IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STEVEN LAUB, et al., Defendants.	Civil Action No. 4161-CC

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF
ITS MOTION FOR INJUNCTIVE RELIEF

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Plaintiff Louisiana Municipal Police Employees' Retirement System ("Plaintiff") respectfully submits this brief in support of its motion for a preliminary and/or permanent injunction to invalidate the November 10, 2008 Amendment to the Atmel Corporation ("Atmel" or the "Company") Amended and Restated Preferred Share Rights Agreement (the "Poison Pill Amendment" or "Amendment").[1]

INTRODUCTION

Just as a corporate board of directors cannot, under any circumstances, adopt a "dead hand" poison pill to block corporate takeover activity, a board does not have the power or authority to adopt a pill whose triggers and operation are not readily ascertainable by either the corporation or its shareholders, including potential proxy contestants or takeover bidders. Plaintiff makes this motion because the Atmel board of directors (the "Board") violated its fiduciary duty by amending its poison pill in such a way that its trigger points are fatally vague and cannot be objectively determined.

On October 2, 2008, Microchip Technology Incorporated ("Microchip") and ON Semiconductor Corporation ("ON Semi") (together, "Bidders"), offered to acquire Atmel's common stock for more than twice the October 1, 2008 market price. In response, Atmel's Board amended the Company's Amended and Restated Preferred Share Rights Agreement (the "Poison Pill") by lowering the percentage of "Beneficial Ownership" that would trigger the pill's "rights" and making the definition of "Beneficial

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[1] By filing this motion challenging the Poison Pill Amendment as facially vague and ambiguous and therefore invalid, Plaintiff does not waive other aspects of its claims for breach of Defendants' fiduciary duties. Plaintiff reserves all other aspects of its complaint and all other demands for declaratory and injunctive relief and for damages.

Ownership" so vague that it became impossible to assess and predict whether and when the pill is triggered. The Bidders promptly dropped their takeover bid, and Atmel's stock price has languished ever since. Plaintiff, by this motion, seeks to invalidate the Poison Pill Amendment because it is fatally vague and unenforceable on its face.

First, the Board lowered the threshold ownership of Atmel common stock that would trigger the pill from 20% to 10% for any person or group of persons who announced a "Takeover Proposal" on or after October 1, 2008. Second, it broadly changed the definition of "Beneficial Ownership" to include interests held pursuant to "Derivatives Contracts," a term the Amendment defines so broadly that it is essentially undefined. There is no objective means for a potential acquiror to determine whether and when it has triggered the new 10% Beneficial Ownership threshold because, among other things: (1) the Amendment's definition of "Derivative Contracts" encompasses a wide range of arrangements which are vaguely defined as involving benefits or risks that "correspond substantially" to ownership of Atmel common stock (including contracts which never provide any actual interest in Atmel stock, much less voting rights); and (2) Atmel shareholders are deemed to hold not only their own shares, but also the shares of their Derivative Contract counterparties as well as those of innumerable levels of those counterparties' own counterparties, whose identities are often unknown and virtually unknowable.

Not only does the expansive definition of Derivative Contracts render a *potential acquiror* unable to reliably evaluate its own Beneficial Ownership, but it completely paralyzes the Atmel Board from determining when the Poison Pill has been triggered.

Investors are not always required to publicly disclose their interests in Derivative Contracts, and even when such arrangements are disclosed it may be impossible for a non-party to those contracts, like Atmel, to ascertain the level of Beneficial Ownership they create. Accordingly, the Amendment renders the Poison Pill fatally vague, ambiguous, and incapable of enforcement.

If allowed to stand, the Poison Pill Amendment will continue to cause substantial and irreparable harm to Atmel's shareholders for several reasons. First, because the Amendment is facially invalid and unenforceable, its mere existence creates substantial uncertainty and constitutes irreparable harm. The definitions of Beneficial Ownership and Derivative Contracts are so vague that the Poison Pill can easily be triggered inadvertently – and may even have been triggered already – thereby causing chaos in the market for Atmel's shares. Second, because its application is unpredictable to say the least, the Amendment is likely to deter potential proxy contestants from seeking to remove the Board or acquirors from making value-maximizing proposals for Atmel. Absent an injunction invalidating the Amendment, Atmel's shareholders are left with a Poison Pill that is patently destructive of shareholder value. On the other hand, if an injunction is granted, the defendants (Atmel's directors) lose nothing but the unfair strategic advantage that they obtained by means of the improper Amendment.

