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The Vital Need to Eliminate a De Facto Negligence Standard Under Section 14(e) of the Exchange Act

Matthew A. Powell*

I. INTRODUCTION

A. DEFINING THE PROBLEM

Able to obtain large fees for little work, the plaintiffs' bar has made the filing of 'merger objection' lawsuits increasingly routine. In 2008, approximately 54% of all public M&A deals were challenged . . . This number rose sharply to 86% in 2009, and continued to rise until its peak of 94% in 2013 . . . The percentage of deals subject to suit hovered between 85% and 90% through 2015 . . . experts project that this trend will continue.¹

In *Varjabedian v. Emulex Corp.* (“*Varjabedian*”), the Ninth Circuit held that a claim for failure to satisfy a statutory disclosure provision concerning tender offers only requires pleading “. . . negligence, not scienter [intent].”² A tender offer, means an offer by an acquiring company to pay a cash price per share for the shares of the target company, here Emulex, in order to acquire the target company.³

The Ninth Circuit's holding in *Varjabedian* creates a clear disagreement and a split with five other circuits (i.e., the Second, Third, Fifth, Sixth, and Eleventh), all of which have held that a Section 14(e) claim requires proof of scienter,⁴ with scienter having been the required

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1. Brief for the Securities Industry and Financial Markets Association as Amicus Curiae at 9, 12, *Varjabedian v. Emulex Corp.* (9th Cir. 2018), *petition for cert. pending*, No. 18-459 (U.S. Nov. 13, 2018) [hereinafter Brief for the Securities Industry and Financial Markets Association].

2. *Varjabedian v. Emulex Corp.*, *aff'd in part, rev'd in part and remanded*, 888 F.3d 399 (9th Cir. 2018), *cert. pending*, (U.S. Oct. 10, 2018) No. 18-459; *see also* *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976).

3. THOMAS L. HAZEN, *PRINCIPLES OF SECURITIES REGULATION* 1, 245 (4th ed. 2016); *see also* *Varjabedian v. Emulex Corp.*, 888 F.3d at 402.

4. *Varjabedian v. Emulex Corp.*, 888 F.3d at 409-410.

standard of culpability for nearly half a century.⁵ The relevant provision in *Varjabedian* is Section 14(e) of the Securities Exchange Act of 1934 (the “1934 Act” or “Exchange Act”),⁶ which prohibits untrue statements or omissions of material facts in connection with a tender offer (i.e., an acquisition strategy).⁷ This Article will focus on the Ninth Circuit’s unexpected Section 14(e) holding.

On October 11, 2018, Emulex filed a petition for a writ of certiorari primarily requesting Supreme Court review of the Section 14(e) question.⁸ Emulex’s petition for certiorari further highlights the radical shift following the Ninth Circuit’s holding, stating the following:

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] ‘no federal court ha[d] held that § 14(e) requires only a showing a negligence.’ However, the Ninth Circuit blew up that consensus.⁹

Separate amicus curiae briefs were filed on November 13, 2018, by the Securities Industry and Financial Markets Association and the Chamber of Commerce of the United States of America.¹⁰ Respondents timely filed their brief for the respondents in opposition on November 30, 2018.¹¹ Then on December 18, 2018, the Petitioners’ reply brief was timely filed, setting the stage for review.¹² On January 4, 2019, the Supreme Court granted Emulex’s petition for certiorari.¹³

5. *Id.*

6. 15 U.S.C.A. § 78n(e) (2012).

7. *Varjabedian v. Emulex Corp.*, 888 F.3d at 409–10; *see also* Aaron F. Miner et al., *Supreme Court Has Opportunity to Reexamine Implied Private Right of Action Under Section 14(e) of the Exchange Act*, ARNOLD & PORTER (Oct. 22, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/10/scotus-has-opportunity-to-reexamine> [perma.cc/DQ3J-V8XP].

8. Aurora Barnes, *Petitions of the week*, SCOTUSBLOG (Nov. 15, 2018), <https://www.scotusblog.com/2018/11/petitions-of-the-week-18/> [perma.cc/XK9X-CPPP].

9. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 14 (U.S. Oct. 10, 2018) No. 18-459.

10. Barnes, *supra* note 8.

11. *Id.*

12. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, at 409–10 (9th Cir. 2018), *reply brief for the Petitioners filed*, 1, 11 (U.S. Oct. 10, 2018) No. 18-459.

13. Public Information Office Supreme Court of the United States, *A Reporter’s Guide to Applications Pending Before the Supreme Court of the United States* 1, 16, (2018), <https://www.supremecourt.gov/publicinfo/reportersguide.pdf> [perma.cc/Q5BA-T6K8].

B. WHY IS VARJABEDIAN IMPORTANT? FINANCIAL STAKES AND DE FACTO NEGLIGENCE STANDARD

The Ninth Circuit's adoption of a negligence standard for claims under § 14(e) of the Exchange Act will encourage stockholder plaintiffs to continue filing frivolous "merger objection" cases in district courts within the Ninth Circuit to circumvent [the scienter requirement] and capitalize on the Ninth Circuit's lenient negligence standard. This, coupled with the Exchange Act's liberal jurisdiction provision, encourages forum-shopping, and risks creating a de facto [national] negligence standard for all § 14(e) cases.¹⁴

Why is the Ninth Circuit's *Varjabedian* holding important? The answer is that securities class action plaintiffs will have accomplished quite a coup if they can lower the standard of proof for Section 14(e) liability.¹⁵ The increase of federal court lawsuits by investors challenging M&A transactions is "[t]he single biggest development in securities class action litigation in the past two years" (i.e., 2016-17).¹⁶

Merger objection lawsuits are often verbatim versions of prior complaints with only the parties' names changed, typically filed within days of the merger announcement.¹⁷ This problem has grown so routine that businesses view merger objection suits simply as a transaction or merger tax on the tender offer.¹⁸ The Legal Reform Institute outlined the plaintiffs' bar strategy clearly, describing the abusive practice as follows:

Here's how it works: Just about every merger or acquisition that involves a public company and is valued over \$100 million—91% of all such transactions in 2010 and 2011—becomes the subject of multiple lawsuits within weeks [or in *Varjabedian's* case, within twenty-four hours] of its announcement. Because the parties to the merger want to close their deal and begin to reap the economic benefits of the combination, the vast majority of these lawsuits settle quickly—within three months—and typically provide little or

14. Brief for the Securities Industry and Financial Markets Association, *supra* note 1 at 13–14.

15. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 24 (U.S. Oct. 10, 2018) No. 18-459.

16. Alison Frankel, *Bucking precedent, 9th Circuit Opens Door to More M&A Challenges*, REUTERS (Apr. 23, 2018), <https://www.reuters.com/article/legal-us-otc-securities/bucking-precedent-9th-circuit-opens-door-to-more-ma-challenges-idUSKBN1HU2NH> [perma.cc/U8CX-QL6L].

17. Brief for the Securities Industry and Financial Markets Association, *supra* note 1, at 7.

18. *Id.* at 9.

no benefit for shareholders. But the settlements do award large attorneys' fees to the lawyers who filed the lawsuits.¹⁹

In an effort to avoid derailing multi-million-dollar acquisition efforts, firms who fear their deals' death after being tied up in lengthy, often frivolous, litigation²⁰ will frequently settle merger objection cases.²¹

In *Varjabedian*, the plaintiffs (Emulex shareholders) alleged that the target-defendant, Emulex, and other defendants omitted material information about the offered purchase price per share when Emulex issued its Recommendation Statement urging its shareholders to accept the \$8.00/share offer to purchase.²² In an attempt to avoid a costly discovery dispute, Emulex then provided shareholders with the core documents, including the so-called 'Board Book' that Goldman Sachs had compiled.²³

While facilitating additional disclosure may appear to be beneficial to shareholders, in practice, however, class action plaintiffs have practically forced corporations to facilitate a practice of over-disclosure.²⁴ Over-disclosure results in corporations burying shareholders in an avalanche of trivial information in order to mitigate risk and avoid liability.²⁵ It is important to note that disclosure documents frequently are already "hundreds of pages long."²⁶

From a market efficiency perspective, this over-disclosure leads to negative outcomes, like companies wasting resources by disclosing immaterial information, and then investors waste their time, money, and effort attempting to distill the material from the immaterial in disclosure.²⁷ Put simply, and as demonstrated in the quote below, over-disclosure rarely culminates a net positive outcome from an economic efficiency perspective, nor is the practice conducive to informed decision-making.²⁸

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 . . . If allowed to stand,

19. Brief for the Chamber of Commerce of the United States of America as Amicus Curiae at 1, 18, *Varjabedian v. Emulex Corp.* (9th Cir. 2018), No. 18-459 (U.S. Nov. 13, 2018) [hereinafter Brief for the Chamber of Commerce of the United States of America].

20. Brief for the Securities Industry and Financial Markets Association, *supra* note 1, at 10.

21. *Id.* at 9.

22. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 8 (U.S. Oct. 10, 2018) No. 18-459.

23. *Id.* at 7.

24. Brief for the Securities Industry and Financial Markets Association, *supra* note 1, at 16–17.

25. *Id.*

26. *Id.* at 17.

27. *Id.*

28. *Id.*

the Ninth Circuit's decision [in *Varjabedian*] 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.²⁹

Prior to 2016, the plaintiffs' bar exploited this opportunity fully in state court, as the number of such cases quadrupled from 2005 to 2010.³⁰ The vast majority of these cases were filed in state court, most frequently in Delaware, with approximately sixty percent of merger objection suits filed in Delaware.³¹ However, in 2017, the number of M&A deals litigated in federal court increased 20 percent, while state court filings declined.³² The shift in forum is no coincidence.³³

Both the decline of Delaware state court filings and the migration to federal courts directly coincide with the time frame in which the Delaware Chancery Court, in its 2016 *Trulia* decision,³⁴ held that it would no longer approve disclosure-only settlements except in "unusual circumstances."³⁵ Put simply, attorneys who obtained only additional proxy disclosures as contrasted with money damages, would no longer be entitled to obtain large fees for little work, so filings quickly shifted out of Delaware and into federal court.³⁶

The primary reason for the Delaware courts' skepticism was that the supplemental disclosures in many cases addressed immaterial details that did not aid stockholders in deciding whether to approve a transaction.³⁷

The Delaware Chancery Court, in essence, saw a need for immediate reform, acknowledging that the plaintiffs' bar had "created a real systemic

29. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 22-23 (U.S. Oct. 10, 2018) No. 18-459.

