Rainbow-Washing

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Abstract

This article examines how private shareholder litigation can be used as a tool of shareholder activism to combat the destructive practice of corporate "rainbow-washing." Although pervasive, rainbow-washing in the context of Delaware public corporations occurs when corporate managers make public-facing statements of support for the LGBTQIA+ community for the purpose of bolstering, maintaining, or re-establishing a corporation's public reputation, without intent to conduct themselves consistent with those statements or fulfill the promises implicit therein. Rainbow-washing is a serious social problem that adversely affects various stakeholders. In the worst instances, corporate managers may make promises of support and then act contrarily to them. For example, corporate managers may violate these implicit promises by either making political donations and lobbying in support of anti-LGBTQIA+ candidates and issues, maintaining discriminatory employment practices, or failing to adequately guard against harassment. In egregious circumstances, rainbow-washing exposes these managers to liability for breach of fiduciary duty and, depending on the context in which the communications are made, securities fraud. In recent years, demands by institutional investors; a rise in Environmental, Social, and Governance ("ESG") investing; and anti-LGBTQIA+ legislation have heightened the potential legal stakes. This article contemplates actionable rainbow-washing and examines how rainbow-washing as a corporate practice can be combatted through shareholder litigation, among other forms of shareholder and consumer activism. The most burdensome procedural hurdle in any shareholder litigation is the motion to dismiss for failure to state a claim upon which relief can be granted. If a claim can survive such a motion, however, resolution via settlement becomes more likely and has the potential to accomplish desirable change in corporate governance behavior.

Introduction

There is an increasingly common, but destructive, practice in which corporations make public-facing statements espousing their support of the LGBTQIA+ community (the "Community")[1] to draw in and retain consumers, investors, employees, and public support, but then either fail to fulfill the promises implicit in those statements or act in contravention to them. This article will refer to this practice as "rainbow-washing." Although rainbow-washing has been discussed in popular culture and social history, it has not received much attention from the legal academy. This article presents an early exploration of the topic.

While rainbow-washing by managers of Delaware public corporations[2] can impact a variety of stakeholders, shareholder activists may have a particularly special interest and positionality to combat such practices through litigation. However, procedural and substantive law impose a high bar for shareholder litigation to overcome. Thus, in addition to articulating rainbow-washing as a social problem, this article

1 In this article, I will refer to the LGBTQIA+ community as "the Community." This will be my shorthand way of referencing the collective of individuals who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, asexual, or any other sexual identity other than heterosexual. As our social—and individual—understanding of sexuality continues to develop, the label "LGBTQIA+" will naturally become underinclusive. Likewise, after publication and through time, language may evolve such that this term no longer best reflects the Community. I hope that readers will be assured that I intend the essence of my discussion to be inclusive, respectful, and widely applicable, even if one's particular sexual or gender identity is not expressly reflected in my vocabulary. For a helpful description of this vocabulary, *see* Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. Times (June 7, 2019), https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html. Please note that when I discuss or quote the work of other scholars, I will use the language that each scholar used.

2 This limited focus on managers of public Delaware corporations is deliberate. Publicly traded companies, rather than privately held entities, face greater supervision under federal securities law and regulations. *See, e.g.*, Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 Hastings L.J. 445, 453 (2017). Relatedly, Delaware's separate court for corporate matters, its Court of Chancery, is a widely respected authority on business matters, with more than 60% of Fortune 500 companies choosing to incorporate in Delaware. *See* Charlotte Morabito, *Here's Why More than 60% of Fortune 500 Companies are Incorporated in Delaware*, CNBC (Mar. 13, 2023), https://www.cnbc.com/2023/03/13/why-more-than-60percent-of-fortune-500-companies-incorporated-in-delaware.html. Finally, the focus of this article is on private shareholder litigation, rather than formal civil or criminal enforcement actions brought by the Government.

will contemplate a private civil action strategy under both Delaware fiduciary duty law and federal securities law to survive a motion to dismiss.

In the United States, during the month of June, the Community commemorates the anniversary of the famous Stonewall Inn Riots that began on June 29, 1969 in Greenwich Village in New York City.[3] After yet another discriminatory and abusive police raid justified by "morals," patrons—many of whom were people of color—fought back against the police.[4] Having rallied thousands of members of the Community to come and join, the riot endured for the next six nights. The message was clear: the Community would no longer be erased or oppressed.[5] Although the Stonewall Riots were not the first or only landmark moment in the gay liberation movement, these riots are extremely well known and many regard the riots as a turning point in the gay rights movement.[6] A year after the Stonewall Riots, on June 28, 1970, thousands of people participated in the first "gay liberation" marches in New York and other cities across America.[7] These marches, now known as "Pride parades," continue every year as an open declaration of LGBTQIA+ equality and dignity.[8] By many accounts, the Stonewall Riots marked a significant moment in history where the Community demanded respect in society and equal dignity under law.[9]

In the decades before Stonewall, the Community's presence in society was usually erased or overlooked. Even when the Community was recognized, it was vilified, criminalized, reviled, and feared. "'Coming out' came with threats of violence and social ostracism."[10] For example,

3 *See Lesbian, Gay, Bisexual, Transgender and Queer Pride Month: About*, Libr. of Cong., https://www.loc.gov/lgbt-pride-month/about/ (last visited July 20, 2022).

4 *See* Alex Abad-Santos, *How LGBTQ Pride Month Became a Branded Holiday*, Vox (June 25, 2018), https://www.vox.com/2018/6/25/17476850/pride-month-lgbtq-corporate-explained; *see also* James M. Donovan, *Same-Sex Union Announcements: Whether Newspapers Must Publish Them, and Why We Should Care*, 68 Brook. L. Rev. 721, 741–48 (2003) (discussing the social significance of the Stonewall Riots).

5 *See* Sherry Wolf, Sexuality and Socialism: History, Politics, and Theory of LGBT Liberation 116–31 (2017).

6 *See* Kyle C. Velte, *From the Mattachine Society to Megan Rapinoe: Tracing and Telegraphing the Conformist/Visionary Divide in the LGBT-Rights Movement*, 54 U. Rich. L. Rev. 799, 807 (2020).

7 Erin Blakemore, *Inside the First Pride Parade–A Raucous Protest for Gay Liberation*, Nat'l Geo. (June 25, 2021), https://www.nationalgeographic.com/history/article/inside-the-first-pride-parade-a-raucous-protest-for-gay-liberation-lgbtq.

8 *See id.*

9 *See* Philip C. Aka, *Technology Use and the Gay Movement for Equality in America*, 35 Cap. U.L. Rev. 665, 671–73 (2007).

10 Blakemore, *supra* note 7.

British mathematician Alan Turing was arrested for being gay and later chemically castrated, despite his achievements in modern computing and contributions as a code-breaker to end World War II.[11] Turing died by suicide in 1954.[12] Later, during the McCarthy era, at the height of the Cold War, there was widespread panic about the national security risk closeted gay and lesbian government employees posed (the "Lavender Scare") because of the assumption that they were suspectable to blackmail.[13] At the time, homosexuality was perceived to be closely tied to communism, and gays and lesbians were portrayed prototypically as perverts who hated America.[14] Thus, "thousands of gay employees were fired or forced to resign from the federal workforce."[15]

In 1980, when gay men in San Francisco started to complain about swollen glands, doctors began noticing deficiencies in their immune systems.[16] About a year later, the Centers for Disease Control and Prevention issued its first bulletin about the AIDS epidemic—with the New York Times reporting, "Rare Cancer Seen in 41 Homosexuals."[17] This marked the early days of the AIDS epidemic in the United States. While broadly ignored by government officials and businesses, community leaders decried AIDS as evidence that gays were immoral, repugnant, and unworthy of participation in civil society.[18]

To commemorate the accomplishments of the gay rights movement, and to recognize the work still left to do, the month of June has become widely recognized as Gay Pride Month in the United States.[19] In more recent years, the month of June has taken on even greater meaning, as it also marks the anniversaries of several landmark

11 *See* Elaine J. Hom, *Alan Turing Biography: Computer Pioneer, Gay Icon*, Live Sci. (June 23, 2013), https://www.livescience.com/29483-alan-turing.html.

12 *Id.*

13 *See* Naoko Shibusawa, *The Lavender Scare and Empire: Rethinking Cold War Antigay Politics*, 36 Diplomatic Hist. 723, 725 (2012).

14 *Id.*

15 Judith Adkins, *"These People are Frightened to Death" Congressional Investigations and the Lavender Scare*, Nat'l Archives: Prologue Mag. (2016), https://www.archives.gov/publications/prologue/2016/summer/lavender.html.

16 Carlos A. Ball, The Queering of Corporate America: How Big Business Went From LGBTQ Adversary to Ally 59 (2019).

17 *Id.*

18 *See* Tim Fitzsimons, *LGBTQ History Month: The Early Days of America's AIDS Crisis*, NBC News (Oct. 15, 2018, 9:40 AM) (updated 10:59 AM), https://www.nbcnews.com/feature/nbc-out/lgbtq-history-month-early-days-america-s-aids-crisis-n919701.

19 For more discussion of the history of Gay Pride month, see *infra* notes 47–57 and accompanying text.

Supreme Court rulings significant to the Community's march toward equal dignity and respect under the law.[20] Now, members and allies of the Community celebrate Pride every June.

At the same time, many modern corporations have embraced the month of June to display their support for the Community.[21] Each year, on the first day of June, many corporate logos turn rainbow, depictions of same-sex couples and inclusive language abound in advertising, and corporations sponsor celebrations around the country; however, the visible support disappears on July 1, just as quickly as it appeared.[22] Corporate engagement in the public sphere ranges from philanthropic contributions to public, outward-facing commitments and stances on matters of social concern.[23] Economists have described this behavior as "impression management" and posit that organizations engage in this conduct "to control and manipulate the impressions of relevant audiences."[24] They further suggest that companies

20 *See* Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020) (holding that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sexual orientation and gender identity and expression); Obergefell v. Hodges, 576 U.S. 644 (2015) (recognizing a constitutional right to same-sex marriage); United States v. Windsor, 570 U.S. 744 (2013) (holding parts of the Defense of Marriage Act unconstitutional); Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing a constitutional right for same-sex sexual intimacy).

21 This article predominantly focuses on LGBTQIA+ issues, however, I explicitly acknowledge that the issues discussed herein are pervasive across marginalized communities in society. No single article can fully examine this pressing social problem. Although the circumstances may be different, the essence of the legal problem is the same. The legal theories discussed here could be applied in the context of other communities that face unique forms of "washing." Thus, although I will not discuss these matters in depth here, I acknowledge them and invite further discourse on the subject. I would be pleased to hear others' experiences and views and to find ways that we can partner to endeavor for a more just and equitable world.

22 *See* Gerardo Bandera, *Genuine Pride or Corporate Rainbow Washing?*, Fair Planet (June 24, 2022), https://www.fairplanet.org/story/genuine-pride-or-corporate-rainbow-washing/.

23 Professor Lisa Fairfax dubs such as "corporate stakeholder rhetoric," that is, "discourse or communication evidencing a corporation's commitment to or concern for groups and interests beyond shareholders, including customers, employees, creditors, suppliers, and society." Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 Fla. L. Rev. 771, 779 (2007). In a fascinating analysis, Professor Fairfax observed that, in 2007, all but two *Fortune* 100 companies espoused "stakeholder rhetoric in some official corporate arena." *Id.* at 780.

24 Adelaide Martins et al., *Managing Corporate Social and Environmental Disclosure: An Accountability vs. Impression Management Framework*, 13 Sustainability 296, 296 (2021).

"deliberately engage in [impression management] and use the various organizational communication channels, such as annual reports or sustainability reports, to strategically manipulate perceptions, and hence, stakeholders' decisions."[25] The public has become increasingly concerned about a corporation's stance on pressing social issues and has demonstrated a willingness to modify its investment behaviors to align with these values and concerns.[26]

Leaders and managers of the "Big Three"[27] index funds have conversed with corporations about the importance of social and civic engagement and public leadership. For example, in his "2022 Letter to CEOs," BlackRock CEO Larry Fink suggested: "[Shareholders] need to know where we stand on the societal issues intrinsic to our companies' long-term success."[28] Vanguard and State Street communicated similar messages.[29] In response, companies have indicated a desire to "do good while doing well" by offering philanthropic support and community

25 *Id.* at 4.

26 *See* Bandera, *supra* note 22; Dee Patel, *How to Avoid 'Rainbow Washing' During Pride Month*, Penn Today (June 24, 2022), https://penntoday.upenn.edu/news/how-avoid-rainbow-washing-during-pride-month; Miriam Barker, *LGBTQ+ Pride: Firms Accused of 'Rainbow-Washing'*, BBC (Aug. 27, 2022), https://www.bbc.com/news/uk-wales-62597165.

27 The "Big Three" refers to United States asset management firms BlackRock, Vanguard, and State Street Global Advisors. *See* Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. Rev. 721, 732–33 (2019).

28 Larry Fink, *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, BlackRock (2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter?cid=ppc:blk:ll:na:ol:goog:na:v2:bhv:tl&gclid=CjwKCAjwzeqVBhAoEiwAOrEmzfHk_ZmTjfv8qJaFyUZAJlo1IaRvOjh_mPqM4Xaa3taWwTK3fA3HmhoC5OkQAvD_BwE&gclsrc=aw.ds.

29 *See* Cyrus Taraporevala, *CEO's Letter on SSGA 2022 Proxy Voting Agenda*, State St. Glob. Advisors (Jan. 18, 2022), https://www.ssga.com/us/en/institutional/ic/insights/ceo-letter-2022-proxy-voting-agenda ("[W]e have been in dialogue with boards on a range of material issues—from climate to diversity to human capital management—for many years. For us, these issues are matters of value, not values—opportunities for companies to mitigate downside risk, innovate, and differentiate themselves from competitors. To that end, we view the use of our voice and our vote as central to our fiduciary responsibility to our clients to maximize long-term risk-adjusted returns."); Vanguard Funds, *Proxy Voting Policy for U.S. Portfolio Companies*, Vanguard 8, (Mar. 1, 2022), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/US_Proxy_Voting.pdf (describing Vanguard's policy to generally vote for shareholder proposals seeking disclosure about board diversity and ensuring appropriate diversity on boards).

service.[30] Specifically, companies have addressed racial injustice,[31] controversies over immigration policy,[32] anti-LGBTQIA+ legislation,[33] and racially hostile voting rights restrictions,[34] among other topics. Relatedly, there has been a noticeable rise in investment practices informed by Environmental, Social, and Governance ("ESG") factors, particularly among members of the Millennial and Generation Z generations.[35]

A corporation's stance on social issues is not, however, merely altruistic or aspirational. Beyond simply supporting positions of social importance, corporations engage in rhetoric and advertising that are unquestionably calculated to attract the attention—and dollars—of investors, consumers, and other economic partners who share the company's expressed values and have a desire to do business with the corporation because of said shared values.[36] Sometimes, however, a corporation that makes such public proclamations of support does not live up to the promises expressed or implicit therein.[37] At times, these

30 *See, e.g.*, Timothy J. McClimon, *Doing Well and Doing Good*, Forbes (Apr. 20, 2020), https://www.forbes.com/sites/timothyjmcclimon/2020/04/20/doing-well-and-doing-good/?sh=6eddcba33da0.

31 *See id.*

32 *See, e.g.*, Ylan Mui, *More Than 100 CEOs Pressure Congress to Pass Immigration Bill by Jan. 19*, CNBC (Jan. 10, 2018), https://www.cnbc.com/2018/01/10/more-than-100-ceos-pressure-congress-to-pass-immigration-bill-by-jan-19.html.

33 *See, e.g.*, Travers Johnson, *Why Tennessee's Ban on Drag Performance is Bad for Business*, Forbes (Mar. 3, 2023), https://www.forbes.com/sites/traversjohnson/2023/03/03/why-the-tennessee-drag-ban-is-bad-for-business/?sh=325d4ef2729f; Emily Birnbaum, *More Than 50 Companies Release Statement Supporting Transgender Equality*, The Hill (Nov. 1, 2018), https://thehill.com/policy/finance/414285-more-than-50-companies-release-statement-supporting-transgender-equality/; Brooke Sopelsa, *Major Corporations Join Fight Against North Carolina's 'Bathroom Bill'*, NBC News (July 8, 2016), https://www.nbcnews.com/feature/nbc-out/major-corporations-join-fight-against-north-carolina-s-bathroom-bill-n605976.

34 David Gelles, *Inside Corporate America's Frantic Response to the Georgia Voting Law*, N.Y. Times (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/business/voting-rights-ceos.html.

35 For discussion of ESG-investing and the likely impact of the anticipated generational wealth transfer on investment behavior, *see infra* notes 136-163 and accompanying text.

36 *Accord* Mihailis E. Diamantis, *The Law's Missing Account of Corporate Character*, 17 Geo. J.L. & Pub. Pol'y 865, 867 (2019) ("Our perceptions of such corporate attributes shape how we, both individually and collectively, are prepared to interact with corporations and their products. Corporations know this. They expend massive amounts of money for marketing and branding campaigns to shape our perceptions of them.").

37 *See* Patel, *supra* note 26.

rainbow-washing statements may be made solely to bolster, maintain, or re-establish the corporation's public reputation even though it engages in conduct that is inconsistent with, or even diametrically opposed to, the espoused values.[38] Any positive effect of this dissonant conduct is further attenuated by the corporation's ability, in absence of regulation requiring disclosure, to conceal or obfuscate its contrary actions from the attention of various stakeholders.

The harm of such statements may be both financial and dignitary. For instance, if unsubstantiated claims are discovered to be false or if conduct contrary to the corporation's commitments is uncovered, investor distrust in the socially responsible investing market may result.[39] In some situations, this dissonant conduct may result in direct financial harm to a corporation and its shareholders by artificially inflating the corporation's value.[40] Additionally, even in situations when the value of the corporation may have actually increased because of the corporate messaging, the "talk without the walk" is nonetheless harmful because it constitutes a dignitary identity offense against the shareholder and the Community.[41] To wit, an investor's ability to invest their funds consistently with their own values, or alternatively, to refrain from being financially complicit in conduct the investor views as socially or morally wrong, is "interwoven with intimate questions about one's identity" and warrants legal protection.[42] More specifically, rainbow-washing statements result in dignitary harm because they economically exploit the members of the Community and those who seek to support them; undermine both the historical and modern struggles, challenges, and dangers that the Community experiences; and distract and desensitize the public from the persisting and significant risks to the Community.[43]

38 *Id.*

39 *See, e.g.*, Magali A. Delmas & Vanessa Cuerel Burbano, *The Drivers of Greenwashing*, 54 Cal. Mgmt. Rev. 64, 65 (2011).

40 *See, e.g.*, Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 Tulane L. Rev. 983, 1032 (2011); Natalie Runyon, *New Litigation Fears Driving Expanded Responsibilities for In-House Lawyers to Prevent ESG Risks*, Thomson Reuters (July 8, 2022), https://www.thomsonreuters.com/en-us/posts/legal/preventing-esg-risks/.

41 *See* Sarah Dadush, *Identity Harm*, 89 U. Colo. L. Rev. 863, 893–913 (2018) (discussing the identity harm that occurs when social or humanitarian promises are broken).

42 *Id.* at 888.

43 Although claims for breach of fiduciary duty do not require financial loss, some claims for securities fraud would only be successful if a shareholder plaintiff could establish financial harm caused by the rainbow-washing statement. This article recognizes that existing securities law may not provide redress when the resulting harm is purely dignitary. The question of how federal securities law could address

This article's primary argument is that when a corporation has made outward-facing statements about its commitment to the Community to solicit investments, appease shareholders, or induce transactions, the corporation must then act in accordance with those stated values. A corporation's stated values, such as a commitment to diversity and inclusion, are fundamental to the corporation's identity and are increasingly impacting whether investors decide to become, or remain, shareholders and exercise their shareholder rights in any particular way.

A corporation acts through its board of directors, officers, and other agents.[44] In turn, these corporate managers are accountable both to the entity and to the shareholders under the law of fiduciary duty and federal securities law.[45] Thus, when a corporation's managers engage in rainbow-washing by knowingly proclaiming a commitment to stand with the Community without an intent to fulfill those promises, or while acting in direct contradiction to said proclamation, they do more than betray public trust; these corporate managers have breached their fiduciary duties to the corporation and shareholders and acted contrary to law. Furthermore, depending on the circumstances, these managers may be liable for securities fraud. While shareholders traditionally took a passive role in managing the entity, shareholder activists[46] may be particularly interested in commencing litigation against corporate managers in furtherance of changing the company. This, in turn, exposes corporations to liability for damages and other relief.

