

Northern District of California: Materially False Statements Were Not Plausibly Pled Because the Aspirational Assertions Concerning Corporate Diversity Were Non-Actionable

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On March 19, 2021, the Northern District of California granted defendants' motion to dismiss with leave to amend a stockholder derivative lawsuit against the board of a prominent social media company, certain executives, and the company itself as a nominal defendant that challenged the company's alleged lack of diversity, discriminatory advertising practices and failure to curb hate speech as false and misleading statements because they contradicted the company's proxy statements about its commitment to diversity, in violation of Section 14(a) of the Exchange Act. *Ocegueda v. Zuckerberg*, 2021 WL 1056611 (N.D. Cal. 2021) (Beeler, J.). The court held that the allegations "do not plausibly plead a materially false statement under [Section] 14(a) primarily because the aspirational assertions in the proxy statements are non-actionable."

Plaintiff's Allegations Concerning Diversity and Inclusion

Plaintiff alleged that defendants' practices contradicted "the representations in [the company's] 2019 and 2020 proxy statements that it is committed to diversity and inclusion, including 'building a workforce that is as diverse as the communities it serves' and including individuals from diverse backgrounds at the board level." Plaintiff further alleged that the company had only one Black board member and no Black senior executives. With respect to the allegedly discriminatory advertising practices, plaintiff cited, among other things, congressional testimony by the company's CEO on its advertising practices, which purportedly "allowed advertisers to discriminate by race in housing ads." Plaintiff also alleged that the company did not stop hate speech, including allegedly incendiary May 2020 posts from then-President Trump on the company's social media platform.

Plaintiff Did Not Plausibly Plead an Actionable False Statement

The court explained that to state a claim under Section 14(a), "plaintiff must allege that the proxy statements contained either (1) a false or misleading declaration of material fact, or (2) an omission of material fact that makes any portion of the statement misleading." The court held that "plaintiff did not plausibly plead an actionable false statement." Citing several cases, the court stated that "courts hold similar statements

are non-actionable puffery or aspirational (and hence immaterial).” For example, the court cited *Lopez v. CTPartners Executive Search*, 173 F. Supp. 3d 12 (S.D.N.Y. 2016), which held that a company’s statements about commitment to a “diverse workforce” and “an inclusive and positive working environment” were “immaterial puffery.”

The court further stated that the allegations did not support an actionable claim of widespread unlawful practices. The court found that plaintiff’s allegations about the board’s composition and selection process were inaccurate. The court noted that two of the nine directors were Black, a third Black director stepped down in March 2020 and, since its 2018 adoption of its diversity policy, a majority of new nominees were Black or female. The court also credited facts contradicting plaintiff’s allegations concerning diversity in the company’s senior executive ranks and noted that the company remediated the alleged discriminatory advertising practices by March 2019. The court additionally determined that “plaintiff did not plead plausible facts about discriminatory practices in advertising, hiring, and pay that render the [proxy] statements misleading.” Finally, the court stated that “plaintiff identifies no basis for inferring that the statements (and the omission of the directors’ alleged lack of commitment to diversity, the lack of an independent chair, and the effect on executive compensation) formed an essential link to a loss-generating corporate action.”

Rising Tide of Lawsuits Challenging Lack of Corporate Diversity

Since last year, stockholders have filed a number of lawsuits concerning board diversity against well-known companies. To date, these suits have not fared well. On April 8, 2021, the Central District of California dismissed without prejudice a lawsuit with similar allegations because plaintiff failed to make a demand on the board or adequately plead demand futility. *Falat v. Sacks*, No. 20-1782 (C.D. Cal. 2021) (Selna, J.).^[1] And, on April 27, 2021, the Northern District of California dismissed a similar stockholder derivative lawsuit against an apparel company without prejudice to the plaintiff filing claims in Delaware Chancery Court pursuant to the forum selection clause in the company’s bylaws. *Lee v. Fisher*, No. 20-06163 (N.D. Cal. 2021) (Kim, J.). The decision in *Ocegueda v. Zuckerberg* indicates that courts may not give allegations concerning diversity and inclusion special consideration, instead applying precedent where corporate statements were determined to be aspirational assertions or puffery.

^[1] In this stockholder derivative action plaintiff alleged violation of Section 14(a) against a beverage company as a nominal defendant and certain of its executives and directors, claiming that the individual defendants caused the company to make false and misleading statements regarding its commitment to diversity in its Code of Business Conduct and Ethics, on its website, and in its proxy statements.

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