30. Brief for the Chamber of Commerce of the United States of America, *supra* note 19, at 18.

31. Brief for the Securities Industry and Financial Markets Association, *supra* note 1, at 4, 12.

32. Brief for the Chamber of Commerce of the United States of America, *supra* note 19, at 18 (emphasis added).

33. Brief for the Securities Industry and Financial Markets Association, *supra* note 1, at 4.

34. Brief for the Chamber of Commerce of the United States of America, *supra* note 19, at 19.

35. Brief for the Securities Industry and Financial Markets Association, *supra* note 1, at 11.

36. Brief for the Securities Industry and Financial Markets Association as Amicus Curiae at 1, 9, *Varjabedian v. Emulex Corp.* (9th Cir. 2018), No. 18-459 (U.S. Nov. 13, 2018) [hereinafter Brief for the Securities Industry and Financial Markets Association]; Brief for the Chamber of Commerce of the United States of America, *supra* note 19, at 19.

37. Brief for the Securities Industry and Financial Markets Association as Amicus Curiae at 1, 10, *Varjabedian v. Emulex Corp.*, 888 F.3d (9th Cir. 2018) *cert. granted* (U.S. Jan. 4, 2019) (No. 18-459).

problem.”³⁸ Further, a Delaware Chancery Court Judge stated that “it just can’t be that there are meaningful disclosure violations in every single M&A case that’s being filed in this court.”³⁹

The *Trulia* decision had an immediate impact, forcing class action plaintiffs to switch tactics in the ‘merger objection’ litigation.⁴⁰ For example, in 2014, federal courts had forty merger objection lawsuits.⁴¹ In 2015, that number increased to forty-four merger objections.⁴² However, following the *Trulia* decision, the number of merger objections more than doubled in 2017, reaching 197 merger objection suits filed.⁴³ It is critical to note that the federal filings increase corresponds to a decrease in merger objection lawsuits filed in Delaware.⁴⁴ Now that the class action plaintiffs’ strategy turns to using the federal courts for merger objection lawsuits, the following risks are created:

The Ninth Circuit’s mere negligence requirement will now circumvent *Trulia* and capitalize on the Ninth Circuit’s lenient negligence standard. This, coupled with the [1934] Exchange Act’s liberal jurisdiction provision, encourages forum-shopping, and risks creating a de facto negligence standard for all § 14(e) cases.⁴⁵

Essentially, the inconsistent application of Section 14(e) merger objection standards will result in a de facto nationwide negligence standard because plaintiffs’ lawyers would logically avoid bringing claims in the more stringent, scienter standard jurisdiction.⁴⁶ One only has to look at the Ninth Circuit filings to see that this de facto nationwide standard will almost certainly affect all future tender offers unless *Varjabedian* is reversed.⁴⁷

The Ninth Circuit has replaced the Delaware Chancery Court as the preferred forum for merger objection suits.⁴⁸ *Varjabedian* has only further bolstered the view that the Ninth Circuit is plaintiff-friendly in the merger objection context.⁴⁹ This determination is strongly supported by the filing

38. *Id.*

39. *Id.*

40. *Id.* at 11.

41. *Id.* at 12.

42. Brief for the Securities Industry and Financial Markets Association, *supra* note 1 at 12.

43. *Id.*

44. *Id.*

45. *Id.* at 14.

46. Brief for the Securities Industry and Financial Markets Association, *supra* note 1 at 18.

47. *Id.*

48. *Id.* at 14.

49. Frankel, *supra* note 16.

numbers.⁵⁰ From 2012 to 2014, only two merger objection suits were filed in the Ninth Circuit, with eight filings in 2015.⁵¹ That number jumped to twenty-five in 2016 and forty-one in 2017.⁵² Merger objection litigation is only projected to grow in 2018, as twenty-two merger objection suits have been filed in the Ninth Circuit during the first half of the year.⁵³

By reversing the Ninth Circuit's decision in *Varjabedian*, the Supreme Court has an opportunity to avoid both perpetuating market inefficiencies resulting from merger objection suits as well as preventing plaintiffs from forum shopping and capitalizing on the de facto nationwide negligence standard.⁵⁴

C. OVERVIEW OF THE NINTH CIRCUIT'S LEGAL ANALYSIS IN VARJABEDIAN

This section walks through the Ninth Circuit's jurisprudence to establish a framework to discuss the Court's deviation in reasoning in *Varjabedian*. The *Varjabedian* Court stated the following: "[W]e now hold that Section 14(e) of the Exchange Act requires a showing of negligence, not scienter."⁵⁵

[W]e are aware that our holding today parts ways from our colleagues in five other circuits However, . . . we are persuaded that intervening guidance from the Supreme Court [i.e., re-analysis of opinions in *Aaron* (1980) and *Ernst & Ernst* (1976)] . . . compels the conclusion that Section 14(e) of the Exchange Act imposes a negligence standard.⁵⁶

The first analytical test, and by far, the most focused upon throughout the opinion by the Ninth Circuit was the plain meaning of the statute.⁵⁷ The precise wording of Section 14(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 the light of the circumstances under which they are made, not misleading, **or** to engage in any

50. Brief for the Securities Industry and Financial Markets Association, *supra* note 1, at 14.

51. *Id.*

52. *Id.*

53. *Id.* at 14–15.

54. *Id.* at 15.

55. *Varjabedian v. Emulex Corp.*, 888 F.3d at 401.

56. *Id.* at 409–10.

57. *Id.* at 404.

fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer.⁵⁸

According to the *Varjabedian* Court, the use of the word “or” between the two clauses is critical because such usage shows that there are two different offenses proscribed by the statute; to construe the statute otherwise would render it “hopelessly redundant” and declare one of the clauses surplusage.⁵⁹ Therefore, the court held ultimately, because the text of the first clause of Section 14(e) does not suggest scienter is required, the first clause of Section 14(e) only requires a showing negligence, not scienter.⁶⁰ The Ninth Circuit did review the leading cases in the other five circuits that require a pleading of scienter for a Section 14(e) claim; however, the opinion diplomatically suggests the statute has not heretofore been read correctly in those other circuits.⁶¹

Beginning with the Second Circuit’s *Chris-Craft* decision in 1973 (“*Chris-Craft*”) and up through the Fifth Circuit’s *Flaherty* decision in 2009, five circuits have held that to state a claim under Section 14(e), one must allege that the defendant acted with scienter.⁶² For example, the Supreme Court held that a Rule 10b-5 violation requires scienter in *Ernst & Ernst* in 1976.⁶³ However, in *Varjabedian*, the Ninth Circuit held the better analogy is between the first part of Section 14(e) and the “nearly identical text” of Section 17(a)(2) of the Securities Act of 1933.⁶⁴ Further, “that is significant because back in 1980, the Supreme Court held in *Aaron* Section 17(a)(2) does not require a showing of scienter.”⁶⁵ Stated alternatively:

The net effect of *Varjabedian* is to make it easier for plaintiffs to challenge tender offer disclosures. Already plaintiffs were using 14(d)(4) in an attempt to avoid having to plead scienter, but that was an uncertain work-around, as many district courts had held that 14(d)(4) does not provide a private right of action. From a plaintiff’s point of view, having a negligence claim under 14(e)

58. 15 U.S.C. § 78n(e) (2012) (emphasis added).

59. *Varjabedian v. Emulex Corp.*, 888 F.3d at 404.

60. *Id.* at 408.

61. *Id.* at 409–10.

62. Bruce A. Ericson et al., *Ninth Circuit: Enough to Allege Negligence When Attacking Tender Offer Documents*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Apr. 25, 2018), <https://www.pillsburylaw.com/en/news-and-insights/enough-to-allege-negligence-when-attacking-tender-offer-documents.html> [perma.cc/3JPC-B9SS].

63. *Varjabedian v. Emulex Corp.*, 888 F.3d at 410.

64. Ericson, *supra* note 62.

65. *Id.*

[courtesy of *Varjabedian*] is more than an even trade for losing the opportunity to claim under 14(d)(4).⁶⁶

The Roberts Court has, on average, selected approximately two securities law cases per term.⁶⁷ Further, the Supreme Court has repeatedly demonstrated a willingness to grant certiorari in securities cases and recently entered decisions either clarifying or limiting the scope of securities class actions.⁶⁸ The abovementioned factors all support the Supreme Court's granting of Emulex's petition for certiorari on January 4, 2019.⁶⁹ Accordingly, the Supreme Court should reverse the Ninth Circuit's holding in *Varjabedian*.⁷⁰

The balance of this Article is as follows: Part II, the background of *Varjabedian*, including basic facts and procedural steps in detail; Part III, the legislative history of The Williams Act concerning tender offers, which includes Section 14(e); Part IV, a review of the most significant case law considered by the Ninth Circuit panel; Part V, an analysis of the Ninth Circuit's reasoning in *Varjabedian*; Part VI, a conclusion; and Part VII, an appendix containing the relevant statutory provisions.

II. BACKGROUND

The *Varjabedian* dispute arose in February 2015 when two technology firms, Emulex and Avago Technologies Wireless Manufacturing, Inc., sought to combine using a tender offer as the technique.⁷¹ Emulex manufactured data center equipment (e.g., routers and network interface cards) and Avago developed semiconductors.⁷² Avago, the prospective acquiror would acquire the target, Emulex, via an Avago subsidiary, Emerald Merger Sub. Inc.⁷³

The merger was jointly announced on February 25, 2015, and would be executed via an accepted tender offer.⁷⁴ The tender offer occurred on April

66. *Id.*

67. Aaron F. Miner et al., *Supreme Court Has Opportunity to Reexamine Implied Private Right of Action Under Section 14(e) of the Exchange Act*, Arnold & Porter (Oct. 22, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/10/scotus-has-opportunity-to-reexamine> [perma.cc/U92Z-Y84M].

68. *Id.*

69. Barnes, *supra* note 8.

70. Miner, *supra* note 67.

71. Ericson, *supra* note 62.

72. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 6 (U.S. Oct. 10, 2018) No. 18-459.

73. Ericson, *supra* note 62.

74. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 6 (U.S. Oct. 10, 2018) No. 18-459.

