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Dated: August 25

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re EMULEX SHAREHOLDER LITIGATION	:	Consolidated C.A. No.: 4536-VCS

PLAINTIFFS' PRE-TRIAL RESPONSE BRIEF

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PRELIMINARY STATEMENT

Emulex's Pre-Trial Brief follows the instruction of Albert Einstein: "If the facts don't fit the theory, change the facts." And so, Defendants' story is written in Emulex's brief without any citation, obviating the need to be constrained by the facts. Unfortunately for Defendants, the record undermines their story. For example, a central theme in Defendants' Pre-Trial Brief is that the shareholder base is ignorant and will be fooled by the "seeds of doubt and uncertainty sown by Broadcom..." concerning Emulex's true value. Defendants testified to the contrary:

> Q. . . . [regarding questions at shareholder meetings] you responded in a way that you felt would clarify the misinformation that Broadcom was putting out, correct?
>
> A. That's correct.
>
> Q. And did you feel at the end of your conversations that by and large the people you had met with kind of understood the situation of the case for Emulex to remain an independent company?
>
> A. They understood the case of why Emulex rejected the nine dollars and twenty-five cents . . .[1]
>
> * * *
>
> Q. So as far as you know, anyone who has sought information from Emulex has gotten it?
>
> A. As far as I am aware.[2]
>
> * * *
>
> Q. I believe you testified in response to some questions by Mr. Grant that at the conclusion of each of these meetings with the stockholders, you

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1 McCluney Tr. 110:10-21.

2 *Id.* at 122:8-16.

were comfortable that you had addressed what you regarded were the misstatements in the marketplace by Broadcom; is that correct?

A. That's correct.[3]

McCluney further testified that the only information he wishes he could provide to shareholders is "to tell them which customers and which platforms Emulex has won."[4] However, Folino confirmed that this detail is not necessary for an informed shareholder vote:

Q. Is it your view that your shareholders are unable to assess whether to accept a tender offer from Broadcom without knowing what customers you have on your new design wins?

A. No, not necessarily. I think we provided what information we're capable of providing now and that's -- we're limited to that.

Q. But it's not -- I mean, you're not testifying that the shareholders should be unable to make a decision until you actually disclose all of the customers, are you?

A. No.[5]

Even Emulex's proxy solicitor testified contrary to Emulex's Brief, explaining that he participated in road show presentations "to communicate the company's business plan" at which institutional investors received materials and were able to ask questions,[6] and that no institutional investors have subsequently expressed any confusion. In short, the shareholder base is fully educated and can make its own decision as to whether they want to tender to Broadcom or stay with an independent Emulex.

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3 *Id.* at 269:5-12.

4 *Id.* at 117:18-118:7.

5 Folino Tr. 446:16-447:7.

6 Burch Tr. 173:11-174:14; *See also* Benck Tr. (DRAFT) 242:10-243:13.

Next, Emulex paints the projections purportedly justifying its refusal to engage with Broadcom as "careful, reasonable and conservative." Once again, the facts belie Defendants' characterizations. In the words of CFO Rockenbach, who was responsible for the projections explained: "There's a difference between what we might pursue as a business and what we would use or what the board and Goldman would use for the assessment of the adequacy of the Broadcom offer. That is two different things."[7]

The fact is that the projections were originally put together to justify the Board's refusal of Broadcom's $9.25 Offer, and when the first few sets of forecasts did not do the trick, the Board sent management back to the drawing board. Just yesterday, Plaintiffs deposed COO Jeff Benck, who detailed the five key changes between the April 27 and May 7 five-year forecasts. [8]

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Emulex's then spins the Poison Pill and the Entrenchment Measures (including the Supermajority Bylaw) as the logical continuation of corporate policy. Once again, Defendants are unable to cite to the record, as they create a fictional story. What the record demonstrates is that: (1) the Poison Pill and Entrenchment Measures were done in

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7 Rockenbach Tr. 100:5-10.

8 Benck Tr. (DRAFT) 94:23-96:17

9 *Id.* at (DRAFT) 109:9-20

10 *Id.* at (DRAFT) 103:9-108:23

direct response to Broadcom's overtures; (2) the Board lacked due care when implementing the Poison Pill and Entrenchment Measures; and (3) the Entrenchment Measures cannot be justified, much less pass muster under the strict scrutiny required of intentional impairment of the shareholder franchise, and in any event, are onerous, disproportionate to any perceived threat, and preclusive.

Finally, Emulex explains in great detail how Broadcom needs Emulex more than Emulex needs Broadcom. But the Defendants do not follow their own logic to its conclusion. They do not explain why, given this incredible leverage, the Emulex Board refuses to negotiate a substantially better deal. In fact, the testimony shows that the Emulex Board never even considered how (and whether) to use its leverage to the advantage of its stockholders:

> Q. Yes or no, did you say anything to Mr. McGregor to try to encourage him to put more money on the table?
>
> A. No, I did not.
>
> Q. Did you consider whether you should use as leverage his desire to see your confidential information in return for them putting more money on the table?
>
> A. No.[11]

Moreover, Defendants do not discuss how the design cycle, while giving great leverage to Emulex now, will likewise cause Broadcom to find Emulex less attractive once that design cycle has come and gone. Indeed, Broadcom's June 29 letter to Folino makes plain the irreparable harm that Emulex shareholders face due to the self-interest and

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[11] McCluney Tr. 98:7-16.

intransience of their fiduciaries: "Delay – and its associated business risks and financial costs – erode the value of a combination. We believe it is in the best interest of each company's stakeholders to complete a transaction expeditiously or to conclude that we cannot, and move on."[12]

Plaintiffs do not disagree that Emulex is valuable and an attractive acquisition candidate for Broadcom. But the Emulex Board is doing nothing to capitalize on that leverage. Indeed, the Board's scorched earth opposition to Broadcom's $9.25 Offer may have already irreparably damaged shareholders given that Broadcom in its June 29 letter which raised its Offer to $11 expressed its exasperation with the Emulex Board and promised to walk away by July 14.[13] The question that the Court must answer is should the Poison Pill (protected by the Entrenchment Measures) allow the Emulex Board to prevent its shareholders from being able to decide for themselves whether to accept Broadcom's Tender Offer or to do what the Defendants refuse to do – negotiate with Broadcom. Plaintiffs respectfully submit the answer is no, and will prove so at trial.

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12 Letter from Scott McGregor to the Board of Directors of Emulex Corporation, c/o Paul Folino, dated June 29, 2009, filed with the SEC as part of Broadcom Schedule 14A on June 30, 2009 ("McGregor June 29 Letter") (Ex. 63).

13 *Id.*

COUNTER-STATEMENT OF FACTS

A. THE SHAREHOLDERS ARE FULLY INFORMED

1. Defendants' Own Admissions And The Admissions Of Their Proxy Advisor Confirm That Shareholders Are Fully Informed And Not Confused

Contrary to Defendants' suggestion, Emulex's shareholders were fully informed regarding Broadcom's $9.25 per share tender offer and, necessarily, are equally able to assess Broadcom's new $11.00 offer. Defendants' argument that information disclosed by Broadcom in support of its Tender Offer and Consent Solicitation has somehow "limited the ability of the Emulex stockholders to accurately consider and fully appreciate the value of their shares"[14] is directly contradicted by the testimony of Defendants and their proxy solicitor. For example, Emulex's Chairman, Folino, testified he was unaware of any instances of shareholder confusion:

> Q. Has anyone come back to you and said, "You know, shareholders are really confused about this and there is a risk that they might just accept the nine twenty-five today"?
>
> A. No, not at this point in time, I can't say that.[15]

Defendants have spared no expense informing Emulex's shareholders about the value they can offer and why they believe Broadcom's Offer should be rejected, including hiring a well-known proxy solicitor and conducting extensive roadshows to educate Emulex's shareholder base regarding the Company's future business prospects and Broadcom's offer. Indeed, McCluney met in person and by telephone with

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[14] *See* Def. Br. at 52.

