

M&A WATCH UPDATE

May 11, 2018

Attention Forum Shoppers! Blue Light Special in the Ninth Circuit!

On April 20, 2018, the Court of Appeals for the Ninth Circuit split from five other circuit courts in *Varjabedian v. Emulex Corp.*, No. 16-55088 (9th Cir. Apr. 20, 2018), by holding that claims under Section 14(e) of the Securities Exchange Act of 1934 require only a showing of negligence rather than intent to defraud.

Background

The Second, Third, Fifth, Sixth and Eleventh Circuits have held that claims alleging misstatements or omissions in connection with a tender offer under Section 14(e) of the Securities Exchange Act of 1934 require intent to defraud (“scienter”). The Ninth Circuit’s decision in *Emulex* stems from the 2015 acquisition of Emulex by Avago Technologies Wireless Manufacturing pursuant to an all-cash tender offer. Subsequent to the closing, a class action was filed, alleging that Emulex had failed to disclose in its recommendation statement on Schedule 14D-9 one of six financial analyses performed by Emulex’s financial advisor, Goldman Sachs, in delivering its fairness opinion to the Emulex board. The omitted analysis found that the 26.4 percent merger premium was fair, but fell below the average for comparable transactions in the semiconductor industry.

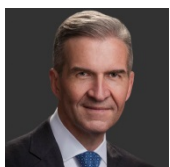
Five other circuits that have considered similar questions have held that claims under Section 14(e) require a finding of scienter. These courts have held that claims under Section 14(e) require a pleading of scienter because of its “shared text” with Rule 10b-5, which has a well-established scienter requirement. In splitting from other circuit courts, the Ninth Circuit noted that Section 14(e) prohibits either (1) making untrue statements or omissions of material fact **or** (2) engaging in fraudulent or

deceptive acts. By focusing on the use of the word “or,” the court found that Section 14(e) provides for two different offenses: one for making material misstatements and another for fraudulent conduct. Thus the Ninth Circuit found that a showing of scienter is not required to bring a claim under Section 14(e), but rather that a showing of negligence would be sufficient to bring a claim under Section 14(e) on the basis of misstatements or omissions of material fact. The Ninth Circuit did not determine whether or not the omitted fact in this case was “material,” but directed the lower court to consider that question.

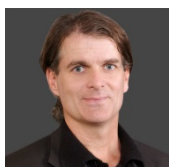
Our View

The Ninth Circuit’s decision in *Emulex* marks the first instance where a negligence standard has been applied to an allegation of a material misstatement in connection with a tender offer. In the event that *Emulex* is not reversed by an *en banc* panel of the Ninth Circuit, the Supreme Court may ultimately resolve the circuit split. We note that the Ninth Circuit’s application of a negligence standard for disclosure in connection with tender offers under Section 14(e) is consistent with well-established jurisprudence applying a negligence standard to false or misleading statements made in connection with solicitation material (i.e., proxy statements) under Section 14(a).

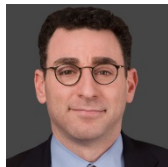
Until the issue is resolved, there may be a higher volume of 14(e) challenges to tender offers in federal court in the Ninth Circuit. Tender offer participants and their advisors should be aware that their disclosure in tender offer documents may come under greater scrutiny. The benefits of this holding to stockholders are open to question—as an increase in the volume of disclosure will not necessarily give investors a clearer picture of the information that is in fact material to their decision of whether or not to tender.



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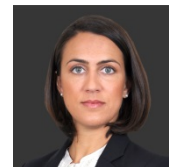
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