7, 2015.⁷⁵ Avago's cash tender offer price of \$8.00 for all outstanding shares was a 26.4% premium over the pre-announcement share price (i.e., the market share price on the day before the merger was jointly announced).⁷⁶ Later that day, Emulex filed its SEC Recommendation Statement, which included a total of nine reasons why the share price tendered should be accepted by its shareholders, including that Emulex shareholders would receive a premium on their stock.⁷⁷

The next day on April 8, 2015, Emulex shareholder Gary Varjabedian, sued, filing a putative federal class action in U.S. District Court for the Central District of California.⁷⁸ Varjabedian asserted 1934 Act claims under Sections 14(e), 14(d)(4), and 20(a).⁷⁹ In an effort to avoid a costly discovery dispute, the target, Emulex, voluntarily provided Varjabedian with core documents, including the so-called 'Board Book' that Goldman Sachs had compiled.⁸⁰

However, the Board Book's final page contained a graphic chart titled "Selected Semiconductor Transactions," (also referred to as the 'Premium Analysis') which listed, based on publicly available information, the premiums received in 17 transactions involving semiconductor companies between 2010-2014.⁸¹ The chart did not provide any additional financial analysis or further comparison apart from showing that Avago's tender offer consisting of a 26.4% share premium, while below average, fell within the range of comparable transaction premiums.⁸²

Varjabedian then amended his class action complaint seeking damages and an order rescinding the merger transaction.⁸³ Despite this, Avago's tender offer was close (i.e., only 60.58% of outstanding shares were tendered),⁸⁴ but ultimately successful and the merger between Avago and Emulex was executed.⁸⁵ In his amended complaint, Varjabedian claimed the failure to include the single page Premium Analysis created the materially misleading impression that the premium Emulex's shareholders

75. *Id.* at 402.

76. *Id.* at 401.

77. *Id.* at 402.

78. *Id.*

79. Ericson, *supra* note 62.

80. Varjabedian v. Emulex Corp., 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 7 (U.S. Oct. 10, 2018) No. 18-459.

81. *Id.* at 402.

82. *Id.* at 402–03.

83. *Id.* at 409–10.

84. Varjabedian v. Emulex Corp., 888 F.3d 399, 409–10 (9th Cir. 2018), *brief for the respondents in opposition filed*, 1, 4 (U.S. Nov. 30, 2018) No. 18-459.

85. 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), <https://www.natlawreview.com/article/ninth-circuit-splits-other-circuits-holding-negligence-standard-applies-to-claim> [<https://perma.cc/XQ6M-ETZ9>].

received was significant, or at the least in line with premiums obtained in similar transactions, as the tender offer was below market average.⁸⁶ Varjabedian stated the following when describing the basis for the amended complaint:

[T]he [Premium Analysis] did not cover one specific page from the banker's slide deck: a chart comparing the merger premium to that of selected semiconductor transactions and showing that the premium on this deal (allegedly 26.4 percent), while within the range, was below the average (allegedly 50.8 percent).⁸⁷

Emulex successfully argued for dismissal of the amended complaint, arguing that the omitted information was publicly available and immaterial, and that the plaintiff [was] required to plead scienter but had not.⁸⁸ The U.S. District Court for the Central District of California ultimately dismissed Varjabedian's amended complaint on the grounds that the plaintiff's 14(e) claim required pleading scienter and that a mere negligence standard was insufficient.⁸⁹ In the district court's reasoning, the court stated the following:

'[N]o 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 [the] 'defendants made false or misleading statements either intentionally or with deliberate recklessness.'⁹⁰

Further, the district court held that the Private Securities Litigation Reform Act ("PSLRA") unequivocally heightened pleading requirements by requiring pleading facts evincing a strong inference of scienter.⁹¹ The district court also dismissed the 14(d)(4) claim, stating that 14(d)(4) does not allow for a private right of action.⁹²

86. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 8 (U.S. Oct. 10, 2018) No. 18-459.

87. *Ericson*, *supra* note 62.

88. *Id.*

89. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 9 (U.S. Oct. 10, 2018) No. 18-459.

90. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 9 (U.S. Oct. 10, 2018) No. 18-459.

91. *Id.*

92. *Ericson*, *supra* note 62.

The key reasons for the district court's holding are as follows: firstly, nothing in the Premium Analysis contradicted the Recommendation Statement; indeed, the chart simply reported that the Emulex premium was below average for the industry but within a reasonable range of outcomes.⁹³ Second, the tender offer price was also below average for the semiconductor industry but still within a reasonable range.⁹⁴ Moreover, the district court stated the exclusion of the Premium Analysis was minor in the entire scheme of the voluminous Goldman Sachs analysis,⁹⁵ finding there was a better explanation than fraud for defendants' decision not to include the chart.⁹⁶ Finally, the district court held the plaintiff's allegations, even if accepted as true, failed to establish a "strong inference of scienter," which was required for proving Section 14(e) and proceeded to dismiss Varjabedian's amended complaint.⁹⁷

Varjabedian then appealed to the Ninth Circuit Court of Appeals.⁹⁸ The Ninth Circuit panel, consisting of Judges Graber, Murguia, and Christen, affirmed the district court's decision that Section 14(d)(4) does not establish a private right of action.⁹⁹ Accordingly, the Ninth Circuit Panel focused primarily on whether Section 14(e) requires a showing of scienter or mere negligence.¹⁰⁰

On April 20, 2018, the Ninth Circuit issued a published opinion affirming the district court's 14(d)(4) ruling, but reversing the district court's Section 14(e) scienter holding and stating that Section 14(e) requires a showing of only negligence, not scienter.¹⁰¹

The Ninth Circuit noted that it chose to part ways from its colleagues in five other circuits.¹⁰² Thereby, the Ninth Circuit currently, contradicts the Second, Third, Fifth, Sixth, and Eleventh Circuits' rationales and interpretations,¹⁰³ and finds the other circuits erred in focusing on the

93. *Id.*

94. Varjabedian v. Emulex Corp., 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 9 (U.S. Oct. 10, 2018) No. 18-459.

95. *Id.*

96. *Id.*

97. *Id.*

98. Danielle Myers, *Ninth Splits with Five Sister Circuits in Holding that §14(e) Claims Require Negligence, Not Scienter, to State a Claim*, AMERICAN BAR ASSOCIATION (Apr. 23, 2018), <https://www.americanbar.org/groups/litigation/committees/securities/practice/2018/ninth-circuit-splits-with-five-sister-circuits/> [perma.cc/DRP6-R2WF].

99. *Id.*

100. *Id.*

101. Varjabedian v. Emulex Corp., 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 8–9 (U.S. Oct. 10, 2018) No. 18-459.

102. Varjabedian v. Emulex Corp., 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 9 (U.S. Oct. 10, 2018) No. 18-459.

103. Myers, *supra* note 98.

shared text found in both Rule 10b-5 and Section 14(e).¹⁰⁴ The shared text between the two provisions is as follows:

[It is] unlawful for any person to make any untrue statement of 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.¹⁰⁵

Instead, the Ninth Circuit explained that its holding that Section 14(e) requires negligence rather than scienter is supported by the Williams Act, relevant provisions of which will be discussed in the analysis section, see *infra*.¹⁰⁶ The court found that Section 14(e) places more emphasis on the quality of the information shareholders receive in a tender offer than on the state of mind harbored by those issuing a tender offer.¹⁰⁷ The Ninth Circuit's reliance on a pure textual analysis¹⁰⁸ was further justified by the court's view that two United States Supreme Court cases had undermined the shared text argument.¹⁰⁹

The first case, *Ernst & Ernst v. Hochfelder*, held Rule 10b-5 requires a showing of scienter not because it uses language suggestive of intentional wrongdoing, but because of its authorizing legislation, Section 10(b) of the Exchange Act, 15 U.S.C. Section 78j(b), which permits the SEC to regulate only scienter-based conduct.¹¹⁰ On the other hand, the Ninth Circuit reasoned this rationale regarding Rule 10b-5 did not apply to Section 14(e), as it is a statute, not an SEC Rule.¹¹¹

The Ninth Circuit, also relied upon *Aaron v. Securities & Exchange Comm'n* to support its holding.¹¹² The Supreme Court analyzed Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2), as a statute with nearly identical wording to Section 14(e)'s first clause, which did not require a scienter.¹¹³ Thus, the Ninth Circuit held Section 14(e) only

104. Varjabedian v. Emulex Corp., 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 10 (U.S. Oct. 10, 2018) No. 18-459.

105. John P. Stigi III and 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), <https://www.natlawreview.com/article/ninth-circuit-splits-other-circuits-holding-negligence-standard-applies-to-claim> [perma.cc/W2TW-YRCJ].

106. *Id.*

107. Myers, *supra* note 98.

108. Stigi III & Landry, *supra* note 105.

109. *Id.*

110. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); Stigi III and Landry, *supra* note 107.

111. Varjabedian, 888 F.3d at 406 (citing *Ernst & Ernst v. Hochfelder*, 425 US 185, 193 (1976)); *see also* Miner, *supra* note 67.

112. Varjabedian v. Emulex Corp., 888 F.3d 399, 407–08 (9th Cir. 2018), *petition for cert. filed*, 1, 10 (U.S. Oct. 10, 2018) (No. 18-459).

113. Stigi III & Landry, *supra* note 107.

requires showing negligence.¹¹⁴ The Ninth Circuit remanded the case to the district court to review Emulex's motion to dismiss under a negligence, instead of a scienter standard.¹¹⁵

III. LEGISLATIVE HISTORY OF THE WILLIAMS ACT

Prior to 1968, the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") left a regulatory loophole.¹¹⁶ Unlike many countries, which analyze the merit of a transaction, the United States relies principally on a disclosure-based regime for regulating securities transactions.¹¹⁷ United States policy prioritizes providing quality, accurate information essential for at least two interrelated reasons: investor protection and the health of capital markets.¹¹⁸ Hofstra Professor of Law, Ronald Colombo, indicates that one only needs to relive the 2008-2009 global financial crisis to highlight the importance of accurate information and pricing.¹¹⁹

Thus, the critical nature of information disclosure in the corporate combination setting requires information and pricing disclosures under both the 1933 Act (e.g., in a stock-for-stock exchange)¹²⁰ and the 1934 Act (e.g., under a more conventional statutory merger route).¹²¹ Despite reporting requirements being in place, both the 1933 and the 1934 Acts still failed to cover all efforts at seizing corporate control.¹²² This regulatory gap¹²³ became particularly apparent during the 1960's when the United States securities markets witnessed a wave of unannounced takeovers carried out by corporate raiders, and which created a threat to managers and shareholders, who were forced to make critical decisions under unreasonable time pressure.¹²⁴

A primary mechanism used by corporate raiders for executing these unannounced takeovers were known as tender offers, which are publicly announced offers to purchase the shares of a target company—as a means

114. *Id.*

115. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 410 (9th Cir. 2018), *petition for cert. filed*, 1, 10 (U.S. Oct. 10, 2018) (No. 18-459).

116. Ronald J. Colombo, *Effectuating Disclosure Under the Williams Act*, 60 CATH. U. L. REV. 311, 315–16 (2011).

117. *Id.* at 313–14 (2011).

