No. ______

In the
Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, who were defendants in the United States District Court for the Central District of California and appellees in the United States Court of Appeals for the Ninth Circuit, are Emulex Corporation; Bruce C. Edwards, Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari, and Dean A. Yoost, individual members of Emulex's board of directors; Emerald Merger Sub, Inc.; and Avago Technologies Wireless (USA) Manufacturing Inc.

Respondents are Gary Varjabedian and Jerry Mutza. Although Varjabedian, who is listed as plaintiff-appellant in the caption for the decision below, filed the initial complaint, the district court appointed Mutza as lead plaintiff. Both Mutza and Varjabedian represent the same putative class of former Emulex shareholders. App. 1a n.1.

RULE 29.6 STATEMENT

Petitioner Avago Technologies Wireless (USA) Manufacturing Inc. is now known as Avago Technologies Wireless (USA) Manufacturing LLC, following a corporate restructuring that occurred on June 26, 2017. Avago Technologies Wireless (USA) Manufacturing LLC is a wholly owned subsidiary of Broadcom Corporation, a California corporation, which is wholly owned by Broadcom Pte. Ltd., a Singapore entity, which is wholly owned by Broadcom Technologies Inc., a Delaware corporation, which is wholly owned by Broadcom Inc., a Delaware corporation. No publicly held company owns 10% or more of the stock of Broadcom Inc.

Petitioner Emulex Corporation, a Delaware corporation, was merged with and into its subsidiary, Emulex Corporation, a California corporation, and ceased to exist as a corporate entity on November 17, 2016. Emulex Corporation, a California corporation, is a wholly owned subsidiary of Avago Technologies Wireless (USA) Manufacturing LLC and thereby a wholly owned indirect subsidiary of Broadcom Inc.

As a result of the transaction at issue in this case, Petitioner Emerald Merger Sub, Inc., ceased to exist as a corporate entity on May 5, 2015 when it merged into Emulex Corporation, a Delaware corporation. Before then, it was a wholly owned subsidiary of Avago Technologies Wireless (USA) Manufacturing Inc.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Petitioners Emulex Corporation (Emulex), Bruce C. Edwards, Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari, Dean A. Yoost, Avago Technologies Wireless (USA) Manufacturing Inc., and Emerald Merger Sub, Inc., respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-26a) is reported at 888 F.3d 399. The district court's order dismissing the complaint with prejudice (App. 27a-57a) is reported at 152 F. Supp. 3d 1226. The order of the court of appeals denying rehearing (App. 58a-59a) is unreported.

JURISDICTION

The court of appeals entered its opinion on April 20, 2018. App 1a. On September 6, 2018, the court of appeals denied a timely petition for rehearing. *Id.* at 58a-59a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage

> in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The [Securities and Exchange] Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Other pertinent statutory and regulation provisions are reprinted at App. 62a-65a.

STATEMENT

This case presents an acknowledged circuit conflict concerning an undeniably important question arising under the Securities Exchange Act of 1934 (Exchange Act or Act): Whether Section 14(e) of the Exchange Act supplies an inferred private cause of action based on mere negligence, not scienter.

Section 14(e) proscribes false statements and material omissions made in connection with a tender offer. Five different circuits, in an unbroken line of decisions dating back nearly half a century, have held that mere negligence is insufficient to establish a claim for relief under Section 14(e), just as with Section 10(b) of the Exchange Act and its better known component, Rule 10b-5. In the decision below, the Ninth Circuit expressly acknowledged that authority, then "part[ed] ways" with it—holding that a private plaintiff seeking relief under Section 14(e) need only plead and prove negligence. App. 20a. Applying its new negligence standard, the court reversed the district court's decision dismissing plaintiff's complaint under the scienter standard that has governed Section 14(e) claims for nearly 50 years.

An acknowledged circuit conflict on a matter of such undeniable importance is a sufficient reason by itself to grant certiorari. This Court has frequently intervened to resolve conflicts over the meaning of the federal securities laws, in part because the flexible venue rules applicable to such suits mean that the outlier position of one circuit can become a de facto national standard simply through forum shopping. Plaintiffs' lawyers already file a disproportionately large number of securities class actions in the Ninth Circuit, and the Ninth Circuit's creation here of a negligence-based claim for damages and other remedies that had been rejected in other circuits for decades will only make it more of a magnet for such actions. *See infra* at 23-24. After all, given the choice, why would a plaintiff desiring to assert a private claim under Section 14(e)—along with, as here, a demand for damages—ever file anywhere else?

But the Ninth Circuit's decision is also wrong. The text of Section 14(e), as well as its roots in Section 10(b) of the Exchange Act and Rule 10b-5, confirm its *antifraud* focus—as other circuits have recognized. Moreover, the Ninth Circuit simply ignored the fact that Section 14(e) contains no express private right of action at all. To the extent a private right of action may be inferred from silence (*cf. Alexander v. Sandoval,* 532 U.S. 275, 286-87 (2001)), the contours of that right cannot disrupt the balance Congress struck in the statute's express provisions—here, a balance between protecting investors against fraud, on the one hand, and overly encumbering the markets with judicial second-guessing, on the other. The

Ninth Circuit's unprecedented embrace of an inferred private right of action under Section 14(e) for merely negligent conduct destroys that balance, and erects a civil liability scheme whose "consequences"—as Judge Friendly observed in analogous circumstances—are "frightening." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 866-67 (2d Cir. 1968) (concurring), *cert. denied*, 394 U.S. 976 (1969).

The petition should be granted.

A. Background

In the wake of the stock market crash that caused the Great Depression, Congress passed two major laws designed to protect the securities markets. The first, the Securities Act of 1933 (1933 Act), regulates the disclosures made in connection with the initial distribution and purchase of securities. The second, the Exchange Act of 1934, regulates subsequent transactions involving securities, including sales on securities exchanges, proxy offers, and tender offers. *See* App. 7a-8a; *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 194-95 (1976).

Section 10 of the 1934 Act makes it "unlawful for any person . . . (b) [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j. In 1942, acting pursuant to authority delegated to it by the 1934 Act, the SEC promulgated Rule 10b-5, which prohibits the use of manipulative and deceptive practices in connection with purchase or sale of any security. 17 C.F.R. § 240.10b-5. This Court has held both that Section 10(b) confers an implied private right of action, and that a plaintiff bringing such an action must plead and prove scienter—*i.e.,* a knowing or reckless violation of the 1934 Act. *See Ernst & Ernst,* 425 U.S. at 196-97, 199. Based on its review of the statute and its history, the Court, however, has been "quite unwilling to extend the scope of the statute to negligent conduct." *Id.* at 214.

Section 14(e) of the Exchange Act, which was enacted as part of a series of amendments made to the Act in 1968, requires the disclosure of certain information in connection with tender offers. The first sentence of Section 14(e) was—as this Court has observed—"modeled on the antifraud provisions of § 10(b) of the Act and Rule 10b-5," *Schreiber v. Burlington N., Inc.,* 472 U.S. 1, 10 (1985), and "prohibits fraudulent acts in connection with a tender offer," *United States v. O'Hagan,* 521 U.S. 642, 667 (1997); *see supra* at 1-2 (reproducing Section 14(e)). The second sentence directs the SEC to promulgate such rules as are "reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 78n(e).

In *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1, 24 (1977), this Court recognized that "Section 14(e) . . . makes no provision whatever for a private cause of action, such as those explicitly provided in other sections of the 1933 and 1934 Acts." Applying the factors set out in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court declined to infer a private cause of action for damages under Section 14(e) for unsuccessful tender offerors. 430 U.S. at 41-42. The Court has not considered whether such a right of action may be inferred under this Court's precedents for the shareholders subject to a tender offer. But lower courts, including the Ninth Circuit, have inferred such a cause of action. *See, e.g., Plaine v. McCabe*, 797 F.2d 713, 717-18 (9th Cir. 1986).

In 1995, Congress enacted the Private Securities Litigation Reform Act (PSLRA) as a check against abusive federal securities litigation by private parties. Among other things, the PSLRA imposes heightened pleading requirements on plaintiffs in federal securities actions, including with respect to scienter. Section 21D(b)(2) of the PSLRA provides that plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). The Act thus "unequivocally raise[d] the bar for pleading scienter" when required. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 313, 321 (2007) (alteration in original) (citation omitted).

B. Facts And Procedural History

1. This case arises from the merger of two technology companies—Emulex and Avago Technologies Wireless (USA) Manufacturing Inc. (Avago) in 2015. App. 29a. Emulex produced equipment for data centers, including network interface cards, server management chips, switches and routers, and connectivity management software. Avago, in turn, was a leading designer, developer, and supplier of analog semiconductor devices. On February 25, 2015, Emulex and Avago jointly announced that they had agreed to merge by way of an accepted tender offer. Under the terms of the agreed upon tender offer, a subsidiary of Avago, Emerald Merger Sub, Inc., offered, on April 7, 2015, to pay $8.00 for every share of outstanding Emulex stock. The $8.00 price reflected a 26.4% premium on

Emulex's stock price the day before the merger was announced.

On the same day that the tender offer was initiated, Emulex filed a 48-page Recommendation Statement with the SEC on Schedule 14D-9 (*see* 17 C.F.R. § 240.14d-101). App. 30a. The Recommendation Statement listed nine separate reasons for approving the merger, including that Emulex shareholders would receive a premium on their stock. *Id.* The Recommendation Statement also provided a five-page summary of a "fairness opinion" that Emulex had received from its financial advisor, Goldman Sachs, which found that the $8.00 offer price was fair to shareholders. *Id.* at 30a-31a.

2. The day after Emulex filed its Recommendation Statement with the SEC, Gary Varjabedian, an Emulex shareholder, filed a putative federal securities class action in the U.S. District Court for the Central District of California on behalf of himself and other shareholders, seeking to enjoin the merger.[1] To avoid a costly discovery dispute, Emulex voluntarily provided plaintiff with the core documents, including the so-called "Board Book," that Goldman Sachs had compiled in undertaking its fairness analysis of the tender offer. The last page of the Board Book contained a chart, entitled "Selected Semiconductor Transactions," which listed, based on publicly available information, the premiums

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[1] The district court eventually appointed Jerry Mutza as lead plaintiff, though it kept Varjabedian in the caption. App. 1a n.1. As the Ninth Circuit explained, "[t]here is no material difference between Mutza and Varjabedian for purposes of this appeal, as they both represent the same class of Emulex shareholders and are represented by the same counsel." *Id.*

received in 17 transactions involving semiconductor companies between 2010-2014. App. 31a.

The one-page chart, also known as the "Premium Analysis," *id.*, did not contain any qualitative assessment of the transactions listed, and did not compare the transactions with Avago's tender offer. It simply showed that the 26.4% premium on the share price under Avago's tender offer for Emulex was within the range of transaction premiums identified in these unrelated semiconductor transactions (even if, as plaintiff stresses, it was below the mean and median of these premiums). *Id.* at 31a, 39a.

After receiving this information (and having failed to secure an order enjoining the merger), plaintiff amended his complaint to allege that, by failing to include the Selected Semiconductor Transactions chart in the Recommendation Statement, Emulex and the other petitioners (the companies involved in the transaction and individual directors of Emulex) violated Section 14(e) of the Exchange Act. According to plaintiff, the omission of the chart "create[d] the materially misleading impression that the premium Emulex's shareholders received was significant, or at the very least in line with premiums obtained in similar transactions." First Am. Compl. ¶ 8 (C.D. Cal. Sept. 17, 2015), ECF No. 29.

The amended complaint sought damages as well as an order rescinding the transaction. *Id.* at 46.

3. The district court dismissed the amended complaint with prejudice. Drawing from the "wealth of persuasive case law" holding that Section 14(e) requires a showing of scienter, the court rejected plaintiff's argument that "only negligence" is required. App. 36a, 35a. As the court explained, "*no*

federal court has held that § 14(e) requires only a showing of negligence," and "the better view is that the similarities between Rule 10b-5 and § 14(e) require a plaintiff bringing a cause of action under § 14(e) to allege scienter," *i.e.,* that "'defendants made false or misleading statements either intentionally or with deliberate recklessness.'" *Id.* (citation omitted). The court added that the PSLRA further requires plaintiffs to "plead facts evincing a *strong inference* of scienter." *Id.* at 36a-37a (citation omitted).

Applying that standard, the district court held that the amended complaint failed to state a claim. First, the court found that nothing in the Selected Semiconductor Transactions chart contradicted the Recommendation Statement; indeed, the chart simply "report[ed] that the Emulex premium was below-average for the industry but within a reasonable range of outcomes." *Id.* at 40a. Second, the court found that there was a "better explanation" than fraud for defendants' decision not to include the chart—it was "minor in the scheme of the voluminous analysis performed by Goldman Sachs," and its substance was "unremarkable." *Id.* at 45a. Accordingly, the court held that plaintiff's allegations, even if accepted as true, failed to establish a "strong inference of scienter." *Id.* at 46a-47a.

4. The Ninth Circuit reversed in a published opinion. The court focused on the legal question whether Section 14(e) requires "proof of scienter, as the district court held, or mere negligence." *Id.* at 8a. It recognized that the district court's conclusion was in line with the case law in "five other circuits"—the Second, Third, Fifth, Sixth, and Eleventh Circuits. *Id.* at 9a. But the court chose to "part[] ways from [its] colleagues in [those] five other circuits," *id.* at 20a,

and held that Section 14(e) requires a showing of "only negligence, not scienter," *id.* at 16a.

According to the Ninth Circuit, these other circuits had erred in focusing on "the shared text found in both Rule 10b-5 and Section 14(e)" reflecting an antifraud focus. *Id.* at 9a. In so reasoning, the court relied on statements in this Court's decisions in *Ernst & Ernst,* holding that an inferred private right of action under Section 10(b) of the Exchange Act and Rule 10b-5 requires scienter, and *Aaron v. SEC,* 446 U.S. 680 (1980), holding that the express right of action for the SEC to seek injunctive relief under Section 17(a)(2) of the Exchange Act does reach negligent conduct. App. 11a-12a. The Ninth Circuit acknowledged that "circuit courts have continued" to hold that Section 14(e) requires scienter in the wake of *Aaron* and *Ernst & Ernst*, but it faulted those courts for doing so. *Id.* at 13a-15a.

