IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF WESTLAND POLICE & FIRE RETIREMENT SYSTEM,	)	
Plaintiff,	)	Civil Action No. 4473-VCN
v.	)	
AXCELIS TECHNOLOGIES, INC.,	)	
Defendant.	)	

PLAINTIFF'S PRETRIAL REPLY BRIEF

DATED: June 29, 2009

Jay W. Eisenhofer (DE Bar No. 2864)
Michael J. Barry (DE Bar No. 4368)
Christian J. Keeney (DE Bar No. 5197)
GRANT & EISENHOFER P.A.
1201 North Market Street, Suite 2100
Wilmington, DE 19801
Tel.: (302) 622-7000
Fax: (302) 622-7100

Attorneys for Plaintiff

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

PRELIMINARY STATEMENT

Defendant's Opening Pre-Trial Brief ("Def. Br.") is more notable for what it does not say than what it does. Although repeatedly claiming that nothing in the Joint Stipulation suggests that the Board of Directors (the "Board") of Axcelis Technologies, Inc. ("Axcelis" or the "Company") breached their fiduciary duties in connection with their successful efforts to fend off unwanted acquisition proposals from Sumitomo Heavy Industries ("SHI") so as to warrant consideration of Plaintiff's 220 demands, Axcelis fails entirely to offer any compelling justification for the Board's decision to reject the shareholders' vote to remove directors Stephen R. Hardis, R. John Fletcher, and H. Brian Thompson from the Board. Not only is the Board's decision in this regard subject to enhanced scrutiny under *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) (which is wholly ignored by Axcelis), but the fact that the Board took this extraordinary action in the context of attempting to fend of what the Board perceived as a hostile offer from SHI means that the Board should be required to demonstrate that its response was reasonable and proportional in relation to this perceived threat. *See MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1130 (Del. Supr. 2003) ("In certain circumstances, a court must recognize the special import of protecting the shareholders' franchise *within Unocal's* requirement that any defensive measure be proportionate and 'reasonable in relation to the threat posed.' A board's unilateral decision to adopt a defensive measure touching 'upon issues of control' that purposefully disenfranchises its shareholders is strongly suspect under *Unocal*, and cannot be sustained without a 'compelling justification.'") (quoting *Stroud v. Grace*, 606 A.2d 75, 92 n.3 (Del. 1992)). Axcelis's opening brief fails to offer any compelling justification for the Board's conduct, and, as such, provides an insufficient basis to reject Plaintiff's 220 demands.

In a Section 220 action where a shareholder seeks to inspect corporate books and records to investigate potential corporate wrongdoing, a plaintiff need only show some credible basis

from which a court can infer that wrongdoing *may have occurred*, and is not required to present affirmative evidence demonstrating that the directors, in fact, acted improperly. *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 122 (Del. 2006). In this regard, it is imperative to consider the Board's conduct in context, drawing all reasonable inferences in Plaintiffs' favor. *See, e.g., Romero v. Career Educ. Corp.*, 2005 WL 1798042, at *2 (Del. Ch. July 19, 2005) ("Plaintiff is entitled to all reasonable inferences that can be drawn from the Complaint."). That Axcelis may offer explanations for the Board's decisions and claim the protections of the business judgment rule does not mean that the uncontested facts as set forth in the Joint Stipulation are insufficient to raise questions regarding whether Axcelis's directors complied with their fiduciary duties. Indeed, the facts as set forth in the Joint Stipulation give rise to an affirmative obligation by the Axcelis Board to present evidence justifying their conduct. Rather than raising these issues for the first time in a derivative action, Plaintiff elected instead to exercise its inspection rights under Section 220 of the DGCL to determine whether the prosecution of a derivative action (or a formal demand on the Company's board) ultimately may be appropriate. Axcelis's attempt to block Plaintiff from using this investigatory tool by attempting to litigate the issue of the applicability of the business judgment rule to the Board's actions in this case is improper and should be rejected.

