IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF WESTLAND POLICE & FIRE RETIREMENT SYSTEM,	:	No. 594,2009
Appellant,	:	ON APPEAL FROM THE OPINION DATED SEPTEMBER 28, 2009
v.	:	AND ORDER DATED SEPTEMBER 28, 2009 OF THE COURT OF
AXCELIS TECHNOLOGIES, INC.,	:	CHANCERY OF THE STATE OF DELAWARE IN
Appellee.	:	C.A. NO. 4473-VCN

APPELLANT'S OPENING BRIEF

DATED: January 4, 2010

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NATURE OF THE PROCEEDING

Appellant Westland Police & Fire Retirement System ("Westland P&F") is a Michigan pension fund and record holder of 9,400 shares of Axcelis Technologies, Inc., ("Axcelis" or "the Company") common stock. Westland P&F sought to inspect certain books and records of the Company to investigate whether members of Axcelis's board of directors ("the Board") breached their fiduciary duties in connection with the Board's: (1) handling of acquisition proposals from Sumitomo Heavy Industries ("SHI") in 2008; and (2) decision to retain three directors who were forced to submit their resignations after a majority of Axcelis shareholders withheld their votes during director elections at the Company's 2008 Annual Meeting.

The Court of Chancery denied Westland P&F's request. *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, C.A. No. 4473-VCN (Del. Ch. Sept. 28, 2009) ("Mem. Op.") Accordingly, Westland P&F appeals the Court of Chancery's order under Del. Const. art. IV § 11 and Supr. Ct. R. 7.

SUMMARY OF THE ARGUMENT

This case presents two issues of vital importance to Delaware's ability to maintain its standing as the leader in corporate law. The first involves the evidentiary burden that is to be imposed on shareholders seeking to exercise their statutory rights to inspect corporate books and records under Section 220 of the DGCL. 8 *Del. C.* § 220. The second involves the standard of review that will be applicable to the decision of a corporate board to reject a resignation submitted by a director pursuant to a voting policy that required the director to submit the resignation if a majority of shareholders did not support the director's reelection. The decision of the Court of Chancery below on both of these issues marks a significant departure from established jurisprudence regarding shareholders' statutory inspection rights, eliminates the opportunity for judicial review on an issue central to the shareholder franchise, and threatens to undermine Delaware's leadership role in significant issues of corporate law.

First, the Court of Chancery erred in conflating the requirement that a shareholder seeking to exercise its statutory right of inspection for the purpose of investigating possible corporate wrongdoing must proffer a "credible basis" from which the Court may infer that wrongdoing may have occurred, with the requirement that a shareholder must provide actual evidence of wrongful intent in order to implicate enhanced scrutiny of director conduct, as established by *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), *Blasius Indus., Inc., v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988), and their

progeny. The Court of Chancery rejected Plaintiff's Section 220 request because, it determined, Plaintiff did not present sufficient evidence to demonstrate that the directors of Axcelis acted with an improper motive when they (a) rejected resignations of corporate directors who resigned after they failed to receive the support of a majority of shareholders for their reelection at the Company's 2008 annual meeting, and (b) successfully fended off a hostile acquisition proposal made by SHI. But the very purpose of the Section 220 demand was to determine whether the directors were, in fact, improperly motivated. The relevant question for purposes of determining whether Plaintiff properly asserted its inspection rights here, therefore, was *not* whether *Unocal* or *Blasius* necessarily applied, but whether they ***might*** have applied given the circumstances here. By rejecting Plaintiff's 220 demands because it did not feel that the Plaintiff presented sufficient "evidence" of the Axcelis Board's wrongful intent, the Court of Chancery essentially elevated the "credible basis" standard on par with the standard applicable in the context of a motion for summary judgment. The court's holding thus renders Section 220 completely irrelevant as part of the "tools at hand" that this Court repeatedly has urged shareholders to use to investigate possible wrongdoing before commencing litigation.

Second, the Court of Chancery erred in holding that the business judgment rule automatically applies to shield from judicial review the decision of a corporate board to reject director resignations at Axcelis in 2008. Axcelis, like many companies, has in place a voting policy that requires directors to submit their resignations if they do

not receive support for their reelection from a majority of shareholders. If a director submits his or her resignation under this policy, the incumbent Board then determines whether to accept that resignation. The Court of Chancery held that because the policy gave discretion to the Axcelis Board, a decision by the Board on that issue necessarily was subject to the protection of the business judgment rule, and as such could not be investigated under Section 220.

The Court of Chancery's analysis on this point put the proverbial cart before the horse. The fact that directors may have "discretion" on an issue does not preclude an investigation under Section 220. And, in any event, the business judgment rule does not apply simply because Axcelis's voting policy gives certain discretion to the Board. The Axcelis Board has discretion with regard to director resignations only because the voting policy gives it to them. But what *standard* applies in reviewing directors' conduct in this regard is determined under Delaware law. And on this point, Delaware law is clear: Under *Blasius*, where director conduct is designed to frustrate the outcome of a shareholder vote or impede the shareholder franchise, the business judgment rule does *not* apply and directors must provide a "compelling justification" for their actions. Here, by virtue of the voting policy in place at Axcelis, the intended outcome of the shareholders' 2008 vote was that three directors would resign from the board. By rejecting these resignations (and by agreeing to continue to serve with regard to the directors who resigned), Axcelis's Board thwarted the will of the majority of the Company's shareholders. As such, the Axcelis Board should have been required to provide a

compelling justification for their actions, and the Court of Chancery erred in holding that the business judgment rule necessarily applied.

But even if under existing jurisprudence the *Blasius* standard of enhanced scrutiny has not yet been extended to the kind of director conduct at issue here, this Court should do so now. In recent years, many Delaware corporations have implemented the kind of voting policy adopted by Axcelis and at issue in this case. If this Court were to hold that the decision of a corporate board to reject director resignations submitted under such policies is just another routine business decision entitled to the same level of protection as any other matter under the business judgment rule, the Court would effectively cut off any realistic opportunity for judicial review for shareholders seeking to hold directors accountable for their decisions in this regard. This would mean that incumbent boards could reject such resignations with impunity, shareholders would have no means under Delaware law to even ask directors to explain or justify their decision to reject the results of a shareholder vote, and these kinds of voting policies would be revealed as a meaningless farce with no force or effect. The only option for shareholders, then, would be to seek to eliminate these kinds of voting policies entirely, or to look elsewhere to compel directors to justify these kinds of extraordinary actions. This does not have to be the result. This Court should make clear that shareholders have meaningful access to the Delaware courts on matters that relate to corporate elections. The Court of Chancery's decision should be reversed.

STATEMENT OF FACTS

A. Axcelis And SHI's Joint Venture

Axcelis is a Delaware corporation specializing in the manufacture of ion implantation and semiconductor equipment. (A38, A59).[1] Sumitomo Heavy Industries ("SHI") is a Japanese company that also makes and sells semiconductor equipment. (A38). Since 1983, Axcelis and SHI have been equal partners in a joint venture called SEN Corporation ("SEN"). (A38, A64). SEN, like Axcelis and SHI, manufactures ion implantation and semiconductor equipment. (A39, A64).

SEN was, by all accounts, an important asset to both Axcelis and SHI. (A40, A297). In Axcelis's 2007 Annual Report, Axcelis stated, "Royalties and income from SEN have been a substantial contribution to our earnings, and a substantial decline in SEN's sales and net income, or a failure of SEN to pay royalties to Axcelis, could have a material adverse effect on our net income." (A39, A184). And according to SHI, SEN "has the largest market share of any ion implantation equipment company in Japan ..." (A40, A257).

SEN was remarkably successful, but also was a source of conflict between Axcelis and SHI. (A43, A333). For instance, in 2006, Axcelis and SEN entered into arbitration in Japan over royalties. (A39, A184). Additionally, Axcelis and SHI disputed the amount of dividends Axcelis should receive from SEN. In a later Form 8-K, Axcelis Chairperson and CEO Mary G. Puma described this dispute to some extent when she stated, "Axcelis' share of SEN's cash has been trapped in

[1] Citations to "A ___" refer to the Appellant's Appendix.

Japan because SHI has declined to join Axcelis in approving dividends which appropriately reflect the amount by which SEN's cash generation over the last few years has exceeded SEN's cash needs." (A43, A333).

B. SHI Proposes To Acquire Axcelis

Beginning in the fall of 2006 and for approximately eighteen months thereafter, SHI attempted to discuss with Axcelis's Board a way to combine SHI, Axcelis, and SEN into one company. (A40, A257). Axcelis's Board, however, continually rejected SHI's overtures. *Id.* Throughout that period, Axcelis's market share declined. *Id.* And by its own estimation, Axcelis expected market conditions to be increasingly difficult. *Id.* Thus, in February 2008, after nearly eighteen months of unsuccessful attempts to engage the Board in private, substantive merger negotiations, SHI along with its financing partner TPG Capital LLP ("TPG"), decided to make its offer public.

Thus, on February 4, 2008, SHI and TPG made an unsolicited offer to acquire Axcelis for $5.20 per share. (A39, A253). SHI's offer represented a 24.4% premium over Axcelis's then $4.18 share price. (A39, A254).