This article will proceed in three parts. In Part I, this article will examine rainbow-washing as a social problem and characterize actionable instances of rainbow-washing. The article then illustrates how this cause of action may equip shareholders and how litigation may be used against corporate managers to address rainbow-washing conduct. Specifically, litigation may be a powerful tool for shareholder activism. In that regard, Part II will articulate the legal theories under which shareholders may bring private litigation against corporate directors and officers for egregious instances of rainbow-washing. Finally, Part III will envision future challenges for rainbow-washing litigation and

purely non-economic harm is beyond the scope of this article.

44 *See* Carol R. Goforth, *"A Corporation Has No Soul"—Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 Hous. L. Rev. 618, 629 (2010).

45 *See* Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 Temple L. Rev. 831, 835 (2008).

46 For a discussion of the nature of shareholder activism, *see infra* notes 136–55 and accompanying text.

recommend strategies for using litigation to deter and combat this harmful and destructive practice.

I. Conceptualizing Rainbow-Washing

A. Rainbow-Washing as a Social Problem

Modern rainbow-washing is rooted in history. The rainbow has gained particular social significance to the Community. Indeed, it is the most widely recognized symbol of the Community in the world.[47] In the late 1970s, at the request of Harvey Milk, the rainbow flag was designed as a symbol of pride for the Community to be flown at a 1978 gay pride march in San Francisco.[48] The symbol "took hold immediately."[49] Milk, one of the first openly gay elected officials in the United States, "gave never before experienced hope to Lesbian, Gay, Bisexual, and Transgender [ ] people everywhere at a time when the [C]ommunity was encountering widespread hostility and discrimination."[50] In one of his most famous speeches, Milk declared:

> Gay people, we will not win our rights by staying quietly in our closets . . . . We are coming out to fight the lies, the myths, the distortions. We are coming out to tell the truths about gays, for I am tired of the conspiracy of silence, so I'm going to talk about it. And I want you to talk about it. You must come out.[51]

Tragically, Milk was assassinated later that year, on November 27, 1978.[52] His killer, who was acquitted of murder, was given a light sentence for manslaughter.[53] The public outrage over the verdict was palpable—the verdict seemed to be undeniable evidence of society's "core, anti-gay values."[54] Even after his death, however, Milk's life legacy inspired change and action. Having anticipated a possible assassination, Milk once wrote: "[I]f a bullet should enter my brain, let that bullet destroy

47 *See* Jacob Shamsian, *How the Rainbow Became the Symbol of LGBT Pride*, Insider (June 1, 2018), https://www.insider.com/why-rainbow-lgbt-gay-pride-2017-6.

48 *Id.*

49 *Id.*

50 *The Official Harvey Milk Biography*, Harvey Milk Foundation, https://milkfoundation.org/about/harvey-milk-biography/ (last visited Jul. 3, 2023).

51 *Id.*

52 *Id.*

53 *See id.*

54 *See* Ron Eyerman, *Harvey Milk and the Trauma of Assassination*, 6 Cultural Sociology 399, 418 (2012).

every closet door."[55] Indeed, it did. Soon after Milk's death, countless people openly identified themselves as lesbian or gay—with marchers in Washington, D.C., chanting "Harvey Milk lives!"[56] Milk remains an iconic figure in the Community, inspiring and empowering countless people to this very day.[57]

With this context in mind, as well as the history of the gay rights movement, including the Lavender Scare, the Stonewall Riots, and the AIDS epidemic, it is not difficult to understand how deeply the rainbow resonates with members of the Community. Driven by both a sense of comradery and a desire to support social change, members and allies of the Community tend to support companies that support them.[58] As such, business and politics are closely related, and indeed, overlap.[59] Specifically, members of disenfranchised and marginalized groups who desire to use their investments to support their communities may operate as political actors in the market by sending messages through the ways in which they spend their money.[60] Members of the Community may therefore be concerned with the actions underlying corporate rhetoric, as this rhetoric can distract and exploit the Community and, more broadly, the gay rights movement.

Rainbow-washing as a practice has developed over time as the topic of homosexuality has gradually entered public discourse. In 1958, the Supreme Court ruled that open discussion of homosexuality could no longer be proscribed as unlawfully obscene.[61] Even then, up until

55 *The Official Harvey Milk Biography*, *supra* note 50.

56 *Id.*

57 *See* Eyerman, *supra* note 54, at 414.

58 *See* Melissa Lowery, *CMI Reveals Diversity and Power of the LGBTQ Consumer*, Bus. Equal. Mag. (Aug. 13, 2018), https://businessequalitymagazine.com/cmi-reveals-diversity-and-power-of-the-lgbtq-consumer/. For individuals who have struggled with their sexuality or are not used to having their sexuality taken seriously, corporate appeals to the Community can be "profoundly affirming." Katherine Sender, Business, Not Politics: The Making of the Gay Market 1, 6 (2004); *see also* Nan Alamilla Boyd, *Sex and Tourism: The Economic Implications of the Gay Marriage Movement*, 100 Radical Hist. Rev. 223, 226 (2008).

59 *See* Sender, *supra* note 58, at 3–10.

60 *See generally*, Robert V. Kozinets & Jay M. Handelman, *Adversaries of Consumption: Consumer Movements, Activism, and Ideology*, 31 J. Consumer Rsch. 691 (2004).

61 *See* One, Inc. v. Olesen, 355 U.S. 371, 371 (1958). In *One, Inc.*, the Court summarily reversed the Ninth Circuit's ruling that a postmaster general could lawfully refuse to deliver a magazine that targeted gay men and lesbians as obscene and filthy *per se*. *See id.* at 371; *see also* Donovan, *supra* note 4, at 728 (describing that, after *One, Inc.*, simply discussing the topic of or using words for homosexuality could no longer be proscribed as an obscene act). *See also* Roth v. United States, 354 U.S. 476 (1957). In *Roth*, the Court held that, while obscenity was not protected as free

the early 1990s, express public acknowledgment of the Community was rare.[62] Most advertisements featuring the Community were subtle and targeted.[63] However, in the late 1990s, LGBTQIA+ presence increased. After Ellen DeGeneres came out as gay in 1997, television shows featuring gay and lesbian characters and same-sex intimacy, like Dawson's Creek, Will and Grace, and Queer as Folk, debuted.[64]

Around the beginning of the Obama Administration, American support for same-sex marriage began to increase.[65] LGBTQIA+ presence in advertising also boomed.[66] This was not an accident: the Community tactfully gained legitimacy through its representation in the commercial marketplace.[67] "The fact that a growing number of large corporations were willing initially to embrace LGBTQ equality measures internally, and later to advocate externally on behalf of public policies that promoted LGBTQ rights, went a long way toward normalizing and mainstreaming LGBTQ equality claims."[68] Over time, homosexuality became viewed as socially acceptable and worthy of equality of law.[69] Indeed, the Community now occupies a significant position in national politics and social discourse.[70]

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speech by the First Amendment, sex and obscenity are not synonymous." *Id.* at 487. The Court explained that "[o]bscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.*

62 *See* Dylan Miettinen, *The Colorful History–and Precarious Future—of Rainbow Washing*, Marketplace (June 28, 2021), https://www.marketplace.org/2021/06/28/the-colorful-history-and-precarious-future-of-rainbow-washing/. Relatedly, Dr. Blaine J. Branchik describes the history of advertising to the Community as occurring in three phases: (1) the underground phase (pre-1941); (2) the community-building phase (1941–1970); and (3) the mainstream phase (1970–present). Blaine J. Branchik, *Out in the Market: A History of the Gay Marketing Segment in the United States*, 22 J. Macromarketing 86, 87 (2002).

63 *See* Miettinen, *supra* note 62.

64 *See* Bonnie J. Dow, *Ellen, Television, and the Politics of Gay and Lesbian Visibility*, 18 Critical Stud. in Media Commc'n 123, 124 (2010); Sheri L. Manuel, *Becoming the Homovoyeur: Consuming Homosexual Representation in Queer as Folk*, 19 Soc. Semiotics 275, 277 (2009).

65 Miettinen, *supra* note 62.

66 *Id.*; *see also* Steven Sheppard et al., *Sincere, Not Sinful: Political Ideology and the Unique Role of Brand Sincerity in Shaping Heterosexual and LGBTQ Consumers' Views of LGBTQ Ads*, 6 J. Ass'n for Consumer Rsch. 250 (2021) (providing a thorough discussion of the relationship between advertising and the Community).

67 Miettinen, *supra* note 62.

68 Ball, *supra* note 16, at 130.

69 *See* Aka, *supra* note 9, at 676–77.

70 *Id.* at 678.

Importantly, too, the Supreme Court decided three landmark cases involving gay rights over the span of thirteen years.[71] As members of the Community waved a rainbow flag at the 53rd Pride March, they did so in an environment where many corporations sponsored marches and celebrations, launched marketing campaigns aimed at the Community, temporarily changed their logos to rainbows, and engaged in messaging extolling themselves as allies and advocates committed to the Community.[72] After the marches wrapped up, everything went back to "normal"—the corporations enjoyed the profits earned and any sense of visible support vanished.[73] In other words, the corporations presented themselves as supportive allies without undertaking any meaningful steps to actually benefit the Community. In fact, even while making these promises of support, some of these same corporations made political donations to politicians who advanced legislation that is hostile to the Community.[74] This naturally causes suspicion of the corporations' motives and raises questions about the legality of the corporations' words without action.

While some are grateful for representation of the Community in the corporate and commercial space—even in the absence of accompanying action—others revile the practice. Specifically, on one hand, some laud such overt representation as beneficial overall.[75] Certainly, the commercial marketplace has offered the Community opportunity to legitimize and develop a shared identity.[76] In particular, philanthropic funding for Community-aligned non-profit and charitable events, operations, and organizations such as GLAAD are beneficial toward this end.[77] Adjacently, some suggest that businesses

71 *See* Steve Sanders, *Dignity and Social Meaning*, Obergefell, Windsor, *and* Lawrence *as Constitutional Dialogue*, 87 Fordham L. Rev. 2069, 2086–89 (2019).

72 *See* Melisa Kose, *Rainbow Capitalism: The Commodification of Pride and Its Impact on LGBTQ+ Mental Health*, Medium (July 1, 2021), https://medium.com/inspire-the-mind/rainbow-capitalism-the-commodification-of-pride-and-its-impact-on-lgbtq-mental-health-c0a3bb07c653.

73 *Id.*

74 *See* Reid Champlin, *Companies' Political Spending Contradicts Pride Support*, Open Secrets (June 13, 2019), https://www.opensecrets.org/news/2019/06/companies-political-spending-contradicts-pride-support/.

75 For example, Professor Cait Lamberton observed: "[S]upport feels much better than silence. Those of us who grew up in decades where the LGBTQ+ community's needs were met with either indifference or intolerance instinctively appreciate the rainbows. At least these companies aren't leaning away, and it's not in the very distant memory that many did." Patel, *supra* note 26.

76 *See* Sanders, *supra* note 71, at 2084–85. Sender, *supra* note 58, at 5–6.

77 *Id.* at 7.

can help create a social environment of acceptance by suggesting that this environment already exists.[78] Finally, and in many ways most significantly, these communications and representations can also serve significant educational functions, particularly for adolescents who may find in prominent representations of the Community in public discourse a helpful (and perhaps the only) resource in their own development, self-worth, and self-perception.[79] As such, those communications and representations are "helping someone" even when they are not backed up with action.[80]

On the other hand, some—such as notable LGBTQIA+ historian and activist Dr. Eric Cervini—warn about the dangers of "fake allies."[81] Others express skepticism and uneasiness about whether the monetization of Pride coincides with the gay rights movement.[82] For instance, rainbow-washing can be damaging because "it misleads well-intentioned people into thinking they're supporting the [C]ommunity, when in reality they're lining the pockets of multi-billion corporations."[83] This results in dignitary and identity harm for both the investor who is deceived into investing and the Community itself.[84]

Likewise, rainbow-washing can divert attention away from the serious social problems that the Community faces and instead focus attention on the corporate messenger.[85] "[I]n borrowing the rainbow

78 *See* Daniel Conway, *The Politics of Truth at LGBTQ+ Pride: Contesting Corporate Pride and Revealing Marginalized Lives at Hong Kong Migrants Pride*, Int'l Feminist J. Pol., Nov. 2022, at 6.

79 *See* Sarah C. Gomillion & Traci A. Giuliano, *The Influence of Media Role Models on Gay, Lesbian, and Bisexual Identity*, 58 J. Homosexuality 330, 331–32 (2011). This benefit can also function as harm. For example, these representations can offer distorted stereotypes of the Community, reduce the Community to a certain image, and perpetuate negative stereotypes. *See* Eric Smialek, *Who Needs to Calm Down? Taylor Swift and Rainbow Capitalism*, 40 Contemp. Music Rev. 99, 106–07 (2021).

80 Brian Broome, *This Pride Month, I'm Embracing 'Rainbow Capitalism,'* Wash. Post (June 6, 2022), https://www.washingtonpost.com/opinions/2022/06/06/pride-month-rainbow-capitalism-acceptance/.

81 Dr. Eric Cervini (@ericcervini), Twitter (Mar. 8, 2022), https://twitter.com/ericcervini/status/1501274284177592324.

82 *See* Wired Staff, *The Problem With the 'Rainbow-Washing' of LGBTQ+ Pride*, Wired (June 21, 2018), https://www.wired.com/story/lgbtq-pride-consumerism/.

83 Daya Czepanski, *Rainbow Washing is a Thing, Here's Why it Needs to Stop*, Urban List (Feb. 4, 2022), https://www.theurbanlist.com/a-list/rainbow-washing.

84 *See* Dadush, *supra* note 41, at 926.

85 *See* Lily Zheng, *Your Rainbow Logo Doesn't Make You An Ally*, Harv. Bus. Rev. (June 30, 2021), https://hbr.org/2021/06/your-rainbow-logo-doesnt-make-you-an-ally.

logo to push products, companies minimize the challenges faced by the LGBTQ community and overshadow the efforts of true LGBTQ allies."[86] This renders the challenges and hostility confronting the Community a mere banality.

Finally, rainbow-washing marketing and communication strategies typically benefit certain members of the Community—typically those in recognized couple relationships with stable employment and financial resources—without accounting for members of the Community who are also, or independently, people of color, women, or homeless youth, or those without stable employment or economic means, and those living with a disability.[87] Thus, in this view, rainbow-washing "tokenizes" some members of the Community while exploiting and further marginalizing the ignored members of the Community.

B. Borrowing the "Greenwashing" Framework

"Greenwashing," a related problem, offers a framework through which to understand rainbow-washing as a legal problem. Generally, "[g]reenwashing occurs when a corporation increases its sales or boosts its brand image through environmental rhetoric or advertising, but in reality does not make good on these environmental claims."[88] In a similar manner, rainbow-washing involves companies making selective disclosures that are engineered to create an inaccurate and overly positive corporate image.[89] This corporate rhetoric may be in the form of vagueness, overstatements, inflation, or even deception.[90] Importantly, such statements are rarely accidental. Rather, they are often the result of creative, complex, and deliberate public relations and communication

86 *See* Audrey Hickey, *Have You Been Tricked by Rainbow Washing?*, Medium (Dec. 18, 2019), https://medium.com/@audreyhickey/have-you-been-tricked-by-rainbow-washing-920b5f91377f.

87 *See* Alan Sears, *Queer Anti-Capitalism: What's Left of Lesbian and Gay Liberation?*, 69 Sci. & Soc'y 92, 93, 103 (2005).

88 Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. Davis Bus. L.J. 281, 282 (2013); *see also* Seth C. Oranburg, *The Unintended Consequences of Mandatory ESG Disclosures*, 77 Bus. Law. 697, 708 (2022) ("Greenwashing occurs when corporations disclose positive environmental and ecological activities that tend to obscure, mask, or distract from more significant negative activities."); Kerr, *supra* note 45, at 843 n. 75 (Greenwashing refers to "the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.").

89 *See* Thomas P. Lyon & John W. Maxwell, *Greenwash: Corporate Environmental Disclosure Under Threat of Audit*, 20 J. Econ. & Mgmt. Strategy 3, 9 (2011).

90 *See* Cherry & Sneirson, *supra* note 40, at 1026.

efforts.[91]

The term "greenwashing" is borrowed from the term "whitewashing."[92] The domestic practice of "whitewashing" involved the use of low-cost calcium paint to cover up structural defect or damage.[93] By some definitions, whitewashing is "(1) a wrongdoer's (2) deployment and publicity of policies and practices (3) in response to the identification of a legal grievance, (4) which does not address the underlying concern of the aggrieved and (5) is intended to establish, maintain, burnish, or restore institutional reputation."[94] The underlying "defect" need not itself be illegal; rather, the point is that "if the law or society deems a company's behavior as wrong, that corporate actor has the potential to engage in a whitewash."[95] Fundamentally, "washing" is a form of deception.[96] This deception may come in the form of confusion,

91 *See* William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. Bus. Ethics 253, 255 (2003); *see also* Diamantis, *supra* note 36, at 867.

92 *See* Cherry, *supra* note 88, at 286 (citing Lesley Wexler, *Extralegal Whitewashes*, 63 DePaul L. Rev. 817 (2013)). The same practice of greenwashing has been used in other CSR contexts. For example, various scholars have labeled forms of corporate deception as "bluewashing" to claim association with the reputation of the United Nations. *See* Laufer, *supra* note 91, at 255. Interestingly and disturbingly, the term "pinkwashing" has taken on a more complicated meaning, having been used in different contexts to commoditize breast cancer, *see* Chavie Lieber, *Breast Cancer Awareness Products Profit of Survivors' Suffering*, Vox (Oct. 17, 2018), https://www.vox.com/the-goods/2018/10/17/17989624/pinkwashing-breast-cancer-awareness-products-profit, LGBTQIA+ issues, *see* Stephan Dahl, *The Rise of Pride Marketing and the Curse of 'Pink Washing,'* The Conversation (Aug. 26, 2014), https://theconversation.com/the-rise-of-pride-marketing-and-the-curse-of-pink-washing-30925, and as a strategic effort "to conceal the continuing violations of Palestinians' human rights behind an image of modernity signified by Israeli gay life," even though conservative and religious politicians remain "fiercely homophobic." Sarah Schulman, *Israel and 'Pinkwashing,'* N.Y. Times (Nov. 22, 2011), https://www.nytimes.com/2011/11/23/opinion/pinkwashing-and-israels-use-of-gays-as-a-messaging-tool.html. The term "fempower-washing" has been used about washing based on gender equality. *See* Yvette Sterbenk et al., *Is Femvertising the New Greenwashing? Examining Commitment to Gender Equality*, 177 J. Bus. Ethics 491, 501 (2022).

93 Wexler, *supra* note 92, at 825 (footnotes omitted). "Whitewashing" is also a term that has been used in the anti-racism discourse to refer to various problematic practices, such as casting white actors to play diverse characters in television or movies, or presenting history in such a way that focuses on white exceptionalism and overlooks racial oppression. *See, e.g.*, Claire Gillespie, *What Is Whitewashing, and Why Is It Harmful?*, Health (Nov. 22, 2022), https://www.health.com/mind-body/health-diversity-inclusion/whitewashing.

94 Wexler, *supra* note 92, at 825–26 (footnotes omitted).

95 *Id.* at 826 (emphasis added).

