 counts
and 25 FIFA
execs

2017: Garcia
Report

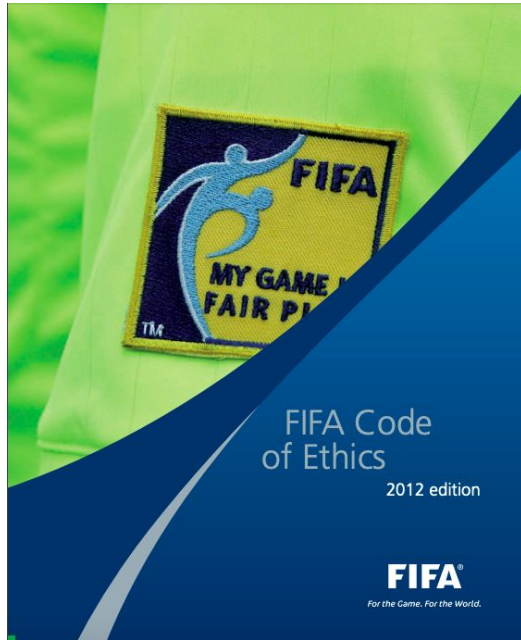
2018: Swiss
courts take
action; FIFA
denies human
rights
atrocities

2010: FIFA
approves
Russia 2018
and Qatar
2022 World
Cups

2015/2016:
President
steps down;
general
counsel gets
promotion

2018: New
President and
legal staff

Proactive reform - is it possible?



FIFA.com / WHO WE ARE

ASSOCIATIONS FIFA CONGRESS THE PRESIDENT FIFA COUNCIL SECRETARY GENERAL COMMITTEES HOME OF FIFA

Independent Ethics Committee

The [Independent Ethics Committee](#) is one of FIFA's judicial bodies. It is primarily responsible for investigating possible infringements of the FIFA Code of Ethics. Since 2012, it has been divided into two separate chambers – the investigatory chamber and the adjudicatory chamber.

JUDICIAL BODIES

- Appeal Committee >
- Disciplinary Committee >
- Ethics Committee

CHAIRMAN

SKOURIS Vassilios Greece

CHAIRWOMAN

ROJAS Maria Claudia Colombia

DEPUTY CHAIRMAN

DE VITA Bruno Canada

NGOGA Martin Rwanda

PRADHAN Vinayak Malaysia

SUNIA Fiti American Samoa

FYRE FESTIVAL



- Intended to be a “luxury music festival”
- Unfolds numerous frauds committed by founder Billy McFarland, CEO of Fyre Media Inc., and rapper, Ja Rule



What Was Promised...



What Actually Happened...



Legal Issues

Case 2:17-cv-03245 Document 1 Filed 04/30/17 Page 1 of 21 Page ID #:1

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Attorneys for Plaintiff DANIEL JUNG, individually and
as the representative of a class of similarly-situated persons

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DANIEL JUNG, individually and as the
representative of a class of similarly-
situated persons;

Plaintiffs,

vs.

BILLY MCFARLAND, an individual;
JEFFREY ATKINS p/k/a JA RULE, an
individual; FYRE MEDIA, INC., a
Delaware corporation; and DOES 1
through 50, inclusive;

Defendants.