The Ninth Circuit remanded for the district court to "reconsider Defendant's motion to dismiss under a negligence standard." *Id.* at 20a.[2]

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[2] Plaintiff also brought claims under Section 14(d)(4) and Section 20(a) of the Exchange Act. The district court held that the former claim should be dismissed on the ground that Section 14(d)(4) does not create a private right of action. App. 55a. The Ninth Circuit affirmed that ruling (*id.* at 18a-19a) and it is not at issue here. The parties agree that plaintiff's Section 20(a) claim, which seeks to hold the individual directors of Emulex liable for any federal securities violation as "controlling persons," rises or falls with his Section 14(e) claim. *Id.* at 6a & n.2, 19a. Accordingly, if this Court grants certiorari and reverses the Ninth Circuit's handling of plaintiff's Section 14(e) claim, then plaintiff's Section 20(a) claim will fall as well.

5. The Ninth Circuit denied Emulex's timely petition for rehearing, but stayed issuance of the mandate to allow Emulex to seek certiorari.

REASONS FOR GRANTING THE WRIT

This case meets all the conventional requirements for certiorari. *See* Supreme Court Rule 10(a). By its own admission, the Ninth Circuit "part[ed] ways" in this case from the approach taken by other circuits on the question whether an inferred private right of action under Section 14(e) of the Exchange Act requires proof of scienter, as opposed to mere negligence. App. 20a. That question is undeniably important. And the Ninth Circuit's unprecedented position that a plaintiff is entitled to a private remedy under Section 14(e) based on a showing of just negligence is at odds with the text, structure, and history of Section 14(e)—which explains why no court has ever previously interpreted Section 14(e) to impose merely a negligence standard.

A. The Decision Below Conflicts With The Decisions Of Five Other Circuits

The petition presents a square circuit split. The Ninth Circuit expressly rejected the view of all five circuits that had previously considered—and rejected—a negligence-based standard under Section 14(e). *See* App. 20a; *see also In re Tangoe, Inc. Stockholders Litig.*, --- F. Supp. 3d ---, 2018 WL 3651334, at *23 (D. Conn. July 31, 2018) (recognizing conflict over whether a plaintiff must "plead[] scienter for claims under Section 14(e)"). And commentators have recognized the split as well. *See, e.g.*, Alison Frankel, *Bucking precedent, 9th Circuit opens door to more M&A challenges*, Reuters (Apr. 23, 2018), http://bit.ly/VarjabedianBuckingPrecedent; John P. Stigi III & John M. Landry, *Ninth Circuit Splits From Other Circuits, Holding That A Negligence Standard Applies To A Claim Challenging Tender Offer Disclosures Under Section 14(e)*, The National Law Review (Apr. 26, 2018), http://bit.ly/VarjabedianNLJ.

1. As the Ninth Circuit explained, five other courts of appeals have considered whether Section 14(e) supports a claim based on a showing of mere negligence, not scienter. *See* App. 20a. And in an unbroken line of decisions going back nearly half a century, each of those circuits has squarely held that the answer was "no." *See id.* at 10a-15a.

The first such decision came in 1973, just five years after passage of Section 14(e). In *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, the Second Circuit noted that "the underlying proscription of § 14(e) is virtually identical to . . . Rule 10b-5," with the "critical difference" being that Section 14(e) applies to tender offers. 480 F.2d 341, 362 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). The court thus decided to "follow the principles developed under Rule 10b-5 regarding the elements of such violations," including the rule that "mere[ly] negligent conduct" does not contravene the law. *Id.* at 362-63. The Second Circuit has adhered to that principle ever since, holding that "[i]t is well settled in this Circuit that scienter is a necessary element of a claim for damages under § 14(e)." *Connecticut Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 961 (2d Cir. 1987).

The Fifth Circuit soon followed suit. In *Smallwood v. Pearl Brewing Co.*, it noted that "liability in a private action for damages has apparently never been imposed for negligent conduct under . . . Rule [10b-5]." 489 F.2d 579, 606 (5th Cir.

1974). Concluding that "the elements to be proved to establish a violation of Section 14(e) are identical to those under the Rule," it held that "some culpability, beyond mere negligence, is required" to state a claim for damages under Section 14(e). *Id.* The Fifth Circuit has adhered to that requirement. *See, e.g.*, *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009) ("The elements of a claim under Section 14(e) . . . are identical to the Section 10(b)/Rule 10b-5 elements," including the need to identify a material false statement or omission "made with scienter.").

The Sixth Circuit adopted the same rule. In *Adams v. Standard Knitting Mills, Inc.*, it concluded that "[t]he language of the Williams Act clearly demonstrates that Congress envisioned scienter to be an element of 14(e)." 623 F.2d 422, 431 (6th Cir.), *cert. denied*, 449 U.S. 1067 (1980). In construing Section 14, the Sixth Circuit also recognized that, in defining the scope of an inferred private right of action, courts "have a special responsibility to consider the consequences of their rulings and to mold liability fairly to reflect the circumstances of the parties." *Id.* at 428. Those considerations, the court explained, also weighed against a bare negligence standard. *Id.*

The Third Circuit reached the same conclusion in 2004. In *In re Digital Island Securities Litigation*, it recognized that "Section 14(e) is 'modeled on the antifraud provisions of § 10(b) of the ['34] Act and Rule 10b-5,' which require proof of scienter." 357 F.3d 322, 328 (3d Cir. 2004) (alteration in original) (quoting *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985); and citing *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 (1976))). Noting that the "similarity in the language and scope of Section 14(e) and Rule 10b-

5" warrants "constru[ing] the two consistently," it "join[ed] those circuits that hold that scienter is an element of a Section 14(e) claim." *Id.*

And the Eleventh Circuit joined these circuits in *SEC v. Ginsburg*, holding that "to establish liability under . . . § 14(e) of the Securities and Exchange Act . . . , the SEC must prove that [the defendant] acted with scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.'" 362 F.3d 1292, 1297 (11th Cir. 2004) (quoting *SEC v. Adler*, 137 F.3d 1325, 1340 (11th Cir. 1998)).

2. For the first fifty years of Section 14(e)'s existence, therefore, there was uniform recognition in circuits across the country that Section 14(e) does not support a private right of action or remedy based on mere negligence. As the district court here explained, "*no* federal court ha[d] held that § 14(e) requires only a showing a negligence." App. 36a.

In the decision below, the Ninth Circuit blew up that consensus. It recognized these "out-of-circuit authorities." App. 2a; *see id.* at 9a (citing cases). But it was "persuaded that the rationale underpinning those decisions" was incorrect. *Id.* at 9a. Instead, pointing to Supreme Court cases decided in 1976 (*Ernst & Ernst*) and 1980 (*Aaron*) that addressed other provisions of the securities laws, the Ninth Circuit concluded that every judge to have ever addressed the question of Section 14(e)'s scienter standard had gotten it wrong. For that reason, and that reason alone, it reversed the district court's decision that had disposed of the case in favor of petitioners. *See id.* at 20a ("[W]e REVERSE the district court's decision as to the Section 14(e) claim because the district court employed a scienter standard in analyzing the Section 14(e) claim.").

As discussed above, the Ninth Circuit fully appreciated that it was creating an expansive new regime at odds with the uniform view in the rest of the country. It recognized that, "[d]espite the Supreme Court's decisions in *Ernst & Ernst* and *Aaron*, circuit courts have continued to" reject a negligence standard in the 38 years since *Aaron* was decided. *Id.* at 13a-14a. But it believed that all these courts got it wrong and that, in fact, Section 14(e) should be interpreted to confer a much broader private cause of action—one for mere negligence—and it embraced that dispositive "holding" even though it meant "part[ing] ways from our colleagues in five other circuits." *Id.* at 20a.

In short, the circuit split here is as square, obvious, and consequential as they come.

B. The Decision Below Is Incorrect

Upsetting a half-century of circuit case law from across the country on an undeniably important issue is reason enough to grant review. But here, there is another reason: the Ninth Circuit's decision also upsets the statutory scheme enacted by Congress.

1. "The 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst,* 425 U.S. at 206. Congress created a number of express causes of actions for potential civil liability, but also placed "significant procedural restrictions" on those actions, including a relatively short statute of limitations and a bonding requirement for defendants' costs and attorneys' fees. *Id.* at 209; *see id.* at 209-11 & n.28. Courts, including this Court, also have inferred certain private causes of actions under those laws. In doing so, however, the Court has

been careful to ensure that such inferred causes of actions do not undermine the statutory scheme, and protections, enacted by Congress. *See id.* at 210.

This Court has "acquiesced" in the "acceptance by the lower federal courts of an implied action [for damages] under § 10(b)" of the Exchange Act. *Touche Ross & Co. v. Reddington,* 442 U.S. 560, 577 n.19 (1979). In *Ernst & Ernst,* however, the Court concluded the implied action under Section 10(b) and Rule 10b-5—which makes it illegal "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made . . . not misleading"—requires a showing of scienter. *Ernst & Ernst*, 425 U.S. at 212, 214-15 (alteration in original) (citation omitted). Mere negligence, the Court held, is not enough. *Id.* at 214. In so holding, the Court looked not only to the text of Section 10(b) and Rule 10b-5, but also to the fact that where Congress has expressly enact a civil remedy for "negligent conduct," it provided "significant procedural restrictions" that are absent in Section 10(b). *Id.* at 208-09.

That same analysis—of both the text that is present and the protections that are absent—applies to any private right of action that can be inferred under Section 14(e). As this Court has already recognized, the text of Section 14(e) is "modeled on the antifraud provisions of § 10(b) . . . and Rule 10b-5," and Section 14(e) is thus an "'antifraud prohibition,'" too. *Schreiber*, 472 U.S. at 10 (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 24 (1977)). It sets out, in a single sentence, a substantive proscription against various kinds of false and deceptive acts—namely, making "any untrue statement of a material fact," "omit[ting] to state any material fact necessary in order to make the statements made . . . not misleading," "fraudulent . . . acts or practices," "deceptive . . . acts or practices," "or manipulative acts or practices." 15 U.S.C. § 78n(e).

One cannot properly interpret any one of those proscriptions without considering all of them. Indeed, as this Court has repeatedly explained, courts should not "construe statutory phrases in isolation," but rather must "read statutes as a whole." *United States v. Morton*, 467 U.S 822, 828 (1984). Relatedly, this Court has also consistently stressed that "the words of a statute must be read in their context." *Utility Air Regulatory Grp. v. EPA,* 134 S. Ct. 2427, 2441 (2014); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167, 174 (2012) ("Context is a primary determinant of meaning.").

Here, Congress used a number of words—"fraudulent," "deceptive," and "manipulative"—that undeniably "connote[] intentional or willful conduct designed to deceive or defraud investors"—"a type of conduct quite different from negligence." *Ernst & Ernst*, 425 U.S. at 199; *see id.* at 214. And because words are "known by the company [they] keep[]," *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015), it follows that the other words in the same sentence were intended to have the same connotation. That is particularly true where, as here, ignoring those neighbors would give "unintended breadth to the Acts of Congress." *Id.* (citation omitted). And that means Congress's references to "untrue statements" and omissions must be read in light of the surrounding references to "fraudulent," "deceptive," and "manipulative" conduct in the same sentence.

Construing the list of proscribed acts in Section 14(e) together, it is clear that Section 14(e) is concerned with purposeful misrepresentations and omissions, not merely negligent ones. The rulemaking authority that Congress delegated to the SEC in the second sentence of Section 14(e) only reinforces that conclusion. There, Congress authorized the SEC to promulgate rules and regulations "reasonably designed to prevent[] such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 78n(e). That clause confirms Section 14(e)'s antifraud focus and further dispels the notion that Congress sought to broadly proscribe negligent as well as intentional conduct.

Like Section 10(b), Section 14(e) also *lacks* the "significant procedural restrictions" that Congress has included when it has created an express right of action under the securities laws for negligence. *Ernst & Ernst,* 425 U.S. at 208-09. As this Court recognized in *Ernst & Ernst*, *see id.* at 209-10, and again in *Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 178-79 (1994), the "express private causes of action in the 1933 and 1934 Acts" are an important benchmark for determining the scope of any inferred causes of actions under the Acts. Looking to the elements of those express private causes of action strongly supports the conclusion that Congress did not intend any inferred private cause of action in Section 14(e) to cover negligence.

This Court has never previously recognized a private right of action under Section 14(e). Some lower courts have created one by inference, but (until now) those courts had recognized that the federal courts that have "created" an inferred right of action "have a special responsibility to consider the consequences of their rulings and to mold liability fairly to reflect the circumstances of the parties."

Adams, 623 F.2d at 428. Until the Ninth Circuit's decision in this case, every court to exercise that "special responsibility" had refused to extend the inferred private right of action to negligent conduct.

Such restraint is always warranted when it comes to the disfavored practice of inferring a private right of action, *see Alexander v. Sandoval,* 532 U.S. 275, 286-87 (2001), but it is especially warranted here. Indeed, as Judge Friendly observed in a similar vein in *SEC v. Texas Gulf Sulphur Co.,* the consequences of inferring a cause of action based on a negligent misstatement or omission in a securities filing are "frightening." 401 F.2d 833, 866-68 (2d Cir. 1968) (concurring), *cert. denied*, 394 U.S. 976 (1969).

Texas Gulf Sulphur concerned whether to infer a damages action for negligence under Section 10(b) and Rule 10b-5, but Judge Friendly's admonition is just as applicable to the prospect of imposing civil liability for negligence under Section 14(e): "[A] rule imposing civil liability in such cases would work directly counter to what the SEC has properly called a commendable and growing recognition on the part of industry . . . of the importance of informing security holders and the public generally with respect to important business and financial developments." *Id.* at 867 (internal quotation marks and citation omitted). If a negligent omission or misstatement can be a basis for civil liability under Section 14(e), then a company may believe it better to stand behind the adequacy of its existing filings even when it determines that additional information might be helpful to investors, lest any new filings be used as evidence that the earlier filings were negligently deficient.

This Court can decide this case—and reverse the decision below—on the assumption that the lower courts have properly inferred a private right of action under Section 14(e) for *intentional* violations. But if it believes that any inferred cause of action that exists under Section 14(e) may be applied to negligent behavior as well, then it should reexamine whether a private right of action can be inferred at all under Section 14(e). The answer, under modern precedent, would be that it cannot. While there was a time when this Court inferred rights of action relatively freely, it has since "sworn off th[at] habit." *Sandoval,* 532 U.S. at 287; *see Central Bank of Denver,* 511 U.S. at 173. Viewed under the rigorous standard that this Court applies today, there is no basis for inferring any private right of action under Section 14(e).

