

## **Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—M.D. Fla.: Target inadequately apprised shareholders of 2023 LGBT Pride Campaign, (Dec 6, 2024)**

By [Jay Fishman, J.D.](#)

Result of inadequate appraisal: actionable misstatements/omissions, scienter and loss causation.

Florida's Middle District Court denied defendant Target's motion to dismiss a shareholder's complaint on finding that the company's chief executive officer made material misstatements and omissions, acted with scienter, and directly caused Target stock to decline in violation of Exchange Act Section 10(b)/Rule 10b-5 and Section 14(a). Basically, the court disagreed with every argument Target made in its November 9, 2023 motion to dismiss, determining the plaintiff shareholder had a plausible case on all claims at this stage of the pleadings ([Craig v. Target Corporation](#), No. 2:23-cv-599-JLB-KCD (M.D. Fla. December 4, 2024)).

**Target's Pride marketing campaign leads to consumer backlash.** The lawsuit arose out of customer backlash in May 2023 over Target Corporation's LGBT-focused "Pride" marketing campaign where it displayed Pride merchandise in its store windows during the 2023 Pride month. The backlash from the merchandise displays resulted in the loss of billions of dollars in market capitalization. The plaintiff alleged that the company made false and misleading statements that caused shareholders to unknowingly support the company's "misuse of investor funds to serve its divisive political and social goals." The complaint asserted claims under 1934 Exchange Act Sections 10(b) and 14(a) that Target's 2022 and 2023 proxy statements misled the plaintiff about the company's approach to overseeing risk related to its ESG and DEI initiatives. The company also misled shareholders about its reasons for adopting the initiatives, and their relevance for calculating executive compensation, according to the plaintiff. The plaintiff additionally asserted that Target was warned about the current backlash after a previous incident where Target objected to a North Carolina transgender bathroom law. Following that opposition, 1.5 million people pledged to boycott Target, and Target's sales fell in the following three quarters. The plaintiff pleaded that not only did Target's CEO know about the boycott but admitted that Target "didn't adequately assess risk" in the matter.

**Target's motion to dismiss.** Target filed a motion to dismiss the shareholder's suit alleging that the plaintiff's complaint was about the company's business judgment and failed to state a securities claim. Simply because the plaintiff disagreed about whether the company's ESG and DEI initiatives were in the long-term interests of Target and its shareholders did not provide a basis for a claim, the company said. The securities laws protect investors against being defrauded, Target continued, but they are not a vehicle for expressing disapproval and do not insure investors against ordinary market losses.

In its motion to dismiss, Target noted that in order to plead a Section 10(b) claim, a plaintiff must allege: 1) a material misrepresentation or omission (i.e., falsity); 2) scienter; 3) a connection between the misrepresentation and the plaintiff's transactions in the security; 4) reliance; 5) economic loss, and 6) loss causation. The Section 14(a) claims share the falsity and loss causation elements, Target argued, and because of allegations of fraud, they also share the scienter element. Target further stated that because Section 14(a) is about protecting shareholder votes, it further requires the plaintiff plead that the solicitation of votes directly caused the allegedly harmful outcomes. In Target's view, the plaintiff failed on every element of his claims ([Craig v. Target Corp.](#), No. 2:23-cv-599-JLB-KCD (M.D. Fla. Nov. 7, 2023)).

**Court disagrees with Target on every claim. Misrepresentations and omissions (falsity).** Target pointed out that in order to plead falsity under both Sections 10(b) and 14(a), the plaintiff must plead particularized facts identifying the alleged misstatements and their content and show how and why they are false or misleading. The plaintiff's falsity

allegations failed under the applicable pleading standard, Target said, because he pleaded no facts showing any of the alleged misstatements were false, instead relying on impermissible inferences and mischaracterizations. Target also claimed that the plaintiff inferred that the existence of a conservative boycott meant risk associated with conservative reactions to ESG and DEI policies were ignored and speculated that risk monitoring was limited to “stakeholders,” which he defined narrowly as progressive nonprofits, contrary to Target’s express definition that includes shareholders.

The company next argued that the plaintiff alleged that three statements in the proxies represented that the board of directors adopted ESG and DEI initiatives to advance shareholder value, but those statements do not mention ESG or DEI mandates at all. Further, Target noted that the plaintiff alleged the proxies did not disclose that progress toward diversity goals was a compensation-related factor, but ultimately conceded that it was explicitly disclosed. Most of the alleged misstatements are not actionable, the company argued, because they are immaterial as a matter of law, including because they are too vague; are unactionable forward-looking statements under the Private Securities Litigation Reform Act (PSLRA); the risk that they allegedly concealed was actually disclosed; and the complaint alleged facts establishing that they did not impact investor decision-making.

The court, however, disagreed with Target on all of the above statements. Relying on Eleventh Circuit precedent, the court repeatedly said that the cautionary risks mentioned in Target’s proxy statements were too general and should have been specifically tailored to the risk associated with the LGBT Pride merchandising campaign. Hence, by not knowing this specific risk, reasonable investors would have no way of knowing that Target’s stock price decline was directly caused by the campaign. Additionally, the court seemed to split hairs when it stated, “while Target’s risk disclosure warned that its failure to meet ESG and DEI objectives may impact its financial condition, Target failed to mention that implementing such objectives may lead to adverse financial conditions.” The court also countered Target’s contention that the risks from the merchandise campaign were in the public domain because the community was already aware of the corporation’s historical support for the LGBTQ community. The court debunked this argument, proclaiming the complaint could not be dismissed at the pleading stage since Target’s risk disclosures failed to include the risk about the Pride marketing campaign. As for Target’s statements being PSLRA protected forward-looking, the court declared that the plaintiff sufficiently pleaded facts showing the CEO’s statements were made with actual knowledge that they were false and misleading when made.