[15] *See* Folino Tr. 195:14-20; *see also* Burch Tr. 143:18-21 ("Q. Have they told you, in any way, that they're confused by the information provided by Emulex? A. No, they haven't.").

approximately 53% of Emulex's shareholders, more than 80% of which are sophisticated institutional investors.[16]

During Emulex's roadshows, McCluney clarified for Emulex's shareholders what he believed to be all "misinformation" put forth by Broadcom regarding Emulex's future prospects:[17]

> Q. So you took that issue on. And to the best of your ability, you corrected the lies and misrepresentations that Broadcom was making, correct?
>
> A. As best I could, yes.[18]

During these investor presentations, McCluney explained Emulex's prospects as a stand-alone company.[19] McCluney says the information Emulex provided its shareholders concerning Emulex's future prospects was extremely thorough:

> Q. With regard to Emulex's economics as a stand-alone corporation going forward, did you feel that you gave them [shareholders] a fairly good description of that, such that they had an understanding of what Emulex's prospects were?
>
> A. Yeah, we took them through the rationale for the earnings projections that we had in our roadshow presentation and answered whatever questions they needed on that, got lots of questions on what is a design win and how does it work, explained that to them. Showed them what the projections meant in terms of market share and, you know, primarily stuck

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16 *See* McCluney Tr. 101:6-104:12; 104:13-106:15. (Emulex shareholders include the likes of Wellington Management, T. Rowe Price, Barclay's, Mason, and American Century with holdings in Emulex stock ranging between one million and six million shares).

17 *See Id.* at 166:1-177:10; and 108:18-110:13. ("Q. [Y]ou responded in a way that you felt would clarify the misinformation that Broadcom was putting out, correct? A. That's correct.").

18 *See Id.* at 169:13-17.

19 *See Id.* at 111:9-112:3.

to the information that was in the public domain.[20] Significantly, following these presentations, Emulex has not received any requests from its shareholder base for further information.[21]

2. Identification Of Emulex's Customers Is Not Necessary

Defendants propose a theory of shareholder confusion based on the "design wins" that may (or may not) represent the Company's future. In their brief, Defendants lament that they have been unable to disclose the names of their OEM customers on the new design wins, and conclude, without record support, that "[t]he market as a whole is consequently unaware of Emulex's pending growth, as these design wins will not convert into revenue for the Company for 9-12 months, and Emulex's stock price is, therefore, significantly undervalued."[22]

More than enough about the design wins is in the public domain, as Defendants themselves concede. It is no secret that virtually all of Emulex's revenues come from design wins.[23] Emulex typically enjoys "numerous" design wins per year[24] and publicly

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20 *Id.* at 113:11-114:4.

21 *See Id.* at 115:22-116:7 ("Q. [D]o you believe that the shareholders have adequate information to reach their own decision, whatever that decision would be? A. They have the information we provided. I haven't received any other calls from them to ask for more information. So it is their judgment now on whether they tender the shares or not."). *See also Id.* at 120:13-18 ("Q. Are you getting calls from your shareholders asking you for additional information? A. I haven't received any since the roadshow.").

22 Def. Br. at 11.

23 Goon Tr. 130:7-12 ("Q. And about what percentage of Emulex's revenues over time come in one way or another from a design win? A. Well, I don't know the percentage answer on that but my belief is virtually all of them.").

24 Goon Tr. 131:2-11.

touted that it entered 2008 with no less than "30 unannounced design wins."[25] Emulex's customer base – REDACTED - are "[b]asically the significant OEM manufacturers or computers and servers," such as

Accordingly, the most basic aspect of an investment in Emulex is the concept of design wins, and the Court should look with suspicion on any argument that assumes Emulex shareholders do not understand the most basic value-driver in their investment.

Further, the record undercuts any story about shareholder confusion regarding the design wins. At his deposition, Chairman Folino made clear that shareholders have been told all they need to know about Emulex's latest design wins.[27] He stated that despite Broadcom's supposed "misstatements" about the design wins, Emulex has corrected the record and analysts have "validated" Emulex's own public description of the value of the design wins, including the likelihood that Emulex can take business from Broadcom as a result.[28] Likewise, McCluney stated that although Emulex had not been able to disclose the names of its customers on new design wins, this information was soon to be disclosed and in any event not so critical as to make a difference in shareholders' decision-making ability.[29]

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25 *See* Ex. 10 at ELX-00007554.

26 Goon Tr. 128:22-129:15.

27 Folino Tr. 188:7-14.

28 Folino Tr. 432:7-23 (adding that the fact that "analysts have done their own work on this and validated the case that we are taking significant business away from" Broadcom is out in the public domain.).

29 McCluney Tr. 118:23-119:8, 168:12-170:5.

Despite defense counsel's attempt to lead Folino through some questions about the Company's inability to actually disclose which customers apply to which design win,[30] Folino agreed with Plaintiffs that shareholders are more than capable of inferring who Emulex's customers are and that, in any event, Emulex's failure to disclose who its specific customers are should in no way impair the ability of shareholders to decide whether or not they trust their Board's latest set of projections:

> Q. Is it your view that your shareholders are unable to assess whether to accept a tender offer from Broadcom without knowing what customers you have on your new design wins?
>
> A. No, not necessarily....
>
> Q. ... I mean, you're not testifying that the shareholders should be unable to make a decision until you actually disclose all of the customers, are you?
>
> A. No.
>
> *****
>
> Q. ... [T]here's a limited world of tier one OEMs, correct?
>
> A. Correct.
>
> Q. Okay. So, it's also likely that when you tell the public that your new design wins are with tier one OEMs, shareholders can make some inferences about who these customers are, right?
>
> A. Yes.[31]

Furthermore, Emulex has produced multiple rounds of detailed investor presentations that provide abundant information regarding the new design wins and the

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30 Folino Tr. 440:22-441:14.

31 Folino Tr. 446:16-447:22; *see also id.* at 450:5-9 ("Q. But the shareholders, they may not know exactly which platform goes with which OEM, but they can infer who your customers are on these design wins? A. That's fair.").

Board's projections, all of which are available on a website specially created to persuade Emulex shareholders not to support Broadcom.[32] If shareholders do not agree with the Board's judgment, it is not because of a lack of information about any pertinent topic, but rather a result of shareholders who want change. Their ability to so choose should not be stymied by contrived arguments about immaterial information.

