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 REPLY 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 further support of its motion for a preliminary and/or permanent injunction (the "Motion") 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").

I. PRELIMINARY STATEMENT

The parties in this Action agree that Plaintiff "assails the Amendment on narrow grounds."[1] Plaintiff is not challenging Atmel's right to implement a poison pill or whether, in the abstract, the triggers for poison pills may take into account derivative interests. Rather, Plaintiff takes issue with the *particular* Poison Pill Amendment adopted by Atmel's board of directors ("the Board"). Specifically, as demonstrated in Plaintiff's Opening Brief ("Pl. Br."), neither shareholders nor the Board can reliably identify which particular economic arrangements qualify as "Derivatives Contracts" under the Amendment and, even if they pass this hurdle, a particular shareholder's "Beneficial Ownership" cannot be determined absent access to sensitive trading data exclusively in the hands of third parties.

While Plaintiff's Motion specifically identifies the problems raised by the Amendment, Defendants respond with a broad policy-based defense of poison pills in general, and of the inclusion of derivative securities in the concept of "beneficial ownership." Defendants cannot use rhetoric and hyperbole to distract the Court from

[1] Defendants' Memorandum in Opposition to Motion for Injunctive Relief ("Def. Br.") at 1.

their critical concessions on the "narrow" points dictating the outcome of this Motion in Plaintiff's favor.

First, Defendants concede that an Atmel shareholder can only "determine its actual extent of beneficial ownership by obtaining information from its counterparties."[2] Defendants likewise admit that only "by inquiring of its counterparty whether the contract is hedged and to what extent" can Atmel's shareholders determine the notional common shares covered by an arrangement that fits the Amendment's definition of "Derivatives Contract."[3] How or why shareholders can demand proprietary trading data from arm's-length counterparties, not to mention their counterparties' counterparties (and further down the line), or their Affiliates' and Associates' counterparties, remains a complete mystery. Nor is it rational to expect shareholders to be able to demand that their counterparties (much less their counterparties' counterparties or their Affiliates' and Associates' counterparties) contractually limit their activities to avoid triggering Atmel's poison pill. Defendants, therefore, confirm Plaintiff's point that the Amendment's definition of "Beneficial Ownership" is so vague that the Pill's trigger points may not be objectively determined by Atmel's shareholders and its Board. *See* Section II.A.2 below.

Second, the Amendment's broad definition of the term "Derivatives Contract," which requires investors to identify any arrangements that "correspond substantially" to ownership of Atmel stock, includes a wide range of economic arrangements that could not conceivably have anything to do with the takeover concerns that justify the Pill in the

[2] Def. Br. at 2.

[3] *See* Def. Br. at 19.

first place. Defendants assert that the phrase "derivative" is "well-understood in today's financial world" while conceding that there are many types of arrangements that "correspond substantially" to a company's stock yet may or may not constitute derivatives in general, and suggest absurd outcomes if these arrangements are deemed to meet the unique definition used in the Pill Amendment. However, the Amendment's language would appear to require these arrangements to be included in "Beneficial Ownership," however illogical the result. At best, the Amendment requires shareholders to guess whether particular arrangements – even those that could never lead to ownership of common stock (which, of course, is the lynchpin of any uninvited takeover effort) – qualify as "Derivatives Contracts." At the same time, the Board is left guessing as to the Beneficial Ownership of particular shareholders, or whether the Pill has been triggered, because there is no requirement that shareholders disclose all economic arrangements that might conceivably qualify as "Derivatives Contracts." *See* Section II.A.3 below.

The problems Plaintiff identifies are not abstract or contrived, as Defendants insist. To the contrary, following the recent *CSX* opinion that Defendants use to explain the intent behind the Amendment, a genuine debate emerged among corporate advisors concerning how boards can protect themselves against shareholder activists holding derivatives. Prudent corporate advisors, ***including Atmel's own litigation counsel,*** have publicly warned their clients of the risks of expanding their poison pills' definitions of beneficial ownership to include derivatives, "in light of a lack of a true reporting mechanism for such derivative positions" and the need for "carefully tailored" provisions

to this effect.[4] As one firm opined, linking a poison pill trigger to derivatives "is likely to be problematic in many respects, including the difficulty a corporation will face monitoring its rights plan and dealing with inadvertent triggers that may come to light weeks or months after the fact."[5] Atmel's shareholders should not be the ones to bear the risks attendant to an Amendment that, as demonstrated in this Motion, was far from "carefully tailored." *See* Section II.B below.