2. In nevertheless inferring a private right of action under Section 14(e) for negligence, the Ninth Circuit relied primarily on this Court's decisions in *Ernst & Ernst* and *Aaron*. *See* App. 10a-15a. But neither of those decisions can support the Ninth Circuit's expansive new private remedy.

The Ninth Circuit believed that *Ernst & Ernst* was significant because of its statement that the text of Rule 10b-5—on which Section 14(e) was modeled—"could be read as proscribing, respectively, *any type* of material misstatement or omission . . . *whether the wrongdoing was intentional or not*." App. 10a (alterations in original) (quoting *Ernst & Ernst*, 425 U.S. at 212). "This means," the Ninth Circuit reasoned, "that Rule 10b-5(b)'s text, and by extension the identical phrasing in the first clause of Section 14(e), did not necessarily compel finding a scienter requirement." *Id.* at 11a.

But as *Ernst & Ernst* itself illustrates, to say that the text of Rule 10b-5 does "not necessarily compel finding a scienter requirement" hardly means that any inferred right of action "necessarily" should extend to negligence. In any event, the Ninth Circuit's analysis fails to account for the fact that Section 14(e) must be read as a whole, and in light of its antifraud objective. *See supra* at 16-18. Moreover, in focusing on one sentence from the opinion, the Ninth Circuit missed the central teaching of *Ernst & Ernst*: that the statutory scheme enacted by Congress in the 1933 and 1934 Acts strongly compels the conclusion that Congress would not have intended a private cause of action for mere negligence in the absence of the "significant procedural restrictions" that it imposed for the express causes of actions it created that cover negligent behavior. *See* 425 U.S. at 208-11. That applies equally to Section 14(e).

The Ninth Circuit's reliance on *Aaron* was also misplaced. The Ninth Circuit stressed that, in *Aaron*, this Court had held that Section 17(a)(2) of the 1933 Act "does *not* require a showing of scienter." App. 12a. But the Ninth Circuit overlooked that, unlike Section 14(e), Section 17 of the 1933 Act was not "modeled on the antifraud provisions of § 10(b) of the [1933] Act and Rule 10b-5." *Schreiber,* 472 U.S. at 10. Moreover, in *Aaron* the SEC was not pursuing a damages remedy under an inferred cause of action, but instead was proceeding under an *express* public cause of action, contained in Section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b), that authorizes the agency to pursue injunctive relief. *See Aaron*, 446 U.S. at 686.

Aaron is this distinguishable in two important respects. First, because it involved an express cause of action, the principles that restrain judicial creation of an implied private remedy did not apply. And second, because *Aaron* involved only a request for injunctive relief, the additional limits that have traditionally applied to securing damages for alleged fraud did not apply. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963) ("It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages."); *Texas Gulf Sulfur Co.*, 401 F.2d at 867-68 (Friendly, J, concurring) (similar). *Aaron*'s holding that a finding of scienter is unnecessary for issuance of an injunction in a suit brought by the SEC under the express cause of action for violations of Section 17(a) therefore by no means suggests that scienter is unnecessary to secure damages or other relief pursuant to any implied private right of action based on Section 14(e).

In any event, the fact that the Ninth Circuit read this Court's decisions to require creation of an expansive private remedy for negligence that had been rejected by every other court to consider it just underscores the need for this Court's intervention.

C. The Question Presented Is Exceptionally Important And Warrants Review Here

The question presented also is undeniably important and one that warrants this Court's review.

1. The federal securities laws not only are key to the efficient functioning of markets, but also are prone to litigation abuses, as Congress itself recognized in the PSLRA. *Supra* at 6. If allowed to stand, the Ninth Circuit's decision will fundamentally alter the civil liability regime that courts have applied under Section 14(e) for half a century and create the

very litigation abuses that Congress has sought to prevent in order to protect businesses and markets.

Even before the decision below, the Ninth Circuit was a magnet for securities cases, many of which are filed as class actions. It was home to more merger-related securities suits than any other circuit, including the Second and Third Circuits where most of the companies subject to such suits are (respectively) listed and incorporated. In 2017, for example, plaintiffs' lawyers filed more than one-fifth of all merger-related class actions in the Ninth Circuit. *See* Cornerstone Research, *Securities Class Action Filings—2017 Year In Review* 13 (2018), http://bit.ly/Cornerstone2017YIR. In 2016, it was even higher—nearly one-third, which was more than double the number in any other circuit. *See id.*

That is no happenstance. Venue under the 1934 Act is available in any district "wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa(a). The Ninth Circuit, and northern California in particular, is home to one of the Nation's hotbeds of corporate startups that present attractive acquisition targets. And even if they are not based in the Ninth Circuit, most publicly traded companies at the very least transact business there. Accordingly, almost *every* merger that is subject to the securities laws can be challenged in the Ninth Circuit. And now that the Ninth Circuit has embraced a negligence standard for damages claims that the Second and Third Circuits (and every other circuit to have weighed in) has rejected, there is every reason to believe that they *will* be challenged there. As one commentator put it, "[i]f investors have the option of suing over an M&A deal in California, Nevada, or other West Coast states, I suspect they will after [the] decision . . . in *Varjabedian*." Frankel, *supra*.

In effect, the venue rules and plaintiffs' lawyers control of the district in which class actions are filed are likely to mean that a position that had never been accepted in the first fifty years of Section 14(e)'s existence will, without this Court's intervention, suddenly become the de facto national standard.

2. That standard is seriously misguided, for the reasons already discussed. In a regime where a showing of scienter is required to bring a private damages action under Section 14(e), and where the SEC may seek injunctive relief under Section 17(a) for negligence, there are ample incentives for businesses to avoid material misstatements or omissions—and to correct any that are made when they are discovered. *See supra* at 19. But the Ninth Circuit's adoption of a negligence standard for private damages claims—potentially applicable to every merger or acquisition of a publicly traded company (no matter where it is listed, incorporated, or headquartered)—fundamentally shifts the balance struck by Congress. Companies and their directors (who, like the individual petitioners here, face piggyback claims under Section 20 of the Exchange Act) will now be exposed to a much greater threat of abusive litigation and will have to grapple with whether any corrective disclosures will be read as admissions of negligence that subject them to backward-looking liability—likely restricting the flow of information into the market. That is precisely the opposite of what Section 14(e) was intended to accomplish.

Moreover, because it is far easier to plead facts that support an inference of negligence than to plead facts that support an inference of scienter, the decision below will substantially weaken the protections that Congress enacted against abusive strike suits in the PSLRA. "Today, the public announcement of virtually every transaction involving the acquisition of a public corporation [already] provokes a flurry of class action lawsuits . . . ." *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 891 (Del. Ch. 2016). The vast majority of such suits are dismissed—between 2009 and 2016, 78 percent of securities suits based on M&A transactions were dismissed, a rate significantly higher than for other types of federal securities suits. *See* Cornerstone Research, *supra*, at 14. By allowing such suits to continue based merely on a plausible allegation of negligence in communications around the transaction, however, the Ninth Circuit has all but assured that many of those suits will continue past the pleading stage and into tremendously expensive and time-consuming discovery. And because of the enormous risks presented by class claims, the reality is that defendants will often have little choice but to settle such claims, regardless of their ultimate merit.

This Court has often granted certiorari to clarify the pleading standards for bringing federal securities claims and vindicate Congress's goal of reducing frivolous securities litigation. *See, e.g., Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308 (2007). And this Court has granted certiorari to review, and correct, decisions expanding the scope of liability under inferred private rights of action for violations of the federal securities laws. *See, e.g., Central Bank of*

Denver, 511 U.S. 164; *Ernst & Ernst,* 425 U.S. 185. This case presents the equally important question of the substantive standard for pleading and proving a claim under Section 14(e). Moreover, it provides an opportunity for this Court to underscore the restraint that is warranted when federal courts are asked to infer, or opine on the scope of, a private damages action under the federal securities laws.

The Ninth Circuit's discovery, for the first time in the statute's 50-year existence, of an inferred private right of action under Section 14(e) for damages and other relief based on a showing of mere negligence, cries out for this Court's review. And this case, in which the Ninth Circuit reversed the grant of judgment for petitioners under the previously settled scienter rule, is an ideal vehicle for such review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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October 11, 2018

APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Gary VARJABEDIAN, Plaintiff-Appellant,

v.

EMULEX CORPORATION; Bruce C. Edwards; Jeffrey W. Benck; Gregory S. Clark; Gary J. Daichendt; Paul F. Folino; Beatriz V. Infante; John A. Kelley; Rahul N. Merchant; Nersi Nazari; Dean A. Yoost; Avago Technologies Wireless (USA) Manufacturing, Inc.; Emerald Merger Sub, Inc., Defendants-Appellees.

No. 16-55088

Argued and Submitted October 5, 2017, Pasadena, California

Filed April 20, 2018

888 F.3d 399

OPINION

MURGUIA, Circuit Judge:

Plaintiff-Appellant Jerry Mutza[1] ("Plaintiff") appeals the district court's dismissal of his putative

[1] Although Gary Varjabedian filed the initial complaint and the notice of appeal, the district court appointed Jerry Mutza as Lead Plaintiff in this case. Indeed, both Plaintiff-Appellant's opening brief and the answering brief identify Jerry Mutza as the court-appointed Lead Plaintiff in this action. The case caption, however, reflects Varjabedian as Plaintiff. There is no material difference between Mutza and Varjabedian for purposes of this appeal, as they both represent the same class of Emulex shareholders and are represented by the same counsel.

securities class action complaint, brought on behalf of former Emulex Corporation shareholders. The district court dismissed Plaintiff's complaint because he failed to plead a strong inference of scienter for Defendants' alleged violations of Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) ("Exchange Act"). In so concluding, the district court followed out-of-circuit authorities holding that Section 14(e) claims require proof of scienter. The district court noted, however, that the Ninth Circuit had yet to decide whether Section 14(e) claims require plaintiffs to plead that defendants acted with scienter. We now hold that Section 14(e) of the Exchange Act requires a showing of negligence, not scienter. Accordingly, we reverse the dismissal of the complaint and remand the case to the district court for it to reconsider Defendants' motion to dismiss under a negligence standard.

Moreover, because Plaintiff's Section 14(e) claim survives, his claim under Section 20(a) of the Exchange Act also remains. Further, for the reasons detailed below, we affirm the district court's (1) conclusion that Section 14(d)(4) of the Exchange Act does not create a private right of action and (2) dismissal of the complaint as to Emerald Merger Sub, Inc. because it is not a proper defendant.

I. BACKGROUND

This case centers on the merger between Emulex Corp. ("Emulex") and Avago Technologies Wireless Manufacturing, Inc. ("Avago"). Emulex was a Delaware-incorporated technology company that sold storage adapters, network interface cards, and other products. On February 25, 2015, Emulex and Avago issued a joint press release announcing that they had entered into a merger agreement, with Avago offering to pay $8.00 for every share of outstanding Emulex stock. The $8.00 price reflected a premium of 26.4% on Emulex's stock price the day before the merger was announced.

Pursuant to the terms of the announced merger agreement, a subsidiary of Avago, Emerald Merger Sub, Inc. ("Merger Sub"), initiated a tender offer for Emulex's outstanding stock on April 7, 2015. A tender offer is a technique whereby the offeror, Avago, seeks to obtain control of a target corporation, here Emulex, by publicly offering to purchase a specified amount of the target company's stock. *See* Arthur Fleisher, Jr. & Robert H. Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 317 (1967). The offeror requests the stockholders of the target corporation "tender" their shares, at a fixed price, customarily in excess of the current market value, in order to gain control of the target company. *Id.*; *see also Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 22, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977). When a tender offer is made, the target company often issues a statement to its shareholders recommending that they either accept or reject the tender offer. Emulex decided to issue such a statement but, before doing so, hired Goldman Sachs to determine whether the proposed merger agreement would be fair to shareholders. Goldman Sachs determined that the agreement would be fair to shareholders and provided Emulex with financial analyses supporting Goldman Sachs's position. Based in part on Goldman Sachs's opinion, Emulex filed a 48-page Recommendation Statement with the Securities and Exchange Commission ("SEC") pursuant to 17 C.F.R. § 240.14d-101 Schedule 14D-9.

The Recommendation Statement supported the tender offer and recommended that shareholders tender their shares. It listed nine reasons for the recommendation: (1) the value shareholders would receive in the merger "was greater than could be reasonably expected" in the future if they continued to hold Emulex stock; (2) other available alternatives and transactions were less favorable; (3) Emulex shareholders would receive a premium on their stock; (4) Goldman Sachs found that the merger was fair; (5) the cash consideration shareholders would receive was certain; (6) the agreement provided that Emulex could back out if it received a better offer before closing; (7) the agreement permitted Emulex to modify its recommendation; (8) a termination fee built into the merger agreement would not preclude subsequent third-party offers for Emulex; and (9) closing conditions were appropriate.

The Recommendation Statement in support of the tender offer also included a summary of Goldman Sachs's fairness opinion. The summary describes in some detail the processes Goldman Sachs followed when rendering its opinion. The Recommendation Statement also highlights four particular financial analyses—the Historical Stock Trading Analysis, the Selected Companies Analysis, the Illustrative Present Value of Future Share Price Analysis, and the Illustrative Discounted Cash Flow Analysis—that supported Goldman Sachs's fairness opinion. These analyses looked at different metrics of Emulex's past, present, and expected financial performance to help Goldman Sachs develop its fairness opinion.

Goldman Sachs also produced a one-page chart titled "Selected Semiconductor Transactions," alternatively referred to as the "Premium Analysis."

The Premium Analysis selected certain transactions in the industry that Goldman Sachs deemed most similar to the proposed merger between Avago and Emulex, and reviewed the respective premiums stockholders received in those transactions. Altogether, the Premium Analysis collected seventeen transactions involving a semiconductor company between 2010 and 2014. Emulex's 26.4% premium fell within the normal range of semiconductor merger premiums listed in the Premium Analysis, but it was below average. Goldman Sachs opined that the merger was fair despite a below-average premium, and Emulex elected not to summarize the one-page Premium Analysis in the Recommendation Statement. Enough Emulex shareholders ultimately accepted the tender offer to consummate the merger. On May 5, 2015, Merger Sub merged into Emulex, with Emulex surviving as a wholly-owned subsidiary of Avago.