96 Cherry, *supra* note 88, at 286; *see also* Lyon & Maxwell, *supra* note 89, at 3, 9

fronting, or posturing.[97]

Like rainbow-washing, greenwashing has emerged relatively recently as a corporate strategy—as environmental concerns only began entering mainstream conversation in the 1970s.[98] There is broad consensus that greenwashing is a problem.[99] Essentially, the harm of greenwashing is the noneconomic deception and sense of betrayal to those who formed a relationship (investor, consumer, partner, etc.) with the corporation believing—and, perhaps, relying upon—the corporation's claims that its decisions and behavior align with the individual's values.[100] Professors Cherry and Sneirson explained this notion well:

> While people might not be shocked or upset to find out that . . . Wal-Mart was (once again) busting unions, it would be a very different matter to discover that Ben & Jerry's, a company that made its image on wholesome ingredients and progressive causes, was actually involved in abusing cows. It would also be a very different matter if executives at Patagonia, which has built its reputation as promoting conservation and stewardship of the environment, engaged in illegal dumping of chemicals in national forests. One comes to have these differing expectations based on the company's past actions, but to be sure, much of our collective knowledge about companies and their actions is predicated on what a particular

("[G]reenwash is fundamentally about misleading consumers and investors by telling the truth, but not the whole truth. This suggests a model in which the firm discloses verifiable information but may choose to withhold facts that do not reflect favorably on it, thereby persuading outsiders that the firm's performance is better than it is in reality.").

97 *See* Laufer, *supra* note 91, at 256.

98 *See* Ajay Menon & Anil Menon, *Enviropreneurial Marketing Strategy: The Emergence of Corporate Environmentalism as Market Strategy*, 61 J. Mktg., Jan. 1997, at 51, 52 (1997). While environmental regulations were weak in the 1950s and 1960s, noncompliance carried few penalties. *Id.* Enforcement was relegated to state agencies. *Id.* Further, "[e]nvironmentalism was seen by the mainstream public as a concern of sportspeople, naturalists, and the affluent not connected to everyday life." *Id.* In the 1970s, however, environmental groups achieved legal and regulatory developments that "created an adversarial relationship between the regulators, environmentalists, and businesses." *Id.* at 53.

99 *See* Eric H. Lane, *Greenwashing 2.0*, 38 Colum. J. Env't. L., 2013, at 279, 323–26; *see also The Seven Sins of Greenwashing*, Green Bus. Bureau (Dec. 16, 2021), https://greenbusinessbureau.com/green-practices/the-seven-sins-of-greenwashing/.

100 *See e.g.*, Cherry and Sneirson, *supra* note 40, at 1025 (discussing the betrayal experienced by socially conscious investors who purchased BP stock because they believed BP was more environmentally conscious than its competitors).

firm chooses to tell the public.[101]

When environmental goals align with making profits, environmental rhetoric presents a win-win situation, even if the corporate motives were driven by profits rather than environmental concerns.[102] On the other hand, when a decision requires the directors to choose between achieving or pursuing environmental goals and making profit—thus, pursuing profit at the detriment of environmental concerns—the story is different.[103] But, there is no clear tort of "greenwashing."[104] "While there are legal possibilities for policing or enforcing CSR [Corporate Social Responsibility] claims, which would in turn cut down the incentives for firms to engage in greenwashing, at present these are mostly only proposals or possibilities of reform."[105] Under some circumstances, greenwashing may support actions under false advertising laws, federal securities laws, and consumer protection laws.[106] Greenwashing's harm, however, can be difficult to measure with certainty. Specifically, compensatory damages are difficult to calculate if the value of the stock has actually increased as a result of the board's statements, as "there would appear to be no quantifiable harm to that individual investor."[107] "But just because there might not be an easily identifiable harm in these cases, does not mean there is no foul."[108] Indeed, the identity harm that results from greenwashing is both psychic (meaning, the harm is dignitary rather than economic) and derivative (meaning, others suffer the injury).[109] It is "the collective harm that presents the most serious challenge to the CSR endeavor."[110]

101 *See id.* at 1026.
102 *See* Cherry, *supra* note 88, at 288.
103 *Id.*
104 *See id.* at 285.
105 *Id.*
106 *See* Cherry & Sneirson, *supra* note 40, at 1028–35.
107 *See* Cherry, *supra* note 88, at 285. Research indicates that greenwashing harms consumers' views and behaviors toward the brand or organization, even when the statements are "half-lies" or misrepresentations. *See* Menno D.T. de Jong et al., *Different Shades of Greenwashing: Consumers' Reactions to Environmental Lies, Half-Lies, and Organizations Taking Credit for Following Legal Obligations*, 34 J. Bus. & Tech. Commc'ns 38, 68 (2019). Even where greenwashing "does not necessarily lead to repercussions for the organization, [ ] it minimizes any positive effects of environmental communication." *Id.* at 48.
108 Cherry, *supra* note 88, at 300.
109 *See* Dadush, *supra* note 41, at 868.
110 Cherry, *supra* note 88, at 300.

C. The Intertwining of Social Consciousness and Investor Behavior

Problems such as those raised by rainbow-washing are becoming increasingly important to investors. In particular, investors are increasingly concerned about matters of diversity, equity, and inclusion.[111] Relatedly, investors are demonstrating an increasing willingness and technological ability to act when corporations fail to further social interests.[112]

A foundational component of corporate law is that "the corporation is a legal fiction, possessing some attributes that are contractual in nature and others that are entity-like."[113] As a hybrid entity, the corporation resembles both a group of individual right-holders and an entity with state-like powers.[114] The division between ownership and control traditionally defines the corporation.[115] Upon incorporation and the issuance of stock, the managers are bound by their accompanying fiduciary duties and standards, which include promoting the value of the corporation for the benefit of its stockholders.[116] This "shareholder primacy" norm—where corporate governance focuses on maximizing the value of shareholders before considering the interests of society, consumers, and employees—has become the widely-accepted view in corporate law.[117] At the same time, however, there is growing consensus that corporations occupy weighty public positions—claiming social, political, and economic power.[118] Thus, a corporation's stance and actions relating to ESG factors is becoming important to shareholders.

While definitions vary, the essence of ESG investing centers

111 Marcela Pinilla & Nandini Hampole, *Investors Are Committing to Action on Diversity. Now What?*, BSR (Oct. 7, 2020), https://www.bsr.org/en/blog/investors-are-committing-to-action-on-diversity-now-what.

112 *Id.*

113 Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 Stan. L. Rev. 791, 799 (2002).

114 Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. Pa. L. Rev. 1861, 1870 (2003).

115 Bainbridge, *supra* note 5113, at 800.

116 eBay Domestic Holdings, Inc. v. Newman, 16 A.3d 1, 34 (Del. Ch. 2010). *Accord* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). For a further discussion of the fiduciary duty of corporate managers, *see infra* notes 191–283 and accompanying text.

117 *See* Leo E. Strine, Jr. et al., Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 Iowa L. Rev. 1885, 1889 (2021).

118 *See* Joan MacLeod Heminway, *Corporate Management Should All Be Feminists*, 40 Minn. J.L. & Ineq. 409, 410 (2022).

around the investor experiencing financial growth within the confines of a particular moral or ethical code.[119] The goal of such investing is to reconcile investors' economic goals with their sustainability values and make a positive social impact.[120] The most basic model of ESG investing involves "a relatively straightforward and negative approach of excluding shareholdings in companies judged to be unethical."[121]

Although the term ESG was coined in 2005,[122] ESG's roots can be traced to at least as early as the nineteenth century, when religious groups would screen investments based on what they considered sinful.[123] More recently, evidence that ESG has financial implications has grown, and the practice is becoming accepted both by investors and businesses.[124]

Scholars have noted the increased significance that ESG and other socially responsible investing practices have in the current investor marketplace.[125] Although corporate directors may have once been able to ignore ESG-minded investors, that is no longer possible as

119 *See* USSIF, Sustainable Investing Basics, available at https://www.ussif.org/sribasics (last visited June 24, 2023). Much scholarship and social discourse uses the terms "sustainable investing," "socially responsible investing," and "ESG investing" interchangeably. In the interest of consistency and clarity, but with respect to the scholars discussed, this article will use the term "ESG investing," even when citing and discussing materials that employ the term "socially responsible investing" or "sustainable investing."

120 *See id.*

121 Russell Sparkes & Christopher J. Cowton, *The Maturing of Socially Responsible Investment: A Review of the Developing Link with Corporate Social Responsibility*, 52 J. Bus. Ethics 45, 47 (2004); *see also* Omari Scott Simmons, *Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism*, 76 Wash. & Lee L. Rev. 1259, 1262 (2019) (defining "shareholder activism" as "using an equity stake in a corporation to influence management . . . to effectuate social change.").

122 *See* Georg Kell, *The Remarkable Rise of ESG*, Forbes (July 11, 2018), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=7056db911695.

123 Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 Ala. L. Rev. 1385, 1435 (2008). This is not to say that there can never be compensatory damages for rainbow-washing, particularly as there are indications that ESG funds can indeed be profitable. *See, e.g.*, Paul Sullivan, *Investing in Social Good is Finally Becoming Profitable*, N.Y. Times (Aug. 28, 2020), https://www.nytimes.com/2020/08/28/your-money/impact-investing-coronavirus.html. The determination of compensatory damages is, however, beyond the scope of this article.

124 *See* Kell, *supra* note 4122.

125 *See, e.g.*, Virginia Harper Ho, *The Limits of Enlightened Shareholder Activism*, Int'l J. for Fin. Servs., 2022, at 1, 5–6.

the practice has extended to many institutional investors,[126] with ESG-investing now representing a $40 trillion industry.[127]

ESG investing can be quite effective at impacting a corporation's behavior when pursued by a "powerful coalition of interests, particularly if it includes substantial institutional investors."[128] In this sense, ESG investing is not merely a form of moral abstention. Rather, it has developed as a strategic investment strategy within the confines of shareholder activism; it is "the exercise and enforcement of rights by minority shareholders with the objective of enhancing shareholder value over the long term."[129]

Strategies for shareholder activism may "range from voting corporate proxies to informal negotiations with management, to shareholder proposals, proxy contests and shareholder litigation."[130] At one time, ESG-motivated investment managers would merely vote against directors; in recent years, however, they have engaged in more confrontational shareholder activism.[131] This is not a new phenomenon, as corporate law has traditionally utilized shareholder activism in furtherance of social change.[132] Famously, in 1948, civil rights activists James Peck and Bayard Rustin each purchased a single share of Greyhound Corporation with the intention of using the shareholder

126 Sparkes & Cowton, *supra* note 3121, at 45–46. For a thorough discussion of the institutional context of passive funds, *see* Jill Fisch et al., *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. Pa. L. Rev. 17, 28–31 (2019).

127 *See* Natasha White, *JPMorgan Wealth Unit Nutmeg Calls Out 'Astonishing' ESG Gaps*, Bloomberg (Mar. 30, 2022), https://www.bloomberglaw.com/bloomberglawnews/securities-law/X480D208000000?bna_news_filter=securities-law#jcite.

128 Sparkes & Cowton, *supra* note 3121, at 49.

129 Chee Keong Low, *A Road Map for Corporate Governance in East Asia*, 25 Nw. J. Int'l L. & Bus. 165, 185–86 (2004); *see also* Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. Corp. L. 51, 57 (2011) (embracing Professor Low's definition of shareholder activism).

130 Virginia Harper Ho, "*Enlightened Shareholder Value*": *Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. Corp. L. 59, 66 (2010).

131 *See* Michal Barzuza et al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. Calif. L. Rev. 1243, 1283 (2020); *see also* Amy Whyte, *State Street to Turn Up the Heat on All-Male Boards*, Institutional Investor (Sept. 27, 2018), https://www.institutionalinvestor.com/article/b1b4fh28ys3mr9/State-Street-to-Turn-Up-the-Heat-on-All-Male-Boards ("State Street will vote against the *entire slate* of board members on the nominating committee of any company not meeting its gender diversity criteria." (emphasis added)).

132 *See* Sarah C. Haan, *Is American Shareholder Activism a Social Movement?*, Revue Internationale des Services Financiers, 2021 No. 4, at 21.

meetings to draw attention to segregation in public transit.[133] Contemporarily, shareholder activists are working to reshape the intersection of corporate governance and social activism[134] by pushing corporations into greater social activism.[135]

Significantly, "[w]omen and younger investors (under 40 years old [i.e., born after 1982]) are most likely to be interested in ESG investments."[136] "Since 2020, new generations of retail investors[137] have been flooding the securities markets, opening a record-breaking number of new brokerage accounts."[138] Indications suggest that retail investing accounted for roughly 20% of stock market activity in the first half of 2021.[139] Further, experts project that, over the next two decades, in perhaps the largest generational wealth transfer[140] in United States

133 *See* Simmons, *supra* note 121, at 1261.

134 Haan, *supra* note 4132, at 12.

135 *Id.* at 3–4.

136 Greg Iacurci, *That Socially Responsible Fund May Not Be As 'Green' As You Think. Here's How to Pick One*, CNBC (June 5, 2022), https://www.cnbc.com/2022/06/05/picking-a-socially-responsible-fund-can-be-confusing-heres-what-to-know.html.

137 "Retail investor" generally refers to any non-professional, individual investor who invests money in their own accounts, usually through traditional or online brokerage firms. *See* Barbara Black, *Are Retail Investors Better Off Today?*, 2 Brooklyn J. Corp. Fin. & Com. L. 303, 303 (2008); *see also* Austin Kilham, *Retail Investors: Definition, Pros, and Cons*, SoFi Learn (Dec. 21, 2022) https://www.sofi.com/learn/content/retail-investors/. For example, Robinhood is a popular, commission-free app used by many retail investors. *See* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 Nev. L.J. 51, 53 (2021).

138 Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Harnessing the Collective Power of Retail Investors*, Rsch. Agenda for Corp. L., (forthcoming) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4147388; *see also* Barzuza et al., *supra* note 131, at 1284 ("Over the next decade, millennials will assume a rising role among investors, employees, and consumers, and they will become the most dominant generation not long thereafter. . . .").

139 Staff of H. Comm. on Fin. Servs., 117th Cong., Game Stopped: How the Meme Stock Market Event Exposed Troubling Business Practices, Inadequate Risk Management, and the Need for Legislative and Regulatory Reform 5 (2022), https://democrats-financialservices.house.gov/uploadedfiles/6.22_hfsc_gs.report_hmsmeetbp.irm.nlrf.pdf.

140 This shift not only a *wealth transfer*, but also population *growth* and *redistribution*. *See* Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, Pew Rsch. Ctr. (Apr. 28, 2020), https://www.pewresearch.org/fact-tank/2020/04/28/millennials-overtake-baby-boomers-as-americas-largest-generation/. According to the Pew Research Center, "With immigration adding more numbers to this group than any other, the Millennial population is projected to peak in 2033, at 74.9 million. Thereafter, the oldest Millennial will be at least 52 years of age and mortality is projected to outweigh net immigration. By 2050 there

history, more than $68 trillion will be transferred from the Baby Boomer generation[141] to the Generation X[142] and Millennial[143] generations.[144]

With the looming generational transfer of wealth, business leaders must account for generational differences and preferences—as younger generations are most interested in investing in companies participating in ESG.[145] More than the Baby Boomers, Millennials and Generation Z "not only demand social responsibility but also transparency and genuine commitments from brands in their support of social issues."[146] The COVID-19 pandemic, coupled with an atmosphere of overall social tension,[147] "have prompted many people around the world to rethink their priorities, leading to the Great Resignation . . . . [and asking for] a greater commitment from businesses to make a positive societal impact."[148] Research indicates that members of these generations "want to see concrete impact to match corporate promises."[149] Specifically, "a majority of consumers, especially young adults, will engage in information seeking to evaluate the authenticity of a company's CSR advertising and other initiatives."[150] As such, combatting rainbow-washing will become all the more important.

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will be a projected 72.2 million Millennials." *Id.* Furthermore, "[b]y midcentury, the Boomer population is projected to dwindle to 16.2. million." *Id.*

141 The "Baby Boomer" *generation is generally regarded as those born af*ter World War II, from 1946 to 1964. See Am. Counts Staff, By 2030, All Baby Boomers Will Be Age 65 or Older, U.S. Census Bureau (Dec. 10, 2019), https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html.

142 "Generation X" generally includes those born between years 1965 and 1980. *See* Michael Dimock, *Defining Generations: Where Millennials End and Generation Z Begins*, Pew Rsch. Ctr. (Jan. 17, 2019), available at https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/.

143 The "Millennial" generation generally includes those born between years 1981 and 1996. *Id.*

144 *See* Gramitto Ricci & Sautter, *supra* note 139137, at 76–77; *see also* Whizy Kim, *The Young, Rich Anti-capitalist Capitalists*, Vox (May 31, 2022), https://www.vox.com/recode/23141993/anticapitalist-investing-rich-heirs-explainer.

145 Iacurci, *supra* note 138136.

146 *See* Sara Champlin & Minjie Li, *Communicating Support in Pride Collection Advertising: The Impact of Gender Expression and Contribution Amount*, 14 Int'l J. Strategic Commc'n 160, 172 (2020).

147 *See, e.g.*, *supra* note 74 and accompanying text.

148 Deloitte, *Striving for Balance, Advocating for Change: The Deloitte Global 2022 Gen Z & Millennial Survey*, 2 (2022), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/deloitte-2022-genz-millennial-survey.pdf.

149 Deloitte, *A Call for Accountability and Action: The Deloitte Global 2021 Millennial and GenZ Survey*, 4 (2021), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/2021-deloitte-global-millennial-survey-report.pdf.

150 Sterbenk et al., *supra* note 92, at 492.

These demands have translated into economic choices. Forty-four percent of Millennials and 49% of Gen Zers report making employment-based economic choices based on their personal values.[151] Forty percent of Millennials and Gen Zers have reported they have "rejected a job or assignment because it did not align with their values."[152] Deloitte interprets its research as suggesting "an eagerness to take the torch from those who, in their opinion, are doing too little to improve society and address the issues they care about most."[153] On the other end, "those who are satisfied with their employers' societal and environmental impact, and their efforts to create a diverse and inclusive culture, are more likely to want to stay with their employer for more than five years."[154]

Further, matters relating to diversity, inclusion, and social equity are personal and important to Millennials and Gen Zers. For example, research reflects that "young adults are at the leading edge of change and acceptance" when it comes to issues surrounding gender identity.[155] Of those surveyed, 26% of Millennials and 23% of Gen Zers responded that they believed that businesses and business leaders have "the greatest potential to help bring about significant change with respect to systemic racism," but only 18% of both generational communities believed that businesses and business leaders were "making the greatest effort to bring about significant change"—ranking them last of the eight choices offered.[156]

This zeal for change is coupled with a particular ability these generations have to utilize technology and social media to initiate and sustain movements. Famously, in 2020, users of the app TikTok

151 Deloitte, *For Millennials and Gen Zs, Social Issues Are Top of Mind–Here's How Organizations Can Drive Meaningful Change*, Forbes (July 22, 2021), https://www.forbes.com/sites/deloitte/2021/07/22/for-millennials-and-gen-zs-social-issues-are-top-of-mind-heres-how-organizations-can-drive-meaningful-change/?sh=4fb47754450c.

152 Deloitte, *supra* note 148, at 4.

153 Deloitte, *supra* note 149, at 33.

154 Deloitte, *supra* note 148, at 4.

155 *See* Kim Parker et al., *Americans' Complex Views on Gender Identity and Transgender Issues*, Pew Rsch. Ctr (June 28, 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/.

156 Deloitte, *supra* note 149, at 31–32. The other choices for surveyors to pick from were: Individuals/Citizens; Education Systems; Governments/Politicians; The Legal/Justice System; Businesses/Business Leaders; Religious Institutions; Activists/Protest Groups and Movements; and Charities/Nongovernment Organizations. *Id.*

orchestrated an effort to get thousands of people to register to attend a rally for then-President Donald Trump's reelection campaign in Tulsa, Oklahoma, despite having no intention of attending.[157] The movement went viral but was seemingly undetected by the campaign.[158] The former president boasted that one million people had requested tickets, but on the day of the rally, the 19,000-seat auditorium remained un-filled.[159] This TikTok campaign highlights the ability of social media to foster shareholder engagement and shareholder activism in ways that may not have previously occurred.

In another example, in early 2021, retail investors, armed with commission-free stock brokerage apps, communicated over social media to purchase, en mass, stock in GameStop Corp.[160] In January 2021, this form of shareholder engagement resulted in GameStop's stock surging 3,000%.[161] Later, in March 2021, a social media discourse about AMC Entertainment Holdings, Inc.'s upcoming shareholder meeting—and specifically, a proposal to issue an additional 25 million shares—sparked such an outrage on social media that AMC took the proposal off the agenda.[162] As illustrated by AMC's action, social media has the power to foster and fuel shareholder activism and therefore change a company's practices, proving to be a viable tool to combat companies engaging in rainbow-washing.