3. Defendants Ignore The Sophisticated Nature Of The Company's Shareholder Base

Defendants suggest that Emulex shareholders are unable to parse significant financial information from the rhetoric that marks a contested proxy fight. Until June 29, Broadcom and Emulex were engaged in an all out war of words through their proxy filings, with Emulex introducing a notable level of spite.[33] Yet as Goon explained, Broadcom's money is as good as anyone else's, since "cash is cash."[34]

Defendants cannot ask the Court to ignore the nature of Emulex's shareholder base for one purpose, while acknowledging it for another. When Emulex shareholders

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32 *See* "Emulex Corporation Investor Presentation May 2009," *available at* http://www.emulexvalue.com/presentations/104InvestorPres.pdf (Ex. 64); "Emulex Corporation Investor Presentation June 2009," *available at* http://www.emulex value.com/presentations/investorPresentationJune2009.pdf. (Ex. 65)

33 Complaint, *Emulex Corp. v. Broadcom Corp and Fiji Acquisition Corp.*, Case No. SACV 09-588 AG (MLGx), filed in the United States District Court for the Central District of California, Southern District, 5/15/09, attached to Form SC TO/T/A filed by Fiji Acquisition Corporation (Broadcom) on May 18, 2009 (Ex. 66) ("Emulex has beaten Broadcom to the market with superior technology, Broadcom has disparaged and misrepresented Emulex's success in order to foster an ill-founded belief that Emulex shareholders will be well advised to support Broadcom's woefully inadequate offer.").

34 Goon Tr. 240:16-22.

appear to support the Board, Defendants tout their wisdom.[35] As Folino explained, Emulex's shareholder base is "smart," "sophisticated" and mainly institutional investors.[36] Indeed, to sidestep the inherently disenfranchising effect of the Supermajority Bylaw, Defendants assert: "Emulex's shareholder base included 85 percent institutional ownership as of September 22, 2008 . . . which institutions are presumably sophisticated enough to recognize a high enough offer to justify a consent solicitation when they see one."[37] There is simply no basis for this Court to infer that if shareholders support Broadcom's $11 Offer, they necessarily must be confused.

B. THE BOARD'S RENEWAL OF THE PILL AND ADOPTION OF THE ENTRENCHMENT MEASURES WERE IN DIRECT RESPONSE TO BROADCOM'S FRIENDLY OVERTURE IN DECEMBER 2008

Defendants contend that the adoption of the Poison Pill, the amendments to Emulex's Bylaws, and the amendments to Emulex's key employee retention agreements for five Emulex executives were not a "specific reaction to Broadcom's overtures" but instead were "part of a general review and modernization" of those documents.[38] This assertion is belied by the evidence.

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35 *See, e.g.*, Emulex Corporation Form 14A filed with SEC June 19, 2009 ("We believe stockholders agree with our Board that Broadcom's offer significantly undervalues Emulex, as evidenced by the meager less than three percent of outstanding shares tendered into the offer") (Ex. 67).

36 Folino Tr. 359:2-23.

37 Def. Br. at 37.

38 Def. Br. at 30-31.

Within seven days of informing Broadcom that Emulex was not for sale, Defendants enacted all of the defensive measures at issue.[39] This was no coincidence. Indeed, on December 18, 2008, just prior to Broadcom's initial overture, Emulex determined **not** to renew the Pill, and specifically decided that because they were taking no action, no public disclosure on the issue was needed.[40] The December 24 inquiry from Broadcom undoubtedly caused the Board to re-consider and adopt the new Pill.[41] As Goon explained: "I did not have an expectation that Broadcom would simply go away if told we are not interested. I hoped that, but I didn't have an expectation" and as a result, he "thought there was a real risk of" a hostile bid from Broadcom.[42]

Similarly, when asked if the Board had engaged in any discussion about a supermajority requirement prior to January 2009, Goon replied "I have no independent recollection of that at all."[43] As to the retention agreements, an email chain between CEO McCluney and COO Benck demonstrates that "[g]iven the potential of a hostile approach by Blackbird" Emulex was "working on" amending its change-in-control

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39 *See* Pl. Br. at 17.

40 Benck Ex. 5, ELX 00016825 (Ex. 68); *See* Benck Tr. (DRAFT) 161:6-14. ("Q. Well, the whole thing, that the company shareholder protection plan expires in January of '09 and will not be renewed? A. Yes. In December I believe the thought was that it would not be renewed.")

41 *See* Folino Tr. 185:16-186:7 (agreeing that Broadcom's interest played some role in the Board's decision to adopt the Pill).

42 Goon Tr. 176:8-19.

43 Goon Tr. 100:6-11; *see also* ELX-00035037 (Ex. 57) ("Next Steps" at January 9 2009, board of directors call includes "Shareholder Protection Plan" "Bylaw Revisions" and "Additional Protection Activities"); ELX-00035042 (Ex. 56) (same); ELX-00068400 (Ex. 55) (same).

documents "because there was [sic] a lot of loop holes in the old plan."[44] The critical terms of the bylaw amendments, Pill, or change-in-control agreements were not considered in any meaningful way prior to Broadcom's overtures in December 2008.

Defendants also contend that two decisions by the Court of Chancery in 2008, namely *JANA Master Fund, Ltd. V. CNET Networks, Inc.*, 954 A.2d 335 (Del. Ch. 2008, *aff'd*, 947 A.2d 1120 (Del. 2008) and *Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244 (Del. Ch. April 14, 2008), were the inspiration for the decisions to amend Emulex's bylaws and adopt other defensive measures.[45] Significantly, however, there is no testimony, and no evidence, that these decisions played any role in any Board member's deliberation on any issue. Moreover, as this Court is well-aware, Defendants have refused to produce and have "clawed back" hundreds of relevant documents under the assertion of attorney/client privilege. Given this assertion, Plaintiffs have been unable to inquire as to the nature of the legal advice. To the extent that Defendants relied on advice of counsel concerning these judicial opinions, Defendants cannot now raise the content of that advice as a justification for their actions.[46] Indeed, because Defendants' reliance on legal advice about the Bylaws presents a classic "sword and shield" problem,

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[44] ELX 68400.

[45] Def. Br. at 32 ("It is no coincidence, then, that one month later, the Nominating/Corporate Governance Committee met to discuss, among other things, updates on governance developments and the Company's defensive measures.").

[46] *See* Pl. Br. at 67-68; citing *Chesapeake Corp. v. Shore*, 771 A.2d 293, 301 (Del. Ch. 2000) (parties that assert privilege and block discovery are precluded from arguing the content of the legal advice they received).

Plaintiffs are moving *in limine* today to preclude any offensive use at trial of such matters.

Defendants also contend (again, without citing any evidence) that "all but one of the January 2009 bylaw amendments" were discussed in 2008 and are merely "relatively quotidian clean-ups" of existing bylaw provisions.[47] Presumably (given that Defendants' brief is silent on evidence), the bylaw amendment they admit was not discussed in 2008 is the Supermajority Bylaw requirement. Therefore, this amendment, clearly the most restrictive bylaw amendment to Emulex shareholders,[48] was admittedly a response to Broadcom's overtures in December 2008.[49]

C. THE SUPERMAJORITY BYLAW IS VERY ONEROUS AND DOES NOT SERVE ITS INTENDED PURPOSE

Defendants attempt to justify their imposition of the Supermajority Bylaw by arguing that "a 66 2/3% majority of outstanding shares is hardly unattainable."[50] Defendants miss the mark for a number of reasons. First, Defendants ignore the fact that achieving 66 2/3% of all outstanding shares means that a dissident will actually have to garner the support of over 83.5% of all voting shares – including those shares held by

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47 Def. Br. at 34.

48 *See* Pl. Br. at 20-23; 61-67.