A poison pill is a powerful device, and a board bears the burden of defining its terms in a clear and enforceable manner. The Atmel Board's failure to do so is inconsistent with the directors' statutory powers under Section 151(a) of the Delaware General Corporation Law, as well as their common law fiduciary duties. This Court should not hesitate to declare the Board's approval of such an inherently unenforceable contract an *ultra vires* act and a *per se* basis for judicial relief, in the form of an injunction invalidating the Amendment or, alternatively, a preliminary injunction suspending the effectiveness of the Amendment pending a final resolution on the merits. Such a ruling will not create uncertainty in the law concerning appropriate defensive measures, as Defendants suggest. That uncertainty exists today, as zealous corporate advisors explore novel variations of the poison pill. By invalidating the Amendment immediately, the Court will bring more clarity to a narrow but evolving issue, before an atypical and value-destructive corporate practice becomes commonplace.

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[4] *See* D. Katz and L. McIntosh, *Shareholders Focused on Stability in Proxy Votes*, N.Y.L.J., Oct. 30, 2008, at n.24 (attached as Exhibit C to the accompanying Declaration of Mark Lebovitch ("Lebovitch Decl.")).

[5] *See* Cravath, Swaine & Moore LLP, *Beneficial Ownership – By-law Disclosure Proposal*, Sept. 8, 2008, at 1 (Lebovitch Decl. Ex. D).

II. ARGUMENT

A. PLAINTIFF HAS SHOWN SUCCESS ON THE MERITS OF ITS CHALLENGE TO THE AMENDMENT

As set forth below, the Amendment should be invalidated 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 breach of fiduciary duty.

1. The Poison Pill's Current Adverse Impact on Atmel's Shareholders Makes Plaintiff's Claim Ripe for Adjudication

Defendants contend that Plaintiff's claim is nonjusticiable because it will "involve the courts of Delaware in anticipatory litigation over the interpretation of corporate instruments in a factual vacuum." *See* Def. Br. at 2. This Motion is not "anticipatory" and Plaintiff did not contrive a hypothetical situation to mount its challenge to the Amendment.[6] Plaintiff asserts this claim to address the Amendment's present adverse impact on Atmel's shareholders and Atmel itself. *See supra* Section II.D.

Indeed, Defendants do not dispute that challenges to poison pills are ripe for adjudication when they concern the pill's "*current* adverse impact" and "*present* depressing and deterrent effect upon shareholders' interests, in particular, the shareholders' *present* entitlement to receive and consider takeover proposals. . ." *Carmody v. Toll Bros., 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. 1985)). Nor do

[6] Moreover, Defendants are incorrect to suggest that the Amendment cannot be challenged based on a hypothetical set of facts that would render the Amendment vague and unenforceable. After all, the Delaware Supreme Court recently struck down a proposed bylaw due to the hypothetical possibility of circumstances where compliance with the bylaw would result in a breach of fiduciary duty. *See CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 238-40 (Del. 2008).

Defendants dispute that a claim for rescission of a poison pill amendment is ripe even absent an actual or threatened proxy contest.[7] *See In re Chrysler Corp. S'holders Litig.*, 1992 WL 181024, at *3 (Del. Ch. July 27, 1992). The *Moran* case itself – which first established the confines of when a poison pill is valid – was litigated on an expedited basis even though no active bid or proxy fight was pending. 490 A.2d 1059. Plaintiff's challenge to the Amendment is procedurally proper.[8]

In addition, despite Defendants' assertion to the contrary, it is perfectly appropriate to invalidate the Amendment because its adoption constituted an abdication of the Atmel Board's fiduciary duties. In *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998), the Delaware Supreme Court found that certain defensive measures simply cannot be justified, regardless of whether the defendant directors' intent was malignant or benign. Likewise, here, the Atmel Board acted beyond its grant of statutory authority by adopting the Amendment, a powerful defensive measure so steeped in uncertainty that no one – including the Board – can determine whether Atmel's Poison Pill has been or will be triggered. Put another way, if the Board cannot determine how the Pill operates, the Board's approval of the Amendment should be nullified.