Because Plaintiff believes there to be no factual dispute surrounding the facial invalidity of the Amendment, Plaintiff requests a permanent injunction declaring the Amendment invalid. In the alternative, Plaintiff has at least established a likelihood of

success on the merits of its claims, and the Court should enter a preliminary injunction against the effectiveness of the Amendment pending discovery and final judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Atmel designs, develops, manufactures, and markets a range of semiconductor integrated circuit products. Atmel's Board currently and at all relevant times has consisted of seven members, each of whom is a defendant in this action (collectively, the "Director Defendants"). Plaintiff is an owner of Atmel common stock and has owned such shares continuously since before the wrongful conduct complained of herein. *See* Verified Class Action Complaint ¶ 11; Verification to Class Action Complaint.

In response to a shareholder-led proxy contest in 2006 that focused on Atmel's poor financial performance and the board's perceived disregard for shareholder interests, Atmel instituted a restructuring plan in an attempt to enhance profitability, accelerate the Company's growth and reduce costs (the "Transformation Plan"). *See* Atmel Form 8-K, filed Dec. 13, 2006 (McIntyre Aff. Ex. A).[2]

On October 2, 2008, citing in part the Company's failure to improve its financial performance despite the Transformation Plan, Microchip and ON Semi announced an all-cash offer to acquire Atmel for $5.00 per share (the "Acquisition Proposal"). *See* Microchip/ON Semi press release dated Oct. 2, 2008 (McIntyre Aff. Ex. B); Transcript and presentation materials from Microchip/ON Semi conference call dated Oct. 3, 2008 (McIntyre Aff. Exs. C & D). The offer provided a 52.4% premium over Atmel's $3.28

[2] Citations to "McIntyre Aff. Ex." are to the exhibits to the accompanying Affidavit of Megan D. McIntyre In Support of Plaintiff's Motion For Injunctive Relief.

per share closing price on October 1, 2008 and represented a premium to the Company's highest closing price over the preceding eleven months. *Id.*; McIntyre Aff. Ex. E.

The Board never engaged in any negotiations with the Bidders. Instead, on October 29, 2008, the Atmel Board publicly rejected the Acquisition Proposal as "not in the best interests of Atmel's shareholders." Atmel Press Release dated Oct. 29, 2008 (McIntyre Aff. Ex. F); *see also* Microchip Press Release dated Oct. 30, 2008 (McIntyre Aff. Ex. G). On November 7, 2008, the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1975 expired, providing Microchip regulatory clearance to purchase 50 percent or more of Atmel's outstanding stock.

In their desire to fend off the Bidders' advances and preserve their corporate control, the Board amended Atmel's Poison Pill on the next business day, November 10, 2008, to thwart any hostile acquisition by the Bidders (or any other potential acquiror).[3] In its Form 8-K announcing the Amendment, Atmel acknowledged that the Amendment was adopted "in response to the November 7, 2008 expiration of the waiting period under the Hart-Scott-Rodino [Act]" and was "designed to guard against a creeping accumulation of Atmel's common stock by Microchip …" *Id.* As explained herein, however, irrespective of the Board's defensive and entrenchment purpose, the Amendment is invalid because its terms are fatally vague.

[3] A copy of the Amendment was attached as Exhibit 4.1 to Atmel's Form 8-K filed on November 10, 2008, and is filed herewith as McIntyre Aff. Ex. H. A copy of the original Poison Pill is filed herewith as McIntyre Aff. Ex. I.

The Amendment lowers the percentage of equity ownership necessary to trigger Atmel's Poison Pill from 20% to 10% for any person or group of persons who made a "Takeover Proposal" on or after October 1, 2008 – *i.e.*, the Amendment specifically included the Bidders and could have been automatically triggered if their collective Beneficial Ownership exceeded 10% when the Amendment was adopted.[4] *See* McIntyre Aff. Ex. H, at ¶ C. In addition, the Board amended the definition of Beneficial Ownership in Section 1(d) of the Poison Pill, to now include "Derivative Contracts" (as defined below) that are designed to produce economic benefits and detriments that correspond "substantially" to the ownership of common stock. *Id.* at ¶ D. The amended definition provides, in relevant part:

