

Corporate & Financial Weekly Digest

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Delaware Rules on Shareholder Access to Corporate Books and Records

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Shareholder Westland Police & Fire Retirement System brought an action under Section 220 of the Delaware General Corporate Law to review the books and records of Axcelis Technologies, Inc., a manufacturer of ion implantation and semi-conductor equipment. In 2008, Sumitomo Heavy Industries, Ltd. (SHI) made an unsolicited proposal to acquire Axcelis for \$5.20 per share, later increasing the offer to \$6.00 per share. The Axcelis board rejected both offers as inadequate, but agreed to meet with SHI to explore whether the parties could reach an agreement on a transaction. After the parties executed a confidentiality agreement and conducted diligence, SHI requested additional time to consider a further acquisition proposal. Axcelis rejected this request and SHI then put all discussions “on hold.” Axcelis’ share price declined significantly following the “on hold” development.

During the negotiation period, Axcelis held its annual shareholder meeting at which three members of Axcelis’ classified board were up for election. Previously, Axcelis had adopted by board resolution a “plurality plus” rule providing that any director who received a plurality but not a majority of shareholder votes must submit a resignation letter, which the board then could in its discretion either accept or reject. At the 2008 meeting, three directors received less than a majority of votes and submitted their resignation letters. The Axcelis board declined to accept the resignations on the ground that it was not in the company’s best interest to do so at that time.

After SHI put its acquisition effort on hold, Westland submitted a books and records request for the purpose of investigating whether the Axcelis board members breached their fiduciary duties by (a) rejecting the SHI acquisition proposals (a possible *Unocal* violation), and (b) declining to accept the director resignations submitted pursuant to the plurality plus policy (a possible *Blasius* violation). The Chancery Court found that investigating possible management wrongdoing was a “proper purpose” for a Section 220 books and records inspection, but that Westland had failed to provide evidence establishing a “credible basis” to infer corporate wrongdoing. Specifically, the Chancery Court found that the mere rejection of an acquisition proposal is not a defensive measure under *Unocal* and that the plurality plus provision expressly provided the board with discretion to accept or reject any resignations.

The Delaware Supreme Court affirmed the Chancery Court’s rulings. Notably, however, the Court’s opinion went on to make clear that Westland’s books and records request for information

regarding the directors' resignations would have been appropriate if Westland had argued that its "proper purpose" was to investigate "director suitability" rather than corporate wrongdoing. The Court found that "[w]here, as here, the board confers on itself the power to override an exercised shareholder voting right without prior shareholder approval", the board must be accountable. Specifically, where stockholders withhold sufficient votes to trigger a corporation's plurality plus policy, a credible basis to infer director unsuitability is established and shareholders are entitled under Section 220 to the documents and other records that the board relied on in declining to accept the resignations. (*City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, No. 594,2009 (Del. August 11, 2010))

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