IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

DEFENDANT'S OPENING PRE-TRIAL BRIEF

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PRELIMINARY STATEMENT

This Section 220 case should be easy to resolve. Plaintiff City of Westland Police & Fire Retirement System ("Plaintiff") has the not insubstantial burden of bringing forth credible evidence of probable corporate wrongdoing in order to demonstrate entitlement to the books and records it seeks -- and it has failed in that regard. Plaintiff's Complaint (Dkt. No. 1) is simply long on speculation and invective and short on substance. Boiled down to its essence, the Complaint merely registers disagreement with two business decisions of the board of directors (the "Board") of defendant Axcelis Technologies, Inc. ("Axcelis" or the "Company"): (i) a decision not to immediately engage in negotiations to sell the Company in response to two unsolicited conditional acquisition proposals from Sumitomo Heavy Industries, Ltd. ("SHI"); and (ii) a decision not to accept the resignations of three directors under a "Pfizer-style" governance policy who received less than majority shareholder support at the Company's 2008 annual meeting.

Both of the Board's decisions would be protected by the business judgment rule if this were an action for breach of fiduciary duty. Because the allegations of the Complaint, which for the most part tracks Plaintiff's demand letter (the "Demand"),[1] could not rebut the presumption of business judgment, it follows *a fortiori* that they do not present any credible evidence of probable wrongdoing.

[1] The Complaint largely parrots the allegations in the Demand, except that the Complaint includes references to, and unfounded accusations regarding, a post-Demand sale of Axcelis' 50% stake in an Axcelis/SHI joint venture to SHI. This sale, which was a product of the Board's valid exercise of business judgment, and fully disclosed, does not further Plaintiff's cause. Although Axcelis discusses this transaction in more detail in this Opening Brief, Axcelis maintains that the transaction and the circumstances surrounding it are irrelevant to the relief sought in the Demand because the Demand pre-dates the transaction.

As set forth more fully below, and as will be demonstrated at trial, the Demand and the Complaint are much ado about nothing. With regard to the Board's decision to reject two unsolicited and conditional acquisition proposals from SHI, Plaintiff relies heavily on the fact that the purchase prices recited in SHI's conditional proposals represented modest premiums to the then-current trading prices of the Company's common stock and that the Company's stock price has since declined. While this might be indicative of a difficult business environment for Axcelis since 2008, it is not indicative of wrongdoing.

With regard to both the rejections of SHI's proposals and the refusal to accept certain director resignations, the Complaint is peppered with conclusory references to disclosure shortcomings and entrenchment motives. Each of these allegations are so unreasonably speculative that they fail on their face. More importantly, however, each must fail because they are contradicted by many of the very documents and sources that Plaintiff itself relies on, and they are likewise contradicted by SEC filings and other public documents.

Significantly, the Company fully disclosed its reasons for rejecting SHI's proposals. In particular, the Company disclosed ***why*** it felt that these proposals undervalued Axcelis and ***why*** it felt that SHI's proposals were timed to take advantage of market conditions that would allow SHI to acquire Axcelis on the cheap. It was well within the prerogative of the Board to "just say no" to SHI's unsolicited overtures and nothing in the Complaint or in the record shows otherwise.

Regarding the Board's decision to reject certain director resignations submitted under a Pfizer-style governance policy following a vote at the Company's 2008 annual meeting, the Company, contrary to the aspersions cast by Plaintiff, did disclose the reasons why the Board (without participation by the directors whose resignations were tendered) determined that it would not be in the shareholders' best interests to accept those resignations. Plaintiff's conclusory allegations of entrenchment in connection with the decision, which are tied to absolutely no evidence that would even suggest a cognizable entrenchment motive, must fail for lack of any support.

In a real stretch to conjure up support for its suspicions, Plaintiff even goes so far as to offer up statements from third parties, including two Axcelis minority shareholders and a proxy advisory firm. The shareholder statements are taken out of context, and when viewed in the totality of the circumstances, actually validate the Board's decision not to engage in negotiations to immediately sell the Company to SHI. The statements by these parties, who have no particular insight into Axcelis' internal decision-making processes, are indicative of nothing other than the fact that certain shareholders would have preferred to monetize their investments in Axcelis based on the equity values implied by SHI's proposals, rather than continuing to hold their stock. That those third parties disagreed with the Board's judgment that Axcelis should not immediately negotiate a sale of the Company based on SHI's proposals and should instead embrace a longer-term strategy is just that -- a disagreement. Mere disagreement with a board of directors' business decision, however, is not credible evidence of wrongdoing that entitles a Section 220 plaintiff to books and records to investigate suspicions of breach of fiduciary duty or mismanagement.

In a final effort to identify even a scintilla of evidence to support its "theories," Plaintiff complains about a post-Demand sale of Axcelis' 50% stake in an Axcelis/SHI joint venture called SEN Corporation ("SEN"). This transaction arose after the date of the Demand. For that reason alone, it should not be considered as evidence of Plaintiff's purported entitlement to the books and records it seeks. With no support whatsoever, Plaintiff alleges that the sale of SEN was a "fire sale" and a capitulation to SHI. The Complaint merely cites to the equity value of SHI's second unsolicited offer, then cites to the price at which Axcelis sold its stake in SEN, and therefrom concludes somehow that the latter was a "fire sale" price. Plaintiff does this without pointing to any facts and without pointing to any nexus between the two values. There is nothing to show any wrongdoing by the Board, which exercised its business judgment when deciding to sell SEN at the time and at the price it did. Because nothing calls into question the Board's business judgment, the inquiry should end there. That aside, however, the only competent evidence in the record -- SEC filings and other public documents -- offer a reasonable explanation as to why Axcelis disposed of its stake in SEN.

That this is an easy case to decide is also supported by the fact that two prior actions, one in this Court and one in Massachusetts, challenging the Board's rejection of the SHI proposals were voluntarily dismissed by plaintiffs after full briefing on a motion to dismiss one of those cases.[2]

[2] *See Simon v. Axcelis Technologies, et al.,* C.A. No. 3582-VCS (Del. Ch.); *Meltzer v. Axcelis Technologies, et al*., Suffolk Superior Court, C.A. No. 08-0692-E.

NATURE AND STAGE OF PROCEEDINGS

Plaintiff delivered the Demand, dated December 9, 2008, to Axcelis via overnight mail. The Demand purports to compel the inspection of the following categories of books and records:

1. All minutes of agenda for meetings (including all draft minutes and agendas and exhibits to such minutes and agenda) 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.

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 meeting (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.

(Compl., Ex. A) [Dkt. No. 1].

Axcelis responded to the Demand by letter dated December 12, 2008. In that response, Axcelis rejected the Demand because the Company determined that it did not satisfy the demand standard in Section 220 and Delaware's jurisprudence interpreting Section 220. (Compl., Ex. "B.")

Plaintiff filed its Complaint on April 2, 2009, and Axcelis filed its Answer on May 1, 2009. [Dkt. No. 7]

Based on a revised proposed stipulated scheduling order filed on June 12, 2009, a one day trial (based almost exclusively on a stipulated fact record) in this matter is scheduled for July 8, 2009.

This is Axcelis' Opening Pretrial Brief.