> A Person shall be deemed the "BENEFICIAL OWNER" of and shall be deemed to "BENEFICIALLY OWN" any securities:
>
> * * *
>
> (iv) which are ***beneficially owned, directly or indirectly, by a Counterparty under any Derivatives Contract (without regard to any short or similar position under the same or any other Derivatives Contract) to which such Person or any of such Person's Affiliates or Associates is a Receiving Party*** (as such terms are defined in the immediately following paragraph); provided however that the number of Common Shares that a Person is deemed to Beneficially Own pursuant to this clause (iv) in connection with a particular Derivatives Contract shall not exceed the number of Notional Common Shares that are subject to such Derivatives Contract; provided, further, that ***the number of securities***

[4] To the extent the Amendment adds the making of a takeover proposal as a trigger, the Poison Pill as amended allows a passive shareholder to purchase more than 10% (but less than 20%) without triggering the Pill. In other words, once a passive shareholder permissibly exceeds the 10% threshold, that shareholder is completely precluded from taking a more active stance, such as proposing a takeover or pursuing a proxy fight, unless it first liquidates enough shares to get back below the 10% threshold.

> ***beneficially owned by each Counterparty ("Counterparty A") under a Derivatives Contract shall for purposes of this clause (iv) be deemed to include all securities that are beneficially owned, directly or indirectly, by a Counterparty ("Counterparty B") under any Derivatives Contract to which such Counterparty A is a Receiving Party, with this proviso being applied to successive Counterparties as appropriate***.
>
> A "Derivatives Contract" is a contract between two parties (the "Receiving Party" and the "Counterparty") that is designed to produce economic benefits and risks to the Receiving Party that ***correspond substantially to the ownership by the Receiving Party of a number of Common Shares (the number corresponding to such economic benefits and risks, the "Notional Common Shares"), regardless of whether obligations under such contract are settled through the delivery of cash, Common Shares or other property***, without regard to any short position under the same or any other Derivative Contract.
>
> Notwithstanding anything in this definition of Beneficial Ownership to the contrary, the phrase "then outstanding," when used with reference to a Person's Beneficial Ownership of securities of the Company, shall mean the number of such securities then issued and outstanding together with the number of such securities not then actually issued and outstanding which are issuable by the Company and which such Person would be deemed to own beneficially hereunder.

Id. (emphasis added).

In sum, any investor considering whether it is approaching the reduced 10% trigger point for purposes of Atmel's Amended Poison Pill must first determine whether any of its financial arrangements are "designed to produce economic benefits and risks [to the investor] that correspond substantially" to the ownership of Atmel shares, such that they fall within the Atmel-specific definition of Derivative Contract.[5] Then the

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[5] Research has not identified a universal definition of "derivative contract." The definition provided at www.businessdictionary.com is: "Contract based on (derived from) but independent of another contract, and involving a party not associated with the original (underlying) contract. For example, a juice packager's contract to purchase orange juice (orange derivative) from a juice manufacturer is a derivative contract and

investor must calculate the "Notional Common Shares" represented by each such arrangement. Then, the investor must determine the number of Atmel shares owned by each "Counterparty A" and "Counterparty B" (and so on) with respect its own Derivative Contracts, as well as each "Counterparty A" and Counterparty B" (and so on) for each Derivative Contract involving the investor's "Affiliates" and "Associates." Only if the investor is able to ferret out all of this information will it be able to calculate its Beneficial Ownership under the Amendment.

On November 12, 2008, the Bidders announced that they would take their offer to buy Atmel directly to the Company's shareholders by proposing their own slate of directors for Atmel's next annual shareholders' meeting.[6] *See* Microchip/ON Semi press release dated Nov. 12, 2008 (McIntyre Aff. Ex. J). In response, Atmel reiterated that the Board had determined the 52.4% premium Acquisition Proposal to be inadequate, and claimed that the Company was on track to realize greater value through its Transformation Plan. *See* Atmel press release dated Nov. 12, 2008 (McIntyre Aff. Ex. K).

On November 18, 2008, Microchip announced that ON Semi had withdrawn from the deal and that, as a result, Microchip was withdrawing the Acquisition Proposal. *See* Microchip/ON Semi press release dated Nov. 18, 2008 (McIntyre Aff. Ex. L). However,

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has nothing to do with the manufacturer's contract for purchase of oranges from an orange grower, although the price of juice is tied to the price of oranges. Similarly, a contract based on the price of certain shares has nothing to do with the purchase of the shares although their prices are tied."

[6] Atmel traditionally holds its annual shareholders' meeting in May, but has not yet announced the date of its 2009 annual meeting.