**Scienter.** Here, Target claimed the plaintiff failed to plead facts showing scienter on a defendant-specific basis, and therefore failed this element as a matter of law. In addition, the shareholder did not plead particularized facts supporting even a group-wide inference of scienter, Target noted. Instead, the plaintiff pointed to supposed red flags related to public information about the potential risk of conservative backlash, not to any evidence that Target was failing to monitor that risk.

Pertaining to the CEO under Section 10(b) and Rule 10b-5, the court found he acted with recklessness, a ground for scienter. While the court dismissed the plaintiff’s allegations that scienter arose from either the CEO’s executive compensation or from his signing a statement promising to deliver value to stakeholders, the court agreed with the plaintiff’s third argument—that the CEO handled the 2023 Pride marketing campaign with severe recklessness toward Target’s investors, evidenced by his awareness of prior, publicly known anti-ESG backlash over the North Carolina transgender bathroom issue and subsequent failure even with the prior knowledge to disclose the risks of the 2023 Pride marketing campaign. The court concluded that this involved “not merely simple or even inexcusable negligence but was an extreme departure from the standards of ordinary care that presents a danger of misleading buyers or sellers because the risk is either known to the defendant or is so obvious that the defendant must have been aware of it.” Finding scienter for the CEO, the court imputed it to Target.

**10 (b) Loss causation.** Regarding Section 10(b), Target stated that the plaintiff failed to plead the existence of a corrective disclosure—news revealing the truth he alleged was concealed by the misstatements—that caused the

stock drop. Target argued that the launch of the 2023 Pride campaign and the resulting backlash did not reveal any allegedly concealed truth regarding Target's risk oversight policies. Moreover, news of those events was not adequately alleged to have caused Target's stock price to drop, the company added.

Again the court disagreed with Target, first laying the backdrop: (1) that the plaintiff shareholder need not show the defendant's misconduct was the 'sole and exclusive cause' of his injury, only that the defendant's act was a "substantial" or "significant" contributing cause; and (2) that loss causation is "not subject to the PSLRA's heightened pleading requirement and must only be pleaded in accordance with Federal Rule of Civil Procedure 8(a)(2). Then the court returned to the fact that Target's general risk disclosure was not enough to warn the investors about the risk of the 2023 Pride marketing campaign. The court specifically declared that the plaintiff and other shareholders did not know Target planned to aggressively promote a new LGBT campaign despite knowing that prior campaigns led to immense backlash; and by acting aggressively to push a new campaign, knowing that prior campaigns led to backlash, Target revealed a new truth.

**14(a) causation.** To plead causation under Section 14(a), Target stated, the plaintiff must plead that his injury was directly caused by the shareholder vote, not an event or decision that came after the shareholder vote. The plaintiff claimed injuries from a drop in Target's stock price beginning May 17, 2023, allegedly resulting from backlash against the 2023 Pride Campaign, the company noted, but the votes he challenges are director elections and a series of non-binding advisory votes. Target stated that losses from business decisions following the election of directors cannot be causally tied back to their election as a matter of law. The company pointed out that the complaint admitted that after the purported "correction" of the alleged misstatements—the release of the 2023 Pride Campaign and subsequent backlash—shareholders continued to vote in line with board recommendations, showing that the alleged misstatements were not causally connected to any voting decisions.

After determining that Target's proxy statements contained materially misleading statements and/or omissions about the 2023 Pride Campaign, and that the presence of negligence in this action even without scienter was enough to deny a motion to dismiss under Section 14(a), the court turned to Target's abovementioned Section 14(a) causation argument. The court debunked Target's contention that the election of directors could not be causally tied back to their election as a matter of law because the plaintiff didn't prove that the alleged misstatements caused the re-election of Target's Board. But the court, instead, found a direct causal connection between the reelected Board members and the stock drop. Specifically, the court agreed with the plaintiff's allegations that the Board would not have been reelected had it not been for the misleading statements which arose directly from Target's turning down multiple proposals through shareholder vote to reform the Board's risk oversight functions and approving executive compensation plans that incentivized Target's officers to implement DEI programs like the 2023 LGBT Pride Campaign.

This is Case [No. 2-23-cv-599-JLB-KCD](#).

Judge: Badalamenti, J.

Attorneys: Jonathan Berry (Boyden Gray PLLC) for Brian Craig and Inspire Advisors, LLC. Sandra Goldstein (Kirkland & Ellis LLP) for Target Corp.

Companies: Inspire Advisors, LLC; Target Corp.

LitigationEnforcement: CorporateGovernance DirectorsOfficers ESGNews ExecutiveCompensation FedTracker  
FiduciaryDuties FraudManipulation GCNNews Proxies PublicCompanyReportingDisclosure RiskManagement  
Securities FloridaNews