Thus, as investors increasingly view ESG considerations as vital to investing behavior, they have demonstrated both a willingness and capacity to undertake large-scale action in line with those values. Further, the COVID-19 pandemic has drawn attention to ESG disparities, forcing investors to focus on the importance of these issues.[163] As this trend is likely to become more and more prominent in the coming years, companies engaging in rainbow-washing are likely

157 *See* Donie O'Sullivan, *Trump's Campaign Was Trolled by TikTok Users in Tulsa*, CNN (June 21, 2020), https://www.cnn.com/2020/06/21/politics/tiktok-trump-tulsa-rally/index.html.

158 *See id.*

159 *Id.*

160 *See* Gramitto Ricci & Sautter, *supra* note 137, at 56–62 (describing the GameStop saga).

161 *See* Sam Quirke, *What's Behind the Latest Surge in GameStop (NYSE: GME)?*, Entrepreneur (Apr. 8, 2022), https://www.entrepreneur.com/business-news/whats-behind-the-latest-surge-in-gamestop-nyse-gme/424303.

162 Gramitto Ricci & Sautter, *supra* note 138.

163 *See* Jennifer Wu & Vincent Juvyns, *Covid-19 Shows ESG Matters More Than Ever*, J.P.Morgan (Aug. 5, 2020), https://am.jpmorgan.com/tw/en/asset-management/institutional/insights/market-insights/market-updates/on-the-minds-of-investors/covid-19-esg-matters/.

to be condemned by the public. Accordingly, corporate managers must pay heed to the significance investors and shareholders place on social issues and anticipate that their public-facing statements in support of the Community are noticed and considered by such investors. Likewise, corporate managers should increasingly understand that a failure to fulfill the promises expressed in company-issued statements in support for the Community may subject the corporation to shareholder activism, including shareholder litigation.

D. Shareholder Litigation and Rainbow-Washing

When corporations engage in acts of rainbow-washing, shareholder litigation may provide harmed shareholders and shareholder activists a tool to seek redress and effectuate change. While any shareholder deceived by rainbow-washing may have standing to assert legal claims against corporate managers, shareholder activists may be particularly interested in commencing litigation, as shareholder activists can use their position as shareholders to change the corporation.[164]

Importantly, not every instance of rainbow-washing will expose corporate managers to liability under corporate and securities law. Considering the issue in the context of private actions against Delaware public corporations, this article defines actionable rainbow-washing as: (1) a corporate public-facing statement of fact; (2) that purports corporate support of the Community; (3) despite underlying action inconsistent with the claimed support; (4) made intentionally, knowingly, or recklessly; (5) for the purpose of deceptively establishing, maintaining, burnishing, or restoring corporate reputation; where (6) investors or shareholders are deceived into changing position or foregoing action based on the statements. Where rainbow-washing fails to reach this level, it is best addressed through actions other than litigation, including publicity campaigns, boycotts or buycotts, or shareholder proposals.

Under this definition, shareholder litigation may be warranted when a corporation represents itself as supportive of the Community but does not disclose its continued political contributions or lobby activities supporting anti-LGBTQIA+ politicians or issues. Alternatively, when a corporation fails to monitor its political contributions and lobbying efforts to ensure that it does not support anti-LGBTQIA+ candidates or

164 *See* Mary Ann Cloyd, *Shareholder Activism: Who, What, When, and How?*, Harv. L. Sch. F. on Corp. Gov. (Apr. 7, 2015), https://corpgov.law.harvard.edu/2015/04/07/shareholder-activism-who-what-when-and-how/.

issues, corporations may be engaging in an actionable form of rainbow-washing. By way of demonstration, the organization Data for Progress has released a list of corporations that have participated in pride campaigns and represented themselves as allies to the Community, while simultaneously making political donations to anti-LGBTQIA+ campaigns or politicians.[165]

Rainbow-washing could also occur where a corporation proclaims support for the Community, but then is discriminatory or apathetic in its employment benefits. For example, a corporation fails to support the Community when it provides its employees with employer-based health insurance that refuses to cover the cost of medical treatment for medical needs closely associated with the Community, such as infertility treatment[166] or preexposure prophylaxis—a medication proved to be effective at preventing the contraction of HIV.[167] Likewise, a corporation fails to support the Community when it inadequately guards against harassment or discrimination in the workplace, or employs discriminatory workplace policies.[168]

II. Using Shareholder Litigation to Combat Rainbow-Washing

Shareholders generally exercise their control over corporations in three primary ways: (1) by voting their shares,[169] (2) by selling

165 *See Pride Corporate Accountability Report*, Data for Progress, https://www.dataforprogress.org/accountable-allies (last visited July 27, 2022); *see also* Judd Legum et al., *These 25 Rainbow-flag Waving Companies Donated $13 Million to Anti-Gay Politicians Since 2021*, Popular Info. (June 2, 2022), https://popular.info/p/lgbtq2022.

166 *See* Shira Stein, *LGBTQ Couples' IVF Hopes Hinge on New Infertility Definition*, Bloomberg L. (May 17, 2022), https://news.bloomberglaw.com/health-law-and-business/lgbtq-couples-ivf-hopes-hinge-on-new-infertility-definition.

167 *See* Sarah Varney, *HIV Preventative Care Is Supposed to Be Free in the US. So, Why Are Some Patients Still Paying?*, KFF Health News (Mar. 3, 2022), https://khn.org/news/article/prep-hiv-prevention-costs-covered-problems-insurance/.

168 *See* Brandon Truitt, *LGBT Employees Rate Their Companies 6% Lower Than Non-LGBT Employees, Study Finds*, CBS News Bos. (June 17, 2022), https://www.cbsnews.com/boston/news/lgbt-employees-rate-companies-lower-workplace-inclusion-harassment/.

169 Professor Stephen Bainbridge describes shareholder voting, not as shareholders making decisions, but rather, shareholders holding the board of directors accountable. *See* Stephen M. Bainbridge, *Shareholder Activism and Institutional Investors*, Univ. of Cal. Sch. Of L., Law & Econ. Rsch. Paper No. 05-20, (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=796227.

their stock, or (3) by suing.[170] A corporation rises or falls based on its reputation, and litigation directly impacts a corporation's reputation.[171] There are two varieties[172] of shareholder litigation that are particularly appropriate vehicles through which to combat rainbow-washing: (1) shareholder derivative litigation for breach of fiduciary duty;[173] and (2) private actions for securities fraud.[174]

While monetary redress is the most common rationale for commencing litigation,[175] it is not the only reason to litigate. Litigation also allows a plaintiff to force both the cost of litigation and the non-monetary cost of negative publicity onto a defendant.[176] That litigation action may shift public opinion about the defendant corporation and may also benefit litigants.[177] Even if the legal action fails, the mere

170 William T. Allen, *Ambiguity in Corporate Law*, 22 Del. J. Corp. L. 894, 897 (1997).

171 *See* Kishanthi Parella, *Public Relations Litigation*, 72 Vand. L. Rev. 1285, 1295–96 (2019).

172 This article will acknowledge, but not discuss in depth, the significance of actions under Del. Code Ann. tit. 8 § 220(c), which provides that if a corporation or officer of a corporation refuses to permit inspection of records by a shareholder, the shareholder "may apply to the Court of Chancery for an order to compel such inspection." 8 Del. Code Ann § 220 (2010). These § 220 actions provide plaintiffs with information necessary to plead demand futility and to meet other heightened specificity pleading rules. A plaintiff desiring to assert a derivative claim or private cause of action of securities fraud would be well-advised to first request to inspect corporate records under § 220 and any relevant corporate bylaw or shareholder agreement. *See* Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 Cardozo L. Rev. 1949, 1980–81 (2021).

173 Derivative suits function as a procedural mechanism for shareholders to enforce state fiduciary duty law on behalf of the corporation. *See* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 Wm. & Mary L. Rev. 1749, 1756 (2010).

174 Federal law recognizes private rights of action to bring claims under certain securities law provisions, either individually or as a class. *See* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1086–87 (1991) (acknowledging a private right of action for misleading statements in proxy solicitations); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) (acknowledging private action for misleading statements for actual purchasers of securities); Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 731 (1975) (recognizing private action for false or misleading statements for actual purchasers of securities); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (implying a private right of action for misleading statements in proxy solicitations). This article will not distinguish between individual and class actions.

175 Parella, *supra* note 3171, at 1327.

176 *Id.* at 1330; *see also* Ben Depoorter, *The Upside of Losing*, 113 Colum. L. Rev. 817, 833 (2013) ("[P]laintiffs, as much as a they might hope to obtain a favorable verdict, recognize that substantial benefits might accrue in defeat.").

177 Parella, *supra* note 3171, at 1330–31.

commencement of a legal action indicates that "some segment of the public cared enough about the organization's conduct to file a complaint and that the conduct at issue may violate legal norms, which are a socially significant set of norms."[178] Furthermore, the educational value of litigation—putting factual and normative information in one place through discovery—is a valuable accomplishment.[179] Thus, courts can be used as a forum for protest.[180]

Litigation ends in one of four ways: (1) judgment; (2) involuntary dismissal; (3) voluntary dismissal; or (4) settlement.[181] Settlements may be monetary or through a reform in governance.[182] Indeed, as most corporate litigation is settled once a plaintiff has survived a motion to dismiss, if a plaintiff can survive the motion to dismiss, its leverage to accomplish the desired change is substantially increased.[183] Of course, not every instance of rainbow-washing will give rise to legal liability. This article should not be viewed as an invitation to "open the floodgates of litigation." Lawyers must be mindful of their professional duty only to commence litigation when "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[184] Lawyers should also be mindful that too much impact litigation may be counter-productive and result in profuse and stable negative precedent.[185] Further, litigation is expensive and may not always be in a client's best interest. Where the facts are compelling and the harm is palpable,[186] lawyers should not be deterred from litigation—even if the likelihood of success is uncertain or unlikely.[187]

A. Rainbow-Washing and Fiduciary Duty

1. Bad Faith

178 *See* Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 965 (2018).
179 *Id.* at 966.
180 Jules Lobel, *Courts as Forum for Protest*, 52 UCLA L. Rev. 477, 479 (2004).
181 *See generally* Erickson, *supra* note 5173, at 1788.
182 *Id.* at 1798.
183 *See* Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 Wash. U. L. Rev. 1857, 1868 (2021).
184 Model Rules of Pro. Conduct r. 3.1 (Am Bar Ass'n 2003).
185 *See* Depoorter, *supra* note 8176, at 843.
186 *See* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 Stan. L. Rev. 87, 113–25 (2022).
187 For an excellent discussion of the "dark side" of social movement litigation, *see generally* Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 Iowa L. Rev. Bull. 61 (2011).

Fundamentally, "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors."[188] Corporations have traditionally been characterized by the division between ownership and control, where shareholders "own"[189] the corporation while the board of directors "control" the corporation.[190] Attendant to this division, "[t]wo parallel bodies of American law establish the obligations of corporate directors to disclose information about the corporation to its existing stockholders: (1) the Securities Exchange Act of 1934, and (2) state common law, including doctrines such as fraud and negligent misrepresentation."[191] Delaware's general corporation laws reflect the idea that the "business of business is better left to those in charge of it rather than to judges and legislators."[192] Considering the power Delaware law gives to directors and officers, fiduciary duty is an equitable response developed through common law to protect the interests of shareholders.[193]

Under Delaware corporate law, the board of directors and corporate officers owe fiduciary duties to both the corporation as an entity and to the shareholders.[194] Specifically, Delaware law imposes two overarching fiduciary duties on corporate directors[195]—the duty of care

188 Del. Code Ann. tit. 8, § 141(a) (2021); *see also* Model Bus. Corp. Act § 8.01(b) (2008) ("[A]ll corporate powers shall be exercised by or under the authority of the board of directors, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of the board of directors.").

189 There is some debate among scholars as to whether shareholders truly "own" the corporation. *See, e.g.*, Bruner, *supra* note 125123, at 1396–1408; Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. Corp. L. 637, 637–38 (2006).

190 *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("[W]hether the vote is seen functionally as an unimportant formalism, or as an important tool of discipline, it is clear that it is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own.").

191 Lawrence A. Hamermesh, *Calling Off the Lynch Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 Vand. L. Rev. 1087, 1089–90 (1996).

192 Hillary A. Sale, *Delaware's Good Faith*, 89 Cornell L. Rev. 456, 457 (2004).

193 *See* Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. Pa. J. Bus. L. 675, 678 (2009).

194 *See* United Food & Com. Works Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1049 (Del. 2021).

195 Delaware's law of corporate fiduciary duty has "been all over the map" since at least 1993. *See* Joan MacLeod Heminway, *Martha's (and Steve's) Good Faith: An Officer's Duty of Loyalty at the Intersection of Good Faith and Candor*, 11 Tenn. J. Bus. L. 111, 113–15 (2009) (describing the development of Delaware jurisprudence of

and the duty of loyalty—both of which are owed to the corporation and to the shareholders.[196] First, the duty of care "requires that fiduciaries inform themselves of material information before making a business decision and act prudently in carrying out their duties."[197] As courts are hesitant to second-guess a board decision or judge the decision with the benefit of hindsight, the business judgment rule "shields corporate managers from judicial scrutiny of their decisions . . . . [when] 'the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'"[198] As such, a breach in the duty of care would generally not result in liability unless the directors had been grossly negligent.[199] Following the infamous ruling in *Smith v. Van Gorkom*,[200] and the ensuing reactions to that controversial decision, the Delaware General Assembly adopted § 102(b)(7) to permit corporate charters to exculpate board directors and officers from monetary liability for breach of the duty of care.[201]

Relatedly, the duty of loyalty "requires an undivided and unselfish loyalty to the corporation and demands that there shall be no conflict

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fiduciary duty).

196 *See id.*

197 *Zuckerberg*, 262 A.3d at 1049–50 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)).

198 Claire A. Hill & Brett H. McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 Fordham L. Rev. 1769, 1772 (2007) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)); *see also* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928 (Del. 2003) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)); *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 126 (Del. Ch. 2009) ("Business decision-makers must operate in the real world, with imperfect information, limited resources, and an uncertain future. To impose liability on directors for making a 'wrong' business decision would cripple their ability to earn returns for investors by taking business risks.").

199 *See* Ann M. Lipton, *Capital Discrimination*, 59 Hous. L. Rev. 843, 869 (2022) (citing Morrison v. Berry, No. 12808-VCG, 2019 WL 7369431, at *22 (Del. Ch. Dec. 31, 2019)); Julie Andersen Hill & Douglas K. Moll, *The Duty of Care of Bank Directors and Officers*, 68 Ala. L. Rev. 965, 975 (2017) (citing *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 748 (Del. Ch. 2005)); Carter G. Bishop, *Directorial Abdication and the Taxonomic Role of Good Faith in Delaware Corporate Law*, 2007 Mich. St. L. Rev. 905, 916 (2007).

200 Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), *overruled in part by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

201 *See* Del. Code Ann., tit. 8, § 102(b)(7) (2022); *see also* Lawrence A. Hamermesh et al., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 364 (2022) (discussing the origins of Section 102(b)(7)).

between duty and self-interest."[202] Traditionally, the duty of loyalty was only implicated when a director, officer, or controlling shareholder had a pecuniary, self-dealing conflict of interest with the corporation[203] or usurped corporate opportunities for themselves.[204] Courts have now established that the directors' duty of loyalty also requires them to make "a good faith effort to oversee the company's operations."[205] In what is now dubbed a "classic *Caremark* claim," a shareholder plaintiff may allege that the directors and officers failed to oversee the corporation.[206]

To illustrate, in *Stone v. Ritter*, the plaintiff argued that the directors failed to implement a system that would have brought the alleged violations to their attention.[207] In making a *Caremark* claim, the plaintiff concedes that the directors "neither 'knew [n]or should have known that violations of law were occurring.'"[208] The underlying theory is that the directors "failed to implement any sort of statutorily required monitoring, reporting or information controls that would have enabled them to learn of problems requiring their attention."[209] Therefore, a director breaches their duty of loyalty with "only a sustained or systematic failure of the board to exercise oversight" or a "conscious disregard" of their duties.[210]

Because they require plaintiffs to affirmatively demonstrate the absence of good faith,[211] a classic *Caremark* claim alleging oversight failures "is one of the most difficult claims for plaintiffs to win" under

202 *Zuckerberg*, 262 A.3d at 1050 (quoting City of Fort Myers Gen. Emps.' Pension Fund v. Haley, 235 A.3d 702, 721 (Del. 2020)) (internal quotation marks omitted).

203 *See Aronson*, 473 A.2d at 812.

204 *See, e.g.*, Broz v. Cellular Info. Sys., Inc., 673 A.2d 148, 154–55 (Del. 1996); Guth v. Loft, Inc., 5 A.2d 503, 510–11 (Del. 1939); *see also* Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the "New" Good Faith*, 56 Am. U. L. Rev. 211, 248 (2006).

205 *See* Marchand v. Barnhill, 212 A.3d 805, 820 (Del. 2019) (citing *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996)). The Supreme Court of Delaware expressly approved the *Caremark* standard in *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006).

206 *See Stone*, 911 A.2d at 364 (Del. 2006) (quoting the Court of Chancery to coin the phrase "classic *Caremark* claim").

207 *Id.*

208 *Id.* (illustrating an example of a *Caremark* claim).

209 *See id.* at 370.

210 *Id.* at 370, 372.

211 *See* Gregory K. Markel et al., *A Director's Duty of Oversight After* Marchand *in "*Caremark*" Case*, Harv. F. on Corp. Governance (Jan. 23, 2022), https://corpgov.law.harvard.edu/2022/01/23/a-directors-duty-of-oversight-after-marchand-in-caremark-case/.

Delaware's law of fiduciary duty.[212] Courts have understood *Caremark* to have two prongs—providing two distinct, but complementary, liability theories.[213] The first prong prods whether the corporation had a reporting system in place to bring information to its attention.[214] The second prong inquires as to whether directors actually monitored any existing system.[215] In essence, courts distinguish between the board's duty to ensure the corporation's compliance with the law from its decision-making responsibilities about the corporation's business risk.[216] The duty to act in good faith is not, itself, an independent basis for director liability, but the requirement that a director act in good faith is a "subsidiary element . . . of the fundamental duty of loyalty."[217]

Despite this high bar, several *Caremark* claims have recently survived motions to dismiss.[218] Most notably, in *Marchand v. Barnhill*, the Supreme Court of Delaware permitted a shareholder derivative action under Caremark's first prong to proceed past a motion to dismiss.[219] The shareholder asserted a classic *Caremark* claim against the board of Blue Bell Creameries USA, Inc., alleging that: (1) numerous reports of listeria outbreaks never made their way to the board; (2) the board had no committee charged with monitoring food safety; (3) the board did not have a process to focus board meetings on food safety compliance; and (4) the board had no protocol requiring management to deliver key food safety compliance reports on a consistent or mandatory basis.[220] Specifically, the shareholder plaintiff argued:

> [D]espite the critical nature of food safety for Blue Bell's continued success . . . management turned a blind eye to red and yellow flags that were waved in front of it by regulators and its own tests, and the board—by failing to implement any system to monitor the company's food safety compliance

212 Strine, Jr. et al., *supra* note 117, at 1862 n. 15; *see also In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

213 *See* Carliss Chatman & Tammi S. Etheridge, *Federalizing* Caremark, 70 UCLA L. Rev. (forthcoming 2024) (manuscript at 24), https://ssrn.com/abstract=4164152.

214 *Id.*

215 *Id.*

216 *Id.*

217 Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (quoting Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)).

218 There is some debate on whether these news cases reflect a material change in the law. *See* Shapira, *supra* note 185, at 1859; Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 Vand. L. Rev. 2013, 2025–30 (2019).

219 Marchand v. Barnhill, 212 A.3d 805, 808 (Del. 2019).

220 *See id.* at 812–13.