Not all the shareholders, however, were happy with the merger's terms. Some believed the $8.00-per-share price offered was inadequate given Emulex's significant growth leading up to the tender offer and the company's prospects for future growth. This class of shareholders, who claimed they were misled by Emulex, Avago, Merger Sub, and the Emulex Board of Directors (collectively, "Defendants") into believing that the merger was better than it actually was, brought a lawsuit against Defendants. The district court eventually named Mutza Lead Plaintiff. Plaintiff alleges that Defendants violated federal securities laws, specifically Section 14(e) of the Exchange Act, by failing to summarize the Premium Analysis in the Recommendation Statement, which would have disclosed that the 26.4% premium was below average compared to similar mergers. Plaintiff also sought to hold the directors of Emulex vicariously liable as "controlling persons" under Section 20(a) of the Exchange Act.

The district court dismissed the complaint with prejudice. In deciding to do so, the district court concluded that Section 14(e) requires a showing of scienter and that Plaintiff failed to plead scienter. Next, the district court rejected Plaintiff's separate claim under Section 14(d), concluding that Section 14(d)(4) does not establish a private right of action for shareholders confronted with a tender offer. Finally, the court dismissed the Section 20(a) claim because Plaintiff did not adequately plead a claim under Section 14(d) or (e).[2] Plaintiff timely appeals.

II. STANDARD OF REVIEW

We review *de novo* a district court's decision to grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We also review *de novo* questions of statutory interpretation. *Millard v. United Student Aid Funds, Inc.*, 66 F.3d 252, 253 (9th Cir. 1995). Because Plaintiff argues that Section 14(e) of the Exchange Act requires Plaintiff to show Defendants were negligent by not including the Premium Analysis in the Recommendation

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[2] Claims under Section 20(a) necessarily rise and fall with the other securities claims. To prevail on a Section 20(a) claim, "a plaintiff must first prove a primary violation of underlying federal securities laws, such as Section [14(e)], and then show that the defendant exercised actual power over the primary violator." *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1052 (9th Cir. 2014).

Statement—not that Defendants intentionally excluded the Premium Analysis to mislead shareholders—this case requires us to interpret Section 14(e).

III. DISCUSSION

A. Section 14(e) Claim

1. Federal Securities Law Background

The Exchange Act of 1934, codified at 15 U.S.C. §§ 78a–78qq, is one of two major federal securities statutes Congress enacted in the wake of the Great Depression. The other statute is the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa. The Exchange Act and the Securities Act of 1933 differ in purpose and scope. "The general purpose of the Securities Act [of 1933] is to regulate the initial distribution of securities by issuers to public investors. . . . The Exchange Act [of 1934] provides for the regulation of the securities exchange markets and the operations of the corporations listed on the various national securities exchanges." Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 Ohio St. L.J. 329, 330 (1988). In other words, the Securities Act of 1933 governs initial public offerings ("IPOs") while the Exchange Act, at issue here, regulates all subsequent securities transactions (*e.g.*, sales on the open market, proxy solicitations, tender offers).

Section 14(e) was not part of the original Exchange Act enacted in 1934. Rather, Congress added Section 14(e) as an amendment to the Securities Exchange Act as part of the Williams Act. *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8, 105 S.Ct. 2458, 86

L.Ed.2d 1 (1985). The purpose of Section 14(e) is to regulate the conduct of a broad range of people who could influence the outcome of a tender offer. *Piper*, 430 U.S. at 24, 97 S.Ct. 926. To that end, Section 14(e) "was expressly directed at the conduct of a broad range of persons, including those engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer." *Id.*

2. Whether Section 14(e) requires Plaintiff to show Defendants knew their actions were wrong or only that they were negligent

The main question here is whether Section 14(e) requires proof of scienter, as the district court held, or mere negligence. "Statutory interpretation begins with the plain language of the statute." *United States v. Johnson*, 680 F.3d 1140, 1144 (9th Cir. 2012) (internal quotation marks omitted). A plain reading of Section 14(e) readily divides the section into two clauses, each proscribing different conduct:

> It shall be unlawful for any person [1] to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, *or* [2] to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . .

15 U.S.C. § 78n(e) (emphasis added). The use of the word "or" separating the two clauses in Section 14(e) shows that there are two different offenses that the statute proscribes; to construe the statute otherwise would render it "hopelessly redundant" and would

mean "one or the other phrase is surplusage." *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976).

In concluding that claims under Section 14(e) require allegations of scienter, the district court stated: "Considering the wealth of persuasive case law to the contrary, the Court concludes that the better view is that the similarities between Rule 10b-5 and § 14(e) require a plaintiff bringing a cause of action under § 14(e) to allege scienter."[3] The district court relied on decisions from five other circuits holding that Section 14(e) claims require alleging scienter. *See, e.g.*, *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004); *SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004); *Conn. Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 961 (2d Cir. 1987); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980). However, we are persuaded that the rationale underpinning those decisions does not apply to Section 14(e) of the Exchange Act. At their core, the decisions from these five circuits rest on the shared text found in both Rule 10b-5 and Section 14(e). Yet important distinctions exist between Rule 10b-5 and Section 14(e)—distinctions that strongly militate against importing the scienter requirement from the context of Rule 10b-5 to Section 14(e).

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[3] Rule 10b-5 is an SEC regulation promulgated under Section 10(b) of the Exchange Act. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989–990 (9th Cir. 2009). The rule provides that "'[i]t shall be unlawful for any person . . . [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.'" *Id.* (citing 17 C.F.R. § 240.10b-5(c)).

The first of the other circuits' decisions came in 1973, a few years after Section 14(e) was enacted, when the Second Circuit held that Section 14(e) requires a showing of scienter: "[W]e shall follow the principles developed under Rule 10b-5 regarding the elements of [Section 14(e)] violations." *Chris-Craft Indus. Inc., v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir. 1973).

One year after *Chris-Craft*, the Fifth Circuit followed suit and held, "[w]e are in accord with the Second Circuit that the same elements must be proved to establish a violation of either [Section 14(e)] or [Rule 10b-5]." *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 605 (5th Cir. 1974) (citing *Chris-Craft*, 480 F.2d at 362). Those two circuits arrived at the conclusion that Rule 10b-5 required a showing of scienter.

Then, in 1976, the Supreme Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976), held that claims under Section 10(b) of the Exchange Act and Rule 10b-5 must allege scienter. Importantly, as it relates to this case, the Supreme Court's reasoning in reaching that decision casts doubt on the rationale of *Chris-Craft* and *Smallwood.* The Court in *Ernst & Ernst* began with the text of Rule 10b-5(b), which states: "It shall be unlawful . . . [t]o make any untrue statement of a material fact or omit to state any material fact . . . ." *Ernst & Ernst*, 425 U.S. at 195–96, 96 S.Ct.1375. Addressing that phrase, the Court noted, "[v]iewed in isolation the language of [Rule 10b-5(b)] . . . could be read as proscribing, respectively, *any type* of material misstatement or omission . . . *whether the wrongdoing was intentional or not*." *Ernst & Ernst*, 425 U.S. at 212, 96 S.Ct. 1375 (emphases added). In other words, the Court acknowledged that the wording of Rule 10b-5(b) could reasonably be read as imposing a scienter *or a negligence* standard. This means that Rule 10b-5(b)'s text, and by extension the identical phrasing in the first clause of Section 14(e), did not necessarily compel finding a scienter requirement. *Compare* 17 C.F.R. § 240.10b-5(b), *with* 15 U.S.C. § 78n(e).

The Court in *Ernst & Ernst* nevertheless went on to conclude that Rule 10b-5(b) requires a showing of scienter because of the relationship between Rule 10b-5 and its authorizing legislation, Section 10(b) of the Exchange Act. Significantly, the Court's conclusion that scienter is an element of Rule 10b-5(b) had nothing to do with the text of Rule 10b-5. As the Court explained:

> Rule 10b-5 was adopted pursuant to authority grand [*sic*] the [SEC] under § 10(b) . . . . [The scope of Rule 10b-5] cannot exceed the power granted the [SEC] by Congress under § 10(b). . . . *[W]e think the [SEC's] original interpretation of Rule 10b-5 was compelled by the language and history of § 10(b)* . . . . When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct.

Ernst & Ernst, 425 U.S. at 212–14, 96 S.Ct. 1375 (emphasis added). Put simply, Rule 10b-5 requires a showing of scienter because it is a regulation promulgated under Section 10(b) of the Exchange Act, which allows the SEC to regulate *only* "manipulative or deceptive device[s]." 15 U.S.C. § 78j(b). This rationale regarding Rule 10b-5 does not apply to Section 14(e), which is a statute, not an SEC Rule.

Later in 1980, the Supreme Court provided useful guidance for interpreting the first clause of Section 14(e) of the Exchange Act in *Aaron v. SEC*, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). The securities provision at issue in *Aaron*—Section 17(a)(2) of the Securities Act of 1933—and the first clause of Section 14(e), contain nearly identical wording. Both sections prohibit "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made . . . not misleading."[4] *Compare* 15 U.S.C. § 77q(a)(2), *with* 15 U.S.C. § 78n(e). Importantly, the Court in *Aaron* held that Section 17(a)(2) does *not* require a showing of scienter. *Aaron*, 446 U.S. at 696–97, 100 S.Ct. 1945.

Although Section 17(a)(2) appears in the Securities Act of 1933, while Section 14(e) appears in the Exchange Act, "statutes dealing with similar subjects should be interpreted harmoniously." *Jonah R. v. Carmona*, 446 F.3d 1000, 1007 (9th Cir. 2006) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701,

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[4] Section 17(a)(2) contains additional language that is missing from the first clause of Section 14(e). Specifically, the phrase "to obtain money or property by means of," appears in Section 17(a)(2) but not in Section 14(e). This phrase did not factor into the Supreme Court's analysis, and there is no meaningful discussion of the significance of these words in *Aaron*. Instead, the words that were outcome determinative are the same words appearing in both provisions: "by means of any untrue statement of a material fact or any omission to state a material fact." *Aaron*, 446 U.S at 696, 100 S.Ct. 1945.

738–39, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (Scalia, J., concurring)). Beyond their nearly identical text, Section 14(e) and Section 17(a) serve similar purposes. Both provisions govern disclosures and statements made in connection with an offer of securities, albeit in different contexts: Section 17(a) applies to initial public offerings while Section 14(e) applies to tender offers. *Chris-Craft*, 480 F.2d at 359 ("The Williams Act of 1968, of which § 14(e) is a part, was enacted to . . . require tender offer disclosures *similar to those required for issuance of new securities*." (emphasis added)).

Accordingly, both *Ernst & Ernst* and *Aaron* cast doubt on the underlying rationale of *Chris-Craft* and *Smallwood*. *Ernst & Ernst* provides that the scienter requirement is rooted not in the text of Rule 10b-5, but rather in the relationship between Rule 10b-5 and its authorizing legislation. *Ernst & Ernst*, 425 U.S. at 212–14, 96 S.Ct.1375. *Aaron* took a further step by holding that the plain language of Section 17(a)(2), which is largely identical to the first clause of Section 14(e), requires a showing of negligence, not scienter. *Aaron*, 446 U.S. at 696–97, 100 S.Ct. 1945. In so doing, *Aaron* rejected the Second Circuit's rationale for holding that a negligence standard does not apply to claims under Section 17(a).[5]

Despite the Supreme Court's decisions in *Ernst & Ernst* and *Aaron*, circuit courts have continued to

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[5] In *Chris-Craft*, the Second Circuit rejected the argument that Section 17(a) imposes a mere negligence standard. 480 F.2d at 363 ("We have indicated, however, that mere negligent conduct is not sufficient to permit plaintiffs to recover damages in a private action under § 17(a) or § 10(b)." (internal quotation marks omitted)).

adopt the reasoning in *Chris-Craft* and *Smallwood*. For instance, in 1987, the Second Circuit cited *Chris-Craft*, holding that "[i]t is well settled in this Circuit that scienter is a necessary element of a claim for damages under § 14(e) of the Williams Act." *Conn. Nat'l Bank*, 808 F.2d at 961. Likewise, as recently as 2009, the Fifth Circuit cited *Smallwood* for the proposition that "[t]he elements of a claim under Section 14(e), which applies to tender offers, are identical to the Section 10(b)/Rule 10b-5 elements." *Flaherty*, 565 F.3d at 207. Similarly, in 2004, the Third Circuit cited *Smallwood* and held, "[w]e therefore join those circuits that hold that scienter is an element of a Section 14(e) claim." *Digital Island*, 357 F.3d at 328.

The two other circuits to reach this conclusion also do not account for the distinction between Rule 10b-5 and Section 14(e). The Sixth Circuit, for instance, concluded that Section 14(e) requires scienter because "Congress used the words 'fraudulent,' 'deceptive,' and 'manipulative.'" *Adams*, 623 F.2d at 431. The Sixth Circuit does not appear to have considered that the *first* clause of Section 14(e) does not contain any of those words. In fact, the *Adams* decision predated the *Aaron* decision by a month, so the Sixth Circuit did not have the benefit of the Supreme Court's decision in *Aaron* holding that the language of Section 17(a)(2), and by extension the language of the first clause of Section 14(e), requires only a showing of negligence.

Lastly, the Eleventh Circuit appears to have concluded, for the first time in 2004, that Section 14(e) requires scienter, but it seems to have relied on the common wording in Rule 10b-5 and Section 14(e). *See Ginsburg*, 362 F.3d at 1297–98. Although the court cited to *SEC v. Adler*, 137 F.3d 1325, 1340 (11th Cir. 1998), to support the proposition that Section 14(e) claims require a showing of scienter, *Adler* does not analyze or discuss Section 14(e). Accordingly, it seems that *Ginsburg* too relied on the common wording of Rule 10b-5 and Section 14(e) for its holding that Section 14(e) claims require scienter. With the benefit of *Ernst & Ernst* and *Aaron*, the most compelling argument is that the first clause of Section 14(e) requires a showing of negligence, not scienter.

Moreover, Section 14(e) differs fundamentally from Section 10(b) because, under Section 14(e), the SEC is authorized to regulate a broader array of conduct than under Section 10(b). "[U]nder § 14(e), the [SEC] may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is 'reasonably designed to prevent . . . acts and practices [that] are fraudulent.'" *United States v. O'Hagan*, 521 U.S. 642, 673, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (alterations in original) (quoting 15 U.S.C. § 78n(e)). "This authority derives from the prophylactic rule-making power granted to the SEC by Section 14(e), *a power that has no parallel in Section 10(b)*." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1005 (9th Cir. 2002) (emphasis added). If the SEC can prohibit "acts themselves not fraudulent" under Section 14(e), then it would be somewhat inconsistent to conclude that Section 14(e) itself reaches only fraudulent conduct requiring scienter.