49 As for the "quotidian" amendments, Defendants assert that adding the word "only" to the bylaws such that "only" the Board, the Chairman or the CEO may call a special shareholder meeting "did not deprive the shareholders of any right they had before January 2009." Def. Br. At 36. This argument cannot be squared with the plain language of the amendment because if "only" the Board, the Chairman or the CEO can call a special meeting, then other shareholders cannot now, but theoretically could have done so before the amendment.

50 Def. Br. at 37.

management and employees.[51] Although not mathematically impossible, achieving such a high percentage of voting shares in the context of a contested consent solicitation is extremely unlikely.[52] Second, the slim possibility of attaining 66 2/3% of all outstanding shares (or, over 83.5% of all voting shares), does not negate the fact that the Supermajority requirement inherently disenfranchises stockholder majorities to the will of a small stockholder minority.[53] Third, Defendants ignore the several factors that put dissidents at an inherent disadvantage in running a contested consent solicitation, including that: (1) the Company controls the record date; (2) trading following the record date (and the 27 million shares traded after Broadcom raised its bid may in fact have killed an possibility of achieving the necessary support here) lowers the potential turnout; (3) lending and derivative transactions lowers the potential turnout; and (4) management's efforts to depress voter turnout.[54]

Defendants additionally attempt to justify the Supermajority Bylaw by arguing that "in the context of a consent solicitation coupled with an unsolicited tender offer, the higher threshold incentivizes a bidder such as Broadcom to raise its Tender Offer price to a level acceptable to a large majority of the stockholders in order to obtain consents – precisely the incentive that a board should seek to provide in such a circumstance."[55]

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51 *See* Expert Report of Bruce H. Goldfarb ("Goldfarb Rep.") at 18 (Ex. 25); Goldfarb Tr. (DRAFT) at 74:14-75:5.

52 *Id.* at 2 (Ex. 25).

53 *Id.* at 19 ("In sum, a supermajority empowers a superminority") (Ex. 25).

54 *Id.* at 7-8 (Ex. 25).

55 Def. Br. at 37.

However, the Supermajority Bylaw actually can have the exact opposite effect. As Plaintiffs' proxy solicitation expert, Goldfarb, astutely, explained:

> [B]y raising its bid, Broadcom may in fact further harm its chances of attaining the required support for the consent solicitation. As trading volume spikes and record date holders sell all or part of their holding, voter turnout may be further depressed for purposes of the consent solicitation. The investors that may be purchasing the shares after the record date may be inclined to tender but cannot vote their shares in support of the consent solicitation. This is in contrast to a simple tender offer where an increased bid almost invariably leads to more, not less, participation."[56]

Indeed, just such an effect has occurred here. Broadcom realized that if it were to increase its Tender Offer, it would be impossible to conduct a successful consent solicitation. Accordingly "[i]n view of the defenses that Emulex erected in response to our approach in December 2008," Broadcom ceased soliciting consents, dismissed its litigation against Emulex, and publicly stated that if a combination between Broadcom and Emulex occurs, it can only be through a "friendly transaction."[57]

Moreover, Defendants ignore the clear disconnect between the intended and actual effect of Emulex's Supermajority Bylaw. Defendants concede in their Opening Brief that "one effect of the amendment is to help ensure that any decision regarding a change in control of the Company be made by the disinterested stockholders, given that a hostile acquirer or other interested person can purchase up to 14.99% of Emulex's shares under the stockholder rights agreement without board approval."[58] However, a majority

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56 Goldfarb Rep. at 18 (Ex. 25).

57 McGregor June 29 Letter (Ex. 63)

58 Def. Br. at 37.

of disinterested stockholder voting rule requires the votes of interested stockholders, be excluded from both the numerator and denominator of the voting model and a simple majority vote of those disinterested stockholders would be required for a proposal to pass.[59] The Supermajority Bylaw sets a much higher standard for approval.[60]

D. THE NOVEMBER ANNUAL MEETING DOES NOT NEGATE THE NEED TO PULL THE PILL OR REPEAL THE ENTRENCHMENT MEASURES

Any doubt that the Pill and the other Entrenchment Measures preclude an acquisition by Broadcom was erased by Broadcom's June 29 letter to Emulex raising the Offer price to $11.00 per share and telling Emulex that if not accepted, the Offer would expire on July 14. Unless Emulex endorses Broadcom's proposal and pulls the Poison Pill, Broadcom has made clear that the Offer will simply disappear along with millions of dollars in shareholder value, even if a majority of Emulex's shareholders tender their shares for $11.00 each.

Emulex's answer is that it will place the Entrenchment Measures before the shareholders at the annual meeting in November. That will do nothing to resuscitate Broadcom's Offer. Instead, Emulex shareholders will be left with a too-late choice to repeal the preclusive Entrenchment Measures and the forever-lost opportunity to agree to the Broadcom Offer. Broadcom's experience shows that the Entrenchment Measures will effectively repel any third-party suitor notwithstanding the enhanced value promised to, and desired by, Emulex shareholders.

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59 Goldfarb Rep. at 10-11 (Ex. 25).

60 *Id.* at 11 (Ex. 25).

E. THE COMPANY'S AND GOLDMAN SACHS' PROJECTIONS ARE NOT CONSERVATIVE

Defendants present a nice narrative in their Opening Brief of their development of five-year projections for Goldman Sachs, but it is a story told without any factual support. They claim that "the forecast process represented a careful, reasonable and conservative analysis of the Company's future prospects," that "Emulex has erred on the side of caution in preparing these forecasts," and that "[t]he revenue projections included in these forecasts were careful and conservative."[61] The reason Defendants failed to provide any supporting testimony for these conclusory assertions is that there is none.

As Plaintiffs demonstrated in their Opening Pre-Trial Brief:

- Emulex's design wins are the almost exclusive way the Company grows revenue;[62]
- Emulex's twelve recent design wins involve new, untested technology, primarily involving FCoE;[63]
- FCoE is only a bridge technology toward an eventual Ethernet-only solution;[64]
- Only three of Emulex's twelve recent design wins are exclusive, and as of February 2009 the products developed with were still

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61 Def. Br. at 20-21.

62 Pl. Br. at 10 & n. 128.

63 Pl. Br. at 10. *See also* Def. Br. at 3 (design wins are for "cutting edge . . . emerging converged network technology"); at 8 ("Today's enterprise networking is at a major inflection point"). Defendants also concede that the bulk of their future growth and revenues are forecast to come from sales of this new technology. *See* Def. Br. at 13 ("Its FCoE products will be a significant portion of a growing market over the next five years").

64 Pl. Br. at 10.

being tested and were not widely accepted in the industry,[65] and there is no evidence the exclusive design wins have any greater profit margin than the non-exclusive wins.[66]

- Management's projections were created in response to Broadcom's offer and were not done in the ordinary course of business; in fact, no one in the industry forecasts out to 2013 or 2014;[67]

- The projections were not an attempt to estimate Emulex's financial situation over the next five years, but instead were created solely to assess the adequacy of Broadcom's offer;[68]

- The bulk of the Company's growth in revenue and profit occur in the last couple of years of the forecasts, where the projections are the most speculative;[69]

- The projections are based on design wins that Emulex has not yet obtained and products that Emulex has not yet developed, produced or sold;[70]

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[65] Pl. Br. at 28-29. As Defendants concede, there are instances where only one supplier is the "'winner' and will get all of the business for that server" and other instances were there are "multiple suppliers . . . with the qualified suppliers then sharing the business." Def. Br. at 9.