STATEMENT OF FACTS

I. The Parties

Plaintiff is and has been the beneficial owner of shares of common stock of Axcelis since December 2008. (Stip., ¶ 44-46.)[3]

Defendant Axcelis is a Delaware corporation with its principal place of business at 108 Cherry Hill Drive, Beverly, Massachusetts 01915. (Stip., ¶ 1.) Axcelis designs, manufactures, and services ion implantation, dry strip and other processing equipment used in the fabrication of semiconductor chips in the United States, Europe, and Asia. (Axcelis Annual Report on Form 10K for the period ended December 31, 2008, filed with the SEC on March 31, 2009 at pp. 1 and 5-6, attached as Exhibit "B" to Stip., hereinafter, "Stip., Ex. __.")

Mary G. Puma ("Puma") currently serves as the Company's Chairman (since May 2006), Chief Executive Officer (since January 2002) and President (since May 2000). (Axcelis Proxy Statement on Schedule 14A, filed with the SEC on April 2, 2009 at p.7, attached hereto as Exhibit "1.")[4]

[3] Citations to "Stip." are to the parties' Joint Stipulation of Uncontested Facts. [Dkt No. 9].

[4] From May 2000 until January 2002, Puma was the Company's President and Chief Operating Officer. (*Id.*) Prior to serving the Company in those positions, from February 1999 until May 2000, Puma served as a Vice President of the Company. (*Id.*)

The other members of the Board are Stephen R. Hardis ("Hardis"), Patrick H. Nettles ("Nettles"), H. Brian Thompson ("Thompson"), William C. Jennings ("Jennings"), R. John Fletcher ("Fletcher"), and Geoffrey Wild ("Wild") (the members of the Board are sometimes referred to herein collectively as the "Directors"). (Exhibit "1" at pp. 7-8.)[5]

II. Relevant Non-Parties

SHI is a Japanese company that manufactures and sells various products that range from general industrial machinery to cutting-edge precision control machinery and components. (Stip., ¶ 3.)

SEN is a Japanese company that develops, manufactures, and sells semiconductor equipment. (Stip., ¶ 5.) In 1983, SHI and Eaton Corporation ("Eaton"), Axcelis' parent until 2000, established a 50-50 joint venture called Sumitomo Eaton Nova Corporation, currently known as SEN. (Stip., ¶ 4.) In June 2000, Eaton transferred its ownership in SEN to Axcelis, which replaced Eaton as a 50% stakeholder in SEN. (Stip., ¶ 6.) From June 2000 until March 30, 2009, Axcelis and SHI each owned 50% of SEN. (Stip., ¶ 7.)

III. SHI's First Proposal And Axcelis' Rejection

On February 4, 2008, SHI, along with private equity investor TPG Capital LLP ("TPG"), made an unsolicited proposal to acquire Axcelis for $5.20 per share, for a total equity value of approximately $544 million (the "First Proposal"). (*See* Stip., ¶ 9; Axcelis Press Release dated February 11, 2008, Stip., Ex. "E.") The Company privately responded to SHI's acquisition overture on February 7, 2008 and indicated that it would provide a substantive response to SHI after discussing the proposal with its advisors. (*Id.*) Instead of

[5] Each of the Directors other than Puma is "independent" and Puma is the only employee director. (*Id.* at pp. 27-28.)

waiting for Axcelis' substantive response, SHI made its proposal public on February 11, 2008. (Stip., ¶ 12.)

While the First Proposal represented a 28.7% premium above the February 11, 2008 closing price of the Company's common stock, it was well below the Company's 52-week high of $8.20 per share reached on May 2, 2007. (Historical Stock Price Report from Axcelis' website, attached hereto as Exhibit "2.") On February 25, 2008, the Company announced that the Board had rejected the First Proposal. (Stip., ¶ 13.) The Company also disclosed an investor presentation regarding the First Proposal and the reasons it was rejected. (Company Presentation dated February 25, 2008, filed as Ex. 99.1 to the Company's Form 8-K, filed with the SEC on February 25, 2008, Stip., Ex. "H.")[6]

As the Company explained:

- The First Proposal "materially discounts the Company's value" because it "ignores the substantial market opportunity to take share back from competitors" and fails to compensate stockholders "for synergies from combining [SEN – the Company's joint venture with SHI;]"

- The First Proposal was made under difficult market conditions, which accounts for a materially depressed offer price;

- The Company is confident in its ability to drive stockholder value "well in excess" of the First Proposal on a stand alone basis; and

- The Company continues to evaluate its available strategic opportunities.

(Stip., Ex. "H" at p. 3.)

[6] This Court may take judicial notice of public filings. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 2007 WL 2351071, at *2 (Del. Ch. Aug. 15, 2007); D.R.E. 201.

The Company, in its presentation to investors, also highlighted the significant potential upside in Axcelis, primarily based on the Company's new product line. (*Id*.) According to the Company, there is an opportunity to gain significant market share in the ion implant market because customers are seeking alternative ion implant providers and Axcelis has differentiated technology and proven performance in advanced applications. (*Id*. at 5.) The Company expected to recognize revenues from its Optima HD products for the first time in the first quarter of 2008. (*Id*.) Axcelis has made progress in winning purchase orders from leading customers and is engaged with major logic and foundry customers. (*Id*.) The Company has the potential to gain back significant market share over the next few years if the Optima HD product line is as successful as expected. (*Id*. at 7.) Axcelis also considered that its fixed cost structure would result in significant earnings opportunity from gaining market share in the future. (*Id*.)

The Company's February 25, 2008 press release also discussed the Board's rejection of the First Proposal. (Stip., ¶ 13; *see* Press Release dated February 25, 2008, filed as Ex. 99.3 to the Company's Form 8-K, filed with the SEC on February 25, 2008, Stip., Ex. "H.") Directors Puma and Hardis explained in that press release that the First Proposal failed to recognize the true value of Axcelis. (Stip., Ex. "H.") Hardis stated that SHI and TPG timed the First Proposal to "reap all of the benefits" of the Company's investments in its development of new products and that a sale at the price specified in the First Proposal would leave the Axcelis shareholders with "inadequate value in return for that investment." (*Id*.) Puma stated that the Company's future prospects were promising and that both the Company's Board and its senior management were confident that the roll

out of the Company's new product -- Optima HD -- and other technical innovations would increase shareholder value.

IV. SHI's Second Proposal And Axcelis' Rejection

Aware that the First Proposal undervalued Axcelis, SHI came forward with another unsolicited conditional proposal on March 10, 2008 (the "Second Proposal," and together with the First Proposal, the "SHI Proposals"). The Second Proposal was $6.00 per share, or approximately $630 million (Stip., ¶ 15), thus confirming that the First Proposal the Board rejected was inadequate and opportunistic. On March 17, 2008, the Company announced that the Board had rejected the Second Proposal. (Stip., ¶ 17.) The Company's press release once again articulated the reasons for the decision:

> The Axcelis Board, after carefully evaluating the offer with its financial and legal advisors, determined the proposal undervalues Axcelis and is not in the best interests of Axcelis and its shareholders. Axcelis' Board is determined to do what is best for the Company and its shareholders and is committed to pursuing all initiatives to achieve this goal and to best position Axcelis to capitalize on its strengths and realize its business potential.
>
> Mary G. Puma, Chairman and Chief Executive Officer stated, "SHI's $6.00 unsolicited proposal undervalues the Company based on the intrinsic value of the business in light of the Company's product portfolio and global market reach. The Board of Directors' decision is supported by extensive valuation analyses and by our trading prices over the last year. Although Axcelis' recent trading prices, along with others' in the industry, have been depressed, the Board believes the Company is well positioned for the future and worth more than $6.00 per share."
>
> Stephen R. Hardis, Lead Director of Axcelis' Board of Directors, commented, "While Axcelis and the Board recognize that Axcelis' financial performance has been adversely affected by the delay of Optima HD products to market, among other factors, we are confident about the Company's future. Given our robust product pipeline and

> Axcelis' customers' favorable reaction to Optima HD products, the Board believes that Axcelis shareholders are in a strong position to benefit as Axcelis realizes its business potential."