The conclusion that Section 14(e) requires a showing of negligence, as opposed to scienter, also finds some support in the legislative history and purpose of the Williams Act. The Senate Report that accompanied Section 14(e) states: "This provision would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal." S. Rep. No. 510, 90th Cong., 2d Sess. (1968). Moreover, the Supreme Court has noted, "[t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975). The legislative history suggests that the Williams Act places more emphasis on the quality of information shareholders receive in a tender offer than on the state of mind harbored by those issuing a tender offer. Such a purpose supports a negligence standard.

Ultimately, because the text of the first clause of Section 14(e) is devoid of any suggestion that scienter is required, we conclude that the first clause of Section 14(e) requires a showing of only negligence, not scienter.

B. Omission of a material fact

The district court did not reach the question whether omitting the Premium Analysis—a one-page chart containing seventeen transactions involving semiconductor companies—from the Recommendation Statement constitutes omission of a material fact in the context of the entire transaction, and we will not reach the question. Although it is difficult to show that this omitted information was indeed material, we remand for the district court to consider the question in the first instance. *See Zucco Partners*, 552 F.3d at 991 ("[T]he plaintiff must plead a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." (internal quotation marks omitted)).

C. Section 14(d)(4) claim

The parties contest whether Section 14(d)(4) of the Exchange Act provides an implied right of action. The statute provides that "[a]ny solicitation or recommendation to the holders of . . . a security to accept or reject a tender offer . . . shall be made in accordance with [SEC] rules and regulations." 15 U.S.C. § 78n(d)(4). One such regulation, Rule 14d-9, states that a recommendation statement must include "information required by Items 1 through 8 of Schedule 14D-9 or a fair and adequate summary thereof." 17 C.F.R. § 240.14d-9(d). In addition, Item 8 on Schedule 14D-9 requires a company's directors to furnish "information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading." 17 C.F.R. § 240.14d-101; 17 C.F.R. § 229.1011(c). Simply put, Section 14(d)(4) imposes an obligation on a company's directors to provide material information if such information is necessary to ensure that other required disclosures are not materially misleading.

The test for determining whether a federal statute creates an implied right of action was set forth in *Cort v. Ash* and entails four questions:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted—that

> is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law . . . ?

422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) (citations and internal quotation marks omitted). The fourth factor—the relationship with state law—is not relevant here. After analyzing this claim under the *Cort* factors, the district court concluded that Section 14(d)(4) does not create a private right of action and dismissed this claim.

After reviewing the factors outlined in *Cort*, we agree with the district court. The first factor weighs against finding an implied right of action because the statute's focus is on the person regulated, those who issue "[a]ny solicitation or recommendation to . . . accept or reject a tender offer." 15 U.S.C. § 78n(d)(4); *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." (internal quotation marks omitted)).

Next, considering the second factor, there is no indication of any legislative intent to provide for a private right of action. Section 14(d)(4) is a generic statute simply requiring that recommendation statements abide by the SEC's rules.

> Finally, turning to the third factor, it would be inconsistent with the legislative scheme of the Williams Act to imply a remedy under Section 14(d)(4). It is undisputed that Section 14(e) provides for a private right of action to challenge alleged misrepresentations or omissions in connection with a tender offer. The question, then, is whether Congress intended to imply a private right of action under Section 14(d)(4) as an alternative to Section 14(e). However, holding that Section 14(d)(4) provides an implied right of action would be redundant and potentially cause tension with Section 14(e).

Accordingly, we affirm the district court's conclusion that Section 14(d)(4) does not create an implied right of action.

D. Section 20(a) claim

As stated above, claims under Section 20(a) of the Exchange Act necessarily depend on Plaintiff's Section 14(d)(4) and (e) claims. *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1052 (9th Cir. 2014). Because Plaintiff's Section 14(d)(4) claim fails, but Plaintiff's Section 14(e) claim remains, the Section 20(a) claim also survives for the district court to consider on remand.

E. Merger Sub Defendant

Finally, we affirm the district court's dismissal of Merger Sub as a Defendant in this case. The Federal Rules of Civil Procedure are clear that a corporation's capacity to be sued is determined "by the law under which it was organized." Fed. R. Civ. P. 17(b)(2). As a Delaware corporation, Merger Sub Corporation ceased to exist after the merger was consummated, and its rights and liabilities now belong to the surviving corporation, Emulex. *See* 8 Del. C. § 259.

IV. CONCLUSION

We are aware that our holding today parts ways from our colleagues in five other circuits. However, for the reasons discussed above, we are persuaded that intervening guidance from the Supreme Court compels the conclusion that Section 14(e) of the Exchange Act imposes a negligence standard. Accordingly, we **REVERSE** the district court's decision as to the Section 14(e) claim because the district court employed a scienter standard in analyzing the Section 14(e) claim. We also **REMAND** for the district court to reconsider Defendant's motion to dismiss under a negligence standard. On remand, the district court shall also consider whether the Premium Analysis was material, an argument that Defendants raised but that the district court did not reach. In addition, the district court shall consider Plaintiff's Section 20(a) claim since the Section 14(e) claim survives. We also **AFFIRM** the district court's conclusion that Section 14(d)(4) does not create an implied right of action. Finally, we **AFFIRM** the district court's dismissal of Merger Sub because it is not a proper Defendant.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**. The parties shall bear their own costs on appeal.

CHRISTEN, Circuit Judge, concurring:

I fully concur in today's decision and write separately only to explain why Supreme Court case law persuades me to depart from the interpretations of § 14(e) announced by several other circuits. By my read, in considering what degree of culpability § 14(e) requires, these courts have not addressed the ramifications of the Supreme Court's holdings in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), and *Aaron v. Securities & Exchange Commission*, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). I conclude that the decision we reach today is a faithful application of these Supreme Court cases.

The Second Circuit was among the first to consider the showing required to establish a § 14(e) violation. In *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973), the court observed that the language of § 14(e) is virtually identical to that of Rule 10b-5.[1] *Id.* at 362. The court reasoned that § 14(e) must therefore require scienter, the same degree of culpability required by Rule 10b-5, citing its earlier decision in *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968). In that case, the Second Circuit reviewed other sections of the Securities Exchange Act of 1934, but not Rule 10b-5's enabling statute. *Id.* at 854–55. A year later, the Fifth Circuit agreed with the Second Circuit's *Chris-Craft* decision, that "the same elements must be proved to establish a violation of either Section [14(e)] or . . . Rule [10b-5]." *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 605

[1] Both § 14(e) and Rule 10b-5 prohibit "mak[ing] any untrue statement of a material fact [or omitting to state a material fact] necessary in order to make the statements . . ., in the light of the circumstances under which they [were] made, not misleading." Both § 14(e) and Rule 10b-5 also prohibit fraudulent or intentionally deceptive acts. *See* 15 U.S.C. § 78n(e); 17 C.F.R. § 240.10b-5(a).

(5th Cir. 1974) (citing *Chris-Craft Indust., Inc.*, 480 F.2d at 362).

In 1976, the Supreme Court also agreed that Rule 10b-5 requires a showing of scienter, but it reached this conclusion for a different reason. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). *Ernst & Ernst* observed that Rule 10b-5's authorizing statute, § 10(b), prohibited "any *manipulative or deceptive device or contrivance* in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe." 425 U.S. at 187–88, 96 S.Ct. 1375 (emphasis added). Because this statutory language "strongly suggest[s]" that Congress intended § 10(b) to prohibit only knowing or intentional misconduct, *id.* at 197, 96 S.Ct. 1375, the Court concluded that the scope of Rule 10b-5 cannot exceed the threshold Congress established when it adopted § 10(b). *Id.* at 214, 96 S.Ct. 1375. Importantly, *Ernst & Ernst* expressly recognized that the language of Rule 10b-5, in isolation, "could be read as proscribing . . . any type of material misstatement or omission . . . that has the effect of defrauding investors, *whether the wrongdoing was intentional or not*." *Id.* at 212, 96 S.Ct. 1375 (emphasis added). Nevertheless, the Court determined that the specific language of the authorizing statute necessarily cabins the sweep of the rule, so that a showing of scienter is required to establish a violation of Rule 10b-5. *Id.* at 212–14, 96 S.Ct. 1375.

In 1980 the Supreme Court explained that Congress sometimes required different levels of culpability within a single securities statute. *Aaron v. Securities & Exchange Commission* addressed the level of culpability required by § 17(a) of the

Securities Act of 1933, a statutory provision containing language nearly identical to the statute at issue in this case, § 14(e). 446 U.S. 680, 682, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). *Aaron* examined the text of § 17(a) and noted that only § 17(a)(1) includes the terms "device," "scheme," and "artifice":

> It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
>
> > (1) to employ any device, scheme, or artifice to defraud, or
> >
> > (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements . . ., in light of the circumstances under which they were made, not misleading . . . .

15 U.S.C. § 77q(a)(1)–(2) (emphasis added). Citing *Ernst & Ernst*, the *Aaron* Court explained that "device," "scheme," and "artifice" "all connote knowing or intentional practices," in sharp contrast to the language of § 17(a)(2), "which prohibits any person from obtaining money or property 'by means of any untrue statement [or omission] of a material fact.'" *Aaron*, 446 U.S. at 696, 100 S.Ct. 1945. Because § 17(a)(2) is "devoid of any suggestion whatsoever of a scienter requirement," *id.*, the Court held that § 17(a)(1) requires scienter, and that § 17(a)(2) does not. *Id.* at 697, 100 S.Ct. 1945.

Ernst & Ernst and *Aaron* are both critical to the decision we issue today. *Ernst & Ernst* explains that where Congress prohibited "fraudulent" or "deceptive" practices—as in the second clause of § 14(e)—a heightened showing of culpability is required. Where Congress used language banning untrue statements of material fact (or the omission of a material fact necessary to make a statement not misleading), a lesser showing of culpability will suffice. With the holding of *Ernst & Ernst* in mind, the words Congress used in § 14(e) are illuminating:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, *or to engage in any fraudulent, deceptive, or manipulative acts or practices*, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. § 78n(e) (emphasis added). Only the second clause of § 14(e) contemplates a scienter requirement; Congress did not use the words signaling a heightened standard of culpability in the first clause of the statute.[2]

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[2] This reading of § 14(e) is consistent with the Supreme Court's separate instruction that the scope of conduct that may be regulated under § 14(e) is broader than that under § 10(b). *See United States v. O'Hagan*, 521 U.S. 642, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (holding that under § 14(e), the SEC may prohibit "acts not themselves fraudulent under the common law or § 10(b), if the prohibition is reasonably designed to prevent acts and practices that are fraudulent" (internal quotation marks and alteration omitted)). Our court, too, has recognized

Aaron is important to today's decision because it reminds us that when Congress uses a disjunctive, a single statutory provision can call for more than one level of scienter. The similarities between the statute discussed in *Aaron*, § 17(a), and the statute at issue here, § 14(e), are striking: both statutes include distinct clauses separated by a disjunctive "or," with one clause containing terms that plainly proscribe more culpable conduct by using terms like "fraudulent," "deceptive," "device," or "artifice." And both statutes have a separate clause more expansively prohibiting "untrue statement[s] of a material fact." *See* 15 U.S.C. §§ 77q(a), 78n(3). Because *Aaron* held that § 17(a)'s two clauses require different degrees of culpability, it strongly suggests the same is true of the two very different clauses in § 14(e).

Some circuits continue to rule that § 14(e) requires scienter in the wake of *Ernst & Ernst* and *Aaron*, but in doing so they have maintained their reliance on pre-*Ernst & Ernst* and pre-*Aaron* circuit case law. *See Conn. Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 961 (2d Cir. 1987) (citing *Chris-Craft* for the proposition that "[i]t is well settled in this Circuit that scienter is a necessary element of a claim for damages under § 14(e) of the Williams Act"); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004) (citing *Connecticut National Bank* and *Smallwood* to hold "[w]e . . . join those circuits that hold that scienter is an element of a Section 14(e) claim"); *Flaherty &*

that § 14(e) authorizes the SEC to promulgate rules "that prohibit acts not themselves fraudulent," which is "a power that has no parallel in Section 10(b)." *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1005 (9th Cir. 2002).

Crumrine Preferred Income Fund, Inc. v. TXU Corp., 565 F.3d 200, 207 (5th Cir. 2009) (citing *Smallwood* for the proposition that "[t]he elements of a claim under Section 14(e), which applies to tender offers, are identical to the Section 10(b)/Rule 10b-5 elements").

We cannot be sure how other circuits would rule were they to revisit § 14(e) in light of *Ernst & Ernst* and *Aaron*, but I question the continuing viability of the foundation for *Chris-Craft* and the cases that followed it.[3] I am persuaded that the decision we issue today is most consistent with the Supreme Court's decisions in *Ernst & Ernst* and *Aaron*.

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[3] *Chris-Craft* held that § 14(e) requires scienter because the identical language in Rule 10b-5 requires scienter. *Chris-Craft Indust., Inc.*, 480 F.2d at 362. But the earlier case that *Chris-Craft* cited for the proposition that Rule 10b-5 requires more than negligence concluded that Rule 10b-5 regulates "a standard of conduct that encompasses *negligence* as well as active fraud." *Sec. and Exchange Comm'n v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 855 (2d Cir. 1968) (emphasis added).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Gary VARJABEDIAN, on behalf of himself and all others similarly situated, Plaintiff,

v.

EMULEX CORPORATION, et al., Defendants.