[66] *See* McCluney Tr. 65:4-66:2 (discussing "sole supplier wins" and agreeing that profit margins are "squeezed" and OEM sales are down in the technology industry).

[67] Pl. Br. at 10 & n. 145, 31 & n. 149.

[68] Pl. Br. at 10 & n. 146. Defendants are thus wrong in stating that "Emulex management simply tried to come up with its best assessment of what Emulex would look like in the future based on currently existing opportunities." Def. Br. at 24.

[69] Pl. Br. at 31 & n. 147 & 148. It is these far-out revenues on which Defendants relied in rejecting Broadcom's $9.25 offer. *See* Def. Br. at 18 ("the Company would *begin* to recognize revenue form its recent design wins *beginning* in 2010") (emphasis added); *id.* at 17 ("Broadcom's $9.25 per share offer significantly undervalues Emulex's *long-term* prospects") (emphasis added).

[70] Pl. Br. at 31 & n. 150-51. As Defendants concede, their projections were based on design wins that have "not yet been awarded" and sales that have not been made and revenues that will not be "realized for a year or more." Def. Br. at 9, 21; *id.* at 25 (projections "based upon known customer wins and incremental design wins that were highly likely"); at 27 ("it takes months (or even years) for a design win to turn into a chip that will be incorporated into an OEM's product and sold through to the market"). *See also* Benck Tr. (DRAFT) 267:11-268:18

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- Even with the wins, Emulex must still compete on pricing and ability to deliver on time.[72]

Emulex's CFO Rockenbach and others described additional assumptions underpinning Emulex management's projections, as well as sixteen separate risk factors that can adversely affect those projections between now and 2011 or 2012.[73] Defendants have not presented any argument or citation disputing these facts.

F. COO BENCK'S DEPOSITION CONFIRMED THAT MANAGEMENT'S REWRITE OF ITS PROJECTIONS REST ON AGGRESSIVE ASSUMPTIONS THAT LEAVE SHAREHOLDERS AT GRAVE RISK

While Defendants assert in their Brief that their May 7 revised projections are conservative, and presumably will argue at trial that those projections even support rejecting and refusing to negotiate Broadcom's $11 per share bid, there is ample reason to look at these projections with deep suspicion. As explained below, the three main creators of the projections cannot even get their stories straight about how the projections relate to each other. Nor can they explain consistently what drove the dramatically

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[71] Pl. Br. at 28-29, 31-32. As Defendants concede, the twelve recent design wins "will not turn into product sales (and revenue) until each OEM begins to produce and sell the products manufactured with Emulex chips." Def. Br. at 13.

[72] Pl. Br. at 28-29.

[73] Pl. Br. at 32 n. 156-59, at 36 n. 183-98. Defendants contend that "Broadcom has repeatedly suggested that Emulex is . . . incapable of turning design wins into revenue." Def. Br. at 26. That is incorrect – Plaintiffs are merely pointing out that there are numerous and considerable risks that may undermine the Company's ability to achieve revenue from its design wins, and the Company has, in fact, previously experienced delays and failures in this regard.

improved financial results from the April 27 projections to the May 7 projections. But most important, in discussing the main drivers for the improved financial results, Benck unwittingly disclosed that they result from a dissonance by management from the facts on the ground so stark it could make the infamous "Baghdad Bob" blush.

Plaintiffs tried to learn how the first set of projections, denominated "Case A" and "Case B" evolved into the second set, denominated "Virgil" and "Wyatt." CFO Rockenbach went first, testifying that Case A and Case B had no relationship to Wyatt and Virgil.[74] Goldman's Tewari went next. He said that Case A became Virgil and that Case B became Wyatt.[75] COO Benck went last. He testified that Case A became Virgil, which then became Wyatt.[76] Plaintiffs accept that different people can have different perspectives on how a particular line item evolved over time. But when the three principal financial professionals, whose job it was to create and understand the four sets of projections backing up the Board's decision about the fate of the corporation, have no

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[74] Rockenbach Tr. 68: 21-70:17 ("Virgil isn't A and Wyatt isn't B, so they are just new forecasts based on new information. It wasn't meant to be a newer version of A or a newer version of B. It was a new model based on the information we had"), 74:6-7 ("Case B is not a precursor to Wyatt"), 290:7-17 ("Q. Does the fact that they are being called Case A and Case B indicate to you that Virgil and Wyatt are just another generation of Case A and Case B that was found in Rockenbach Exhibit 1? A. No.").

[75] Tewari Tr. 132:22-23 ("Virgil and Wyatt were developed using Case A and Case B"), 228:22-229:3 ("management came back and presented to the board a couple of cases, a case called Virgil and a case called Wyatt, which were, from what I understood, derivatives of Cases A and B"), 229:12-14 ("Q. So Plan B morphed into Wyatt? A. Plan B morphed into Wyatt; that is correct").

[76] Benck Tr. (DRAFT) 86:5-10 (Virgil came out of Case A, but Wyatt was a derivative of Virgil"), 87:13-19 ("Q. So Mr. Tewari may not have it exactly right? It's not that B morphed into Wyatt; it's that A morphed into Virgil, and Virgil morphed into Wyatt? A. Yes.").

idea how the four sets relate to each other, the Court can conclude that the projections evidence a "seat of the pants" approach unworthy of judicial deference.

Plaintiffs also heard different stories about why the financial results evidenced in Wyatt and Virgil were so much more impressive than those presented in Case A and Case B created just 10 days earlier. Rockenbach attributed the improved results to "more current information" and "a new model."[77] Goldman's Tewari, whose job it was to ensure the projections were not "insane" and to then use those numbers to conduct critical financial analysis, testified that one cannot compare the prior with the latter projections because of a "mistake" in the model that accounted for virtually all of the discrepancy.[78] According to Goldman, it would therefore have been error to rely on the April 27 projections, since correcting this simple error showed that Emulex's future was far brighter, even at the earlier date. Finally, Benck, even when specifically shown Tewari's testimony, rejected any suggestion of a modeling error, stating unambiguously that there was an error in an early version of the April 27 projections, but it was corrected even before it went to Goldman.[79]

Benck's testimony about what really drove the improved financial results from April 27 to May 7 is the final coup. Benck identified five adjustments from Case A that resulted in the improvement in financial outcomes evident in both Virgil and Wyatt.[80]

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77 Rockenbach Tr. 70: 6-73:14, 83:16-85:7.

78 Tewari Tr. 256:5-257:4, 259:3-262:16, 298:19-299:22.

79 Benck Tr. (DRAFT) 84:20-85:3, 87:20-92:19.

80 *Id* at 94:23-96:17.

Two of the adjustments actually lowered Emulex's projections.[81]

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Another adjustment that decreased value came from an outside industry consulting service.[83] The three adjustments that increased value – more than making up for the decrease necessitated by the outside data points – were driven by new forecasts created internally within Emulex.[84]

Thus, while the objective evidence coming from the outside world actually told the Board that Emulex's future was growing dimmer between April 27 and May 7, Emulex management made up the difference, and a whole lot more, by putting on rosier glasses with respect to the parts of the projections they could control. Playing financial games like this might work as an academic exercise, but it is no way to determine the fate of a nearly billion dollar offer made to Emulex shareholders.