118. *Id.* at 314.

119. *Id.*

120. *Id.* at 315.

121. HAZEN, *supra* note 3, at 245.

122. COLOMBO, *supra* note 116, at 315.

123. HAZEN, *supra* note 3 at 245.

124. James Chen, *Williams Act*, INVESTOPEDIA (Mar. 31, 2018), <https://www.investopedia.com/terms/w/williamsact.asp>.

of effecting corporate combinations.¹²⁵ Tender offers were unregulated, “unlike conventional means of effecting takeovers such as mergers, exchange offers, and proxy contests.”¹²⁶ In its infancy, the tender offer was primarily used for uncontested situations where the offeror and the target were on friendly terms.¹²⁷

Using a tender offer in an uncontested setting was viewed as favorable because it reduced fees and expenses of the corporate combination when compared with a traditional statutory merger.¹²⁸ Additionally, uncontested tender offers were employed by an issuer attempting to repurchase its own shares.¹²⁹ Tender offers continued to be primarily used in these types of uncontested settings through the early 1960s, however, their usage quickly evolved.¹³⁰

In essence, the loopholes gained practical significance in the 1960s, when the cash tender offer became a favored method of acquiring control of publicly held corporations.¹³¹ To highlight both the scope and scale of this evolution, only eight tender offers were initiated in 1960, but more than 100 tender offers were initiated in 1966.¹³² Further, tender offers began to be employed throughout a variety of settings, for example, to obtain control of a corporation that is adverse to being taken over, to acquire a company whose board of directors, although unopposed is not in favor of sponsoring the acquisition, to gain control of a corporation before a competing bid is perfected by a third party, and to save a company in danger where a timely merger could not be made.¹³³

This substantial increase in tender offers was due to several key advantages over traditional takeover methods: (1) speed and efficiency, (2) cheaper and reduced risk of unsuccessful takeover efforts, and (3) its “secrecy and surprise” capabilities.¹³⁴ The third key advantage is that the target company is left virtually powerless to convince shareholders not to sell their shares for above-market prices when the offeror’s identity is concealed.¹³⁵

The third key benefit was the most significant as it allowed the buyer to accumulate large amounts of an issuer’s shares and to extend cash tender

125. HAZEN, *supra* note 3 at 245.

126. Neal I. Korval, *Defining Tender Offers: Resolving a Decade of Dilemma*, 54 ST. JOHN’S L. REV., 520, 522 (1980).

127. *Id.* at 521.

128. *Id.*

129. *Id.*

130. *See id.*

131. COLOMBO, *supra* note 116, at 316.

132. KORVAL, *supra* note 126, at 521.

133. *Id.*

134. *Id.* at 523.

135. *Id.* at 523–24.

offers, all in complete secrecy.¹³⁶ Tender offers also typically comprised a timing element that forced shareholders to operate on a compressed timetable.¹³⁷ Shareholders had minimal information about the offeror, and were often required to make hurried decisions while lacking key information which Congress always intended to be disclosed to investors.¹³⁸ While there were some defensive strategies to defend against hostile takeovers (e.g., poison pills and Pac-Man defenses),¹³⁹ many legal scholars accepted the basic claim that most defensive tactics are overall undesirable.¹⁴⁰ Coupled with the continued lack of regulatory oversight, a “war-like” takeover culture emerged, ultimately prompting Congressional action by the late 1960s.¹⁴¹

In 1965, New Jersey Senator Harrison Williams led drafting reform efforts to end the war-like takeover culture and began the fight to close the loopholes.¹⁴² In doing so, Senator Williams’ draft legislation stated that:

[A]ny substantial accumulation of shares of a company registered under the [1934 Securities Exchange] Act must be preceded by the filing of public information . . . as this was the only way that corporations, their stockholders, and employees [can] adequately prepare in advance to meet the threat of the takeover specialist.¹⁴³

Congress enacted Senator Williams’ legislation in 1968, known as the Williams Act.¹⁴⁴ The Williams Act amended the 1934 Act and introduced Sections 13(d), 13(e), 14(d), 14(e) and 14(f) to the 1934 Act. Essentially, Congress amended the 1934 Act by adopting the tender offer and takeover provisions of the Williams Act.¹⁴⁵

The Williams Act exclusively deals with transactions deemed to be a tender offer, a term which is not defined in the Act itself.¹⁴⁶ A variety of tests have been put forth (e.g., the SEC’s eight-factor test) to determine whether or not an offer qualifies as a tender offer.¹⁴⁷ In *Varjabedian*, both

136. COLOMBO, *supra* note 116, at 316.

137. Dale A. Oesterle, *Target Managers as Negotiating Agents for Target Shareholders in Tender Offers: A Reply to the Passivity Thesis*, 71 CORNELL L. REV. 53, 55 (1985).

138. HAZEN, *supra* note 3.

139. *Id.*

140. OESTERLE, *supra* note 137, at 54.

141. HAZEN, *supra* note 3.

142. COLOMBO, *supra* note 116, at 316.

143. *Id.*

144. KORVAL, *supra* note 126, at 521–522.

145. HAZEN, *supra* note 3, at 246.

146. Thomas Hurst, *The Regulation of Tender Offers in the United States and the United Kingdom: Self-Regulation Versus Legal Regulation*, 12 N.C. J. INT’L L. & COM. REG. 389, 394 (1987).

147. *Id.* at 395.

parties are in accord that the dispute involves a tender offer and is subject to the Williams Act.¹⁴⁸ The Williams act is subject to one exception stated as follows:

The [Williams Act] exception is that anyone who acquires over five percent of any class of equity securities of a company subject to the Act is required to file a disclosure statement with the SEC and the target regardless of whether the acquisition is by way of tender offer or otherwise.¹⁴⁹

Legislative history indicates that Congress intended the Williams Act to be neutral, and not to tip the balance of regulation in favor of the target corporation or the offeror.¹⁵⁰ Further, the legislative history highlights a primary Congressional goal, largely due to Senator Williams' intent, to close regulatory loopholes by requiring the disclosure of pertinent information to stockholders when a corporation undergoes a potential acquisition by a cash tender offer or through open market or privately negotiated purchases of securities.¹⁵¹

For the purposes of this Article, this author will provide a brief overview of the amended sections and then provide detailed analysis relating to section 14(e) as it is directly relevant to *Varjabedian*. In contrast to other provisions of the Williams Act, 1934 Act Section 14(e) applies to any tender offer using an instrumentality of interstate commerce, even if the target company is not subject to the Exchange Act's registration and reporting requirements.¹⁵²

Section 13(d) relates to the appropriate form for 1934 Act filings regarding disclosure requirements about the firm, its officers, directors, and principal business, as well as any financing arrangements that have been entered into to finance the purchase.¹⁵³ Section 13(e) of the 1934 Act makes it unlawful for issuers, subject to the 1934 Exchange Act's registration requirements, to purchase their own shares in contravention of SEC rules.¹⁵⁴ Section 14(d) requires any person planning a 'tender offer' for any class of equity security subject to the Exchange Act's registration and reporting requirements file with the Commission all solicitations, advertisements, or other material used in connection with the tender

148. *Varjabedian v. Emulex Corp.*, *aff'd in part, rev'd in part and remanded*, 888 F.3d 399, 402–03 (9th Cir. 2018), *cert. pending*, (U.S. Oct. 10, 2018) No. 18-459.

149. Hurst, *supra* note 146, at 394.

150. Hurst, *supra* note 146, at 391.

151. *Id.*

152. HAZEN, *supra* note 3, at 247–48.

153. *Id.* at 248.

154. *Id.* at 246.

offer.¹⁵⁵ Section 14(e) contains an anti-fraud provision, which the author will examine in detail, see *infra*.¹⁵⁶ Section 14(f) addresses public disclosure requirements on the applicable SEC filing forms.¹⁵⁷

IV. MOST SIGNIFICANT CASE LAW: DETERMINING WHETHER SECTION 14(E) REQUIRES A PLEADING OF SCIENTER OR MERE NEGLIGENCE

Prior to examining the Ninth Circuit's reversal of the district court's 14(e) holding, it is necessary to understand the significant tender offer case law and its historical development leading up to *Varjabedian*.

A. CASE SUMMARIES

i. *Chris-Craft Industries v. Piper Aircraft Corporation* (“*Chris-Craft*”) – Second Circuit (1973)

The Second Circuit laid the groundwork for defining the scope, as well as the principles to apply when analyzing Section 14(e), in *Chris-Craft Industries v. Piper Aircraft Corporation* (“*Chris-Craft*”).¹⁵⁸ In 1968 to 1969, both Chris-Craft Industries (“CCI”) and Bangor Punta Corporation (“BPC”) initiated financing efforts in an attempt to each individually acquire Piper Aircraft Corporation, which culminated in instant litigation.¹⁵⁹

In *Chris-Craft*, CCI's and BPC's tender offers led CCI and BPC to own forty-one percent and forty-five percent, respectively, of the outstanding Piper Shares.¹⁶⁰ CCI eventually withdrew from the power struggle leaving BPC to purchase 100,614 shares in order to gain majority control of Piper Aircraft.¹⁶¹ CCI's unsuccessful tender offer attempt cost the firm more than \$44 million.¹⁶²

155. *Id.* at 248.

156. *See id.*

157. HAZEN, *supra* note 3, at 249.

158. *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 349 (1973).

159. *Id.* at 350.

160. *Id.* at 354.

161. *Id.* at 354–55.

162. *Id.*

CCI then initiated suit, claiming, *inter alia*, each defendant violated Section 14(e) of the Securities Exchange Act of 1934, due to a joint Piper-BPC press release which stated that BPC was acquiring the Piper family's stock holdings through a tender exchange offer for a package of BPC securities. The release contained a statement that BPC would offer to the remaining Piper shareholders a package of BPC securities valued in the judgment of First Boston "at not less than \$80 per Piper share," which was later reported by the President of BPC, David W. Wallace, to a Wall Street Journal reporter.¹⁶³ However, some BPC's purchases, were conducted ultimately for less than \$80.00, made during the pendency of an exchange offer for the purchased shares, further driving up the share price.¹⁶⁴

The Second Circuit ultimately held that 14(e) was violated.¹⁶⁵ In doing so, the Second Circuit reviewed Section 14(e)'s accompanying Senate Report, stating the Report indicated clearly and more specifically than Rule 10b-5 that Section 14(e) was intended to apply the long established antifraud proscriptions of the federal securities laws to a tender offer.¹⁶⁶

When reviewing the district court's analysis, the Second Circuit held the various communications to Piper shareholders, including the press release by Piper and BPC did not violate 14(e).¹⁶⁷ However, the Second Circuit, in reversing the lower court's Section 14(e) holding acknowledged Section 14(e) was relatively new, and therefore had not been the subject of extensive judicial construction, and never in the context of the factual situation here presented.¹⁶⁸

However, the Second Circuit has held that the underlying proscription of Section 14(e) was virtually identical to Rule 10b-5; with the critical difference of the latter applicable only in connection with the purchase or sale of any security, while the former is applicable in connection with any tender offer.¹⁶⁹

Accordingly, the *Chris-Craft* court held Section 14(e) requires scienter via the principles developed under Rule 10b-5.¹⁷⁰ In short, the Second Circuit held a violation of Section 14(e) requires a material misstatement or omission concerned with a tender offer, and that such misstatement or omission was sufficiently culpable to justify granting relief to the injured party.¹⁷¹

163. *Chris-Craft Industries*, 480 F.2d at 354.