Case No.: SACV 15-00554-CJC(JCGx)

Signed 01/13/2016

152 F. Supp. 3d 1226

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

I. INTRODUCTION

This is a putative securities class action brought by Plaintiff Gary Varjabedian against Defendants Emulex Corporation ("Emulex"), Emerald Merger Sub, Inc. ("Merger Sub"), Avago Technologies Wireless (U.S.A.) Manufacturing, Inc. ("Avago"), and ten members of Emulex's Board and management (the "Individual Defendants") (collectively, "Defendants").[1] Avago acquired Emulex in 2015 after the two companies reached a merger agreement and Merger Sub initiated a tender offer for Emulex's outstanding stock. Emulex solicited a fairness

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[1] Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Bruce C. Edwards, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari, and Dean A. Yoost.

opinion from its financial advisor, Goldman Sachs, who performed financial analyses and determined that the proposed merger, which produced a 26.4% premium over Emulex's stock price at the time, was fair to shareholders. Emulex subsequently issued a statement that summarized Goldman Sachs' findings and recommended that investors tender their shares. Emulex's statement did not mention a one-page chart Goldman Sachs had created which indicated that although Emulex's premium was within industry norms, it was also below-average. Plaintiff argues that by omitting the one-page chart from its summary of Goldman Sachs' fairness opinion, Emulex misled shareholders into believing the merger was a better deal than it actually was, in violation of federal securities laws. He brings claims under §§ 14 and 20 of the Exchange Act.

Defendants have moved to dismiss. They argue that Emulex's statements to its shareholders regarding whether they should tender their shares were not misleading, and that in any event, Plaintiff has failed to plead the required "strong inference of scienter," or that Defendants acted with "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 n.12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). Plaintiff responds that such an inference exists because the Recommendation Statement contradicts the Premium Analysis and because Defendants' omission of the Premium Analysis demonstrates their intent to mislead shareholders. The Court disagrees. Nothing in the Recommendation Statement contradicts the information in the Premium Analysis, and Defendants' decision to omit the Premium Analysis was not "highly unreasonable" or an "extreme departure from the standards of ordinary care" such that the Court could infer scienter from the omission alone. *Zucco Partners, LLC v. Digimarc Corp.,* 552 F.3d 981, 991 (9th Cir.2009). Accordingly, Plaintiff has failed to properly plead a strong inference of scienter, and Defendants' motion is GRANTED.

II. BACKGROUND

Emulex was a Delaware corporation with its headquarters in Costa Mesa, California, that provided converged networking solutions centers and sold storage adapters, network interface cards, and other products. (Dkt. 29 ["First Amended Complaint" ("FAC")] ¶ 14.) On February 25, 2015, Emulex and Avago, another technology company, issued a joint press release announcing that they had entered into a merger agreement, with Avago offering to pay $8.00 for every share of outstanding Emulex stock. (*Id.* ¶¶ 52–53.) The $8.00 price was a premium of 26.4% on Emulex's stock price the day before the merger was announced. (*Id.* ¶ 7.) Pursuant to the terms of the announced agreement, a subsidiary of Avago, Merger Sub, initiated a tender offer for Emulex's outstanding stock on April 7, 2015. (*Id.* ¶¶ 4– 5.) The tender offer expired on May 5, 2015, and Merger Sub merged into Emulex, with Emulex surviving as a wholly owned subsidiary of Avago. (*Id.* ¶ 4.)

Prior to the consummation of the merger, Emulex retained its financial advisor, Goldman Sachs, to determine whether the proposed merger agreement would be fair to shareholders from a financial point of view. Goldman Sachs determined that it would be, and provided Emulex with a number of financial analyses justifying its position. Based in part on

Goldman Sachs' opinion, on April 7, 2015, the day that Merger Sub initiated the tender offer, Emulex filed a 48–page Recommendation Statement with the Securities and Exchange Commission ("SEC") on Schedule 14D–9. (*See* Dkt. 31 Exh. A ["Recommendation Statement"] at 25.)[2] The Recommendation Statement supported the tender offer and recommended that shareholders tender their shares. It listed nine reasons for that recommendation: (1) that the value shareholders would receive in the merger "was greater than could be reasonably expected" in the future if they continued to hold Emulex stock; (2) that other available alternatives and transactions were less favorable; (3) that Emulex shareholders would receive a premium on their stock, (4) that Goldman Sachs found that the merger was fair; (5) that the cash consideration shareholders would receive was certain; (6) that the agreement provided that Emulex could back out if it received a better offer before closing; (7) that the agreement permitted Emulex to modify its recommendation; (8) that a termination fee built into the merger agreement would not preclude subsequent third party offers for Emulex; and (9) that closing conditions were appropriate. (Recommendation Statement at 22–23.)

The Recommendation Statement also included a five-page summary of Goldman Sachs' fairness opinion. The summary describes in some detail the

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[2] Defendants' request for judicial notice is GRANTED. Public SEC filings are properly subject to judicial notice and, in any event, the Recommendation Statement is incorporated by the FAC. *See U.S. v. Ritchie*, 342 F.3d 903, 908–09 (9th Cir.2003).

processes Goldman Sachs followed when rendering its opinion, and relates how four particular financial analyses—the Historical Stock Trading Analysis, the Selected Companies Analysis, the Illustrative Present Value of Future Share Price Analysis, and the Illustrative Discounted Cash Flow Analysis—supported Goldman Sachs' opinion that the merger was fair to shareholders. (Recommendation Statement at 27–29.)

Among the other financial analyses Goldman Sachs produced for Defendants was a one-page chart called "Selected Semiconductor Transactions," and which the parties refer to as the "Premium Analysis." (*See* FAC at p. 35.) The Premium Analysis "selected certain transactions in the industry" that Goldman Sachs deemed most similar to the proposed merger between Avago and Emulex, and "reviewed the respective premiums stockholders received in those transactions compared to" the premium Emulex's stockholders were due to receive. (FAC ¶¶ 137–38.) Altogether the Premium Analysis collected 17 transactions involving a semiconductor company between 2010 and 2014. Comparing Emulex's premium—26.4%—with the premiums listed in the Premium Analysis indicates that although Emulex's premium fell within the normal range of semiconductor merger premiums, it was below-average. (*Id.* at p. 35.) Goldman Sachs' opinion was that the merger was fair despite a below-average premium, and Defendants elected not to summarize the one-page Premium Analysis in the fairness opinion summary they included in the Recommendation Statement. Plaintiff alleges that this failure violates the federal securities laws.

One day after the Recommendation Statement was published, Plaintiff filed his original complaint. After obtaining limited expedited discovery, Plaintiff filed his FAC on September 17, 2015, alleging violations of §§ 14 an 20 of the Exchange Act. (*See generally* FAC.) Defendants moved to dismiss for failure to state a claim on October 13, 2015. (Dkt.30.)

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.,* 108 F.3d 246, 249 (9th Cir.1997). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2). When evaluating a Rule 12(b)(6) motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir.1994). The district court may also consider additional facts in materials that the district court may take judicial notice, *Barron v. Reich,* 13 F.3d 1370, 1377 (9th Cir.1994), as well as "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading," *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir.1994), *overruled in part on other grounds by Galbraith v. Cnty. of Santa Clara,* 307 F.3d 1119 (9th Cir.2002). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (stating that while a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" (citations and quotes omitted)). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955. In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States,* 58 F.3d 494, 497 (9th Cir.1995).

IV. ANALYSIS

A. Section 14(e) Cause of Action

Plaintiff's first cause of action is for violations of § 14(e) of the Exchange Act, which makes it unlawful to "make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . . in connection with any tender offer." 15 U.S.C. § 78n(e). Defendants move to dismiss Plaintiff's § 14(e) cause of action on the ground that Plaintiff has failed to allege that Defendants acted with the scienter necessary to state a claim under § 14(e).[3]

The parties dispute whether Plaintiff is required to plead that Defendants acted with scienter to allege a claim under § 14(e). "[E]ven though the Ninth Circuit has not decided the issue regarding the scienter required under section 14(e), the majority of other circuits and districts to address the issue have held that . . . scienter [is] required under section 14(e)[.]" *Rubke v. Capitol Bancorp Ltd.,* 460 F.Supp.2d 1124, 1150 (N.D.Cal.2006) (collecting cases); *see also Dixon v. Cost Plus,* Case No. 12–CV–02721–LHK, 2012 WL 2499931, at *6 (N.D.Cal. June 27, 2012) ("Under Section 14(e) of the Securities and Exchange Act, Plaintiff must show that Defendants made a material misrepresentation or omission with scienter in connection with a tender offer.") The courts that have concluded that § 14(e) claims require a showing of scienter have generally reasoned as follows: § 14(e) is "modeled on the antifraud provisions of § 10(b) of the ['34] Act and Rule 10b–5," *Schreiber v. Burlington Northern, Inc.,* 472 U.S. 1, 10, 105 S.Ct. 2458, 86 L.Ed.2d 1 (1985), and those provisions require proof of scienter, *Ernst & Ernst v. Hochfelder,* 425 U.S. at 193, 96 S.Ct. 1375, so § 14(e) claims should also require scienter.

The parallels between the two provisions are obvious: Rule 10b–5 prohibits individuals from, in

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[3] Defendants also move to dismiss the FAC on the ground that the Premium Analysis was not material. *See* § 14(e) (making it unlawful to "omit to state any *material* fact necessary . . .). Because the Court is disposing with this action on the ground that Plaintiff has not pleaded scienter, there is no need to reach the question of whether he has properly pleaded materiality.

certain circumstances, "mak[ing] any untrue statement of a material fact or . . . omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5. Section 14(e) uses identical language. 15 U.S.C. § 78n(e). Courts have looked to this parallel to hold unanimously that § 14(e) claims require proof of scienter. *See, e.g., In re Digital Island Sec. Litig.,* 357 F.3d 322, 328 (3d Cir.2004) ("We . . . join those circuits that hold that scienter is an element of a Section 14(e) claim . . . [b]ecause of the similarity in the language and scope of Section 14(e) and Rule 10b–5"); *Flaherty v. Crumrine Preferred Income Fund, Inc. v. TXU Corp.,* 565 F.3d 200, 207 (5th Cir.2009) ("The elements of a claim under Section 14(e), which applies to tender offers, are identical to the Section 10(b)/Rule 10b–5 elements," including scienter.); *Adams v. Standard Knitting Mills, Inc.,* 623 F.2d 422, 431 (6th Cir. 1980) ("Congress envisioned scienter to be an element of 14(e).").

Plaintiff contends that he should not have to allege scienter for his § 14(e) claim—only negligence—and that those courts that have concluded that § 14(e) claims require proof of scienter have erred. To support this position, Plaintiff constructs an elaborate argument involving the stated legislative purpose of section 14(e), analogies to other federal securities laws, and citations to the academic literature. (See Dkt. 38 at 10–15.) In its essence, the argument goes like this: § 14(e) contains two clauses, one of which is patterned after Rule 10b–5 (which requires scienter), and one of which is patterned after § 17(a)(2), (which does not, see *Aaron v. SEC,* 446 U.S. 680, 701, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980)).

Accordingly—Plaintiff argues—claims brought under the § 14(e) clause resembling § 17(a)(2) should not require a showing of scienter. Finally, Plaintiff asserts that reading § 14(e) to *not* require scienter is consistent with the statute's legislative intent—to ensure that stockholders have adequate information when responding to a tender offer.

This argument is not entirely without merit, but Plaintiff has cited no case law adopting his novel view of § 14(e). So far as Plaintiff has alleged, and so far as the Court can determine, *no* federal court has held that § 14(e) requires only a showing of negligence. Considering the wealth of persuasive case law to the contrary, the Court concludes that the better view is that the similarities between Rule 10b–5 and § 14(e) require a plaintiff bringing a cause of action under § 14(e) to allege scienter.

To adequately demonstrate that a defendant acted with scienter in a securities fraud case, "a complaint must allege that the defendants made false or misleading statements either intentionally or with deliberate recklessness." *Zucco Partners,* 552 F.3d at 991.[4] Importantly, the standard for pleading scienter in the context of securities fraud is atypical. Rather than simply allege some facts that plausibly suggest scienter, the Private Securities Litigation Reform Act ("PSLRA") requires Plaintiff to satisfy an unusually high standard: he must "plead facts evincing a *strong*

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[4] Plaintiff is required to allege both falsity and scienter. The Ninth Circuit has noted that allegations of falsity and scienter "involve the same set of facts" and so "can be collapsed into a single inquiry." *No. 84 Employer–Teamster Joint Council Pension Trust Fund v. America West Holding Corp.,* 320 F.3d 920, 932 (9th Cir.2003). Accordingly, this order considers falsity and scienter together.

inference of scienter in order to survive a motion to dismiss." *Gompper v. VISX, Inc.,* 298 F.3d 893, 896 (9th Cir. 2002) (emphasis added). The Ninth Circuit has explained that this requirement is designed to "eliminate abusive and opportunistic securities litigation and to put an end to the practice of pleading fraud by hindsight." *Id.* at 897. When determining whether a plaintiff has met the strong inference standard, the district court "must consider all reasonable inferences to be drawn from the allegations, including inferences unfavorable to plaintiffs." *Id.* at 897. Plaintiff's allegations regarding scienter can survive Defendants' motion to dismiss "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the alleged facts." *Biotechnology Value Fund, LP v. Celera Corp.,* 12 F.Supp.3d 1194, 1200–01 (N.D.Cal.2013). In other words, the Supreme Court has explained, "[t]he reviewing court must ask: When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?" *Tellabs, Inc. v. Makor Issues and Rights, Ltd.,* 551 U.S. 308, 326, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

In the Ninth Circuit, district courts employ a "dual inquiry" to determine whether a plaintiff has pleaded a strong inference of scienter. *Zucco Partners,* 552 F.3d at 992. First, the court "determine[s] whether any of the plaintiff's allegations, standing alone, are sufficient to create a strong inference of scienter." *Id.* The Ninth Circuit has described this step as "segmented" and noted that Supreme Court has "call[ed] into question" whether an analysis that "relies exclusively on a segmented analysis of scienter" is sufficient. *Id.* at 991. Accordingly, "if no individual allegations are sufficient," the court proceeds to the second step and conducts a "holistic review of the same allegations to determine whether the insufficient allegations combine to create a strong inference of intentional conduct or deliberate recklessness." *Id.* at 992.

