No. 18-459

IN THE

Supreme Court of the United States

EMULEX CORPORATION, ET AL.,
Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,
Respondents.

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

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is the leading securities industry trade association, representing the interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA works to represent its members' interests locally and globally. SIFMA has offices in New York and Washington, D.C. and is the U.S. regional member of the Global Financial Markets Association.

On behalf of the industry's nearly one million employees, SIFMA advocates on issues affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA's mission is to support a strong financial industry while promoting fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. To further that mission, SIFMA regularly files *amicus* briefs in cases that raise issues of concern to securities industry participants. *See, e.g.*, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 583 U.S. ___, 138 S. Ct. 1061

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of SIFMA's intent to file this *amicus curiae* brief, and all parties consented to the filing. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than SIFMA, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

(2018); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. ___, 135 S. Ct. 1318 (2015); *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013); *Gabelli v. SEC*, 570 U.S. 254 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011).

The issues raised by Emulex's petition for certiorari in this case (the "Petition") are of vital importance to SIFMA and its members. The plaintiffs-side securities class action bar files lawsuits challenging the vast majority of U.S. public company merger transactions. These "merger objection" suits frequently focus on the financial advice provided to the seller's board of directors – stockholders allege that the financial advisors' analyses were flawed and accompanied by inadequate or incomplete disclosures. The financial analyses at issue in these "merger objection" class actions typically are provided by SIFMA members.

Until recently, stockholders filed most "merger objection" class actions in state court under theories based on state law, including disclosure obligations thereunder. Since early 2016, however, and for reasons discussed more fully below, stockholders have changed strategies and now are filing "merger objection" cases in federal court invoking § 14 of the Securities Exchange Act of 1934 (the "Exchange Act") rather than state disclosure law. The Petition here concerns § 14(e), the subsection of the statute governing mergers completed by tender offer. The Ninth Circuit's decision here, which assumes the existence of an implied private right of action and adopts a simple negligence standard for § 14(e) claims, will have an enormous impact on the mergers and acquisitions industry and especially on financial advisors.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

In its opinion below, the Ninth Circuit became the first circuit to hold that claims under § 14(e) of the Exchange Act require a stockholder to plead and prove ordinary negligence, rather than scienter. In contrast, the Second, Third, Fifth, Sixth and Eleventh Circuits have long held that § 14(e), like § 10(b) of the Exchange Act and SEC Rule 10b-5, requires a showing of intentional fraud or scienter.[3] Given the importance of the federal securities laws to the proper functioning of the financial markets, this circuit split alone warrants this Court's attention.

The Court should grant the Petition for several additional reasons. *First*, the elements of a § 14(e) claim have become critically important given recent developments in the "merger objection" litigation industry. Beginning in or around 2000, plaintiffs-side securities class action firms began filing an

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[2] This Court has never held that there is an implied private right of action under § 14(e). The Ninth Circuit has assumed that such a private right of action exists without expressly analyzing the issue. *See* App. 19a.

[3] *See SEC v. Ginsburg*, 362 F.3d 1292 (11th Cir. 2004); *In re Digital Island Sec. Litig.*, 357 F.3d 322 (3d Cir. 2004); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422 (6th Cir.), *cert. denied*, 449 U.S. 1067 (1980); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

increasing number of lawsuits challenging public company merger transactions. By 2015, more than 90% of all public company deals were targeted with abusive "merger objection" litigation. The vast majority of these cases were filed in state court, most frequently in Delaware.

In early 2016, however, the Delaware Chancery Court issued the landmark decision *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 885 (Del. Ch. 2016), which severely limited the ability of stockholders to bring frivolous "merger objection" litigation. To avoid the impact of the *Trulia* decision, stockholders began filing their "merger objection" suits in federal court, relying on § 14 of the Exchange Act. As a result, the number of "merger objection" cases in federal courts has doubled since 2016. "Merger objection" litigation has become a federal court and federal law problem that likely will be exacerbated by the Ninth Circuit's decision allowing stockholder plaintiffs to bring § 14(e) claims on a showing of mere negligence.

