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Emulex Again Fends Off Investor Suit Over $606M Deal

By **Craig Clough**

Law360, Los Angeles (February 26, 2020, 11:47 PM EST) -- A Los Angeles federal judge has again dismissed a putative securities class action alleging Emulex Corp. concealed that Avago Technologies Ltd.'s $606 million acquisition offer was too low, saying the case still failed to pass muster after the Ninth Circuit ordered him to evaluate it under a different standard.

U.S. District Judge Cormac J. Carney first dismissed the complaint in 2016 on the grounds that Emulex shareholders needed to show scienter, or that the telecommunications company had intentionally deceived investors. The Ninth Circuit remanded the case to the district court to reconsider its finding by assessing whether the shareholders had shown negligence, rather than scienter. On Tuesday, Judge Carney said he was still unswayed.

The shareholders' suit hinged significantly on a "premium analysis" presented by Emulex leadership and prepared by Goldman Sachs, which they alleged was omitted in a presentation to shareholders because it showed that, while Avago's offer was within industry norms, the 26.4% premium to investors was below average.

But Judge Carney ruled among other things that this omission was not significant. The chart was about semiconductor companies, a related but "ultimately distinct sector of the industry," and included mergers that occurred four years before Avago's tender offer, he said.

"Plaintiff has also not plausibly alleged that the premium analysis was so important that its omission was negligent," the judge wrote. "In fact, there are good reasons to doubt that the premium analysis says anything significant about the merits of the Emulex-Avago merger."

Emulex shareholder Gary Varjabedian first filed the suit against the company, its board of directors and Avago in April 2015, just over a month after Emulex announced the deal. Varjabedian claimed that the $8-per-share offer failed to account for Emulex's recent performance and potential for future growth.

Judge Carney considered in his 2016 dismissal ruling whether the shareholders had to prove that Emulex and its directors had acted with scienter and intentionally omitted the chart in an effort to deceive investors. The judge rejected the investors' argument that they only needed to show negligence for claims under Section 14(e) of the Exchange Act related to tender offers, finding all federal courts to consider the issue have required proving scienter.

The judge's opinion then found that the shareholders couldn't prove Emulex and its executives had intentionally omitted the information to deceive investors about the value of the deal.

The Ninth Circuit panel found in 2018, however, that Judge Carney wrongly concluded that Section 14(e) requires that claims brought under it must allege intent, departing from circuit court rulings in five similar cases.

The defendants appealed, and the U.S. Supreme Court granted their petition for writ of certiorari, but after hearing oral arguments, the Supreme Court dismissed the writ of certiorari in April 2019 as improvidently granted.

At a hearing Friday on the defendants' motion to dismiss, Juan E. Monteverde of Monteverde & Associates PC urged Judge Carney to find that the omission of the premium analysis was negligent.

"The analysis cut against the deal," he said. "That's something that the courts have focused on through jurisprudence and why something is material. If your analysis does not fair well or does not fair as good as the consideration offer and the merger at issue, that would be something that shareholders had to know and may want to know and should know."

Eric Landau of Thomas Whitelaw & Kolegraff LLP, who represents Emulex and the directors, told the judge Friday that "the basic elements of negligence are not there. We don't have, No. 1, the standard of care, and we don't have the departure from the standard of care."

In his Tuesday ruling, Judge Carney concluded that the evidence appeared to show the plaintiffs were significantly inflating the purported value of the premium analysis and essentially making a mountain out of a molehill.

"The record in this case suggests that after obtaining limited discovery plaintiff scoured the financial analyses performed by Goldman looking for anything negative about the merger that did not appear in the recommendation statement," the judge wrote. "He has come up only with the premium analysis — a one-page chart. Even construing the allegations in the [first amended complaint] in the light most favorable to plaintiff, the exclusion of that chart from the fairness opinion summary does not plausibly suggest negligence."

Monteverde told Law360 in an email Wednesday that the shareholders intend to appeal.

"We are confident the Ninth Circuit will agree with us that corporations cannot withhold important valuations from shareholders, and we intend to keep fighting on their behalf," he said.

Counsel for the defendants did not immediately respond to a request for comment.

The shareholders are represented Juan E. Monteverde of Monteverde & Associates PC.

Emulex and the directors are represented by Eric Landau and Travis Biffar of Thomas Whitelaw & Kolegraff LLP.

Avago is represented by Gregory G. Garre and Matthew Rawlinson of Latham & Watkins LLP.

The case is Gary Varjabedian v. Emulex Corp. et al., case number 8:15-cv-00554, in the U.S. District Court for the Central District of California.

--Editing by Aaron Pelc.