Many believed that SHI's proposal to acquire Axcelis was motivated, at least in part, by a desire to end the troubled relationship over SEN. (A447-48). Indeed, Axcelis's public statements indicated the value of SEN was a major sticking point for it in considering any offers from SHI. For instance, Axcelis Director Stephen R. Hardis stated, "[SHI's] proposal ignores the value SHI would obtain by acquiring full ownership of SEN, a Japanese joint venture Axcelis has with SHI." (A40, A279).

After receiving SHI's offer, Axcelis's Board informed SHI that it would discuss the proposal with its advisors. (A39, A253). Although the Axcelis Board claimed that it "thoroughly review[ed] the proposal" (A40, A279), in fact, SHI informed Axcelis's public investors that the Axcelis Board did *not* actually engage in any discussions with SHI regarding SHI's offer. (A40, A256). Nonetheless, just a few weeks later, Axcelis rejected SHI's offer, claiming it was "inadequate." (A40, A279). The Axcelis Board, however, did not disclose what, if any, valuation analyses it conducted to determine whether SHI's offer fairly valued Axcelis, or make any suggestion as to what price (or range of prices) the Axcelis Board might consider "adequate." *Id.*

C. SHI Revises Its Acquisition Proposal

After Axcelis rejected SHI's initial offer, SHI met with Axcelis shareholders representing a substantial majority of Axcelis's outstanding shares for input on a revised acquisition proposal. *Id.* On March 10, 2008, based in part on these discussions, SHI revised its offer to acquire Axcelis for $6 per share. (A40, A281-82). This represented nearly a 44% premium over the publicly traded price of Axcelis stock before SHI made its first offer public. (A40, A286).

Predictably, the Axcelis Board claimed that SHI's revised proposal somehow vindicated the directors' position that SHI's original proposal "undervalued Axcelis." (A1200). SHI, however, explained its reasons for revising its offer in its March 10, 2008 letter to the Board and nowhere in that letter did SHI indicate it revised its offer because it believed its first offer "undervalued" Axcelis. (A40, A281-82). To the contrary, SHI explained that it based

its revised offer 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[.]" *Id.*

Many Axcelis shareholders also strongly supported a combination between Axcelis and SHI. For instance, Sterling Capital Management ("Sterling Capital"), an approximately 12 percent stakeholder in Axcelis sent the Axcelis Board several letters expressing its support for a merger between Axcelis and SHI. (A449-52). Indeed, most shareholders agreed that "the best outcome for Axcelis is some combination with Sumitomo Heavy." *Id.*

Again, Axcelis's Board claimed it would "thoroughly evaluate" SHI's proposal (A40, A285), and asserted it conducted "extensive valuation analyses" in evaluating SHI's revised proposal (A40, A296). Yet only a week after receiving SHI's revised offer, and without any meaningful discussions with SHI, Axcelis's Board rejected SHI's revised offer. *Id.* But as before, although the Board claimed SHI's offer "undervalued" Axcelis, the Board never disclosed what methods, if any, it used to determine Axcelis's value; did not disclose what range it considered to be a fair value for Axcelis; and did not provide any specifics at all regarding the alleged "valuation analyses" the Axcelis Board considered before summarily rejecting SHI's revised offer. *Id.*

D. Axcelis Shareholders Withhold Support For Axcelis Directors

Approaching Axcelis's 2008 Annual Meeting, shareholders were widely dissatisfied with the Board's responses to SHI's offers. In a March 28, 2008 letter from Sterling Capital to Axcelis's Board, Sterling Capital said it likely would withhold its support for Axcelis's directors in the upcoming director elections because of its dissatisfaction with the Board's handling of SHI's offers. (A450-51). Additionally, 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. (A453-55).

Axcelis has in place the kind of voting policy that has become in vogue among corporations seeking to placate demands by shareholders frustrated with the default "plurality" standard in director elections. As shareholders have increased pressure among corporate boards to adopt "majority voting" policies, some corporations such as Axcelis have adopted a hybrid approach – designed to impose a kind of majority voting requirement, but retaining in the incumbent board the ability to exercise discretion. Specifically, Axcelis's voting policy requires directors who fail to receive a majority of the stockholder vote must submit their resignations to the Nominating and Corporate Governance Committee ("Committee"). (A41, A321). Once it receives a resignation, the Committee is required to consider it and recommend to the Board whether to accept or reject it. *Id.* The Board then decides whether to accept or reject a director's resignation. *Id.* This policy, commonly referred to as a "Pfizer-style" policy (named after

the first company to implement the idea) or "majority voting lite" is a compromise between traditional plurality voting and pure majority voting, where only nominees who receive majority shareholder support are elected to the board.

Axcelis held its 2008 Annual Meeting on May 1, 2008. (A41). At that meeting, directors Stephen R. Hardis, R. John Fletcher, and H. Brian Thompson were up for reelection to the Board. *Id.* In the face of widespread shareholder dissatisfaction with the manner in which Axcelis's Board was addressing the acquisition proposals from SHI, and the recommendations from major shareholders and proxy voting advisory services to withhold votes for incumbent directors, all three directors up for reelection at Axcelis's 2008 annual meeting received less than a majority of the shareholder vote. (A42). Consequently, pursuant to Axcelis's "Pfizer-style" policy, all three submitted their resignations to the Committee. *Id.*

E. Axcelis's Board Thwarts Shareholders' Will

After the shareholder vote, the Board declared it would "act on the [Committee's] recommendation as [the Board] determine[s] appropriate and in the best interests of the shareholders." (A42, A319). Thereafter, contrary to the majority of Axcelis shareholders who withheld support from Messrs. Hardis, Fletcher, and Thompson, the Board rejected their resignations and retained them anyway. (A43). The Board claimed its decision was necessary to "move forward on discussions with SHI. ..." *Id.* But shareholders refused to support the rejected directors, at least in part, because of their inability to negotiate a combination with SHI. As Sterling Capital stated in a

letter dated May 2, 2008, to the Axcelis Board, "the failure of [Messrs. Hardis, Fletcher, and Thompson] to receive a majority of the shareholder vote in support of their re-election represents a clear message from shareholders of their discontent with the failure of the Board to fully engage SHI in negotiations that could ultimately lead to a transaction that fairly values our company." (A452). Thus, by retaining directors Hardis, Fletcher, and Thompson specifically to further the Board's strategy of responding to SHI's acquisition proposals, the Board's action contradicted the results of the shareholder vote, which was in essence a directive to Messrs. Hardis, Fletcher, and Thompson to resign.

F. Axcelis Purports To Engage In Discussions With SHI, But The Board's Conduct Raises Questions Regarding Its Good Faith

Shortly after the Board rejected the resignations of Messrs. Hardis, Fletcher, and Thompson, it entered into a confidentiality agreement with SHI to discuss SHI's acquisition proposals. (A43). Sometime in June 2008, representatives from Axcelis and SHI met to discuss SHI's acquisition proposals. *Id.* After that meeting, SHI requested additional information from Axcelis in order to perform due diligence in formulating a revised acquisition proposal. *Id.* Axcelis agreed to provide additional information to SHI on condition that SHI agree to submit a revised acquisition proposal by August 1, 2008. (A44). Thereafter, SHI requested additional time to formulate a revised proposal – a mere seven weeks *Id.* Axcelis's Board, however, rejected SHI's request, effectively ending all discussions between the companies. *Id.*

On September 15, 2008, Axcelis announced to shareholders that negotiations between itself and SHI were over. *Id.* That same day, Axcelis's stock price dropped 67% from $4.34 to $1.43, wiping out over $300 million in shareholder equity and further reinforcing the notion that any bump in Axcelis's stock price was largely, if not entirely, attributable to investor enthusiasm for a combination between Axcelis and SHI. (A45).

G. Westland P&F Requests – And Is Denied – Access To Axcelis's Books And Records

On December 9, 2008, Westland P&F sent Axcelis a demand letter requesting for inspection, books and records relating to the Board's handling of SHI's acquisition proposals and the Board's decision to retain Messrs. Hardis, Fletcher, and Thompson. *Id.* Westland P&F's letter complied with all of Section 220's requirements: (a) it included a power of attorney form authorizing Westland P&F's counsel to make the demand; (b) it contained proof of Westland P&F's beneficial ownership of Axcelis; (c) and it stated a proper purpose. *Id.* Westland P&F's stated purpose was – and still is – to investigate 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 Messrs. Hardis, Fletcher, and Thompson. *Id.*

Axcelis flatly refused Westland P&F's lawful request. (A46). In a letter dated December 12, 2008, Axcelis's Board claimed that Westland P&F failed to "satisfy the standard set forth in Section 220 and Delaware's jurisprudence interpreting Section 220." *Id.*

H. Axcelis Sells SEN To SHI

Only months after denying SHI's request for a few additional weeks to formulate an acquisition proposal for Axcelis, the Board chose instead to sell SEN to SHI outright for $132 million. (A46). Thus, instead of spending over $615 million to purchase Axcelis itself – as it indicated it was prepared to do through its $6 per share offer - SHI was able to buy SEN for just $132 million. *Id.* And SEN provided, by Axcelis's admission, a "substantial contribution" to Axcelis's earnings and indeed was the driving force behind SHI's interest in acquiring Axcelis itself. (A39). But by selling SEN, the Board retained control of Axcelis and SHI got something it wanted all along: sole control over SEN. (A41). By contrast, the Board's actions deprived shareholders of the opportunity to consider a premium offer from SHI. SHI previously offered $6.00 per share, which Axcelis's Board said "undervalue[d]" Axcelis. (A40). But Axcelis's stock was trading for around $0.50 per share at the time of the hearing before the Court of Chancery below. (A47).[2] Thus, Axcelis's rejection of SHI's $6.00 per share offer effectively cost shareholders over $503 million in shareholder equity measured by the Company's current stock price. (A40).