Second, the Ninth Circuit's outlier decision risks establishing a de facto national standard in § 14(e) cases. Under the Exchange Act, a plaintiff may file § 14(e) tender offer claims against a corporation in any district where the corporation "transacts business"; most public companies transact business and conduct tender offers across all 50 states. Stockholder plaintiffs, then, are likely to take advantage of the lower negligence standard for § 14(e) claims in the Ninth Circuit by filing their "merger objection" lawsuits there – even if a company is headquartered elsewhere, incorporated elsewhere, has its shares listed elsewhere, and does the majority of its business elsewhere.

Third, the Ninth Circuit's holding raises a significant risk of over-disclosure. Tender offer documents are already voluminous. Merger parties provide stockholders with exhaustive detail on the background of the proposed transaction, the reasons for the merger, and multiple financial analyses supporting the fairness of the purchase price. If participants in multi-billion dollar merger transactions can be held liable for damages under § 14(e) for inadvertently failing to include some disclosure item that a court determines in hindsight to be material, there is a risk that merger participants will err on the side of even more voluminous disclosure, making it more difficult for stockholders to make well-informed investment decisions.

Finally, and as discussed more fully in Petitioner's brief, the Ninth Circuit's decision is wrong on the merits. Courts have long held that § 14(e) is an anti-fraud provision designed to prevent knowing and intentional misconduct in connection with tender offers. With knowledge of those decisions, Congress adopted the Private Securities Litigation Reform Act of 1995 (the "PSLRA") and the Securities Litigation Uniform Standards Act ("SLUSA") without lowering the intent requirement for claims under § 14(e).

The Ninth Circuit's approach to § 14(e) is likely to encourage and permanently federalize frivolous "merger objection" litigation, harming the entire financial industry and imposing undue burden on federal courts. This Court should grant the Petition in order to reconcile the circuit split and, at the merits stage, hold that § 14(e) claims require a stockholder plaintiff to plead and prove scienter.

ARGUMENT

U.S. public companies implement M&A transactions through a variety of legal mechanisms. The mechanism chosen for any particular merger transaction depends on an array of factors, including tax, regulatory and financial issues. One common structure involves the buyer and the seller's board of directors agreeing to a merger and then seeking approval from the seller's stockholders through a proxy vote. When seeking stockholder approval, companies must provide extensive written disclosures regarding, among other things, the background and terms of the proposed transaction. The disclosures provided to stockholders in the proxy solicitation scenario are governed by state and federal law.

Another merger mechanism is the tender offer. In a tender offer, the buyer goes directly to the target's stockholders and offers to purchase their shares, typically at a premium to the prevailing market price. Tender offers may be used in connection with both unsolicited and negotiated mergers. Stockholder disclosures in the tender offer context are governed by state law as well as federal law, in particular § 14(e) of the Exchange Act and the SEC's rules promulgated thereunder.

Regardless of form, merger transactions are obviously significant events in the life of public companies, posing significant economic risks for boards of directors, management, employees, stockholders and creditors on both sides of merger transactions. Capitalizing on this risk, the plaintiffs-side securities class action bar has developed a litigation strategy that focuses on extracting quick settlements from merger participants by threatening the ability of the parties to timely close on agreed transactions, even though the underlying claims lack merit and the settlements provide nothing of value to the shareholder classes.

I. THE NINTH CIRCUIT'S DECISION WORKS AGAINST *TRULIA* AND WILL INCREASE THE NUMBER OF FRIVOLOUS "MERGER OBJECTION" CASES FILED IN FEDERAL COURTS.