Microchip stated that it would evaluate potential alternatives for pursuing a transaction without ON Semi. *Id.* On December 15, 2008, reaffirming its commitment to nominate a slate of highly qualified directors at Atmel's next annual meeting, Microchip announced that it had delivered to Atmel the written notification required under Atmel's bylaws to propose an alternate slate of directors. *See* Microchip press release dated Dec. 15, 2008 (McIntyre Aff. Ex. M).

With the threat of a pending acquisition proposal behind it, Atmel announced a revised financial forecast for the fourth quarter on December 18, 2008. It disclosed that its gross margins would *not* improve, that it will make drastic cuts to its current quarter revenue and sales forecast, and that it will make major job cuts and close offices to reduce costs. *See* Atmel Form 8-K, filed Dec. 18, 2008 (McIntyre Aff. Ex. N). The Amendment remains in place.

ARGUMENT

I. PLAINTIFF IS ENTITLED TO PERMANENT AND/OR PRELIMINARY INJUNCTIVE RELIEF INVALIDATING THE AMENDMENT

A. The Standards For Injunctive Relief

To obtain a preliminary injunction, the moving party must demonstrate: (1) a reasonable probability of success on the merits of its claim; (2) that irreparable harm will occur absent the injunction; and (3) that the harm it will suffer if the injunction is not granted outweighs any harm the opposing party will suffer if the injunction is granted. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986); *Hough Assoc., Inc. v. Hill*, 2007 WL 148751, *2 (Del. Ch. Jan. 17, 2007). "Where a permanent injunction is being sought, the standards are identical [to those for a

preliminary injunction], except that actual, rather than probable, success on the merits is the relevant criterion." *Draper Commc'ns, Inc. v. Delaware Valley Broadcasters, L.P.*, 505 A.2d 1283 (Del. Ch. 1985); *Qwest Commc'ns Int'l Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 821 A.2d 323, 327-28 (Del. Ch. 2002). *See also W.L. Gore & Assocs. v. Wu*, 2006 WL 2692584, *10 (Del. Ch. Sept. 15, 2006), *aff'd*, 918 A.2d 1171 (Del. 2007). "When the moving part[y] ha[s] succeeded on the merits and proven that [it] will suffer irreparable harm, however, the Court's 'discretion to decline to award an injunction based on a balancing of the equities in favor of the defendants is substantially circumscribed.'" *Horizon Pers. Commc'ns, Inc. v. Sprint Corp.*, 2006 WL 2337592, *23 (Del. Ch. Aug. 4, 2006) (citation omitted).

As demonstrated below, Plaintiff has satisfied the three elements necessary to obtain a permanent injunction invalidating the Amendment. At the least, a preliminary injunction is proper because Plaintiff's success on the merits is reasonably probable.

B. The Poison Pill Amendment Is a Per Se Breach of the Director Defendants' Fiduciary Duties

The Court should immediately review and invalidate the Poison Pill Amendment, consistent with this Court's prior poison pill case law. The Amendment should be invalidated as an unlawful defensive measure because it is written to be so vague that nobody can objectively determine how it operates or when it is triggered, and its adoption therefore constituted a *per se* breach of fiduciary duty.

1. Plaintiff's Claim Is Ripe For Adjudication and Can Be Assessed On The Basis of The Amendment's Plain Terms

It is well-established under Delaware law that challenges to a poison pill are ripe for adjudication when, as here, they concern the pill's "*current* adverse impact" and "*present* depressing and deterrent effect upon the shareholders' interests, in particular, the shareholders' *present* entitlement to receive and consider takeover proposals . . . " *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180, 1188 (Del. Ch. 1998) (emphasis in original) (citing *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1072 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985)). *See also In re Chrysler Corp. S'holders Litig.*, 1992 WL 181024 (Del. Ch. July 27, 1992).

Similar to this action, *In re Chrysler Corp. Shareholders Litigation* involved claims that a board's amendment of the company's poison pill – in particular, its reduction of the triggering ownership threshold – was improper. 1992 WL 181024, at *1. The defendants moved to dismiss, asserting that the claim was unripe because there was no proxy contest afoot and no allegation that any shareholder would have waged such a contest but for the amendment. *Id.* Then-Vice Chancellor Jacobs disagreed, holding that the plaintiffs' claim for rescission of the poison pill amendments ***was ripe even absent an actual or threatened proxy contest.*** Specifically, the Vice Chancellor stated:

> The plaintiffs may be viewed as complaining of "the [Rights] Plan's *present* effect on their entitlement to receive and consider takeover proposals and to engage in a proxy fight for control of [Chrysler]." *Moran v. Household Intern., Inc.*, Del. Ch., 490 A.2d 1059, 1072, *aff'd*, Del. Supr., 500 A.2d 1346 (1985) (emphasis added). Thus, the complaint fairly alleges an injury from the . . . amendments that has a present and continuing adverse effect upon the shareholders' interest, and makes their claim for rescission of those amendments ripe for adjudication.