First, Plaintiff's allegations demonstrate – and Axcelis concedes – that the Board reversed the results of a shareholder vote. (J. Stip. ¶ 31.) Under Delaware law, Axcelis's Board must offer a compelling justification for this decision. *Blasius*, 564 A.2d at 661. Axcelis's brief offers nothing of the sort, claiming instead that the Board's decision in this regard, like any other Board action, is cloaked in the protections afforded by the business judgment rule. (Def.'s Op. Br. 24.) Axcelis is incorrect. The affirmative decision of corporate directors to reject and undermine the majority vote of shareholders is not the kind of routine business decision entitled

to automatic deference by this Court. This is particularly true where the rejected vote, as here, concerns the election of directors – the central and most sacred aspect of the shareholder franchise. *See Liquid Audio*, 813 at 1126 ("The most fundamental principles of corporate governance are a function of the allocation of power within a corporation between its stockholders and its board of directors. The stockholders' power is the right to vote on specific matters, in particular, in an election of directors.").

Second, the facts set forth in the Joint Stipulation, viewed as a whole and in context, present a concerted effort by Axcelis's Board to fend off SHI's proposals and to retain their control over Axcelis as an independent entity. After months of refusing to even discuss a potential business combination with SHI and flatly rejecting SHI's $6.00 per share offer for Axcelis as financially "inadequate," the Axcelis Board affirmatively rejected the majority shareholder vote to remove three directors specifically because of their opposition to SHI's proposals, refused to grant SHI a brief extension to formulate a final proposal (thus prompting SHI to abandon its acquisition efforts), and just a few months later sold Axcelis's interest in SEN – the very asset that gave rise to SHI's interest in acquiring Axcelis in the first place – to SHI. At the very least, these facts give rise to a reasonable inference that Axcelis's Board may have acted with an improper motive to entrench themselves in their positions of control over the Company, which would implicate the jurisprudence of *Unocal v. Mesa Petroleum*, 493 A.2d 946, 955 (Del. 1985) and its progeny. For purposes of Plaintiff's Section 220 demand, however, the question is not whether *Unocal* definitively applies, but whether the conduct as alleged gives rise to an inference that *Unocal* ***may*** apply. Given the unique circumstances of this case, Plaintiff should be entitled the Board's conduct through the limited and focused procedure permitted under Section 220.

Axcelis argues that the sale of SEN should not be considered by this Court because it occurred after Plaintiff submitted its 220 requests. Axcelis is incorrect. For purposes of considering Plaintiff's 220 demand, the question is whether, in making the demand, Plaintiff articulated a "proper purpose." Where, as here, the shareholder's claimed purpose is the investigation of possible corporate wrongdoing, in a proceeding to enforce 220 inspection rights the shareholder must present the Court with facts sufficient to demonstrate a "credible basis" to infer that wrongdoing may have occurred, which the shareholder may present "through documents, logic, testimony, or otherwise. . . . " *Security First Corp. v. U.S. Die Casting and Dev. Co.*, 687 A.2d 563, 568 (Del. 1997). In establishing this "credible basis," nothing in Delaware law prevents a shareholder from relying on events that post-date the inspection demand but which confirm the shareholder's belief and support the reasonable inference that wrongdoing may have occurred.

Axcelis's argument that the conduct of its Board of Directors in rejecting the shareholders' vote and successfully thwarting SHI's acquisition efforts should be cloaked in the protection of the business judgment rule is premature and should provide no basis to reject Plaintiff's 220 demand. Delaware courts repeatedly have admonished shareholders to use their inspection rights under Section 220 as part of their "tools at hand" before commencing a derivative lawsuit. Axcelis should not be permitted to block Plaintiff's efforts to exercise its rights here by transforming a 220 proceeding into a hearing on the merits of the very issues that may – or may not – ultimately be considered in the context of a motion to dismiss in a derivative case.

COUNTERSTATEMENT OF FACTS

Axcelis's version of the facts presents a one-sided story based on the limited and incomplete facts that the Axcelis Board chose to disclose to the investing public. Axcelis cannot be permitted to block Plaintiff's 220 inspection rights by offering explanations for the Board's conduct, when the reasons and motives behind the Board's actions are the very facts that Plaintiff seeks to investigate through its Section 220 demands. But, as discussed below, even if the Court were inclined to consider Axcelis's version of the facts, Axcelis's version of the facts is woefully misleading and incomplete.