A. The Plaintiffs' Bar Adopts "Disclosure-Only" Settlements.

Beginning in or around the early 2000s, the plaintiffs' bar began challenging a significant percentage of public company mergers through shareholder class action litigation. *See, e.g.*, Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 Vand. L. Rev. 603, 610-11 (2018). The complaints in these "merger objection" cases often are nearly verbatim versions of prior complaints with only the parties' names changed, and they typically are filed within days of the announcement of the mergers. *See* Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797, 1827-28 (2004).

In these "merger objection" cases, the stockholder plaintiff generally alleges that the seller's board of directors sold the company for a price that was too low and through a sales process that was unfair in some way. *See* Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55, 56-57, 68 (2014). Once the seller files the required public disclosures (*e.g.*, a proxy statement or tender offer recommendation), the stockholder plaintiff alleges that the disclosures are false and misleading with respect to the background or terms of the transaction. *See* Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and A Proposal for Reform*, 93 Tex. L. Rev. 557, 565 (2015).

In a typical case, the stockholder plaintiff immediately files a motion for a temporary restraining order and a preliminary injunction, arguing that the court should enjoin the closing of the transaction until the disclosure document is corrected or supplemented. After creating the risk that a transformative bet-the-company transaction might be enjoined, the stockholder plaintiff takes advantage of that risk by making an offer to settle with the merger parties. The standard proposal is for a "disclosure-only" settlement: if the defendants make certain supplemental disclosures and pay plaintiffs' counsel a substantial fee award, plaintiffs will provide defendants with a broad class-wide release covering all alleged misconduct in connection with the challenged transaction. The stockholder class receives nothing more than the supplemental disclosures. As the Seventh Circuit has observed, such a "class action that yields fees for class counsel and nothing for the class" is "no better than a racket." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016).

Such offers are nevertheless difficult for the merger parties to refuse, no matter how meritless plaintiffs' claims are or how little value is provided to the class. Faced with the uncertainty, expense and distraction of litigation, and the risk (however small) that a court might enjoin a critical corporate transaction on the basis of an expedited litigation record, many defendants choose to settle these "merger objection" cases. *See* Fisch et al., *supra*, at 565-66; Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 Iowa L. Rev. 465, 478 (2015) ("Settlements which only require disclosure constitute 55.1% of the settlement types in the sample and are the most common type of settlement.").

Although such settlements bring no economic value to the shareholders, and the additional disclosures are often trivial, the attorneys' fees have reached into the millions of dollars. *See* Cain et al., *supra*, at 624. 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. *See* Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* (2018) at 2, https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2017-M-and-A-Litigation (hereinafter "2017 Cornerstone Review"). This number rose sharply to 86% in 2009, and continued to rise until its peak of 94% in 2013. *See id.* The percentage of deals subject to suit hovered between 85% and 90% through 2015. *See id.*

These "merger objection" lawsuits are so common that they are viewed as a "merger tax" and part of the cost of doing M&A transactions. *See* Jeffries, *supra*, at 108 ("Through this overabundance of litigation, plaintiffs' attorneys have successfully attached what amounts to a transaction tax to an overwhelming majority of large public company deals. Attorneys extort this tax – in the form of attorneys' fees – from defendant companies who fear their deals will die after being tied up in lengthy, often frivolous litigation.").

B. *Trulia* Eliminates Delaware as a Friendly Forum.

Prior to 2016, the majority of these abusive "merger objection" suits were filed in Delaware pursuant to the "internal affairs doctrine." Over time, Delaware courts expressed increasing skepticism of "merger objection" cases generally and "disclosure-only" settlements in particular. *See Assad v. World Energy Sols., Inc.,* No. 10324-CB (Del. Ch. Aug. 20, 2015) ("It just can't be that there are meaningful disclosure violations in every single M&A case that's being filed in this court."); *see also In re Aruba Networks, Inc. Stockholders Litig.*, No. 10765-VCL (Del. Ch. Oct. 9, 2015) ("[W]e have reached a point where we have to acknowledge that settling for disclosure only and giving the type of expansive release that has been given has created a real systemic problem."); *In re Riverbed Tech., Inc. Stockholders Litig.*, No. 10484-VCG (Del Ch. July 27, 2015) ("[A]t least some members of this Court have been thinking in some depth about what the value of disclosure-only settlements is.").