(Press release dated March 17, 2008, filed as Ex. 99.2 to the Company's Form 8-K, filed with the SEC on March 17, 2008 at p. 1, Stip., Ex. "L.") The press release also set forth the Board's view that:

> Axcelis has a clear opportunity to regain high current implant market share. Optima HD products are demonstrating in head to head manufacturing that they are more productive than competitive systems. The upside of these new products is just beginning to be realized. Axcelis is recognizing revenues from Optima HD products for the first time in the first quarter of 2008. Even modest gains in market share will result in significant improvement to Axcelis' financial performance. Historically, market share in ion implantation has shifted dramatically based on changes in manufacturing processes, chip technology advances and semiconductor equipment competitive portfolios. In fact, Axcelis and its leading competitor have traded the number one spot four times since 1990. Customers are making it clear that Axcelis is well positioned both technically and commercially. SHI's proposal does not take into account even modest market share gains.
>
> As a 50% owner of SEN (the joint venture between Axcelis and SHI), SHI uniquely understands the significant commercial and operational synergies that could result from a combination of Axcelis and SEN. There are meaningful financial and operational synergies to be realized in a "one company" strategy. Axcelis shareholders should participate in the value of those synergies. SHI's proposal fails to reflect the value of the benefits of SHI's gaining full ownership of SEN.

(Stip., Ex. "L" at pp. 1-2.)

Approximately one month later, on April 14, 2008, the Board further explained its basis for rejecting the Second Proposal in a letter to the shareholders. Specifically, the Board stated:

> Given that SHI is communicating its views to shareholders and the media, we feel that it's important that you understand our perspective in making this decision….
>
> [W]e stated that we were ready to meet with SHI, on a private and confidential basis, to explore whether we could reach a mutually beneficial transaction to optimize return to our shareholders. However, thus far we have been unable to reach an agreement with SHI on appropriate terms for such discussions.
>
> Axcelis feels strongly that in order to engage in serious, productive discussions, significant confidential information must be shared between the parties. As we noted in an earlier press release, we have been ready to share confidential information with SHI on customary terms since 2006. However, we believe it is imperative that both SHI and Axcelis agree to keep the content of such conversations private, and to agree not to pursue actions in the public stock market based on any non-public disclosures between the parties. To this end, we proposed a customary confidentiality and standstill agreement to SHI that sought to protect Axcelis' confidential information and the content of our negotiations for a reasonable period of time. Since sending the draft agreement, we also have proposed several compromises in an effort to reach a conclusion on the agreement and begin discussions with SHI.
>
> SHI, however, has been unwilling to agree that it will keep our discussions private. SHI has also been unwilling to agree that, after receiving confidential information from us, it will not immediately turn around and commence an unsolicited tender offer or a proxy fight or start a creeping accumulation of our shares. Given SHI's unwillingness to agree to the most basic and customary protections, to date we have been unable to commence discussions with them.

> We are concerned that at this point, SHI may be trying to use you, our shareholders, as a tool to pressure the Board by advocating that you withhold votes for our director nominees. The Board rejected SHI's $6.00 per share offer, which SHI has said it does not intend to increase, because we continue to believe that this offer significantly undervalues the Company. While we are ready to have discussions with SHI, the fact that SHI will not agree to reasonable terms for those discussions, and that it continues to lobby our shareholders for withhold votes, suggests that SHI may now simply be trying to gain negotiating leverage.
>
> As you know, SHI owes our shareholders no duties, and it is in SHI's interest to try to acquire Axcelis at the lowest possible price. We ask that you consider the ramifications of SHI's approach so that you may act in a manner that serves your best interest. In turn, we will continue to commit to discussions with SHI at such time as SHI is ready to agree to reasonable terms for those discussions, and we will continue to be open to all reasonable solutions.

(Letter to Shareholders dated April 14, 2008, filed as Ex. 99.2 to the Company's Form 8-K, filed with the SEC on April 14, 2008 at pp. 2-3, Stip., Ex. "M.")

In response to Axcelis' letter to its shareholders, SHI, on April 16, 2008, continued its public relations campaign in favor of the Second Proposal, even though the Axcelis Board had already considered and rejected that Proposal. (SHI Press Release, dated April 16, 2008, Stip., Ex. "N.") This campaign included statements calling into question the Axcelis Board's evaluation of the Second Proposal. (*Id.*) Furthermore, SHI stated that it did not believe Axcelis was interested in further discussions regarding a sale of the Company to SHI. (*Id.*) Yet SHI made no effort to further those discussions through actions such as raising the $6.00 per share offering price or agreeing to routine confidentiality and standstill agreements. (*See id.*)

Axcelis responded in a short press release that same day, noting:

> Axcelis has been and remains ready to engage in private, confidential discussions with SHI, but SHI appears to be more interested in negotiations through the press. Axcelis does not believe that negotiation through the press is productive. When SHI is ready to talk privately with Axcelis, Axcelis will be happy to do so. Axcelis also observed: "SHI in its press release reiterated its unsolicited proposal to acquire Axcelis at $6.00 per share. As previously announced, the Axcelis board has already rejected this proposal as undervaluing the company."

(Axcelis Press Release dated April 16, 2008, attached hereto as Exhibit "3.")

V. The Axcelis Shareholders' Meeting And The Rejection Of Director Resignations In Compliance With The Company's Governance Policies

On May 1, 2008, Axcelis held its annual shareholders' meeting. At the meeting, the shareholders, among other things, cast votes for re-election of three of the Board members: Hardis, Thompson and Fletcher. (Stip., ¶ 24.) The election was uncontested as to all three directors, there being no candidates challenging any of them. (*See* Axcelis Proxy Statement, Form 14A filed with SEC on March 27, 2008, attached hereto as Exhibit "4.") Each of the three directors received a plurality of the vote, but none received a majority of the shareholders' votes. (Stip., ¶¶ 25-27; Press Release dated May 1, 2008, filed as Ex. 99.1 to the Company's Form 8-K, filed with the SEC on May 1, 2008, Stip., Ex. "O.") In accordance with Paragraph 7 of Axcelis' Governance Policies (Stip., Ex. "P"), each of the three directors who did not receive a majority was required to submit a letter of resignation. (Stip., ¶ 20.) Again, in accordance with the Governance Policies, the Nominating and Governance Committee must consider the offers of resignation and make a recommendation to the Board as to whether the Board should accept the resignations. (Stip., ¶ 21.) Specifically, the relevant Governance 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 that 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.

(Stip., Ex. "P.").

Mr. Hardis, the only of the three directors up for re-election who was a member of the Nominating and Governance Committee, recused himself from the decision-making process. (*See* Stip., Ex. "Q."). Thereafter, Mr. Nettles, the sole remaining member of the Nominating and Governance Committee, after deliberation over the factors influencing the vote and the qualities of the three directors, recommended that the Board not accept the offers of resignation. Subsequently, the Board, minus the three directors whose resignations were being considered, decided not to accept the offers of resignation after deliberation. (*See id*.) In that press release, the Company explained:

> In making there 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.

(*Id.*) Not only did the Company comply with its Governance Policies, it disclosed the Board's reasons for rejecting the resignations as contrary to shareholders' best interests.