1992 WL 181024, at *3. *See also Carmody*, 723 A.2d at 1188 (rejecting "the proposition that the adoption of a facially invalid rights plan, on a 'clear day' where there is no specific hostile takeover proposal can never be the subject of a legal challenge," and holding that plaintiff's challenge to the validity of a poison pill was ripe because it complained of the pill's present impact on shareholders).

As in *Chrysler*, *Toll Brothers* and *Moran*, Plaintiff seeks to invalidate the Amendment because of its deleterious *present* effect on the rights of Atmel's shareholders. Accordingly, this claim is ripe for adjudication. Moreover, despite the early stage of this case, a permanent injunction is appropriate at this time because the Amendment is invalid on its face, and thus there is no need for discovery.

2. The Amendment Should Be Invalidated as Fatally Vague And Unenforceable

The Amendment is invalid under Delaware law because the Atmel Board has effectively paralyzed itself, shareholders and potential bidders by creating an impermissible cloud of doubt about how and under what circumstances the Poison Pill may be triggered.

Frequently, directors' adoption of defensive measures is reviewed pursuant to the standard set forth in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985), which considers whether the measures were reasonable in relation to a perceived threat. However, that type of contextual analysis is not always required, and is not required here, because certain defensive measures are simply invalid as a matter of law. In *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998), the Delaware Supreme Court made clear that, irrespective of the defendants directors' intent – be it

malignant or benign – certain defensive measures simply cannot be justified. In that case, the Court considered a board's amendment of a poison pill to add a six-month "delayed redemption provision," and found it invalid as a matter of law because it "restrict[ed] the board's power in an area of fundamental importance to the shareholders-negotiating a possible sale of the corporation," contrary to the mandate of Section 141(a) of the Delaware General Corporation Law. *Id.* at 1291-92. Accordingly, the delayed redemption provision was beyond the board's authority to adopt. *Id.*

Here, the Amendment is invalid as a matter of law for analogous reasons. Just as a board cannot abdicate its fiduciary duties, it cannot adopt defensive measures that are so steeped in uncertainty that no one – including the board itself – can determine whether they have been or will be triggered on a specific set of facts. The Amendment is a contract between Atmel and its stock transfer agent, and as such it must be "reasonably definite and certain in its terms" to be legally binding. *Haft v. Dart Group Corp.*, 877 F. Supp. 896, 906 (D. Del. 1995) (quoting *Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons v. Hiram Grand Lodge Masonic Temple*, 80 A.2d 294, 295 (Del. Ch. 1951)).[7] "The material terms of a contract will be deemed fatally vague or

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[7] Delaware law applies to the interpretation of the Poison Pill Amendment, despite the choice-of-law provision in the agreement, because corporate governance issues are determined according to the law of the state of incorporation. *See Vantagepoint Venture Partners v. Examen, Inc.*, 871 A.2d 1108, 1114-16 (Del. 2005). Even if California law applied, however, it similarly requires a contract to be sufficiently definite in order to be binding and enforceable. *See, e.g., Bustamante v. Intuit, Inc.*, 45 Cal. Rptr. 3d 692 (Cal. App. 2006) ("Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable.") (citations omitted); *Weddington Productions, Inc. v. Flick*, 71 Cal. Rptr. 2d 265 (Cal. App. 1998) ("If … a supposed 'contract' does not provide a basis for

indefinite if they fail to provide a reasonable standard for determining whether a breach has occurred and the appropriate remedy." *Independent Cellular Tel., Inc. v. Barker*, 1997 WL 153816, *4 (Del. Ch. Mar. 21, 1997) (citing Restatement (Second) of Contracts, § 33(2), at 92 (1981)). *See, e.g., Lynch & Assocs. v. Sweeten Contracting*, 1999 WL 743953, *2 (Del. Super. Jul. 13, 1999) (contract unenforceable where court could not tell how commission was to be calculated based on contractual language); *In re Radiology Assocs., Inc. Litig.*, 1990 WL 67839, *7 (Del. Ch. May 16, 1990) (finding agreement unenforceable "because its material provisions are uncertain and indefinite").