[7] Consequently, Defendants' fact-based assertion that Microchip did not withdraw its proxy solicitation in response to the Amendment does not matter. *See* Def. Br. at 14-15.

[8] Even if the Amendment's current adverse impact on Atmel's shareholders is ignored, Plaintiff would be entitled to seek relief. Indeed, shareholders are entitled to seek declaratory judgments interpreting their rights under a company's governing documents. See 10 Del. C. § 6501; *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990). The same principle surely supports injunctive relief where a rights plan is unenforceable and void.

2. The Definition of "Beneficial Ownership" Is Invalid As It Requires Shareholders and the Board to Infer Information Exclusively in the Control of Numerous Third Parties

The parties agree on the basic principles of contract interpretation under Delaware law. *See Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *1 (Del. Ch. Nov. 8, 2007) ("courts interpret contracts to mean what they objectively say"); *Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons of Del. v. Hiram Grand Lodge Masonic Temple*, 80 A.2d 294, 295 (Del. Ch. 1951) (a contract must be "reasonably definite and certain in its terms" to be legally binding); *Independent Cellular Tel., Inc. v. Barker*, 1997 WL 153816, at *4 (Del. Ch. Mar. 21,1997) ("The material terms of a contract will be deemed fatally vague or indefinite if they fail to provide a reasonable standard for determining whether a breach has occurred and the appropriate remedy"). As set forth below, Defendants' concessions that neither Atmel nor its shareholders may ***independently*** determine whether the Poison Pill is triggered confirms the unenforceability of the Amendment.

The first problem with the Amendment's definition of Beneficial Ownership is that it ties the number of a shareholder's "Notional Common Shares" to the holdings of third parties. Specifically, the Amendment provides that a shareholder's beneficial ownership shall "***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 shareholder may be unable to determine the extent of its Beneficial Ownership with any certainty, because he is

imputed with ownership of the shares (if any) owned by his counterparty on a Derivatives Contract, and also those owned by his counterparty's counterparties, and so on.[9] Defendants concede that to avoid a trigger under the Amendment, an Atmel shareholder will have to "determine its actual extent of beneficial ownership by obtaining information from its counterparties." Def. Br. at 2. Similarly, Defendants concede that only "by inquiring of its counterparty whether the [derivative] contract is hedged and to what extent" can a shareholder determine the notional common shares covered by a derivative contract. *See* Def. Br. at 19. With these concessions the Court can end the analysis.

Defendants try to limit the problem posed by this uncertainty by saying that "the number of common shares that a person may be deemed to beneficially own under a derivatives contract is capped at the number of notional common shares that are subject

[9] Under the Amendment, a shareholder is also imputed with beneficial ownership of shares owned by the shareholder's Affiliates and Associates, and by the counterparties on its Affiliates' and Associates' Derivatives Contracts (and by the successive counterparties of those counterparties). The problem in calculating a shareholder's own "Beneficial Ownership" described above is only more acute when attempting to assess Derivatives Contracts entered into by its Affiliates and Associates. While Defendants make public policy arguments about the need to include associates and affiliates among persons who beneficially own Atmel shares in order to close loopholes in the hostile tender offer process, *see* Def. Br. at 20-21, nothing they cite addresses Plaintiff's challenge to the Amendment's coupling of "Associates and Affiliates" with the calculation of beneficial ownership of shares ***through derivatives***. For example, Defendants rely upon *Moran v. Household International, Inc.*, 490 A.2d 1059 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985), where the Court merely recognized the general proposition that a rights plan may include in its definition of "beneficial ownership" the shares owned by other members of an "ownership group, acting in concert for the purposes of a proxy contest." 490 A.2d at 1080. Not only is this type of group narrower than the Amendment's broad definition of "Associates" and "Affiliates," but *Moran* speaks only of the inclusion of shares that are actually, not derivatively, owned by the other group members -- a knowable amount. *Moran*, as well as Defendants' references to General Instruction C to Schedule 13D, Item 1008(a) of Regulation M-A under the Exchange Act and the proposed amendments to the Delaware General Corporation Law, do not address how a stockholder can be expected to determine, much less be charged with ownership of, the shares beneficially owned by an Associate's or Affiliate's derivative contract counterparty (or counterparties of such counterparty).

to that derivatives contract." *See* Def. Br. at 17. This is circular, since Defendants assume that a "derivatives contract" as defined in the Amendment necessarily states a "notional" common share total. Defendants ignore the various arrangements that are not traditional "derivatives" (or can be called derivatives yet do not include a maximum "notional" total) but still meet the Atmel-specific definition of Derivatives Contract. As described *infra*, numerous arrangements can "correspond substantially" to Atmel common stock without providing a pre-set number of Atmel shares.

