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Conscious Capitalism

We enjoyed a recent interview of Whole Foods founder and CEO John Mackey. He recounts that before he founded Whole Foods he believed that "business was evil and government was good." Then he found himself starting a business and trying to meet a payroll and people thought he had become evil, so his thinking had to evolve. He points out that many people say that "everyone in business is just out to make money." But doctors, teachers, and postal workers all want to make money too. Take away their paychecks and see how long they stay in their jobs. And no successful entrepreneur starts a business to get rich, they do it to pursue a passion. We've seen people trying to start businesses to get rich. They always fail. And venture investors will not back anyone who says they are doing it to make millions. A successful entrepreneur needs to have a passion and commitment about what they are doing, just as deep and strong as any artist. There are just too many roadblocks and reasons to stop. Mackey talks of "conscious capitalism" which he defines in three ways: (i) business must be about a deeper purpose, (ii) businesses must satisfy their many stakeholders, and (iii) leaders need to be part of the team. Bill Gates didn't start Microsoft so that he could be the richest man on the planet; he did it because he was passionate about software and the possibilities inherent in personal computers. We would argue that Henry Ford did more for mankind by making automobiles affordable than almost any US President ever did. Ford said, "a business that makes nothing but money is a poor business." And David Packard expressed the sentiment that profit is the reward for making a contribution. The important thing to note is that the contribution has to come first; the profit second. And Packard agreed with Mackey that any business has to consider many stakeholders; not just its shareholders or owners. Ray Kroc said that, "If you work just for money, you'll never make it, but if you love what you're doing and you always put the customer first, success will be yours." There are tens of thousands of great entrepreneurs toiling in relative obscurity enriching our lives every day by creating the things that we find useful. A marketing friend of ours pointed out that Leo Fender was an "overnight success" with his electric guitar (*after* he spent 20 years in business working on it). If you don't help people, you'll never make it. Milton Friedman asked why pursuing political self interest was any more noble than pursuing economic self interest. We think Mackey would agree with the question.

Compete all You Want

Yet another non-compete / non-solicitation provision has bit the dust in California. An Appeals court has held the provision void under the California Business and Professions Code and the Unfair Competition Law, affirming a judgment for two employees and their new employer. In *Dowell v. Biosense Webster, Inc.*, the Court also questioned whether any such restrictions can be upheld based on a common law "trade secret" exception to the state's abhorrence of such agreements. The case involved the market for atrial fibrillation products. Two professional education specialist employees of Biosense signed an Employee Secrecy, Non-Competition and Non-Solicitation Agreement. The Agreement contained an 18-month *non-competition provision* prohibiting employees from performing services for a competitor in a position where the employee could enhance the use or marketability of a competing product through the application of "confidential information." "Confidential information" included all information Biosense disclosed to the employee, not generally known to the trade or industry; a definition generally seen to mean, "You can't use our trade secrets," to compete. Despite this definition, the court found the non-compete provision to be unenforceable, although stating that it did not need to reach the question of whether trade secret use was prohibited (as it should be). Possibly in *Biosense*, the court wanted a more narrowly tailored trade secret prohibition in competing. And, of course, a prohibition on "use" of trade secrets should be both enforceable (as not specifically prohibiting competition) while actually preventing use of those same trade secrets in competing; maybe elegantly meeting the desired result without specifically mentioning competition.

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Stop the Beach

On Dec. 2, the Supreme Court heard arguments in the first real Takings Clause case to reach the Court since *Kelo v. New London*. In *Kelo* the court ruled that private property could be taken to be used for private development for the public purpose of "enhancing" the tax base. The present case, *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection* may settle a long standing dispute as to whether or not there is such a thing as a "judicial taking" and, if so, how to deal with them. Judicial takings are court decisions that effectively take property away from a private holder for public use. In this case, an administrative law judge approved state occupation of private beachfront property for the purpose of repairing beaches damaged by hurricanes. A group of property owners sued; a lower court ruled in favor of the landowners but the Florida Supremes reversed. The SCourt agreed to hear the case. We'll see what happens but apparently handicappers believe that our Supreme Court will put another nail in private property owners' coffin.

Res Ipsa Loquitor

Jack Kirby

As all comic book fans know Jack Kirby was instrumental in creating some of the most well know Marvel Comics icons. Well, now his heirs are trying to invalidate copyrights for many of Kirby's co-creations, and Marvel has sued to stop them. On the heels of Marvel's shareholders approving its sale to Disney, some of Kirby's children are trying to cancel copyrights on 45 Marvel characters and stories published between 1958 to 1963. In September the heirs filed dozens of termination notices with the U.S. Copyright Office in a bid to revert Marvel's rights to them beginning in 2014. Marvel claims that the work was work-made-for-hire and that it owns the copyrights, not Kirby estate. The comic book publisher and movie producer claims Kirby's contributions to the comic book superheroes and stories were made-for-hire works, making Marvel the sole owner of the copyrights.

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