G. SHAREHOLDERS SHOULD BE ENTITLED TO ACCEPT BROADCOM'S OFFER

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81 *Id.* at 109:9-20.

82 *Id.* at 99:4-102:8.

83 *Id.* at 95:7-12; 97:12-17.

84 *Id.* at 103:9-108:23.

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2. Shareholders Should Decide How Much Risk To Bear Between Accepting Broadcom's Offer Or Trusting The Board To Achieve Earnings From Design Wins

Defendants contend that "Emulex stockholders have all the authority they need to express and implement their judgment both with respect to the make-up of the Company's board and the supermajority bylaw amendment."[85] However, Defendants wish to prevent the shareholders from exercising a different judgment – whether to accept Broadcom's Offer or trust the Emulex Board to realize the sales and revenue it forecasts from current and future design wins. This decision, too, should be made by the shareholders. As McCluney testified: "Reasonable minds probably will differ because everybody has got a different risk profile."[86] Indeed, Defendants regularly touted that the shareholders have "already passed judgment on Broadcom's $9.25 per share offer"[87] when the market price was trading above the Broadcom offer. But using that same logic, the shareholders have also passed judgment on Broadcom's revised $11.00 per share offer – since Emulex's stock price has not traded above the $11 offer price and is in fact more than a dollar below that price as of July 1.

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85 Def. Br. at 2.

86 McCluney Tr. 137:18-138:4, 138:11-17.

87 Def. Br. at 30.

H. THE EMULEX BOARD REFUSED TO NEGOTIATE

The record is clear that Defendants never sought to negotiate with Broadcom following McGregor's December 24, 2008 telephone conversation with Folino.[88] Indeed, there is no evidence that the Defendants ever wanted to negotiate with Broadcom, preferring instead that they just "go away" and leave "their" company alone.[89]

Despite this clear record, Defendants have tried to confuse the Court by citing only a portion of Folino's deposition testimony in an attempt to show that somehow it was Broadcom that refused to engage in further discussions in early January 2009. Specifically, Defendants refer to the fact that McGregor left Folino a message in early January that there was "no reason to talk" citing Folino's testimony in support.[90] Defendants, however, fail to acknowledge that the reason McGregor left Folino this message was because Folino had already expressed to Samueli that the Emulex Board decided not to engage in any negotiations with Broadcom of any sort. As Folino readily admitted:

> Q. Well, you did speak with Mr. Samueli, right?
> A. Yes.
> Q. Didn't you tell him that it was your view that there was no reason to talk?
> A. Yes.
> Q. So Mr. McGregor's response that says "There's no reason to talk" was just consistent with what you asked them to do, which was to not pursue any further discussions, right?
> A. Say –

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88 *See* Goon Tr. 300:15-301:8; Folino Tr. 343:13-344:13; McCluney Tr. 98:1-100:11.

89 *See* Goon Tr. 175:17-176:12, 255:7-20, 373:7-21; Folino Tr. 143:3-13, 205:8-206:10; McCluney Tr. 40:6-14, 334:19-335:1; and Lyle Tr. 119:23-120:13.

90 *See* Def. Br. at 13.

Q. You told Mr. Samueli that you didn't –
A. We didn't have an interest.
Q. – didn't see a need to talk, right?
A. Yes.
Q. So then Mr. McGregor's saying, "Well, I guess we have nothing to talk about" is consistent with your wishes –
Q. – for them to drop the issue? Is that correct?
A. Yes.[91]

LEGAL ARGUMENT

A. THE BUSINESS JUDGMENT RULE DOES NOT APPLY

The Defendants' description of the applicable standard of judicial review is not consistent with Delaware law and, in all events, invites the Court to establish a standard that invites fiduciary misconduct while providing no meaningful protection to shareholders.[92] Specifically, Defendants suggest that so long as their decision to adopt the Pill, and more importantly to maintain it in place even after shareholders have received months of information and all alternatives to the Broadcom Offer have been privately and publicly vetted, is not "preclusive," the Court is powerless to intervene.[93]

This is not a correct statement of the standard to be applied. First, the "preclusive" prong of the *Unocal* analysis is a final "catch-all" if a defense is otherwise both reasonable and proportionate in response to the threat – neither of which is the case

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91 *See* Folino Tr. 163:1-164:4; *see also* 428:15-429:4.

92 Defendants do not dispute that some form of enhanced scrutiny is appropriate with respect to both the Pill and the Supermajority Bylaw. *See* Def. Br. at 45 (arguing in summary that "the actions of the Emulex board challenged by plaintiffs satisfy the two-part test of *Unocal*"). The problem with Defendants' position, however, is that it applies the *Unocal* standard in a manner that renders the Court toothless to protect shareholders.

93 Def. Br. at 45.

here.[94] Second, the Emulex Board is insulating its refusal to deal with Broadcom or pull the Pill by altering the ground rules for its own election, which implicates "strict scrutiny" of the Board's actions in accordance with *MM Liquid Audio* and *Blasius*.[95] In all events, Defendants' assertion that the Pill can be ignored because of the possibility of a future proxy contest not only ignores that Delaware does not set forth such black and white rules, but more importantly, asks this Court to ignore the existence of the Supermajority Bylaw.[96]

B. DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT THE PILL IS JUSTIFIED

Emulex contends that Pill was justified because Broadcom's $9.25 per share Offer was "opportunistic" because shareholders were unaware of design wins which greatly enhanced the value of Emulex. Even if the Offer was "opportunistic" at first, the problem has been solved.[97] COO Benck, who was involved with Emulex's comprehensive roadshow presentations and investor calls, testified that he spoke with Emulex's twenty-five largest shareholders – who collectively hold over fifty percent of

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[94] *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (stating that enhanced scrutiny requires a board to satisfy a two-part test before the business judgment rule can apply: "First, a *reasonableness test,* which is satisfied by a demonstration that the board of directors had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and Second, a *proportionality test,* which is satisfied by a demonstration that the board of directors' defensive response was reasonable in relation to the threat posed.").

[95] *Compare Id.* at 1380-83 (explaining that the repurchase program at issue did not actually alter the likely outcome of any proxy contest and did not alter the method by which shareholders could force removal of the pill).

[96] *Id.* at 1387 ("Where all of the target board's defensive actions are inextricably related, the principles of *Unocal* require that such actions be scrutinized collectively as a unitary response to the perceived threat.").

[97] *See* Pl. Br. at 41-44.

Emulex stock – and agreed that those investors "had a full understanding of the prospects of Emulex as a stand-alone company," had access to a web site called Emulexvalue.com, and that Emulex had a "public relations firm to help get the information out there."[98]

While Emulex complains that it cannot disclose the identity of its customers, as Plaintiffs' explained in their Opening Brief (at 43), and above (*supra* at 10-11), Chairman Folino has already conceded that this information can be inferred, and thus there is no legitimate reason to support maintaining the Pill. Moreover, rational shareholders can make a judgment regarding the Offer, recognizing that management will always have more information that it could conceivably provide and some assessment of management's credibility is required. As Defendants' own expert, Professor Ferrell, explains:

> Rational but imperfectly informed shareholders will take into account their having less information than management and will vote in favor of the move only if they conclude that, all things considered – including both the fact that management has more information and the possibility that it might have self-serving motivations – they will be better off on an expected value basis by moving.[99]

In short the Pill has fulfilled its primary purpose, as Emulex has had time to communicate to its shareholders and has completed that educational process.