Furthermore, even when the dollar amount put at risk by the investor and the counterparty (the security issuer) in a particular economic arrangement *may, in theory*, correlate to a number of Atmel shares, the contract is not necessarily expressed in that manner. The parties might protect their respective economic exposure by purchasing or selling Atmel stock, or they might do so with hedging contracts that provide for cash payouts and never result in actual stock ownership. Indeed, Defendants concede as much when they admit that "it is theoretically possible that a counterparty may not fully hedge its exposure, as a result of which the holder's ownership under the Amendment would be *less* than the notional common shares covered by the derivative contract."[10] *See* Def. Br. at 19.

Moreover, even accepting Defendants' flawed assumption that only a contract that defines a "notional maximum" number of Atmel shares would qualify as a "Derivatives Contract," the amount of "Notional Common Shares" for purposes of

[10] Defendants, thus, also confirm Plaintiff's point that the Notional Common Shares limit is illusory because it depends on a number of assumptions and requires a shareholder to make inquiries of third parties who have their own interests in not disclosing their strategies. *See* Pl. Br. at 16, fn. 9.

calculating Beneficial Ownership cannot be determined without access to information from numerous counterparties. Recognizing the Board's self-created predicament, Defendants contend that any problems related to a shareholder's determination of its beneficial ownership under derivative contracts made by a counterparty's counterparty can be solved "through contract and rational business practice." *See* Def. Br. at 20. Defendants' theory is fanciful. Trading counterparties may rationally refuse to disclose their proprietary investing strategies to the shareholder. A shareholder may be unable to make its *own* counterparty submit to contractual terms related to its beneficial ownership, much less its counterparty's counterparties. This problem is even more pronounced when one considers that the Amendment imputes a shareholder with ownership of shares held by the counterparties to the shareholder's Affiliates or Associates. There is no reason to believe a shareholder has the power to make its Affiliates' and Associates' counterparties (or their counterparties) assent to contractual terms when the shareholder itself is not even a party to their contracts. Moreover, what is a shareholder to do when, as here a corporation's board suddenly changes the term and triggering mechanism of its poison pill? Surely, a shareholder cannot be expected to renegotiate its derivative contracts each time this occurs.

Finally, no limit exists to how many economic contracts that "correspond substantially" to Atmel stock can be written without anyone ever obtaining shares to cover a derivative position.[11] A person can enter into innumerable contracts that have

[11] Indeed, as shown by AIG's writing of credit default swap insurance for "synthetic CDOs," – i.e., CDOs that contained few if any actual asset-backed securities as collateral – willing investors can easily write cash contracts with values far in excess of the total amount of Atmel shares

pure cash settlements where the person, by definition, never receives the right to acquire any shares. If investors are willing to bear the risk, pure cash settlement contracts can be written in amounts far exceeding the total enterprise value of the referenced company. Thus, Defendants' assertion that a shareholder will know its maximum notional common shares for its derivative positions is hollow, and provides no answer for a shareholder actually trying to determine the number of shares that it beneficially owns.

3. The Definition of "Derivatives Contract" Is So Broad That It Allows For Triggering In Situations Where a Hostile Acquisition is Inconceivable, And It Includes Arrangements Not Required To Be Publicly Disclosed

Defendants also rendered the Amendment unworkable by including cash-settled derivatives – which by definition cannot result in a hostile acquisition and which often need not be publicly reported – in the definition of arrangements that can trigger the Pill. The Amendment defines "Derivatives Contract" as:

> 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.[12]

This definition, even to the extent the phrase "correspond substantially" can be applied in a rational way, is overly broad.

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outstanding. *See* Alistair Barr, *AIG Says It's Exposed to Synthetic Securities*, MarketWatch, Dec. 10, 2008 (Lebovitch Decl. Ex. E).

[12] Amendment, at 5 (emphasis added) (attached as Ex. H to the McIntyre Declaration, dated Dec. 18, 2008).