> programs—was unaware of any problems until it was too late.[221]

The Court of Chancery, however, held that the plaintiff had "failed to plead particularized facts to raise a reasonable doubt that a majority of the [Blue Bell board] members could have impartially considered a pre-suit demand."[222] Essentially, the court concluded, "What Plaintiff really attempts to challenge is not the existence of monitoring and reporting controls, but the effectiveness of monitoring and reporting controls in particular instances."[223] Accordingly, the Chancery Court dismissed the shareholder plaintiff's action.[224]

On appeal, the Supreme Court reversed the Chancery Court's order dismissing the shareholder derivative action. [225] The Court summarized:

> Under Caremark and Stone v. Ritter, a director must make a good faith effort to oversee the company's operations. Failing to make that good faith effort breaches the duty of loyalty and can expose a director to liability. In other words, for a plaintiff to prevail on a Caremark claim, the plaintiff must show that a fiduciary acted in bad faith—"the state of mind traditionally used to define the mindset of a disloyal director."[226]

The court further explained that the directors did not make the good faith effort that *Caremark* requires when they completely failed to implement a reporting system that would bring significant

221 *Id.* at 811.

222 *Id.* at 816 (alterations in original).

223 *Id.* (alterations in original).

224 *See id.*

225 *Id.* at 807. The Delaware Supreme Court noted, on multiple occasions, that before filing the derivative action, the shareholder plaintiff had requested the corporation's books and records through a request under Del. Code Ann., tit. 8, § 220. *See id.* at 815–16 ("After requesting Blue Bell's books and records through a § 220 request, the plaintiff, a Blue Bell stockholder, sued Blue Bell's management and board derivatively . . . ."); *id.* at 822 ("Here, the plaintiff did as our law encourages and sought out books and records about the extent of board-level compliance efforts at Blue Bell . . . ."); *id.* at 824 ("Where, as here, a plaintiff has followed our admonishment to seek out relevant books and records and then uses those books and records to plead facts support a fair inference that no reasonable compliance system and protocols were established . . . the plaintiff has met his onerous pleading burden and is entitled to discovery to prove out his claim."). The Court's ruling, thus, seems to indicate the effectiveness of § 220 requests in empowering a plaintiff to plead sufficient allegations to survive a motion to dismiss for demand futility. *See, e.g.*, Shapira, *supra* note 172, at 1981.

226 Marchand v. Barnhill, 212 A.3d 805, 820–21 (Del. 2019) (alterations in original) (footnotes omitted).

information to their attention.[227] Specifically, the plaintiff pleaded facts to show that the board had no committee addressing food safety and no regular process by which it would be informed of food safety compliance practices and risks.[228] While the company complied with the FDA regulations it was subjected to, this did not establish that "the board implemented a system to monitor food safety at the board level."[229] The fact that food safety was an issue "intrinsically critical to the company's business operation"[230] and "essential and mission critical"[231] made the lack of board oversight all the more problematic.

The court clarified that *Caremark* requires that the board make a good faith effort to monitor and report its "central compliance risks."[232] The court explained that, simply stated, "[i]f *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty."[233] In reversing the dismissal and remanding the shareholder plaintiff's claim to proceed to discovery,[234] the court commended the plaintiffs for seeking out the corporation's books and records and then referencing those books and records in the complaint.[235]

Caremark and its progeny suggest that Delaware courts are becoming more inclined to enforce the oversight duty beyond the high burden that once existed.[236] Further, the courts seem more inclined

227 *Id.* at 822.
228 *Id.*
229 *Id.* at 823.
230 *Id.* at 822.
231 *Id.* at 824.
232 *Id.*
233 *Id.*
234 *Id.*
235 *Id.*
236 *See In re* The Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *33 (Del. Ch. Sept. 7, 2021) ("[T]he Board has a rigorous oversight obligation where safety is mission critical, as the fallout from the Board's utter failure to try to satisfy this "bottom-line requirement" can cause "material suffering," even short of death, "among customers, or to the public at large," and attendant reputational and financial harm to the company."); Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065, at *25 (Del. Ch. Aug. 24, 2020) ("Plaintiffs have adequately pled that the Board was aware of the Pre-Filled Syringe Program's contravention of mission critical drug health and safety regulations, and that the Board failed to act in response."); Hughes v. Hu, No. 2019-0112-JTL, 2020 WL 1987029, at *16 (Del. Ch. Apr. 27, 2020) ("The complaint's allegations support a pleading-stage inference that the board never established its own reasonable system of monitoring and reporting, choosing instead to rely entirely on management."); *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-

to allow a complaint to proceed on the merits when allegations in the complaint reference the corporation's books and records.[237] The trends in the *Caremark* progeny seem to suggest that *Caremark* liability arises when the claim relates to an issue that is "mission-critical" and, frequently, involves some sort of regulatory agency action.[238]

In addition to the classic *Caremark* claim pertaining to oversight, a shareholder plaintiff may also prevail on a more general theory of bad faith. In the Walt Disney Co. Derivative Litigation, the Supreme Court of Delaware articulated that corporate managers may face liability for a class of offenses falling somewhere between "conduct motivated by subjective bad intent" and gross negligence.[239] Actions in "bad faith" violate the duty of loyalty.[240] Indeed, a corporate fiduciary acts in bad faith when they either "intentionally act[ ] with a purpose other than that of advancing the best interests of the corporation, . . . [act] with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[241] This is a non-exhaustive list, and a plaintiff may articulate other reasons why a corporate fiduciary should face liability for acting in bad faith.[242]

Rainbow-washing relates to "mission-critical" issues in two ways. For one, rainbow-washing occurs in the context of regulated speech, where corporate managers have an affirmative duty to speak truthfully and completely about material information. Furthermore, diversity- and equity-related initiatives are essential to innovation, can enrich the business operations,[243] and have profound impact on employment and

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0222-JRS, 2019 WL 4850188, at *15 (Del. Ch. Oct. 1, 2019) (finding a well-pleaded *Caremark* claim when "the Board consciously ignored red flags that revealed a mission critical failure to comply with the RECIST protocol and associated FDA regulations.").

237 Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019).

238 *See* Chatman & Etheridge, *supra* note 213, at 36–37.

239 *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66 (Del. 2006).

240 *See* Andrew D. Appleby & Matthew D. Montaigne, *Three's Company:* Stone v. Ritter *and the Improper Characterization of Good Faith in the Fiduciary Duty "Triad,"* 62 Ark. L. Rev. 431, 452–53 (2009).

241 *In re Walt Disney Co.*, 906 A.2d. at 67.

242 *Id.*; *see also* Edward Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. Pa. L. Rev. 1907, 1960 (2013).

243 *See* Burcin Ressamoglu, *Companies Must Continue to Prioritize Diversity, Equity and Inclusion, Even During Tough Economic Times*, Forbes (Jan. 31, 2023), https://www.forbes.com/sites/forbesbusinesscouncil/2023/01/31/companies-must-continue-to-prioritize-diversity-equity-and-inclusion-even-during-tough-economic-times/?sh=71ebfff63453; Lily Zheng, *We're Entering the Age of Corporate Social Justice*, Harv. Bus. Rev. (June 15, 2020), https://hbr.org/2020/06/were-

the workforce.[244] Rainbow-washing similarly fits within the *Disney* non-exclusive list of bad faith.

Additionally, as corporations act through the authority of their boards,[245] corporations do not accidentally make statements. Rather, all corporate stakeholder rhetoric is necessarily designed to appeal to a community or to investors with certain values. Thus, all corporate statements are subject to regulatory compliance,[246] and disclosures and public statements, whether mandated or voluntarily made, are relied upon by the SEC, investors, employees, consumers, competitors, lenders, and various other stakeholders in the market.[247] The dissemination of accurate and complete information in the market is certainly a mission-critical aspect of a board's responsibilities, and false or misleading statements subject the directors to liability and expose the corporation to reputational harm. Accordingly, boards are obligated to ensure that all public statements are made in conformance with federal securities laws, and they are responsible for correcting statements that contain false, misleading, or omitted information.

2. "Duty of Candor" or "Duty of Complete Honesty"

In addition to a claim that rainbow-washing constitutes bad faith, shareholders may also be able to prevail under the theory that rainbow-washing breaches the obligation of candor and complete honesty under the duty of loyalty. The directors' and officers' obligation of candor under Delaware law has a complicated history. At one time, under former Section 144,[248] Delaware statutorily prohibited corporations

entering-the-age-of-corporate-social-justice.

244 *See* Brian Kropp et al. *How Fair is Your Workplace?*, Harv. Bus. Rev. (July 14, 2022), https://hbr.org/2022/07/how-fair-is-your-workplace?registration=success.

245 *See, supra* note 188 and accompanying text.

246 *See* Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 Yale J. Reg. 499, 510 (2020).

247 *Id.* at 509–10.

248 *See* 21 Del. Laws 451(1899) ("If the directors or officers of any corporation organized under the provisions of this Act, shall knowingly cause to be published or given out any written statement or report of the condition or business of the corporation that is false in any material respect, the officers and directors causing such report or statement to be published or given out, or assenting thereto, shall by jointly and severally, individually liable for any loss or damage resulting therefrom."), available at https://delawarelaw.widener.edu/files/resources/dgcl1899.pdf, later codified at 8 Del. Code ann. tit. 8 § 144 (1953), repealed by amendment in 1967. *See* Del. Code ann. tit. 8 § 144 (1967), https://delawarelaw.widener.edu/files/resources/dgcl1967.pdf; *see also* Donald E. Pease, *Delaware's*

from publishing any statement that was knowingly false in a material way.[249] Recognizing that former Section 144 did not mandate disclosure, courts construed the statute as requiring "corporate directors [to] honestly disclose all material facts when they undertake to give out written statements concerning the condition or business of their corporation."[250] Former Section 144 was repealed when the Delaware General Corporation Law was revised in 1967, although legislative history offers no hint as to the intent of removing this obligation.[251]

Under current law, however, it is well established that directors and officers have a duty to disclose accurate information to shareholders, even absent a request for shareholder action.[252] Interestingly, the Court of Chancery continued to apply the former Section 144 rule requiring complete honesty of all material facts in disclosures—as entrenched in Delaware common law—despite the statute's repeal. For example, in *Kelly v. Bell*, the Delaware court reviewed a shareholder complaint that alleged directors had fraudulently reported voluntary payments as "local taxes" in shareholder annual reports.[253] Relying on its earlier decision in *Hall*,[254] which cited former Section 144, the Court of Chancery concluded that "[o]f course directors owe a duty to honestly disclose all material facts when they undertake to give out statements about the business to stockholders."[255] The court paid no heed to the repealed statute—implying the repeal of former Section 144 had no material change on Delaware law.[256] Then, in *Malone v. Brincat*, the Supreme Court of

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Disclosure Rule: The "Complete Candor" Standard, Its Application, and Why Sue in Delaware, 14 Del. J. Corp. L. 445, 448 (1989) (describing amendments to the DGCL).

249 *See* J. Robert Brown, Jr., *Speaking with Complete Candor: Shareholder Ratification and the Elimination of the Duty of Loyalty*, 54 Hastings L.J. 641, 660–61 (2003); Hamermesh, *supra* note 3191, at 1104–08. The now-repealed statute is often referred to as "former section 144." *See id.* at 1104.

250 Hall v. John S. Isaacs & Sons Farms, Inc., 146 A.2d 602, 609–10 (Del. Ch. 1958).

251 *See* Marhart, Inc. v. CalMat Co., 18 Del. J. Corp. L. 330, 335 (Del. Ch. 1992); Hamermesh, *supra* note 191, at 1105–08.

252 *See* Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977) (holding that majority shareholder owed a duty of "complete candor" and to disclose all "information such as a reasonable shareholder would consider important in deciding whether to sell or retain stock" when seeking shareholder approval of a tender offer). The Court's subsequent cases developed this duty of complete candor in connection to other requests for shareholder action. *See* Hamermesh, *supra* note 3191.

253 Kelly v. Bell, 254 A.2d 62, 71 (Del. Ch. 1969).

254 *See Hall*, 146 A.2d at 609–10.

255 *Kelly*, 254 A.2d at 71.

256 *Id.*

Delaware affirmed that the directors' fiduciary duty extended to being honest in outward-facing statements—even when the statement was not made in connection with a shareholder request.[257]

In *Malone*, several plaintiffs filed a class action suit[258] against the directors of Mercury Finance Company ("Mercury"), alleging that the directors had disseminated information overstating Mercury's financial performance.[259] The Court of Chancery dismissed the complaint, reasoning that, in the absence of a board request for shareholder action, the board owed no fiduciary duty of candor in "any statement, including public statements, made by a corporate officer [or] director selling shares on a public market."[260] The court held that federal securities law already "ensure[d] the timely release of accurate information into the marketplace" and that "[t]he federal power to regulate should not be duplicated or impliedly usurped by Delaware."[261] Thus, any claim against the directors should be brought under—and only under—federal law.[262]

On appeal, the Supreme Court of Delaware rejected this rather narrow view of the so-dubbed "duty of candor."[263] The court held that "directors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder violate their fiduciary duty and may be held accountable in a manner appropriate to the circumstances."[264] Specifically, because shareholders count on

257 Malone v. Brincat, 722 A.2d 5, 14 (Del. 1998).

258 These overstatements apparently spawned "more than fifty lawsuits in four jurisdictions." Malone v. Brincat, No. 15510, 1997 WL 697940, at *1 (Del. Ch. Oct. 30, 1997), *aff'd in part, rev'd in part, by Malone*, 722 A.2d. Distinguishing this class action from other securities fraud and derivative actions, the Chancellor described this suit as "apparently the only one of its kind." *Id.* This distinction was critical to the Supreme Court's disposition of the case: "[i]f the plaintiffs intend to assert a derivative claim, they should be permitted to replead to assert such a claim and any damage or equitable remedy sought on behalf of the corporation. Likewise, the plaintiffs should have the opportunity to replead to assert any individual cause of action and articulate a remedy that is appropriate on behalf of the named plaintiffs individually, or a properly recognizable class . . . ." *Malone*, 722 A.2d at 14.

259 *Malone*, 1997 WL 697940, at *8.

260 *Id.* at *2 (quoting Uni-Marts, Inc. v. Stein, Nos. 14713, 14893, 1996 WL 466961, at *6 (Del. Ch. Aug. 12, 1996)). In contrast, the Court of Chancery recognized that the directors indeed owed a fiduciary duty to be candid when such statements were made in connection to board request for shareholder action. *See id.* at *2 n.7 (collecting cases).

261 *Id.* at *2.

262 *Id.*

263 *Malone*, 722 A.2d at 10.

264 *Id.*; *see also* Heminway, *supra* note 197195, at 111, 118 (discussing the prospect of claims for breach of fiduciary duty, and maybe securities fraud, against directors

elected directors, when directors communicate publicly "about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty."[265] The court held that this duty extended to all communications, not only communications in connection to a request for shareholder action.[266] The duty is limited, however, to material facts.[267]

On the other hand, corporate managers must still be completely honest with shareholders in all communications, even when the communications are not tied to a request for shareholder action. Indeed, "When the directors are not seeking shareholder action, but are deliberately misinforming shareholders about the business of the corporation, either directly or by a public statement, there is a violation of fiduciary duty."[268]

In the wake of *Malone*, many scholars recognized—and even lamented—the murkiness of how the *Malone* duty of disclosure fits in with other fiduciary duties.[269] In 2020, however, the Supreme Court of Delaware clarified that the fiduciary duties of care and loyalty, together, are referred to as the "fiduciary duty of disclosure."[270] This "unremitting" duty prohibits directors from using "superior information or knowledge to mislead others in the performance of their own fiduciary obligations."[271] While "good faith erroneous judgment" as to the scope of disclosures implicates the duty of care, and thus may be exculpated under Del. Code. Ann., tit. 8 section 102(b)(7), bad faith, knowing, or

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and officers who fail to disclose personal facts that may be harmful to the corporation).

265 *Malone*, 722 A.2d at 10.

266 *Id.*

267 *Id.* at 12 (explaining that the standard for "materiality" under Delaware law is the same as the standard for "materiality" under federal securities law.

268 *Id.* at 14.

269 *See, e.g.*, Reza Dibadj, *Disclosure as Delaware's New Frontier*, 70 Hastings L.J. 689, 708–09 (2019); Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine*, 38 Fla. State U. L. Rev. 209, 214 n.24 (2011); Carter G. Bishop, *The Deontological Significance of Nonprofit Corporate Governance Standards: A Fiduciary Duty of Care Without a Remedy*, 57 Cath. U. L. Rev. 701, 742–43 (2008); Claire A. Hill & Brett H. McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 Fordham L. Rev. 1769, 1773 (2007); Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 Duke L.J. 1, 3 n.5 (2005); Sale, *supra* note 194192, at 487–88.

270 Dohmen v. Goodman, 234 A.3d 1161, 1168 (Del. 2020).

271 City of Fort Myers General Emps.' Pension Fund v. Haley, 235 A.3d 702, 718 (Del. 2020) (internal quotation marks omitted) (quoting Mills Acquisition Co. v. MacMillian, Inc., 559 A.2d 1261, 1283 (Del. 1989)).

intentional misstatements implicate the duty of loyalty and may not be exculpated.[272] Recent court rulings indicate that *Malone* claims for breach of fiduciary duty remain a live issue in the realm of shareholder litigation.[273]

When directors make a statement in connection with a request for shareholder action, the violation and damages (for nominal damages) are per se.[274] In making such a claim, the shareholder must prove the misrepresentation or omission was of a material fact.[275] The shareholder may, however, obtain injunctive relief and nominal damages without proving reliance, causation, or damages.[276]

On the other hand, if the statement is not made in connection with a shareholder request, the burden is higher.[277] The shareholder must prove scienter—that the directors knowingly made a false statement of material fact.[278] The shareholder must also prove reliance,[279] causation, and damages.[280] Thus, when asserting a claim for breach of fiduciary duty for failure to be candid or completely honest under *Malone*, the

272 *In re* GGP, Inc. S'holder Litig., 282 A.3d 37, 63–64 (Del. 2022).

273 *See, e.g.*, Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co., Inc., No. 9250, 2022 WL 2255258, at *4, *12 (Del. Ch. June 23, 2022) (discussing whether plaintiffs must prove damages under a *Malone* claim); Patterson v. Hennessy, No. 21-907, 2022 WL 2208893, at *3 (Del. Ch. June 21, 2022) (characterizing plaintiff's claim as a *Malone* claim); *In re* Geron Corp. S'holder Derivative Litig., No. 2020-0684, 2022 WL 1836238, at *1 (Del. Ch. June 3, 2022) (characterizing a plaintiff's claim as a *Malone* claim).

274 *See In re* Geron Corp., 2022 WL 1836238 at *1.

275 *Id.* For a discussion of materiality, *see infra* notes 376–93 and accompanying text.

276 Dohmen v. Goodman, 234 A.3d 1161, 1168, 1172 (Del. 2020).

277 *Id.* at 1169.

278 *Id.*

279 As to reliance, there remains an outstanding question of whether "holders"—i.e., shareholders who refrained from selling (or engaging in other forms of shareholder activism)—may assert a claim under *Malone. Id.* In these regards, a *Malone* claim is essentially identical to a claim under Section 10(b) and Rule 10b-5 under the Securities Exchange Act of 1934. For additional analysis, *see infra* notes 258–68 and accompanying text. A "holder claim" is "a cause of action by persons wrongfully induced to hold stock instead of selling it." Citigroup Inc. v. AHW Inv. P'ship, 140 A.3d 1125, 1132 (Del. 2016). The court in *Citigroup* recognized that holders, as opposed to buyers or sellers, may choose to hold stock for a number of different reasons. *See id.* at *1141. Thus, it may be difficult to prevail under a *Malone* theory on a holder claim. *Id.* No Delaware court has recognized the viability of a holder claim, but nor has one disclaimed them; the most recent Delaware case addressing holder claims was *In re MultiPlan Corp. S'holder Litig.*, 268 A.3d 784, 807–08 (Del. Ch. 2022). The court recognized that holder claims may not be brought as class actions. *See id.* at 808.

280 *See Dohmen*, 234 A.3d at 1174.

elements turn on whether the statement is made in connection with a request for shareholder action or not.[281]

Rainbow-washing may be actionable for a breach of fiduciary duty under *Malone* because this conduct fundamentally contradicts the corporate managers' duties of candor and complete honesty. If corporate managers are making implicit promises of support for the Community while the corporation simultaneously engages in conduct inconsistent with such support, the managers have run afoul of their duty of loyalty as understood under *Malone* and its progeny. Rainbow-washing is deceptive conduct that compromises shareholders' ability to rely on what the corporate managers say about their positions on social issues and commitment to the Community.