This principle applies equally in determining whether a condition has been met with respect to a contract affecting a corporation's internal governance. In *Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons*, the plaintiff (a Masonic organization) had received the majority of the common stock in a related organization, in exchange for its investment. 80 A.2d at 295. A condition of the issuance of the stock was that the plaintiff did not have voting power except "[i]n cases of misgovernment of the Trustees, or anything that would work harm to the corporation, or to [the plaintiff]. . ." *Id*. Several years later, the plaintiff attempted to vote its shares in a director election but was refused. Defendants cited the provision restricting the plaintiff's voting rights, and the plaintiff argued that the provision was not a legally binding obligation because of its uncertainty and indefiniteness. *Id.* The court agreed,

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determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract.").

holding that the term "anything that would work harm" was too indefinite to permit enforcement of the agreement because there was no objective standard by which to measure what would constitute harm. *Id.* at 295-96. The court thus declared the provision invalid. *Id. Accord Hoover v. State*, 958 A.2d 816 (Del. 2008) ("'A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden" or "if it encourages arbitrary or erratic enforcement.'") (citation omitted).

Similarly, here, the Poison Pill Amendment's definitions of "Derivative Contract" and "Beneficial Ownership" are fatally broad and ill-defined. Objective criteria must determine whether a poison pill has been triggered, so that the corporation and its stockholders can reliably determine what transactions will trigger it, and precisely when the triggering threshold is met. The inclusion of vaguely-defined derivative interests in the Poison Pill's definition of Beneficial Ownership – including interests held by numerous levels of "Counterparty" participants – renders such an objective determination virtually impossible, for several reasons:

First, a shareholder may be unable to determine the extent of its own Beneficial Ownership with any certainty, because it will be imputed with ownership of not only the shares owned by its own counterparty on a Derivative Contract, but also those owned by its counterparty's counterparties, and by the counterparty's counterparties' counterparties, and so on. Indeed, the Amendment goes ***even further*** in defining Beneficial Ownership to include not only shares owned by the ***stockholder's*** counterparties, but also by counterparties on Derivatives Contracts to which ***the stockholder's Affiliates or***

Associates are parties – as well as by the counterparties of those Affiliates' and Associates' counterparties, and by the counterparties of those counterparties, and so on.[8] It will often be impossible for a shareholder to navigate this endless string of counterparties to determine its Beneficial Ownership.[9]

One of the key reasons why the courts have permitted boards to adopt poison pills at all is because they are not wholly preclusive of hostile bids, as they preserve the power of the shareholder bidder to "form a group up to [the triggering level] and solicit proxies for consents to remove the Board and redeem the Rights." *Moran*, 500 A.2d at 1354. Thus, "the safety valve which justifies a board being allowed to resist a hostile offer [which] a majority of shareholders might prefer, is that the shareholders always have their ultimate recourse to the ballot box." *Carmody*, 723 A.2d at 1193 (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 959 (Del. 1985)). But if there is no objectively verifiable means for a stockholder seeking to remove the Board to determine the extent of

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[8] The Poison Pill defines "Affiliates and Associates" by reference to Securities Exchange Commission Rule 12b-2, which defines an "affiliate" as "a person that directly, or indirectly through one or more intermediaries, controls, or its controlled by, or is under common control with, the person specified," and which defines an "associate" as "(1) any corporation or organization … of which [one] is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of securities, (2) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (3) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of the registrant or any of its parents or subsidiaries." 17 C.F.R. § 240.12b-2.

[9] In this regard, the Amendment's use of the term "Notional Common Shares" renders any effort to limit the scope of the Beneficial Ownership standard illusory, since calculating the Notional Common Shares itself depends on numerous assumptions.

its Beneficial Ownership, then its ability to purchase shares and form groups without triggering the Poison Pill, and therefore its ability to solicit proxies and remove the Board, may be deeply impaired.

Second, as difficult as it will be for a shareholder to sort through its various layers of counterparties to determine its own level of Beneficial Ownership, it will be simply impossible for Atmel to do so. Shareholders are not always required to publicly disclose their Derivative Contracts[10] – much less the Derivative Contracts of their successive counterparties – and a hostile acquiror cannot be expected to act against its own interests and voluntarily confess its derivative ownership, when doing so will trigger the Poison Pill. As a result, Atmel has no reliable or objective means of knowing when the Poison Pill has been triggered.[11] Absent a means for the *corporation* to determine, based on readily available information, when a triggering event has occurred, the Poison Pill cannot be enforced in a reliable and predictable way.