First, Atmel is only able to determine whether the Poison Pill has been triggered if an acquirer discloses the full gamut of its economic interests tied to Atmel shares. As Defendants acknowledge, neither federal nor state law mandates disclosure of all arguably "derivative" positions relating to a particular stock. *See* Def. Br. at 21, 24. Defendants refer the Court to definitions of "derivative securities" contained in Section 16 of the Exchange Act of 1934 – which relates to reporting of "short-swing" trading by corporate insiders. *See* Def. Br. at 23, n.34. But the federal securities laws distinguish between reporting of trading positions where the public issue is profit and reporting of trading positions geared towards shareholder activism. Under Section 13(d) of the Exchange Act and Rule 13d-3 promulgated thereunder – which dictate whether and when a potential acquirer must report its position in a particular company's stock – a "person shall be deemed to be the beneficial owner of a security … if that person ***has the right to acquire beneficial ownership of such security*** … within sixty days …." 17 C.F.R. § 240.13d-3(d)(1)(i). Thus, under Section 13(d), persons acquiring only cash-settled derivatives need not disclose those holdings.[13] The Board's failure to tie the Pill to existing and objective disclosure obligations is highly problematic, and indeed fatal.

Second, although at a time they were widespread, poison pills are not part of the "natural order of things" in governing the relations between shareholders, directors and

[13] Defendants' assertion that "[a]fter *CSX*, no corporate control contestant would likely use derivatives contracts as a means to avoid disclosure of beneficial ownership under Section 13(d)" is a red herring because the Amendment defines "Derivatives Contract" differently from Section 13(d). *See* Def. Br. at 24. Even if a large financial institution or hedge fund (or even a pension fund with multiple outside money managers) has controls in place to comply within Section 13(d)'s requirements, they can have no confidence in their ability to monitor Atmel-specific Pill triggers.

outside bidders.[14] Rather, a pill is justified in light of its role in deterring coercive or unfair takeover tactics. *See Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1354 (Del. 1985); *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 481 (Del. Ch. 2000). Plaintiff does not dispute that traditional derivatives, *i.e.*, arrangements that can and often do result in the shareholder receiving the target company's stock when the transaction is closed, may play a role in a hostile acquisition. But the definition of "Derivatives Contract" in the Amendment can include arrangements – like derivatives linked to indices including Atmel stock or even contractually-crafted baskets of securities – that by definition cannot result in delivery of the underlying stock. Thus any hostile bidder holding such derivatives would separately need to purchase the shares to complete a buyout. No legitimate purpose is served by allowing derivatives that cannot result in delivery of shares to trigger the Pill, and shareholders who purchase these types of derivatives will often have no way of knowing the number of Atmel shares (if indeed there is such a number) to which their derivative interests correspond.

Defendants engage in sleight of hand in asserting that "[n]o reasonable interpretation" of the definition of Derivatives Contract would conclude "that the phrase refers to an investment in . . . an exchange traded fund."[15] To make their point, Defendants selectively chose the S&P North American Technology-Semiconductors Index Fund, of which Atmel makes up only 1.49%. Defendants have cherry-picked, to say the least. Attached as Exhibit A to the Declaration of Mark Lebovitch is a chart

[14] Vice Chancellor Leo E. Strine, *Categorical Confusion: Deal Protection Measures in Stock-For-Stock Merger Agreements*, 56 Bus. Law. 919, 926 (2001) (Lebovitch Decl. Ex. F).

[15] *See* Def. Br. at 27.

showing the price movements of Atmel stock as compared with the S&P 400 Semiconductors Index ("S4SECO") and the S&P 400 Semiconductors and Semiconductor Equipment Index ("S4SSEQ"). Approximately 17% of the S4SECO is accounted for by Atmel stock, while about 13% of the S4SSEQ is Atmel stock. Attached as Exhibit B to the Lebovitch Declaration is a table showing the daily percentage movement of these indices and of Atmel stock. The data contained in these charts makes clear that investors on the indices arguably hold derivatives that "correspond substantially" to ownership of Atmel stock. Indeed, over the past two years of trading, Atmel stock had an average divergence from the S4SECO and S4SSEQ of less than 2% on a daily basis.[16] In other words, a derivative investment in these indices would not only "correspond substantially" to Atmel stock, but it would virtually mirror Atmel's performance. These indices confirm Plaintiff's point that the Amendment's definition of a Derivatives Contract is so broad that it surely encompasses an investment in an exchange-traded fund that holds Atmel common stock, even though it would be virtually impossible for the investor to ascertain the number of Atmel shares to which its investment relates.