I. Chancery Court Denies Westland P&F's Books And Records Request

On April 2, 2009, Westland P&F filed a complaint under 8 *Del. C.* § 220 to compel inspection of Axcelis's books and records. (A7-26). After the parties completed briefing, Vice Chancellor Noble of the

[2] Even now, Axcelis stock is only trading around $1.40 per share. *See* http://finance.yahoo.com/q?s=ACLS (last visited January 4, 2010).

Court of Chancery held a trial, on July 8, 2009, to determine whether Axcelis would be required to allow inspection of books and records related to the Board's: (1) rejection of the resignations of directors Hardis, Fletcher, and Thompson; and (2) handling of SHI's acquisition proposals.

The trial was held on a stipulated record, consisting of the Company's press releases and regulatory filings, newspaper and internet articles, the parties' court filings, and a joint statement of facts. (A38 – A418).

On September 28, 2009, the Court of Chancery denied Westland P&F's books and records requests in their entirety. Mem. Op. at 12. First, the Court of Chancery reasoned that the Board's conduct did not implicate *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), because Westland P&F failed to allege sufficient facts demonstrating that the Board *intended* to entrench itself in office to fend off SHI's acquisition proposals in either rejecting the directors' resignations, or in how the Board otherwise responded to SHI's acquisition proposals. Mem. Op. at 12.

The Court of Chancery also rejected Westland P&F's request to inspect documents relating to the Axcelis Board's rejection of the resignations of directors Hardis, Fletcher, and Thompson because, the Court of Chancery determined, the incumbent Board's decision in this regard did not "frustrate" (and in fact "effectuated") the 2008 election thus did not trigger the enhanced scrutiny required under *Blasius Indus., Inc., v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988), and its progeny. Mem. Op. at 13. The Court of Chancery held that

Blasius's compelling justification standard did not apply because Westland P&F failed to allege sufficient facts suggesting that the Board, defensively or for entrenchment purposes, *intended* to frustrate the shareholder vote. *Id.* Further, the Court of Chancery held, because Axcelis's voting policy gave discretion to the Board, the Board's exercise of such discretion could not support any inquiry by shareholders Section 220. *Id.*

On October 12, 2009, Westland P&F appealed to this Court. (A6).

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN FAILING TO APPLY THE "CREDIBLE BASIS" STANDARD TO WESTLAND P&F'S BOOKS AND RECORDS ACTION

Question Presented

Whether the Court of Chancery impermissibly raised the burden for a plaintiff to state a proper purpose in a books and records action by requiring Westland P&F to set forth sufficient facts to state a claim – the standard applicable in the context of a motion to dismiss – instead of only requiring Westland P&F to show some credible basis on which the court could infer that corporate wrongdoing may have occurred.

Standard Of Review

This Court reviews the Court of Chancery's determinations *de novo* for errors in "formulating or applying legal precepts." *Chavous v. State*, 953 A.2d 282, 286 n.15 (Del. 2008). This standard applies because although the Court of Chancery recited the "credible basis" standard in its opinion, it incorrectly applied that standard and, in fact, required Westland P&F to provide affirmative evidence of wrongdoing, well more than just some "credible basis" from which the court could infer that corporate wrongdoing may have occurred.

Merits

A. Section 220 And The "Credible Basis" Standard

To prevail in a books and records action, a shareholder need only show some "credible basis" from which the court can infer that corporate wrongdoing may have occurred. In *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117 (Del. 2006), this Court "reaffirm[ed] the

well-established law of Delaware that stockholders seeking inspection under section 220 must present 'some evidence' to suggest a 'credible basis' from which a court can infer that mismanagement, waste or wrongdoing may have occurred." 909 A.2d at 118. A shareholder can establish this credible basis through "documents, logic, testimony or otherwise." *Security First Corp. v. U.S. Die Casting and Dev. Co.*, 687 A.2d 563, 568 (Del. 1997). But a shareholder need not prove that any wrongdoing has, in fact, occurred. *Id.* at 567.

Here, the Court of Chancery erred by elevating the "credible basis" standard to a level on par with the standard applicable to a motion for summary judgment by denying Westland P&F inspection rights for purportedly failing to produce evidence sufficient to prove every element of its potential *Unocal* and *Blasius* claims. In that regard, the Court of Chancery's application of the "credible basis" standard is contrary to this Court's Section 220 jurisprudence, and the Delaware courts' long history of encouraging shareholders to use their rights of inspection under Section 220 of the DGCL to investigate possible corporate wrongdoing.

A shareholder's right to inspect corporate books and records was recognized at common law because "[a]s a matter of self-protection, the stockholder was entitled to know how his agents were conducting the affairs of the corporation of which he or she was a part owner." *Seinfeld*, 909 A.2d at 119 (quoting *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002)). Delaware enshrined and, in fact, expanded this right by enacting Section 220 of the DGCL, which allows any

stockholder "upon written demand under oath stating the purpose thereof," to inspect corporate books and records. 8 Del. C. § 220.

Since Section 220's enactment, this Court has strongly encouraged shareholders to use it as part of the "tools at hand" before commencing derivative litigation. *See, e.g., Rales v. Blasband,* 634 A.2d 927, 935 n.10 (Del. 1993) ("[A] stockholder who has met the procedural requirements and has shown a specific proper purpose may use the procedure embodied in 8 *Del. C.* § 220 to investigate the possibility of corporate wrongdoing."); *Grimes v. Donald,* 673 A.2d 1207, 1218 (Del. 1996) ("A stockholder ... has the right to use the 'tools at hand' to obtain relevant corporate records ..."). In fact, this Court has even criticized shareholders for failing to take advantage of Section 220 inspection rights. For instance, in *White v. Panic*, 783 A.2d 543, 557 (Del. 2001), this Court denied a plaintiff leave to amend a derivative complaint, reasoning that leave was "inappropriate" since further pre-suit investigation under Section 220 may have yielded sufficiently particularized facts required to proceed with derivative litigation.

While this Court encourages shareholders to utilize Section 220 inspection rights, it does not permit "fishing expeditions." *Seinfeld*, 909 A.2d at 117. The "credible basis" standard, therefore, is designed to balance the rights of shareholders to gain access to corporate materials and management's interest in avoiding unnecessarily burdensome inspection requests. How this balance is achieved, however, has been the subject of considerable debate.

This Court has described the "credible basis" standard as "the lowest possible burden of proof." *Seinfeld*, 909 A.2d at 123. Nevertheless, the standard has been harshly criticized as eliminating Section 220 as a viable option for shareholders seeking to investigate corporate mismanagement.[3] Although such criticism has been dismissed as "sensationalized" by the Court of Chancery,[4] the threat that the "credible basis" standard can be misapplied so as to create an unnecessary and insurmountable hurdle for shareholders seeking to investigate legitimate claims is very real.

Louisiana Municipal Employees' Retirement System v. Countrywide Fin. Corp., 2007 WL 2896540 (Del. Ch. Oct. 2, 2007), demonstrates this point. There, a shareholder sought to investigate possible backdating and springloading of stock options granted to company executives. *Id.* at *1. Although that company's stock options grants were widely criticized in the mainstream media, the shareholder hired an expert statistician to analyze the company's stock option grants and determine whether those grants warranted further investigation before ever requesting any corporate materials. *Id.* at *2. After the expert concluded that the history of option grants at the company gave rise to a statistical probability of manipulation, thus warranting further

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[3] *See, e.g.*, J. Robert Brown, *Inspection Rights Under Delaware Law*, http://www.theracetothebottom.org (Nov. 20, 2007, 6:16 a.m.)(arguing that the "credible basis" standard imposes an "evidentiary burden that is often difficult or impossible to meet at the pleading stage"; *see also* J. Robert Brown, *City of Westland v. Axcelis Technologies: The Myth of Majority Vote Provisions and the Further Need for Preemption of Delaware Law (Credible Evidence As An Excessive Pleading Standard)*, http://theracetothebottom.org (Oct. 21, 2009, 6:00 a.m.).

[4] *See Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 n.19 (Del. Ch. 2007).

investigation, the shareholder requested inspection of the company's books and records related to the grants. *Id.* Instead of producing the requested books and records, however, the company hired its own expert to rebut the statistical analysis provided by the shareholder's expert. *Id.* at 7. This resulted in the absurd situation of having dueling experts at a Section 220 hearing – what this Court has described as a "summary procedure." *Rales*, 634 A.2d at 934 n.10. After the parties spent tens of thousands of dollars in expert fees and expenses, the Court of Chancery concluded that the shareholder's evidence was "barely sufficient" to satisfy the "credible basis" standard. *Countrywide*, 2007 WL 2896540 at *1. Thus, although the plaintiffs in *Countrywide* ultimately were permitted access to certain documents, they were able to do so only after spending tens of thousands of dollars in expert witness fees and contesting a statistical model created by the company to fight the 220 request. The fact that this "summary procedure" was permitted to devolve into a battle of the experts, with the company producing its own statistician to theorize on what the company's own documents might or might not have said, demonstrates the unreasonable hurdles that can be erected by the Courts of Chancery in applying the "credible basis" standard.