164. *Id.* at 377.

165. *Id.* at 358.

166. *Id.*

167. *Id.* at 362.

168. *Id.*

169. *Chris-Craft Industries*, 480 F.2d at 362.

170. *Id.*

171. *Id.*

ii. *Smallwood v. Pearl Brewing Co.* – Fifth Circuit (1974)

In the Fifth Circuit, *Smallwood v. Pearl Brewing Co.* (“*Smallwood*”), the court found a scienter requirement for a 14(e) violation and further raised multiple questions under the 1934 Act.¹⁷²

The plaintiff-appellant, Joe L. Smallwood, brought several claims following a tender offer, including claims under the Williams Act.¹⁷³ The dispute arose in 1968 when Pearl Brewing, Defendant-Appellee, began to look for a suitable merger partner to diversify its product portfolio.¹⁷⁴ Eventually three merger candidates were identified, and Pearl Brewing ultimately selected a company called Zapata.¹⁷⁵

However, during the tender offer process, Pearl’s Board failed to inform Pearl shareholders the merger with Zapata could be consummated without an underwriting commitment and without the ten-day period in which to tender their shares.¹⁷⁶ Pearl shareholders filed suit alleging the defendants omitted material facts; and these failures constituted fraud or deceit upon the Pearl shareholders.¹⁷⁷

Ultimately, the jury in the district court found that Pearl’s failure to inform constituted material omissions.¹⁷⁸ On appeal, the issue was whether the district court erred by not ruling that the defendants violated Section 14(e) and Rule 10b-5.¹⁷⁹ The Fifth Circuit affirmed the district court citing *Chris-Craft* and further aligning with the Second Circuit’s elemental analysis.¹⁸⁰ In doing so, the Fifth Circuit stated if Section 14(e) and Rule 10b-5’s analyses are identical the scienter standard applies, and liability in a private action for damages has apparently never been imposed for negligent conduct under Rule 10b-5.¹⁸¹

iii. *Ernst & Ernst v. Hochfelder* – Supreme Court (1976)

Ernst & Ernst v. Hochfelder (“*Ernst & Ernst*”) addresses whether an action for civil damages may lie under 10(b) of the 1934 Act and Rule 10b-5 in the absence of an allegation of intent to deceive, manipulate, or

172. *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 584 (1974).

173. *Id.*

174. *Id.* at 584–85.

175. *Id.* at 587.

176. *Id.*

177. *Smallwood*, 489 F.2d at 588.

178. *Id.* at 605.

179. *Id.*

180. *Id.*

181. *Id.* at 605–06.

defraud on the part of the defendant.¹⁸² In this case, First Securities hired Ernst & Ernst, an accounting firm, to audit documents in connection with SEC filings (e.g., 10-K reports).¹⁸³ *Ernst and Ernst* was an opportunity for the Supreme Court to directly address whether Rule 10b-5 could include both a negligence and a scienter standard.¹⁸⁴

The respondents, Olga Hochfelder, et. al. (“Hochfelder”), invested in a fraudulent securities scheme where the president of the firm and owner of ninety-two percent of its stock induced the respondents to invest in escrow accounts that the president claimed had a high return rate.¹⁸⁵ However, in reality, it was discovered that there were no escrow accounts.¹⁸⁶

Hochfelder then sued claiming (1) the escrow scheme violated Section 10(b) and Rule 10b-5 and (2) that Ernst & Ernst had aided and abetted the company’s violations by its failure to conduct proper audits of First Securities and as revealed through discovery, the respondents’ cause of action rested on a theory of negligence.¹⁸⁷ The SEC argued that subsections (b) and (c) of Rule 10b-5 are worded such that, when standing alone, the subsections could encompass both intentional and negligent behavior.¹⁸⁸

The Supreme Court reversed the Court of Appeals decision that both intentional and negligent behavior could be encompassed within Rule 10b-5 finding that such a reading could not be harmonized with the administrative history of Rule 10b-5.¹⁸⁹ While the Supreme Court conceded that subsection (b)’s and subsection (c)’s language, could be read as proscribing, respectively, any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not.¹⁹⁰

Further, the Supreme Court held such a reading of encompassing negligence cannot be harmonized with Rule 10b-5’s administrative history, which made it clear Rule 10b-5 was intended to apply only to activities that involved scienter¹⁹¹ Put simply, when a statute speaks so specifically in terms of manipulation and deception, most will understand this terminology as intentional wrongdoing.¹⁹²

182. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 187–88 (1976).

183. *Id.* at 188.

184. *Id.* at 193.

185. *Id.* at 189.

186. *Id.*

187. *Ernst & Ernst*, 425 U.S. at 189–90.

188. *Id.* at 212.

189. *Id.*

190. *Id.*

191. *Id.* at 212.

192. *Id.* at 189–90.

Accordingly, the Supreme Court in *Ernst & Ernst*, largely due to a lack of expansive intent, was unwilling to extend the statute's scope to negligent conduct.¹⁹³

iv. *Adams v. Standard Knitting Mills, Inc.* – Sixth Circuit (1980)

In *Adams v. Standard Knitting Mills, Inc.* (“*Adams*”), the appellees brought a class action suit under the 1934 Act.¹⁹⁴ Chadbourn, Inc., a North Carolina-based hosiery manufacturer, and Standard Knitting Mills, Inc., a Tennessee-based textile manufacturer, sought to merge.¹⁹⁵ A class action lawsuit followed based on the Appellees arguing that an allegedly false proxy solicitation was used to get the shareholder approval necessary for Standard Knitting and Chadbourne, Inc. to merge.¹⁹⁶ Standard's management stated their recommendation to merge with Chadbourn, Inc., in the proxy statement.¹⁹⁷

The key issue in *Adams* was whether the failure to mention certain restrictions on the payment of dividends by the acquiring corporation, applied to preferred as well as common stock in the proxy statement, was a negligent error.¹⁹⁸ In its analysis, the Sixth Circuit reviewed the congressional intent and Section 14(e)'s language, focusing on the Williams Act.¹⁹⁹ The Sixth Circuit found the Williams Act's language clearly demonstrates Congress envisioned scienter to be an element of 14(e) analysis.²⁰⁰ The Sixth Circuit determined scienter was the correct standard given Congress' use of ‘fraudulent,’ ‘deceptive,’ and ‘manipulative’ and in light of the *Ernst & Ernst* holding, that 14(e) analysis requires a showing of scienter.²⁰¹ Thus, in reversing the district court's decision in *Adams*, the Sixth Circuit Court of Appeals ruled that scienter is the required mental state for Section 14(e), based on congressional intent.

193. *Id.*

194. *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 423–24 (1980).

195. *Id.* at 424.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 430–431.

200. *Adams*, 623 F.2d at 431.

201. *Id.*

v. Aaron v. Securities and Exchange Commission – Supreme Court (1980)

A month following the *Adams* decision, the Supreme Court addressed the issue of whether the SEC is required to establish scienter as an element of a civil enforcement action to enjoin violations of Section 17(a) of the Securities Act of 1933 (“1933 Act”) and Section 10(b) of the 1934 Act in *Aaron v. SEC* (“*Aaron*”).²⁰² In *Aaron*, the petitioner, an employee manager, of a registered broker-dealer in New York made false statements regarding due diligence documents.²⁰³ Here, the manager made false statements relating to a company, Lawn-A-Mat, a lawn-care equipment franchisor and supplier.²⁰⁴ The false statements concerned files relating to Lawn-A-Mat’s deteriorating financial condition and revealed no plans for manufacturing a new car and tractor.²⁰⁵ Importantly, no corrective measures were taken to prevent the manager from making further false statements to clients.²⁰⁶

The SEC then filed a complaint in the Southern District of New York against the petitioner for, *inter alia*, violating Section 17(a) of the 1933 Act.²⁰⁷ The SEC alleged that the manager knew or had reason to know that the employees under his supervision engaged in fraudulent practices, but failed to take adequate steps to prevent those practices from continuing.²⁰⁸ The relevant provisions of Section 17(a) of the 1933 Act are as follows:

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 the use of the mails, directly or indirectly . . . (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 the light of the circumstances under which they were made, not misleading.²⁰⁹

Citing *Ernst & Ernst*, the *Aaron* court held the language and history of Section 10(b) did not require a showing of scienter in an injunction enforcement action brought by the Commission under Section 17(a)(2).²¹⁰

202. *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 682 (1980).

203. *Id.*

204. *Id.* at 682–83.

205. *Id.* at 683.

206. *Id.*

207. *Id.* at 683–84.

208. *Aaron*, 446 U.S. at 684.

209. *Id.* at 687 (also provided for reference in the Appendix).

210. *Id.* at 685 n.3.

The majority in *Aaron* reasoned that the *Ernst & Ernst* decision was consistent with such a holding since it addressed a Commission enforcement action for injunctive relief and *Ernst & Ernst* was a private cause of action.²¹¹ Put simply, with regards to Section 10(b), the Supreme Court majority held scienter is a necessary element of a violation of Section 10(b).²¹²

However, regarding whether scienter was required to prove a Section 17(a)(2) claim, the Supreme Court relied largely on congressional intent, stating a negligence standard is sufficient to support an injunction.²¹³ In support, the Court relied upon congressional intent, finding securities legislation enacted for the purpose of avoiding frauds should not be construed technically or restrictively, but flexibly to effectuate its remedial purposes.²¹⁴ The Supreme Court held nothing on the face of 17(a)(2) necessitates a finding of both scienter or intent to defraud.²¹⁵

The majority also examined Sections 20(b) and 21(d) and determined that nothing on the face of either provision nor contrary legislative history imposed an independent requirement of scienter.²¹⁶ Section 17(a)(1) requires scienter, but scienter is not required for a finding under Section 17(a)(2) or 17(a)(3).²¹⁷

The concurring opinion instead held sound reasons are available to distinguish between private damages and public enforcement actions under these statutes, and therefore, apply a scienter standard for private damages actions.²¹⁸ For example, the general tenor of state securities laws was cited as it pertains to equitable relief. Moreover, this notion was further reinforced via the Concurring Justices issuing a reminder that the Supreme Court was examining equity practice requirements, which consisted of several centuries of development.²¹⁹

Justice Blackmun's dissent conceded the history, statutory structure, legislative purpose, and policy suggested injunctive relief did not require scienter per Section 17(a) and Section 10(b).²²⁰ Justice Blackmun further relied upon Congress's prior approval of scienter's use in both private damages and public enforcement actions to diminish the importance of a preliminary scienter finding.²²¹ Put simply, scienter should apply for all

211. *Id.* at 691–92.