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[10] A person who, directly or indirectly, is the beneficial owner of more than five percent of a company's stock must disclose certain information on either Schedule 13D or Schedule 13G. 17 C.F.R. § 240.13d-1. Shares underlying derivative contracts do not count toward this five percent threshold unless the contract gives the disclosing party a right to acquire voting and/or investment power in the shares within sixty days. *See* 17 C.F.R. §240.13d-3(d)(1)(i). Once the five percent threshold is reached, Schedule 13D requires the disclosure of contracts relating to the issuer's securities, but Schedule 13G has no similar requirement. *Compare* 17 C.F.R. § 240.13d-101, Item 6, *with* 17 C.F.R. § 240.13d-102.

[11] The Poison Pill provides that a "Triggering Event" "shall be deemed to have occurred upon any Person becoming an Acquiring Person." *See* Amended and Restated Preferred Shares Rights Agreement dated as of October 18, 1999, at § 1(qq) (McIntyre Aff. Ex. I). Pursuant to the Amendment, for takeover proposals initiated after October 1, 2008, this means the Poison Pill is triggered upon a shareholder becoming a Beneficial Owner of 10% or more of Atmel's common stock, including shares owned under Derivative Contracts. *See* Amendment, § C (McIntyre Aff. Ex. H).

Third, it is impossible to objectively determine whether a particular contract even qualifies as a Derivative Contract for purposes of the Amendment. "Derivative Contract" is only defined in very vague terms as "a contract … that is designed to produce economic benefits and risks to the Receiving Party that correspond substantially to the ownership by the Receiving Party of a number of Common Shares, regardless of whether obligations under such contract are settled through the delivery of cash, Common Shares or other property, without regard to any short position under the same or any other Derivative Contract."

Any attempt by Atmel to determine what a particular stockholder's contracts are "designed" to do, or whether the economic benefits and risks of those contracts "correspond substantially" to the ownership of Atmel stock, would be fraught with uncertainty. For better or worse, so-called "derivative" arrangements can relate to a company's stock in virtually infinite ways, and a more specific definition of the phrase "Derivative Contract" would be required to know which of those arrangements fit the definition of the Amendment. Indeed, a standard mutual fund or exchange traded fund ("ETF") may well hold a concentration of the Company's stock, and investments in that fund may well "substantially correspond" to the economic risks and benefits of owning some number of shares of the Company's stock, even if there is never any prospect of the investor in the fund receiving the underlying shares, much less controlling how they are voted.[12] However, an owner of shares in such a fund will likely have no way of knowing

[12] Mutual funds or ETFs are hardly the only example of financial arrangements in which the investor's economic interest is closely linked to movements in the underlying security

the number of Atmel shares to which its investment corresponds, and Atmel itself surely has no way of making that determination.

In sum, because the triggering condition of the Amended Poison Pill cannot be objectively determined (and likely cannot even be subjectively determined by the investor in many instances), the Amendment is hopelessly vague and unenforceable. Accordingly, the Court should invalidate the Amendment as void for vagueness and as a *per se* breach of the Board's fiduciary duty. *See Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons*, 80 A.2d at 296 (invalidating contract as not reasonably definite); *Quickturn*, 721 A.2d at 1290-92 (invalidating poison pill amendment as contrary to Delaware law and therefore beyond board's authority to adopt).

C. Plaintiff Will Suffer Irreparable Harm If Injunctive Relief Is Not Granted

Although irreparable harm is an element for granting a permanent injunction, Plaintiff submits that where, as here, challenged corporate action is invalid *per se*, the irreparable harm element is not a clean or logical fit, since the invalid corporate action should plainly be remedied and undone. Nevertheless, even if the Court looks beyond the facial invalidity of the Amendment to its effect on Atmel's stockholders, the Amendment

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price even though the investor receives no rights to either acquire or direct the voting of those securities. For example, a common type of derivative is an "equity-linked" note or other security. The holder of the security receives a structured payout that is based on a formula tied to the value of one or more underlying securities that are held in the issuer trust, but never has any right to acquire the underlying shares, much less vote those shares. Because of the definition of "Derivative Contract," the Amendment may or may not impute ownership of the underlying equity to the holder of such derivatives.

should be invalidated because Plaintiff and the other Atmel shareholders are suffering, and will continue to suffer, irreparable harm as a result of the Amendment.