Although the standard itself is designed to achieve the goal of balancing shareholders' statutory inspection rights with the interests of avoiding "fishing expeditions," the "credible basis" standard should not be used to create an insurmountable hurdle that actually *discourages* shareholders from legitimately exercising their inspection rights. If the bar is set too high, the statutory right of inspection

established under Section 220 of the DGCL will be rendered meaningless as a tool for shareholders, and this Court's encouragement of shareholders to exercise their inspection rights will ring hollow.

B. In Denying Westland P&F's Inspection Rights, The Court Of Chancery Conflated The Requirement Of Establishing A "Credible Basis" For Believing That Wrongdoing May Have Occurred For Purposes Of Establishing A Right To Inspection Of Corporate Documents With An Evidentiary Requirement Applicable In Establishing Substantive Claims

Westland P&F satisfied the "credible basis" standard for two reasons. First, in the context of trying to fend off SHI's acquisition proposals, Axcelis's Board rejected the resignations of three directors whose reelection was opposed by a majority of shareholders precisely because of the way they were responding to SHI's proposals, and refused to give SHI additional time to conduct due diligence. There was a legitimate basis to believe that the Board's decisions in this regard *might* have been the product of an entrenching motivation, thus implicating the standards imposed by *Unocal*. Second, because the Board effectively reversed the intended consequence of a shareholder vote, there was a "credible basis" to believe that the Board's decision *might* have been subject to a higher level of judicial scrutiny than afforded routine business decisions that do not impact the shareholders' voting franchise.

As an initial matter, the Board's handling of SHI's acquisition proposals raises serious questions about whether the Board responded to those proposals in good faith and with loyalty to the Company's shareholders. Notably, the Board rejected SHI's acquisition proposals for purportedly "undervaluing" Axcelis. Yet SHI's offers of $5.20 and $6.00 per share were considerably higher than the publicly traded

price of Axcelis's stock both before SHI made its offer, and after SHI finally went away. Particularly because the Axcelis Board refused to disclose the bases upon which they determined that SHI's offers "undervalued" the Company, shareholders had a legitimate basis to at least question the voracity of the Board's claim that the offers were inadequate. Had the Axcelis Board merely just "said no," such conduct might not have been sufficient to constitute a "credible basis" to suspect that wrongdoing occurred. *Gantler v. Stephens,* 965 A.2d 695, 705 n.23 (Del. 2009) ("Rejecting an acquisition offer, without more, is not 'defensive action' under *Unocal.*"). But, in this case, the Axcelis Board did well more than "just say no."

As explained above, the Board's handling of SHI's acquisition proposals generated significant dissatisfaction among the Company's shareholders. (A449-55). In its March 28, 2008, Sterling Capital Management, one of Axcelis's largest shareholders, explained that it would oppose the reelection of Messrs. Hardis, Fletcher, and Thompson because of "significant differences" with the Board over its handling of SHI's acquisition proposals. Similarly, Glass Lewis recommended that shareholders withhold their votes for these candidates. (A453-55). It cannot seriously be disputed, therefore, that SHI's acquisition proposals could have been deemed a "threat" to the Axcelis Board's control over the Company.

In the face of this threat, the Axcelis Board (a) rejected the resignations of Messrs. Hardis, Fletcher, and Thompson when the shareholders effectively voted to remove them from the Board (A42), (b) refused to provide SHI with a modest extension to formulate a

formal demand (A44), and (c) just a few months after breaking off discussions with SHI, sold to SHI the central asset of Axcelis that prompted SHI's interest in acquiring the Company – SEN – at a fraction of the price SHI previously stated it was willing to pay to acquire the whole Company. (A46). So SHI got what it wanted – SEN; the Axcelis Board got what they wanted – maintaining their control over Axcelis as an independent company; and the shareholders saw a $6 per share offer disappear and the value of the stock plummet to about $0.50 per share at the time of the hearing before the Court of Chancery. (A47).

Based on these facts, Westland P&F submitted, there was a "credible basis" to believe that Axcelis's directors ***may*** have breached their fiduciary duties to the shareholders. First, by rejecting the resignations of the directors in the context of an active defense against SHI's acquisition proposal, refusing SHI's request for a modest extension, and thereafter selling to SHI the central asset of Axcelis that originally prompted SHI's acquisition proposal, a serious question exists regarding whether the Board did so out of a legitimate business interest, or whether they did so based on an illegal motive of entrenching their control over the Company, which would violate their fiduciary duties under *Unocal*. Second, because the decision of the Axcelis board to reject the resignations of Hardis, Fletcher, and Thompson had the direct impact of reversing the intended result of the shareholder vote, there was a "credible basis" to believe that the Axcelis Board would have been required to offer a "compelling justification" for their decision under the standard articulated in

Blasius. Since the Board failed to offer any "compelling justification" at all, there was a credible basis to suspect corporate wrongdoing may have occurred.

But instead of applying the "credible basis" standard to Westland P&F's claims, the Court of Chancery erroneously applied the standard applicable in the context of a motion for summary judgment, requiring Westland P&F to allege sufficient facts necessary to state a *Unocal or Blasius* claim.

First, the Court of Chancery disputed that there was ever any "threat" to the Axcelis Board's control. Mem. Op. at 16 ("There was no present threat to corporate control at the time of the May 2008 election."). Of course there was. An incumbent board need not be faced with a competing slate of candidates for *Unocal* to apply. *See, e.g.*, *Black v. Hollinger Int'l. Inc.*, 872 A.2d 559 (Del. 2005) (applying *Unocal* to a board's enactment of a poison pill in response to hostile takeover attempt by the board's chairman and controlling shareholder); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995) (applying *Unocal* to a board's enactment of a poison pill response to a hostile offer in the absence of any contested election).

Second, the Court of Chancery held that the Board's decision to reject the resignations of Hardis, Fletcher, and Thompson did not frustrate the intended result of the shareholder vote, thus implicating *Blasius*, because the purpose of the vote was not to get the directors to resign. Mem Op. at 15 ("If the purpose was the removal of the Three Directors, then those shareholders would have been better served by supporting an alternative slate of directors in

the May 2008 election. A poor strategic choice cannot be the basis of a Section 220 action."). The Court of Chancery's analysis in this regard also makes no sense. The voting policy in place at Axcelis *required* directors who failed to receive a majority vote to resign. (A41). When a majority of shareholders withheld their votes, therefore, resignation was the direct and intended outcome. The fact that the remaining Board members thereafter had the ability to consider whether to accept these resignations does not change the analysis. If the remaining directors determined, as they did here, to *reject* the resignations, those directors still reversed the intended outcome of the election. The Court of Chancery's criticism of shareholders for failing to launch an independent solicitation for a different slate of candidates, therefore, was misplaced.

But more importantly, the Court of Chancery repeatedly referred to Westland P&F's purported inability to supply "evidence" about the directors' "motives" for their actions. For instance, the Court of Chancery held that *Unocal* was not implicated because purportedly "[t]here is no evidence that the Board disloyally desired to fend off SHI's advances" and "[t]here is no support in the record for any entrenchment motive." Mem. Op. at 12, 16. Similarly, the Court of Chancery incorrectly assumed *Blasius* could not apply because purportedly "[t]here is no evidence that the Board ... sought to thwart[] the will of the shareholder franchise." *Id.* at 13.

The Court of Chancery's criticism of Westland P&F for purportedly failing to present evidence of the Board's motives ignores the fact that the very purpose of Westland P&F's request is to uncover what the

Board's motives were in order to determine whether the directors' conduct was, in fact, improperly motivated. As this Court has clearly explained, for purposes of evaluating whether a shareholder is entitled to an inspection of books and records, the question is not whether that shareholder presents evidence that wrongdoing occurred, but instead whether there is a credible basis to believe that wrongdoing *may* have occurred. *Seinfeld*, 909 A.2d at 123. Thus, in this case, the correct inquiry is not whether Westland P&F presented evidence establishing that the Board's motives were improper, but whether Westland P&F provided a credible basis for inferring that the Board's motives *may* have been improper.

The Court of Chancery conceded that "were the heightened standards of *Unocal* or *Blasius* to apply, some credible suspicion of wrongdoing would implicitly exist." Mem. Op. at 12 n.34. But even here, the Court of Chancery missed the point. If *Blasius* and *Unocal* necessarily applied, there would be no need for any shareholder to conduct an inspection using the "tools at hand." They could simply file a lawsuit. *See Emerald Partners v. Berlin*, 787 A.2d 85, (Del. 2001) (explaining that whether enhanced scrutiny applies "often controls the outcome of litigation on the merits"). The appropriate question was whether there was a credible basis to believe that these heightened standards *might* have applied.

Finally, to the extent the Court of Chancery weighed competing inferences, giving the Axcelis Board the benefit of the doubt (*see, e.g.*, Mem. Op. at 14, 17-18), the court improperly applied a *Twombly*-type analysis, which may be applicable in the context of a motion to

dismiss in federal court,[5] but which has never been applied by a Delaware court in the context of a Section 220 proceedings.

The bottom line is that the Court of Chancery in this case elevated the "credible basis" standard to an evidentiary requirement on par with the standard applicable on a motion for summary judgment. By doing so, the Court of Chancery gutted Section 220 as a useful tool for shareholders seeking to investigate corporate wrongdoing before commencing litigation. For that reason, the Court of Chancery's decision should be reversed.

