



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF WESTLAND POLICE & FIRE	)	
RETIREMENT SYSTEM,	)	
	)	
Plaintiff,	)	Civil Action No. _____
	)	
v.	)	
	)	
AXCELIS TECHNOLOGIES, INC.,	)	
	)	
Defendant	)	

**COMPLAINT PURSUANT TO 8 DEL. C. § 220  
TO COMPEL INSPECTION OF BOOKS AND RECORDS**

Plaintiff Westland Police & Fire Retirement System (“Westland P&F”) brings this action against defendant Axcelis Technologies, Inc. (“Axcelis” or the “Company”), seeking relief under 8 Del. C. § 220 (“Section 220”), and for this Complaint alleges upon personal knowledge and other information obtained upon investigation by its counsel that it believes to be true as follows:

**NATURE OF THE ACTION**

1. This case arises from Axcelis’ refusal to allow its shareholders to inspect Company books and records in connection with possible breaches of fiduciary duty by Axcelis’ Board of Directors (the “Board”).

2. Shareholders have reasonable grounds to believe that the Board may have breached its fiduciary duties to the Company and its shareholders in connection with recent acquisition proposals from Sumitomo Heavy Industries, Inc. (“SHI”), and in connection with the Board’s refusal to accept the resignations of three Board members whose candidacy was opposed by a majority of shareholders during the course of the Board’s consideration of SHI’s offers.

3. On December 9, 2008, pursuant to Section 220, Westland P&F requested from Axcelis inspection of books and records related to these events. Axcelis, however, rejected Westland P&F's request.

4. Axcelis' blanket refusal of Westland P&F's request to inspect certain books and records compels Westland P&F to bring this action.

### **THE PARTIES**

5. Plaintiff Westland P&F, a Michigan pension fund, is the record holder of 9,400 shares of Axcelis common stock.

6. Defendant Axcelis is a Delaware corporation with its principal executive offices located in Beverly, Massachusetts.

### **BACKGROUND**

#### **SHI's First Acquisition Proposal**

7. On February 4, 2008, SHI, along with TPG, made an unsolicited bid to acquire Axcelis for \$5.20 per share. SHI's offer came after nearly 18 months of SHI attempting to engage in good-faith negotiations with Axcelis, throughout which, Axcelis' market share and financial performance declined dramatically. By February 8, 2008, Axcelis stock was trading at \$4.04 per share – 22% below SHI's offer.

8. At the time, SHI's acquisition proposals were widely seen as an effort by SHI to put an end to a contentious relationship with Axcelis regarding a joint venture the companies operated in Japan known as SEN Corporation ("SEN"). SHI and Axcelis each owned 50% of SEN, but disputes had arisen in recent years regarding the operation of SEN and the allocation of royalties from the joint venture. SHI's acquisition of Axcelis would have ended the dispute and put SHI in control of 100% of SEN.

9. After SHI's initial offer, shareholders expressed support for the merger. For instance, Brian Walton, the Managing Director of Sterling Capital, an Axcelis shareholder, stated that "Axcelis needs to actively look for consolidation opportunities within the semiconductor capital equipment industry. [SHI's] offer to purchase Axcelis is a meaningful first step in this direction."

10. Despite Axcelis' declining performance, SHI's generous offer, and wide shareholder support for a merger, the Board rejected SHI's acquisition proposal. In a February 25, 2008 press release, Chairperson Mary Puma ("Puma") called SHI's proposal "inadequate." However, the Board never disclosed in SEC filings or elsewhere how it determined SHI's proposal was "inadequate."

#### **SHI's Second Acquisition Proposal**

11. On March 10, 2008, SHI revised its offer to acquire Axcelis at \$6 per share.

12. SHI acknowledged its revised offer was based, in part, on "a constructive dialogue with a limited number of Axcelis shareholders representing a substantial majority of the outstanding shares [of Axcelis]." Public statements by Axcelis shareholders corroborated SHI's statements. For instance, D.A. Davidson & Co. stated that "the best outcome for Axcelis is some combination with SHI."

13. Along with its revised offer, SHI released a statement urging Axcelis to "meet with [SHI] promptly, permit [SHI] to commence due diligence immediately and concurrently negotiate a definitive agreement."

14. However, just a week later on March 17, 2008 – without even attempting to negotiate with SHI – the Board rejected SHI's revised offer. Puma claimed in a subsequent press release that "SHI's \$6.00 unsolicited proposal undervalues the Company based on the intrinsic

value of the business. . . . [Additionally,] [t]he Board of Directors’ decision is supported by extensive valuation analyses . . . .”