212. *Id.* at 695.

213. *Aaron*, 446 U.S. at 701.

214. *Id.* at 695.

215. *Id.* at 696.

216. *Id.* at 701.

217. *Aaron*, 446 U.S. at 701.

218. *Id.* at 704.

219. *Id.* at 712.

220. *Id.* at 717.

221. *Id.*

Section 17 provisions in a private right of action and a negligence standard may apply only for Section 17 SEC enforcement actions when the statute and relevant case law is interpreted in its respective context.²²²

vi. *Connecticut Nat. Bank v. Fluor Corp.* – Second Circuit (1987)

The *Connecticut Nat. Bank v. Fluor Corp.* (“*Connecticut Nat.*”) arose out of Fluor Corp.’s tender offer for St. Joe’s Mineral Corporation.²²³ On May 4, 1981, the Plaintiff Appellants, Connecticut Nat. Bank (“CNB”), bought 39,000 St. Joe Shares from Hartford Steam Boiler Company.²²⁴ However, that number of shares represented the number that Fluor, by virtue of the proration requirements of the Williams Act, would have purchased if CNB tendered the 50,000 shares before midnight on April 15.²²⁵ When CNB later resold the shares following Fluor’s expiration date, the firm suffered a net loss in excess of \$550,000.²²⁶

CNB then brought claims under Sections 14(d) and 14(e) of the 1934 Act, alleging Fluor’s failure to print the oversubscription restriction in the same paragraph with, and in the same size print as, the May 1, 1981, expiration date of the tender offer, and its failure in other ways to emphasize that restriction, constituted misstatements and omissions of material facts in the description of the tender offer in violation of the Williams Act.²²⁷ Further, CNB stated shareholders were misled by the offer, alleging scienter stating the following:

Fluor intended to mislead the Shareholders or their agents, commercial banks or custodians by the aforesaid misstatements and omissions, or knew or should have known that the misstatements and omissions would mislead and confuse the shareholders or their agents, commercial banks, or custodians and acted recklessly and wantonly in communicating the terms of the offer.²²⁸

The district court dismissed this Williams Act claim since CNB’s allegations of scienter failed to comply with Rule 9(b) requirements.²²⁹ The Second Circuit upholding the district court’s holding, further dismissed

222. *Id.* at 712.

223. *Connecticut Nat. Bank v. Fluor Corp.*, 808 F.2d 957, 958 (1987).

224. *Id.* at 959–60.

225. *Id.*

226. *Id.* at 960.

227. *Id.*

228. *Id.*

229. *Connecticut Nat. Bank*, 808 F.2d at 959.

the above claim, emphasizing that scienter was a necessary element for a damages claim under Section 14(e).²³⁰ Moreover, the Second Circuit reiterated that the same principles for determining scienter under Rule 10b-5 apply likewise to Section 14(e).²³¹

vii. *In re Digital Island Securities Litigation* – Third Circuit (2004)

In re Digital Island Securities Litigation (“*Digital Island*”), former shareholders of Digital Island, Inc., an e-commerce provider as well as the acquired corporation here, brought a class action lawsuit against the company.²³² Cable & Wireless PLC’s (“C & W”) acquired Digital Island, Inc., via a tender offer which resulted in C & W purchasing eighty percent of Digital Island’s outstanding shares.²³³ In May 2001, Digital Island announced that it entered into an agreement to provide certain business services to Microsoft, increasing Digital Islands’ share price from \$2.00 to \$3.69 per share.²³⁴

Three days later, the Digital Island board unanimously voted to approve the merger and to recommend that shareholders accept the tender offer price of \$3.40.²³⁵ However, Digital Island announced two significant business deals immediately following the tender offer’s expiration.²³⁶ The two business deals were with (1) Bloomberg LP and (2) Major League Baseball (“MLB”).²³⁷ Based on this announcement, and immediately following C & W’s tender offer, Digital Island, Inc., shareholders filed a class action suit under Section 14(e).²³⁸ The shareholders claimed that both “the Bloomberg and MLB deals had substantial value to Digital Island, and, if disclosed, would have substantially influenced the shareholders’ decision to tender their shares.”²³⁹

In affirming the district court’s decision, the Third Circuit held, citing *Ernst & Ernst*, that Section 14(e) was modeled on the antifraud provisions of Section 10(b) of the 1934 Act and Rule 10b-5 and therefore also required proof of scienter.²⁴⁰ The Third Circuit reasoned that courts historically have construed both Sections 14(e) and 10(b) consistently

230. *Id.* at 961.

231. *Id.*

232. *In re Digital Island Securities Litigation*, 357 F.3d 322, 324–25 (2004).

233. *Id.* at 325.

234. *Id.*

235. *Id.* at 325–26.

236. *Id.* at 326.

237. *In re Digital Island*, 357 F.3d at 326.

238. *Id.*

239. *Id.*

240. *Id.* at 328.

because of the similarity in the language and scope of Section 14(e) and Rule 10b-5.²⁴¹

viii. *Securities and Exchange Commission v. Ginsburg* – Eleventh Circuit (2004)

SEC v. Ginsburg (“*Ginsburg*”) arose from a suspect trading pattern that occurred.²⁴² Family members made several trades following multiple phone calls from a principal relaying alleged tips related to a tender offer.²⁴³ The allegations alleged that Ginsburg told his brother, Mark Ginsburg, and his father, Jordan Ginsburg, material nonpublic information relating to two merging companies, EZ Communications, Inc., and Katz Media Group, and that Mark and Jordan had traded on EZ stock using that information.²⁴⁴

The SEC brought a civil enforcement action against Ginsburg.²⁴⁵ In reversing the district court’s holding, the Eleventh Circuit held, pursuant to *Aaron* that to establish liability under Section 10(b) and Section 14(e) and accompanying Rules 10b-5 and 14e-3, the SEC must prove that Ginsburg acted with scienter.²⁴⁶

The Eleventh Circuit reasoned the factors would be rendered meaningless if no injunction was entered where every factor weighed in favor of an injunction, as was the case in *Ginsburg*.²⁴⁷ Accordingly, the district court’s judgment was reversed and remanded with instructions to enjoin Scott Ginsburg from future violations of the securities laws.²⁴⁸

ix. *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.* – Fifth Circuit (2009)

Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp. (“*Flaherty*”) arose out of a class action by convertible securities holders responding to a tender offer.²⁴⁹ The corporation, TXU, and its CEO, Stan Haiduk (“Haiduk”), allegedly were aware of an imminent dividend increase at the time of share repurchase.²⁵⁰ The appellants alleged that TXU and Haiduk made material misrepresentations and omissions of fact in

241. *Id.*

242. *S.E.C. v. Ginsburg*, 362 F.3d 1292, 1295 (11th Cir. 2004).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 1297.

247. *Ginsburg*, 362 F.3d. at 1305.

248. *Id.*

249. *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 200 (5th Cir. 2009).

250. *Id.*

connection with a self-tender offer to purchase certain convertible TXU securities by the tender offer in 2004.²⁵¹ Also, the appellants brought fraud claims under Section 10(b) and 14(e) of the 1934 Act and Rule 10b-5.²⁵² The claims were based on the premise that appellees fraudulently misrepresented the timing and magnitude of a planned stock repurchase program and dividend increase to induce participation in the tender offer.²⁵³ The district court dismissed the above claims, requiring a showing of scienter and not mere negligence.²⁵⁴

The Fifth Circuit, affirmed the district court's scienter requirement, and held plaintiffs must allege a misstatement or an omission of a material fact made with scienter on which the plaintiffs relied that proximately caused the plaintiff's injury.²⁵⁵ Accordingly, the Fifth Circuit, citing *Smallwood*, found scienter is required for Section 14(e) claims because of the identical elemental nature of Rule 10b-5 and Section 14(e).²⁵⁶

x. *In re Tangoe, Inc. Stockholders Litigation* – D.C. Conn. (2018)

In 2018, shareholders filed a consolidated class action against Tangoe, a global telecom and expense management corporation, and its Board of Directors in the District Court for the District of Connecticut alleging 1934 Act violations following a tender offer.²⁵⁷ The class action shareholders alleged that Tangoe and its Board intentionally made misstatements and omitted material information from the Recommendation Statement to induce stockholders to participate in the tender offer for their own personal gain.²⁵⁸

The district court found the claimants failed to state a claim for violation of the statute making it unlawful to engage in any fraudulent, deceptive or manipulative practice in connection with the tender offer.²⁵⁹ In so holding, the district court examined Section 14(e)'s requirements:

- (1) [D]efendant misrepresented or omitted ... material facts in connection with the purchase or sale of a security;
- (2) the shareholders relied to their detriment upon the misrepresentations

251. *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 203 (5th Cir. 2009).

252. *Id.* at 203.

253. *Id.*

254. *Id.*

255. *Id.* at 207.

256. *Flaherty*, 565 F.3d at 207.

257. *In re Tangoe, Inc. Stockholders Litigation*, 333 F. Supp. 3d 77, 77 (2018).

258. *Id.* at 80.