SHI's Second Proposal

Axcelis claims it is a fact that SHI revised its acquisition proposal because it was "[a]ware that the First Proposal undervalued Axcelis" and because its first offer was "inadequate and opportunistic." (Def.'s Op. Br. 11.) These are not facts supported in the record. SHI disclosed its reasons for revising its offer in its March 10, 2008 letter to Axcelis's Board and nowhere in that letter did SHI indicate it revised its offer because it was "inadequate" or "opportunistic." (J. Stip. ¶ 14) (incorporating by reference Exhibit I). To the contrary, SHI explained that its revised offer was based on "a very constructive dialogue" with Axcelis shareholders and its belief that "bringing [SHI and Axcelis] together quickly is in the best interest of all involved, including Axcelis and its stockholders, employees, and customers." *Id.*

Axcelis also quotes language from Axcelis's March 17, 2008 press release indicating that Axcelis's future prospects should improve with the roll out of its Optima HD product line. But what Axcelis does not say is that Optima HD has been on the market since January, 2006. *See* Press Release from Axcelis, dated January 11, 2006, Keeney Decl., Ex. A. And since that time, Axcelis's stock price has dropped over 91 percent. *See* Chart from Yahoo Finance, dated June 22, 2009, Keeney Decl., Ex. B. This undercuts Axcelis's arguments about the

importance of the Optima HD line to its future success and again raises serious questions about what methods, if any, the Board used to determine Axcelis's value.

Axcelis claims SHI "made no effort" to further discussions between Axcelis and SHI since SHI did not raise its $6.00 per share offer and did not agree to the Axcelis Board's conditions for entering into discussions. (Def.'s Op. Br. 14.) First, it is not a fact that SHI "made no effort" to further discussions. In fact, every indication is that SHI was the driving force behind any discussions between itself and Axcelis. Second, SHI already raised its offer. (J. Stip. ¶¶ 14, 15.) (incorporating by reference Exhibits I and J). And since doing so, Axcelis's share price dropped precipitously. (J. Stip. ¶ 56) (incorporating by reference Exhibit EE). Third, there is nothing in the record to indicate the conditions sought by the Board for entering into negotiations with it were "routine" as Defendant claims. In fact, these conditions were apparently onerous enough that it took nearly two years for an obviously interested bidder in SHI to agree to them. (J. Stip. ¶¶ 12, 32) (incorporating by reference SHI's February 11, 2008 letter to Axcelis).

The Board Retains The Rejected Directors

Axcelis correctly states that Messrs. Hardis, Thompson, and Fletcher received a plurality – but not a majority – of the shareholder vote. (Def.'s Op. Br. 15.) But what Axcelis conveniently ignores is that, because the election was uncontested, these directors would have received a "plurality" vote with just one vote. (J. Stip. ¶ 20) (incorporating by reference the Board's governance policies as amended through October 16, 2007). More important, however is the fact that Axcelis had implemented a voting policy that *required* directors to submit their resignations if they failed to receive the affirmative support of the majority of shareholders. And although this policy permitted the Board to consider whether to accept such resignations, any decision of the Board to reject the majority vote of shareholders in an election implicates well-

established principles of Delaware law that would require the Board to offer a compelling justification for such a decision.

The Opinions Of Axcelis Shareholders

Axcelis claims that the opinions of its shareholders, such as Sterling Capital Management ("Sterling Capital") and D.A. Davidson & Co., are "irrelevant." (Def.'s Op. Br. 17.) Oddly though, Axcelis also relies on those opinions in an attempt to support its assertion that SHI's offers were "too low." *Id.*

Axcelis correctly points out that Sterling Capital Management believed SHI's initial offer was below what it considered to be Axcelis's full value. *Id.* But what Axcelis fails to mention is that Sterling Capital also stated that if Axcelis intended to obtain a higher offer, it needed to negotiate with SHI – something it steadfastly refused to do for over 18 months. (J. Stip. ¶ 12) (incorporating by reference SHI's February 11, 2008 letter to Axcelis). Since the Board's refusal to negotiate in good faith with SHI caused many shareholders, including Sterling Capital, to withhold their votes in Axcelis's 2008 director elections, these opinions are – despite Axcelis's protestations to the contrary – undoubtedly relevant.

Plaintiff Files Its Complaint

Axcelis's not-so-subtle swipes at the timing of Plaintiff's Complaint are entirely specious. (Def.'s Op. Br. 21.) Plaintiff did not miss any filing deadline, ignore any procedural rule, or shirk any obligation whatsoever. Indeed, Axcelis's unfounded speculation regarding its shareholder's motives is just more evidence of how hostile the Axcelis Board appears to be toward not only Plaintiff, but to any attempt to inquire into the Board's motives in thwarting SHI's proposal and rejecting the shareholders' decision to remove three directors from the Board.