Case No.: 2:17-cv-03245

CLASS ACTION COMPLAINT

1.FRAUD

2.FRAUD—NEGLIGENT

MISREPRESENTATION

3.BREACH OF CONTRACT

4.BREACH OF THE COVENANT

OF GOOD FAITH AND FAIR

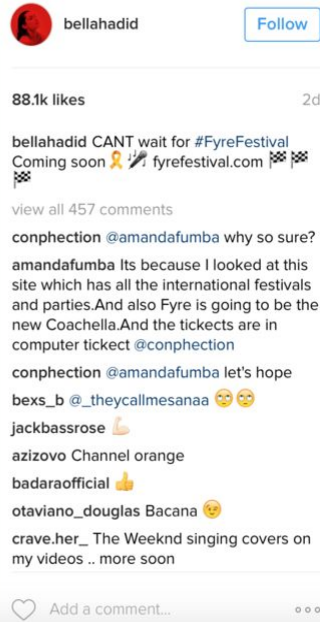
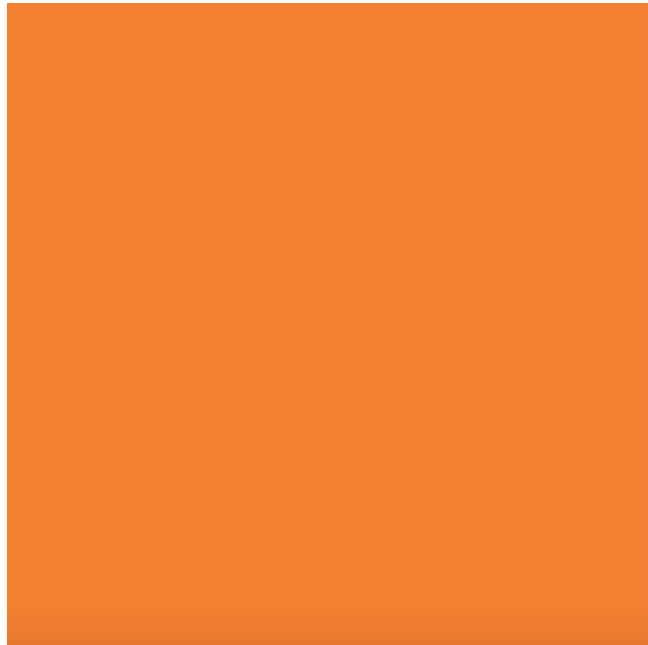
DEALING

DEMAND FOR JURY TRIAL

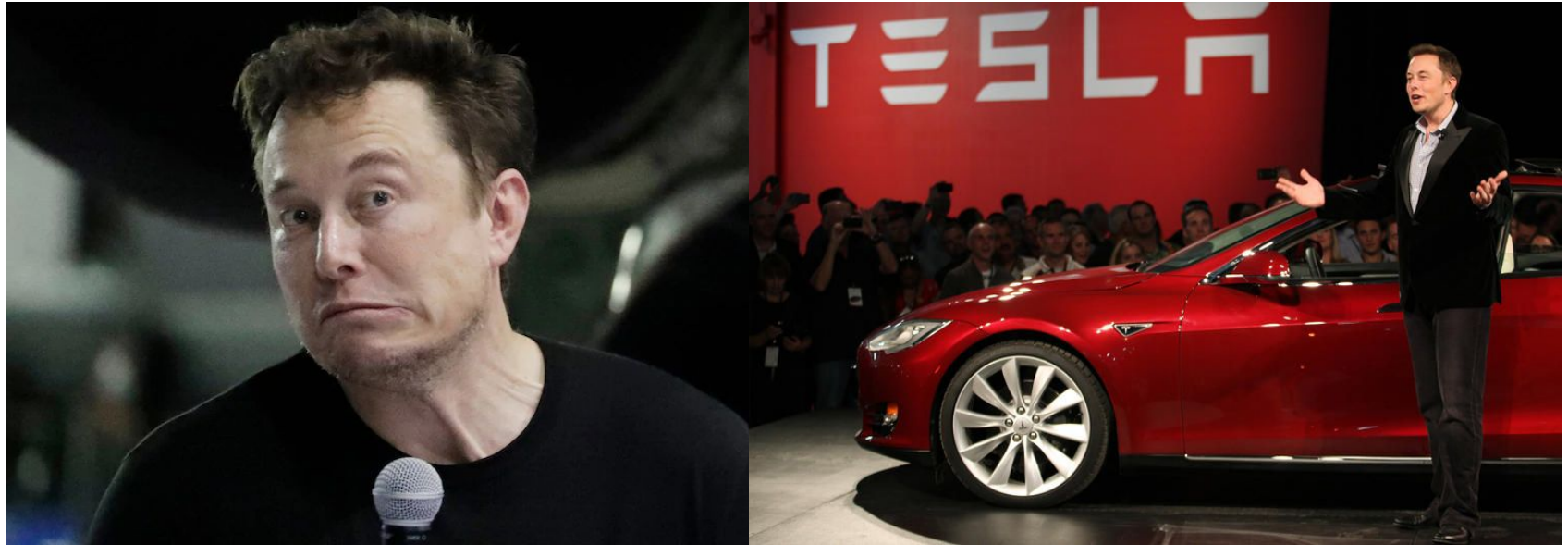
- \$ 100 million class action lawsuit in California for fraud, negligent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing
- Two other class action lawsuits in Florida and New York
- Individual lawsuits brought by attendees and vendors who were not paid for their services
- McFarland and Fyre Media were charged criminally for wire fraud