259. *Id.* at 77.

or omissions; and (3) the misrepresentations or omissions were made with scienter.²⁶⁰

Thus, in *In re Tangoe, Inc.* (“*Tangoe*.”) the plaintiffs did not satisfy the above scienter requirement.²⁶¹ The district court, in citing *Aaron*, also acknowledged, as the Ninth Circuit did in *Varjabedian*, that Section 17(a)(2) of the 1933 Act and the first clause of Section 14(e) contain near-identical wording, but found that reasoning ultimately unpersuasive.²⁶² In support of its position, the district court held:

While the Ninth Circuit has abandoned the requirement of pleading scienter for claims under Section 14(e), neither the Supreme Court—since its decision in *Aaron* considered Section 17(a)(2) of the Securities Act, not Section 14(e) of the Exchange Act—nor the Second Circuit has abandoned scienter as an element of pleading a claim under Section 14(e), and this Court therefore will continue to apply the current law in this Circuit.²⁶³

The *Tangoe* court further relied upon a previous case in its own district, *Sodhi*,²⁶⁴ which held scienter was an independently sufficient ground to grant a motion to dismiss.²⁶⁵ In addition, the *Tangoe* opinion reiterated the requirements to satisfy a Section 14(e) claim: (1) Defendants misrepresented or omitted to state material facts in connection with the purchase or sale of a security; (2) the shareholders relied to their detriment upon the misrepresentations or omissions; and (3) the misrepresentations or omissions were made with scienter.²⁶⁶

Accordingly, the district court held, even in light of the Ninth Circuit’s ruling in *Varjabedian*, a showing of scienter, not mere negligence, is required to successfully plead a Section 14(e) claim.²⁶⁷

V. ANALYSIS OF THE NINTH CIRCUIT’S HOLDING IN *VARJABEDIAN*

The Ninth Circuit’s holding in *Varjabedian* rests, for the scope of this Article, on three key premises: (1) Section 14(e)’s text is disjunctive and

260. *Id.* at 98.

261. *Id.* at 99.

262. *Id.* at 107.

263. *In re Tangoe*, 333 F. Supp. 3d at 107.

264. *Sodhi v. Gentium S.p.A.*, No. 14-CV-287 JPO, at 1, 1 (S.D.N.Y. Jan. 22, 2015).

265. *In re Tangoe*, 333 F. Supp. 3d at 107.

266. *Id.*

267. *Id.*

renders two separate and distinct clauses; (2) under the isolated language of Section 14(e)'s first clause, as analyzed in *Ernst & Ernst* and *Aaron*, a pleading of negligence, not scienter, is sufficient under Section 14(e); and (3) Emulex's concerns regarding the creation of a de facto negligence standard are unfounded.²⁶⁸ The Conclusion section of the Ninth Circuit's opinion states the following:

We are aware that our holding today parts ways from our colleagues in five other circuits. However, . . . we are persuaded that intervening guidance from the Supreme Court compels the conclusion that Section 14(e) of the [1934] Exchange Act imposes a negligence standard. Accordingly, we **REVERSE** the district court's decision as to the Section 14(e) claim [emphasis in original].²⁶⁹

Regarding the text of Section 14(e), the Ninth Circuit's justification for its holding, closely aligns with the Appellant's Appellate and Supreme Court briefs.²⁷⁰ The Ninth Circuit relied heavily on a plain reading of Section 14(e).²⁷¹ In so doing, the Ninth Circuit states that a purely textual interpretation readily divides the Section 14(e) into two clauses, each proscribing different conduct.²⁷² In *Varjabedian*, the court focused on the "or":

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.²⁷³

The *Varjabedian* opinion finds Section 14(e) proscribes two different offenses.²⁷⁴ Moreover, the Ninth Circuit solely relies on the plain language

268. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *brief for the respondents in opposition filed*, 1, 2 (U.S. Nov. 30, 2018) No. 18-459.

269. *Id.* at 409–10, *cert. pending*, (U.S. Oct. 10, 2018) No. 18-459.

270. *Id.* at 405–06, *cert. pending*, (U.S. Oct. 10, 2018) No. 18-459; *see also Id.* at 409–10.

271. *Id.* at 407–08.

272. *Varjabedian v. Emulex Corp.*, *aff'd in part, rev'd in part and remanded*, 888 F.3d 399, 404 (9th Cir. 2018), *cert. pending*, (U.S. Oct. 10, 2018) No. 18-459.

273. *Varjabedian v. Emulex Corp.*, *aff'd in part, rev'd in part and remanded*, 888 F.3d 399, 404 (9th Cir. 2018), *cert. pending*, (U.S. Oct. 10, 2018) No. 18-459, (emphasis and numbering added to statutory language).

274. *Id.*

meaning to predominate the statutory interpretation analysis.²⁷⁵ Thus, the use of the word “*or*” separating the two clauses in Section 14(e) shows that there are two distinct offenses that the statute proscribes.²⁷⁶ To hold otherwise, according to the Ninth Circuit, would be an improper statutory interpretation.²⁷⁷

Stated alternatively, a purely textual interpretation supposedly permits the Ninth Circuit to view the first clause of Section 14(e) in isolation.²⁷⁸ Thus, removing the preliminary clause away from its appropriate Section 14(e) context is supposedly appropriate statutory interpretation.²⁷⁹ Further, the Ninth Circuit then relates the preliminary clause to materially indistinguishable text from other contexts to hold that the first clause, not its second, only requires a pleading of negligence, not scienter.²⁸⁰

On balance, the Ninth Circuit’s textual interpretation of Section 14(e) is flawed.²⁸¹ While, statutory interpretation does begin with the plain language, it certainly does not end there.²⁸² Context is a primary determinant of meaning.²⁸³ In addition, the Supreme Court has consistently stressed the importance of reading a statute holistically and avoiding construing statutory phrases in isolation.²⁸⁴

In essence, statutory provisions are not hermetically sealed off from the rest of the same sentence.²⁸⁵ In *Chris-Craft*, the Supreme Court already stated that Section 14(e) is modeled on the antifraud provisions of Section 10(b) and Rule 10b-5.²⁸⁶ Accordingly, Section 14(e) is an antifraud prohibition, not a negligence prohibition.²⁸⁷

A review of the legislative history is also necessary to place Section 14(e) in its appropriate context.²⁸⁸ When constructing Section 14(e):

275. *Id.*

276. *Id.*

277. *Id.* at 404–05.

278. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 16-17 (U.S. Oct. 10, 2018) No. 18-459.

279. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *brief for the respondents in opposition filed*, I, I (U.S. Nov. 30, 2018) No. 18-459.

280. *Id.*

281. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 17 (U.S. Oct. 10, 2018) No. 18-459.

282. *Id.*

283. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167, 174 (2012).

284. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 17 (U.S. Oct. 10, 2018) No. 18-459.

285. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 9 (U.S. Dec. 18, 2018) No. 18-459.

286. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 18 (U.S. Oct. 10, 2018) No. 18-459.

287. *Id.*

288. *Id.*

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.’²⁸⁹

When conducting statutory interpretation, words are known by the company they keep.²⁹⁰ Thus, an examination of the legislative history is also critical to conduct a thorough textual interpretation.²⁹¹ The language Congress selected for 14(e) cannot merely be read in isolation because words in the same sentence, as is the case with Section 14(e)’s construction, were intended to have the same connotation. This is particularly true, however, in *Varjabedian*, as ignoring those neighbors would give “unintended breadth” to the Acts of Congress.²⁹²

The Respondents, claim a negligence standard applies because Section 14(e)’s text is unambiguous, yet they later cut against their own proposition by stating that Section 14(e) does not expressly require any specific state of mind.²⁹³ Per Congress’ perspective, the scienter element is viewed as so critical in the securities law context that they added a special, heightened pleading standard for it in the PSLRA of 1985.²⁹⁴

In conclusion of the first premise, the Ninth Circuit’s failure to properly read Section 14(e) in its proper context, does not justify the departure from the otherwise uniform precedent on this issue across the country for the half-century since enactment of Section 14(e).²⁹⁵

The Ninth Circuit’s second premise is based on two decades-old Supreme Court decisions, lending particular focus on a 1976 decision where the Supreme Court did conclude Rule 10b-5 required scienter as the SEC has the authority to regulate manipulative or deceptive practices.²⁹⁶ In short, the Ninth Circuit does not lend appreciable weight to the SEC context versus a private right of action and, accordingly, misapplies *Ernst & Ernst*. In so holding, the Ninth Circuit then stated the rationale regarding Rule 10b-5 does not apply to Section 14(e), which is a statute, not an SEC Rule.²⁹⁷ The Ninth Circuit panel asserts Section 17(a)(2) of the Securities

289. *Id.* at 17.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 9 (U.S. Dec. 18, 2018) No. 18-459.

294. *Id.*

295. *Id.* at 5.

296. *Miner*, *supra* note 67.

297. *Varjabedian v. Emulex Corp.*, *aff’d in part, rev’d in part and remanded*, 888 F.3d 399, 409 (9th Cir. 2018), *cert. pending*, (U.S. Oct. 10, 2018) No. 18-459.

Act of 1933—and the first clause of Section 14(e), contain nearly identical wording.²⁹⁸ 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 not misleading.²⁹⁹

The Ninth Circuit does, and quite compellingly so from a surface-level analysis, state that the first clause’s text is devoid of any suggestion of a scienter requirement.³⁰⁰ Section 17(a)(2) appears in the 1933 Act whereas Section 14(e) appears in the 1934 Act, citing their own circuit stating, “statutes dealing with similar subjects should be interpreted harmoniously.”³⁰¹ The Ninth Circuit’s argument is this similarity in wording, irrespective of context, supposedly supports the proposition that Section 14(e) only requires a mere negligence showing because *Aaron* held that Section 17(a)(2) does not require a showing of scienter.³⁰²

The Ninth Circuit’s reliance on both *Ernst & Ernst* and *Aaron* is misplaced.³⁰³ Essentially, the source of the confusion stems from the Ninth Circuit believing 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.”³⁰⁴

However, the *Ernst & Ernst* dicta pertaining to Rule 10b-5’s text, does not necessarily compel finding that any inferred right of action should necessarily extend to negligence.³⁰⁵ The Ninth Circuit further did not account for the fact that Section 14(e) must be read as a whole, and in light of its antifraud objective.³⁰⁶ The central holding in *Ernst & Ernst* was that both the legislative histories of the 1933 and 1934 Acts highlight the following takeaway:

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

298. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 406 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 782, 202 L. Ed. 2d 511 (2019).

299. *Id.*

300. *Id.* at 16.

301. *Id.* at 12.

302. *Id.*

303. *Id.* at 13.

304. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 20 (U.S. Oct. 10, 2018) No. 18-459.

305. *Id.* at 21.