15. Although Puma claimed SHI’s second offer “undervalued” Axcelis, the Board never disclosed what methods, if any, it used to determine the “intrinsic value” of the Company was greater than \$6 per share. Since Axcelis stock now trades for around \$.40 per share, information about those methods is pertinent to understanding whether the Board complied with its fiduciary obligations to shareholders by performing due diligence in valuing the Company.

**Shareholders React Negatively to Axcelis’ Rejection of SHI’s Proposals And Withhold Votes for Directors Who Rejected SHI’s Acquisition Proposals**

16. Many shareholders reacted negatively to Axcelis’ rejection of SHI’s proposals. For instance, on March 28, 2008, Sterling Capital worried the Board was embracing an “intrinsic value which is not achievable.” Glass Lewis, a proxy advisory firm, advised shareholders to “send a message to the board, expressing their discontent with the company’s unresponsiveness to SHI” by withholding support for the Directors at the 2008 Annual Meeting.

17. Approaching the 2008 Annual Meeting, the Board sent shareholders a letter explaining its rejection of SHI’s proposals. In that letter, the Board acknowledged it had “been aware, for many years, that a ‘one company’ approach combining Axcelis and [SHI] could yield significant operational and commercial synergies. . . .” However, this statement flatly contradicted the Board’s actions. The Board rejected SHI’s second acquisition proposal without ever engaging in negotiations. In fact, the Board refused to even meet with SHI to discuss its acquisition proposal despite allegedly being “aware” that a combination with SHI “could yield significant operational and commercial synergies.”

18. The Board’s actions or, perhaps more accurately, inactions regarding SHI’s proposals and the timing of the letter – just before the 2008 Annual Meeting – suggest the letter

was merely an attempt to pander for votes for those Directors up for reelection rather than provide shareholders with information related to its consideration of SHI's acquisition proposals.

19. Nonetheless, at the 2008 Annual Meeting, a majority of shareholders withheld their support for the Directors. Sterling Capital called the vote a "mandate" for the Board to negotiate with SHI. However, since the Board used a process called "Pfizer-style" majority voting instead of pure majority voting to elect its directors, the unelected Directors were not automatically removed from the Board. Instead, the Directors submitted their resignations and the Board, in keeping with its fiduciary duties, was obligated to decide, based on what would be in the shareholders' best interests, whether to accept the resignations.

#### **Pfizer-Style Majority Voting**

20. In 2005, Axcelis amended its Corporate Governance Policies by replacing plurality voting with "Pfizer-style" majority voting. With plurality voting, the nominees receiving the most votes, up to the number of seats open, are elected – even if a majority of votes cast are not in their favor. Thus, in an uncontested election, each nominee slated by the board will be elected provided he or she receives at least one affirmative vote. By contrast, "Pfizer-style" majority voting requires directors who receive more withheld than affirmative votes to submit their resignations to the board. Having received the resignations, the board must then decide whether to accept them. Only if the board rejects the resignations may the unelected director remain on the board.

#### **The Board Manipulates The Majority Voting Policy to Thwart Shareholders' Will**

21. In a May 1, 2008 letter to Axcelis shareholders, Puma stated that "The Nominating and Corporate Governance Committee will consider each of these resignations and make a recommendation to the full Board on the acceptance or rejection of the resignations. The

Board will act on the recommendation as they determine appropriate and in the best interests of the shareholders.”

22. In a May 23, 2008 press release the Board announced its decision to retain the unelected Directors. The announcement stated, in part:

The decision by the Board of Directors assures that Axcelis has the full range of expertise and oversight in place as it proceeds with the business of the Company and potential discussions with SHI. The Board remains committed to serving the long-term business interests of Axcelis and to building the Company’s value for all stockholders.

23. Neither the Company, nor any of its directors, has ever disclosed what steps it took to determine that the shareholders’ “best interests” would be served by retaining Directors that a majority of those shareholders refused to support for reelection. However, the Board’s decision to allow directors who were opposed by a majority of shareholders to continue to serve on the Board indicates – consistent with its refusals to negotiate with SHI – Board members were more interested in entrenching themselves on the Board than in guarding the best interests of shareholders.