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. *See In re Aruba Networks*, No. 10765-VCL; *Assad*, No. 10324-CB; *In re Riverbed Tech.*, No. 10484-VCG; *Acevedo v. Aeroflex Holding Corp.*, No. 7930-VCL. (Del. Ch. July 8, 2015).

In *Trulia*, the Delaware Chancery Court largely eliminated "disclosure-only" settlements in order to reduce frivolous "merger objection" litigation. The *Trulia* court emphasized that:

> [s]cholars have criticized disclosure settlements, arguing that non-material supplemental disclosures provide no benefit to stockholders and amount to little more than deal "rents" or "taxes," while the liability releases that accompany settlements threaten the loss of potentially valuable claims related to the transaction in question or other matters falling within the literal scope of overly broad releases.

129 A.3d at 887. Accordingly, the Chancery Court rejected the parties' "disclosure-only" settlement, finding that the supplemental disclosures that plaintiffs' attorneys obtained for the class were not "material or even helpful." *Id.* The Chancery Court made clear that it would no longer approve disclosure-only settlements except in unusual circumstances. *Id.* at 898 ("Practitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission.").

C. The Plaintiffs' Bar Shifts to Federal Court.

The *Trulia* decision had an immediate impact on the plaintiffs' bar's tactics in "merger objection" litigation.[4] Since *Trulia*, the plaintiffs' bar has

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[4] The number of challenged mergers dropped from 84% in 2015 to 71% in 2016 and 73% in 2017. *See* 2017 Cornerstone Review, *supra*, at 2.

redirected "merger objection" litigation to federal courts. The post-*Trulia* transfer of "merger objection" litigation to federal courts has been immediate and substantial. In 2014, the federal courts saw 40 "merger objection" filings. *See* NERA, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* (Jan. 29, 2018) at 5, http://www.nera.com/content/dam/nera/publications/2018/PUB_Year_End_Trends_Report_0118_final.pdf. In 2015, that number rose to 44 "merger objection" filings. *Id.* In 2016, the federal courts saw more "merger objection" filings than the past two years combined, with 90 "merger objection" suits filed. *See id.* That number more than doubled in 2017, reaching 197 "merger objection" suits filed. *See id.* The number of "merger objection" filings in federal courts in 2016 and 2017 is more than the number of filings in the years 2011 through 2015 combined. *See id.*

This increase in federal filings corresponds to a decrease in "merger objection" lawsuits filed in Delaware. Pre-*Trulia*, when suing a company incorporated in Delaware, stockholders filed 60% of suits in Delaware. *See* NERA, "Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review" (Jan. 23, 2017) (citing Matthew D. Cain and Steven Davidoff Solomon, *Takeover Litigation in 2015*, Berkeley Cent. for L. Bus. Econ. (Jan. 14, 2016), https://ssrn.com/abstract=2715890. That number dropped to 23% in 2016 and to just 6% in 2017. *See* 2017 Cornerstone Review, *supra*, at 5.

Experts project that this trend will continue. 109 of the 217 securities class action filings in the first half of 2018 were "merger objection" cases, indicating a projected total of 218 "merger objection" cases this year, another 10% increase over 2017. *See* NERA, *Recent Trends in Securities Class Action Litigation: H1 2018 Update* (July 18, 2018), http://www.nera.com/content/dam/nera/publications/2018/Recent_SCA_Trends_2018_1H.pdf.