306. *Id.*

imposed for the express causes of actions it created that cover negligent behavior . . . **That applies equally to Section 14(e).**³⁰⁷

The Ninth Circuit's reliance on *Aaron* and Section 17(a)(2) is misguided.³⁰⁸ In *Aaron*, the Supreme Court held that Section 17(a)(2) of the 1933 Act did not require a showing of scienter.³⁰⁹ The Second Circuit has and continues to apply a scienter standard even in light of the very cases the Ninth Circuit claims question continuing viability of the foundation for *Chris-Craft* and the cases that followed it, all requiring scienter.³¹⁰

Further, and perhaps most convincingly, in *Aaron* the SEC was not pursuing a damages remedy under an inferred cause of action, but instead proceeded under an express public cause of action, contained in Section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b), which authorizes injunctive relief.³¹¹

Aaron involved an express cause of action.³¹² Therefore, the principles that restrain judicial creation of an implied private remedy did not apply.³¹³ Moreover, because *Aaron* only involved a request for injunctive relief, the additional limits that have traditionally applied to securing damages for alleged fraud did not apply.³¹⁴ Hence, the negligence standard can be summarized as follows:

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 . . . [the Supreme] . . . 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**

307. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 21 (U.S. Oct. 10, 2018) No. 18-459 (emphasis added).

308. *Id.*

309. *Id.*

310. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 4 (U.S. Dec. 18, 2018) No. 18-459.

311. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 21 (U.S. Oct. 10, 2018) No. 18-459.

312. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 4 (U.S. Dec. 18, 2018) No. 18-459.

313. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 21–22 (U.S. Oct. 10, 2018) No. 18-459.

314. *Id.*

underscores the need for [the Supreme Court's] intervention.³¹⁵

Applying *Chris-Craft* and *Smallwood*, the Fifth Circuit followed the Second Circuit in requiring the same elements to establish a violation of either Section 14(e) or Rule 10b-5.³¹⁶

The Ninth Circuit claims that it is obvious that *Chris-Craft* is inconsistent with *Ernst & Ernst* and *Aaron*.³¹⁷ However, the Ninth Circuit is just arguing the merits. Further, the Second Circuit declared, years after *Aaron* and *Ernst & Ernst*, that it remained well settled in the Second Circuit that scienter is a necessary element of a claim for damages under Section 14(e).³¹⁸ *Sodhi*, is also instructive here, stating the following:

[T]he Ninth Circuit has abandoned the requirement of pleading scienter for claims under Section 14(e) . . . [N]either the Supreme Court . . . nor the Second Circuit has abandoned scienter as an element . . . under Section 14(e), and this Court therefore will continue to apply the current law in [the Second] Circuit . . . because the Second Circuit has squarely held that scienter is required under Section 14(e).³¹⁹

In light of these facts, the Ninth Circuit's statement in *Varjabedian* that they were unsure how recent case law impacts the instant case,³²⁰ is misguided and shows an unjustified willingness to dismiss long held precedent that had existed since enactment of Section 14(e).³²¹

The third and final key premise for the scope of this Article highlights the Ninth Circuit's failure to fully appreciate the substantial risks that a *Varjabedian*-type circuit split would foster. The *Varjabedian* opinion, in addition to creating a circuit split by parting ways from their colleagues in five other circuits, lacks the necessary discussion to warrant such a drastic

315. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 22 (U.S. Oct. 10, 2018) No. 18-459 (emphasis added).

316. *Id.*

317. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 4 (U.S. Dec. 18, 2018) No. 18-459.

318. *Id.*

319. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 5 (U.S. Dec. 18, 2018) No. 18-459.

320. *Varjabedian v. Emulex Corp.*, *aff'd in part, rev'd in part and remanded*, 888 F.3d 399, 412 (9th Cir. 2018), *cert. pending*, (U.S. Oct. 10, 2018) No. 18-459.

321. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 5 (U.S. Dec. 18, 2018) No. 18-459.

departure, leaving one to consider if the Court even contemplated the consequences of its actions, much less in a sufficient manner.³²²

The Respondents' attempt to dismiss the forum shopping problem is also unpersuasive, as the key economic concern in *Varjabedian* is not why *this case* was filed in the Ninth Circuit, but whether plaintiffs will flock to the Ninth Circuit if the decision is allowed to stand.³²³ Of course they will.³²⁴

The Respondents attempt to dismiss Emulex's petition for certiorari stating, *inter alia*, that aside from a few errant statements and some superficial disagreement, there is no legitimate split.³²⁵ Thus, the Respondents incorrectly conclude no further review is warranted.³²⁶ Cutting against their own statements, however, the Respondents also state that a genuine circuit conflict does not exist in a futile attempt to explain away, what the Ninth Circuit itself acknowledges, as a circuit split as it parted ways with five other Circuits.³²⁷ Emulex is the one, in fact, that properly gauges the far-reaching impacts that *Varjabedian* has and will have, if not reversed, as it states:

Eliminating a scienter requirement also will open the doors to a whole new class of defendants . . . [T]he scienter element has traditionally prevented application of Section 14(e) to financial advisors or commentators on transactions, who, unlike, say, members of a board of directors, have no direct interest in the transaction and thus no motive for fraud. But the Ninth Circuit's new negligence standard will expose that additional group of defendants to suit for providing negligent advice to their clients or even to the public at large.³²⁸

Moreover, the Respondents claim that concerns over creating a de facto nationwide negligence standard are unwarranted because it is geography, not lenient standards, that drives the Ninth Circuit's docket.³²⁹

322. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 7 (U.S. Dec. 18, 2018) No. 18-459.

323. *Id.*

324. *Id.*

325. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *brief for the respondents in opposition filed*, 1, 7 (U.S. Nov. 30, 2018) No. 18-459.

326. *Id.*

327. *Varjabedian v. Emulex Corp.*, *aff'd in part, rev'd in part and remanded*, 888 F.3d 399, 409 (9th Cir. 2018), *cert. pending*, (U.S. Oct. 10, 2018) No. 18-459.

328. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 7 (U.S. Dec. 18, 2018) No. 18-459.

329. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *brief for the respondents in opposition filed*, 1, 26 (U.S. Nov. 30, 2018) No. 18-459.

The Respondents attempt to use statistical analysis to justify the above proposition claiming that approximately the same percentage of all cases are filed in the Ninth Circuit relative to the population it serves.³³⁰ This statistical analysis, however, fails to account for Section 14(e)'s liberal jurisdiction requirements that allows for a class action plaintiff to bring a suit in the Ninth Circuit if he or she satisfies the 1934 Act's liberal jurisdiction provision providing that:

Section 27 of the Exchange Act provides that venue is proper anywhere, among other places, that the defendant is found or is an inhabitant or transacts business.³³¹

As a result of this liberal jurisdictional requirement, a plaintiff may file Section 14(e) tender offer claims against a corporation in any district where the corporation 'transacts business'; however, most public companies transact business and conduct tender offers across all 50 states.³³² Therefore, stockholder plaintiffs, then, are likely to take advantage of the lower negligence standard for Section 14(e) claims in the Ninth Circuit.³³³

Rational economic actors are likely to respond to new constraints on their behavior.³³⁴ The belief that Respondents subscribe to is that class action plaintiffs' attorneys will not forum shop merger objection suits, as the Respondent states that venue decisions are motivated by a multitude of considerations.³³⁵

The Respondents' argument is incomplete and, accordingly, unconvincing as members of the plaintiffs' bar, despite their protestations to the contrary, are rational economic actors.³³⁶ Further, the Respondents conveniently fail to address the statistical reality that, the Ninth Circuit already attracts a disproportionate number of merger objection filings.³³⁷ Finally, although half of all U.S. corporations and over sixty-seven percent of all Fortune 500 companies are incorporated in Delaware, in 2017, only

330. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *brief for the respondents in opposition filed*, 1, 26 (U.S. Nov. 30, 2018) No. 18-459.

331. Brief for the Securities Industry and Financial Markets Association, *supra* note 1, at 14.

332. *Id.* at 4.

333. *Id.*

334. HENRY BUTLER, CHRISTOPHER DRAHOZAL, AND JOANNA SHEPHERD, *ECONOMIC ANALYSIS FOR LAWYERS* 1, 10 (3rd ed. 2014).

335. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *brief for the respondents in opposition filed*, 1, 26 (U.S. Nov. 30, 2018) No. 18-459; JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* 1, 140 (1st ed. 2008).

336. JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* 1, 140 (1st ed. 2008).

337. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *reply brief for the petitioners filed*, 1, 14 (U.S. Dec. 18, 2018) No. 18-459.

twenty-five percent of all federal-court challenges to deals were filed in the Third Circuit.³³⁸

Accordingly, the Respondents fail to provide convincing answers to the three key premises (summarized at the beginning of Section V of this Article) that aim to validate the Ninth Circuit's reasoning. On balance, the risk of creating a sudden, de facto nationwide negligence standard for Section 14(e) via forum shopping is substantial if the Ninth Circuit's decision in *Varjabedian* stands.³³⁹

VI. CONCLUSION

The Ninth Circuit's holding in *Varjabedian* departs from half a century of established case law and creates a circuit split with five other circuits. The elimination of a scienter requirement for Section 14(e) pleadings exposes an entirely new class of potential defendants, namely financial advisors and commentators on transactions. As witnessed following the Delaware Court of Chancery's crackdown on disclosure-only fee awards, the plaintiffs' bar, as a rational economic actor, does forum shop. The Ninth Circuit is not immune to this established economic principle, as the 1934 Act's liberal jurisdiction and venue provisions will only further promote a de facto nationwide negligence standard for all Section 14(e) cases.

In addition to both the immense financial stakes and the creation of a de facto nationwide negligence standard, the Ninth Circuit's legal analysis in *Varjabedian* is misguided. In reviewing Section 14(e)'s legislative history, the *Varjabedian* decision cuts against Rule 10b-5, which is the very antifraud rule after which Section 14(e) was modeled. Moreover, the Ninth Circuit's textual analysis fails to examine Section 14(e) in light of its appropriate context, as words in the same sentence cannot merely be read in isolation. The *Varjabedian* decision, at its core, fails to appreciate private rights of actions versus SEC enforcement actions within Section 14(e)'s appropriate context.

The Ninth Circuit's *Varjabedian* decision, for the abovementioned reasons, is ripe for the Supreme Court to review. Accordingly, the Supreme Court should reverse the Ninth Circuit's *Varjabedian* decision, holding that Section 14(e) requires a pleading of scienter, not mere negligence.

338. *Id.*

339. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, 1, 24 (U.S. Oct. 10, 2018) No. 18-459.

VII. APPENDIX

For the scope of this Article, the most relevant statutory provisions are provided below for convenient reference.³⁴⁰

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

340. Varjabedian v. Emulex Corp., 888 F.3d 399, 409–10 (9th Cir. 2018), *petition for cert. filed*, i, iv (U.S. Oct. 10, 2018) No. 18-459.

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 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.

* * *

Section 14(e) 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.

* * *

Rule 10b-5**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.