In sum, like the unenforceable contract at issue in *Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons of Delaware v. Hiram Grand Lodge Masonic Temple*, 80 A.2d 294, 295-296 (Del. Ch. 1951), the Amendment is too indefinite to allow

[16] On only three trading days in the past two years has the differential between the percentage movement of Atmel stock departed from the percentage movement of either Index by ten points or more. Two of those three occasions involved the Microchip bid: October 2, 2008, when Atmel confirmed that it received an unsolicited proposal from Microchip and ON Semi and the Atmel stock price increased over 34%; and October 29, 2008, when Atmel announced that its Board had rejected Microchip's proposal, sending the value of Atmel shares down over 11%.

for enforcement because neither the shareholders nor the Board can readily determine which types of economic arrangements meet the definition of "Derivatives Contract" and are to be considered when calculating "Beneficial Ownership."

4. The Amendment's Invalidity Is Not Cured By the Board's Ability to Use its Discretion to Determine Whether to Exercise the Rights Plan

Defendants concede that the Board cannot independently determine when the Poison Pill is triggered, but argue that this does not matter because the Amendment allows the Board to use its discretion to determine when and how to declare a "Distribution" of rights under the Pill.[17] Defendants' logic is flawed because it ignores the harm to shareholders from the existence of the problematic trigger in the first place. The Board's ability to mitigate the effect of unclear triggering events by not distributing the rights automatically is a red herring. As a practical matter, no potential acquirer would dare to trigger the Poison Pill and therefore put itself in the position of letting the Board decide whether to exercise the rights.

Moreover, it is insufficient to say that the defect in the Amendment can be cured because the approval of the Amendment violated the Board's statutory powers under 8 Del. C. § 151(a), which states:

> Any of the voting powers, designations, preferences, rights and qualifications, limitations or restrictions of any such class or series of stock may be made dependent upon facts ascertainable outside the certificate of incorporation or of any amendment thereto, or outside the resolution or resolutions providing for the issue of such stock adopted by the board of directors … ***provided that the manner in which such facts operate*** … ***is clearly and expressly set forth*** in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors.

[17] *See* Def. Br. at 21-25.

(Emphasis added.) The Amendment makes the "powers" and "rights" of Atmel shareholders "dependent upon facts" that are ascertainable only by reference to information provided by third parties, and in any event "the manner in which such facts operate" is not "clearly and expressly set forth" in any enabling resolution. The defective Amendment therefore cannot be "cured" by the Board's discretion to determine when to exercise the rights, and should be invalidated as a matter of law.

B. THE PUBLIC INTEREST SUPPORTS INVALIDATING ATMEL'S PILL AMENDMENT

In arguing that a ruling for Plaintiff would somehow "disserve public interests by casting a cloud over rights plan provisions adopted by a number of other companies," Defendants get the relevant policy considerations backwards. *See* Def. Br. at 36. The Court should decide the case at hand without regard to Defendants' "chicken little" preaching about the consequences of any ruling for other companies. More importantly, however, this Motion presents an opportunity for the Court to provide guidance to the public on a novel issue that has already caused considerable and vigorous debate among corporate advisors, including Defendants' own litigation counsel.[18]

1. Many Corporate Advisors Have Publicly Identified the Pragmatic Problem Raised by the Pill Amendment

The parties agree that the events leading to Judge Kaplan's ruling in *CSX Corp. v. The Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008), *aff'd*,

[18] Atmel claims it is "in good company" because sixteen other companies have attempted to include derivatives in their rights plans' definitions of "beneficial ownership." Of course, the "everyone else is doing it defense" is not recognized in Delaware jurisprudence. Moreover, Atmel is noticeably silent as to any other company whose definition of "Beneficial Ownership" depends on third party data and/or third parties' willingness to enter into limitations in derivatives contracts, and, in any event, no court has yet to determine the enforceability of any such provisions.