[5] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

II. THE COURT OF CHANCERY ERRED BY CONCLUDING THAT THE *BLASIUS* STANDARD OF REVIEW WAS INAPPLICABLE TO THE BOARD'S REJECTION OF DIRECTOR RESIGNATIONS

Question Presented

Should the decision of a corporate board to reject the resignations of directors, who were compelled to submit their resignations under a voting policy that required directors to resign if their reelection was not supported by a majority of shareholders, be subject to any meaningful judicial review.

Standard of Review

This Court reviews the Court of Chancery's determinations *de novo* for errors in "formulating or applying legal precepts." *Chavous*, 953 A.2d at 286 n.15.

Merits

Following Axcelis's 2008 annual meeting, the Company's Board determined to reject the resignations of three directors who failed to receive support of a majority of shareholders for their reelection, and who tendered their resignations in accordance with a voting policy that required those directors to resign. By doing so, the directors who rejected the resignations, as well as the directors who resigned but thereafter agreed to continue to serve on the Board, reversed the intended result of the election. Their decision in this regard, therefore, should have triggered enhanced scrutiny under *Blasius*. But even if it did not, at the very least, shareholders should be entitled to exercise their statutory rights of inspection under Section 220 to evaluate the directors' decision in this regard.

Delaware courts long have recognized the importance of protecting the shareholder franchise. Indeed, the shareholder franchise is "the ideological underpinning upon which the legitimacy of directorial power rests." *Blasius*, 564 A.2d at 659; *see also Preston v. Allison*, 650 A.2d 646, 549 (Del. 1994) ("[a] stockholder's ability to participate in corporate governance through the election of directors is a fundamental part of our corporate law."). Thus, when a board acts to interfere with or frustrate a shareholder vote, that board "bears the heavy burden of demonstrating a compelling justification for such action." *Blasius*, 564 A.2d at 661.

The voting policy at issue in this case is designed to have a specific impact if a director fails to achieve majority shareholder support for their candidacy – and that impact is resignation. If the policy is triggered, it is not a matter of whether a director *may* submit their resignation, that director *must* do so. Although this policy then gives the incumbent directors the ability to accept or reject that resignation, that does not mean, *ipso facto*, that the deferential business judgment rule applies. Rather, whether such a decision will be subject to judicial review – and if so to what extent - must be evaluated under established Delaware jurisprudence.

In this regard, Delaware courts have been very clear that the business judgment rule does ***not*** necessarily apply to director conduct concerning corporate elections. In *Blasius*, this Court explained that issues involving the stockholder franchise are implicated "in a very specific way in [cases] which deal[] with the question who should constitute the board of directors of the corporation." 564 A.2d at

660. Thus, in *MM Companies v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003), this Court held that "[c]areful 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." *Id.* at 1127. The Courts of Chancery (excepting the opinion below) have been similarly mindful of the need to allow judicial scrutiny into board conduct that involves director elections.[6] Indeed, as Justice Hartnett (then serving on the Court of Chancery) explained in *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1206-07 (Del. Ch. 1987):

> In the interests of corporate democracy, those in charge of the election machinery of a corporation must be held to the highest standards in providing for and conducting corporate elections. The business judgment rule therefore does not confer any presumption of propriety on the acts of the directors in postponing the annual meeting. Quite to the contrary. When the election machinery appears, at least facially, to have been manipulated, those in charge of the election have the burden of persuasion to justify their actions.

The Court of Chancery rejected even the notion of subjecting the decision of the Axcelis Board to the kind of enhanced scrutiny required under *Blasius*, simply because Axcelis's voting policy vested in the Company's Board the very discretion that it exercised to reject the resignations here. Mem. Op. at 13. That observation is beside the point. The mere fact that the policy permitted the Axcelis Board

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[6] *See, e.g., Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 810 (Del. Ch. 2007) ("[O]ur cases have universally recognized the need for close scrutiny of director action that could have the effect of influencing the outcome of corporate director elections or other stockholder votes having consequences for corporate control."); *Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 (Del. Ch. 2000) ("it may be optimal simply for Delaware courts to infuse our *Unocal* analyses with the spirit animating *Blasius* and not hesitate to use our remedial powers where an inequitable distortion of corporate democracy has occurred.").

to exercise discretion does not mean that the Board necessarily acted within protection of the business judgment rule *even if* it applied. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 371 (Del. 1993) ("A breach of either the duty of loyalty or the duty of care rebuts the presumption that the directors have acted in the best interests of the shareholders[.]") But in any event, the business judgment rule does not necessarily apply to the kind of board action at issue here. "[I]nequitable action does not become permissible simply because it is legally possible." *Schnell v. Chris-Craft, Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971). Thus, merely acting in accordance with a company policy does not vindicate a board's conduct, nor does it shield that conduct from judicial review. As this Court once noted: "every valid by-law is always susceptible to potential misuse." *Stroud v. Grace*, 606 A.2d 75, 96 (Del. 1992). The same can be said about Axcelis's voting policy.

In *Liquid Audio*, for example, this Court applied *Blasius* to its review of a board's conduct even though the board acted according to the company's bylaws (813 A.2d at 1132):

> At issue in this case is not the validity generally of either a bylaw ... or a board's power to appoint successor members to fill board vacancies. In this case, however, the incumbent Board timed its utilization of these otherwise valid powers ... for the primary purpose of impeding and interfering with [shareholder voting rights]. ... [T]hese are inequitable purposes, contrary to established principles of corporate democracy ... and may not be permitted to stand. (internal quotes omitted).

The Court of Chancery's assertion that the Axcelis Board did not "frustrate" (and in fact "effectuated") the shareholder vote by rejecting the resignations simply because it had the authority to do

so (Mem. Op. at 13), therefore, misses the point. By rejecting the resignations, the Axcelis Board implemented a decision that was contrary to the majority will of the Company's shareholders. (A41). To deny this is to ignore the obvious. A board may not overrule an otherwise lawful shareholder vote simply because it disagrees with the outcome. As the Chancery Court explained in *Blasius*:

> The only justification that can, in such a situation, be offered for the action taken is that the board knows better than do the shareholders what is in the corporation's best interest. While that premise is no doubt true for any number of matters, it is irrelevant (except insofar as the shareholders wish to be guided by the board's recommendation) when the question is who should comprise the board of directors. The theory of our corporation law confers power upon directors as the agents of shareholders; it does not create Platonic masters.

564 A.2d at 663. Because the decision of a corporate board to reject resignations submitted by directors pursuant to the kind of policy in place at Axcelis necessarily reverses, or "frustrates," the majority vote of the shareholders, a corporate board's decision in this regard is subject the kind of enhanced scrutiny established under *Blasius.*

To the extent, however, that the Court determines that existing Delaware jurisprudence is not sufficiently clear on this matter, the Court should take this opportunity to extend *Blasius*'s application now. The Court of Chancery refused to do so, arguing that "[i]f merely acting in accordance with the terms of a Pfizer-style policy is found to be credible evidence of wrongdoing, then its death knell has been rung." Mem. Op. at 16. Respectfully, the Court of Chancery got it backwards. If the decisions of corporate boards to reject resignations are immune from judicial scrutiny, then the usefulness of this kind of Pfizer-type policy as a means of establishing meaningful

consequences of a shareholder vote while avoiding pitfalls that may arise by eliminating plurality voting altogether[7] is completely eliminated. Shareholders will be forced either to compel companies to eliminate the policies, or to look elsewhere for authority to get corporate directors to justify their decisions.[8]

Subjecting such board decisions to judicial review would *not* open the floodgates for litigation, nor would it impose undue liability on corporate boards. Shareholders rarely withhold their votes for incumbent directors,[9] and to Plaintiffs' knowledge, corporate boards nationally have only rejected resignations under Pfizer-type policies *twice*, including the situation at issue here. (A1151-56). This suggests that a board's rejection of a director's resignation is truly

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[7] *See generally* Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 Ohio St. L.J. 53, 65 (2008) (explaining Pfizer-style majority voting policies).

[8] *See* J. Robert Brown, *City of Westland v. Axcelis Technologies: Majority Voting and Delaware Law (The Beginning of the Evisceration)*, http://theracetothebottom.org (Jul. 22, 2009, 6:00 a.m.):

> The problem in the end is that there shouldn't be a need to invoke a higher standard of review. For matters that directly contradict the voting position of shareholders, shareholders ought to have an inherent right to know the reasons and explore any supporting documentation. Only with the information can shareholders be certain that the board acted in a manner consistent with its fiduciary obligations. In other words, there should be no need for "credible" evidence beyond the actions taken by the board to overturn the shareholder vote. ...
>
> If the Chancery Court does not allow inspection to occur in this case, it will be another area where the SEC will need to preempt and substantially increase the disclosure obligations on the company. It will be the only way for the owners of the company to obtain the information they need to assess the quality of the managers.

[9] *See* Ted Allen, *Postseason Review: Withhold Votes*, Risk & Governance Weekly (October 17, 2008), http://www.riskmetrics.com/governance_weekly/2008/201)

an exceptional circumstance warranting judicial review. Requiring directors to demonstrate a compelling justification for such a decision also would not expose corporate boards to unnecessary liability. "Burden shifting does not create *per se* liability on the part of the directors. Rather, it 'is a procedure by which Delaware courts of equity determine under what standard of review director liability is to be judged.'" *Cinerama Inc. v. Technicolor*, 663 A.2d 1156, 1162 (Del. 1995)(internal citation omitted).