B. Rainbow-Washing and Securities Fraud

Depending on the circumstances, rainbow-washing may be combatted under federal law through shareholder litigation for securities fraud. In response to the 1929 market crash, the federal government began regulating securities.[282] Federal securities regulations are based on policies that promote full and fair disclosure.[283] Because securities laws may be publicly or privately enforced—with either criminal or civil liability attaching as a result—"securities disclosures [are] far more credible than purely contractual representations."[284] In many instances under the Securities Act of 1933 (the "'33 Act")[285] and Securities Exchange Act of 1934 (the "'34 Act"),[286] "[t]he same facts that give rise to a claim for breach of fiduciary duty of disclosure often also give rise to a claim under the anti-fraud provisions of the federal securities laws."[287] This section will consider the prima facie elements[288] of claims

281 *See id.* at 1169.

282 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 (1976).

283 *See* Chatman & Etheridge, *supra* note 215213, at 13.

284 Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 Cardozo L. Rev. 675, 686 (2002).

285 15 U.S.C. §§ 77(a)-(aa).

286 15 U.S.C. §§ 78(a)-(rr).

287 Jennifer O'Hare, *Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws*, 70 U. Cin. L. Rev. 475, 495 (2002); *see also* Erickson, *supra* note 5173, at 1773–76 (discussing the interplay between derivative actions and securities litigation).

288 This article only discusses possible liability under § 10(b) and Rule 10b-5, and § 14(a) and Rule 14-a(9) because they are the most likely sections under which exposure relevant to this article may arise. There are certainly other regulations that bare significantly on disclosure practices. Without overlooking their significance, this

under the two provisions of the '34 Act and the regulations promulgated thereunder: the anti-fraud provisions[289] of Section 10(b)[290] and Rule 10b-5[291] (collectively, "Rule 10b-5") when the rainbow-washing statements are made in connection with the purchase or sale of securities, and Section 14(a)[292] and Rule 14a-9[293] (collectively, "Rule 14a-9") when the rainbow-washing statements are set forth in proxy statements. Violations mean that board directors may face legal exposure for rainbow-washing. In either instance, shareholder litigation must be able to survive a motion to dismiss for failure to state a claim upon which relief can be granted.

1. Rule 10b-5

First, rainbow-washing may constitute fraud in the purchase or sale of securities. Rule 10b-5[294] broadly prohibits manipulation or deception through false or misleading statements[295] in connection with the purchase or sale of securities either listed on national exchanges and those not so registered.[296] Likewise, one may be liable under Rule 10b-5 for an omission of material fact or an omission that renders a stated fact misleading. For example, one who outwardly advocates in support of

article does not explore securities regulations, various governmental enforcement actions, or actions under state securities laws. *See* Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 Iowa L. Rev. 49, 55–57 (2011) (describing various types of enforcement mechanisms under federal securities law).

289 *See* Verity Winship, *Private Company Fraud*, 54 U.C. Davis L. Rev. 663, 681 (2020) (discussing anti-fraud provisions).

290 15 U.S.C. § 78(j)(b).

291 17 C.F.R. § 240.10b-5(c) (2020).

292 15 U.S.C. § 78(n).

293 17 C.F.R. § 240.14a-9 (2020).

294 The jurisprudence of § 10(b) and Rule 10b-5 is complex and nuanced, and there is tremendous scholarship exploring the various facets of this area of the law. This article only summarizes the doctrine.

295 The Supreme Court has recognized that a claim under Rule 10b-5, is related, but not identical, to common law misrepresentation, deceit, and fraud claims. *See, e.g.*, Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 343 (2005); Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975). All statements made by any corporation may trigger liability under Rule 10b-5. Rule 10b-5 applies to both public and closely held corporations. Only public corporations are required to make certain disclosures—annually, quarterly, or in some cases, within days. Closely held corporations are not subject to mandatory disclosure rules but may still face liability for statements made. Thus, there is an incentive for corporations to remain silent in the absence of required disclosure. *See* Chatman & Etheridge, *supra* note 5213, at 14.

296 *See* 15 U.S.C. § 78(j)(b); Thomas Lee Hazen, The Law of Securities Regulation 456 (2021).

gay rights while contributing to anti-gay movements may be liable under Rule 10b-5.[297] Generally speaking, only the "maker" of a statement may face liability under Rule 10b-5.[298]

All claims under Rule 10b-5 have three principal elements: "manipulation or deception []; in connection with the purchase or sale of a security; [and] with scienter."[299] Plaintiffs bringing private actions, however, must also prove standing, reliance, causation, and damages.[300] The Supreme Court has held that, to have standing to bring a private action, a plaintiff must show that they purchased or sold securities in connection with the false or misleading statement.[301] The statements must have been false or misleading at the time they were made.[302]

Damages under Rule 10b-5 require a showing of transaction causation (or reliance) and loss causation. To plead transaction causation, the plaintiff must allege that "but for" the fraud, they would not have engaged in the transaction.[303] Loss causation is simply "a causal connection between the material misrepresentation and the loss."[304]

As is true with regard to other claims under securities laws, plaintiffs raising 10b-5 claims must show that the manipulation or deception concerned a "material" fact.[305]

2. Rule 14a-9

297 *See* Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988).

298 *See* Janus Cap. Grp., Inc. v. First Derivative Traders, 546 U.S. 135, 141–44 (2011). *But see* Lorenzo v. Sec. & Exch. Comm'n, 139 S. Ct. 1094, 1099 (2019) (holding those "who disseminate false or misleading statements to potential investors with the intent to [deceive or] defraud can be found to have violated" Rule 10b-5).

299 *See* Joan MacLeod Heminway, *Martha Stewart Saved! Insider Violations of Rule 10B-5 for Misrepresented or Undisclosed Personal Facts*, 65 Md. L. Rev. 380, 383 (2006) (discussing elements of Rule 10b-5 claims).

300 *Id.*

301 Eric C. Chaffee, *Standing Under Section 10(b) and Rule 10b-5: The Continued Validity of the Forced Seller Exception to the Purchaser-Seller Requirement*, 11 U. Pa. J. Bus. L. . 843, 855–56 (2009) (discussing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975)).

302 *See* Plumber & Steamfitters Local 773 Pension Fund v. Danske Bank A/S, 11 F.4th 90, 100 (2d Cir. 2021) (quoting *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 266 (2d Cir. 1993)).

303 *See* Nuveen Mun. High Income Opportunity Fund v. City of Alameda, 730 F.3d 1111, 1118 (9th Cir. 2013) (quoting *In re* Daou Sys., Inc., 411 F.3d 1006, 1025 (9th Cir. 2005)).

304 Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342 (2005).

305 *See* Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988). For further discussion of the materiality standard, *see infra* notes 379–81 and accompanying text.

Next, if the rainbow-washing statements are set forth in annual proxy statements sent to existing shareholders, corporate managers may be subject to liability under Rule 14a-9. In publicly held corporations, shareholders exercise the voting franchise at annual meetings, where most shares are voted by proxy rather than in-person.[306] A proxy is a power of attorney whereby a shareholder authorizes another to vote their share at the shareholder meeting.[307] Section 14 of the '34 Act regulates how a corporation may solicit proxies from shareholders.[308] Schedule 14A describes the contents required in proxy statements.[309] These proxy rules are intended to "protect the right of a shareholder to a fully-informed vote on matters with regard to which proxies have been solicited."[310]

Rule 14a-9 prohibits proxy solicitations that contain any false statements as to material facts.[311] To prevail on a claim under Rule 14a-9, a plaintiff must show "(1) a proxy statement contained a material misrepresentation or omission which (2) caused the plaintiff injury and (3) that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction."[312] An omission in the proxy solicitation is actionable if it is an omission that makes other material statements that make the proxy solicitation false or misleading.[313]

To prove causation, the plaintiff must prove transaction causation—that the false or misleading statements or omissions were causally related to the occurrence of the transaction.[314] In addition, the plaintiff must prove loss causation—that the false or misleading statements or omissions were causally related to the harm suffered.[315] In private actions arising under Rule 14a-9, liability is limited to instances where a false or misleading statement is made when a shareholder vote is mandatory.[316] Remedies for violation of Rule 14a-9 may include

306 Hazen, *supra* note 298296, at 365.
307 *Id.*; *see also* Del. Code Ann. tit. 8 § 216.
308 *See* 15 U.S.C. § 78n.
309 *See* 17 C.F.R. § 240.14a-101 (2021).
310 *See* Hazen, *supra* note 8296, at 365.
311 *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976); *see also* Franklin A. Gevurtz, *The Complex Dualisms of Corporations and Democracy*, 14 Ne. U. L. Rev. 365, 389 (2022) (describing potential claims under Rule 14a-9).
312 Jaroslawicz v. M&T Bank Corp., 962 F.3d 701, 710 (3d Cir. 2020); *accord* 7547 Corp. v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 229 (5th Cir. 1994).
313 Gevurtz, *supra* note 3311, at 389.
314 *See* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).
315 *See id.* at 341.
316 *See* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1107–08 (1991).

damages or injunctive relief.[317]

3. Surviving the Motion to Dismiss

No matter whether rainbow-washing is challenged by a claim under Rule 10b-5 or Rule 14a-9, the complaint must sufficiently set forth the claims so that it can survive a motion to dismiss filed by the corporate managers. As a general matter, when bringing a civil action in federal court, a plaintiff's complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[318] A motion to dismiss challenges the legal sufficiency of a complaint. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[319] In 1995, however, motivated by a desire to reduce the perceived abuse of private actions for securities fraud, Congress passed the Private Securities Litigation Reform Act ("PSLRA").[320] Among other things, the PSLRA imposes heightened pleading requirements for certain elements of securities fraud actions.[321] Claims under Rule 10b-5 or Rule 14a-9 must satisfy these heightened pleading demands:

> In any private action arising under [the '34 Act] in which the plaintiff alleges that the defendant—
>
> (A) made an untrue statement of material fact; or
>
> (B) omitted to state a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading;
>
> the complaint shall specify each statement alleged to have

317 Hazen, *supra* note 8296, at 382.

318 Fed. R. Civ. P. 8(a)(2).

319 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

320 Private Securities Litigation Reform Act of 1985, 15 U.S.C. § 78u-4(b)(1); *see also* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?* 2003 U. Ill. L. Rev. 913 (2003) (discussing history of the PSLRA).

321 *See* Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007) ("Exacting pleading requirements are among the control measures Congress included in the PSLRA."). *Cf.* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); Del. R. Ch. Ct. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.").

> been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which the belief is formed.[322]

The PSLRA also requires plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[323] Furthermore, while the PSLRA has codified the loss causation requirement, the statute does not address whether allegations of loss causation must be pleaded with particularity.[324] Thus, the complaint must allege facts to show: (1) that the corporation made a statement of fact; (2) that the fact is a "material" fact; and (3) that the maker of the statement acted with scienter.

a. Did the Corporation Make a Statement of Fact?

To survive a motion to dismiss claims under Rule 10b-5 or Rule 14a-9, a plaintiff must first plead facts to show that a corporation has made a statement of fact. Whether a statement is a statement of fact can be difficult to identify. For instance, the Supreme Court has ruled that, under some circumstances, subjective expressions of opinion may be actionable.[325] In *Omnicare*, the Court evaluated two statements: (1) "We

322 15 U.S.C. § 78u-4(b)(1).

323 15 U.S.C. § 78u-4(b)(2). Indeed, the statute limits recovery of monetary damages to cases where a plaintiff shows "proof that the defendant acted with a particular state of mind." *Id.*

324 This article focuses specifically on materiality and scienter. Transactional cost and loss causation are important issues that warrant future exploration in future scholarship. This article will presume that the plausibility standard under Fed. R. Civ. P. 8(a)(2) applies to allegations of transactional cost and loss causation.

325 *See* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 181, 201 (2015). *Omnicare* involved a challenge under Section 11 of the '33 Act. *See id.* at 180. Courts have extended *Omnicare* to Rule 10b-5 claims. *See* Michael D. Moritz, *The Advent of Scienterless Fraud? Applying* Omnicare *to Section 10(b) and Rule 10(b)-5 Claims*, 13 N.Y.U. J.L. & Bus. 595, 608–16 (2017). The Ninth Circuit Court of Appeals has applied *Omnicare* to a claim under Rule 14a-9. *See* Golub v. Gigamon, Inc., 994 F.3d 1102 (9th Cir. 2021). In *Golub*, the Ninth Circuit recognized that the Supreme Court's 1991 decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), addressed certain issues about false or misleading opinions in Rule 14a-9 claims. The Ninth Circuit explained that, while *Sandberg* aligned the first two bases for liability for opinions under *Omnicare*, *Sandberg* did not address liability for omissions. *Id.* at 1106. The Ninth Circuit concluded that, because Section 11 and Rule 14a-9 are both concerned with false or misleading statements of material fact or omissions of material fact, the *Omnicare* theory of liability for omissions

believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws[;]" and (2) "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve."[326]

The Court first held that every opinion affirms at least one fact: "that the speaker actually holds the stated belief."[327] While, a statement of sincere opinion cannot be the basis of liability, as the opinion can be proven false,[328] a sincere statement of opinion may be the basis for liability if, and only if, the maker did not truly hold the opinion they espoused.[329]

Similarly, opinions may be "embedded statements of fact."[330] As an example, the Court offered a hypothetical statement: "I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access."[331] The Court explained that while this was a statement of opinion, reflecting the maker's state of mind, it was also a statement of an underlying fact: "that the company uses a patented technology."[332] So, even though the statement was an opinion and began with the magic words "I believe," it nonetheless made an assertion of fact that may be actionable.[333]

The Court explained, however, that liability for a false or misleading statement does not just lie in the words the maker said.[334] Rather, liability can arise from the words the maker left out.[335] The Court rejected the notion that an opinion could never be reasonably understood to be anything more than a reflection of the speaker's mindset.[336] Furthermore, the Court held that simply attaching the words "we think" or "we believe" to the beginning of a statement does not by itself free speakers from liability.[337] Indeed, a reasonable investor can

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extended to claims under Rule 14a-9. *Id.* at 1107.

326 *Omnicare*, 575 U.S. at 179–80.
327 *Id.* at 184.
328 *See id.* at 185–86.
329 *Id.*
330 *Id.* at 185.
331 *Id.*
332 *Id.*
333 *Id.* at 185–86.
334 *Id.* at 189.
335 *Id.*
336 *Id.*
337 *Id.* at 192–93.

understand an opinion to convey facts about how the speaker formed their opinion.[338] "[I]f the real facts are otherwise, but not provided, the opinion statement will mislead its audience."[339]

The Court offered another example using the statement, "We believe our conduct is lawful."[340] The Court explained that if the speaker had not consulted with a lawyer and made that statement without indicating they had not received legal advice, the omission would render the statement misleading.[341] Likewise, if the speaker made the statement after receiving contrary legal advice—that their conduct was not lawful—the speaker's failure to disclose the contrary advice would render the statement misleading.[342]

At the same time, the speaker is not obligated to disclose all facts, even those that go the other way or cut against them, when they offer an opinion.[343] Opinions are inherently statements of uncertainty, so it makes sense that there may be facts to the contrary or ones that may call the speaker's opinion into question.[344] A reasonable shareholder may recognize that opinions could ultimately be proven wrong, but still expect the opinion be formed on an informed basis.[345] The Court stressed the significance of the context in finding that opinions must be construed in the broader frame in which they are given.[346]

Under the Court's ruling in *Omnicare*, corporate rainbow-washing could certainly support claims under Rule 10b-5 or Rule 14a-9 but must overcome a high bar. Most likely, corporate statements like, "We believe we are diverse," "We think diversity is important," "Diversity is our strength," or "Our LGBTQIA+ stakeholders are important to us" would be considered sincere statements of belief that reflect the mindset or opinion of the speaker. As such, these statements would not support claims under Rule 10b-5 or Rule 14a-9.

On the other hand, more detailed and factual opinions could meet the requirements of a "material fact." For example, the Coca-Cola Company proclaims on its website: "Our commitment to diversity, inclusion and equality, and our support for our colleagues, family members and friends is intrinsic and enduring. We have always and will

338 *Id.* at 188.
339 *Id.*
340 *Id.*
341 *Id.*
342 *Id.*
343 *Id.* at 189.
344 *See id.* at 190.
345 *Id.* at 190.
346 *Id.*

continue to demonstrate this commitment through both our policies and actions."[347] A court would likely consider this statement an opinion, but it is an opinion that suggests underlying facts. The statement suggests that Coca-Cola has adopted policies and engaged in action to support diversity, inclusion, and equality. It also implies that the maker has some basis of knowledge on which to make this claim; presumably, the maker is aware of the company's policies and advocacy and has sincerely assessed them to be supportive of the Community.

Applying *Omnicare*, and assuming a court would find this statement material, Coca-Cola could face liability if a plaintiff showed that: (1) the maker did not truly believe the opinion they offered; (2) Coca-Cola had not made any policies or taken any action in support of the Community; or (3) the company had omitted facts showing that the company had not been supportive of, or had been hostile to, the Community. As evidence of these false or misleading statements or omissions, a plaintiff could show that in 2019, Coca-Cola made political contributions to several anti-LGBTQIA+ politicians. Most notably, Coca-Cola made donations to a Tennessee politician who had advanced sensational legislation that would require businesses to restrict restroom use on the basis of biological sex and prominently post warning signs that someone using a restroom facility may be transgender.[348] In issuing a summary judgment against enforcement of the statute, the court characterized the statute as "a brazen attempt to single out trans-inclusive establishments and force them to parrot a message that they reasonably believe would sow fear and misunderstanding about the very transgender Tennesseans whom those establishments are trying to provide with some semblance of a safe and welcoming environment."[349] Coca-Cola has since updated its political contribution policy to account for candidates' positions on equality and inclusion, which implicitly acknowledges the problematic nature of prior donations.[350]

347 *How Coca-Cola Supports Inclusion and Equality for the LGBTQ+ Community*, The Coca-Cola Co. (Mar. 3, 2019), https://www.coca-colacompany.com/news/coca-cola-fosters-inclusive-lgbtq-community.

348 *See* LZ Granderson, *Column: Corporate America's Shameful Both-Siderism on Gay Rights*, LA Times (Jun. 9, 2021), https://www.latimes.com/opinion/story/2021-06-09/pride-gay-rights-corporations-discrimination-both-sides.

349 Bongo Prods., LLC v. Lawrence, 603 F. Supp. 3d 584, 611 (M.D. Tenn. 2022).

350 *See* Anagha Srikanth, *'Keep Your Pride,' Activists Tell Companies Donating to Anti-LGBTQ+ Causes*, The Hill (June 4, 2021), https://thehill.com/changing-america/respect/diversity-inclusion/556928-keep-your-pride-activists-tell-companies/. After the January 6, 2021 insurrection on the U.S. Capitol, the Coca-Cola Company has suspended all political contributions and has not specified

Another common problem in securities fraud litigation arises when the board makes a forward-looking statement or discloses "soft information." Soft information is generally regarded as information known with less than absolute certainty—like "projections, forecasts, plans, opinions, motives, or intention."[351] In 1976, the SEC reversed its long-standing prohibition against corporations disclosing forward-looking statements or soft information.[352] In response, federal courts developed the "bespeaks caution" doctrine, which, as explained by the Third Circuit, is "essentially shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law."[353] Courts have deemed forward-looking statements immaterial when defendants have provided "sufficiently specific risk disclosures or other cautionary statements."[354] The cautionary language, however, must relate directly to the statement—meaning boilerplate disclaimers are not sufficient.[355]

The PSLRA codified the bespeaks caution doctrine into a "safe harbor" for forward-looking statements.[356] Under this safe harbor provision, forward-looking statements will not support a claim for securities fraud when they are "identified as a forward-looking statement, and [are] accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement[.]"[357]

On the other hand, if challenged rainbow-washing statements are aspirational or vague, courts may discount statements they determine to be immaterial as "puffery." The concept of puffery is familiar to many

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if or when they will resume. *See* Matt Kempner, *Coke, UPS, Others Freeze Political Donations After U.S. Capitol Attack*, Atl. J. Const. (Jan. 12, 2021), https://www.ajc.com/ajcjobs/coke-ups-pulte-freeze-political-donations-after-us-capitol-attack/HMS5YUQ275BK3G2CI4NTETUBFQ/.