2008 WL 4222848 (2d Cir. Sept. 15, 2008), raised corporate awareness of the role that derivatives may play in the world of takeover battles. In *CSX*, the court determined that a shareholder running a proxy fight used certain derivatives relating to CSX stock (in that case credit default swaps) as part of a plan or scheme to evade the reporting requirements of Section 13(d). *Id.* at 548. Applying federal law, the court decided that the shareholders were engaged in an intentional scheme to evade reporting requirements, and on that basis treated them as beneficial owners of the stock held by their counterparties under the derivatives at issue. *Id.*

Corporate advisors promptly began devising defensive tactics to address the dangers identified in the *CSX* opinion. Bylaw amendments requiring disclosure of non-common stock positions as a pre-condition to nominating directors for election became the most common approach, and in 2008, over 350 companies amended their bylaws in this manner.[19] In contrast, many corporate advisors, including Atmel's counsel on this Motion, the Wachtell Lipton firm, warned their clients that amending their poison pills to include derivatives in the definition of beneficial ownership would raise important enforcement problems – exactly like those asserted here.

For example, in October 2008, lawyers at Wachtell published an article expressing the view that "with respect to poison pill triggers, careful consideration needs to be given to including derivative transactions in the beneficial ownership definition ***in light of the lack of a true reporting mechanism for such derivative positions***… [T]his is a rapidly developing area and provisions need to be ***carefully tailored*** to the specific

[19] *See* White & Case, *Client Alert: Poison Pills in an Increasingly Hostile Environment*, February 2009, at 3 (Lebovitch Decl. Ex. G).

circumstances that a company faces." (Emphasis added).[20] Cravath, Swaine & Moore LLP publicly issued a memo on September 8, 2008, which similarly warned its clients: "Some corporations have sought protection with a shareholder rights plan incorporating a broader concept of 'beneficial ownership' that captures interests held through derivatives. ***However, this solution is likely to be problematic in many respects, including the difficulty a corporation will face monitoring its rights plan and dealing with inadvertent triggers that may come to light weeks or months after the fact.***"[21] (Emphasis added). Even more recently, White & Case, another sophisticated corporate advisor, told its clients that provisions tying rights plans to derivatives "***have not yet become common*** and should be carefully considered in light of particular circumstances."[22]

Besides raising questions about the ability of shareholders as well as boards to identify when and whether a pill has been triggered, commentators have cautioned about other unintended consequences when the term "derivative contract" is loosely defined. For example, major financial institutions (like Citigroup, Deutsche Bank or Goldman Sachs) write so many contracts that could fit an overly broad definition of "derivatives" that they may inadvertently become an "Acquiring Person" under a pill similar to Atmel's.[23] Alternatively, if an investor triggers a poison pill through derivative contracts,

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[20] *See* Lebovitch Decl. Ex. C, at n.24 (citing D. Katz and L. McIntosh, *Corporate Governance Update: Advance Notice Bylaws: Lessons from Recent Cases*, N.Y.L.J, May 22, 2008).

[21] *See* Lebovitch Decl. Ex. D, at 1.

[22] *See* Lebovitch Decl. Ex. G, at 3.

[23] Atmel's Amendment provides that "if a bona fide swaps dealer who would otherwise be an 'Acquiring Person' has become so as a result of its actions in the ordinary course of its business

the shareholder can settle the contract without purchasing the underlying shares, leaving the financial institution suffering losses from dilution and resulting in "the wrong party [being] punished."[24]

Good corporate advisors can zealously serve their executive and director clients' interests with creative and novel structures. Many take a conservative approach, staying well within the bounds of existing law and precedent. Sometimes, however, advisors get too aggressive and cross over the outer limits of the law. When they do, this Court should not hesitate to invalidate improper defensive measures, thus providing essential guidance for all boards and corporate advisors going forward.

2. A Ruling for Plaintiff Will Not Conflict With Delaware House Bill No. 19

Defendants also contend that invalidating the Amendment will cause confusion about the validity of Delaware House Bill No. 19 (the "Bill"), which seeks to permit bylaws requiring a corporation to include stockholder nominees in its proxy materials. The Bill states that such nomination procedures may include "defining beneficial ownership ***to take into account options or other rights*** in respect of or related to such stock." (Emphasis added). Though the Bill has no relation to poison pills, Defendants suggest that because the Bill would permit corporations to define beneficial ownership in

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that the Board of Directors of the Company determines in good faith were taken without the intent of evading or assisting any other Person to evade the purposes and intent of this Agreement, or otherwise seeking to control or influence the management or policies of the Company, then such Person shall not be deemed to be an 'Acquiring Person.'" *See* McIntyre Decl. Ex. H, at 2. This conditional exclusion does not fully address the risk that a bank will inadvertently trigger the Pill , because its application depends upon the Board's subjective view regarding the bank's intent.