The Court of Chancery's decision improperly eliminates judicial oversight on a novel and developing issue of corporate law involving a matter of critical importance to shareholders. To the extent *Blasius* does not already apply, it should. As Professor Hamermesh recently observed while criticizing the opinion below:

> Perhaps a new doctrinal structure is needed to deal with the situation: perhaps when a director fails to be reelected by a majority of the shares voting, and a previously submitted resignation thereby becomes effective, the remaining directors ought to be charged with carrying some burden (similar to enhanced scrutiny under *Unocal*) that their decision has been made in good faith and for a proper purpose. After all, choosing who should stay on as a director despite having failed to be reelected is not, as *Blasius* has pointed out, purely a matter of business judgment; rather, the matter is one at least partly within the domain of the stockholders' legal power.[10]

CONCLUSION

For the foregoing reasons, the Court of Chancery's September 28, 2009 Memorandum Opinion and Order should be REVERSED.

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[10] Lawrence A. Hamermesh, *Court of Chancery Deals a Blow to Use of "Pfizer Type" Majority Voting Policies as a Mechanism for Shareholder Activism*, The Institute of Delaware Corporate & Business Law, http://blogs.law.widener.edu/delcorp/de-corporate-law-news/%E2%80%9Cpfizer-type%E2%80%9D-majority-voting-policies/

Respectfully submitted,

/s/ Michael J. Barry

DATED: January 4, 2010

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Exhibit A

EFiled: Sep 28 2009 3:26PM EDT
Transaction ID 27291666
Case No. 4473-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF WESTLAND POLICE & FIRE RETIREMENT SYSTEM,	:	
Plaintiff,	:	
v.	:	**C.A. No. 4473-VCN**
AXCELIS TECHNOLOGIES, INC.,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: July 8, 2009
Date Decided: September 28, 2009

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John L. Reed, Esquire, Paul D. Brown, Esquire, and Joseph B. Cicero, Esquire of Edwards Angell Palmer & Dodge LLP, Wilmington, Delaware, Attorneys for Defendant.

NOBLE, Vice Chancellor

I. INTRODUCTION

This is a books and records action brought under 8 *Del. C.* § 220. A company adopted a policy requiring a director standing for reelection who receives less than a majority of the stockholder vote to submit her resignation to the board of directors. The board then decides whether to accept the resignation. Three directors received less than a majority of the stockholder vote at the 2008 annual meeting, but the board refused to accept their resignations. This, according to the plaintiff stockholder, is evidence of wrongdoing—especially when coupled with the board's failure to accept an acquisition offer from a competitor to whom it soon thereafter sold the company's principal asset for a fraction of the initial offer—that entitles it to inspect a range of the company's books and records.

II. BACKGROUND

A. *The Parties*

Defendant Axcelis Technologies, Inc. ("Axcelis" or the "Company") is a Delaware corporation specializing in the manufacture of ion implantation and semiconductor equipment.[1] Plaintiff City of Westland Police & Fire Retirement System (the "Plaintiff") is and has been the beneficial owner of shares of common stock of Axcelis since August 2007.[2]

[1] Joint Stipulation ("J. Stip.") ¶¶ 1-2.
[2] *Id.* at Ex. U, at 9.

SHI is a Japanese company that also makes and sells semiconductor equipment.[3] In 1983, Axcelis and SHI became equal partners in a joint venture called SEN.[4] SEN, like Axcelis and SHI, manufactures ion implantation and semiconductor equipment.[5] SEN was an important asset to both Axcelis and SHI.[6]

The Axcelis board of directors, (the "Board") is comprised of Mary G. Puma, who currently serves as the Company's Chairwoman, Chief Executive Officer and President, as well as Stephen R. Hardis ("Hardis"), Patrick H. Nettles, H. Brian Thompson ("Thompson"), William C. Jennings, R. John Fletcher ("Fletcher"), and Geoffrey Wild.

B. *SHI's Proposals*

On February 4, 2008, SHI (along with TPG Capital LLP) made an unsolicited bid to acquire Axcelis for $5.20 per share. Shares of Axcelis closed at a price of $4.18 per share that day. Three days later, Axcelis informed SHI that it would respond to its acquisition proposal after completing discussions with certain advisors. The Board rejected SHI's proposal on February 25, 2008. The Board found that the $5.20 per share price failed to compensate shareholders adequately

[3] *Id.* at ¶ 3.
[4] *Id.* at ¶ 4.
[5] *Id.* at ¶ 5.
[6] *Id.* at ¶17, Ex. L.

for the synergistic value of the SEN joint venture and ignored the substantial business opportunity to take market share back from Axcelis competitors.[7]

On March 10, 2008, SHI again proposed to acquire Axcelis, this time at a price of $6 per share. Shares of Axcelis closed at a price of $5.45 per share that day. On March 17, 2008, the Board again rejected SHI's overtures. The Board concluded that, while "a 'one company' approach combining Axcelis and SEN could yield significant operational and commercial synergies, . . . [its] view of current market conditions and of the company's prospects when market conditions do improve" led to a belief that a transaction with SHI would not be in the shareholders' best interest.[8] The Board also noted its feeling that, in order to engage in serious, productive discussions with SHI, some exchange of confidential information would be necessary, and SHI had yet to agree to keep such information and discussions confidential.[9]

C. *The May 2008 Axcelis Shareholders' Meeting, Director Election, and the Rejection of Director Resignations*

On May 1, 2008, Axcelis held its annual shareholders' meeting. The terms of three directors were expiring, and each ran unopposed for reelection to the Board. Those directors were Hardis, Fletcher, and Thompson (the "Three Directors"). Axcelis follows the plurality voting provisions of Delaware law, and

[7] *Id.* at Ex. H.
[8] *Id.* at Ex. M.
[9] *Id.*

thus a director may be elected without receiving a majority of the votes cast in a given election. Each of the Three Directors received less than a majority of the votes cast in his reelection bid. The Court assumes the Plaintiff's position to be true: that the failure of the Three Directors to receive a majority of the votes cast in their reelection bids was the result of a concerted effort by at least some Axcelis shareholders to "send a message to the board, expressing their discontent with the [C]ompany's unresponsiveness to SHI" by withholding support for each of the Three Directors facing reelection at the 2008 annual meeting.[10]

The failure to receive at least a majority of the votes cast triggered one of Axcelis's corporate governance policies. Pursuant to this policy (the "Policy"),[11] directors failing to receive a majority of the stockholder vote must submit their resignations to the Board's Nominating and Corporate Governance Committee, which must then consider and recommend to the Board whether such resignations

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[10] Keeney Decl. in Supp. of Pl.'s Br., Ex. E (Anupreeta Das, *Proxy advisors oppose three Axcelis board directors*, Reuters, Apr. 18, 2009). The Company attributed the results to a recommendation by Institutional Shareholder Services that stockholders withhold their votes for the reelection of the Three Directors due to the failure of the Board to support a proposed change to the Axcelis Certificate of Incorporation eliminating the classified board structure. J. Stip. Ex. O. That proposed change failed to receive the approval of the requisite 75% vote of the outstanding shares. *Id.*

[11] These policies are often called "Pfizer-style" policies (because Pfizer, Inc. pioneered their use) or "plurality plus" policies. *See generally* Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 Ohio St. L.J. 53, 65 (2008) (describing the Pfizer, Inc. policy). For a discussion of their use and relation to majority voting trends, see William K. Sjostrom, Jr. & Young Sang Kim, *Majority Voting for the Election of Directors*, 40 Conn. L. Rev. 459, 480 (2007).

should be accepted or rejected.[12] The Board must then accept or reject any resignations submitted by its directors under the Policy. Following the May 1, 2008, vote, the Three Directors offered to resign their positions. Through a May 23, 2008, press release, the Board announced its decision not to accept those resignations.[13]

The press release stated that:

> In making their determination, the Board considered a number of factors relevant to the best interests of Axcelis. The Board noted that the three directors are experienced and knowledgeable about the Company, and that if their resignations were accepted, the Board would be left with only four remaining directors. One or more of the three directors serves on each of the key committees of the Company and Mr. Hardis serves as lead director. The Board believed that losing this experience and knowledge would harm the Company. The Board also noted that retention of these directors is particularly important if Axcelis is able to move forward on discussions with SHI following finalization of an appropriate non-disclosure agreement.

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[12] J. Stip. ¶¶ 20-21. The Policy provides: "At any shareholder meeting at which Directors are subject to an uncontested election, any nominee for Director who receives a greater number of votes 'withheld' from his or her election than votes 'for' such election shall submit to the Board a letter of resignation for consideration by the Nominating and Governance Committee. The Nominating and Governance Committee shall recommend to the Board the action to be taken with respect to such offer of resignation. The Board shall act promptly with respect to each such letter of resignation and shall promptly notify the Director concerned of its decision." *Id.* at Ex. P.