ARGUMENT

I. THE APPLICABLE STANDARD IN A SECTION 220 ACTION

The standard in a Section 220 action is clear: a plaintiff must demonstrate a proper purpose for requesting corporate books and records by providing some credible basis from which the court can infer that wrongdoing may have occurred. *Seinfeld*, 909 A.2d at 122. Although Axcelis cautions that this burden is "not insubstantial," the *Seinfeld* court stated, "the 'credible basis' standard sets the ***lowest possible burden of proof***. The only way to reduce the burden of proof further would be to eliminate any requirement that a stockholder show *some evidence* of possible wrongdoing." 909 A.2d at 123 (emphasis added).

Axcelis also incorrectly – and repeatedly – refers to the standard on a motion to dismiss. (Def.'s Op. Br. 23, 25.) But this is a red herring, which this Court should ignore. A plaintiff in a Section 220 action is not required to prove a breach of fiduciary duty claim. In fact, this Court has acknowledged that a sufficiently credible basis to infer wrongdoing in a Section 220 action may ultimately "fall well short of actually proving wrongdoing. . . ." *Forsythe v. CIBC Employee Private Equity Fund*, 2005 WL 1653963, at *5 (Del. Ch. July 7, 2005). Despite Axcelis's attempts at obfuscating this point, the "'credible-basis-from-some-evidence' standard is settled law." *Seinfeld*, 909 A.2d at 123-24. Plaintiff meets this standard.

II. DEFENDANT FAILS TO ARTICULATE A COMPELLING JUSTIFICATION FOR REJECTING THE SHAREHOLDERS' VOTE

When a board acts with the primary purpose of interfering with the shareholder franchise, it must demonstrate a compelling justification for such action. *Blasius*, 564 A.2d at 661. Axcelis undoubtedly interfered with the shareholder franchise by overturning the results of a shareholder vote to elect directors. (J. Stip. ¶ 31.) Despite that, Axcelis barely addresses the voting issue in its opening brief.

Failing to cite even one case to support its argument that "the Board acted properly" in retaining rejected directors, Axcelis inexplicably relies on its own governance policies as "proof" that it did so. Axcelis also cites to a law review article, *Majority Voting in Director Elections: A Simple, Direct, and Swift Solution?*, for the proposition that most corporations adopting a majority voting standard, choose the "Pfizer-style" voting policy. But the issue is not whether Axcelis has given itself the authority to overturn the results of director elections, or whether other companies have adopted a similar policy. The issue is what standard of review is applicable to a Board's decision to interfere with the shareholder franchise. Under Delaware law, that standard is clear: the board must offer a compelling justification. *Blasius*, 564 A.2d at 661. The simple point is this: Under Delaware law, the decision of a board of directors to interfere and reverse the results of a shareholder vote, particularly in the context of director elections, is not entitled to the deference afforded other board decisions by the business judgment rule. *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 239 (Del. 1982) ("careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been effectively frustrated and denied. . . . ") The fact that Axcelis's Board may have given itself the specific authority to reverse a shareholder vote through the adoption of this "Pfizer-style" majority voting policy does not change Delaware law in this regard and does not *ipso facto* result in the Board's decision to exercise this ability to be subject to the business judgment rule.

Although Axcelis repeatedly characterizes its decision to retain unelected directors as "routine" and "common practice," Axcelis is flat-out wrong. Axcelis has not offered a single example of another corporate board rejecting the resignations of directors who were required to submit such resignations because they did not receive the support of a majority of shareholders in an uncontested election. Indeed, other than Axcelis last year, Plaintiff is aware of only *one other time* in which this happened – at Pulte Homes just last month. *See* Pulte Homes 8-K, dated June

2, 2009, Keeney Decl., Ex. C. And no court, in Delaware or elsewhere, has ever ruled that a board's decision to reject and undermine a shareholder vote in connection with an election of directors is subject to the protections of the business judgment rule. Far from being "routine," the Axcelis Board's decision to reject the resignations of Messrs. Hardis, Fletcher, and Thompspon was truly exceptional and, to the great disappointment and frankly shock of Axcelis's shareholders, unprecedented.