VI. Plaintiff's Reliance On Irrelevant Opinions Of Third Parties

In an unavailing attempt to bolster Plaintiff's speculations of wrongdoing, the Complaint alleges that third parties (who are not alleged to be privy to non-public information) were critical of the Board's decision not to immediately engage in negotiations to sell the Company to SHI. (Compl., ¶¶ 9, 12, 16.) These third parties include two minority shareholders of Axcelis that expressed support for a merger with SHI (*id.*), and a proxy advisory firm that recommended that Axcelis shareholders withhold votes for the reelection of the Company's slate of directors in protest to the Company's decision not to engage in acquisition discussions with SHI. (*See id*. at ¶ 16.) None of these assertions, however, include allegations that any of the third parties knew the process that the Board took in considering the First or Second Proposals, nor do they allege that the Board failed to follow a proper procedure in considering the offers. As explained below, none of this is relevant because none of it is indicative of any wrongdoing by the Company or the Board.

Additionally, when viewed in context, the shareholder statements actually vindicate the Board's decision to reject the SHI Proposals. For example, while Sterling Capital Management LLC ("Sterling") did express support for Axcelis negotiating a deal with SHI (*see* Compl. ¶ 9; Letter to Puma, attached as Exhibit 99 to Sterling's Form SC 13D/A filed with the SEC on February 11, 2008, attached hereto as Exhibit "5."), Sterling, like the Board, believed the price was too low. (Letter to Axcelis, attached as Exhibit 99 to Sterling's From SC 13D/A filed with the SEC on February 29, 2008, attached hereto as

Exhibit "6") (stating that SHI's "initial bid of $5.20 per share for Axcelis is clearly too low. Even with strong industry headwinds and lack of traction-to-date, it is appropriate to value Axcelis assuming some modest level of Optima success. Our analysis would indicate that a fair price for Axcelis under this scenario would approximate $7.00 to $7.50 per share.").

Similarly, while it is true that D.A. Davidson & Co. ("Davidson") also expressed support for a combination with SHI (*see* Compl. ¶ 12), Davidson was in accord that SHI's price was too low. (Bloomberg.com Report dated February 25, 2008, attached hereto as Exhibit "7") ("'I think management was right in stating their belief that the bid was too low,' Matt Petkun, an analyst at D.A. Davidson & Co. in Lake Oswego, Oregon, said in an interview today.")

VII. Axcelis And SHI Engage In Shortlived Merger Discussions And The Company Ultimately Decides To Its Stake In SEN To SHI

On June 6, 2008, it was announced that Axcelis, SHI and TPG commenced talks regarding SHI's bid to acquire Axcelis. (*See* Axcelis Press Release, dated June 6, 2008, Stip., Ex. "R.") In connection therewith, the parties entered into a confidentiality agreement with respect to such discussions. (*Id.*)

In June 2008, after entering into the above-referenced confidentiality agreement, representatives of Axcelis management provided data in response to SHI's due diligence requests and met several times in June and July with representatives from SHI to discuss SHI's due diligence requests. (Stip., ¶ 33) After the above-referenced June and July 2008 meetings between representatives from Axcelis and SHI, SHI requested additional information from Axcelis in order to perform due diligence in formulating an acquisition proposal. (*Id.* at ¶ 34.) Axcelis agreed to provide additional information to SHI, and

agreed to further meetings with SHI, in exchange for SHI agreeing to commit to a specific written schedule for submitting a revised acquisition proposal, which proposal was to include an indication of value and a draft acquisition agreement. (*Id.* at ¶ 35.) SHI agreed to submit a revised acquisition proposal to Axcelis by August 1, 2008. (*Id.* at ¶ 36.)

Thereafter, SHI requested from Axcelis an extension of the August 1, 2008 deadline. (*Id.* at ¶ 37.) Specifically, SHI requested an additional seven weeks to perform due diligence before deciding whether to submit a revised acquisition proposal and a five week period of confirmatory due diligence thereafter. (*Id.*) Based on a determination by the Board, Axcelis informed SHI that it could not agree to the extended deadline. (*Id.* at ¶ 38.) Axcelis disclosed the reasons for not agreeing to the extended deadline for a revised proposal and an additional 5 weeks of confirmatory due diligence thereafter. (Press Release dated September 15, 2008, filed as Ex. 99.1 to the Company's Form 8-K, filed with the SEC on September 15, 2008, Stip., Ex. "S" ("Given [SHI's] repeated failure to deliver a new proposal for the purchase of Axcelis, and with increasing uncertainty as to whether [SHI] would ever make such a proposal, the Axcelis Board determined that the additional process requested by [SHI] in August was not Axcelis' shareholders' best interests.")).

Instead, Axcelis granted SHI until the end of August 2008 to submit a revised acquisition proposal. (Stip., ¶ 39.) Axcelis also made an alternative proposal to SHI that SEN and Axcelis could become one company by SHI exchanging its SEN shares for Axcelis shares. (*Id.*) SHI decided not to submit a revised acquisition proposal to Axcelis. In a September 15, 2008 press release, Axcelis announced that on September 4, 2008, SHI informed Axcelis that it was placing discussions regarding the acquisition of Axcelis on

"hold." (*Id.* at ¶ 40.)

Subsequent to the Demand and Axcelis' response thereto (*see* Stip., Exs. "V" and "W"), Axcelis sold its 50% stake in SEN to SHI in a transaction that closed on March 30, 2009. (Press Release dated March 30, 2009, filed as Exhibit 99.1 to the Company's Form 8-K, filed with the SEC on April 3, 2009, Stip., Exs. "Z" and "AA.") After fees and expenses, Axcelis received net proceeds from the sale of approximately $122.3 million, a majority of which were needed to service overdue debt. (*Id.*) Indeed, in the months leading up to the date on which interest payments on that debt was due, the Company disclosed that it was considering refinancing options. (*See* Stip., Ex. "S.") As explained more fully in its Annual Report for the year ended December 31, 2008, Axcelis' sale of its stake in SEN not only allowed the Company to discharge its debt, but also secured the obligee's agreement to dismiss pending litigation regarding non-payment of that debt.

> In January 2009, the Trustee under the Indenture relating to the Company's 4.25% Convertible Senior Subordinated Notes (the "Notes"), filed a Complaint in US District Court in New York seeking a judgment for the amount due on the Notes, (a total payment of approximately $85 million). This litigation relates to the Company's failure to pay the principal and interest due on the Notes on January 15, 2009 …. In February 2009, as an inducement to enter into the Share Purchase Agreement dated February 26, 2009 (the "Share Purchase Agreement") with SHI Heavy Industries, Ltd. ("SHI") and SEN Corporation, an SHI and Axcelis Company ("SEN"), the Trustee confirmed in writing that judgment will not be entered in this litigation until after April 13, 2009, during which time it was contemplated that the closing under the Share Purchase Agreement would occur. On March 30, 2009, the Company completed the sale of SEN for net proceeds of $122.3 million net of $10.5 million of advisor fees and other expenses. A portion of the net proceeds was used in the direct repayment of all amounts due under the Indenture. As a result of the payment, the trustee for the Notes will withdraw litigation filed in connection with Axcelis' default on the Notes.

(Stip., Ex. "B" at p. 20.)