[13] *Id.* at Ex. Q. An account of how this evolved, authored by Axcelis's General Counsel, may be found at Lynnette C. Fallon, *How One Company Got Caught in the Middle of Proxy Firm Voting Recommendations, a "Pfizer" Governance Policy, and an Unsolicited Acquisition Proposal*, 1704 PLI/Corp. 1173, (Nov. 12-14, 2008). Although the Court does not rely in any way upon this work, it may be of interest to the reader that the article's author asserts that the Board was uncertain whether the withhold vote was the result of dissatisfaction with the its response to SHI's acquisition proposals or its decision not to recommend in favor of declassification.

> The Board also expressed its intention to be responsive to the shareholder concerns that gave rise to the withhold votes. The Board is seeking to engage in confidential discussions with SHI and, prior to next year's Annual Meeting, the Board will consider recommending in favor of a declassification proposal at that meeting.[14]

D. *Renewed Negotiations with SHI*

On June 6, 2008, less than a month after the Board's decision to retain the Three Directors, Axcelis and SHI (along with TPG Capital LLP) entered into a confidentiality agreement governing discussions between the parties. Axcelis management exchanged "a significant amount of data" in response to SHI's due diligence requests and met repeatedly with SHI during June and July 2008 to discuss such requests.[15] Axcelis anticipated that this process would result in a revised proposal to acquire Axcelis.[16]

To that end, Axcelis continued to provide requested information in anticipation of a revised acquisition proposal from SHI. Axcelis and SHI agreed to a schedule for the submission of a revised proposal; they set an August 1, 2008, date for SHI's revised acquisition proposal. SHI, however, requested additional time, seeking a seven week extension for the performance of due diligence before submitting an acquisition proposal, along with a five week period for confirmatory

[14] *Id.* at Ex. Q.
[15] *Id.* at Ex. S.
[16] *Id.*

due diligence thereafter.[17] Axcelis, instead, only extended the deadline to submit an acquisition proposal until the end of August 2008. Axcelis also proposed that SEN and Axcelis become one entity—through SHI's exchanging its SEN shares for Axcelis shares—thereby achieving previously identified synergies.[18]

SHI did not submit a revised acquisition proposal to Axcelis by the extended deadline and, on September 4, 2008, SHI informed Axcelis that it was placing further discussions regarding the acquisition of Axcelis on "hold." On September 15, 2008, after Axcelis's announcement of these developments, Axcelis shares closed at a price of $1.43 per share.

E. *The Section 220 Demand*

Plaintiff delivered a Demand, dated December 9, 2008, to Axcelis by overnight mail. The Demand seeks the inspection of the following categories of books and records:

> 1. All minutes of agendas for meetings (including all draft minutes and agendas and exhibits to such minutes and agendas) of the Board at which the Board discussed, considered or was presented with information concerning SHI's acquisition proposals.
>
> 2. All documents reviewed, considered, or produced by the Board in connection with SHI's acquisition proposals.
>
> 3. Any and all communications between and among Axcelis directors and/or officers and SHI's directors and/or officers.

[17] *Id.* at ¶ 37.
[18] *See supra* text accompanying note 7.

> 4. Any and all materials provided by SHI to the Board in connection with SHI's acquisition proposals.
>
> 5. Any and all valuation materials used to determine the Company's value in connection with SHI's acquisition proposal.
>
> 6. All minutes of agendas for meetings (including all draft minutes and exhibits to such minutes and agendas) of the Board at which the Board discussed, considered or was presented with information concerning or related to the Board's decision not to accept the resignations of Directors Stephen R. Hardis, R. John Fletcher, and H. Brian Thompson.
>
> 7. All documents reviewed considered, or produced by the Board in connection with the Board's decision not to accept the resignations of Directors Stephen R. Hardis, R. John Fletcher, and H. Brian Thompson.[19]

Axcelis responded by letter dated December 12, 2008, rejecting the Demand because the Company determined that it did not satisfy the demand standard set out in Section 220 and Delaware case law interpreting Section 220.[20]

F. *Financial Difficulty and the Sale of SEN*

In early 2009, Axcelis announced its failure to make a required payment under an indenture agreement with U.S. Bank National Association. In a move to raise needed capital, on February 26, 2009, Axcelis agreed to sell its stake in SEN to SHI for approximately $136.6 million.[21] SHI concluded its acquisition of

[19] Compl. Ex. A.
[20] *Id.* Ex. B.
[21] J. Stip. ¶ 50.

Axcelis's 50% stake in SEN on March 30, 2009. That day, Axcelis shares closed at a price of $0.41 per share.

G. *The Alleged Wrongdoing*

Plaintiff alleges that there is a credible basis from which this Court can infer that the Board breached its fiduciary duties to shareholders by: (1) rebuffing the attempts by SHI to negotiate an acquisition of Axcelis for more than 18 months; (2) subsequently rejecting two above-market acquisition proposals from SHI as inadequate; (3) retaining three candidates for the Board after a majority of the shareholders refused to support them, allegedly for their failure to negotiate with SHI; and (4) selling one of Axcelis's most important assets, its stake in SEN, to SHI.

H. *Procedural History*

The Plaintiff filed its Complaint on April 2, 2009, seeking to compel inspection of certain Axcelis books and records pursuant to 8 *Del. C.* § 220. Axcelis answered on May 1, 2009.

The parties filed a Joint Stipulation of Uncontested Facts and have both submitted opening, and answering, pre-trial briefing. A one-day trial was held on July 8, 2009. No witnesses were presented at trial; the proceeding was the functional equivalent of an oral argument after a trial based on a paper record.

This is the Court's post-trial opinion.

III. DISCUSSION

A. *Applicable Standard*

A stockholder of a Delaware corporation has a right to inspect the books and records of the corporation under 8 *Del. C.* § 220. However, that right is not unlimited. The stockholder must first satisfy certain technical requirements for inspecting books and records, and then must demonstrate a proper purpose for the inspection.[22] The statute defines a "proper purpose" as "a purpose reasonably related to such person's interest as a stockholder."[23] Because the Plaintiff demands inspection of books and records, instead of the corporation's stock ledger or list of stockholders, it bears the burden of proving a proper purpose.[24]

Our courts have recognized that investigation of suspected wrongdoing on the part of a corporation's management or board is a proper purpose for inspection of the corporation's books and records. Yet, a plaintiff must do more than simply state its suspicion of wrongdoing; a Section 220 demand made merely on the basis of suspicion or curiosity is insufficient.[25] Rather, the plaintiff must present "some evidence to suggest a credible basis from which [this Court] can infer that mismanagement, waste, or wrongdoing may have occurred."[26] This "credible

[22] There is no dispute over the Plaintiff's compliance with the formal requirements of Section 220.
[23] 8 *Del. C.* § 220(b).
[24] 8 *Del. C.* § 220(c).
[25] *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 120 (Del. 2006).
[26] *Id.* at 118 (internal quotation marks omitted).

basis" standard has been described as "'the lowest possible burden of proof' in Delaware jurisprudence."[27] The plaintiff may make a credible showing that legitimate issues of wrongdoing might exist "through documents, logic, testimony or otherwise,"[28] and is not required to prove any wrongdoing actually occurred.

B. *Has the Plaintiff Demonstrated a Proper Purpose?*

The Plaintiff here seeks an inspection of Axcelis's books and records for the purpose of investigating whether members of the Board have breached their fiduciary duties in connection with: (1) the Board's decision to retain the Three Directors whose resignations had been tendered to the Board in accordance with prevailing Board policy following an annual meeting; and (2) the Board's handling of SHI's acquisition proposals. Each basis is addressed in turn.[29]

1. The Board's Decision to Retain the Three Directors

According to the Plaintiff, the Board members retained the Three Directors for the purpose of entrenching those directors and themselves in office.[30] The Plaintiff argues that, because of this "interference" with the shareholder franchise

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[27] *Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 n.19 (Del. Ch. 2007) (quoting *Seinfeld*, 907 A.2d at 123).
[28] *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997).
[29] The Plaintiff argues that the combination of the Board's actions involving SHI and the May 1, 2008, election should be viewed as a unitary predicate from which wrongdoing might be inferred. While discussion of the events is presented separately, the Court has viewed the facts in the aggregate as well and cannot agree with the Plaintiff. The sum here is no greater than its constituent parts.
[30] Compl. ¶ 23.

for the purpose of entrenchment,[31] the Board must bear the heavy burden of justifying its actions under the compelling justification standard found in *Blasius Indus., Inc. v. Atlas Corp.*[32] Alternatively, the Plaintiff argues that the Board must justify its actions under the reasonable and proportionate standard of *Unocal Corp. v. Mesa Petroleum Co.*[33] because the decision to retain the Three Directors was a defensive measure designed to defeat or impede a change of control.[34]

The Court does not need to address the proper substantive standard of review surrounding a board's behavior under these Pfizer-type policies because the Plaintiff fails to demonstrate any credible basis from which the Court might infer the foundational assumptions upon which the Plaintiff's theory rests: that the Board's decision to retain the Three Directors was either motivated by entrenchment or was defensive in nature.