In truth, however, whether the board of directors at Pulte Homes or any other corporate board (before or after Axcelis) acted to reject the majority vote of shareholders in connection with an election of directors is really beside the point. Delaware law on the subject is well-established and remains clear. A decision of a corporate board to impair the effective vote of shareholders is not entitled to the same kind of deference that may be applicable to other business decisions, and even if the board's action may be justified they must offer a compelling justification for their decision. *Blasius,* 564 A.2d at 661. Axcelis has not even attempted to offer such a "compelling justification" and cannot block Plaintiff's Section 220 inspection demands by claiming that the Board's decision to reject the shareholder vote was just a routine business decision.

III. DEFENDANT FAILS TO SHOW ITS ACTIONS WERE BOTH REASONABLE AND PROPORTIONAL

When a board acts defensively to impede a threatened change in control, it must show its actions were both reasonable and proportional in relation to the threat posed. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373; *Unocal* 493 A.2d at 955. Moreover, where a target board's actions are closely related, Delaware courts require such actions to be evaluated collectively. *Unitrin,* 651 A.2d at 1387. Axcelis's Board acted defensively by overturning the results of a shareholder vote in director elections. They did so after refusing for nearly eighteen months to negotiate with SHI and rejecting two premium offers from SHI. Despite that, Axcelis does not

even attempt to show that the Board's actions were either reasonable or proportional in response to SHI's acquisition offers.

Instead Axcelis argues, somewhat beside the point, that the individual directors could not be considered "interested" with respect to SHI's acquisition proposals (Def.'s Op. Br. 30). But even if Axcelis was right in this regard, and this is by no means clear, it does nothing to demonstrate whether the Board's actions constituted a reasonable and proportional response. The analysis, simply, is irrelevant to determining whether Axcelis's Board complied with their fiduciary obligations under *Unocal*. 493 A.2d at 955. For the same reason, the cases Defendant cites in support of that argument – *Pogostin v. Rice*, 480 A.2d 619 (Del. 1984) (holding that a board's rejection of a merger by itself does not establish "interestedness") and *In re Paxson Communications Corp. Shareholders Litigation*, 2001 WL 812028, at *8-9 (Del. Ch. July, 12, 2001) (holding that rejection of a merger by itself is insufficient to support a claim of demand futility in a derivative action) – are off point.

But more importantly, for purposes of evaluating Plaintiffs' 220 demands, the question most definitely is *not* whether Axcelis's directors complied with their fiduciary obligations under *Unocal, et al*, but whether their fiduciary obligations under *Unocal* may have been implicated. If a question exists regarding whether the Axcelis Board complied with its fiduciary duties in responding to SHI's acquisition efforts, Plaintiff is entitled to investigate that issue through the mechanism provided by Section 220.

IV. THE SALE OF SEN AND ALL INFERENCES FLOWING FROM IT ARE PROPERLY BEFORE THIS COURT AND PROVIDE A CREDIBLE BASIS FROM WHICH THIS COURT CAN INFER WRONGDOING

Axcelis also asserts, without citing to any authority for the proposition, that this Court should not consider the sale of SEN to SHI because the sale occurred after Plaintiff submitted its request for books and records under Section 220. (Def.'s Op. Br. 35 n.14) ("The allegations

regarding the sale of Axcelis' interest in SEN relate to a time period after that in the Demand. For that reason, those allegations should have no bearing on the Court's decision.") Defendant is plainly wrong. It is well settled that in a Section 220 action where the proffered purpose is to investigate possible corporate wrongdoing, a stockholder may establish a credible basis for the Court to infer such wrongdoing "through documents, logic, testimony, or otherwise. . . . " *Security First*, 687 A.2d at 568. Testimony at trial, by definition, comes after a request for books and records. Similarly, documents and logic are not limited to the time before a books and records request is made. Although a shareholder may be required to establish a "credible basis" to a Court when seeking to enforce its rights under Section 220, nothing in the statute requires the shareholder to provide to a corporation all evidence that would establish such a "credible basis" when submitting the inspection demand in the first place. The sale of SEN is a part of the record in this case and there is absolutely nothing that prevents this Court from considering it.