#### **The Board Enters Into – Then Breaks Off – Negotiations With SHI**

24. On June 6, 2008, under immense – and mounting – pressure from shareholders, the Board entered into a confidentiality agreement to discuss SHI’s acquisition proposals. However, when SHI requested additional time to submit a new acquisition proposal, the Board refused; effectively ending negotiations.

25. In its September 15, 2008 8-K, Axcelis stated that “the additional process requested by SHI . . . was not in Axcelis’ shareholders best interests.” However, Axcelis never disclosed what “additional process” was required of it by extending the deadline or why it would not be in its shareholders’ best interests to do so.

26. Although the Board consistently represented that SHI's offers of \$5.20 and \$6.00 per share "undervalued" the Company, Axcelis stock now trades at about \$0.40 per share. This raises questions that either the Board's representation that the Company was worth more than \$6.00 per share was misleading, or that SHI walked away for some reason other than a unilateral decision and there may be undisclosed issues with the Company.

**Westland P&F Requests Books and Records**

27. On December 9, 2008, Westland P&F sent to Axcelis a narrowly-tailored demand letter via Federal Express requesting, for inspection, books and records related to Axcelis' rejection of SHI's acquisition proposals and the Board's decision to retain the unelected Directors. The letter included a power of attorney form authorizing its counsel to make demand, and it contained proof of Westland P&F's beneficial ownership of Axcelis shares as of December 4, 2008.

28. Westland P&F explained that its request was for the legitimate purpose of investigating whether the Board breached its fiduciary duties to the Company and its shareholders in connection with SHI's acquisition proposals and by refusing to accept the resignations of the unelected Directors. A copy of Westland P&F's demand letter is attached to this Complaint and marked as "Exhibit A."

29. By letter dated December 12, 2008, Axcelis advised Westland P&F of its refusal to make any books and records available for inspection. Axcelis claimed Westland P&F failed to "satisfy the standard set forth in Section 220 and Delaware's jurisprudence interpreting Section 220." The letter did not say why Westland P&F's demand apparently did not satisfy the requirements of Delaware law – only that it did not. A copy of Axcelis' rejection is attached to this Complaint and marked as "Exhibit B."

30. Despite Axcelis' assertions, Westland P&F complied fully with all of Section 220's requirements concerning the form and manner for making a demand for inspection of Axcelis' books and records, including articulating a proper purpose.

**Axcelis Sells its Stake in SEN to SHI**

31. On February 26, 2009, after rejecting SHI's repeated proposals to acquire the Company, the Axcelis Board agreed instead to sell Axcelis's 50% stake in SEN to SHI for \$132.6 million. By selling Axcelis's 50% interest in SEN to SHI, Axcelis's Board essentially gave SHI what it wanted all along – control of SEN and an end to the contentious joint venture between the companies – while keeping the Axcelis directors firmly entrenched and in control of the Company.

32. SHI's acquisition of Axcelis's 50% interest in SEN was completed on March 30, 2009, in a transaction that netted Axcelis approximately \$122.3 million after payment of fees and expenses.

33. Thus, while the Axcelis board rejected SHI's proposals to acquire the Company for some \$630 million at \$6 per share, they agreed to let SHI acquire the Company's 50% interest in SEN for just \$132.6 million while the price of Axcelis's stock languishes at under \$0.40 per share.

34. Axcelis' sale of SEN to SHI at a rock-bottom price, in an attempt to preserve control of the board, only heightens questions about Axcelis' loyalty to shareholders.

35. Since Axcelis wrongfully refuses Westland P&F's proper request and since Westland P&F has no other adequate remedy at law, Westland P&F asks this Court, pursuant to 8 *Del. C.* § 220 (c), for an Order compelling inspection of Axcelis' corporate books and records.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully prays for the following relief:

- A. An order summarily requiring Axcelis to immediately permit the inspection and copying of each and every book and record requested by its demand;
- B. An order directing Axcelis to pay reasonable attorneys' fees and expenses in connection with plaintiff's Section 220 demand and litigation; and
- C. Such other relief as this Court deems just and appropriate.

Dated: April 2, 2009

/s/ Michael J. Barry  
Jay W. Eisenhofer (Del. ID No. 2864)  
Michael J. Barry (Del. ID No. 4368)  
Christian J. Keeney (Del. ID No. 5197)  
GRANT & EISENHOFER P.A.  
1201 North Market Street  
Wilmington, DE 19801  
Tel.: (302) 622-7000  
Fax: (302)622-7100  
*Counsel for the Plaintiff*