[24] *See* N. Pettifer, *Derivative Poison Pills Could Be Invalid*, International Financial Law Review, August 6, 2008, at 1 (Lebovitch Decl. Ex H).

a way that takes into account "options or other rights in respect of or related to" the corporation's capital stock, this means Atmel's attempt to include derivatives in the definition of beneficial ownership in its Poison Pill is somehow permissible.

Even assuming that the language of a proposed bill were a relevant consideration on this Motion – which it is not – the Bill is not inconsistent with Plaintiff's position. First, Plaintiff does not assert that beneficial ownership can *never* be defined to include derivative positions, but rather that the specific language formulated by Atmel's Board for purposes of its Poison Pill is unworkable. The Bill does not suggest any particular definition of "beneficial ownership," but leaves it to corporate boards to craft appropriate language. Additionally, the Bill would include derivatives in "beneficial ownership" only for purposes of disclosures to be made by stockholders presenting director nominees. Therefore, a finding that Atmel's particular definitions of "Beneficial Ownership" and "Derivatives Contract" are inappropriate within the poison pill context would not undermine the Bill, as boards would be free to formulate alternative means of including derivative-type interests in beneficial ownership, and/or to assert that the approach taken for disclosure purposes should be different from that applied to poison pills.

C. PLAINTIFF WILL SUFFER IRREPARABLE HARM IF THE INJUNCTIVE RELIEF IS NOT GRANTED, WHEREAS NO HARM WILL RESULT FROM AN INJUNCTION

Defendants claim that Plaintiff has not demonstrated a threat of irreparable harm, because the Amendment did not prevent Microchip from proposing an alternate slate of directors (which it subsequently withdrew) and because the Rights Plan will expire before

shareholders have another opportunity to propose a slate of directors. *See* Def. Br. at 3.[25] Defendants' narrow focus on the Amendment's effect on Atmel's proxy process ignores that the fatally vague Amendment has a present chilling effect on valuable takeover bids. *See In re Chrysler Corp. S'holders Litig.*, 1992 WL 181024 (Del. Ch. July 27, 1992); *QVC Network, Inc. v. Paramount Commc'ns Inc.*, 635 A.2d 1245, 1273 (Del. Ch. 1993), *aff'd*, 637 A.2d 828 (Del. 1993); *accord Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1188 (Del. Ch. 1998). *See also* Pl. Br. at 19-22.

Defendants further argue that "Delaware law recognizes that a rights plan's existence does not unlawfully restrict … stockholders' ability to receive tender offers." *See* Def. Br. at 35. In support, they misguidedly cite *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 249 (Del. 2001). In the *Hilton Hotels* case, the Delaware Supreme Court acknowledged *Moran*'s holding that the particular rights plan at issue in that case "did not 'usurp stockholders' rights to receive tender offers.'" *Id.* at 249 (*quoting Moran*, 500 A.2d at 1354). However, the Court also noted that "*Moran*, of course, did not address whether every provision that might be includable in a rights plan would be sustainable under all circumstances …" *Id*. Here, Plaintiff does not contend that the Rights Plan's mere existence constitutes irreparable harm, but rather that the uncertainties created by Atmel's new and untested permutation of the definitions of "Beneficial Ownership" and "Derivatives Contract" present a risk of irreparable harm. If the Court finds, as it should, that the Amendment is facially invalid and unenforceable, then leaving the Amendment

[25] It is as likely as not that Atmel's Board will renew the Poison Pill, as amended, prior to its October 2009 expiration. Defendants proffer no evidence to the contrary.

in place is likely to discourage legitimate bidders from pursuing takeover proposals, thus causing irreparable harm.

In contrast, an injunction would not cause Atmel or the Board to suffer any harm because the Court would be invalidating an Amendment that served no purpose due its vagueness and unenforceability. Moreover, the protections afforded by Atmel's pre-existing Poison Pill will remain in effect. Accordingly, the balance of harms favors injunctive relief.

III. CONCLUSION

For all 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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