Plaintiff argues that he has alleged a strong inference of scienter in at least three different ways. First, he says, Defendants made misleading statements regarding Emulex premiums despite having access to contradictory information—namely, the Premium Analysis. Second, Plaintiff argues that Defendants knew of the Premium Analysis and failed to reveal it to investors, knowing that keeping the information from the investors would mislead them, and that this alone suggests that Defendants acted with scienter. Finally, Plaintiff argues that the Individual Defendants had a motive and opportunity to commit fraud because they feared they would lose their jobs if Emulex did not sell quickly and because they wanted to tout that they had successfully sold Emulex at a premium, knowing that doing so would help their individual reputations. In fact, Plaintiff's allegations of scienter fail for two independent reasons. First, Defendants' statements or omissions were not in fact false. And second, Defendant has not alleged facts leading to a strong inference that Defendants intended to deceive or mislead Plaintiff and the other shareholders by omitting the Premium Analysis.

i. Contradictory Information

As one of its reasons for recommending that shareholders tender their shares, Emulex noted in the Recommendation Statement that the offer price of $8.00 per share "represented . . a premium of 26.4% to the closing sale[ ] price [on the day before the merger agreement was executed]; a premium of 24.0% based on the 30–day average [of Emulex's stock price], a premium of 32.9% based on the 90–day average [of that stock price]; a premium of 4.8% based on the 52–week high [of the stock price]; a premium of 79.4% based on the 52–week low [of the stock price]; and a premium of 33.3% based on the International Brokers' Estimate System median price target [of the stock]." (Recommendation Statement at 25–26.) Plaintiff alleges that these statements were "materially misleading" because they suggested to Emulex's stockholders that the premium they would receive for their shares was significant. (FAC ¶ 8.) In reality, Plaintiff says, "the premium was drastically below the premiums stockholders had received in connection with similar merger transactions in recent years." (*Id.*) Defendants respond by arguing that the statements were not misleading because they did not create any impression of how the premiums Emulex stockholders would receive related to the premiums stockholders of other companies had received, even in comparable transactions. Moreover, Defendants point out, although the Emulex premiums were below the reported means and medians of the transactions that Goldman Sachs decided to include in the Premium Analysis, Emulex's premiums also fall *within* the range of premiums listed in the analysis.

Plaintiff is correct that an inference of scienter may exist when a defendant makes an affirmative, misleading statement despite having access to contradictory information. *Nursing Home Pension Fund, Local 144 v. Oracle Corp.,* 380 F.3d 1226, 1230 (9th Cir.2004) ("The most direct way to show both that a statement was false when made and that the party making the statement knew it was false is via contemporaneous reports or data, available to the party, which contradict the statement.") But that is not what happened here. The Recommendation Statement reports that Emulex stockholders were going to receive a premium on their stock and that Emulex believed that the premium was a reason to tender shares. The Premium Analysis reports that the Emulex premium was below-average for the industry but within a reasonable range of outcomes. [5]

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[5] Seventeen transactions conducted between 2011 and 2014 were surveyed in the Premium Analysis. The Emulex premium over its sale price as of the announcement—26.4%—is higher than four than that of the surveyed transactions, and lower than 13. (Recommendation Statement at 25.) The Emulex premium over the 52–week high price of Emulex stock—4.8%—is higher than four of the surveyed transactions, and lower than 10 (fewer data was available for 52–week highs). (*Id.*) When compared against only the 2014 transactions in the Premium Analysis, Emulex's 26.4% sale price premium would have rated sixth out of nine, and its 4.8% 52–week premium would have rated fifth out of seven. (*Id.*) In other words, although Emulex's premiums are in the bottom half of the distribution, they are decidedly within the normal range of transactions, and not "drastically below the premium stockholders of similar companies had received in connection with comparable transactions," as Plaintiff alleges, (FAC ¶ 7.) Additionally, the Premium Analysis does not contain any *analysis*—that is, any explanation of why Emulex's merger with Avago is more or less like any of the listed examples, or where in

These statements are not contradictory. The Recommendation Statement creates no impression in the reasonable reader that the Emulex premiums were either higher or lower than the average premiums in the industry.[6] And the Premium Analysis does not say that only above-average premiums are a reason to tender shares. No doubt many stockholders were delighted to receive a 26% premium on their shares.[7]

Plaintiff cites several cases in an attempt to shore up his argument that Defendants' recommendation based on premium amount is sufficient to support a strong inference of scienter. But each of Plaintiff's cases is distinguishable from the facts here. In *Reese v. Malone,* for example, the defendant oil company spilled 200,000 gallons of oil onto the Alaskan tundra

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the distribution Emulex's premium should be expected to fall. Goldman Sachs was evidently not troubled by the Premium Analysis, determining that the $8.00 was fair to investors from a financial standpoint.

6 In fact, the Recommendation Statement deliberately hedges by noting that its summary of Goldman Sachs' fairness opinion "does not purport to be a complete description of the analyses performed by Godman Sachs in connection with its opinion and is qualified in its entirety by reference to the full text of the written opinion of Goldman Sachs included as Annex A to this Statement." (Recommendation Statement at 29.)

7 Moreover, the practical upshot of Plaintiff's argument is troubling. If the Court were to find a strong inference of scienter from these facts alone, it would mean that for any merger that produces a below-median premium (in other words, exactly half of all mergers), a target company may not report a premium amount as a reason to tender shares without saying exactly where in the distribution its merger premium falls. This would essentially convert the scienter element of § 14(e)'s antifraud provisions into an affirmative reporting requirement.

when a pipeline developed a leak. 747 F.3d 557, 563 (9th Cir.2014). The company and its directors subsequently made a number of public statements reassuring investors that the faulty pipeline was anomalous and that the company's other pipelines were in good condition. In fact, the company's data indicated that the leaky pipeline was in comparable condition to other pipelines, suggesting that the company should have been more worried about future leaks. Sure enough, another pipeline sprung a leak a few months later, and investors brought suit. The Ninth Circuit found that a director's "detailed factual statement, contradicting important data to which she had access," gave rise to a strong inference of scienter. *Id.* at 572. Here, by contrast, no similar contradiction exists. Emulex did not say its premiums were above-average—only that they were a reason to tender shares. And the Premium Analysis does not say that the premiums were not a reason to tender shares—only that they were below-average. That is not a contradiction.

Similar problems exist with Plaintiff's citation to *Berson v. Applied Signal Tech., Inc.,* 527 F.3d 982, 987 (9th Cir.2008). There, a company performed contracted work for the federal government, although the government would occasionally issue "stop-work" orders, following which the company was required to halt work and would receive no future income on the project unless work resumed. Work almost never resumed after stop-work orders, but the company continued counting work on contracts that had been stopped within its "backlog," or tally of pending work. The Ninth Circuit concluded that doing so gave rise to a strong inference of scienter, since the company knew the work was very unlikely to resume yet represented to investors that the work was in the company's queue. *Id.* at 988–89. No comparable allegations exist here, since Emulex's statements do not contradict any knowledge it or its directors had. Plaintiff's other cases are similarly distinguishable. *See Siemers v. Wells Fargo & Co.*, No. C 05–04518, 2007 WL 1140660, at *12 (N.D.Cal. Apr. 17, 2007) (holding that a strong inference of scienter existed when a defendant knew about, but failed to disclose, a "vast and secret program of revenue sharing" while making false statements to the contrary); *Schlagal v. Learning Tree Int'l,* No. CV 98–6384 ABC (Ex), 1998 WL 1144581, at *2 (C.D.Cal. Dec. 23, 1998) (inferring scienter when defendants misstated earnings figures, among other things, despite having access to the true numbers).

Simply put, Plaintiff has not demonstrated that anything in Emulex's Recommendation Statement contradicted the Premium Analysis. Emulex did not represent in the Recommendation Statement that its 26.4% premium was above average. It only expressed its belief that the premium was fair and a reason for shareholders to tender their shares.

ii. Failure to Disclose a Potentially Material Fact

Plaintiff's second scienter argument is that he has raised a strong inference of scienter by alleging that Defendants failed to reveal a potentially material fact—the Premium Analysis—knowing that such a failure would likely mislead shareholders. In the Ninth Circuit, to successfully plead scienter based on an omission, a "plaintiff must plead a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Zucco Partners,* 552 F.3d at 991. This standard is extremely difficult to meet, because even clear misconduct does not always raise a strong inference of scienter. *In re NVIDIA Corp. Sec. Litig.,* No. C 08–04260 RS, 2011 WL 4831192, at *8 (N.D.Cal. Oct. 12, 2011), *affirmed, In re NVIDIA Corp.,* 768 F.3d 1046, 1046 (9th Cir.2014) (finding no strong inference of scienter even when a company knew of a significant product defect and failed to disclose it to investors, since "[s]uch behavior, at worst, reflects recklessness in the ordinary sense of the word"); *see also In re XenoPort, Inc. Securities Litig.,* No. C–10–03301 RMW, 2011 WL 6153134, at *4, 6 (N.D.Cal. Dec. 12, 2011) (holding that although a plaintiff successfully pleaded that the defendant misled investors by failing to disclose important differences between two drugs, a "strong inference of scienter" was not warranted because the failure was not a "highly unreasonable omission").

Here, Plaintiff argues that the simple omission of the Premium Analysis alone raises an inference of scienter. The Court is not persuaded. To begin with, the mere omission of information from a fairness opinion summary cannot alone justify an inference of scienter without a showing that the *content* of the omitted material renders the omission "an extreme departure from the standards of ordinary care," *see Zucco Partners,* 552 F.3d at 991. After all, a fairness opinion summary is just that–a summary–which cannot be expected to include every relevant or meaningful bit of analysis performed by a financial advisor. Indeed, investors would be done great harm if companies dumped entire financial analyses into recommendation statements and expected investors to sift through the mess. This Court has observed that "just because a particular analysis was worth considering by the board does not mean that is material to a reasonable investor" and therefore must be contained within a summary. *Masters v. Avanir Pharm., Inc.,* 996 F.Supp.2d 872, 885 (C.D.Cal.2014). The very fact that Plaintiff is attacking a *summary* of a fairness opinion casts doubt on his assertion that Defendants were intending to deceive investors as they undertook the task of determining what information was worth including in the summary and what information was not.

A better explanation is that Defendants realized that the Premium Analysis was minor in the scheme of the voluminous analysis performed by Goldman Sachs, and that the Premium Analysis's substance—that the Emulex premiums were below-average but otherwise ordinary for the industry—was unremarkable. Indeed, there are good reasons to doubt that the Premium Analysis says anything significant about the merits of the Emulex/Avago merger. For example, as the Recommendation Statement describes, Goldman Sachs went to considerable lengths to conduct a Selected Companies Analysis, which compared Emulex with a list of companies "chosen because they are publicly traded companies with operations that, for purposes of analysis, may be considered similar to certain operations of Emulex." (Recommendation Statement at 27.) But none of the companies in the Selected Companies Analysis appear on the Premium Analysis (*i.e.,* they were not among the companies involved in the mergers described in the chart). Defendants may have simply concluded that because none of the companies very similar to Emulex were listed on the Premium Analysis, the mergers in that analysis were not similar enough to the Avago/Emulex merger to convey useful information about the premium—at least not useful enough to include in a summary of all the financial analysis Goldman Sachs performed. Moreover, even if the Court were to assume that the Premium Analysis was important, the fact of the matter is that the Emulex premium falls well within the range of premiums listed in the Premium Analysis. No doubt some investors would have found the Premium Analysis interesting and useful. But the utility of that analysis is in question, and the Court cannot say that it was an extreme departure from the standards of ordinary care to leave it out.

What to include in a fairness opinion summary is a judgment call. The Premium Analysis evidently did not trouble Goldman Sachs, who determined that the deal was fair despite knowing that the premium it produced was below-average. And there is no reason to believe that it troubled the Defendants—much less that it troubled them so much that they kept it from investors in an attempt to deceive them. Instead, what appears to have happened here is Plaintiff, having obtained limited discovery, scoured the financial analysis performed by Goldman Sachs looking for anything negative about the merger that did not appear in the Recommendation Statement. He has come up only with the Premium Analysis—a one-page chart demonstrating that a single element of the merger (the premium) was below-average when compared with other selected mergers. The exclusion of that chart from the fairness opinion summary was not highly unreasonable and therefore does not give rise to a strong inference of scienter.

iii. Motive and Opportunity to Commit Fraud

Finally, Plaintiff alleges that a strong inference of scienter exists because the Individual Defendants were motivated to commit fraud by persuading shareholders to tender offers despite an inadequate premium. The facts Plaintiff alleges to support this theory are as follows: activist investors began pressuring Emulex's Board to sell the company in 2012, with two activist hedge funds in particular jockeying to place individuals on the Board and demanding "wholesale change at the Board level." (*See* FAC ¶¶ 60–67.) Ultimately two senior officers resigned and Board membership was expanded. (*Id.* ¶¶ 62; 69–70.) Plaintiff posits that other members of the Board feared for their jobs and ultimately decided to sell Emulex at a discount rather than face the "embarrassment of losing their jobs" as the activist investors continued to pursue Board change. (*Id.* ¶¶ 74, 133.) After receiving two "inadequate" proposals from private equity firms, Plaintiff alleges, the Board reached out to Avago and ultimately agreed to the merger at an unfair price. (*Id.* ¶¶ 80; 137.)

Plaintiff argues that these facts support a strong inference of scienter because the Individual Defendants figured that they were going to lose their jobs one way or another—either at the hands of the activist investors or by selling the company. Knowing that selling the company would be better for their reputations than getting kicked off the Board, the Individual Defendants resolved to the sell the company even if it meant duping shareholders as to what a fair price for Emulex stock was. The problems with using this rationale as an inference of scienter are obvious. For one thing, *all* executives would like to enhance their reputations and conduct successful transactions; that does not mean that all executives have a quasi-permanent motive for securities fraud. A number of courts have so reasoned, including the Ninth Circuit. *Lipton v. Pathogenesis Corp.,* 284 F.3d 1027, 1038 (9th Cir.2002) ("If scienter could be pleaded merely by alleging that officers and directors possess motive and opportunity to enhance a company's business prospects, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions."); *see also O'Connell v. Arthur Andersen LLP (In re AlphaStar Ins. Group Ltd.),* 383 B.R. 231, 259 (Bankr.S.D.N.Y.2008) ("Every businessperson is concerned about his reputation. The motive to protect a business reputation is, therefore, too general to satisfy the pleading requirement for scienter."); *In re Moody's Corp. Securities Litig.,* 599 F.Supp.2d 493, 515 (S.D.N.Y.2009) ("Nor does the preservation of reputation constitute a cognizable motive for fraud."). As Defendants persuasively argue, "[e]very board member in America cannot start with one or two legal strikes in the scienter column based on a boilerplate accusation that she cares more about her reputation in the business world than shareholder welfare." (Dkt. 39 at 10.)