351 Susanna Kim Ripken, *Predictions, Projections, and Precautions: Conveying Cautionary Warnings in Corporate Forward-Looking Statements*, 2005 U. Ill. L. Rev. 929, 937–38 (2005). *See* Carl W. Schneider, *Nits, Grits, and Soft Information in SEC Filings*, 121 U. Pa. L. Rev. 254, 255 (1972); *see also* 15 U.S.C. § 78u-5.

352 *See* Janet E. Kerr, *A Walk Through the Circuits: The Duty to Disclose Soft Information*, 46 Md. L. Rev. 1071, 1074 (1987).

353 *In re* Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig., 7 F.3d 357, 364 (3d Cir. 1993).

354 SEC v. GenAudio, Inc., 32 F.4th 902, 928 (10th Cir. 2022) (quoting Grossman v. Novell, Inc., 120 F.3d 1112, 1120 (10th Cir. 1997)).

355 *Id.* at 929.

356 *See* 15 U.S.C. § 78u-5.

357 *Id.* § 75c-5(c)(1)(A)(i).

but somehow evasive at the same time.[358] Black's Law Dictionary defines "puffing" as "[t]he expression of an exaggerated opinion—as opposed to a factual misrepresentation—with the intent to sell a good or service."[359] Puffery is typically asserted as a defense against various claims across multiple fields of law, including federal false advertising, securities fraud, the Uniform Commercial Code, and common law contract and tort claims of promissory estoppel.[360] Statements that are immeasurable and non-factual almost always qualify as puffery.[361] Professor David Hoffman observed two characteristics of the often-invoked puffery defense: (1) speech encourages consumption, making "optimistic" (i.e., exaggerated) claims about products and (2) speech relates to purchase decisions that are reasonably based on facts offered by the seller.[362] Generally speaking, a statement that is considered puffery does not give rise to legal liability on the part of the person making the statement.[363]

While federal securities law does not recognize the concept of "puffery," courts nevertheless regularly designate marketing statements as corporate puffery or a type of "sales-talk" and dismiss claims against the makers.[364] The standard for distinguishing between a material statement and puffery seems to be a balancing act: set it too low, and corporations will be forced to defend against minor misstatements, but set it too high, and potentially meritorious claims will be dismissed.[365] Neither would be consistent with congressional intent underlying the statutory scheme.[366]

Courts are more likely to characterize a statement as puffery when it is an expression about the future.[367] Additionally, "general statements about reputation, integrity, and compliance with ethical

358 *See* M. Neil Browne et al., *Legal Tolerance Toward the Business Lie and the Puffery Defense: The Questionable Assumptions of Contract Law*, 37 S. Ill. U. L.J. 69, 72–75 (2012).

359 *Puffery*, Black's Law Dictionary (11th ed. 2019).

360 *See* David A. Hoffman, *The Best Puffery Article Ever*, 91 Iowa L. Rev. 1395, 1401 (2006).

361 *See* Browne et al., *supra* note 358, at 73–74; *see also* Oregon Pub. Emps. Ret. Fund v. Apollo Grp., Inc., 774 F.3d 598, 606 (9th Cir. 2014) ("Statements by a company that are capable of objective verification are not 'puffery' and can constitute material misrepresentations.").

362 Hoffman, *supra* note 360, at 1400 (emphasis omitted).

363 U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922 (3d Cir. 1990).

364 *Id.*

365 O'Hare, *supra* note 287, at 1701–02.

366 *Id.*

367 *See* Hoffman, *supra* note 360, at 1406.

norms are inactionable 'puffery[.]'"[368] For example, statements that have been recently classified as puffery include "statements about 'hit[ting] the ground running'; 'implementing . . . proven strategies, standards, and discipline'; being 'on track'; being 'very pleased with the integration work so far'; and occupying an 'industry-leading position.'"[369] Furthermore, statements that describe qualities and traits of processes, operations, or business models have also been considered puffery.[370]

In any event, courts should be reluctant to label statements by corporate managers as puffery because the concept of puffery is fundamentally inconsistent with the law of fiduciary duty. Puffery as a defense is appropriate in the context of sales and warranties, where the doctrine of caveat emptor—let the buyer beware—applies and where there is no fiduciary duty owed.[371] Corporate managers not only have a higher fiduciary duty to their shareholders but also are subject to various regulations under federal securities law when they communicate about the corporation's business.[372] Likewise, the Supreme Court's ruling in *Omnicare* clearly contemplates some theory of liability for statements of opinion.[373] Rainbow-washing can exceed these standards of puffery, particularly when the statements relate to the corporation's current behavior or policies of support for the Community.

b. Is the Fact a Material Fact?

Liability under Rule 14a-9[374] and Rule 10b-5[375] is limited to misstatements or omissions of material facts. The Supreme Court of the

368 Singh v. Cigna Corp., 277 F. Supp. 3d 291, 311–12 (D. Conn. 2017) (quoting City of Pontiac Policemen's and Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014)).

369 City of Plantation Police Officers Pension Fund v. Meredith Corp., 16 F.4th 553, 557 (8th Cir. 2021) (alterations in original).

370 Statements where defendant alleged "'risk management processes [that] are highly disciplined and designed to preserve the integrity of the risk management process,' that it 'set the standard' for 'integrity'; and that it would 'continue to reposition and strengthen [its] franchises with a focus on financial discipline'" was not considered puffery. ECA v. JP Morgan Chase Co., 553 F.3d 187, 205–06 (2d Cir. 2009) (alterations in original) (internal citations omitted).

371 *See* O'Hare, *supra* note 287, at 1715.

372 *See supra* notes 188–281 and accompanying text (discussing the fiduciary duties of corporate managers and securities regulation).

373 *See* Part II Section A and the discussion on *Omnicare* and accompanying text.

374 *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

375 Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988).

United States has held that, for purposes of Rule 10b-5 and Rule 14a-9, "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[376] Likewise, the Supreme Court of Delaware has adopted this definition for purposes of assessing "materiality" under Delaware law.[377]

This test is an objective one and requires courts to consider materiality through the perspective of the "reasonable shareholder."[378] Under classic reasoning, "shareholders are single-minded and only care about the bottom line,"[379] whereby a rational shareholder who is displeased with a board's management decisions will simply sell their shares rather than trying to effectuate change through a proxy contest or through litigation.[380] Although courts have been careful not to say it so expressly, the materiality standard tends to presume that the prototypical "reasonable investor" is an economically rational investor.[381] In this way, the materiality standard has, in some ways, become a "proxy

376 *TSC Indus., Inc.*, 426 U.S. at 449; *see also Basic Inc.*, 485 U.S. at 233 (adopting the *TSC Industries* "materiality" standard for claims brought under Rule 10b-5).

377 *See* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 945 (Del. 1985). Other states have likewise adopted or applied the *TSC Industries* standard for materiality under their respective state securities laws. *See, e.g.*, Blackmon v. Nexity Fin. Corp., 953 So. 2d 1180, 1191–92 (Ala. 2006); Brown v. Ward, 593 P.2d 247, 251 (Alaska 1979); People v. Hedgecock, 795 P.2d 1260, 1265 (Cal. 1990); Goss v. Clutch Exch., Inc., 701 P.2d 33, 35–36 (Colo. 1985); TSA Int'l Ltd. v. Shimizu Corp., 990 P.2d 713, 728 (Haw. 1999); Dep't of Fin., Sec. Bureau v. Zarinegar, 474 P.3d 683, 702 (Idaho 2020); Enservco, Inc. v. Ind. Sec. Div., 623 N.E.2d 416, 423 (Ind. 1993); Marram v. Kobrick Offshore Fund, Ltd., 809 N.E.2d 1017, 1030 (Mass. 2004); Qualcomm Inc. v. Am. Wireless License Grp., 980 So. 2d 261, 272 (Miss. 2007); Piazza v. Kirkbride, 827 S.E.2d 479, 488–89 (N.C. 2019); Green v. Green, 293 S.W.3d 493, 512 (Tenn. 2009).

378 *TSC Indus., Inc.*, 426 U.S. at 450. Specifically, the Court explained:

> The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. In considering whether summary judgment on the issue is appropriate, we must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.

Id. (internal footnotes omitted).

379 Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. Rev. 1761, 1768 (2011).

380 Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & Econ. 395, 420 (1983).

381 Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?* 15 Wm. & Mary J. Women & L. 291, 297 (2009).

for economic rationality."[382]

Materiality may also take into account the board's knowledge of the special concerns of certain investors.[383] A fact need not be disclosed only because it is material or because "a reasonable investor would very much like to know that fact."[384] "Silence, absent a duty to disclose, is not misleading under Rule 10b–5."[385] However, once a company speaks about a subject—whether voluntarily or as a required disclosure—"it has a duty to do so honestly and with full disclosure."[386] For example, a corporation may not brag about its ESG efforts while withholding information about "material, negative activities" that would affect the accuracy of the corporation's ESG impact assessment.[387]

But scholars have criticized the conception of the reasonable investor as "at best fluid and at worst ill-defined."[388] The Court has not returned to the matter since 1978, and lower courts have treated the materiality requirement as a proxy for financial relevance.[389] Materiality, however, should not be understood as a standard frozen in time. Rather, as former SEC Commissioner Kara M. Stein has explained: "What investors want changes. Materiality evolves. It changes as society

382 David A. Hoffman, *The "Duty" to be a "Rational" Shareholder*, 90 Minn. L. Rev. 537, 604 (2006).

383 *See* Allan Horwich, *The Neglected Relationship of Materiality and Recklessness in Actions Under Rule 10b-5*, 55 Bus. Law. 1023, 1025 (2000).

384 Meyer v. Jinkosolar Holdings Co., 761 F.3d 245, 250 (2d Cir. 2014) (quoting *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993)).

385 Basic, Inc. v. Levinson, 485 U.S. 224, 239 n.17. (1988).

386 Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. Rev. 851, 890 (2021). *Cf.* Rock, *supra* note 286284, at 678 (describing securities regulations as lobster traps because they are relatively easy to become subject to, but once subject to the regulations, it is difficult to escape).

387 Hazen, *supra* note 386, at 890.

388 Heminway, *supra* note 381, at 294; *see also* Amanda M. Rose, *The "Reasonable Investor" of Federal Securities Law: Insights from Tort Law's "Reasonable Person" & Suggested Reforms*, 43 J. Corp. L. 77, 88–92 (2017) (evaluating perspectives on the "reasonable investor"); Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. Rev. 461, 466 (2015) (recognizing the lack of consensus around the meaning of "reasonable investor"); Dale A. Oesterle, *The Overused and Under-Defined Notion of "Material" in Securities Law*, 14 U. Pa. J. Bus. L. 167, 172–73 (2011); Stefan J. Padfield, *Is Puffery Material to Investors? Maybe We Should Ask Them*, 10 U. Pa. J. Bus. & Emp. L. 339, 344 (2008) (recognizing a wide range of constructions of the "reasonable investor"); Margaret V. Sachs, *Materiality and Social Change: The Case for Replacing "the Reasonable Investor" with "the Least Sophisticated Investor" in Inefficient Markets*, 81 Tul. L. Rev. 473, 508 (2006) (recognizing that the "reasonable investor" standard does little to protect unsophisticated investors).

389 *See* Hoffman, *supra* note 382, at 604.

changes, and it also changes with the availability of new and better data. To achieve effective disclosure, we must understand what is important to today's investors."[390] Significantly, investors—not courts—are the arbiters of materiality.[391] Thus, with the growing predominance of ESG investing, commitment to improving social inequities, and willingness and ability to act (as demonstrated by the Millennial and Gen Z generations),[392] rainbow-washing litigation presents a significant opportunity to push for change in corporate governance and securities law alike.

Additionally, even if the general rule is that some aspirational statements or statements of value or optimism do not rise to the level of being fact or material fact, rainbow-washing statements about the Community, or other historically marginalized communities, are distinguishable. Considering the history of oppression, discrimination, and harassment the Community has faced, and even ongoing social and political concerns, the Community is particularly vulnerable.[393] Thus, when a corporation makes a statement offering support to this Community, the corporation wades into the political and social landscape surrounding the Community and makes a factual promise. Corporations should not make these statements lightly or without intent to follow through with them—especially as investors are placing great weight in making investment decisions on statements precisely like this. Thus, courts should carefully consider the social understanding of these statements and the promises implicit therein before discounting them as mere puffery or immaterial.

c. Did the Maker of the Statement Have the Requisite Scienter?

Lastly, under Rule 10b-5's "scienter" requirement, plaintiffs must show that a defendant's intention in making the false or misleading

390 Kara M. Stein, Comm'r, Sec. & Exch. Comm'n, Disclosure in the Digital Age: Time for a New Revolution (May 6, 2016) (transcript available at https://www.sec.gov/news/speech/speech-stein-05062016).

391 Allison Herren Lee, Comm'r, Sec. & Exch. Comm'n, Living in a Material World: Myths and Misconceptions About Materiality (May 24, 2021) (transcript available at https://www.sec.gov/news/speech/lee-living-material-world-052421) ("[I]nvestors, the arbiters of materiality, have been overwhelmingly clear in their views that climate risks and other ESG matters are material to their investment and voting decisions.").

392 *See* notes 136-163 *supra* and accompanying text.

393 *See U.S.: UN Expert Warns LGBT Rights Being Eroded, Urges Stronger Safeguards*, United Nations (Aug. 30, 2022), https://www.ohchr.org/en/press-releases/2022/08/united-states-un-expert-warns-lgbt-rights-being-eroded-urges-stronger.

statement at the time the statement was made was "to deceive, manipulate, or defraud."[394] Many courts have interpreted the standard of scienter in civil cases to be "reckless" or "deliberate recklessness."[395] Directors are not expected to be clairvoyant, and there cannot be "fraud by hindsight"—that is, a statement is not fraudulent merely because the maker realizes in hindsight that it was not true.[396] Instead, a plaintiff must set forth particularized allegations about the maker's mindset at the time the statement was made.[397] A court may infer scienter if a reasonable person, considering all the facts alleged in the complaint, would find the inference of scienter "cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[398]

Corporate managers who engage in rainbow-washing act with the requisite scienter when they communicate the corporation's stance on social matters pertaining to the Community without first ensuring that the statements are grounded in fact or accurately represent the corporation's behavior with regard to the issue or when they communicate about the corporation's stance on social issues without also communicating about contrary conduct. Thus, some circumstances of rainbow-washing may amount to violations of Rule 10b-5 or Rule 14a-9 when the communications are of statements of fact, that are material to the reasonable investor, and made with the appropriate scienter.

III. Past "Washing" Litigation

While there have not yet been any instances of rainbow-washing challenged in court, there have been lawsuits challenging other forms of diversity-based "washing." The first instance involved a securities fraud class action suit and a shareholder derivative action arising from an alleged failure to stop pervasive harassment and discrimination

394 Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193–94 (1976)).

395 *See* Moritz, *supra* note 325, at 602–03; *see also* Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 991 (9th Cir. 2009) (quoting *In re* Daou Sys. Inc., 411 F.3d 1006, 1014 (9th Cir. 2005)) ("To adequately demonstrate that the 'defendant acted with the required state of mind,' a complaint must 'allege that the defendants made false or misleading statements either intentionally or with deliberate recklessness.'"). In criminal cases, the government must prove the defendant acted "willfully and knowingly with the intent to defraud." United States v. Rosen, 409 F.3d 535, 549 (2d Cir. 2005).

396 *See* Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978).

397 *See* 15 U.S.C. § 78u-4(b)(2)(A).

398 *Tellabs, Inc.*, 551 U.S. at 324.

against a videogame company, Activision Blizzard, Inc. ("Activision").[399] The second is a line of lawsuits against various corporations challenging that, while these corporations claimed to value diversity, they did not have an African American director serving on their boards or that none of the corporation's high-ranking officers were African American.[400] Although neither line of cases specifically involved rainbow-washing, both involved director liability for public statements about diversity and inclusion. Neither set of litigation was ultimately successful, but they did draw additional attention to diversity-related problems within the corporations. Thus, these lawsuits both serve as cautionary tales about pleading blunders to avoid and offer insight into how prospective rainbow-washing litigation may find a path to success.

A. The Activision Litigation

Two separate actions—a securities fraud action and a derivative action alleging breach of fiduciary duty—involving the board of Activision are relevant to this article's discussion of rainbow-washing. Litigation against Activision arose out of allegations that, over a period of nearly seven years, Activision permitted an "endemic 'frat house' workplace culture that included gender-based pay disparities, unwanted sexual advances, abundant alcohol consumption, and other offensive or illegal conduct."[401] As a result, Activision became the subject of several government investigations and civil harassment and discrimination lawsuits.[402] Indeed, on September 26, 2018, the United States Equal Employment Opportunity Commission ("EEOC") commenced an investigation of Activision.[403] Less than a month later, on October 12, 2018, the California Department of Fair Employment and Housing ("DFEH") initiated an investigation against Activision.[404] Shortly after issuing a finding against Activision on June 24, 2021, DFEH commenced a lawsuit on July 20, 2021.[405] That same day, both the Washington Post

399 *See* notes 401–50, *infra*, and accompanying text.

400 *See* notes 451–77, *infra*, and accompanying text. These lawsuits focused specifically on the lack of African American representation to challenge diversity values; I acknowledge that diversity spans beyond a single ethnicity.

401 *See* Kahnert v. Kotick, No. CV 21-8968, 2022 WL 2167792, at *2 (C.D. Cal. May 20, 2022).

402 *Id.*

403 *Id.*

404 *See* Cheng v. Activision Blizzard, Inc., No. CV 21-6240, 2022 WL 2101919, at *2 (C.D. Cal. Apr. 18, 2022).

405 *Id.*

and Bloomberg produced investigation reports confirming a culture of "sexual abuse at [Activision] that reached the highest levels, where the perpetrators included former [Activision] Chief Technology Officer . . . ."[406] In response, Activision released a public statement:

> We value diversity and strive to foster a workplace that offers inclusivity for everyone. There is no place in our company or industry, or any industry, for sexual misconduct or harassment of any kind . . . .
>
> We take every allegation seriously and investigate all claims. In claims related to misconduct, action was taken to address the issue. . . .
>
> The DFEH includes distorted, and in many cases false, descriptions of Blizzard's past. We have been extremely cooperative with the DFEH throughout their investigation, including providing them with extensive data and ample documentation, but they refused to inform us what issues they perceived[.] . . . The picture the DFHE paints is not the [Activision] workplace of today[.][407]

Beginning in August 2021, high-ranking personnel including Blizzard Entertainment's President and Senior Vice President of Human Resources left the company.[408] A month later, the Wall Street Journal reported that the SEC had launched an investigation against Activision's disclosures about workplace discrimination and harassment.[409] Activision's stock dropped more than 8% between September 20 and 21, 2021.[410] When Activision announced delays in the release of two high-profile products, stock prices dropped more than 14%, causing experts to forecast liquidity risks.[411] On November 16, 2021, the Wall Street Journal published an article confirming that sexual harassment and discrimination were endemic at Activision and that the board was likely aware of problems to a certain extent.[412]

But when communicating with shareholders in various outward-

406 Amended Class Action Complaint for Violations of the Federal Securities Law, ¶ 7, Cheng v. Activision Blizzard, Inc., No. CV 21-6240, 2022 WL 2101919 (C.D. Cal. Apr. 18, 2022).

407 *Cheng*, 2022 WL 2101919, at *2–3.

408 *Id.* at *3.

409 *Id.* at *4.