Neither Broadcom's $9.25 Offer, nor its pending $11.00 Offer present a threat justifying continued maintenance of the Pill.

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98 *See* Benck Tr. (DRAFT) 230:4-235:18.

99 Bebchuk, Lucian, Ferrell, Allen, "Federal Intervention to Enhance Shareholder Choice," 87 Virginia Law Review 993, 996 (2001) (Ex. 69).

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Emulex's stock price is now trading at less than $10 per share. All of these facts demonstrate there is no threat justifying continued maintenance of the Pill.[100] Even Defendants' expert, Professor Ferrell, recognized that in a situation such as that presented here, the pill should be pulled:

> [I]f I concluded that the trade-off between the possibility of getting a higher premium as a result of the board negotiating was outweighed by shareholders not getting an advantageous bid at all and that the board would not act in the interest of shareholders, then if I could wave a magic wand, I would say the pill should be redeemed or maybe, you know, to make it more concrete, if I was on the board, at some point I would vote to redeem the pill.[101]

Professor Ferrell similarly recognized that the combination of the absence of the right to call a special meeting or act by written consent, together with the pill, could destroy shareholder value. To resolve that, he "would say that, if there's evidence, strong evidence, real evidence, that the bidder would go away and value would be destroyed as a result on an ex ante basis, you know, so ex ante you would expect that outcome, and the ability to act by special meeting would have changed that outcome, then I would have a policy concern about a limitation on special meeting."[102]

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100 *See Grand Metropolitan Public Ltd. Co. v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988) (ordering redemption of poison pill where no threat resulted from an all-cash, all-shares third-party bid and target board had sufficient time to communicate with stockholders and negotiate with acquiror).

101 Ferrell Tr. (DRAFT) 147:14-148:5.

102 *Id.* at 139:14-23.

Finally, Defendants assert that the Emulex Board "decided" not to redeem the Pill in the face of Broadcom's Offer.[103] Notably absent from their brief, however, is any evidentiary reference that the Board ever made any such decision. In fact, as Folino clearly stated in his deposition, the Emulex Board has never even *considered* the issue of redeeming the Pill since Broadcom made its $9.25 Offer.[104] Absent consideration of the issue, of course, there can be no decision one way or the other.

In short, there is no longer any reason for the Pill. Since Defendants refuse to consider pulling the Pill, the Court must make that decision for them, because the potential harm to shareholders if the Court stays its hand far outweighs any conceivable continuing benefit of deferring to the Board.

C. THE SUPERMAJORITY BYLAW SHOULD BE STRUCK DOWN

Broadcom's dropping of its Consent Solicitation is no reason to give the Board a pass for adopting the Supermajority Bylaw. That provision has affected the Offer to date and increased the potency of the Pill. Moreover, the Board's breach in using the Supermajority Bylaw to entrench themselves requires a remedy.

1. The Supermajority Bylaw Is *Per Se* Invalid

Defendants argue in their Opening Brief that because "[n]o provision of the DGCL specifies the stockholder vote required to amend a company's bylaws," a corporation "is free to impose a supermajority stockholder voting requirement to amend

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103 *See* Def Br. at ii, iii, 50-53 (reciting the Board's purported "decision not to redeem the rights").

104 Folino Tr. 318:1-13. *See also* McCluney Tr. 44:19-45:7 (testifying that he was not even aware that the Board can pull the pill for a given transaction, and that the Board has had no such discussions).

its bylaws in its certificate of incorporation."[105] Defendants are wrong. As discussed more fully in Plaintiffs' Opening Brief, DGCL § 109 expressly states that any grant of authority to directors to adopt bylaws "shall not divest the stockholders . . . of the power, ***nor limit*** their power to adopt, amend or repeal bylaws."[106] On its face, the Supermajority Bylaw adopted by the Emulex Board violates that provision by "limiting" the ability of shareholders to amend the bylaws.

2. The Supermajority Bylaw Does Not Need To Be Mathematically Preclusive To Be Improper

Defendants claim that "the Supermajority Bylaw is valid because it is not preclusive and it does not impermissibly interfere with the stockholder franchise."[107] However, as set forth in Section "D" above, in Plaintiffs' Opening Brief and in the expert report of Bruce Goldfarb, achieving the support of 66 2/3 percent of all outstanding Emulex shares is incredibly difficult to achieve and is far more onerous than a bylaw requiring a majority of disinterested shares – a bylaw which the Emulex Board failed to even consider.[108] Indeed, Broadcom's recent cancellation of its consent solicitation confirms the preclusiveness and inherently disenfranchising effect of the Supermajority Bylaw. Just as Mr. Goldfarb predicted in his expert report, the combination of the Board's refusal to engage on the $9.25 bid and the mechanics of the consent solicitation

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105 Def. Br. at 57.

106 8 *Del. C.* § 109 (emphasis added). *See also, CA, Inc. v. AFSCME Emples. Pension Plan*, 953 A.2d 227, 232 (Del. 2008) ("By its terms [Del. Code. Ann. Tit. 8 §] 109 (a) vests in the shareholders a power to adopt, amend or repeal bylaws that is legally sacrosanct, i.e., the power cannot be non-consensually eliminated or limited by anyone other than the legislature itself.").

107 Def. Br. at 58.

108 Pl. Br. at 20; Goldfarb Rep. at 8-19 (Ex. 25); Goldfarb Tr. (DRAFT) at 105:8-106:20.

effectively precluded Broadcom from increasing its Tender Offer price while preserving any chance to amend the Bylaws.[109] Broadcom's raising of its bid in a last ditch attempt to entice the Board to negotiate caused massive trading volume in Emulex shares, with over 27 million shares trading the day after the offer was made, while the average volume is about 2.5 million per day.[110] Because all shares traded after the record date separate economic from voting rights, those shares are effectively unavailable to support Broadcom's consent solicitation. Broadcom's withdrawal of the solicitation is simply a recognition of the futility of its efforts.

Furthermore, there is no requirement that the Supermajority Bylaw be absolutely preclusive in order to be invalid. The stated purpose behind Emulex's imposition of the Supermajority Bylaw is not coextensive with its actual effect, and any theoretical relationship is too tenuous to justify such a powerful imposition on the shareholder franchise.[111] Defendants cannot demonstrate a benefit justifying such an onerous imposition on the stockholder franchise.

Defendants additionally argue that the "2/3 bylaw is really a moot issue unless Broadcom offers evidence that it can even get 50% plus 1 of the shares to sign

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109 *See* Goldfarb Rep. at 17-19 (Ex. 25).

110 Notably, Emulex's stock price closed at $9.78, or well below the amended Offer price. It's a fair surmise that Emulex shareholders do not have faith in their Board to accept Broadcom's latest offer and are fearing that their fate will be like that of the many other shareholders of companies whose stock prices have languished after boards have used a poison pill and other defenses to defeat premium offers.

111 Pl. Br. at 21; Goldfarb Rep. at Section VI, page 9 (Ex. 25).

consents."[112] Defendants' argument is a red herring. First, the burden is not on Plaintiffs to demonstrate the onerous nature of the Supermajority Bylaw. To the contrary; because the Supermajority Bylaw directly impacts the shareholder franchise, Defendants must establish a compelling justification for their actions.[113] Defendants cannot establish such a compelling justification here. Second, because the Supermajority Bylaw is so effective at precluding the shareholder franchise, by its very nature it will preclude not only a 66 2/3 majority consent but also a simple majority consent. Having prevented the shareholders from acting, Defendants cannot require such action as a standing requirement to come to Court.