But even if it were realistic to use a board member's desire to pad his or her resume as a motive for fraud, there are compelling facts to suggest that the Board did not act in an effort to defraud shareholders and save their reputations. For one, Plaintiff acknowledges that activist pressure began more than *two years* before Emulex was sold; this delay does not square with Plaintiff's assertion that the Board sold Emulex in a rush to save face. Additionally, Plaintiff ignores that the Individual Defendants held significant amounts of Emulex stock and therefore had as much to lose as any shareholder from sale at an unfair price. Finally, Plaintiff himself alleges that Defendants rejected two inadequate proposals from private equity firms before approaching Avago, (FAC ¶ 78), who Plaintiff notes was "much more likely to submit [a] higher proposal[ ]" that the private equity firms, (*id.* ¶ 79). These facts are difficult to reconcile with Plaintiff's current argument that Defendants were desperate to sell at any price in order to avoid losing their jobs. In short, Plaintiff's allegations of motive and opportunity on the part of the Individual Defendants do not give rise to a strong inference of scienter.[8]

4. Holistic Analysis

Having concluded that none of Plaintiff's individual arguments establish a strong inference of scienter, the Court is now required to "consider the complaint in its entirety to determine whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter . . . tak[ing] into account plausible opposing inferences." *Zucco Partners,* 552 F.3d at 1006. The Court finds that a strong inference

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[8] Plaintiff also alleges, in passing, that it has adequately pleaded scienter on the part of one of the Individual Defendants, Gregory S. Clark, because he "represented the interests of hedge fund Elliott Associates." (Dkt. 38 at 21.) Mere association with an activist investor cannot alone justify a strong inference of scienter.

of scienter is not warranted. Accepting the factual allegations of the complaint as true, Plaintiff essentially alleges that Defendants left an important financial analysis out of a fairness opinion summary in the Recommendation Statement, misleading stockholders into believing that the tender offer was a good deal when it was in fact a bad one. But Plaintiff's efforts to show that Defendants did so with "at a minimum, *deliberate* recklessness," *In re NVIDIA,* 768 F.3d at 1053, boil down to inferences that are less plausible than innocent alternatives. It *may* be true, as Defendants argue, that the Defendants deliberately hoodwinked investors by concealing the Premium Analysis. But it is certainly more likely true that Defendants legitimately believed the premium the merger would deliver to shareholders was a fair one, and that the Premium Analysis did not indicate otherwise (after all, Defendants could not reasonably include every piece of the fairness opinion in the Recommendation Statement, and the Emulex premiums fell within the range indicated on the Premium Analysis). Similarly, Plaintiff's story of how beleaguered Board members sought to sell Emulex quickly to shore up their reputations is not totally implausible, but even combined with the other facts Plaintiff alleges, it is not a good reason to believe that Defendants deliberately bamboozled shareholders by concealing the Premium Analysis.

Additionally, some of Plaintiff's allegations of scienter undermine each other. For example, as evidence for his claim that Emulex's directors accepted a lowball offer for the company to protect their reputations, Plaintiff points to the LinkedIn profile of one of the directors, which boasts that the director worked to negotiate the merger, which delivered "a 26% premium over current stock price." (Dkt.38–6.) Assuming, without deciding, that this evidence is appropriate for judicial notice, it seems to actually cut exactly *against* an inference of scienter by undermining Plaintiff's other scienter allegations.[9] At one turn, Plaintiff asks the Court to infer scienter because, as Plaintiff tells it, the directors were so embarrassed that Emulex's premium price was below the industry median that they refused to disclose (publicly available) industry norms to shareholders. Yet Plaintiff simultaneously argues that the directors touted the premium price online to boost their reputations, and that the Court should take this as evidence that they acted with scienter. In fact, it is good evidence that they were *not* so troubled by how low the premium was that they deliberately defrauded shareholders by concealing the Premium Analysis. This contradiction is a good example of how Plaintiff's hodgepodge of scienter allegations do not holistically add up to a strong inference that Defendants acted with the requisite state of mind.

When Congress elected to require a "strong inference of scienter" in securities fraud cases, it set the pleading bar deliberately high in securities fraud cases. Plaintiff has not met that heightened pleading bar, and his § 14(e) claim is DISMISSED.

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[9] Defendants objected to Plaintiff's request for judicial notice, but then withdrew their objection at the hearing the Court held on this motion. The Court GRANTS Plaintiff's request for judicial notice as to certain SEC filings, including a single filing from a separate merger which includes a premium analysis like the one Plaintiff believe was wrongfully omitted here. (Dkt. 38 Exhs. 1, 2, 6.) A single filing from another case is not evidence of materiality, much less of falsity or scienter.

B. Plaintiff's Other Securities Claims

Plaintiff's next claim is for a violation of § 14(d)(4) and Rule 14d–9. Section 14(d)(4) provides that "[a]ny solicitation or recommendation to the holders of . . . a security to accept or reject a tender offer . . . shall be made in accordance with [the] rules and regulations [of the SEC]." 15 U.S.C. § 78n(d)(4). Rule 14d–9 in turn specifies that one of those rules is that recommendation statements "shall include . . . information required by Items 1 through 8 of Schedule 14D–9 or a fair and adequate summary thereof." 17 C.F.R. § 240.14d–9(d). Finally, Item 8 on Schedule 14D–9 requires a company's directors to furnish "information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading." *See* 17 C.F.R. § 240.14d–101; 17 C.F.R. § 229.1011. Using these provisions in tandem, Plaintiff argues that by omitting the Premium Analysis, Defendants misled investors, therefore breaching Rule 14d–9 and, in turn, violating § 14(d)(4). Defendant responds by arguing that there is no private right of action under § 14(d)(4).

Every federal court to consider the question whether § 14(d)(4) establishes a private right of action has concluded that it does not. *Dixon,* 2012 WL 2499931 at *6 n.2 ("Plaintiff also purports to bring a Section 14(d)(4) claim, but that provision does not give rise to a private right of action."); *McCreary v. Celera Corp.,* No. 11–1618 SC, 2011 WL 1399263, at *3 n.1 (N.D.Cal. Apr. 13, 2011) (same); *Washburn v. Madison Square Garden Corp.,* 340 F.Supp. 504, 508 (S.D.N.Y.1972) ("Here again, we are cited no case granting a private right of action under [§ 14(d)(4)].") The parties agree that § 14(d)(4) does not *expressly* create a private right of action, but Plaintiff argues that this Court should break from the above authorities and hold that that section creates an *implied* right of action. He points out that the Ninth Circuit has found that at least one other subsection of § 14(d) does create a implied private right of action—§ 14(d)(7)—and asks that the Court do the same here. *Epstein v. MCA, Inc.,* 50 F.3d 644, 649–52 (9th Cir.1995), *reversed on other grounds, Matsushita Elec. Indus. v. Epstein,* 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996).

Although Plaintiff does not attempt to apply it, the traditional analysis for determining whether a federal statute creates an implied right of action is a test set forth in *Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). That test requires courts to ask four questions:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally regulated to state law . . . ?

Id. (internal citations omitted). The fourth Cort factor—whether a cause of action is traditionally regulated to state law—does not apply here, in the federal securities context. But the remaining three Cort factors weigh against implying a private right of action. First, § 14(d)(4) focuses not on the shareholders ostensibly being protected by recommendation statements, but on the companies who are actually required to make those statements. *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.") (internal citations omitted). The statute does require that recommendation statements abide by SEC rules that are "appropriate in the public interest or for the protection of investors." § 14(d)(4). But just because certain rules exist to protect investors does not mean that individuals have a private right of action to enforce a *statute* that requires companies' recommendation statements to abide by those rules. By contrast, § 14(d)(7), which the Ninth Circuit has held *does* create an implied private right of action, explicitly provides for payment to individual security holders, and therefore focuses on a class of persons benefiting from protection, and not a class of entities being regulated. *See* § 14(d)(7) ("When any person varies the terms of a tender offer . . . before the expiration thereof . . . such person shall pay the increased consideration to each security holder whose securities are taken up and paid for[.]")

Second, there is no indication of any legislative intent to provide for a private right of action. Section 14(d)(4) is a generic statute simply requiring that recommendation statements abide by the SEC's rules. If anything, the statute presumes SEC—not private—enforcement. And finally, it would be inconsistent with the scheme of § 14 to imply a private right of action from § 14(d)(4). Section 14 already has a provision providing for a private right of action to sue over material misrepresentations or omissions in recommendation statements: § 14(e). It would make little sense to look to § 14(d)(4)—a more general subsection—in an effort to cover the same ground. Plaintiff is candid about his reasons for attempting to wring a private right of action out of § 14(d)(4): he believes that claims under that subsection would only be required to plead negligence, and not scienter. But this argument cuts directly against finding a private right of action in § 14(d)(4). Why would Congress permit individuals to sue over misrepresentations and omissions in recommendation statements under § 14(e)—while requiring scienter—but then intend for the same individuals to bring parallel actions under § 14(d)(4) without the scienter requirement? There is no reason to believe that Congress intended that private individuals be permitted to sue under § 14(d)(4) and good reasons to believe otherwise. As the *Cort* factors weigh against finding a private right of action, the Court concludes that § 14(d)(4) does not create such a right, and Plaintiff's § 14(d)(4) claim is DISMISSED WITH PREJUDICE.

Finally, Plaintiff's § 20(a) claim fails because "to establish a cause of action under [§ 20(a)], a plaintiff must first prove a primary violation of underlying securities laws." *In re NVIDIA,* 768 F.3d at 1052. Plaintiff has not successfully alleged a violation of federal securities law, so his § 20(a) claim fails.

C. Futility of Granting Leave to Amend

Although the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations, *Doe v. United States,* 58 F.3d 494, 497 (9th Cir.1995), the district court need not grant leave to amend if amendment of the complaint would be futile. *See Kendall v. Visa U.S.A., Inc.,* 518 F.3d 1042, 1051–52 (9th Cir.2008) (finding that amendment would be futile where plaintiff was granted leave to amend once and the amended complaint contained the same defects as the prior complaint). Here, although Plaintiff requested leave to amend should Defendants' motion be granted, the Court sees no reason to grant such leave. Plaintiff has already obtained expedited discovery and filed an amended complaint. *DSAM Global Value Fund v. Altris Software, Inc.,* 288 F.3d 385, 391 (9th Cir.2002) (affirming district court's denial of leave to amend where plaintiffs in a securities fraud case failed to adequately allege scienter in an amended complaint). At the hearing on Defendants' motion, Plaintiff's counsel did not identify any facts nor offer any reason to believe that Plaintiff could allege any facts beyond what is currently in the FAC and the materials of which Plaintiff requested judicial notice, despite a direct question from the Court on the issue. Plaintiff has already put his best foot forward with regard to scienter and failed to adequately allege scienter in his amended complaint. It would be a pointless exercise and an unnecessary waste of the parties' resources to permit Plaintiff to file yet another amended complaint. This is especially true given the heightened pleading standard of PSLRA. *In re VISX, Inc. Securities Litig.,* No. C 00–0649 CRB, 2001 WL 210481, at *11 (N.D.Cal. Feb. 27, 2011) (denying leave to amend where plaintiffs had "not identified any additional facts that would provide plaintiffs' allegations of scienter the strength needed to satisfy the PSLRA").[10] Plaintiff has not alleged, and cannot allege, a claim for securities fraud based on Defendants' failure to disclose the Premium Analysis in connection with the Recommendation Statement.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion is GRANTED, and Plaintiff's claims are DISMISSED WITH PREJUDICE.

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[10] Judge Breyer also denied leave to amend in *In re VISX, Inc.* because plaintiffs were "represented by experience securities fraud class action counsel who are intimately familiar with the PSLRA and the Ninth Circuit's stringent interpretation of its pleading standards," and because plaintiffs in that case amended their complaint "more than five months after the original lawsuits were filed." *In re VISX,* 2001 WL 210481, at *11. Both of these rationales are present here as well; Plaintiff is represented by competent securities counsel who understand the uphill battle of pleading scienter, and Plaintiff's amended complaint was filed on September 17, 2015, more than five months after he filed his original complaint in April. (*See* Dkt. 1; Dkt. 29.)

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY VARJABEDIAN, Plaintiff-Appellant, v. EMULEX CORPORATION; BRUCE C. EDWARDS; JEFFREY W. BENCK; GREGORY S. CLARK; GARY J. DAICHENDT; PAUL F. FOLINO; BEATRIZ V. INFANTE; JOHN A. KELLEY; RAHUL N. MERCHANT; NERSI NAZARI; DEAN A. YOOST; AVAGO TECHNOLOGIES WIRELESS (USA) MANUFACTURING, INC.; EMERALD MERGER SUB, INC., Defendants-Appellees.	No. 16-55088 D.C. No. 8:15-cv-00554-CJC-JCG Central District of California, Santa Ana ORDER

Before GRABER, MURGUIA, and CHRISTEN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED (Docs. 63, 64).

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GARY VARJABEDIAN, Plaintiff-Appellant, v. EMULEX CORPORATION; BRUCE C. EDWARDS; JEFFREY W. BENCK; GREGORY S. CLARK; GARY J. DAICHENDT; PAUL F. FOLINO; BEATRIZ V. INFANTE; JOHN A. KELLEY; RAHUL N. MERCHANT; NERSI NAZARI; DEAN A. YOOST; AVAGO TECHNOLOGIES WIRELESS (USA) MANUFACTURING, INC.; EMERALD MERGER SUB, INC., Defendants-Appellees.	No. 16-55088 D.C. No. 8:15-cv-00554-CJC-JCG Central District of California, Santa Ana ORDER

Before GRABER, MURGUIA, and CHRISTEN, Circuit Judges.

Appellees' motion for stay of mandate pending filing of petition for writ of certiorari is GRANTED (Doc. 76). Fed. R. App. P. 41(b).

The mandate is stayed for ninety (90) days pending the Appellees' filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay shall continue until final disposition by the Supreme Court.

Section 17(a) of the Securities Act of 1933

15 U.S.C. § 77q(a)

§ 77q. Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * *

Section 10(b) of the Securities Exchange Act of 1934

15 U.S.C. § 78j(b)

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

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1 So in original. Probably should be followed by a comma.

Section 14(3) of the Securities Exchange Act of 1934

15 U.S.C. § 78n(e)

§ 78n. Proxies

* * *

(e) Untrue statement of material fact or omission of fact with respect to tender offer

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

* * *

17 C.F.R. § 240.10b–5

§ 240.10b–5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.