First and foremost, the vagueness of the Amendment creates great uncertainty as to when and how the Poison Pill will be triggered, and indeed whether it has already been triggered without Atmel's knowledge. As long as the Amendment remains in effect, Atmel's shareholders can never be sure what their true ownership and/or voting interests in Atmel are, because the possibility will always exist that a shareholder has acquired, but not disclosed, derivative interests sufficient to trigger the Poison Pill. Particularly given Microchip's announced intention to wage a proxy contest to elect new directors at the May 2009 annual shareholders meeting, the need for certainty regarding the shareholders' Beneficial Ownership and voting rights, including the extent to which they can form groups with other shareholders without triggering the Poison Pill, is paramount. Absent an injunction, the all-important counter-weight to the Board's power to adopt the Poison Pill – the stockholders' ability to "form a group up to [the triggering level] and solicit proxies for consents to remove the Board and redeem the Rights" – will be impaired. *Moran*, 500 A.2d at 1354. *See also Carmody*, 723 A.2d at 1193.

Second, because potential acquirors of Atmel cannot be certain whether the instruments and securities they own are Derivative Contracts as that term is used in the Amendment, or the extent of their counterparties' (or their counterparties' counterparties') holdings that may be imputed to them under such contracts, the Amendment has a chilling effect on such acquirors pursuing transactions that would otherwise provide opportunities for Atmel's shareholders to maximize value. This effect

is aggravated by the fact that the Amendment reduced the triggering ownership threshold from 20% to 10%. When one considers that derivative interests count toward the 10% threshold, even if the potential acquiror has no real economic or voting power in the shares underlying those derivative interests, the 10% threshold may effectively be preclusive of legitimate shareholder-led proxy efforts and takeover proposals, including non-coercive offers made at a premium to market value. By impeding such proposals or proxy fights, the Amendment threatens Atmel's shareholders with imminent and irreparable harm. *See, e.g., Harbinger Capital Partners Master Fund I, Ltd. v. Northwestern Corp.*, 2006 WL 572823, *1 (Del. Ch. Feb. 23, 2006) (where shareholder faced threat that directors would trigger the company's poison pill if the shareholder communicated with other stockholders in aid of a proxy contest, thus impeding the proxy contest, the facts "tend to show that there is a risk of irreparable harm"); *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, *5 (Del. Ch. Jan. 14, 1991) (finding that irreparable harm would result if injunction were denied, where directors' conduct was alleged to be interfering with the nomination of a competing slate of directors and with shareholders' exercise of their corporate franchise); *International Banknote Co. v. Muller*, 713 F. Supp. 612, 623 (S.D.N.Y. 1989) ("Courts have consistently found that corporate management subjects shareholders to irreparable harm by denying them the right to vote their shares or unnecessarily frustrating them in their attempt to obtain representation on the board of directors.") (citations omitted). *See also In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 83-84 (Del. Ch. 1999) (stockholders suffer injury where bylaw amendments "markedly diminish the voting power of the …

stockholders" by, among other things, making it more difficult to replace directors); *QVC Network, Inc. v. Paramount Commc'ns Inc.*, 635 A.2d 1245, 1273 (Del. Ch. 1993), *aff'd*, 637 A.2d 828 (Del. 1993) (granting preliminary injunction to invalidate defensive mechanisms, and finding irreparable harm "[s]ince the opportunity for shareholders to receive a superior control premium would be irrevocably lost if injunctive relief were not granted); *accord Carmody*, 723 A.2d at 1188 (recognizing that facially invalid poison pill has a "*present* depressing and deterrent effect upon the shareholders' interest, in particular, the shareholders' *present* entitlement to receive and consider takeover proposals …").

D. The Harm That Will Result If An Injunction Is Not Entered Outweighs Any Harm That Will Befall Defendants If An Injunction Is Granted

By contrast to the irreparable harm Plaintiff and other Atmel shareholders will suffer if the Amendment is allowed to stand, no genuine harm will come to the Board or Atmel if the Amendment is invalidated. The pre-existing Poison Pill may remain in effect to the extent leaving it in place is consistent with the best interests of the corporation. Atmel functioned with the prior pill for nearly ten years before the Board chose to make it more onerous in response to the threat to their positions that was presented by the Bidders' Acquisition Proposal.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court grant a permanent injunction invalidating the Poison Pill Amendment or, in the alternative, a preliminary injunction suspending the effectiveness of the Amendment pending a final resolution on the merits.

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