VIII. Plaintiff Delays The Filing Of Its Complaint

Although Plaintiff could have filed its Complaint within five business days of Axcelis' response to the Demand, Plaintiff waited over three months to commence this action. That alone suggests that Plaintiff is less concerned with investigating wrongdoing than it is with harassing or pressuring the Company in connection with some, as of yet undetermined, self interest. There is yet another plausible explanation for the seemingly curious timing of Plaintiff's Complaint. Plaintiff filed the Complaint just a couple of business days after the closing of the sale of Axcelis' stake in SEN to SHI. No doubt recognizing the infirmity of its Complaint, Plaintiff may well have been waiting for some additional "evidence" in order to prop up its infirm Complaint. Regardless of the real reason for the Complaint, or the three-month delay in filing it, Plaintiff is not entitled to the books and records it seeks.

ARGUMENT

I. SECTION 220 STANDARD APPLICABLE TO THIS CASE

It is well established that a plaintiff demanding books and records under Section 220 must present credible evidence of probable wrongdoing when seeking to investigate suspected breaches of fiduciary duty or mismanagement. *See, e.g., Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 565 (Del. 1997) ("The plaintiff must not only show a credible basis to find probable wrongdoing, but must justify each category of the requested production."); *Deephaven Risk ARB Trading Ltd. v. Unitedglobalcom, Inc.*, 2005 WL 1713067, at * 8 (Del. Ch. July 13, 2005) (noting that while "[s]tockholders are not required to show actual mismanagement, [ ] they must show, by a preponderance of the evidence, that there is a 'credible basis to find probable corporate wrongdoing.' Stockholders cannot satisfy this burden merely by expressing a suspicion of wrongdoing or a disagreement with a business decision.") "This burden is not insubstantial, and '[m]ere curiosity or a desire for a fishing expedition will not suffice.'" *Mattes v. Checkers Drive-In Restaurants, Inc.*, 2001 WL 337865, at *5 (Del. Ch. Mar. 28, 2001) (internal citation omitted).[7] It is equally well established that mere suspicion or disagreement with a board of directors' *business judgment* is insufficient to establish the required credible evidence of wrongdoing. *See Seinfeld v. Verizon*, 909 A.2d 117, 120 (Del. 2006).("The Court of Chancery properly noted at a disagreement with the business judgment of [the board] or its compensation committee is not evidence of wrongdoing and did not satisfy [plaintiff's] burden under section 220.").

[7] Plaintiff has not stated any additional bases for books and records under Section 220, such as communicating with other stockholders or valuing its investment.

Here, Plaintiff is contesting nothing other than the Board's business decision to say "no" to unsolicited acquisition proposals. In its Complaint, Plaintiff points to such unremarkable facts as (i) a decline in Axcelis' stock price after rejection of SHI's unsolicited proposals, (ii) alleged failures to disclose the details of the Board's decision making process, (iii) third party support for a merger with SHI, and (iv) wholly speculative and unfounded allegations of entrenchment. As discussed more fully below, none of these facts is in any way indicative of any wrongdoing on the part of Axcelis or the Board. Indeed, Plaintiff's allegations are of the type that are routinely dismissed for failure to rebut the presumption of business judgment and for that reason, among others, the Complaint should not serve as a predicate for a court-sanctioned fishing expedition under the guise of Section 220. *See Weiland v. Central & South West Corp.*, 1989 WL 48740, at *2 (Del. Ch. May 9, 1989) (dismissing Section 220 action where facts failed to evidence that board members were interested rather than independent or they that failed to exercise due care).[8]

[8] Although the Delaware Supreme Court has admonished would be plaintiffs to use Section 220 demands as a tool to gather facts prior to initiating derivative litigation, *see, e.g.*, *Seinfeld*, 909 A.2d at 120, books and records investigations are unnecessary and unwarranted in cases where, as here, even assuming the truth of nonconclusory allegations in a demand, plaintiff has failed to evidence probable corporate wrongdoing. In this case, the absence of facts indicating a lack of director loyalty or due care supports the conclusion that plaintiff has failed to carry its burden of establishing credible evidence of probable corporate wrongdoing. This is so because, even if Plaintiff's nonconclusory allegations are accepted, there is no basis on which to second guess the decisions made by the Board.

II. THE BUSINESS JUDGMENT RULE APPLIES TO THE DIRECTORS' DECISION TO REJECT SHI'S UNSOLICITED PROPOSALS, AND THEREFORE, THE FACT OF THAT REJECTION CANNOT CONSTITUTE CREDIBLE EVIDENCE OF PROBABLE WRONGDOING

The affairs of Delaware corporations are managed by their board of directors, who owe to shareholders duties of unremitting loyalty. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 2007 WL 2351071, at *3 (Aug. 15, 2007). Corporate directors, and not the courts, are in the best position to make business decisions for their companies and they are protected by the business judgment rule. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

This Court has recognized repeatedly that a board of directors' decision not to proceed with a merger proposal "is normally reviewed within the traditional business judgment framework." *Gantler v. Stephens*, 965 A.2d 695, 706 (Del. 2009) (citing *TW Servs., Inc. v. SWT Acquisition Corp.*, 1989 WL 20290, at *11 (Del. Ch. Mar. 2, 2989); *Kahn v. MSB Bancorp, Inc.*, 1998 WL 409355, at *3 (Del. Ch. July 16, 1998)) ("the Directors' decision not to sell the company is Board action appropriately examined within the business judgment framework.").

The presumption underlying the business judgment rule is that "in making a business decision, the directors of a corporation act on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." *Gantler*, 965 A.2d at 705-706 (quoting *Aronson*, 473 A.2d at 812); *Orman v. Cullman*, 794 A.2d 5, 20 (Del. Ch. 2002). Absent allegations from a plaintiff that a director's action was an abuse of discretion, decisions of corporate directors will be respected by the courts.

Gantler, 965 A.2d at 706. "The burden is on the party challenging the decision to establish facts rebutting the presumption." *Aronson*, 473 A.2d at 812.

For the same reasons that the business judgment rule would warrant the dismissal of a fiduciary duty action premised on the allegations of the Complaint, this Court should conclude that Plaintiff's allegations regarding the Board's decision to reject the SHI Proposals are insufficient to constitute credible evidence of wrongdoing. Consistent with *Gantler* -- as well as *TW Services*, upon which *Gantler* is based -- this Court should judge the Axcelis Board's decision to reject the SHI Proposals by asking two fundamental questions under the business judgment rule: (1) did the Directors reach their decisions in the good faith pursuit of legitimate corporate interests?; and (2) did they do so advisedly? *See Gantler*, 965 A.2d at 706. Because, on the record before the Court, the answers to these questions must be in the affirmative, Plaintiff has not, and cannot, carry its burden to present credible evidence of wrongdoing.

In this case, all that is alleged is that the Board received two unsolicited proposals to negotiate the acquisition of the Company and chose to reject them, each after careful review with the assistance of its financial and legal advisors. As the Board stated in its press release rejecting the First Proposal, it believes that the offer "substantially undervalues the Company":

> The Board, after thoroughly reviewing the proposal with its financial and legal advisors, concluded that the proposal substantially undervalues the Company and its prospects of reclaiming its market share and creating value for its shareholders. The Board's priority is enabling Axcelis to realize its long term potential and, in turn, generate enhanced value for shareholders. The Board regularly evaluates all available strategic alternatives and will continue to do so. The Board is confident of Axcelis' long term potential and

> the company's ability to deliver attractive value to shareholders as it capitalizes on this potential.

(Stip., Ex. "H") SHI's Second Proposal demonstrates the sound business judgment of the Board in rejecting the First Proposal. Of course, the fact that SHI made a Second Proposal that the Board reasonably believed undervalued the Company does not change the fiduciary calculus, nor does it change the calculus here. In response to SHI's Second Proposal, the Board once again explained at length to its shareholders the reasons it had concluded that the Offer was inadequate. (*See* Stip., Ex. "L") There is no difference between two offers that undervalue the Company and one offer that undervalues the Company.