3. Defendants Did Not Exercise Due Care In Adopting the Supermajority Bylaw

Contrary to Defendants' argument that they exercised due care in adopting the Supermajority Bylaw,[114] the record establishes that the Emulex Board neither adequately informed themselves nor acted with requisite care when they adopted the Supermajority Bylaw. Indeed, conspicuously absent from Defendants' Opening Brief is any discussion whatsoever of what the Board considered or discussed prior to adopting the Supermajority Bylaw. What the record does establish, however, is that Defendants failed

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112 Def. Br. at 61.

113 *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988)(when a board chooses to act defensively by directly altering the director election process, the reasonableness test of *Unocal* becomes a form of "strict scrutiny"); *Mercier v. Inter-Tel (Del.) Inc.*, 929 A.2d 786, 809 (Del. Ch. 2007) ("[T]he heightened scrutiny that *Unocal*'s fit test employs to assess defensive actions by directors, was to be ratcheted up to a form of strict scrutiny when the directors' actions affected the corporate franchise.").

114 Def. Br. at 58 (the Emulex Board adopted the Supermajority Bylaw "after due consideration and consistent with its ultimate conclusion that the Company was at risk of a hostile takeover at an unreasonable price.").

to consider: (1) the specific bylaw amendments the Board was adopting; (2) the actual text of the bylaw amendments; (3) the practical impact of the Supermajority Bylaw upon a possible consent solicitation; (4) historical turnout in Emulex elections; (5) composition of the Emulex electorate; (6) lesser altematives to the Entrenchment Measures; (7) Bylaw Amendments individually or their impact collectively; and (8) equity ownership Emulex management and/or employees have in Emulex and how that could affect any vote.[115]

In addition, the record establishes that the Board adopted the Entrenchment Measures, and Supermajority Bylaw in particular, without obtaining any meaningful financial or proxy solicitation advice on the topic. The only purportedly expert advice the Board did receive – from its attorneys at Gibson Dunn – has been carefully hidden from view.

Accordingly, far from establishing that the Defendants exercised "due consideration" in adopting the Supermajority Bylaw, the record demonstrates a clear abandonment and breach of Defendants' duty of care.

D. DEFENDANTS DID NOT EXERCISE DUE CARE IN FAILING TO CONSIDER HOW TO MAXIMIZE THEIR LEVERAGE AGAINST BROADCOM

Defendants also failed to exercise proper due care by refusing to even consider utilizing Emulex's future business prospects, including the recently announced design wins, as leverage to negotiate a higher price from Broadcom. Despite Emulex's early design wins and new technology, McCluney stated that the Board was not interested

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115 Pl. Br. at 63-67.

attempting to maximize shareholder value by using these valuable breakthroughs as leverage to encourage Broadcom to increase its bid:

> Q. Yes or no, did you say anything to Mr. McGregor to try to encourage him to put more money on the table?
> A. No, I did not.
> Q. Did you consider whether you should use as leverage his desire to see your confidential information in return for them putting more money on the table?
> A. No.[116]

Accordingly, Defendants failed to exercise due care by never seeking to use Emulex's future prospects, or any Emulex advantage, as leverage to negotiate with Broadcom.[117]

E. PLAINTIFFS WILL BE IRREPARABLY HARMED IF THE PILL IS NOT REDEEMED AND/OR THE SUPERMAJORITY BYLAW IS NOT REVOKED

Failing to comprehend that the Entrenchment Measures inherently disenfranchise Emulex's shareholders, Defendants contend that no irreparable harm can exist here because the Company's annual meeting will be held in November.[118] The theoretical and prospective ability to choose new directors and repeal the Supermajority Bylaw in November, however, will do nothing to remedy the irreparable harm caused by preventing Emulex's shareholders from making a choice now concerning Broadcom's currently-pending Offer.

The threat of Broadcom walking away from Emulex is not speculative or purely theoretical. Broadcom made clear in its June 29 letter that unless the Board accepts Broadcom's offer so that the companies can "move quickly to combine," Broadcom will

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116 McCluney Tr. 98:7-16.

117 *See* Goon Tr. 300:15-301:8; Folino Tr. 343:13-344:13; McCluney Tr. 98:1-100:11.

118 Def. Br. at 68-73.

move on "to consider other alternatives."[119] There are no other offers on the table, and it is highly likely that if the Board rejects Broadcom's offer, Emulex's stock price will fall well below $11 per share.

The Emulex shareholders also will suffer irreparable harm due to their loss of franchise rights if the Supermajority Bylaw is not removed. Indeed, as Defendants' expert, Professor Ferrell, testified, supermajority bylaws empirically destroy firm value, which itself constitutes irreparable harm. Professor Ferrell has conducted an empirical analysis about a wide range of corporate governance provisions and determined that a total of six, including a supermajority bylaw amendment requirement, "largely drive the documented negative correlation that [a group of 24 perceived antitakeover devices] have with firm valuation and stockholder returns since 1990."[120] He specifically explained that "knowing which provisions are responsible for the identified negative correlation" can help identify which specific corporate governance provisions "deserve the attention of private and public decision-makers seeking to improve corporate governance."[121] Indeed, Professor Ferrell made clear his view that, at least in general, supermajority bylaws are a bad thing: "I do hold the view that supermajority provisions, supermajority bylaw provisions can be entrenching and reduce firm value."[122] He further stated:

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119 McGregor June 29 Letter (Ex. 63).

120 Bebchuk, Lucian, Cohen, Alma, and Ferrell, Alan, "What Matters in Corporate Governance?" 22 *Review of Financial Studies* 783 at 4 (2009) (Ex. 70).

121 *Id.* at 4 (Ex. 70).

122 Ferrell Tr. (DRAFT) 301:17-21.

> Q. So now I want to know your opinion, just standing alone, a supermajority bylaw standard, does that itself create any benefit for shareholders, as a policy as an empirical matter?
>
> A. Well, if we are talking about supermajority provisions at large, I think there are certainly cases where it negatively affects firm value.
>
> Q. Well –
>
> A. So again, I repeat, I do think that supermajority voting provisions can be an entrenching device.[123]

Accordingly, Plaintiffs will be irreparably harmed if the pill is not redeemed and the Supermajority Bylaw is not revoked.

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[123] Ferrell Tr. (DRAFT) 143:8-23; *id.* at 318:15-319:1 ("I agree with the view that supermajority bylaw provisions can be entrenching and have a negative effect.")

CONCLUSION

For all the foregoing reasons, and those set forth in Plaintiffs' Opening Pre-Trial Brief, Plaintiffs' respectfully request that the Court: (1) order the Emulex Board to redeem the Pill; (2) invalidate the Entrenchment Measures; and (3) order such other relief as the Court deems fair and just.

DATED: July 2, 2009

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re EMULEX SHAREHOLDER LITIGATION	:	Consolidated C.A. No.: 4536-VCS

CERTIFICATE OF SERVICE

I, Stuart M. Grant, hereby certify that on July 2, 2009, I caused a true and correct copy Plaintiffs' Pre-Trial Response Brief to be served upon the following counsel via LexisNexis File & Serve.

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