The plaintiffs' bar has turned to federal courts in the hope that those courts would be willing to approve the type of disclosure-only settlements rejected in *Trulia*. *See Rosenfeld v. Time Inc.*, No. 17CV9886 (DLC), 2018 WL 4177938, at *2 (S.D.N.Y. Aug. 30, 2018) ("Post-*Trulia*, plaintiffs have begun bringing M&A lawsuits in other courts, particularly federal courts."). Plaintiffs have had mixed results, with some courts following *Trulia* and others willing to approve the disclosure-only settlements. *Compare In re Walgreen Co. Stockholder Litig.*, 832 F.3d at 724-26 (adopting the rationale of *Trulia*), *with In re Hatteras Fin., Inc., S'holder Litig.*, 286 F. Supp. 3d 727, 730-31 (M.D.N.C. 2017) (approving settlement despite finding that supplemental disclosures were immaterial).

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The Court should grant the Petition because the Ninth Circuit's holding that § 14(e) claims require only a negligently omitted disclosure will burden the federal court system with an increasing number of frivolous "merger objection" cases that the plaintiffs-side class action bar continues to file.

II. THE NINTH CIRCUIT'S DECISION ENCOURAGES FORUM-SHOPPING AND RISKS CREATING A DE FACTO NATIONWIDE 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 *Trulia* and capitalize on the Ninth Circuit's lenient negligence standard. This, coupled with the Exchange Act's liberal jurisdiction provision,[5] encourages forum-shopping, and risks creating a de facto negligence standard for all § 14(e) cases – factors that call for an order granting the Petition.

The Ninth Circuit already attracts a disproportionate number of "merger objection" filings. Although 50% of all U.S. corporations and over 67% of all Fortune 500 companies are incorporated in Delaware,[6] in 2017, only 25% of all federal-court challenges to M&A deals were filed in the Third Circuit. *See* Cornerstone Research, *Securities Class Action Filings: 2018 Midyear Assessment* (2018) at 10, https://www.cornerstone.com/Publications/Reports/Securities-Securities-Class-Action-Filings—2018-Midyear-Assessment. This mismatch reflects a distinct pivot to courts in the Ninth Circuit. In the three-year period from 2012 through 2014, only two "merger objection" suits were filed annually in district courts in that circuit; only eight cases were filed there in 2015. *Id.* However, in 2016, 25 such cases were filed in district courts in the Ninth Circuit, a figure which increased to 41 cases in 2017. *Id.* 22 cases have been filed in the Ninth

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[5] 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." 15 U.S.C. § 78aa(a).

[6] *Annual Report Statistics*, Del. Division of Corps., https://corp.delaware.gov/stats/ (last visited Nov. 13, 2018).

Circuit in the first half of 2018 alone. *Id.* The Ninth Circuit's decision embracing a negligence standard in § 14(e) cases will exacerbate this trend.

The transition of new case filings to the Ninth Circuit raises an obvious concern about the inconsistent application of § 14(e) in federal courts across the country (and in particular among the main forums for "merger objection" cases) and the potential for forum shopping. Moreover, this development risks creating an undue burden on the resources of Ninth Circuit courts.

In addition, the shifting of cases to the Ninth Circuit means its decision below will, as a practical matter, set a standard not just for corporations headquartered or incorporated within the Ninth Circuit, but for the vast majority of corporations that do any business or conduct tender offers anywhere in the Ninth Circuit.

III. THE NINTH CIRCUIT'S DECISION CREATES UNCERTAINTY AND RISK WITH RESPECT TO TENDER OFFER DISCLOSURE REQUIREMENTS.

In addition to inviting more "merger objection" cases into federal courts, the Ninth Circuit's adoption of a negligence standard also threatens to change the type and volume of disclosures corporations make in connection with tender offers. The Exchange Act was intended to increase disclosure from companies to investors, "arming investors with information" in order to improve market efficiency, curb corporate abuse, limit insider trading, and reduce the need for government intervention. Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417, 418 (2003); *see also Ernst & Ernst v.*

Hochfelder, 425 U.S. 185, 195 (1976); Thomas L. Hazen, *Treatise on the Law of Securities Regulation* § 1:16 (7th ed. 2017). Section 14(e), enacted in 1968 as part of the Williams Act (amending the Exchange Act), serves this goal as well. *See* Pub. L. No. 90-439, 82 Stat. 455; *see also Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 11 (1985) ("Nowhere in the legislative history is there the slightest suggestion that § 14(e) serves any purpose other than disclosure . . . .").