A. Because Plaintiff's Allegations Would Not Support A Claim That The Axcelis Board Breached The Fiduciary Duty Of Loyalty, Those Same Allegations Cannot Constitute Credible Evidence Of Probable Wrongdoing

Under *Gantler* and *SWT*, the first prong of the analysis essentially calls for a determination of whether the Board breached the duty of loyalty -- *i.e.*, has Plaintiff pled facts demonstrating that the Board was interested, lacked independence or proceeded in bad faith? Importantly, six of the seven members of the Board are not employed by Axcelis, and are independent directors. (*See* Exhibit "4" at pp. 5, 28-29.) This strengthens the presumption of independence and good faith. *See Kahn*, 1998 WL 409355, at *3 (citing *Polk v. Good*, 507 A.2d 531, 537 (Del. 1986)). The Complaint is devoid of any allegations that even attempt to challenge this presumption. To do so, Plaintiff must sufficiently allege that either (i) a majority of the Company's directors were interested in or lacked independence with respect to the SHI Proposals or (ii) the Company's directors acted in bad faith. *Id.*; *Crescent/Mach 1 Partners L.P. v. Turner*, 846 A.2d 963, 984 (Del.

Ch. 2000).

Here, the Complaint does not even try to allege that the Directors lacked independence.[9] In fact, the Complaint makes no reference to the independence of the Directors. Six of the seven directors are outside directors, and there are no allegations that they are beholden to Axcelis' management or anyone with a financial interest in the rejection of the SHI Proposals. The absence of such allegations further supports the conclusion that Plaintiff has offered no credible evidence of probable wrongdoing. What Plaintiff has offered instead is rank speculation and its disagreement with the Board's decision not to sell Axcelis to SHI, a disagreement no doubt motivated by Plaintiff's disappointment with the declining value of its investment in Axcelis. Such suspicion and disappointment, however, does not entitle Plaintiff to investigate Axcelis' books and records in the hopes of uncovering some wrongdoing. Rather, the standard is clear -- Plaintiff must show credible evidence of probable wrongdoing before it is entitled to the books and records it seeks. Plaintiff has not and cannot satisfy that burden.

[9] "Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson*, 473 A.2d at 816. The question of independence is one that courts must answer using the following inquiries: "independent from whom and independent for what purpose?" *Khanna v. McMinn*, 2006 WL 1388744, *14 (Del. Ch. May 9, 2006).

1. Plaintiff's Allegations Fail To Demonstrate An Entrenchment Motive

While there are no specific allegations in the Complaint that the Directors were interested in the decisions to reject the SHI Proposals, to reject the resignations of Hardis, Thompson, and Fletcher, or to sell Axcelis' 50% interest in SEN to SHI, the Complaint could be construed to suggest interestedness by way of generic allegations that the Directors desired to entrench themselves. (*See* Compl. ¶¶ 23, 31.) Such conclusory allegations, however, repeatedly have been rejected as insufficient to show that a board of directors is interested in a proposed transaction or decision.[10] In *Gantler*, the Court held that generalized allegations that the defendants wanted to remain directors in order to continue to receive director related compensation or that executives wanted to retain their positions were inadequate. The *Gantler* Court held that:

> A claim of this kind must be viewed with caution, because to argue that directors have an entrenchment motive solely because they could lose their positions following an acquisition is, to an extent, tautological. By its very nature, a board decision to reject a merger proposal could always enable a plaintiff to assert that a majority of the directors had an entrenchment motive. For that reason, the plaintiffs must plead, in addition to a motive to retain corporate control, other facts sufficient to state a cognizable claim that the Director Defendants acted disloyally.

965 A.2d at 707. Here, the Complaint does not even include generalized allegations that the Directors desired to retain their directorships for the associated pay or positions of power, much less any "other facts" suggestive of disloyalty.

[10] A director is "interested" in a transaction when he or she sits on both sides of the transaction or expects to derive a personal financial benefit that is not also shared by other shareholders generally or the corporation as a whole. *Aronson*, 473 A.2d at 812; *see also Nebenzahl v. Miller*, 1993 WL 488284, at *3 (Del. Ch. Nov. 8, 1993).

The most Plaintiff does is to question the Board's decision not to accept the resignations of Hardis, Fletcher and Thompson. (Compl., ¶¶ 22-23). A plain reading of Axcelis' Governance Policies demonstrates that the Board acted properly. Those Policies provide:

> 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.

(Stip., Ex. "P.") This is a routine, discretionary policy for uncontested elections that is known as "Pfizer-style policy." The Pfizer-style policy has been repeatedly approved and is widely used by public companies. *See* Vincent Falcone, Note, *Majority Voting in Director Elections: A Simple, Direct and Swift Solution*? 2007 COLUM. BUS. L. REV. 844, 861-62 (2007) ("Most corporations adopting a majority voting standard have chosen to follow the 'director resignation policy' approach, pioneered by Pfizer in June 2005."). Under this policy, in an uncontested election, if directors are to receive only a plurality rather than a majority of the shareholder votes, the director is still elected, but he or she also must offer to resign from the Board (which each of Hardis, Thompson and Fletcher did). After due consideration by the Nominating and Governance Committee (without participation by Mr. Hardis), the Board met without the three directors at issue and decided not to accept the offers of resignation. (*See* Compl., ¶ 23; Stip., Ex. "Q.") Such a common practice, which includes a deliberative process by the disinterested members of the Board and the Nominating and Governance Committee, with no alternative directors proposed by

anyone, including Plaintiff, simply does not support Plaintiff's assertion that the Directors acted with entrenchment motives, or were otherwise guilty of any wrongdoing, in rejecting the SHI Proposals. Rather, it shows an exercise of business judgment that is protected under Delaware law.

2. Plaintiff's Allegations Fail To Show Specific Benefits To The Board

To the extent Plaintiff is suggesting that the Directors' purported entrenchment motives are evidence of wrongdoing, Plaintiff does not describe what benefits the members of the Board are receiving by allegedly remaining "entrenched." Axcelis can only assume that Plaintiff is referring to fees the directors receive for their service, a proposition repeatedly rejected as a basis to establish an entrenchment motive. *See Kahn*, 1998 WL 409355, at *3 (citing *Grobow v. Perot*, 539 A.2d 180, 188 (Del. 1988)). Whenever a corporate board of directors votes for a merger, sale, or other business combination, their directorships may be in danger. Such a dilemma will always accompany merger decisions and for that reason alone it is not sufficient to establish a particular director is self-interested. The Delaware Supreme Court, in *Pogostin v. Rice*, 480 A.2d 619 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), rejected the conclusory allegation that because a majority of the board failed to approve an offer to purchase the company, they did so because they wanted to retain control and therefore were interested. *Id*. at 627; *see also In re Paxson Communications Corp. S'holders Litig.*, 2001 WL 812028, at *8-*9 (Del. Ch. July 12, 2001).