Axcelis argues that even if this Court considers the sale of SEN, it does not constitute evidence of corporate wrongdoing. (Def.'s Op. Br. 36.) Again, Axcelis's arguments fall short and depend on considering the sale of SEN in isolation. Axcelis's Board twice rejected a premium offer from SHI citing the "value of SEN" as a major sticking point in why it could not merge with SHI. (J. Stip. ¶¶ 13, 18) (incorporating by reference Axcelis's February 25, 2008 8-K and Axcelis's April 14, 2008 8-K). In other words, according to the Axcelis Board, SHI's bid of $630 million "undervalued" the Company, based in large part supposedly on the "value of SEN." Yet, just months after causing SHI to abandon its efforts to acquire the whole Company, the Board sold SEN to SHI for $136 million. (J. Stip. ¶¶ 50, 51) (incorporating by reference Axcelis's February 26, 2009 press release and Axcelis's April 3, 2009 8-K). This indicates that either (a) the value of SEN was not, in fact, the real sticking point and thus the Axcelis Board's representation that a $6 per share offer from SHI "undervalued" the Company was wrong and

without basis, or (b) the Axcelis Board unloaded Axcelis's interest in SEN for a song and at a price that did not reflect its true value. Moreover, the sale of Axcelis's interest in SEN further depleted an already struggling Axcelis, permanently deprived shareholders of a premium offer from SHI, and made Axcelis far less attractive to any future suitors. Thus, the sale of SEN viewed in the context of the history of the Axcelis Board's efforts to thwart SHI's acquisition proposals, is rightly considered when determining whether the record, as a whole, establishes a credible basis from which this Court can infer corporate wrongdoing may have occurred at Axcelis so as to warrant Plaintiff's inspection demands.

V. THE BUSINESS JUDGMENT RULE IS INAPPLICABLE

Axcelis claims all of the actions by the Board set forth in the Joint Stipulation are protected by the business judgment rule. (Def.'s Op. Br. 24.) For instance, Axcelis cites *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009). *TW Services, Inc. v. SWT Acquisition Corp.*, 1989 WL 20290 (Del. Ch. March 2, 1989) and *Kahn v. MSB Bancorp, Inc.*, 1998 WL 409355 (Del. Ch. July 16, 1988) for the proposition that a board of directors' decision to reject a merger proposal is normally reviewed under the business judgment rule standard. (Def.'s Op. Br. 24.) But these cases – none of which involved a Section 220 action – universally miss the mark.

In *Gantler*, the court did not – as Axcelis suggests – hold that a board's decision to reject a merger proposal is, as a rule, evaluated under the business judgment standard. 965 A.2d. at 705. Rather, the court determined *Unocal* did not apply because the plaintiffs in that case failed to sufficiently allege that the board acted defensively. *Id.* In fact, the plaintiff's only allegation that the board acted defensively was that the board rejected a merger proposal. *Id.* But here, Plaintiff has alleged much more. Plaintiff alleges Axcelis overturned the results of a shareholder vote to elect directors in order to preserve its control over Axcelis and thwart SHI's acquisition attempt. Since Plaintiff has made such allegations, *Gantler* is inapposite.

TW Services is similarly inapplicable. 1989 WL 20290. There, this Court determined enhanced scrutiny did not apply because of the "particularities" of the tender offer in that case. *Id.* at *1. In contrast to the broad reading Axcelis gives *TW Services*, this Court went so far as to call the circumstances of that case "anomal[ous]." *Id.* at *9. Specifically, the way the potential acquirer structured its offer in that case, enhanced scrutiny could not be implicated unless the board could be considered interested. *Id.* at *11 ("By conditioning the closing of its tender offer upon the execution of a merger agreement, [the offeror] has implicated . . . the board's Section 251 power. . . . The exercise of the board's power under that Section is, where there is no interested merger involved, subject to a traditional business judgment review. . . ."). As these circumstances do not apply to the instant case, *TW Services* is irrelevant.

Axcelis's last stab at invoking the business judgment rule is its reliance on *Kahn*. 1998 WL 409355. But like *Gantler* and *TW Services*, *Kahn* is also inapposite. In *Kahn*, this court refused to adopt a new rule proposed by plaintiff that would have applied enhanced scrutiny to a board's rejection of a merger offer. The plaintiff there made no allegations that the board acted with an entrenchment motive or took any defensive actions. 1998 WL 409355, at *3. But Plaintiff here does allege that the Board acted with an entrenchment motive and also that it acted defensively. (Pl.'s Op. Br. 16-20.) Thus, Defendant's reference to *Kahn* falls flat.