How could this have been prevented?

- Advertising
- Sponsorship Agreements
- Liability



Elon Musk & Tesla



What happened?

AUG 7 2018

9:30 AM
Nasdaq Opens

TSLA: \$ 343.84



12:48 PM



Following

Am considering taking Tesla private at \$420.
Funding secured.

Elon Musk @elonmusk · 7 Aug 2018
My hope is *all* current investors remain with Tesla even if we're private. Would create special purpose fund enabling anyone to stay with Tesla. Already do this with Fidelity's SpaceX investment.

512 929 8.7K

1 more reply

Follow

Shareholders could either to sell at 420
or hold shares & go private



Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote.

2:08 PM
Nasdaq halts trading of TSLA shares.

3:15 PM
Musk emails employees and posts an entry on Tesla's blog

3:45 PM
Nasdaq lifts trading halt on TSLA shares.

4:00 PM
Nasdaq closes.

TSLA: \$ 379.57

Up 6% since Tweet, 10.98% over previous day.





SEC Charges Musk & Tesla



"Rule 10b-5: Employment of Manipulative and Deceptive Practices":

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, ...

(b) **To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or**

in connection with the purchase or sale of any security."

Opportunities for Intervention

2013 → 2017 → July 13, 2018 → Aug 2, 2018 → Aug 3, 2018 → Aug 7, 2018

Tesla informs SEC they intend to use Musk's Twitter to share material information regarding the company

Musk speaks briefly with Saudi sovereign wealth fund

30 minute meeting with Fund representative at factory in Fremont

Musk emails BoD, CFO, GC re: wanting to take Tesla private

Conference call with BoD authorizing Musk to get feedback from shareholders

Musk Tweets



\$420 per share



In-House / Company Response

Immediate response:

- CFO / Comms Director / GC: offered to draft communications (Elon's blog?)
- Musk's Chief of Staff : response to reporters

SEC Settlement:

- Avoided protracted litigation
- Implementation?

February 19, 2019



What settlement?



How could this have been prevented?

- Before the Tweets
 - BoD, GC - inquire about details
 - Follow-up w/ Musk re: shareholder feedback
 - Were they too 'soft'?
- Day of the Tweets
 - BoD & GC intervention
 - Were they *way* too 'soft'?
- Post SEC Settlement
 - Implement requirements ... OOPS
 - **SECOND** SEC settlement



Why do you think the company (and shareholders for that matter) trusted Musk so much?

Keep in mind:

- Sleeping in the factory
- Disdain for “some CEO template”
- Paranoia about short sellers
- \$1 billion loss in 2018 -- since founded in '03, only 2 (slim) profitable quarters before the Tweets

“Third-world children should be allowed to work in factories because it provides them with much-needed wages.”

**“Breast cancer also came into prominence in the 1990s. I suggest this was due to the number of cigarette-smoking Power Women who were on the pill (...) and taking on the stress previously left to men in the working world.
“**

“I think that [the company] was so successful because I was probably the only straight guy that was making women’s apparel, and I knew what a guy liked.”

“It’s funny to watch them try and say it.” –on Japanese people having trouble in pronouncing his company’s name



“Frankly, some women’s bodies just don’t actually work [for the yoga pants]... it’s more really about the rubbing of the thighs, how much pressure is there over a period of time, how much they use it.”