The Exchange Act and the Williams Act amendments, of course, do not require disclosure to shareholders of every fact. Rather, the statute and this Court have required disclosure of only material information. *See TSC Indus., Inc., v. Northway, Inc.*, 426 U.S. 438, 448 (1976). In the tender offer context, federal courts find "a misstatement or omission [to be] 'material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding' whether to accept the tender offer." *Seaboard World Airlines v. Tiger Int'l, Inc.*, 600 F.2d 355, 361 (2d Cir. 1979) (quoting *Prudent Real Estate Tr. v. Johncamp Realty, Inc.*, 599 F.2d 1140, 1146 (2d Cir. 1979) (Friendly, J.)) (additional quotation marks omitted); *accord In re Digital Island Sec. Litig.*, 357 F.3d at 328. This is essentially the same standard that this Court announced in *TSC Industries*, and which federal courts apply to § 10(b) cases. *TSC Indus.*, 426 U.S. at 448.

In recent years, however, attempts to comply with these disclosure requirements in the context of an aggressive litigation environment have created a risk of "over-disclosure," as management teams are incentivized to "bury shareholders in an avalanche of trivial information,"[7] in order to minimize risk and "avoid liability." *In re Goodyear Tire & Rubber Co. Sec. Litig.*, No. CIV. A. 88-8633, 1993 WL 130381, at *6 (E.D. Pa. Apr. 22, 1993), *aff'd*, 16 F.3d 403 (3d Cir. 1993). This practice of over-disclosure is not "conducive to informed decision-making." *TSC Indus.*, 426 U.S. at 448-49. Over-disclosure causes companies to waste resources by disclosing immaterial information, and then investors waste their time, money, and effort attempting to distill the material from the immaterial in disclosure documents that are often hundreds of pages long. *See* Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 Ala. L. Rev. 473, 507 (2007).

The Ninth Circuit's decision in this case perversely encourages such over-disclosure. Instead of making judgments to ensure that no material misstatements or omissions appear in the documents, companies will have every reason to attempt to avoid liability under the Ninth Circuit's negligence standard by erring in favor over-inclusive disclosures. The decision below thus threatens to upset the balance struck by this Court's jurisprudence, which seeks to ensure that shareholders obtain material information without becoming drowned in a sea of mundane, immaterial details.

This Court has recognized the danger of over-disclosure. *See TSC Indus.*, 426 U.S. at 448 ("Some information is of such dubious significance that insistence on its disclosure may accomplish more

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7 *TSC Indus.*, 426 U.S. at 448.

harm than good.").[8] Here, the Ninth Circuit tipped the materiality bar too far in one direction – the wrong direction – and invited management to make voluminous tender offer documents even longer, without providing any additional material information to shareholders. Because the Ninth Circuit's negligence standard will become a nationwide one in practice,[9] the issue of over-disclosure is likely to affect all future tender offers unless the decision below is reversed.

IV. THE NINTH CIRCUIT'S DECISION CREATES ADDITIONAL RISKS FOR FINANCIAL INSTITUTIONS PARTICIPATING IN MERGER TRANSACTIONS.