The *Pogostin* Court held that the plaintiff had the "burden to allege with particularity that the improper motive in a given set of circumstances, for example, perpetuation of self in office or otherwise in control, was the *sole or primary purpose* of

the wrongdoer's conduct." *Pogostin*, 480 A.2d at 627 (emphasis added). In *Pogostin*, the plaintiffs sought to "establish a motive or primary purpose to retain control only by showing that the [] board opposed a tender offer." *Id*. at 627. The Court stated that "[a]cceptance of such an argument would condemn any board, which successfully avoided a takeover, regardless of whether the board properly determined that it was acting in the best interests of the shareholders." *Id.*

B. Because Plaintiff's Allegations Would Not Support A Claim That The Axcelis Board Breached The Fiduciary Duty Of Care, Those Same Allegations Cannot Constitute Credible Evidence Of Probable Wrongdoing

The second prong of the analysis set forth in *Gantler* and *SWT* -- *i.e.*, did the Board make its decision advisedly? -- is a due care inquiry. In this case, there is no credible evidence of probable wrongdoing suggesting that the Board breached its duty of care. The Complaint simply shows that SHI made two unsolicited proposals to engage in negotiations to acquire Axcelis, that the Axcelis Board rejected those proposals, and that SHI sought to engage Axcelis in a public debate in an effort to create leverage to force Axcelis into accepting the inadequate SHI Proposals. These simple facts, without more, cannot overcome the presumptions of the business judgment rule.[11]

[11] Indeed, to reiterate, SHI's Second, higher Proposal vindicates the Board's rejection of the First Proposal.

There are no facts alleged in the Complaint to suggest that the Axcelis Board rejected the SHI Proposals out-of-hand or without appropriate consideration.[12] In contrast, the Company's press releases and shareholder letter outlining the reasons for rejecting both the First and Second Proposals explicitly and repeatedly explained that the Board considered the offers with the advice of their financial and legal advisors. (Stip., Exs. "H," "L," and "M.") This Court regularly has rejected due care claims where directors' actions have relied upon advice of legal and financial advisors in making their decisions as a part of a deliberative process. *See Perlegos v. Atmel Corp.*, 2007 WL 475453, at * 20 (Del. Ch. Feb. 8, 2007) (citing *Citrin v. E. I. DuPont de Nemours & Co.*, 584 A.2d 490, 510 (Del. Ch. 1990) and *Cinerama Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1175 (Del. 1995)); *see also Kahn v. Roberts*, 679 A.2d 490, 466 (Del. 1996); *Rabkin v. Philip A. Hunt Chemical Corp.*, 547 A.2d 963, 970 (Del. Ch. Dec. 4, 1986).

Furthermore, Plaintiff cannot complain that the Axcelis Board has refused to discuss any business combination with SHI, although it suggests as much. (*See* Compl. ¶¶ 24-25.) This unfounded suggestion is belied by at least two things. In a March 17 press release, the Company stated:

> Axcelis also noted that SHI has not accurately portrayed Axcelis' willingness to hold discussions with SHI. Axcelis' CEO, Mary Puma, and other members of Axcelis' senior management team meet regularly with SHI representatives to discuss how to optimize the value of SEN. In fact, these

[12] When considering a board's decision making process and the amount and character of information on which it bases its decisions, it is important to bear in mind that information itself does not come without associated costs and the amount of information on which directors rely is itself a matter of discretion. *See In re RJR Nabisco Corp. S'holders Litig.*, 1989 WL 7036, at * 19 (Del. Ch. Jan. 31, 1989 (noting that "information has costs" and that "the amount of information that is prudent to have before a decision is made is itself a business judgment of the very type that Courts are institutionally poorly equipped to make").

> meetings have occurred seven times since SHI first expressed an interest in acquiring Axcelis in July 2006. Notably, in November 2006, Axcelis offered, subject to SHI's agreeing to sign a customary nondisclosure agreement, to meet and provide SHI with confidential information that would further demonstrate Axcelis' market opportunity. SHI never responded to Axcelis' invitation. Conversations between Axcelis and SHI were restarted in March 2007 but, after meetings in November 2007, representatives of SHI declined to attend further meetings offered by Axcelis.

(Stip., Ex. "L" at p. 2.) This is a completely normal and customary approach in such situations. Of course, SHI finally came around on these issues and discussions between the parties did commence. Those discussions ended, however, after SHI continually requested more time to present Axcelis with a revised acquisition proposal or even to confirm its prior proposal.

Consistent with its efforts to conjure up indicia of wrongdoing, Plaintiff skews what transpired between Axcelis and SHI. After Axcelis declined to continue to extend SHI's deadline for submission of a revised acquisition proposal (and another five weeks of due diligence after that), the Company issued a press release indicating that the "additional process" sought by SHI was not in the Axcelis' stockholder' best interests. Twisting this disclosure, Plaintiff complains that Axcelis failed to disclose what "additional process" was required of it. (*See* Compl., ¶¶ 24-25.) A plain reading of the press release makes it clear that (i) the referenced "process" was requested by SHI, and (ii) Axcelis believed the delay was contrary to its shareholders' best interests because it had reason to doubt that a bona fide offer was forthcoming. (Stip., Ex. "S.") This conclusion is bolstered by the fact that SHI was able to make two unsolicited acquisition proposals earlier in 2008, which fact calls into question the extraordinary amount of time requested by SHI to make a third offer. (*See id.*)

Furthermore, the Complaint's reliance on statements of minority shareholders and other third parties to support its suspicions of wrongdoing is misplaced. (*See* Compl. ¶ 16.) First, the alleged statements of the Managing Director of Sterling criticizing the Board's response to SHI's Offers are substantially undercut by Sterling's own public declaration that it would like $7.00 to $7.50 per share. (*See* Exhibit "6.") Similarly, the statement attributed to an analyst at Davidson actually supports the Board's rejection of the SHI Proposals. (*See* Exhibit "7"; Section VI, *supra* at p.16-18.) Second, and more importantly, whether individuals with no responsibility for managing Axcelis and no additional information regarding the long term business plans of Axcelis believe that the Board should have accepted SHI's offers is simply irrelevant to the due care inquiry. If the rule were otherwise, the business judgment rule would be eviscerated because any objection to a board's informed decision-making would be subject to non-deferential judicial review.

The Complaint also alleges that Axcelis refused to publicly disclose the detailed valuation methodology that the Board uses in valuing the Company. (Compl., ¶ 15.) Non-disclosure of this type of information is routine; no publicly traded company discloses this type of information without good reason.[13] Moreover, and ironically, disclosure of this information, as the Plaintiff appears to want, would put Axcelis at a considerable strategic disadvantage in negotiations with SHI or any other potential acquiror. Such a result would severely undercut the Company's ability to effectively consider and negotiate a potential strategic transaction, should the Board conclude in its business judgment a potential

[13] *See Pfeffer v. Redstone*, 965 A.2d 676, 687-89 (Del. 2009) (recognizing that there is no duty to disclose valuation methodologies when a board is not requesting shareholder action).

transaction is advisable. Nevertheless, Axcelis did publicly disclose its basis for determining that SHI's proposals "undervalued" the Company and why those proposals were not in line with the Company's "intrinsic value." Indeed, these disclosures are made in the very same press release that Plaintiff references in its Complaint. (*See* Sections III and IV, *supra* at pp. 8-14.)