If the Board, in fact, acted defensively it would have to show its actions were both reasonable and proportional in a derivative action. Although Plaintiff has not yet commenced a derivative action, based on the facts, there is a credible basis from which this Court can infer that the Board acted defensively. Acting responsibly and as instructed repeatedly by Delaware courts, Plaintiff seeks to exercise its inspection rights to investigate whether the Board acted defensively, with an improper motive, or unreasonably in a manner that was out of proportion with SHI's offer. Axcelis should not now be permitted to block Plaintiff's lawful request for books and

records by claiming that the Board did not breach its fiduciary obligations under *Unocal* when that is the very fact Plaintiff seeks to investigate by using its Section 220 inspection rights.

The reason Defendant cannot cite to any authority that shows the business judgment rule should be applied in this circumstance is because the business judgment rule is inapplicable here. Both the Board's decision to overturn the results of a shareholder vote and to act defensively in the context of SHI's repeated acquisition attempts are subject to enhanced scrutiny. The former requiring the Board to set forth a compelling justification for its actions – which it has not – and the latter requiring the Board to show its actions were both reasonable and proportional before business judgment protections attach. *Blasius*, 564 A.2d at 661 (holding that where a board acts with the primary purpose of interfering with the shareholder franchise, it must demonstrate a compelling justification for such action); *Unitrin*, 651 A.2d at 1373 (holding that a target board that acts defensively must show those actions were both reasonable and proportional). Since Axcelis has not even attempted to set forth a compelling justification for overturning a shareholder vote or show that any of its defensive actions were both reasonable and proportional, the business judgment rule cannot apply.

VI. THAT THE AXCELIS BOARD MAY BE INDEMNIFIED FOR A BREACH OF THE DUTY OF CARE PROVIDES NO BASIS TO REJECT PLAINTIFF'S INSPECTION DEMANDS.

A corporate board violates its fiduciary duties to shareholders when it responds to an acquisition proposal uninformed or without good faith. For instance, in *Paramount Commc'ns Inc. v. QVC Networks*, the court held a board breached its fiduciary duties by refusing to be informed about terms and conditions of a tender offer and by failing to negotiate actively and in good faith with the offeror. 637 A.2d 34, 48 (Del. 1994). Additionally, in *City Capital Associates Ltd. v. Interco Inc.*, this Court stated, "the central obligation of a board . . . is to act in an informed manner." 551 A.2d 787, 802 (Del. Ch. 1988) (*reversed on other grounds*). Thus,

Plaintiff's allegations regarding the Board's failure to respond to SHI's acquisition proposals fully informed and in good faith, provide a credible basis from which the Court can infer that the Axcelis Board breached its fiduciary duties.

In this regard it is irrelevant that Axcelis may fully exculpate the directors for breaches of the duty of care via the Company's Section 102(b)(7) provision. Stockholders may use information obtained from a books and records request "in a variety of contexts." *Seinfeld*, 909 A.2d at 119. Specifically, stockholders may use information about corporate mismanagement or wrongdoing to "institute derivative litigation; 'seek an audience with the board [of directors] to discuss proposed reform or, failing in that, they may prepare a stockholder resolution for the next annual meeting, or mount a proxy fight to elect new directors." *Id.* at 119-120. Thus, it is immaterial whether information related to Axcelis's handling of SHI's offers ultimately leads to liability on the part of the Axcelis directors. All that Plaintiff is required to do is raise an inference of wrongdoing – not necessarily liability. Since Plaintiff meets that standard, Plaintiff should be granted access to the requested books and records.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant its books and records request and Order Defendant to produce for inspection and copying all documents identified in Plaintiff's December 9, 2008 demand letter.

DATED: June 29, 2009

Respectfully submitted,

/s/ Michael J. Barry
Jay W. Eisenhofer (DE Bar No. 2864)
Michael J. Barry (DE Bar No. 4368)
Christian Keeney (DE Bar No. 5197)
GRANT & EISENHOFER P.A.
1201 North Market Street, Suite 2100
Wilmington, DE 19801
Tel.: (302) 622-7000
Fax: (302) 622-7100

Attorneys for Plaintiff