-Dennis James (Chip) Wilson, founder and former CEO of Lululemon



Mar 2013:

Mass recall of Luon yoga pants

Jun 2013:

Shares fall 17.5%, \$1.62-billion loss

Three class actions by investors

CEO Christine Day resigns

Nov 2013:

Chip Wilson on Bloomberg TV

Steps down as Chairman of the Board

May 2015:

Lawsuits dismissed



LULULEMON ATHLETICA INC (LULU:UW)

189.30 ▼ **4.31** (2.23%)

As of: 09/22/19 7:06:14 pm
(delayed at least 15 minutes)

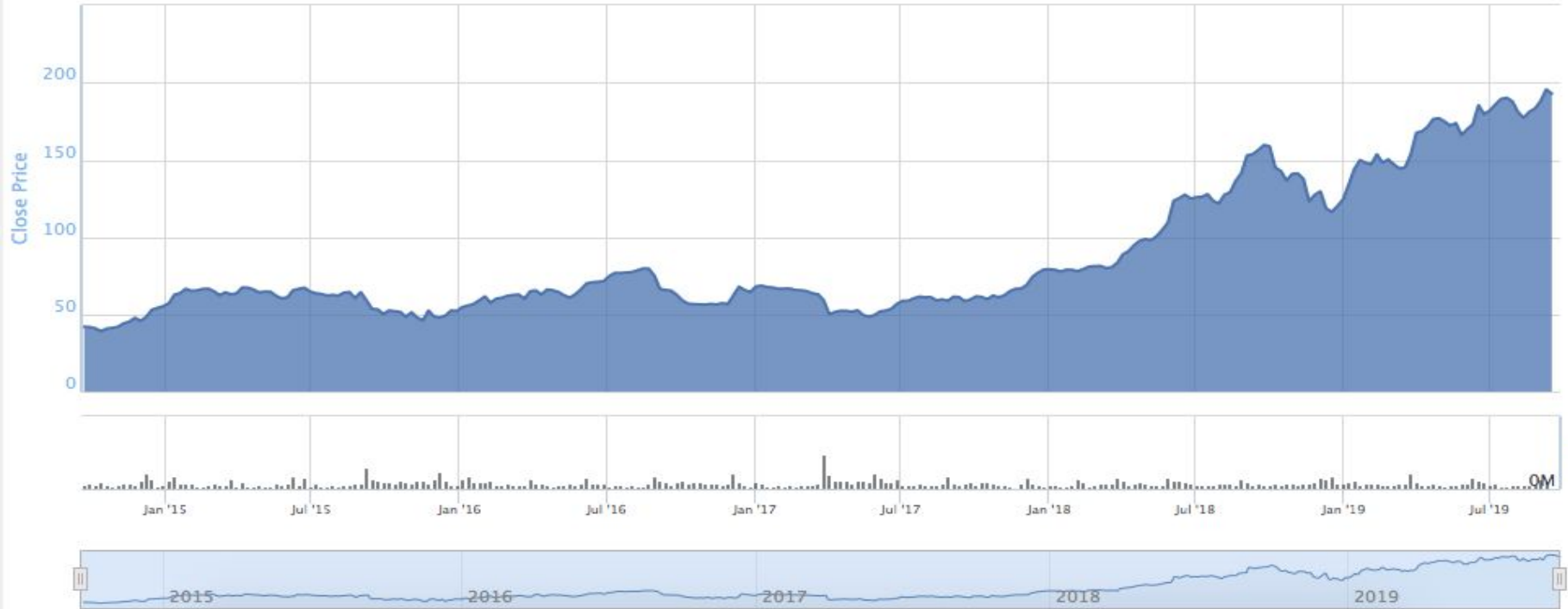
Compare Search

Enter Company or Symbol

Compare Index

Indicators

Trend Line



Data obtained at: bnnbloomberg.ca

So... maybe you CAN say ANYthing.



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