Plaintiff also points to the Company's sale of its stake in SEN as supportive of Plaintiff's suspicions of wrongdoing. (*See* Compl., ¶¶ 31-34.)[14] Plaintiff characterizes the transaction as a "fire sale," yet the record is devoid of any evidence showing the Board did not exercise valid business judgment in determining to sell the Company's stake in SEN at the time, and at the price it did. As discussed above, the Company disclosed that it was considering its refinancing options in the third quarter of 2008, that a substantial $85 million interest payment on the Notes was due in January 2009, and that the proceeds from the SEN sale allowed the Company to discharge its debt and obtain the Trustee's dismissal of litigation regarding Axcelis' non-payment on the Notes. (*See* Section VII, *supra* at pp. 18-20.) This is the only competent and non-speculative evidence in the record that is indicative of Axcelis' decision to sell its stake in SEN at the time, and at the price, it did. Additionally, Plaintiff simply alleges in conclusory fashion that SEN was sold at a "fire sale" price, but it offers nothing to establish that the price should have been higher or that Axcelis' 50% stake in SEN was worth more than the price at which it was sold. Plaintiff compares the sale price of SEN to the equity value of the Second Proposal, and suggests, without any explanation, that this somehow evidences a "fire sale." The Complaint,

[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. Axcelis nevertheless addresses the impotence of Plaintiff's speculations about the SEN sale.

however, does not allege the purported nexus between these two prices. In other words, there is no explanation of why the Second Proposal (with an equity value of approximately $630 million) supposedly evidences that the sale of Axcelis' stake in SEN for approx $133 million was insufficient.

At bottom, the decision of the Board not to engage in negotiations to sell the Company at prices proposed by SHI, or to sell the Company's interest in SEN to SHI, is not credible evidence of any probable wrongdoing. That the Board's decision not to sell the Company is itself a decision protected by the business judgment rule compels the conclusion that Plaintiff, at best, simply disagrees with that decision, which disagreement is not a basis for a books and records demand under Delaware law. To be clear, the Board was and is under no obligation to abandon the Company's business or to sell Axcelis to SHI and, therefore, failure to do so cannot serve as the basis of a breach of fiduciary duty claim. *See generally Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *see, e.g.*, *Cincinnati Bell Cellular Systems Co. v. Ameritech Mobile Phone Service of Cincinnati, Inc.*, 1996 WL 506906, *13 (Del. Ch. Sept. 3, 1996.) Even assuming that the SEN sale is properly considered on this record, which it is not, that no more constitutes evidence of probable wrongdoing than does the Board's decision not to engage in discussions to sell the Company at prices proposed by SHI. The SEN sale, like the decision not to engage in the proposed Company sale discussions, was a business judgment and nothing in the record suggests otherwise. Because Plaintiff has alleged nothing other than unexceptional and unfounded suggestions of wrongdoing that would be dismissed under a business judgment analysis, there is no basis on which to conclude that

those same allegations somehow constitute credible evidence of probable wrongdoing that would permit an intrusive and disruptive books and records investigation.

III. TO THE EXTENT PLAINTIFF IS SUGGESTING DISCLOSURE SHORTCOMINGS AS AN INDEPENDENT BASIS FOR ENTITLEMENT TO THE BOOKS AND RECORDS IT SEEKS, SUCH AN ARGUMENT IS CONTRARY TO THE RECORD AND CONTRARY TO LOGIC

As discussed throughout this Opening Brief, Plaintiff, without going so far as to state that it suspects disclosure violations by the Company, raises the issue in an attempt to bolster its infirm Complaint. For example, Plaintiff suggests that Axcelis did not adequately disclose (i) the bases for its determination that the SHI Proposals were inadequate and undervalued the Company (*see* Compl., ¶¶ 9, 15, 26); (ii) the valuation metrics underlying the Board's determination that the Second Proposal undervalued the Company (*see* Compl., ¶ 15); (iii) the "additional process" that led to the Board's decision not to continue to extend SHI's deadline for submitting a revised acquisition proposal (*see* Compl. ¶ 25); and (iv) why it was in Axcelis' shareholders' best interests for the Board to reject the resignations of Hardis, Fletcher, and Thompson (*see* Compl., ¶ 23).

Although each of Plaintiff's speculations about disclosure has been addressed above, those responses are summarized again here for the sake of clarity. As to the suggestion that Axcelis did not disclose the bases for its determinations that the SHI Proposals undervalued the Company, there are numerous public filings that make these very disclosures. Among the publicly disclosed bases for rejecting the SHI Proposals, which bases are set out in more detail in Sections III and IV, *supra* at pp. 8-14, are (i) the failure to account for the market opportunity to take market share back from competitors; (ii) the failure to account for synergies; (iii) the Company's ability to drive shareholder

value higher than the value implied by the SHI Proposals on a "stand alone" basis; (iv) the fact that SHI made the SHI Proposals in the midst of depressed market conditions; and (v) significant potential upside based on Axcelis' new product line.

In response to Plaintiff's complaint that the Company did not publicly disclose the internal valuation metrics on which it based its determination that the Second Proposal undervalued the Company, it has already been pointed out that such a result is illogical and impractical. (*See* Section II.B., *supra* at pp. 34-35.) It is simply not in any public company's best interests to disclose this type of information without good reason. To do so would put companies at a significant disadvantage when negotiating with a potential acquiror.

As to Plaintiff's musing that the decline in Axcelis' stock price since the rejection of the SHI Proposals suggests that there may be undisclosed "problems" with the Company, there is little to say. This much is certain, though. If every time a Delaware corporation remains publicly optimistic about its future prospects even though its stock price is declining suggests non-disclosure of some undefined "problem" that shareholders can fish for by way of a books and records demand, there would be opened a Pandora's Box of Section 220 abuses.

As to Plaintiff's less than clear concern with what was or was not disclosed about Axcelis' decision not to further extend SHI's deadline to present the Company with a revised acquisition proposal, the record speaks for itself. The Company plainly explained its reason why it was unwilling to wait another seven weeks for SHI to present a revised proposal (and then, after that, accommodate another five weeks of confirmatory due diligence). This "additional process," reasoned the Board, was unwarranted based on

SHI's repeated failures to deliver a new acquisition proposal and the Board's belief that a bona fide offer was not forthcoming. (*See* Stip., Ex. "S"; *see also* Section VII, *supra* at pp. 18-20.)

As to Plaintiff's final disclosure concern -- the bases for the Board's determination that is was not in the shareholders' best interests to accept to the resignations of Hardis, Fletcher, and Thompson -- the best response simply is to repeat yet again what was disclosed:

> In making there 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.

(Stip., Ex. "Q.") This answers the precise question posed by Plaintiff, and Plaintiff has not explained why this is insufficient or why Plaintiff is entitled to anything more. The simple answer is that the Company's disclosure is sufficient and Plaintiff is entitled to nothing more.

The final reason for concluding that Plaintiff's disclosure concerns do not constitute credible evidence of probable wrongdoing is the observation that neither Plaintiff nor any other Axcelis shareholder has brought a disclosure action against the Company, whether premised on state law or the federal securities laws. In today's litigious society, the most obvious reason for the lack of any such claims in this case is the fact that

there is no basis for them. The material facts and circumstances surrounding the SHI Proposals and the rejection of director resignations following the Company's 2008 annual meeting have been disclosed. That Plaintiff might not like the decisions, and the reasons therefor, that were disclosed does not evidence anything other than Plaintiff's disagreement. Such disagreement does not entitle Plaintiff to investigate the Company's books and records in the hopes of concocting some litigable claim.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court conclude that Plaintiff has failed to show any credible evidence of probable wrongdoing to warrant an inspection of the Company's books and records for the purported purpose of investigating possible mismanagement or breach of fiduciary duty.

DATED: June 12, 2009 **EDWARDS ANGELL PALMER & DODGE LLP**

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CERTIFICATE OF SERVICE

I, John L. Reed, do hereby certify that on this 12th day of June 2009, a copy of the foregoing **DEFENDANT'S OPENING PRETRIAL BRIEF** was served on the following in the manner indicated:

LEXIS NEXIS FILE AND SERVE

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