There is no support in the record of any entrenchment motive. Only the Plaintiff's bare accusations suggest such a motive, and mere accusations are insufficient.[35] The Plaintiff has not shown why the Court should suspect that the

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[31] Pl.'s Pre-trial Br. at 13-14.
[32] 564 A.2d 651 (Del. Ch. 1988).
[33] 493 A.2d 946 (Del. 1985).
[34] The Court presumes for the purposes of this action, but does not decide, that, were the heightened standards of either *Unocal* or *Blasius* to apply, some credible suspicion of wrongdoing would implicitly exist.
[35] *See Gantler v. Stevens*, 965 A.2d 695, 707 (Del. 2009).

independent,[36] outside director members of the Board were motivated to perpetuate the Three Directors in office. The Three Directors were properly reelected to the Board under Delaware corporate law's plurality voting provisions. With this fact the Plaintiffs do not, and cannot, disagree. However, because a certain number of shareholders withheld their votes, a Board-enacted governance policy was triggered requiring each of the Three Directors to submit their resignation to a Board designated committee, which would then recommend whether the Board should, it its sole discretion, accept the resignations. The Plaintiff argues that a sufficient number of shareholders withheld their votes in reliance on, and out of a desire to trigger, the Policy. If so, they were successful; these shareholders achieved their desired goal and the Policy was triggered.

The problem for the Plaintiff is that the Policy vested discretion whether to accept the resignations of the Three Directors in the Board. By refusing to accept these resignations, the Board effectuated the results of a valid shareholder election. There is no evidence that the Board identified, and then sought to thwart, the will of the shareholder franchise by refusing to accept the resignations of the Three Directors.

[36] Six of Axcelis's seven directors are outside directors not employed by the Company, and each is considered independent for purposes of the NASDAQ rules. Def.'s Ans. Br. at Ex. 2 (Axcelis Proxy Statement on Schedule 14A (Mar. 27, 2008)).

The Plaintiff argues that the Board's purported justifications for the retention of the Three Directors under the Policy is not logically consistent with the record, and that this inconsistency creates a credible basis from which the Court might infer wrongdoing in the form of a breach of the Board's duty of loyalty.[37] The Plaintiff identifies this alleged inconsistency as follows: SHI claims in its public statements to have attempted to negotiate with the Axcelis Board for nearly two years, but was repeatedly rebuffed. However, the Board justifies retention of the Three Directors as essential to moving forward with any negotiations with SHI.[38] This alleged inconsistency is not a sufficiently credible basis from which the Court might infer wrongdoing.

Moving forward with negotiations with SHI was not the sole justification for the retention of the Three Directors. The Board also credited their experience and knowledge regarding the management of Axcelis, as well as the fact that they served on a number of key Axcelis committees. The record demonstrates that, throughout the prior negotiations with SHI, the Board insisted on some form of confidentiality agreement before moving forward—a request SHI avoided. Soon after the Board's decision to retain the Three Directors was made, Axcelis and SHI entered into a confidentiality agreement and negotiations proceeded, albeit unsuccessfully. In short, the purported justifications for the retention of the Three

[37] Pl.'s Pre-trial Br. at 13.
[38] *Id.*

Directors are not materially inconsistent with the record and do not demonstrate a credible basis from which to infer wrongdoing.

Nevertheless, the Plaintiff argues that the Board's exercise of discretion under the Policy warrants heightened scrutiny and a suspicion of wrongdoing. The Plaintiff's logic is not sufficiently credible to support such suspicion. The Plaintiff's position would require this Court to accept the theory that mere shareholder reliance upon a board-enacted governance policy could effectively rewrite the voting provisions contained in a corporation's by-laws. The Axcelis By-laws provide for director election by plurality vote,[39] and the interposition of the Board's discretionary review required by the Policy cannot change that fact simply because the shareholders who chose to withhold their votes wish it to be so. Perhaps certain shareholders withheld their votes for the purpose of symbolically demonstrating their lack of confidence in the Board. If the purpose was the removal of the Three Directors, then those shareholders would have been better served by supporting an alternative slate of directors in the May 2008 election. A poor strategic choice cannot be the basis of a Section 220 action.

It further appears that the Plaintiff's position would require this Court to subject Axcelis to the burden of a Section 220 request merely for having adopted

[39] The Axcelis By-Laws provide that "[a]ny election by stockholders shall be determined by a plurality of the votes cast by the stockholders entitled to vote at the election." Def.'s Ans. Br. at Ex. 1.

the Policy, and exercising its discretion under it in fidelity with Axcelis's By-laws. Unless enacting the Policy and then acting in accordance with it constitutes credible evidence of wrongdoing, the Plaintiff has failed to demonstrate the requisite credible basis to suspect wrongdoing under Delaware's Section 220 jurisprudence. If mere acting in accordance with the terms of a Pfizer-style policy is to be found credible evidence of wrongdoing, then its death knell has been rung. Reasonable people might disagree as to the utility and propriety of the Policy. However, this Court is not prepared to eliminate functionally its use at this juncture. Merely pointing out the Board's exercise of discretion under the Policy—an exercise which ultimately effectuated the shareholder franchise—is not credible evidence of wrongdoing on this record. The Three Directors took office, duly elected by a plurality of Axcelis shareholders. The ultimate result under the Policy was the result of the shareholder franchise, not an interference with it. Absent the Policy, the result of the May 2008 election would have been no different.

The Plaintiff's attempt to paint the retention of the Three Directors as a defensive measure requiring the application of *Unocal* is equally unavailing. There was no present threat to corporate control at the time of the May 2008 election. There is no evidence that the Board disloyally desired to fend off SHI's advances. Indeed, the record demonstrates the opposite. Soon after the reelection

of the Three Directors, the Board engaged SHI in further acquisition discussions and executed a confidentiality agreement, the absence of which had previously hindered negotiations. There is no credible basis from which the Court might infer that the Board's negotiations were conducted in bad faith. Failed negotiations, without more, do not form a credible basis supporting an inference of wrongdoing. In short, the Plaintiff has not demonstrated a logically credible basis from which wrongdoing might be inferred from the Board's retention of the Three Directors under the Policy.

2. The Board's Handling of SHI's Acquisition Proposals

Likewise, there is no credible evidence that rejecting SHI's two acquisition proposals was a defensive action requiring the application of the enhanced judicial scrutiny of *Unocal*. "Rejecting an acquisition offer, without more, is not 'defensive action' under *Unocal*."[40] Further, there is no credible basis from which the Court can infer any wrongdoing in the Board's rejection of the two proposals from SHI.

The record demonstrates that the Board rejected two proposals from SHI before Axcelis's May 1, 2008, annual meeting. The first proposal was rejected for a number of reasons, not the least of which was the Board's opinion that it failed to

[40] *Gantler*, 965 A.2d at 705 n.23.

adequately value the Company. The propriety of this finding is supported by SHI's subsequent proposal increasing its offer by nearly $1.00 per share.

Axcelis also rejected SHI's second offer. Again, the Board pointed to insufficient consideration, particularly in light of its opinion that increased market share was ripe for the taking. Importantly, underlying the rejection of both this proposal and the earlier SHI proposal was the inability to negotiate successfully a confidentiality agreement that would enable the two companies to exchange necessary information. It is not the Court's function in a Section 220 action to speculate as to a particular board's motives. However, the Court notes that, after a confidentiality agreement was reached between the parties, SHI was unwilling to submit a timely proposal for Axcelis at any price.

The Plaintiff points to the Board's unwillingness to extend proposal deadlines for SHI to submit a revised proposal as further support for an inference of wrongdoing. Yet, again, there is no basis from which this Court can infer that decision was anything other than a good faith business decision. That the Plaintiff might have arrived at a different decision does not suggest wrongdoing.[41]

To be sure, Axcelis has experienced a precipitous drop in its per share trading price since February 2008, when SHI made its first overture. It is not unreasonable—in the general sense—that the Plaintiff desires to discover how and

[41] *Seinfeld*, 909 A.2d at 120 ("a disagreement with the business judgment of [the board] . . . is not evidence of wrongdoing").

why this loss of value occurred. Once its per share price had reached its nadir, Axcelis was forced to sell its stake in SEN, one of its valued assets. That the transaction was conducted with SHI, the very entity seeking to acquire Axcelis, understandably increases the Plaintiff's desire to discover what happened.

Nevertheless, the Plaintiff must point the Court to something other than a precipitous drop in stock price before Section 220 inspection rights may be granted. Otherwise, Delaware corporations would be universally subject to the very burdens Section 220 was carefully designed to protect against. Perhaps the Board made poor business decisions in its dealings with SHI. Because the Plaintiff has not demonstrated any basis from which this Court might infer wrongdoing in those decisions, its Section 220 request must be denied.

IV. CONCLUSION

For the foregoing reasons, this action will be dismissed and judgment will be entered in favor of the Company. An implementing order will be entered.

Exhibit B

EFiled: Sep 28 2009 3:26PM EDT
Transaction ID 27291666
Case No. 4473-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF WESTLAND POLICE & FIRE RETIREMENT SYSTEM,	:	
Plaintiff,	:	
v.	:	**C.A. No. 4473-VCN**
AXCELIS TECHNOLOGIES, INC.,	:	
Defendant.	:	

ORDER

AND NOW, this 28th day of September, 2009, for the reasons set forth in the Court's Memorandum Opinion of even date,

IT IS HEREBY ORDERED that judgment be, and the same hereby is, entered in favor of Defendant and against Plaintiff; that the above-entitled action be, and the same hereby is, dismissed; and that each party shall bear its own costs.

/s/ John W. Noble
Vice Chancellor

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Opening Brief and Appendices In Support Of Appellant's Opening Brief were caused to be served on the 4th day of January, 2010 on the following parties in the manner indicated below:

LEXIS NEXIS FILE AND SERVE

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