The Ninth Circuit's ruling adversely affects financial institutions participating in merger activity. Financial institutions are often involved in merger activity as advisors. In most mergers, the seller obtains a "fairness opinion" from a financial advisor, which provides the financial advisor's view

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[8] Delaware courts, too, have cautioned against over-disclosure. *See In re Micromet Inc. S'holders Litig.*, C.A. No. 7197-VCP, 2012 WL 681785, at *11 (Del. Ch. Feb. 29, 2012) ("The duty to disclose is not a mandate for prolixity. Instead, balanced against the requirement of complete disclosure is the pragmatic consideration that creating a lenient standard for materiality poses the risk that the corporation will bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decision-making.") (internal citations, quotation marks, and alterations omitted); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994) ("Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information.").

[9] *See* Section II, *supra*.

on whether the price terms of the merger – usually the per share price to be received by the seller's shareholders – are fair.

As the facts of this case illustrate, shareholders often challenge the financial advisor's analyses and/or conflicts. *See* App. at 4a-5a. Respondent Varjabedian challenged, among other things, the Recommendation Statement's failure to summarize Goldman Sachs' Premium Analysis conducted in connection with the Avago-Emulex merger. App. 5a-6a.

Under Delaware law, a seller must disclose only a "fair summary" of the opinion. *See, e.g.*, *Dent v. Ramtron Int'l Corp.*, C.A. No. 7950-VCP, 2014 WL 2931180, at *12 (Del. Ch. 2014). Stockholder plaintiffs, however, routinely bring "merger objection" cases premised on the notion that merger parties failed to disclose every conceivable detail regarding the financial advisor's fairness opinion. Although Delaware courts have long rejected these claims as a matter of state law,[10] the Ninth Circuit's opinion authorizing negligence-based § 14(e) claims gives plaintiffs the potential opportunity to do what

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[10] *See, e.g.*, *Dent*, 2014 WL 2931180, at *13 ("This is simply a 'tell me more' request that, unlike a viable disclosure claim, fails to identify how the analysis is misleading or incomplete if it does not disclose specifically which publicly available sources of information Needham used to do its work."); *In re 3Com S'holders Litig.*, Civil Action No. 5067-CC, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009) ("There are limitless opportunities for disagreement . . . . Considering this reality, quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim.").

Delaware has prohibited – nitpick the details and assumptions underlying financial analyses.

Moreover, the lower standard may entice stockholder plaintiffs to allege § 14(e) claims directly against financial advisors. Plaintiffs sometimes allege aiding and abetting claims against a financial advisor, but such claims often fail (or are not made) because they require scienter. *See, e.g.*, *In re Zale Corp. Stockholders Litig.*, C.A. No. 9388-VCP, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) (dismissing aiding and abetting claim against financial advisor Merrill Lynch); *Malpiede v. Townson*, 780 A.2d 1075, 1098 (Del. Ch. 2001) ("[P]laintiffs' aiding and abetting claim fails as a matter of law because the allegations in the complaint do not support an inference that [defendant] knowingly participated . . . ."); *Lee v. Pincus*, C.A. No. 8458-CB, 2014 WL 6066108, at *13 (Del. Ch. Nov. 14, 2014) ("To demonstrate the 'knowing participation' element of an aiding and abetting claim, it must be reasonably conceivable from the well-pled allegations that 'the third party act[ed] with . . . knowledge . . . .' Knowing participation has been described as a 'stringent' standard that 'turn[s] on proof of scienter.'") (alterations in original; internal citations omitted).

Now, however, the Ninth Circuit may have effectively opened the door to claims that would have failed under Delaware law, as plaintiffs need only allege negligence, not scienter, to assert § 14(e) claims directly against financial advisors.[11] If more

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[11] This Court has long rejected aiding and abetting claims for violations of the securities laws. *See Stoneridge Inv. Partners,*

financial advisors are named as defendants in "merger objection" litigation, there is an increased risk of disruption in the proper and efficient operation of the capital markets. This is another reason why it is important for this Court to resolve the circuit split as to the state of mind required for a § 14(e) claim.[12]

V. THE NINTH CIRCUIT ERRED IN ADOPTING A NEGLIGENCE STANDARD.

In adopting a negligence standard for § 14(e), the Ninth Circuit expressly acknowledged that it was breaking with the past decisions by the Second, Third, Fifth, Sixth, and Eleventh Circuits, all of which require scienter as an element of a § 14(e) claim.[13] The Ninth Circuit was wrong to reject the reasoning of those Circuits for several reasons.

LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 158 (2008) (holding the reforms of the PSLRA do not permit private aiding and abetting claims under § 10(b)); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 183 (1994) (holding that private plaintiffs cannot maintain aiding and abetting claims under § 10(b)).

[12] While this Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), requires that a defendant be the "maker" of a statement in order to be the target of a federal securities claim, at least one court – the United States District Court for the Northern District of California – has found that alleged misrepresentations in a recommendation statement that relate to a fairness opinion are attributable to the financial advisor. *See Biotechnology Value Fund, L.P. v. Celera Corp.*, No. C 13-03248 WHA, 2014 WL 988913, at *3-4 (N.D. Cal. Mar. 10, 2014).

[13] *See Ginsburg*, 362 F.3d at 1297-98; *In re Digital Island Sec. Litig.*, 357 F.3d at 328; *Adams*, 623 F.2d at 428-29, 431;

First, the circuits adopting a scienter standard have correctly emphasized the similarities between § 10(b), which requires scienter, and § 14(e).[14] This Court has likewise recognized that similarity, explaining that § 10(b) and § 14(e) are both anti-fraud statutes designed to prevent knowing violations of the securities laws. *See Schreiber*, 472 U.S. at 10-11.

Second, the Ninth Circuit ignored the significance of Congress's decision to leave § 14(e) untouched when enacting the PSLRA in 1995 and SLUSA in 1998. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 409 n.66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Congress did not revise § 14(e) on either occasion, even knowing that three of the five circuits adopting a scienter standard did so prior to 1995. *See Adams*, 623 F.2d at 428; *Smallwood*, 489 F.2d at 605; *Chris-Craft Indus.*, 480 F.2d at 362.

Third, the Ninth Circuit's textual analysis of § 14(e) is flawed. In the opinion below, the Ninth Circuit divided Section 14(e) into two parts:

> "It shall be unlawful for any person [1] to make any untrue statement of a material

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Smallwood, 489 F.2d at 596, 605; *Chris-Craft Indus., Inc.*, 480 F.2d at 362.

[14] *See Ginsburg*, 362 F.3d at 1298; *In re Digital Island Sec. Litig.*, 357 F.3d at 328; *Adams*, 623 F.2d at 432; *Smallwood*, 489 F.2d at 596; *Chris-Craft Indus., Inc.*, 480 F.2d at 363-64.

> fact or omit to state any material fact necessary in order to make the statement made, in the light of 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 . . . ."

App. 8a (quoting 15 U.S.C. § 78n(e)) (emphasis and alterations in original). Construing the statute as creating "two different offenses," the Ninth Circuit concluded that "because the text of the first clause of Section 14(e) is devoid of any suggestion that scienter is required, we conclude that the first clause of Section 14(e) requires a showing of only negligence, not scienter." App. 8a, 16a. But this was error, in violation of the principle that courts should not "construe statutory phrases in isolation." *United States v. Morton*, 467 U.S. 822, 828 (1984). Moreover, even if the Ninth Circuit were correct in dividing § 14(e) into two clauses, the first clause is "devoid of any suggestion that" *negligence* is required; it says nothing about the mental state necessary to support a claim for making a material false statement.

Further, § 14(e) does not contain the "significant procedural restrictions" Congress employs when expressly enacting a civil remedy for negligence. *See Ernst & Ernst*, 425 U.S. at 208-09. This is of particular significance as courts disagree on whether § 14(e) provides a private civil right of action, and this Court has not yet settled the issue.

CONCLUSION

In light of the foregoing principles, the Court should grant Petitioner's Petition for a writ of certiorari.

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