410 *Id.*

411 *Id.*

412 *See id.*

facing statements,[413] Activision maintained standard language in SEC filings regarding legal matters:

> We are party to routine claims, suits, investigations, audits, and other proceedings arising from the ordinary course of business, including . . . labor and employment matters, regulatory matters, . . . [and] compliance matters . . . . In the opinion of management, after consultation with legal counsel, such routine claims and lawsuits are not significant and we do not expect them to have a material adverse effect on our business, financial condition, results of operations, or liquidity.[414]

Notably, while Activision's proxy statements pronounced the company's commitment to employee diversity, development, and treatment, the company then failed to disclose the governmental investigations and internal work conditions.[415] Activision's 2020 ESG Report, the first of its kind, stated that Activision "do[es] not tolerate retaliation against any employee who makes a good faith report or assists in good faith in an investigation."[416] Finally, Activision's Code of Conduct, which was incorporated into SEC filings and other outward-facing statements, contained several claims purporting that Activision did not tolerate harassment, discrimination, or retaliation.[417]

1. The Securities Fraud Class Action

On August 3, 2021, a securities fraud action was initiated against Activision alleging claims under Rule 10b-5 and Section 20(a) (i.e., 15 U.S.C. § 78t(a) of the '34 Act) on behalf of all persons who purchased Activision common stock between February 28, 2017, and November 16, 2021.[418] The plaintiffs alleged that Activision's public statements had "misled investors about Activision's pervasive misconduct and the existence of and [sic] material risks from the regulatory investigations by the DFEH and the EEOC."[419] The plaintiffs also alleged that Activision

413 *Id.* at *4–5. The court explained that these statements were contained in Activision's Form 10-Qs and 10-Ks filed with the SEC, various proxy statements, and ESG reports. *See id.*

414 *Id.*

415 *Id.*

416 *Id.* at *5 (alteration in original).

417 *Id.*

418 *Id.*

419 *Id.*

failed to fully disclose the scope of the investigations.[420]

Activision filed a motion to dismiss on the basis that the plaintiffs had not satisfied the heightened pleading standards of the PSLRA.[421] Activision argued that: (1) the statements identified in the complaint were statements of opinion, (2) the Code of Conduct and ESG reports were not actionable, (3) the complaint did not allege scienter of the maker at the time the statements were made, and (4) any allegations of scienter were speculative.[422]

The court granted Activision's motion to dismiss both because the plaintiffs had not sufficiently alleged that Activision had made a false or misleading statement, and they failed to prove scienter.[423] The court seemed to view the plaintiffs' failure to adequately state their allegations against Activision as the primary deficiency in the complaint. The court explained that while the plaintiffs had "paint[ed] a picture of Activision's toxic workplace and toleration of reprehensible conduct," the complaint did not allege facts with the required specificity or particularity of the maker's scienter at the time the statements were made.[424] Rather, the plaintiffs' claims described "fraud-by-hindsight" and did not provide sufficient evidence that the makers knew the statements were false or misleading at the time they were made.[425] The court held that in the absence of "particularized, temporal facts," conclusory allegations were insufficient to support a claim.[426]

The court also rejected the plaintiffs' claims that Activision had omitted material facts about the federal and state investigations.[427] The court reasoned that Activision's mere mention of "investigations" did not require the board to provide a full description of them to shareholders.[428] Additionally, the court found that the statements in the Code of Conduct did not rise to the level of "objectively verifiable" despite overwhelming evidence of misconduct.[429] The court also held

420 *Id.* at *2.
421 *Id.* at *5.
422 *Id.* at *7.
423 *Id.* at *13. The court permitted the plaintiffs to file a second amended complaint within thirty days of the order. *Id.* The plaintiffs filed their Second Amended Complaint on May 18, 2022. Activision filed a Motion to Dismiss the Second Amended Complaint on June 16, 2022. As of the time of writing, the court has not ruled on Activision's Motion to Dismiss.
424 *Id.* at *8.
425 *Id.*
426 *Id.* at *9.
427 *Id.*
428 *Id.*
429 *Id.* at *10.

that the complaint lacked any allegation to support that the directors "took no action at all in the face of blatant and pervasive violations of its [Code]."[430] Likewise, the plaintiffs' "bare bone allegations" that the ESG Report was actionable did not state a claim.[431] Finally, the court held that, to the extent the plaintiffs had pleaded Activision's directors had acted with scienter, the plaintiffs did not plead the requisite facts.[432] Accordingly, the court dismissed the class action suit for failure to state a claim.[433]

2. The Shareholder Derivative Action

In separate litigation, two shareholder plaintiffs commenced a derivative action against Activision and alleged that the Activision directors failed to take action to prevent rampant harassment and discrimination.[434] They argued that this, in turn, resulted in substantial harm to Activision.[435] Additionally, the shareholder plaintiffs alleged that the directors had caused Activision to communicate with investors and shareholders in a false and misleading manner, particularly in its proxy solicitations.[436] The lawsuit raised claims for breach of fiduciary duty and violation of Rule 14a-9.[437] Activision filed a motion to dismiss.[438]

With regard to fiduciary duty, the plaintiff shareholders maintained that the directors had breached their duties under *Caremark* because the directors knew of the corporate wrongdoing but failed to adequately respond.[439] Although the shareholder plaintiffs conceded under the first prong of *Caremark* because the Activision board had a monitoring system in place, the plaintiffs proceeded under *Caremark*'s second prong to argue that the directors failed to adequately monitor it and respond to instances of harassment and discrimination.[440] The court found that shareholder plaintiffs' own allegations established actions that the board had taken to combat the noncompliance.[441] The court

430 *Id.*
431 *Id.*
432 *Id.* at *12.
433 *Id.* at *13.
434 Kahnert v. Kotick, No. CV 21-8968, 2022 WL 2167792, at *1 (C.D. Cal. May 20, 2022).
435 *Id.*
436 *Id.* at *2.
437 *Id.* at *3.
438 *See id.* at *3.
439 *See id.* at *5.
440 *See id.* at *6.
441 *Id.* at *7.

explained that "[t]hough in hindsight Activision's response to red flags could have been more drastic or immediate, the Director Defendants' actions to remedy compliance issues defeats any plausibility of bad faith."[442] The court reiterated that, for a *Caremark* claim to succeed, the allegations must be that the directors took no action to try to correct noncompliance; *Caremark* claims are not appropriate to address the adequacy of the directors' responses.[443]

Next, the plaintiff asserted that the directors had breached their fiduciary duty under *Malone* by deliberately misinforming shareholders about the company's business in public statements.[444] The court found that the directors could not be held liable for the misleading statements under *Malone* because the shareholder plaintiffs had failed to establish that the majority of the directors were personally involved in making the statements or that the directors had knowledge that any disclosures or omissions were false.[445] Rather, the suit only alleged "fraud-by-hindsight."[446]

Finally, the court found that Activision's Code of Conduct was only aspirational and non-specific.[447] The Code of Conduct could, however, be actionable where the statements in the code were specific and directly at odds with the allegations of the complaint, or when the directors fail to take any action in the face of blatant and pervasive violations of the code.[448] Once again, the court found that the shareholder plaintiffs' allegations challenging the adequacy of the directors' response, rather than inaction, did not state a claim for breach of fiduciary duty or violation of Rule 14a-9.[449] Accordingly, the Court dismissed the complaint for failure to state a claim.[450]

B. Board Diversity Litigation

Relevant to this article are at least ten shareholder lawsuits that have been filed challenging the lack of diversity in board composition.[451]

442 *Id.*
443 *Id.*
444 *See id.*
445 *Id.* at *7–8.
446 *Id.* at *8.
447 *Id.* at *8–9.
448 *See id.* at *8 (discussing *In re* Signet Jewelers Ltd. Sec. Litig., No. 16 Civ. 6728, 2018 WL 6167889, at *17 (S.D.N.Y. Nov. 26, 2018)).
449 *Id.* at *9.
450 *Id.* at *11.
451 Law blogger Kevin M. LaCroix, Esq., has done an exemplary job identifying and

These include lawsuits against well-known corporations, including: Cisco Systems, Inc.;[452] Danaher Corporation;[453] Facebook, Inc.;[454] Micron Technology, Inc.;[455] Monster Beverage Corporation;[456] NortonLifeLock Incorporated;[457] OPKO Health, Inc.;[458] Oracle Corporation and Oracle

tracking many of these lawsuits. *See* Kevin M. LaCroix, *Board Diversity Suit Against Cisco Systems' Directors Dismissed*, The D&O Diary (Mar. 7, 2022), https://www.dandodiary.com/2022/03/articles/shareholders-derivative-litigation/board-diversity-suit-against-cisco-systems-directors-dismissed/; Kevin M. LaCroix, *Qualcomm Board Diversity Derivative Suit Dismissed*, The D&O Diary (Nov. 16, 2021), https://www.dandodiary.com/2021/11/articles/shareholders-derivative-litigation/qualcomm-board-diversity-derivative-suit-dismissed/; Kevin M. LaCroix, *Two More Board Diversity Lawsuits Dismissed*, The D&O Diary (Sept. 2, 2021), https://www.dandodiary.com/2021/09/articles/shareholders-derivative-litigation/two-more-board-diversity-lawsuits-dismissed/; Kevin M. LaCroix, *Board Diversity Lawsuit Against the Gap Dismissed Based on Forum Clause*, The D&O Diary (Apr. 28, 2021), https://www.dandodiary.com/2021/04/articles/shareholders-derivative-litigation/board-diversity-lawsuit-against-the-gap-dismissed-based-on-forum-clause/; Kevin M. LaCroix, *Board Diversity Lawsuit Against Danaher Directors Dismissed*, The D&O Diary (July 1, 2021), https://www.dandodiary.com/2021/07/articles/shareholders-derivative-litigation/board-diversity-lawsuit-against-danaher-directors-dismissed/; Kevin M. LaCroix, *Micron Technology Hit with Board Diversity Law Suit*, The D&O Diary (Feb. 10, 2021), https://www.dandodiary.com/2021/02/articles/director-and-officer-liability/micron-technology-hit-with-board-diversity-law-suit/; Kevin M. LaCroix, *Qualcomm Hit with Board Racial Diversity Derivative Lawsuit*, The D&O Diary (July 20, 2020), https://www.dandodiary.com/2020/07/articles/shareholders-derivative-litigation/qualcomm-hit-with-board-racial-diversity-derivative-lawsuit/; Kevin M. LaCroix, *Facebook Board Hit with Derivative Lawsuit on Board Diversity and Other Race-Related Issues*, The D&O Diary (July 16, 2020), https://www.dandodiary.com/2020/07/articles/shareholders-derivative-litigation/facebook-board-hit-with-derivative-lawsuit-on-board-diversity-and-other-race-related-issues/; Kevin M. LaCroix, *Oracle Directors Hit with Derivative Suit on Board Diversity Issues*, The D&O Diary (July 6, 2020), https://www.dandodiary.com/2020/07/articles/shareholders-derivative-litigation/oracle-directors-hit-with-derivative-suit-on-board-diversity-issues/.

452 City of Pontiac Gen. Emps.' Ret. Sys. v. Bush, No. 20-CV-06651, 2022 WL 1467773 (N.D. Cal. Mar. 1, 2022).

453 *In re* Danaher Corp. S'holder Derivative Litig., 549 F. Supp. 3d 59 (D.D.C. 2021).

454 Ocegueda *ex rel.* Facebook v. Zuckerberg, 526 F. Supp. 3d 637 (N.D. Cal. 2021).

455 Foote *ex rel.* Micron Tech., Inc. v. Mehrotra C.A., No. 1:21-CV-00169 (D. Del., filed Feb. 9, 2021).

456 Falat v. Sacks, No. SACV 20-1782 (KESx), 2021 WL 1558940 (C.D. Cal. Apr. 8, 2021).

457 Esa v. NortonLifeLock Inc., No. 20-CV-05410, 2021 WL 3861434 (N.D. Cal. Aug. 30, 2021), *appeal docketed*, No. 21-16909 (9th Cir. Oct. 24, 2022).

458 Lee v. Frost, No. 21-20885-CIV-ALTONAGA/Torres, 2021 WL 3192651 (S.D. Fla. Sept. 1, 2021).

America, Inc.;[459] Qualcomm Incorporated;[460] and The Gap, Inc.[461] However, for various reasons, none of the lawsuits have survived motions to dismiss for failure to state a claim.[462] Many have been brought by the same law firm.[463] Although one of these cases was dismissed strictly on procedural grounds,[464] the rest were dismissed for failure to allege demand futility and failure to state a claim upon which legal relief could be granted.[465]

All of the lawsuits advanced claims of hypocrisy and empty promises against corporate directors.[466] In essence, the actions alleged that, even though many of the corporations had been recognized for their commitments to diversity, and virtually all of the corporations had represented themselves as having a commitment to diversity, none had an African American director serving on their boards.[467] For example, in the derivative action, *In re Danaher Corporation Shareholder Litigation*, a group of shareholder plaintiffs sued several of the corporate directors, alleging that "the Defendants falsely represented [the corporation] as a diverse corporation even though no African American [director] serves on the Board."[468] More specifically, the shareholder plaintiffs alleged that, although the corporation had "received 'multiple awards and recognitions for diversity,' including being recognized on Forbes' list of the Top 200 Best Employers for Diversity in 2018 and 2019," the

459 Klein v. Ellison, No. 20-CV-04439, 2021 WL 2075591 (N.D. Cal. May 24, 2021).

460 Kiger v. Mollenkopf, No. 21-409, 2021 WL 5299581 (D. Del. Nov. 15, 2021).

461 Lee v. Fisher, No. 20-CV-06163, 2021 WL 1659842 (N.D. Cal. Apr. 27, 2021).

462 As of July 25, 2022, there remains a motion to dismiss pending in *Foote*.

463 *See* Francis A. Bottini Jr., *Using the Federal Securities Law to Improve Diversity on Corporate Boards*, Am. Bar Assoc., (Apr. 1, 2022), https://www.americanbar.org/groups/litigation/committees/securities/articles/2021/federal-securities-law-improve-diversity-corporate-boards/.

464 *See Lee*, 2021 WL 1659842, at *6 (dismissing shareholder plaintiff's complaint without prejudice because the company's bylaws designated the Delaware Court of Chancery as the exclusive forum for the claims and that shareholder plaintiff had failed "to demonstrate that enforcing the forum selection clause would contravene a strong public policy of this forum."). The *Esa* Court also dismissed state law claims, without prejudice, on the basis of a forum selection clause. *See* 2021 WL 3861434, at *3.

465 *Bush* involved a lawsuit following a pre-suit demand. *See* City of Pontiac Gen. Emps.' Ret. Sys. V. Bush, No. 20-CV-06551, 2022 WL 1467773, at *1 (N.D. Ca. Mar. 1, 2022). All of the other lawsuits discussed in this part were filed without first making demand on the board of directors. *See supra* notes 452–61.

466 *See supra* notes 452–61.

467 *Id.*

468 *In re* Danaher Corp. S'holder Derivative Litig., 549 F. Supp. 3d 59, 62 (D.D.C. 2021).

corporation had materially misrepresented its diversity efforts.[469]

The shareholder plaintiffs claimed that despite the many corporate statements touting the company's commitment to diversity, the corporation's board of directors did not include a director who was African American.[470] As support, the plaintiffs quoted numerous corporate statements—from the corporation's website, annual reports, the corporation's 2018 sustainability report, and the corporation's proxy statements.[471] Further, according to the corporation's proxy statement, the corporation did not have a policy in place to ensure diversity on the board of directors other than to "subjectively take into consideration the diversity . . . of the Board when considering director nominees."[472] This, the shareholder plaintiffs contended, supported claims for breach of fiduciary duty and violation of Rule 14a-9.[473]

The rulings on the motions to dismiss employ similar reasoning. Most significantly, seven of the eight courts addressing these substantive claims have found that diversity statements are not actionable because they are merely aspirational statements or puffery.[474] Thus, these statements could not be demonstrated to be false or misleading. None of these courts explained precisely why the statements complained of were puffery.[475] Specifically, the courts in *Esa*, *Ocegueda*, *Falat*, *Frost*, and *Kieger*, labeled the statements as "puffery," with no detailed explanation of why.[476] The *Bush* and *Klein* courts, on the other hand, explained

469 *Id.*

470 *Id.* at 66–68.

471 *Id.* at 66–67, 72.

472 *Id.* at 63 (alteration in original).

473 *Id.* at 66.

474 *See* City of Pontiac Gen. Emps.' Ret. Sys. v. Bush, No. 20-CV-06651, 2022 WL 1467773, at *4 (N.D. Cal. Mar.1, 2022); Ocegueda v. Zuckerberg, 526 F. Supp. 3d 367, at 651 (N.D. Cal. 2021); Falat v. Sacks, No. SACV 20-1782 (KESx), 2021 WL 1558940, at *6 (C.D. Cal. Apt. 8, 2021); Esa v. Pilette, No. 20-CV-05410, 2021 WL 3861434, at *5 (N.D. Cal. Aug. 30, 2021); Lee v. Frost, No. 21-20885-CIV-Altonaga/Torres, 2021 WL 3912651, at *12 (S.D. Fla. Sept. 1, 2021); Klein v. Ellison, No. 20-CV-04439, 2021 WL 2075591, at *7 (N.D. Cal. May 24, 2021); Kiger v. Mollenkopf, No. 21-409, 2021 WL 5299581, at *2–3 (D. Del. Nov. 15, 2021).

475 This is consistent with Professor O'Hare's observation that "the courts have significantly expanded the scope of a powerful defense to dismiss potentially meritorious securities fraud actions with little or no analysis or consideration of the effect of their decision." O'Hare, *supra* note 287, at 1699–1700.

476 The *Falat* Court only offered a conclusory statement, with no supporting citation. *See Falat*, 2021 WL 1558940, at *6. The *Esa*, *Ocegueda*, and *Frost* Courts relied on the fact that other courts had found similar statements to be puffery and provided citations but did not provide any specific analysis about the statements at issue in those cases. *See Esa*, 2021 WL 3861434, at *5; *Ocegueda*, 526 F. Supp. 3d at 651;

that the statements were puffery because they could not be objectively verified or disproved.[477]

C. Anticipating Future Rainbow-Washing Litigation

Although the Activision and board diversity litigation should be commended for drawing attention to serious social issues and prompting corporate boards to think about best practices to avoid such litigation, the likelihood of prevailing was slim. Even though the past "washing" litigation has been unsuccessful, this should not deter future litigation—particularly from those interested in accomplishing social change. Certainly, the law of fiduciary duty and securities fraud provides a framework for combatting rainbow-washing. Shareholder litigants, however, should exercise special care in preparing for this litigation. First, shareholders would be well-advised to first seek corporate books and records in advance of filing suit and then referencing those books and records in the allegations in the complaint. Next, shareholders should heed the heightened pleading standards and articulate the precise rainbow-washing statements made and explain why they are inaccurate. Shareholders must carefully link their allegations to the specific elements articulated under Delaware law for breach of fiduciary duty and under Rule 10b-5 or 14a-9. Shareholders would also be well-advised to include specific factual allegations both as to why these statements were statements of fact—as opposed to puffery—and why these statements were material. Courts, in turn, should be hesitant to discount statements as puffery or immaterial at the motion to dismiss stage.

Conclusion

Rainbow-washing is a harmful practice that is exploitative of a vulnerable and historically marginalized community. When a corporation engages in rainbow-washing, it distracts attention away from the Community and the problems facing the Community. Likewise, rainbow-washing poses dignitary and identity harm to investors who attempt to invest in corporations with whom they share values but are actually duped. When a corporation chooses to publicly express views espousing its support and commitment to the Community, the corporate

Frost, 2021 WL 3912651, at *12. The *Esa* Court did not analyze the allegations in the complaint any further. *See* 2021 WL 3861434, at *5.

477 *See Bush*, 2022 WL 1467773, at *4; *Klein*, 2021 WL 2075591, at *7.

managers owe fiduciary duties and must refrain from engaging in securities fraud; they must be cautious to not make statements of support of the Community unless it can be factually rooted in conduct consistent with the statements. When corporate managers engage in rainbow-washing, shareholder activists may be able to use litigation as a tool, among others available to them, to combat rainbow-washing. Despite the high bars imposed by substantive and procedural law, there is a path to success with these claims. While the ideal remedy is that corporate managers will refrain from making unfounded statements of support, pursuing a rainbow-washing action at least exposes directors to liability when their behavior is contrary to such statements and serves the function of protest. Likewise, the mere commencement of litigation can present a public relations matter to which the corporate managers must respond. This article has provided a framework for how existing law may be used in this way. Critically, however, plaintiffs must survive the motion to dismiss. This necessarily involves courts taking a broader view of the materiality standard and recognizing that the essence of the "reasonable investor" has significantly evolved—and will continue to evolve—since the Supreme Court first articulated the standard in 1978. After surviving the motion to dismiss, shareholders will have more leverage to engage in discussion with managers to effectuate changes in corporate governance, and where there has been cognizable harm, perhaps accomplish monetary settlement.